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Fiona Sampson

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This article analyzes the Supreme Court of Canada's decision in Granovsky v. Canada *as a defining moment for the author, a feminist equality rights lawyer with a specific interest in disability discrimination. At issue in* Granovsky *was the constitutionality of section 44(2)(b) of the* Canada Pension Plan Act*, as it relates to persons with disabilities. While the Court's decision that the contested legislation was constitutional was disappointing in terms of the advancement of equality rights for disabled persons in Canada, of perhaps greater concern is the manner in which the Court reached its conclusions in this case. The way in which the decision in* Granovsky *affirms, rather than transforms, the power imbalance between disabled and non-disabled persons struck the author as a defining moment in the evolution of equality rights jurisprudence.*

Le présent article analyse l'arrêt de la Cour suprême du Canada, Granovsky c. Canada*, arrêt important d'après l'auteure, une avocate féministe qui s'intéresse aux droits à l'égalité, particulièrement en ce qui a trait à la discrimination fondée sur le handicap. Dans l'affaire* Granovsky*, on contestait la constitutionnalité de l'alinéa 44 (2) (b) de la* Loi sur le régime de pensions du Canada *dans son application aux personnes handicapées. Bien que la décision de la Cour confirmant la constitutionnalité de la disposition contestée ait été décevante, eu égard à la progression des droits à l'égalité des personnes handicapées au Canada, le cheminement logique par lequel la Cour en est arrivée à cette conclusion pose de plus sérieux problèmes. En effet, la manière par laquelle la décision* Granovsky *maintient le déséquilibre de pouvoir entre les personnes handicapées et les personnes non handicapées et refuse de le transformer a frappé l'auteure comme un moment marquant dans l'évolution de la jurisprudence en matière de droits à l'égalité.*

Introduction

In response to the call from the *Canadian Journal of Women and the Law* for submissions on "defining moments" in feminist engagement with the law, I have chosen to write about the Supreme Court of Canada's decision in

Granovsky v. Canada (Minister of Employment and Immigration).[1] I have decided to write about *Granovsky* because it provided a stark example for me, as a feminist, equality rights lawyer, of the potential for equality claims to go astray, and of the challenges associated with achieving transformative change and advancing disability equality rights through section 15 *Charter* claims, especially in the post-*Law*[2] era.

Disability discrimination is one of the most entrenched forms of discrimination in contemporary Canadian society. Evidence of disability discrimination can be found in nearly every aspect of our society and includes inaccessibility in places of employment, in housing, and in service delivery, to name only a few obvious examples. Historically, society has understood the experience of disability as rooted in the individual and has analyzed his/her difference in bio-medical terms. This traditional social construction of disability places the emphasis on the individual's lack of conformity with the non-disabled norm. The traditional social construction of disability has been identified by many authors and academics as the greatest source of disability discrimination in society.[3] The social construction of disability characterizes disability as a negative attribute that results in the isolation of disabled persons from mainstream, non-disabled society. It is not generally well understood that the source of the greatest handicaps experienced by persons with disabilities is not one related to individual bio-medical impairments but, rather, is one imposed by a society comprised primarily of persons who are not disabled. The barriers created by prejudice and discrimination are thus the source of the greatest handicap experienced by most persons with disabilities. While the Supreme Court of Canada does demonstrate some awareness of the social construction of disability in its decision in *Granovsky,* its decision also unfortunately reflects the bio-medical, individual-based understanding of disability disadvantage. It is this perspective that is perhaps responsible for the Court's failure to recognize the legitimacy of the discrimination claim in *Granovsky* and from which the problems with the decision flow.

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1. *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 [*Granovsky*].
2. *Law* v. *Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 [*Law*].
3. See Dianne Pothier, "Miles to Go: Some Personal Reflections on the Social Construction of Disabilty" (1992) 14 Dalhousie Law Journal 526; Jerome E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993); Lennard Davis, "Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century," in Lennard Davis, ed., *The Disability Studies Reader* (New York: Routledge, 1997); and John Swain and Sally French, "Towards an Affirmation Model of Disability" (2000) 15(14) Disability and Society 569.

