

The Burden of Proof Facing a Person Who Invokes S.15(1) of the Canadian Charter

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I. INTRODUCTION	525
II. THE GENERAL BURDEN OF PROOF, THE STANDARD OF PROOF AND THE STATUS OF THE PERSON INVOKING S. 15(1)	528
A. Capacity, Standing and Legal Interest	528
1. Capacity	528
2. Standing	529
(a) <i>Artificial Persons</i>	529
(b) <i>Individuals</i>	530
3. Legal Interest	531
B. A Legislative Enactment Subject to the <i>Charter</i>	532
III. THE BURDEN WITH RESPECT TO S. 15(1)	533
A. The Rights Enshrined in s. 15(1)	533
1. Extent of the Rights to Equality	534
(a) <i>Equality Before the Law</i>	534
(b) <i>Equality Under the Law</i>	535
(c) <i>The Right to Equal Protection</i>	536
(d) <i>The Right to Equal Benefit</i>	536
2. The Link Between Rights to Equality and Discrimination	537
B. Discrimination	539
1. Definition	539
2. Cause of the Legislative Distinction	540
(a) <i>Based on the Object of a Legislative Enactment</i>	540
(b) <i>The Ground (Enumerated or Analogous) of the Distinction</i>	540

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3.	The Effect of the Legislative Distinction	542
4.	The Relationship Between the Discrimination and the Irrelevance of the Personal Characteristic Behind the Distinction	544
5.	The Causal Connection Between the Ground of the Distinction and the Difference in Treatment	547
6.	Affirmative Action Programs under s. 15(2)	548
7.	Presentation of Evidence	549
IV.	CONCLUSIONS	551

I. INTRODUCTION

As the turn of the century approaches, Canada is declaring war on discrimination *a mari usque ad mare*. One can at the present time count no less than one Constitution Act¹, two acts of the Canadian Parliament² and twelve Provincial laws³ which expressly prohibit discrimination of one kind or another.⁴ The scope of the application, the purpose, the effect and the normative content of these laws differ; however, they do overlap to a certain extent⁵. The first task of the person who believes that he or she is the victim of discrimination is, thus, to determine from among these laws which is most relevant to his or her case.⁶

The provincial charters and other provincial human rights legislation constitute true human rights codes within the territory of each province.⁷ They govern at one and the same time the relationship between private citizens and that between the citizen and the provincial government.⁸ In all cases, however, federal institutions escape their purview.⁹ The latter fall exclusively within the scope of the *Canadian Human Rights Act*.¹⁰ Over and above the

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.) C. 11, ss. 15(1), 27, 28 (hereinafter the *Charter*).
 2. *Canadian Charter of Rights*, R.S.C. (1970), App. II, and *Canadian Human Rights Act*, S.C. (1976-77), c. 33.
 3. *Individual's Rights Protection Act* (Alberta), R.S.A. c. I-2; *Human Rights Act* (British Columbia), S.B.C. (1984) c. 22; *Human Rights Act* (Manitoba), C.C.S.M. c. H-175; *Human Rights Act* (New Brunswick), R.S.N.B. (1973) c. H-11; *Human Rights Code* (Newfoundland), R.S.N. (1970) c. 262; *Fair Practice Ordinance* (Northwest Territories), R.O.N.W.T. (1974) c. F-2; *Human Rights Act* (Nova Scotia), S.N.S. (1969) c. 11; *Ontario Human Rights Code* (Ontario), S.O. (1981) c. 53; (1975) c. 72; *Charter of Human Rights and Freedom* (Quebec), L.R.Q. (1977) c. C-12; *Human Rights Code* (Saskatchewan), S.S. (1979) c. s-24.1; *Fair Practices Ordinance* (Yukon), R.O.Y.T. (1971).
 4. M.L. Berlin & W.F. Pentney, *Human Rights and Freedoms in Canada: Cases, Notes and Materials* (Toronto: Butterworths, 1987) at 13-1ff.
 5. *Ibid.*
 6. G.A. Beaudoin & E. Ratushny, eds., *Charte Canadienne des droits et libertés*, 2d ed. (Montreal: Wilson & Lafleur, 1989) at 75ff; S.N. Lederman & A. Ristrie, "The Relationship between Federal and Provincial Human Rights Legislation and Charter Equality Rights", in L. Smith *et al.*, eds., *Righting the Balance, Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) at 83ff.
 7. *The Board of Governors of the Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 at 195.
 8. *Individual's Rights Protection Act*, *supra* note 3, art. 12; *Human Rights Act* (Manitoba), *supra* note 3, art. 57; *Human Rights Act* (New Brunswick), *supra* note 3, art. 9; *Human Rights Act* (Nova Scotia), *supra* note 3, art. 15; *Human Rights Code* (Newfoundland), *supra* note 3, art. 3; *Ontario Human Rights Code* (Ontario), *supra* note 3, art. 46; *Human Rights Act* (Prince Edward Island), *supra* note 3, art. 33; *Charter of Human Rights and Freedom* (Quebec), *supra* note 3, art. 54; *Human Rights Act* (Saskatchewan), *supra* note 3, art. 43.
 9. *Bell Canada v. Quebec* (C.S.S.T), [1988] 1 S.C.R. 749 at 805ff; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226 at 233; *Re Canadian Pacific Ltd. and Attorney General of Alberta*, 108 D.L.R. (3d) 738 (Alberta C.A.); *Re Forest Industries Flying Tankers Ltd. and Kellough* (1980), (B.C.C.A.) 108 D.L.R. (3d) 686; *Charter of Human Rights and Freedom* (Quebec), *supra* note 3, art. 55.
 10. *Supra* note 2; W.S. Tarnopolsky, "Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 242 at 255, 256.

foregoing, are the *Canadian Bill of Rights* and the *Charter*. The former, which is still in force, serves to interpret all federal acts¹¹ and is of a declaratory nature.¹²

Enshrined in the Constitution of the country, the *Charter* represents the supreme law of the land¹³ and covers the legislative actions¹⁴ of both the provincial and federal levels of government.¹⁵ The *Charter* takes aim at discriminatory measures having the force of law, a particularly repugnant and oppressive form of discrimination.¹⁶ Only the *Charter* prohibits discrimination which infringes the right to equality before and under the law and to the equal protection and benefit of the law.¹⁷ It makes unenforceable any legislative action whose purpose or effect is discriminatory, except in those instances where the rights to equality are restricted within reasonable limits and where such restriction can be justified in the context of a free and democratic society.¹⁸

The *Charter* is the most recent of the laws prohibiting discrimination in Canada.¹⁹ To date,²⁰ however, the Courts have already decided more than six hundred cases involving

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11. *Ontario Human Rights Commission & O'Malley v. Simpson Sears*, [1985] 2 S.C.R. 536; *R. v. Cornell*, [1988] 1 S.C.R. 461.
 12. *Ibid*; *Singh et al v. M.E.I.*, [1985] 1 S.C.R. 177 at 224 where the *Immigration Act of 1976* was held to be incompatible with the requirements of fundamental justice enumerated in s. 7 of the *Charter*. Beetz, Estey and McIntyre JJ. preferred to refrain from expressing an opinion on the question of the application of the *Charter* and based their judgment on the *Canadian Bill of Rights* underlining that s. 26 of the *Charter* implicitly stipulated that the *Canadian Bill of Rights* continued with full effect, that the wording of the *Canadian Bill of Rights* is not identical to the *Charter* and that the benefit of their cumulative effect risks being lost if the *Canadian Bill of Rights* falls into disuse.
 13. *Constitution Act of 1982*, *supra* note 1, s. 52.
 14. The *Charter* applies to government action in the legislative, executive and administrative branches, of Parliament and the legislatures of the Provinces, s. 32(1). See *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 598 ff; see also *Douglas Kwontlen Faculty Association v. Douglas College* (1988), 2 W.W.R. 718 (C.A.B.C.), which has been appealed to the Supreme Court of Canada and which is presently under advisement.
 15. The *Charter supra* note 1, s. 32(1). The *Charter* applies:
 - (a) To Parliament and the Government of Canada in all areas of Parliament's jurisdiction and those of the Northwest Territories;
 - (b) To the legislature of each Province and its jurisdiction.
 16. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 172.
 17. *R. v. Turpin*, [1989] 1 S.C.R. 1296. Subsection 1(b) of the *Canadian Bill of Rights* also protects the right to equality before the law and confers the right to equal protection of the law. Unlike the *Charter*, it is enough in this context to show the existence of an ordinary federal objective to justify the setting aside of this principle (See *Cornell, supra* note 11 at 470ff).
 18. The *Charter, supra* note 1, s. 1.
 19. The *Charter* came into force on April 17, 1982. S. 15 only came into force on April 17, 1985, by s.32.2 of *Charter* and has no retroactive effect: *Devine v. P.G. Québec*, [1982] 2 S.C.R. 790, 820; *R. v. Edwards Books*, [1986] 2 S.C.R. 713, 786.
 20. 1 June 1989.

the rights to equality.²¹ Because of their constitutional impact, these cases have a special importance.²² They rise above the private interest of the parties to the action.