At issue in *Granovsky* was the constitutionality of section 44(2)(b) of the *Canada Pension Plan Act*,[4] as it relates to persons with disabilities. While the Court's decision that the contested legislation was constitutional was disappointing in terms of the advancement of equality rights for disabled persons in Canada, of perhaps greater concern is the manner in which the Court reached its conclusions in this case. Justice William Binnie, writing for a unanimous Court, grounded his decision to dismiss Mr. Granovsky's equality claim in some questionable rationales relating to disabled persons and the experience of disability. The decision raises concerns about the judiciary's understanding of disability discrimination and its understanding of the social construction of disability. The Court's decision in *Granovsky* leads one to question the Court's appreciation of the experience of disability discrimination, since the decision risks perpetuating some of the traditional myths and stereotypes associated with disability (and perhaps introduces some new ones). The analysis that follows will focus on three specific concerns relating to the Court's decision in *Granovsky*: the discussion of employability and pertinent functional limitations; the identification of the correct comparator; and the introduction of a hierarchy of disability.

Background to the Granovsky *Claim*

At the age of thirty-two, Mr. Granovsky injured his back at work. Thirteen years later, having been employed irregularly at various jobs in the interim, he applied for a permanent disability pension under the Canada Pension Plan (CPP). The minister refused the application because over the relevant ten-year period prior to the application, Mr. Granovsky had failed to make the required CPP contributions in any year except one. Mr. Granovsky argued that it was his disability that prevented him from making all of the required CPP contributions in the relevant ten-year contribution period and that the failure of the CPP to take his disability into account in considering his lack of contribution constituted discrimination contrary to section 15(1) of the *Canadian Charter of Rights and Freedoms*.[5]

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4. *Canada Pension Plan Act*, R.S.C., 1985, c. C-8 [*CPP*]. The *CPP* was designed to be a comprehensive social insurance scheme for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. The disability pension, an integral element of the *CPP* since this scheme came into force in 1966, is an income replacement measure for those persons determined to be "disabled" within the meaning of the plan. See Allan Puttee, "Reforming the Disability Insurance System: A Collaborative Approach," in Allan Puttee, ed., *Federalism, Democracy and Disability Policy in Canada* (Montreal: McGill-Queen's University Press, 2002).
5. *Granovsky*, *supra* note 1 at para. 1. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

In order to qualify for a disability pension under the CPP, applicants must satisfy two legislative requirements. First, the applicant must suffer from a "severe and prolonged mental or physical disability." A disability is deemed to be "severe" if the person is "incapable regularly of pursuing any substantially gainful occupation," and "prolonged" if it is "likely to be long continued and of indefinite duration or is likely to result in death" (in the Court's decision this is referred to as a "permanent" disability).[6] Second, contributors must also satisfy "recency of contributions" provisions as set out in section 44(2) of the CPP. At the time Mr. Granovsky applied for the benefits, the "recency" provisions required contributions to have been made to the plan in five of the last ten years or in two of the last three years of the contributory period.[7]

The impugned legislative measure, section 44(2)(b), creates "drop out" provisions for two classes of persons: the permanently disabled and family allowance recipients.[8] The drop-out provisions permit certain months to be excluded from the contributory period. If a claimant is permanently disabled in the course of a calendar year, the months during which that person is permanently disabled are not counted against him or her in determining whether the recency of the CPP contributions requirements are satisfied.[9] Mr. Granovsky was denied benefits under the plan because he did not contribute during the time that he was temporarily totally disabled due to an intermittent and degenerative back injury following his work-related accident, which later developed into a permanent disability. These periods of temporary total disability were included as part of his contributory period.

Mr. Granovsky claimed that the impugned provisions violated section 15(1) of the *Charter* and could not be saved under section 1. Specifically, Mr. Granovsky claimed that the legislation infringed section 15(1) because the qualifying contributions requirement for a disability pension failed to take into account the fact that persons with temporary disabilities may not be able to make contributions for the minimum qualifying period because they are physically unable to work. Basically, his argument was that section 44(2)(b) discriminated against him as a person with disability by including periods of disability in his contributory period. Mr. Granovsky argued that there was a "cruel irony" to the system as it affected him, which must be remedied by the *Charter* in so far as it was a system dedicated to providing income-protection against disability. It effectively said to him: "[Y]our eligibility is being

6. *CPP, supra* note 3 at section 42(2)(a).
7. *Ibid.* at section 44(1)(b) and 44(2)(a).
8. *Ibid.* at section 44(2)(b)(iii)(iv).
9. *Granovsky, supra* note 1 at para.12.

terminated because you were rendered totally temporarily disabled while trying to work."[10]

The constitutionality of the drop-out provisions themselves were not challenged in *Granovsky*. Only their application to Mr. Granovsky's case was challenged. Mr. Granovsky claimed that the "recency" provisions drop-out scheme was discriminatory because, for the purposes of eligibility, it excluded years in which he was, for most or all of the year, totally temporarily disabled. Mr. Granovsky asked the Court that he be awarded "full credit for the years in which he *did* work and make contributions, and that the 'eligibility clock' should not run" thereafter.[11] By way of remedy, Mr. Granovsky asked the Court either to "'read in' to the Plan scheme a drop-out provision for years in which a person was receiving workers compensation for most of the year"; or to use section 24 of the *Charter* and provide him with a "constitutional exemption" from the strict application of the recency provisions.[12] As an alternative remedy, Mr. Granovsky asked the Court to declare the CPP's recency requirement invalid,[13] although he did not develop arguments in support of this remedy.[14] The Court found that there was no section 15 violation in this case and refused to grant the remedies sought by Mr. Granovsky. The Court's reasoning in support of its decision was somewhat flawed in terms of its theoretical understanding and appreciation of the experience of disability inequality. The concerns with the Court's analysis as it relates to this thinking are discussed in the next sections of this article.

Concerns with the Supreme Court of Canda's Analysis in Granovsky

Employability and Pertinent Functional Limitations

The Court in *Granovsky* did articulate some significant recognition of the social construction of disability. This recognition was provided in the context of its discussion about employability and pertinent functional limitations. Unfortunately, the articulation of this recognition was somewhat confusing in places, which may account for the problems the Court faced in applying an equality rights analysis to this case (as will be discussed in later sections

10. *Granovsky, supra* note 1, Appellant's Factum, at para. 28.
11. *Ibid.* at para. 27.
12. *Ibid.* at paras. 28 and 31.
13. Presumably, Mr. Granovsky intended to argue that the legislation was invalid and of no force or effect pursuant to the *Constitution Act, 1982*, *Amendment to the Constitution Act, 1867, Part VI,* section 52, however, he did not reference section 52 in his factum.
14. *Granovsky, supra* note 1 at para. 32.

of this article) and which prevented the Court from fully appreciating the implications of the social construction of disability. An example of the Court's recognition of the social construction of disability can be found at paragraph 39 of the decision, which reads:

> In summary, while the notions of impairment and functional limitation (real or perceived) are important considerations in the disability analysis, the primary focus is on the inappropriate legislative or administrative response (or lack thereof) of the state. Section 15(1) is ultimately concerned with human rights and discriminatory treatment, not with biomedical conditions.[15]

This assessment of the role of section 15 in the disability context constitutes a strong endorsement of disability theory and the relevance of the social construction of disability. Unfortunately, other passages relating to the social construction of disability within the employability analysis are not as clear, which potentially diminishes their value.

A more perplexing section of the Court's employability and impairment analysis reads as follows:

> An individual may suffer severe impairments that do not prevent him or her from earning a living. Beethoven was deaf when he composed some of his most enduring works. Franklin Delano Roosevelt, limited to a wheelchair as a result of polio, was the only President of the United States to be elected four times. Terry Fox, who lost a leg to cancer, inspired Canadians in his effort to complete a coast-to-coast marathon even as he raised millions of dollars for cancer research. Professor Stephen Hawking, struck by amyotrophic lateral sclerosis and unable to communicate without assistance, has nevertheless worked with well-known brilliance as a theoretical physicist. (Indeed, with perhaps bitter irony, Professor Hawking is reported to have said that his disabilities give him more time to think.) The fact they have steady work does not, of course, mean that these individuals are necessarily free of discrimination in the workplace. Nor would anyone suggest that, measured against a yardstick other than employment (access to medical care for example), they are not persons with daunting disabilities.[16]

15. *Ibid.* at para. 39.
16. *Ibid.* at para. 28.