By bringing to the constitutional debate the rights and liberties enshrined in the *Charter* (including the right to equality), the constitutional debate, hitherto centered on the separation of legislative powers, has assumed a new aspect which raises many practical and previously unconsidered problems, particularly in the field of legal proof. Traditional constitutional debates rarely deal with questions of fact, and the Courts were not required to set out special rules of evidence for such cases.²³

Any person invoking the *Charter* to affirm the right to equality enters the constitutional arena where adversaries are formidable, e.g. the Attorney General of Canada and of one or more of the Provinces. The stature and resources of the parties are obviously unequal. Finally, the analytical approach appropriate for *Charter* cases also clearly distinguishes these from ordinary cases where a person is claiming discrimination.²⁴ These factors must be taken into account in determining the burden of proof and the rules of evidence and intervention by third parties; otherwise, the *Charter* cannot fulfill its purpose.

In this rather special context, this paper will examine what burden of proof falls on the person who invokes the *Charter* to escape the effect of a law which is undermining his or her right to equality. I shall first touch upon the principles relating to the general burden of proof, the standard of proof, and the status of the person who invokes s. 15(1) and which, with few exceptions, are common to all cases where the *Charter* is invoked. I will then consider the burden of proof with respect to s. 15(1).

II. THE GENERAL BURDEN OF PROOF, THE STANDARD OF PROOF AND THE STATUS OF THE PERSON INVOKING SECTION 15(1)

It falls to the person who claims an infringement of the right to equality to prove it.²⁵ Any person invoking the *Charter* will immediately have the burden of proof of the following:

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21. According to statistics prepared by the Canadian Council on the Status of Women.
 22. F. Gélinas, "La primauté du droit et les effets d'une loi inconstitutionnelle" (1988) 67 Can. Bar Rev. 455.
 23. The most obvious difficulties of proof in such cases relate to the admissibility and weight of extrinsic facts urged by the litigants in searching for the real object of the legislation in question: M. Manning, "Proof of Facts in Constitutional Cases", in *Charter Cases 1986-87: Proceedings of the October 1986 Colloquium of the Canadian Bar Association* (Montreal: Yvon Blais, 1987); in this respect, the Supreme Court of Canada has refrained from setting out any general rule and inclines more to flexibility: Refer to *Re Motor Vehicle Act* (B.C.), [1985] 2 S.C.R. 486 at 505 ff.
 24. Compare *Andrews*, *supra* note 16, and *Brossard v. Commission des droits de la personne du Québec*, [1988] 2 S.C.R. 279; *Forget v. P.G. Québec*, [1988] 2 S.C.R. 90; *Cornell*, *supra* note 11; *C.N. v. Commission des droits de la personne du Canada*, [1987] 1 S.C.R. 1114 (Action travail des femmes), for the most recent examples.
 25. *Andrews*, *supra* note 16 at 182.

does the language or the application of the legislation²⁶ being attacked infringe (or might it infringe) one of the enshrined rights of equality?

The essential element of this burden of proof is as follows: after having established capacity, standing and legal interest, the person invoking the *Charter* must demonstrate that the legislative enactment to which the *Charter* applies has for its purpose or has the effect of creating an inequality or a disadvantage consisting either in a difference in treatment, or type of treatment based on one of the heads of s. 15(1) or heads that are analogous thereto.²⁷ The legislative impact of this demonstration justifies the Courts in requiring proof by a preponderance of evidence.²⁸

A. Capacity, Standing and Legal Interest

1. Capacity

In principle, no one can come before the Courts who does not have the free exercise of his or her rights.²⁹ Since the abolition of civil death, the only persons of the age of majority who are deprived of the exercise of their right to sue and be sued are those interdicted.³⁰ Unemancipated minors, not having the free exercise of their rights, must be represented by a tutor before the Courts.³¹ The inability to exercise one's right to appear before the Courts is itself a fundamental difference in treatment before the law and under the law and can, therefore, be challenged.³² As we shall see later,³³ only a person whose rights have been violated can invoke the *Charter*. However, it would seem absurd that a lack of proper representation could deprive a person of the possibility of invoking the *Charter* to escape the incapacity to exercise his rights imposed by legislation which is unconstitutional.

2. Standing

26. *Ibid.* at 164.

27. *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441; see also *infra*, notes 52 to 53.

28. *R. v. Oakes*, [1986] 1 S.C.R. 103 at 135ff.

29. Article 56 of the Code of Civil Procedure accepts this principle in Quebec; see also C.D. Gonthier (then a Judge of the Superior Court), "L'attitude du tribunal" in Barreau du Québec, *Application des chartes des droits et libertés en matière civile* (Cowansville, Que.: Yvon Blais, 1988) 135.

30. J.L. Beaudoin, *Les Obligations*, 2d. ed., (Cowansville, Que.: Yvon Blais, 1983) at 159ff.

31. Art. 314 ss. C.C.L.C.

32. We do not say "inequality" of treatment, when the difference in treatment seems based in this case, up to a certain point, on prejudice.

33. *Infra*, Part II. A. 3 p.5.

(a) Artificial Persons

Although some hold a contrary opinion,³⁴ no artificial person has the standing necessary to claim the benefit of s. 15(1).³⁵ S. 15(1) is not unique in this respect.³⁶ The heads of distinction set out in this section constitute personal characteristics peculiar to natural persons. Moreover, the object of s. 15(1) is:

*the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.*³⁷

Thus, to show that legislation infringes s. 15(1), it must be shown that "the legislative impact of the law is discriminatory".³⁸ Finally, the Supreme Court of Canada's definition of discrimination is only compatible with the infringement of the rights of a natural person.³⁹

(b) Individuals

In the *Borowski* case (No. 1),⁴⁰ the Supreme Court accorded Mr. Borowski standing even though he was not personally affected by s. 251 of the *Criminal Code* (relating to abortion), the constitutionality of which he was contesting. This decision was based on the fact that it concerned a request to declare a law unconstitutional, that this was not a frivolous question, that Borowski as a citizen had the right to have the question answered and that no other reasonable and efficacious way existed to bring this matter before the Courts.

Encouraged by his success, Borowski amended his submission to allege that ss. 7 and 15 of the *Charter* guaranteed to the fetus the right to life and to equality. Some years later in the *Morgentaler* case (No. 2),⁴¹ the Supreme Court declared s. 251 of the *Criminal Code* unconstitutional taking away the legislative context of the issue.

34. *Cabre Exploration Ltd. v. A.R.N.D.T.*, [1986] 4 W.W.R. 262 (B.R. Alta); E. Gertner, "Are Corporations Entitled to Equality? Some Preliminary Thoughts" (1986) 10 C.B.R. 288.

35. *Milk Board v. Clearview Dairy Farm Inc.*, [1987] 4 W.W.R. 279, request for leave to appeal refused by the Supreme Court of Canada; the Supreme Court of Canada refused to rule on this question in *Devine*, *supra* note 19 at 820 and 821. On the other hand, it is always accepted in a criminal or penal action that in defence a non-physical person may raise the unconstitutionality of a law: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 314ff.

36. *R. v. Amway Corp.*, [1989] 1 S.C.R. 21.

37. *Andrews*, *supra* note 16 at 171.

38. *Ibid.* at 182.