This passage can be understood, in its best light, to be saying that impairment does not necessarily equate to incapacity and employment disadvantage. The idea that disability does not mean that employment disadvantage is inevitable is an important tenet of the social construction of disability. However, the passage can also be understood to be saying that if an individual with an impairment is prevented from earning a living, it is the individual's impairment that is to blame, not society's failure to accommodate this impairment. An identification of the individual's impairment as the central barrier to successful employment demonstrates a failure to recognize and challenge the use of the non-disabled norms in the social construction of disability and in the legal construction of disability equality.[17] The exact meaning of this paragraph is unclear, which limits its potential to contribute to the advancement of disability-related equality rights.

In a different passage within this same section of the decision, the Court developed another analysis that also sends some mixed messages relating to its understanding of the social construction of disability. The passage reads as follows:

> The *Charter* is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment. What s. 15 of the *Charter* can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied.[18]

17. The Court's analysis is also lacking in its failure to question whether what counts as impairment is socially constructed. Some critical disability theorists have argued that impairment is not value-neutral or merely descriptive as it is inherently linked to the social construction of disability. Both impairment and disability can be understood to be the effects of historical conditions and contingent on relations of power. Shelley Tremain and Kelly Fritish have both argued that linking impairment to disability is part of the bio-medical practice that informs disability (see Shelley Tremain, "On the Government of Disability" (2001) 27(4) Social Theory and Practice 617 at 627; and Kelly Fritsch, "SuperCrip Strikes Again: or Mine-Body Dualism," presentation for "Disability Studies: Putting Theory into Practice," Lancaster University, 26–8 July 2004 at 6, text is available at <www.disabilitystudies.net>.
18. *Granovsky, supra* note 1 at para. 33

This analysis contains some useful insight into the understanding of the social construction of disability and equality law. However, it also includes some problematic reasoning, relating specifically to the source of disability discrimination, which detracts from the overall value of the analysis. The analysis in the last part of the paragraph is useful in its recognition of the effect of the social construction of disability. Juxtaposed to the recognition of the social construction of disability in the second half of the paragraph, however, is the impression created in the first half of the paragraph that it is physical or mental impairments that are responsible for the disadvantage experienced by disabled persons in society. The inference that equality might be achieved through the elimination of impairments suggests that these impairments are the source of inequality. The source of the greatest handicaps experienced by disabled persons is not one related to individual impairments but, rather, is one imposed by a society comprised primarily of persons who are not disabled, in which barriers are created by prejudice and discrimination. The paragraph does conclude by recognizing the significance of the social construction of disability, but the opening reference to magic wands and the elimination of impairments distracts from the important message in the second half of the paragraph. The Court's musings relating to individual disabled icons and then to magic wands eliminating impairments risks perpetuating the inaccurate assumption that it is an individual's disability that generally interferes with performance. This assumption actually contributes to the perpetuation of disability discrimination rather than its eradication, which is, of course, the goal of any disability discrimination claim.

An additional concern with the Court's articulation of its recognition of the social construction of disability in the employability and impairment analysis is the oblique message contained in the passage relating to the disabled icons. The reference to the four accomplished disabled men who experienced employment-related success[19] can be read as an indirect disparagement to those persons with disabilities who are unable to earn a living, such as Mr. Granovsky. The veiled message seems to be that if these four men could earn a living despite their "daunting disabilities," other disabled persons should be able to accomplish the same. The Court seems to applaud these four exceptional individuals who "suffer(ed) severe impairments," but were able to transcend their disabilities and achieve success in the employment context (the understanding that impairments are "suffered" is telling of the Court's perspective on the experience of

19. Terry Fox cannot strictly be understood to have "earned a living" through his coast-to-coast marathon, and his inclusion in this list of disabled people who have earned a living despite being disabled seems dubious.

disability). The passage can be interpreted to suggest that individuals' impairments are the potential barrier to employment success, not the social construction of disability and a failure to provide for accommodation of the impairments, and, thereby, the blame for failing to achieve success in the employment context is shifted onto the disabled individual. A failure to be fully sensitive to the operation of the social construction of disability and its effects upon disabled persons limits the potential for the advancement of disability equality. However, an implied criticism of disabled persons who are unable to earn a living is somewhat insulting. The Court certainly acknowledged the social construction of disability in its employability analysis, which was promising, even despite the weaknesses associated with some of its analyses—unfortunately, the promise of those articulations was not fulfilled in the Court's application of its equality rights analysis, as discussed in the next section.

Identification of the Correct Comparator

The framework for an equality rights analysis under section 15(1) of the *Charter* involves three broad inquiries as per the Supreme Court of Canada's decision in *Law* v. *Canada (Minister of Employment and Immigration)*:[20] (1) is there differential treatment; (2) is the differential treatment based on an enumerated analogous ground; and (3) is the differential treatment discriminatory.[21] For the Court, a "crucial" element of the section 15 test is the identification of the group in relation to which the equality claimant can properly claim differential treatment,[22] as per the first branch of the *Law* test. The accurate identification of a comparator group—that is, the group in relation to which the equality claimant can properly claim "unequal treatment,"[23] determines whether the claimant may be said to have experienced differential treatment for the purpose of section 15.

Mr. Granovsky argued that the appropriate comparator in his case was a non-disabled worker who makes more or less regular contributions to the CPP and then suffers a permanent disability. He argued that he ought to be compared to a non-disabled member of the workforce during the contribution period at issue because he was required to satisfy the level of contribution expected of an ordinary member of the workforce with

20. *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*].
21. The *Law* test for discrimination has been the subject of extensive critique by many authors. See, for example, the forthcoming LEAF publication by Fay Faraday, Margaret Denike, and Kate Stephenson, eds., Making Equality Rights Real: Securing Substantive Equality Under the *Charter* (Toronto: Irwin Law Publishing, forthcoming).
22. *Granovsky, supra* note 1 at para. 45.
23. *Ibid.*

insufficient regard for periods of temporary disability. Mr. Granovsky argued in his factum that the relevant comparator in his case was a healthy, non-disabled person because the CPP's 'eligibility clock' continued to run as though he were an able-bodied person who had the normal opportunities to continue in his employment."[24] Mr. Granovsky expressed concern that if he were to compare himself to "permanently disabled" persons, Parliament would have "an easy answer in principle to complaints by temporary disabled persons; it would simply deny any adjustment for permanently disabled persons as well."[25]

According to the principles established in *Law,* the Court is not bound by the claimant's characterization of the appropriate comparator group and has the authority to redefine it where warranted.[26] In *Granovsky,* Binnie J. decided that Mr. Granovsky inaccurately identified the proper comparator group for purposes of the first step of the section 15(1) test—that is, differential treatment. Binnie J. noted that pursuant to the Court's decision in *Law,* a section 15 claimant is given considerable scope to identify the appropriate group for comparison.[27] However, he went on to find that

> [s]uch identification has to bear an appropriate relationship between the group selected for comparison and the benefit that constitutes the subject matter of the complaint. As was pointed out in *Law,* at para. 57: "Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups." The purpose of the drop-out provision is to facilitate access of people with permanent disabilities to a CPP disability pension. It does so by employing the same criteria ("severe" and "prolonged") as the criteria used for the disability pension itself... An able-bodied worker who makes more or less regular CPP contributions then suffers a permanent disability will be a paid-up CPP contributor within the 5/10 or 2/3 year rule and thus will have no need (by reason of disability) to resort to the drop-out provision.[28]

There are several problems with the Court's comparator analysis in G*ranovosky*. One problem with the analysis is its reliance on the purpose of the legislation (this was an element of the comparator group analysis

24. *Ibid.,* Appellant's Factum, at para. 39.
25. *Ibid.* at para. 55.
26. *Law, supra* note 19 at para. 58.
27. *Granovsky, supra* note 1 at para. 46.
28. *Ibid.* at para. 47–9.

that was condoned in *Law* and reaffirmed in *Granovsky*). The focus on the purpose of the legislation within the section 15 analysis—as opposed to within the section 1 analysis, where the government has the onus of justifying an established breach—constitutes a shift in the focus of a discrimination analysis that disadvantages an equality claimant. The focus of discrimination analyses is supposed to be on the effect of the alleged discriminatory (in)action or treatment on the claimant.[29] In *Granovsky,* the Court's focus on the purpose of the legislation allowed it to shift the analysis away from the effect of the drop-out provisions on Mr. Granovsky—that is, how they worked to deny him access to the benefit because of his disability. The analysis instead focused on persons with permanent disabilities who are accommodated through the drop-out provisions. The focus on the purpose of the legislation disadvantaged Mr. Granovsky as it was through this focus that the Court came to identify permanently disabled persons as being the appropriate comparator group in the case.