39. *Ibid.* at 173ff.

40. *Minister of Justice (Canada) v. Borowski* (No. 1), [1981] 2 S.C.R. 575.

41. *R. v. Morgentaler* (No. 2), [1988] 1 S.C.R. 30.

After having his case dismissed on the merits by the Court of Queen's Bench and the Court of Appeal of Saskatchewan, Borowski was subsequently refused standing pursuant to the *Charter* in the second judgment of the Supreme Court.⁴² In this unanimous judgment, the Supreme Court confirmed that one could have standing pursuant to the *Charter* in only two ways: either by application of s. 24(1)⁴³ of the *Charter* or by s. 52(1)⁴⁴ of the *Constitution Act, 1982*.

To meet the conditions of s. 24(1), a person invoking the *Charter* must allege the infringement of his or her own rights (and not those of the fetus as in the case in question).⁴⁵ On the other hand, according to s. 52, the litigation must relate to a law or governmental action performed under the authority of a power conferred by the law, which no longer existed in the case in point since s. 251 of the *Criminal Code* had already been declared as having no force or effect.⁴⁶

Thus, it would seem that a person can, by virtue of s. 52(1), invoke the *Charter* in a case where his or her own rights are not affected by the legislation attacked if the criteria of the trilogy of *Thorson*,⁴⁷ *MacNeil*⁴⁸ and *Borowski (No 1)*⁴⁹ are met.

Of course, in my view, the legal representative of someone lacking the capacity to exercise his legal rights has the necessary standing to appear before the Courts.

3. Legal Interest

To justify his or her interest in bringing an action, a person invoking the *Charter* must show that an issue actually exists, that is to say, there is a concrete and tangible dispute.⁵⁰ It must also be shown that the person is himself or herself affected (or susceptible

42. *Borowski v. Attorney General of Canada* (No. 2), [1989] 1 S.C.R. 342.

43. The *Charter*, *supra* note 1, s. 24(1), [*Enforcement of guaranteed rights and freedoms*]:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

44. S. 52(1) [*Primacy of Constitution of Canada*]:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

45. *Borowski* (No. 2), *supra* note 42 at 367.

46. *Ibid.*

47. *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138.

48. *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265.

49. *Borowski* (No. 1), *supra* note 40.

50. *Borowski* (No. 2), *supra* note 42 at 353.

of so being)⁵¹ by the legislation that the person is attacking.⁵² To do this, the person must prove that he or she possesses the personal characteristic which is the basis of the distinction. When this characteristic is a voluntary one, as in the case of a religious belief, the person must further convince the Court of his or her sincerity.⁵³ Finally, the person must establish that the prejudice he or she suffers is truly caused by the legislation being attacked, i.e., that in the absence of this provision that person would not bear the burden imposed thereunder or would receive the benefit which had been denied to him or her. In a word, that person must establish that he or she would enjoy a real benefit from the judgment being sought.⁵⁴

B. A Legislative Enactment Subject to the *Charter*

To date, the Supreme Court has refrained from deciding the exact meaning of the word "law" in s. 15(1) and more precisely the question as to whether other governmental or quasi-governmental regulations, rules or requirements, can be termed "laws" under this section.⁵⁵ In dealing with the same question in the context of s. 32, the Court has nevertheless stated that it would seem "that the *Charter* would apply to many types of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures" and underlined that this list is certainly not exhaustive.⁵⁶

I do not see why the concept of "rule of law" in the French text can be used to delimit the scope of application of the *Charter* but not that of s. 15.⁵⁷ Must we not take into account in this respect that the right to equality encompasses all the other rights enshrined in the *Charter*?⁵⁸

Before dealing specifically with the burden of proof relating to s. 15(1), we should remember that, if the person invoking this section succeeds in such proof, the burden then falls on the party who maintains that the infringement is justified.⁵⁹

Demonstrating the constitutional justification of the discriminatory infringement of the right to equality will be done in conformity with the criteria set out by the Supreme Court

51. *Operation Dismantle*, *supra* note 27.

52. *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. The inapplicability of a law to the person challenging it renders the litigation purely theoretical: See *Borowski*, (No. 2), *supra* note 42 at 357.

53. *Jones v. R.*, [1986] 2 S.C.R. 284 at 295.

54. *Borowski* (No. 2), *supra* note 42. The same principle applies in a case based on the *Canadian Bill of Rights*: *Cornell*, *supra* note 11.

55. *Andrews*, *supra* note 16 at 164.

56. *Dolphin Delivery*, *supra* note 14 at 602.

57. *Beaudoin & Ratushny*, eds., *supra* note 6 at 676.

58. *Andrews*, *supra* note 16 at 185.

59. *Ibid.* at 153, 178; *Turpin*, *supra* note 17.

in the *Oakes* and *Edwards Books* cases.⁶⁰ To succeed in this respect, the justification must be demonstrated by a preponderance of evidence.⁶¹

Any justification must be addressed in the framework of the analysis made under s. 1;⁶² only at this section's level should the purpose of laws be weighed in the light of their effect.⁶³

Independently of these rules, each party may file in the record, according to the appropriate procedures,⁶⁴ as strong a proof as possible with respect to each of the questions in dispute.

III. THE BURDEN WITH RESPECT TO S. 15(1)

It is somewhat paradoxical to undertake to describe the burden of proof of the person complaining of a discriminatory infringement of his right to equality while the normative content of s. 15(1) remains uncertain. An exhaustive study of the limits to the rights to equality would lead us far afield from our principal concern. Let it suffice to underline that I will explore the content of s. 15(1) in the light of the judgments of the Supreme Court of Canada which deal with it. Such analysis will thus only consider the minimal normative content of s. 15(1). I set out on this task knowing that it is restricted because s. 15 itself requires analysis.⁶⁵

60. *Oakes*, *supra* note 28; *Edwards Books*, *supra* note 19.

The burden for the Crown is to convince the Court that the following two questions must be answered in the affirmative:

1. Do real pressing concerns exist which make the legislative objective at which the contested measure was aimed sufficiently important to restrict the right to equality?

2. Are the methods used to achieve the objective aimed at appropriate, taking into account on the one hand the importance of this objective and on the other hand the degree of the restriction of the right to equality, i.e.,

a) are the means used reasonable, i.e., neither arbitrary, unjust nor irrational?

b) do these methods inflict the least possible restriction to the right to equality?

c) are the results of the methods used in proportion to the targeted objective?

61. *Supra* note 28.

62. *Supra* note 60.

63. *Turpin*, *supra* note 17 at 36, 37.

64. In this respect, I suggest a similar reasoning. See *Mills v. R.*, [1986] 1 S.C.R. 863 at 953ff as to the effect of the *Charter* on the Canadian judicial system.

65. *Turpin*, *supra* note 17 at 44; *Andrews*, *supra* note 16 at 168.

A. The Rights Enshrined in s. 15(1)

The concept of equality will doubtless always be controversial. Difficult to grasp, it does not lend itself to a precise definition because of its powerful symbolism and the inexorable evolution of our society which keeps it in flux.⁶⁶ It is, thus, not surprising that the normative content of s. 15(1) has caused much ink to flow.⁶⁷ Although several dozen judgments from Courts of Appeal across the country have been entered in this respect, the Supreme Court of Canada has refused to attempt an exhaustive definition of the four expressions describing the right to equality.⁶⁸ Since even the Supreme Court refrains from exhibiting such temerity, I will restrict this analysis to an outline of each of the fundamental rights, using precedents of the Court.

This brief overview of the minimal content of the rights to equality will show in its legislative and judicial contexts the large remedial component which the Supreme Court attributes to s. 15(1).⁶⁹

1. Extent of the Rights to Equality

The *Charter* recognizes four principal rights to equality, equality before and under the law, as well as equal protection and equal benefit of the law.⁷⁰ This list is aimed at avoiding results similar to those flowing from the interpretation (notoriously restrictive) of the *Canadian Bill of Rights* by the Supreme Court of Canada.⁷¹ It reflects also an expanded concept of discrimination which has developed since the adoption of the *Bill of Rights*.⁷² Thus, over and above the heads of discrimination prohibited by the *Canadian Bill of Rights*, the *Charter* expressly prohibits discrimination based on ethnic origin, age and mental or physical disability.

66. *Andrews*, *supra* note 16 at 152, 153, 164.

67. Beaudoin and Ratushny, *supra* note 6 at 983ff.

68. *Turpin*, *supra* note 17; *Andrews*, *supra* note 16 at 164, 168.

69. *Andrews*, *supra* note 16 at 171.

70. S. 15(1) "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

71. *Andrews*, *supra* note 16 at 170: "The inclusion of these last three additional rights in s. 15 of the *Charter* was an attempt to remedy some of the shortcomings of the right to equality in the *Canadian Bill of Rights*" and at 171: "It has a large remedial component".

72. Note that McIntyre J. said in *Andrews*, *supra* note 16 at 170, that the *Canadian Bill of Rights* does not talk of equality before the law even if s. 1 b) of the *Canadian Bill of Rights* stipulates:

"...b) the right of the individual to equality before the law and the protection of the law."

(a) *Equality Before the Law*

Equality before the law is the first of the four facets under which the concept of equality in s. 15(1) is presented. It is also the first to have been enacted legislatively in Canada where it was introduced as sub-paragraph 1(b) of the *Canadian Bill of Rights*. Equality before the law relates to the manner in which the law is applied.⁷³ Sub-paragraph 1(b) of the *Canadian Bill of Rights* does not require that all federal laws apply in the same way to everyone; a law aimed at a category of persons is valid so long as it is adopted for the purpose of achieving a valid federal objective,⁷⁴ or of achieving one which is necessary and desirable.⁷⁵

In the *Turpin* case⁷⁶, the Supreme Court of Canada has qualified the following definition given by Ritchie J. in the *Drybones* case⁷⁷ as to the minimal content of the right to equality before the law as guaranteed by s. 15 of the *Charter*:

*I think that the word "law" as used in s. 1(b) of the Bill of Rights is to be construed as meaning "the law of Canada" as defined in s. 5(2) (i.e. Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed an offence or having been made subject to any penalty.*⁷⁸

(b) *Equality Under the Law*

The *Charter* added this complementary dimension to the concept of equality which refers to the content of the law.⁷⁹ In the *Lavell* case⁸⁰ (decided under the *Canadian Bill of Rights*), the Supreme Court "upheld s. 12(1)(b) of the *Indian Act* which deprived women, but

73. M. Gold, "A Principled Approach to Equality Rights: A Preliminary Enquiry" (1982) 4 *Supreme Ct. L.R.* 130 at 136.

74. *Cornell*, *supra* note 11 at 470 ff; *Beauregard v. Canada*, (1986) 2 *S.C.R.* 56 at 90 ff.

75. *La Reine v. Bunshine*, (1975) 1 *S.C.R.* 693; *Prata v. Ministre du travail et de l'immigration*, (1976) 1 *S.C.R.* 376 at 382; *MacRay v. La Reine*, (1980) 2 *S.C.R.* 370 at 406, 412.

76. *Supra* note 17.

77. *R. v. Drybones*, (1970) *S.C.R.* 282.

78. *Turpin*, *supra* note 17.

79. *R. v. Le Gallant*, (1986) 33 *D.L.R.* (4th) 444, 453 (B.C. C.A.); *Re McDonald and The Queen*, (1986) 21 *D.L.R.* (4th) 397.

80. *Attorney General of Canada v. Lavell*, (1974) *S.C.R.* 1349.

not men, of their membership in Indian Bands if they married non-Indians."⁸¹ In the eyes of the Court, this provision did not violate equality *before* the law, although it might violate equality *under* the law.⁸²

81. *Andrews, supra* note 16 at 170. S. 28 of the *Charter* would today give the opposite result.

82. *Ibid.*

(c) *The Right to Equal Protection*

This concept comes to us from the 14th Amendment to the American Constitution⁸³ enacted after the American Civil War. It was aimed at guaranteeing the black population a full and equal status in American society.⁸⁴ Even though the language of s. 1(b) of the *Canadian Bill of Rights* might have given the impression that this right had been introduced in Canada by legislative enactment,⁸⁵ the Supreme Court of Canada, in the *Lavell* case, expressly rejected the egalitarian concept exemplified by the 14th Amendment as interpreted by American Courts and retained instead that of Dicey, namely "equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts."⁸⁶

As Tarnopolsky and Pentney noted,⁸⁷ the broad American interpretation of this right could be justified also under either the principle of "equality under the law" and the right to "equal protection".

In the future, it appears that American law could be used to interpret the extent of the right to the same protection,⁸⁸ but we must not be misled into thinking that this is an easy solution.⁸⁹ The 14th Amendment has no limitation provision similar to s. 1 of the *Charter*.⁹⁰

(d) *The Right to Equal Benefit*

The *Bliss* case⁹¹ is a good example of the object of this right.⁹² In this case, the Supreme Court of Canada upheld the denial of the regular unemployment insurance benefits to which Mrs. Bliss would have been entitled had she not been pregnant. Having worked only eight weeks rather than the required ten, Mrs. Bliss was not entitled to maternity benefits. Even though her eight weeks qualified her, she was also denied regular unemployment insurance benefits on the grounds that a person who is not capable of working and not available for work has no right thereto. Such is the case of a woman during pregnancy.

83. Gold, *supra* note 73 at 139.

84. W.S. Tarnopolsky & W. Pentney, *Discrimination and the Law: Including Equality Rights under the Charter* (Toronto: De Boo, 1985) at 16-3.

85. *Supra* note 72.

86. *Lavell*, *supra* note 80 at 1366.

87. Tarnopolsky & Pentney, *supra* note 84 at 16-11.

88. D. Proulx, "Le défi de l'égalité et la Charte canadienne des droits" (1988) 48 R. du B. 633 at 637.

89. Gold, *supra* note 73 at 139ff.

90. *Andrews*, *supra* note 16 at 177.

91. *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

92. *Andrews*, *supra* note 16 at 170.

The right to equal benefit was enshrined to counter the effect of this judgment⁹³ and is intended to ensure that social measures are subject to the same obligation of equality as are other laws⁹⁴ and this despite the fact that the benefits are established by the legislatures.⁹⁵

2. The Link Between Rights to Equality and Discrimination

Every legislative distinction between individuals or groups does not in itself constitute an infringement to the right to equality.⁹⁶ The first question that must be answered when s. 15(1) is invoked is whether or not the distinction is acceptable under this section.⁹⁷

S. 15(1) prohibits the breach of legislative equality not by the mere fact of a "distinction" but rather by that of "discrimination".⁹⁸ This nuance is of the utmost importance. Without it, s. 15(2) would become an exception to s. 15(1)⁹⁹ when in fact these sections complement one another. Worse still, if it were so, there would be contradictions between the purpose of s. 15 and that of several other provisions designed to safeguard certain distinctions.¹⁰⁰

The analytical approach adopted by the Supreme Court in its most recent judgment on s. 15(1) splits into two distinct steps the inquiry into an infringement of any one of the rights to equality. First, the occurrence of the infringement is established, and then its

93. *Ibid.* see also *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1291.

94. Proulx *supra* note 88 at 637.

95. Gold, *supra* note 74 at 136.

96. *Andrews, supra* note 16 at 154, 164, 194. Wilson, J.: "... not every distinction between individuals and groups will violate s. 15. If every distinction between individuals and groups gave rise to a violation of s. 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation" (at 154).

LaForest, J.: "That having been said, I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that *all* legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions" (at 194).

97. *Ibid.* at 169.

98. *Ibid.* at 182.

99. According to W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 242, s. 15(2) is not the final word but rather an explanation of s. 15(1); see also D. Gibson, "Accentuating the Positive and Eliminating the Negative: Remedies for Inequality under the Canadian Charter", in Smith *et al.*, eds., *supra* note 6 at 311ff.

100. *Andrews, supra* note 16 at 171: "... then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions".

discriminatory nature examined. This seems, with respect, to be wrong, useless and misleading.