The problem with the identification of persons with permanent disabilities as the correct comparator group is that it confuses the claim for differential treatment actually asserted by Mr. Granovsky. This claim challenged "unequal treatment" in the context of access to benefits that would ordinarily have been available, but for the claimant's periods of disability-related absence. The normative baseline for the receipt of benefits under the plan is the non-disabled worker, and the exception under the current legislation is the worker with a permanent disability. The "drop-out" provisions represent a form of accommodation for persons with permanent disabilities—a fine-tuning of the norm so that some discriminatory disadvantage is alleviated. Persons with permanent disabilities would experience disadvantage under the act, but for the "drop-out" provisions. In accordance with the arguments made by Mr. Granovsky, persons with temporary disabilities that develop into permanent disabilities should be accommodated in the same way that persons with permanent disabilities are accommodated under the act, through the "drop-out" provisions—an accommodation that is achieved by a comparison to non-disabled workers.

The justification for dismissing Mr. Granovsky's argument that non-disabled employees were the proper comparator group was grounded in somewhat circular reasoning. The Court found that non-disabled employees are not disabled and, thus, have no need "to resort to the drop-out provision ... He or she (the non-disabled employee) neither comes within the purpose of the drop-out provision, nor is disadvantaged by it."[30] The relative

29. *O'Malley* v. *Simpsons-Sears,* [1985] 2 S.C.R. 536.
30. *Granovsky, supra* note 1 at para. 49.

disadvantage experienced by the comparator group is not generally considered relevant to the analysis. The issue in this case was not whether non-disabled persons are disadvantaged by the CPP's drop-out provision. It was the claimant's alleged disadvantage as a person with a temporary disability that developed into a permanent disability that was at issue. It is difficult to appreciate why the Court would deny that non-disabled employees are the proper comparator in this case based upon such faulty reasoning. The Court's reasoning relating to the identification of the proper comparator is confusing, and it set the stage for other problematic findings that followed.

Introduction of a Hierarchy of Disability

Another concern with the Court's treatment of disability in *Granovsky* relates to the introduction of a hierarchy of disadvantage among the disabled. Mr. Granovsky was diagnosed as being temporarily totally disabled before his condition deteriorated to the point that he became permanently totally disabled. Binnie J. made several references to the fact that in his assessment, persons with permanent disabilities are "more disadvantaged" and have "greater disabilities" than those persons who are temporarily disabled.[31] The experience of total disability, regardless of the duration of this experience, may result in disability-related discrimination, resulting in disadvantage that cannot be judged as greater than, or less than, other experiences of disadvantage. The result of the introduction of a hierarchical analysis of equality is to pit the different groups of disadvantaged people against each other to determine who is more disadvantaged and creates an unhealthy pecking order of disadvantage,[32] as happened in *Granovsky* with respect to different kinds of disability.

The analysis in *Granovsky* introduced a hierarchy of rights that contradicts one of the fundamental principles of equality law, which is that a hierarchical approach to the interpretation of *Charter* rights must be avoided.[33] The problematic nature of the hierarchy of disadvantage analysis in *Granovsky* was compounded by the impossibility of reaching qualitative or quantitative conclusions about the relative disadvantage associated with a temporary versus permanent disability or a congenital versus acquired disability. Binnie J. concluded that Mr. Granovsky and those who experience temporary disabilities that develop into permanent disabilities are "better off" and "more fortunate" than those who have permanent

31. *Ibid.* at paras. 67 and 81.
32. *Lovelace* v. *Ontario*, [2000] S.C.R. 950 at para. 59.
33. *Dagenais* v. *Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835 at para. 72.

pre-existing disabilities.[34] This is quite a controversial conclusion. No accurate determination can ever really be made with respect to the relative severity of a pre-existing permanent disability versus a newly acquired disability. Those who are disabled from birth may adjust to their disability with a fair degree of ease as a child. Those who develop disabilities as adults may experience more difficulty adapting to new limitations and challenges. It seems somewhat presumptuous for the Court to conclude that one disadvantaged group is "better off" than another. The fact that the Court developed this hierarchical analysis within the disability context signals a lack of sensitivity to the experience of disability.