In the *Turpin* case, two men accused of murder complained that, by being tried in Ontario, they were deprived of their right to elect trial by judge alone as would have been the case in Alberta where trial by jury is optional.¹⁰¹ The Court first concluded that s. 11(f) of the *Charter* did not confer a constitutional right to be judged by judge alone.¹⁰² It then turned its attention to the argument put forward by the accused that the pertinent provisions of the *Criminal Code* breached their rights to equality as guaranteed by s. 15. As a first step, the Court examined whether there had been a breach of one of the four basic rights to equality. Only after having concluded that a breach of the right to equality before the law existed because of the different treatment accorded the accused did the Court turn its attention to determining whether such denial resulted in discrimination.¹⁰³

This approach appears, with respect, to be a mistake as it reduces the concept of equality to a simple matter of difference in treatment. In addition, encouraging us to look upon all legislative distinctions as infringements of rights to equality trivializes these fundamental rights as would be the case if we considered every legislative distinction to be a violation of s. 15(1).¹⁰⁴ This approach also appears useless because by disassociating the content of the rights to equality from discrimination, it is difficult to imagine what form of legislative distinction would not constitute a breach in principle of one of these rights.

But, above all it appears to be misleading since, in turning the exception into the rule, one easily mistakes the true basis and ambit of the enshrined rights to equality which can only lead to incorrect conclusions as to the proper application of s. 15(1).

In brief, the purpose of s. 15 is to guarantee equality in the formulation and application of the law.¹⁰⁵ These rights are not absolute¹⁰⁶ as their application remains capable of evolving.¹⁰⁷ They only guarantee that laws will be impartial. These rights are not infringed when the reason behind the legislative distinction is not discriminatory.

It is not a question of a global protection against any form of distinction between persons or groups.¹⁰⁸ Legislative enactments which create distinctions are essential in governing a modern society and even in order to respect the differences related to the personal characteristics of its members.¹⁰⁹

101. Prior to 1 December 1985, the date on which the new Article 430 of the *Criminal Code* came into force.

102. *Turpin*, *supra* note 17.

103. *Ibid.*

104. *Andrews*, *supra* note 16 at 181.

105. *Ibid.* at 171.

106. *Ibid.* at 163.

107. *Ibid.* at 153, 193.

108. *Supra* note 105.

109. *Ibid.* at 168, 169.

Finally, these rights can be overridden by law in accordance with s. 1. Since a breach of s. 1 means a discriminatory breach of the rights to equality, what meaning must be given to the word "discriminatory"?

B. Discrimination

1. Definition

The etymological meaning of the word discrimination is "separation" without any pejorative overtones.¹¹⁰ The Supreme Court first defined this concept in the context of s. 15(1) in the *Andrews* case.¹¹¹ A British subject and permanent resident in Canada for less than three years, Andrews had a law degree from Oxford. He met all the requirements for admission to the practice of law in British Columbia except that he was not a Canadian citizen. A majority of four judges concluded that this last requirement imposed by s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, chap. 26, infringed the rights guaranteed by s. 15(1) of the *Charter* and that this infringement was not justifiable under s. 1.

Five of the six judges involved endorsed the following definition of discrimination in the context of s. 15(1):¹¹²

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

The cause and effect of the legislative distinction are the two essential elements of this definition.

2. Cause of the Legislative Distinction

It must be underlined at once that even unintentional discrimination is prohibited.¹¹³ That which the *Charter* forbids is "based on grounds relating to personal characteristics of the individual or group".

110. P. Robert, *Dictionnaire alphabétique et analogique de la langue française* (Paris: Société du Nouveau Littré, 1982) at 550.

111. *Andrews*, *supra* note 16 at 172ff.

112. *Ibid.* at 174.

113. *Ibid.*

(a) Based on the Object of a Legislative Enactment

The analysis of the purpose of a law obviously starts with the examination of its text. It is not a case of determining what the legislator had in mind but of scrutinizing the language employed to determine whether a distinction has been made based on one of the heads of s. 15(1) or analogous thereto.

As with direct discrimination, the legislative enactment whose purpose is discriminatory is typified by the obvious distinction which it creates. In this latter case, it appears from merely reading the legislative enactment. The discriminatory nature of the difference in treatment which it creates must be proved. Even though it might not be necessary, anyone invoking the *Charter* would be well advised to show the extent of the prejudicial effect that would result therefrom. This will place a greater burden on the government in arguing justification under s. 1.

When the purpose of the legislative enactment is challenged, the difficulty obviously does not lie in establishing the existence or the cause of the distinction but in proving that such distinction is in fact discriminatory.

(b) The Ground (Enumerated or Analogous) of the Distinction

To be found discriminatory, a distinction must be based on a ground prohibited under s. 15(1) or on an analogous ground.¹¹⁴ The *Charter* is clearly different from the provincial human rights acts which specifically designate certain grounds upon which discrimination is prohibited.¹¹⁵ The Supreme Court of Canada has not only accepted that analogous grounds are covered (it accepted citizenship as an analogous ground) but, without ruling, the Court conceded that the prohibition to discriminate might be even more general.¹¹⁶ The Court gave little indication as to the nature of the non-enumerated grounds which might be invoked other than perhaps that it would concern personal characteristics possessed by disadvantaged groups or by persons.¹¹⁷ In *Re Workers' Compensation Act*, the Court, however, rejected the argument that the situation of the workers and dependants in this case was analogous to those enumerated in s. 15(1).¹¹⁸

It is not necessary that the sole ground of the distinction be prohibited in order that a distinction founded in part on that ground be declared inoperative. A legislative enactment inconsistent with the *Charter* is of no force or effect to the extent of this inconsistency.¹¹⁹

114. *Ibid.* at 175.

115. *Ibid.*

116. *Ibid.* at 152, 153, 175, 182.

117. *Ibid.*

118. *Re Workers' Compensation Act*, (1983) (Nfld.), [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765.

119. *Constitution Act, 1982*, *supra* note 1, s.52(1).

The *prima facie* evidence of the discriminatory nature of a distinction based on the object of a legislative enactment does not require any further proof when the ground of the distinction is one of the grounds enumerated in s. 15(1). On the other hand, when the grounds of the distinction are not mentioned in s. 15(1), the person invoking the *Charter* must establish that his or her situation is analogous to that of persons possessing the personal characteristics enumerated in s. 15(1).¹²⁰ This exposé must include proof of the pertinent social, political and legal contexts.¹²¹ The principal task of a person invoking the *Charter* lies in showing that, over and above the immediate effect caused by the distinction, the latter stereotypes the historical disadvantage or vulnerability of those prone to political and social prejudice, due to a fundamental personal characteristic analogous to those enumerated in s. 15(1).¹²² The same proof is necessary when one contests the effect or the purpose of a legislative enactment.

In examining the grounds of distinction enumerated in s. 15(1) it is difficult to find any common denominator other than those based on the fundamental personal characteristics which historically have been wrongfully associated with the merit and capacity of the individual and, on occasion, unfortunately still are. This observation brings us closer to the basis for the prohibition to infringe on the rights to equality. I will concentrate on this while studying the other element of the definition of discrimination endorsed by the Supreme Court of Canada, that is, the effect of the prohibited legislative distinction.

120. *Supra* note 119.

121. *Turpin, supra* note 17.

122. *Ibid.*; *Andrews, supra* note 16 at 175.

3. The Effect of the Legislative Distinction

The legislative distinction forbidden by the *Charter* may be described as a distinction

*... which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*¹²³

This enumeration of the possible effects of the distinction emphasizes the difference in treatment resulting directly from the legislative enactment itself which is under fire. It has the merit of showing in what ways this difference in treatment can manifest itself. It fails, however, to bring out the more fundamental prejudice that s. 15(1) is designed to prevent and without which a claim, actual or impending, for the right to equality appears ill-founded. This is how Gold describes this other prejudice:¹²⁴

Discrimination involves not only burdening a particular individual or group per se: it involves the imposition of burdens for particular kinds of reasons. These reasons involve a denial of the essential worth and dignity of the class against whom the law is directed, a denial based upon unwarranted stereotypes about the capacities and roles of the members of that class.

In my view, a legislative enactment comprising a distinction based on a ground related to the personal characteristics of an individual or a group or causing a prejudice does not constitute a violation of the rights to equality protected by s. 15(1) unless it results as well in an attack on the personal integrity of this individual or group.

The right to equality serves to affirm human dignity¹²⁵ in that it guarantees the right for everyone to be treated equally and not the right to equal treatment.¹²⁶ This guarantee follows directly from the principle of the supremacy of the law which the *Charter* expressly recognizes to be one of the bases of our society.¹²⁷ But, this principle is only carried out when the law is impartial in its content and in its application.¹²⁸

123. *Supra* note 113.

124. Gold, *supra* note 73 at 147.

125. *Andrews, supra* note 16 at 171; A. Brudner, "What are Reasonable Limits to Equality Rights?" (1986) 64 *Can. Bar Rev.* 469 at 482.

126. Proulx, *supra* note 89 at 647; see also R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 190.

127. *Preamble to Charter, Turpin, supra* note 17.

128. *Ibid.*

The most striking and perhaps the most important feature of the traditional personification of justice is not her scales but her blindfold symbolizing her impartiality which precludes all knowledge of the litigants other than the facts relevant to her adjudication.

By analogy, the distinction prohibited by s. 15(1) is the violation of the principle that every person enjoys inherent dignity and worth and a constitutional right to equal respect and consideration under any legislative enactment.¹²⁹

William Black and Lynn Smith reject an idea of equality which would take into account a broader notion of human dignity since, according to them, it could not be applied to all possible challenges and it would be difficult to translate this idea into a workable legal formula.¹³⁰ To illustrate their view, they give the example of a process of selection which "would be able to treat all citizens with equal respect and interest", but which would have the unforeseen result of excluding a particular group.

The exclusion of a particular group of citizens does not, in itself, constitute discriminatory infringement of their rights unless such prejudice is related to their common personal characteristic rather than to the work and capability of each member of the group which is the real cause of the exclusion. Furthermore, a process of selection whose unforeseen result was the exclusion of a particular group of citizens because of their common personal characteristic and without respect for their merit and individual capacity would not be treating all citizens with an equal consideration and respect. This was precisely the conclusion reached by the Supreme Court of Canada in the *Andrews* case.

It is, indeed, very difficult to translate the concept of human dignity into a workable legal formula. This observation does not furnish for all times a valid reason for ignoring this concept.¹³¹

If it is appropriate to consider in the framework of an analysis of s. 15(1) whether the challenged legislative enactment affects human dignity, it should be done, as the Supreme Court of Canada has suggested, when examining the potentially discriminatory nature of this enactment:

*... a finding that there is discrimination will I think in most but perhaps not all cases necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.*¹³² (Emphasis added)

129. Proulx, *supra* note 89 at 646, 647.

130. Beaudoin & Ratushny, *supra* note 6 at 635, 636.

131. Take as an example the case of *Snyder v. The Montreal Gazette Limited*, [1988]1 S.C.R. 494, which illustrates the difficulties and the necessity of assessing moral damages.

132. *Turpin*, *supra* note 17. An example of this "disadvantage" is furnished by the Supreme Court of Canada in the case of *Action travail des femmes*, *supra* note 24, in connection with the adverse effect of discrimination in the context of employment:

The discrimination is then reinforced by the very exclusion of the disadvantaged group *because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job"*. [Emphasis added]

The study of the impact on human dignity of the challenged legislative enactment requires one to stand back and examine not only this enactment but also "the larger social, political and legal context".¹³³ In effect, "it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether contrariwise it would be identical treatment that would in the particular context result in inequality or foster disadvantage".¹³⁴

This approach recommended by the Supreme Court of Canada is indispensable if the Courts are to avoid being bogged down by questions of semantics and thus be in a position to consider cases on their true merits.

4. The Relationship Between the Discrimination and the Irrelevance of the Personal Characteristic Behind the Distinction

In this broader view, we can easily conceive why a distinction based, for obviously justifiable reasons, on a relevant personal characteristic should not be classed as discriminatory. In such a case, the distinction causes no prejudice because it does not favour the "stereotyping and historical disadvantage or vulnerability to political and social prejudice".¹³⁵ In essence, the distinction, based for an obviously valid reason on a relevant personal characteristic, does not come within the ambit of s. 15 "in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society".¹³⁶

It is not possible to challenge, for example, the relevance of faculties impaired by alcohol or drugs, as a clearly justified prohibition to drive a motor vehicle by persons otherwise qualified to do so. Could it be that such a provision would, *prima facie*, be an unconstitutional distinction (assuming that one could compare intoxication to "mental or physical disability" or analogous grounds), and thus impose on the government the onus of justifying its action under s. 1?¹³⁷

In my view, this constitutes a good example of "an obviously trivial and vexatious claim" in the words of McIntyre J.¹³⁸ In such cases, it should not be necessary to refer to s. 1 to defeat it. It is enough to show that the distinction is not discriminatory because it does not have the effect (or the object) of undermining a fundamental value which has been enshrined.

133. *Turpin*, *supra* note 17.

134. *Ibid.*

135. *Ibid.*

136. *Ibid.*

137. This example is given by McLachlin, J., in *Re Andrews and Law Society, B.C.* (1986), 27 D.L.R. (4th) 600 at 607 (B.C.C.A.).

138. *Andrews*, *supra* note 16 at 182.

McIntyre J. sets out the burden of proof for the person invoking s. 15(1) in the following terms:

... However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law, but, in addition, must show that the legislative impact of the law is discriminatory.¹³⁹

... To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.¹⁴⁰

This said, the discriminatory effect resulting from the irrelevance of the personal characteristics enumerated in s. 15(1) as the basis for the distinction is presumed. It would be unthinkable that the person invoking the *Charter* to avoid being subjected to the effect of a legislative distinction based on one of the grounds enumerated in s. 15(1) should have the burden of showing that the personal characteristic which is the ground for the distinction is a stereotype.¹⁴¹ Logically, the reverse must apply where the grounds are claimed to be analogous to those of s. 15(1). However, the personal characteristic forming the ground for the distinction must not be one which is classified as discriminatory, *juris et de jure*, as we have already underlined.

In a word, I believe that the discriminatory legislative impact of the law which results from a distinction based on one of the s. 15(1) personal characteristics (or one that has been shown to be analogous) may be presumed *juris tantum* because normally such characteristics are not relevant, as they have little or no relationship to the merits or capacities

139. *Ibid.*

140. *Ibid.* at 165.

141. Such was already the opinion of the Supreme Court of Canada in the *O'Malley* case, *supra* note 11 at 558ff. in the case of an action under the *Ontario Human Rights Code*.

of the individuals possessing them. I believe it to be a simple presumption (and not an irrebuttable one) in light of the reasons advanced by the Supreme Court of Canada in the *Andrews* case with respect to the proof of "discriminatory effect" of the law and the possibility of "the screening out of the obviously trivial and vexatious claim".¹⁴² I am of the opinion that the Crown can rebut this presumption in the framework of an analysis of s. 15(1) and not under s. 1. In so doing, the Crown must show the manifest relevance of the personal characteristic as the ground for the distinction because of its close relationship to the merit or capacities of the individuals concerned.

Such an approach permits reconciliation of the rights of the person invoking the *Charter* with sound administration of justice which can screen out the obviously trivial and vexatious claims without permitting them to be unduly prolonged.¹⁴³ The purpose of verifying the discriminatory nature of the use of a personal characteristic as the basis for the distinction is not to justify a discriminatory infringement of the rights to equality but rather to show that the ground of the presumably discriminatory distinction is not in fact discriminatory so that recourse to s. 1 is not necessary.

5. The Causal Connection Between the Ground of the Distinction and the Difference in Treatment

The person invoking the *Charter* cannot limit himself or herself to establishing that a legislative enactment creates a distinction even in the case of a prohibited ground.¹⁴⁴ He or she must also show that this distinction will subject him or her (and other persons in his or

142. *Supra* note 119; *Andrews*, *supra* note 16, LaForest, J.:

"... I hasten to add that the relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague has defined it, i.e., on the basis of 'irrelevant personal differences' such as those listed in s. 15 and, traditionally, in human rights legislation" (at 193).

Then at 197:

"While it cannot be said that citizenship is a characteristic which 'bears no relation to the individual's ability to perform or contribute to society' (*Fontiero v. Richardson*, 411 U.S. 677 (1973), at p. 686), it certainly typically bears an attenuated sense of relevance to these. That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification" (Our underlining).