The analysis relating to relative degrees of disadvantage is also flawed because it is incomplete. There seems to be no appreciation of the fact that a temporary disability can degenerate into a permanent disability, thereby creating a situation of need that is identical to the need of a permanently disabled person with a pre-existing disability. The Court concluded in *Granovsky* that the purpose of the CPP and the drop-out provision was

> to facilitate access of people with permanent disabilities to a CPP disability pension. It does so by employing the same criteria ("severe" and "prolonged") as the criteria used for the disability pension itself. I do not suggest that faithful correspondence between the benefit in issue and the purpose of the larger plan necessarily avoids the claim of discrimination, because the discrimination may lie in the purpose or effects of the larger plan, as discussed by McLachlin J., as she then was, in *Battlefords and District Co-operative Ltd. v. Gibbs,* [1996] 3 S.C.R. 566, at para. 46 et seq.[35]

The Court found, without explaining why, that there was "no exact fit (or correspondence) between the drop-out provision and the appellant."[36] Those persons with temporary total disabilities whose disability becomes permanent can be understood to have the same needs as someone with a permanent pre-existing disability. Indeed, it is difficult to understand how someone with a permanent rather than a temporary disability could really make use of the drop-out provisions because if they were permanently disabled from the start for employment purposes, they would never "drop-in" to the workforce to make contributions in the first place. The Court's lack of curiosity about this anomaly is representative of

34. *Granovsky, supra* note 1 at para. 76 and 79.
35. *Ibid.* at para. 48.
36. *Ibid.* at para. 61.

its somewhat lackadaisical attitude towards disability discrimination as expressed throughout the *Granovsky* decision.

Conclusion

The Court in *Granovsky* did hold that the focus of a section 15 analysis in the context of disability should not be on the impairment or functional limitations of the individual but, rather, on the "problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the 'large remedial component' or 'ameliorative purpose' of section 15(1)."[37] There was some promise in this expression of the Court's theoretical understanding of disability discrimination that, if realized, could have contributed to a positive outcome for the claimant. Unfortunately, despite this promising beginning, the Court was unable to connect its theoretical understanding of how the social construction of disability works to the facts and issues in this case.

The Court's section 15 equality analysis in *Granovsky* concludes with a somewhat dismissive, yet perhaps telling, declaration of sympathy for Mr. Granovsky's injured back. Binnie J. states that he has "every sympathy for the appellant's injured back."[38] This declaration is perhaps a helpful indicator of how and why the Court's thinking about disability went wrong in *Granovsky*. One cannot get to a place of true equality from an analysis grounded in sympathy. The concern is that in the disability context, sympathy equates to pity for the disabled who do not conform to the non-disabled norm. The emotion of sympathy provides a convenient cover for what's really happening relationally between the non-disabled and the disabled. To declare sympathy for the disabled allows the person making the declaration to portray her/his self as a benevolent humanitarian, while allowing them to assert a relationship of domination over the disabled. Sympathy and pity work to perpetuate a negative social construction of disability that reinforces the power of the dominant norm of the non-disabled. This kind of thinking does not provide for equality and, in fact, can undermine it, working to the ultimate disadvantage of disabled persons.

Unfortunately, the Court in *Granovsky* failed to address the power relations at issue in the case and failed to construct a legal analysis of

37. *Ibid.* at para. 26. See also the Court's reference to the social construction of disability in paragraph 30.
38. *Ibid.* at para. 81.

disability discrimination that is representative of the socio-political reality of the experience of disability discrimination. The Court's decision in *Granovsky* is skewed by the introduction of considerations relating to the purpose of the legislation into the section 15 analysis. These considerations allow for a shift in the focus of the analysis away from the effects of the impugned legislation on the equality claimant. The findings that followed flowed out of this fundamental problem with the analysis—a problem that could be corrected by maintaining a focus on an effects-based analysis that exposes the source of the disadvantage experienced by the equality claimant—that is, the social construction of disability and its implications. Judicial decision-makers have the potential to transform the traditional interpretation of the social construction of disability by developing a legal construction of disability discrimination grounded in a socio-political understanding of this experience. Based upon the nature of the Court's findings in *Granovsky,* it may be said that the Court failed to fulfil the potential of section 15 in this case and rendered a decision that leads one to question whether it actually added insult to injury.