143. A precedent exists for the dismissal for want of merit of an action wherein s. 7 of the *Charter* was raised: In the *Operation Dismantle* case, *supra*, note 28, the Court granted a preliminary motion and dismissed a petition for a declaratory judgment asked for by the groups who claimed that the testing of these missiles increased the risk of nuclear war. In the Court's view, even at this preliminary stage, it is not required to accept as proven allegations of unprovable facts (at 452 ff).

144. *Supra* note 136.

her category)¹⁴⁵ to treatment more restrictive or less favourable than that accorded other persons.¹⁴⁶ The burden of the person invoking the *Charter* at this stage is to show that it is the prohibited distinction which causes him or her the prejudice. The proof involves two steps: First, the person must connect the prejudicial effect to the prohibited distinction, then he must convince the court that, in the absence of such causal connection, he or she would not suffer any prejudice.

Thus, in the *Andrews* case, the Plaintiff had to prove his own professional competence. Without this evidence, he could not have established that the prohibited distinction was the cause of his prejudice.¹⁴⁷ This evidence does not pose any difficulty when the purpose of the legislation is discriminatory, as it was in the *Andrews* case.

When the discrimination results from the effect of a legislative enactment, the situation is more complex. In our view the person invoking the *Charter* will have proved this causal connection, *prima facie*, if he shows that a majority of the persons in the group of which he or she is a member (that is, the group which experiences the unfavourable effect of the legislation) possess the same personal characteristics.¹⁴⁸ It is then the Crown's turn to try to show that, despite appearances, the real cause of the unfavourable effect of legislation lies elsewhere. Here again, the debate centres on s. 15(1) and not on a recourse to s. 1 since it is not a question of justifying a discriminatory infringement of the right to equality but of verifying whether in fact such an infringement exists.

6. Affirmative Action Programs under s. 15(2)

I submit that the two paragraphs of s. 15 are complementary and that their common goal is the full recognition in legislative enactments that all persons in Canada are of equal worth.¹⁴⁹ Any legislative enactment which creates differences in treatment in relation to the benefits it accords must be examined in the context of s. 15(2) before it can be classed as discriminatory.¹⁵⁰

145. *Andrews*, *supra* note 16 at 154; *Turpin*, *supra* note 17. This does not signify that a category must consist of more than one individual. If this were not the case, it would be necessary to show how many people can form a category, which would be arbitrary.

146. *Andrews*, *supra* note 16 at 174.

147. *Ibid.* at 183. We do not share the view of Messrs. David Lepofsky and Hart Schwartz on this point: See D. Lepofsky & H. Schwartz, *Commentaires d'arrêt (R. v. Ertel)*, (1988) 67 Can. Bar Rev. 115 at 122.

148. *Forget*, *supra* note 24 at 101. By analogy, in the context of s. 10 of the Quebec *Charter of Human Rights and Freedoms*, *supra* note 99.

149. Gibson, *supra* note 99.

150. We are aware that the Supreme Court of Canada posed the following constitutional questions in *Re. Workers' Compensation Act*, *supra* note 118:

Question 2:

Are ss. 32 and 34 of *The Workers' Compensation Act*, (1983) N.S. (1983) c. 48, (the 'Act') inconsistent

At this stage, perhaps we should consider how s. 15(1) should be applied to laws which create human rights. Do these laws, by creating exceptions, grounds of defence and niceties of definition applicable to discrimination based on age, infringe rights to equality?

The Supreme Court of Canada's refusal to grant leave to appeal in the *Blainey* case¹⁵¹ may foretell that, faced with such a question, the Court would in this respect treat human rights legislation as it would any other law. Contrary to the views of some others,¹⁵² I fear that, if such were indeed the case, worthwhile government initiatives to promote equality would be indefinitely delayed. I believe that governments should not be held to perfection in enacting laws, especially when their purpose is to create rights as in the

with s. 15(1) of the *Charter*?

Question 3:

If ss. 32 and 34 of the Act are inconsistent with s. 15(1) of the *Charter*, are they saved by s. 15(2) of the *Charter*?

This analysis cannot mean that the Court considers the affirmative action program could be judged as violating the right to equality. S. 15(2) expressly says that "Subsection (1) does not *preclude* any law, program or activity ..." and not, "notwithstanding s. 1" (Our underlining).

151. *Blainey v. Ontario Hockey Association et al.*, (1986) 54 O.R. (2d) 513, 58 O.R. (2d) 274. Cited with approval by McIntyre J. in *Dolphin Delivery*, *supra* note 14.
152. Beaudoin & Ratushny, *supra* note 6; see as well Lepofsky & Schwartz, *supra* note 147 at 119, 120: "Third, while the Aristotelian maxim that like cases should be treated alike [20] is an appropriate goal for courts deciding individual cases through common law adjudication, it is ill-suited to the legislative process. Courts deal with individual common law cases one at a time, apply comparable legal principles to all cases, attempting to ensure that similar results are reached in cases where the relevant facts are similar.

In contrast, legislatures, unlike courts, do not make laws and policy on an individual, case by case basis. Legislating essentially involves identifying a social problem, deciding whether it warrants government action, weighing competing measures for addressing the problem, and then choosing the most desirable and politically marketable course of action. Legislative solutions to social problems are often experimental and piecemeal, taking reform one step at a time [21]. Painted with a broad brush, they do not solve all aspects of a social problem at once, or draw perfect lines when demarcating who should benefit from a new initiative.

Additionally, if section 15's goal was to require governments to treat similarly all who are similarly situated, then the section would have the bizarre effect of *prima facie* obliging governments to enact perfectly drawn legislation. A legislature, responding to a social problem (for example, pollution, poverty, or consumer protection) would be obliged constitutionally either to solve the entire problem with one fell swoop, or face the prospect of an equality rights challenge, brought by an aggrieved individual who could have, but did not, benefit under the initiative. This 'all or nothing' requirement for legislative action is a practical impossibility for governments, and as such could not be the intended objective of the *Charter*'s equality guarantee.

[20] *The Politics of Aristotle* (Oxford University Press; trans. E. Barker, 1946), Book III, xii, 1280a-1281a.

[21] This reality of government has obtained constitutional recognition in the United States in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), cited with approval in *Edward Books and Art Ltd. v. The Queen*, *supra*, note 8, pp. 772 (S.C.R.), 44 (D.L.R.), 428 (C.C.C.)".

Canadian Bill of Rights.¹⁵³ The presence of niceties of definition applicable to discrimination based on age should be considered with reserve as in all cases when age is the basis of a distinction which is arbitrarily¹⁵⁴ imposed and with the approach suggested by the Court where it is a question of appreciating the discriminatory nature of a legislative enactment. Failing such reserve, there is a risk of unduly hindering or hampering important government initiatives by forcing the use of s. 1 to justify laws which, far from undermining the legislative recognition of the right to equality, constitute their nascent manifestation.

From this point of view, it becomes clear that the *Canadian Bill of Rights* introduces the idea of discrimination but only partially. We will know a great deal more about this question once the Supreme Court of Canada renders its judgment in the *McKinney* case which it presently has under advisement.¹⁵⁵

7. Presentation of Evidence

Discrimination is a question of fact.¹⁵⁶ To show that a difference in treatment is discriminatory, the most important element to demonstrate is that in fact this difference is based on one of the enumerated grounds of distinction or on one analogous thereto and that a discriminatory legislative impact results therefrom.

The proof that a law is *applied* in a discriminatory fashion is particularly complicated since this type of inequality arises despite the fact that a statute's wording appears to be neutral.¹⁵⁷ Its effects on people differ, depending on whether a person belongs to a group corresponding to one of the grounds enumerated in s. 15(1) or an analogous ground.

Whether it be a question of "prejudice", of "analogous grounds" or "concrete effects", we are dealing with material facts the proof of which is indispensable before judicial reasoning can lead to a judgment that condemns an infringement of the right to equality as protected by the *Charter*. It is a truism to say that every litigious fact must be proved: it goes with the moral authority of the Court: Justice must not only be done, it must be seen to have been done. Therefore, if proof must be made, it must be subject to rules.

153. *Re Rosen*, (1987) 3 F.C. 238 for an example of a claim of this type; see also *Madisso v. Bell Canada*, 4 A.C.W.S. (3rd) 355 (C.A. Ont.) (a compulsory retirement policy is justified by virtue of s. 1); *McKinney v. Board of Governors of University of Guelph et al.*, (1988) 24 O.A.C. 242 (C.A. Ont.) (same result in the area of a university); *Harrison v. University of British Columbia*, (1988) 2 W.W.R. 688 (C.A.B.C.) (contrary result); *Stoffman v. Vancouver General Hospital*, (1988) 2 W.W.R. 708 (C.A.B.C.) (the abolition of admission rights to a hospital by doctors over 65 years of age is unjustified). The appeals of these cases to the Supreme Court have been heard and are presently under advisement.

154. *Attorney General of Quebec v. Irwin Toys Ltd.*, [1989] 1 S.C.C. 927 (Reasons of the majority).

155. *Supra* note 153.

156. B. Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) 252.

157. *Action travail des femmes*, *supra* note 24 at 1137.

Three major reasons can be advanced to justify rules of evidence in a judicial context. In the first place, the principle of the supremacy of law, which is the constitutional foundation of the *Charter*, depends on the operation of the rules of substantive law which it encompasses. Thus, the equality of all before the law presupposes a uniform application of the rules of substantive law. Without rules of evidence, judicial search for the truth becomes arbitrary.¹⁵⁸

Secondly, the irrebuttable presumption of the authority of *res judicata* commands a respect which can only be merited if the factual premises of the judgment are admitted or proved. Since the trial serves to solve a real dispute, legal proof of a fact is required because of its litigious nature, its pertinence¹⁵⁹ and the consequence of the judgment for which it forms a basis.¹⁶⁰ What would be the credibility of the burden of proof in criminal matters, for example, if no rules existed for the admissibility of and the evidentiary value of facts?

Finally, thanks to rules of evidence, litigants can foresee their chances of success should they have recourse to the Courts.

This said, a problem of another order is created by the fact that our oldest rules of evidence are increasingly out of touch with modern reality.¹⁶¹ Since they are derived from English law, they were conceived in a historical context when jury trials were predominant and jurors were not well educated.¹⁶² Accordingly, it is natural that such rules should have been developed to prevent facts of little objective importance playing a preponderant role.¹⁶³ This judicial context has given us our outmoded rules of best evidence and hearsay.¹⁶⁴ Although it was denounced some fifteen years ago,¹⁶⁵ the hearsay rule still remains in force despite the work of the Law Reform Commission of Canada.¹⁶⁶

Now is the time to adopt the provisions dealing with judicial notice as found in the draft Code of Evidence presented in 1975 by the Law Reform Commission or as contained in draft Bill S-33 of the Government of Canada.¹⁶⁷ Rules of judicial notice could be a powerful tool which would make hearings more effective. Broadening of these rules would

158. *Borowski* (No. 2), *supra* note 42.

159. C. Fabien, "L'utilisation par le juge, de ses connaissances personnelles dans le procès civil" (1987) 66 *Can. Bar Rev.* 433ff; see also Sopinka, J. & S.N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 3, 39.

160. Which gives the judgment a conclusive authority; see Sopinka and Lederman, *ibid.* at 384ff; see also Gelin, *supra* note 22 at 478.

161. Sopinka & Lederman, *supra* note 169 at IX.

162. *Ibid.* at 5ff.

163. *Ibid.* at 6.

164. *Ibid.* at 40ff, 279ff.

165. *Ibid.* at 8, 150ff.

166. Commission de réforme du droit du Canada, *La Prevue* (Ottawa, Approvisionnement et services, 1977) at 49.

167. Fabien, *supra* note 160 at 440, 441.

permit the Court to look beyond the confines of the arguments made by the parties in seeking the truth, as well as relieving the parties of the burden of having to prove all the facts at issue by the usual means.¹⁶⁸

IV. CONCLUSIONS

The Supreme Court of Canada has thrice ruled directly on s. 15. In the context of s. 15(1), the word "discrimination" denotes a distinction based on a fundamental personal characteristic of a biological (race, ethnic origin, colour, sex, age and physical and mental disabilities), political (national origin and citizenship) or religious nature or analogous ones which cause a prejudice. A legislative enactment infringes s. 15(1) by its purpose or by its effect when, in its drafting or its application, it treats the person who invokes the *Charter* less favourably or more harshly than other people belonging to the same category because of an irrelevant common personal characteristic listed in s. 15(1) or one analogous thereto.

The analytical approach adopted by the Court with respect to s. 15(1) in the most recent cases seems to me to be wrong because it robs rights to equality of their importance and does not take into sufficient account the importance of what is enshrined in s. 15. The more appropriate analytical approach to deciding a case when s. 15(1) has been invoked flows from the right guaranteed by this section.

The purpose of s. 15 is to guarantee legislative impartiality, that is to say, the right of every individual to be treated as an equal and not to be treated equally. This right is part of the principle of the supremacy of law on which our society is based.

A legislative distinction does not infringe s. 15 and the rights to equality therein enshrined unless it is discriminatory, that is to say, based on a stereotype, and it causes a prejudice.

The burden of proof for the person who invokes s. 15 comprises many elements and varies with the circumstances. Besides his or her status, such a person must establish in every case that the distinction which the person seeks to abolish is based on grounds listed in s. 15(1) or analogous thereto.

Beyond the special features of each of the four rights to equality enshrined in s. 15(1), different cases may present themselves for analysis depending on whether the distinction flows from the purpose or the effect of the legislative enactment and depending on whether it is based on grounds listed in s. 15(1) or on one analogous thereto. Showing the causal connection between the forbidden ground of the legislative enactment and the difference in treatment is always required.

168. *Ford v. Procureur général du Québec*, [1988] 2 S.C.R. 712 at 774, 777.

This said, the simplest case is one in which the distinction flows from the purpose of the law and is based on one of the enumerated grounds. At that point, the burden of proof is reversed.

When the distinction is a result of the purpose of the legislative enactment and is founded on analogous grounds, to assume the burden of proof, the Plaintiff must show that a majority of those who belong to the group with which he or she identifies himself, share the same personal characteristics and their situation, as a group, is comparable with that of those groups listed in s. 15(1).

When the distinction does not come from the purpose of the law but rather from its application and it is claimed that it is based on an enumerated ground, the whole problem becomes one of showing that the difference seen in this treatment results from the grounds alleged.

The most complex case, and the one wherein the burden of proof is most onerous, is when the distinction comes from the application of the law and is based on an analogous ground. Then, not only must it be shown that the grounds invoked are the real cause of the difference in treatment but also that the persons forming the group with which the Plaintiff identifies share the same personal characteristic and that their situation as a group is comparable with that of the groups listed in s. 15(1).

In no case does the plaintiff have the burden of showing that the grounds for the distinction are unjustified. On the contrary, by proving the essential grounds appropriate to each type of case, the person invoking the *Charter* has the benefit of a *prima facie* presumption that the distinction he or she is attacking is motivated by an unacceptable prejudice.

The Crown can rebut this presumption in the framework of s. 15. To do so, it must show that, despite the fact that the distinction is based on grounds expressly prohibited or on analogous ones, it is not truly discriminatory since the basis of the distinction is evidently impartial because of the direct connection with the merits or capacities of the individuals involved. If the Crown succeeds in rebutting this presumption, it does not have to go further. In the opposite case, one must verify if the distinction contained in the framework of an affirmative action program which, because of the benefits it grants to some but not all, does not come within the ambit of discrimination.

If the distinction does not fall within such a program, rights of equality are infringed. To justify this violation, the Crown must proceed by way of s. 1.

To sum up, the constitutional task entrusted to Parliament and to the legislatures is henceforth to promote or at least to safeguard the equal rights of persons to the respect of their individual identity. This guarantee is aimed at impartiality and not uniformity. Since the right of equality is the foundation for all the others, there is no doubt that decisions still to come from our Courts with respect to s. 15(1) of the *Charter* will have a tremendous influence on the extent of our freedom and the course of democracy in Canadian society.