

# Does Section 15 Have a Future?

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In 1989, in the *Andrews*<sup>1</sup> case, the Supreme Court of Canada took equality analysis in a new, original and positive direction. By 1995, only six years later, it appeared that some members of the court had second thoughts about the wisdom of this direction. In a trilogy of highly fragmented decisions (*Miron*<sup>2</sup>, *Egan*<sup>3</sup> and *Thibaudeau*<sup>4</sup>) the Supreme Court showed itself dramatically divided. Since that date there have been few opportunities to resolve the division, but in those which have presented themselves<sup>5</sup> the Court has made it clear that the division continues. Four judges (McLachlin, Cory, Sopinka and Iacobucci JJ.) are prepared to continue on the *Andrews* path, which I shall refer to as the "human rights" approach. Four others (Gonthier, LaForest, Major JJ., and Lamer, C.J.C.) wish to return to the kind of analysis previously rejected in *Andrews* as circular and incapable of permitting section 15 to fulfill its purposes. This I will refer to as the "internal relevance" approach. Two (one on each side) may be ambivalent (Lamer,

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1. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*].
  2. *Miron v. Trudel*, [1995] 2 S.C.R. 418 [hereinafter *Miron*].
  3. *Egan v. Canada*, [1995] 2 S.C.R. 513 [hereinafter *Egan*].
  4. *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 [hereinafter *Thibaudeau*].
  5. The first was *Adler v. Ontario*, [1996] 3 S.C.R. 609, in which the issue was the denial of government funding for independent religion-based schools other than those funded pursuant to section 93 of the *Constitution Act, 1867*, which requires the Ontario government to fund Roman Catholic separate schools. The majority (McLachlin J. Dissenting in part and L'Heureux-Dubé J. dissenting) held that there was no infringement of either section 15(1) or section 2(a) since funding for denominational schools was the product of a historical constitutional compromise immune from *Charter* review by virtue of that fact and of section 29 of the *Charter*. The second was *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [hereinafter *Eaton*], an appeal from the decision of a school board pursuant to the *Education Act* to place a 12-year-old girl with cerebral palsy in a special education class rather than a regular classroom in her neighbourhood school. After a series of appeals and judicial review, the Ontario Court of Appeal set aside the order, holding that the *Education Act* infringed section 15(1) of the *Charter* in failing to set up a presumption in favour of integration of special-needs children. The Supreme Court unanimously held that there should have been notice to the Attorney General of a review of the constitutional validity of the *Education Act* and that therefore the decision of the Court of Appeal below was invalid. It also held that there was no violation of section 15(1), whichever of the competing approaches from the trilogy was applied. The third was *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 [hereinafter *Benner*], in which the issue was the provision in the *Citizenship Act* that children born abroad before February 15, 1977 to Canadian mothers and non-Canadian fathers would not have automatic entitlement to Canadian citizenship, while children born in the same circumstances to Canadian fathers and non-Canadian mothers would. The Court unanimously held that there was a violation of section 15, not saved by section 1, and that it was not necessary to say determinatively which of the several approaches to section 15 was most appropriate since the result was the same no matter which test was used.

C.J.C. and Sopinka J.<sup>6</sup>) And one (L'Heureux-Dubé J.) has advanced a new approach which, she suggests, amounts to an improvement on the original *Andrews* one.

Since May 1995, when the trilogy was released, the lower courts have either struggled with its import or have simply chosen either the human rights or the internal relevance approach (or sometimes a combination of the two) with little discussion as to why.

In this paper I will briefly review the jurisprudence to date, and speculate as to why equality rights analysis has proved to be particularly challenging for the courts. I will then argue that the original, human rights approach was solidly founded and should be maintained. Finally, I will comment on some specific aspects of it, including the limitation to enumerated and analogous grounds and the extension to both intentional and unintended, systemic discrimination.

## I. FROM *ANDREWS* TO THE TRILOGY: THE CHALLENGE OF PATH-BREAKING<sup>7</sup>

### A. The Path Chosen in *Andrews*

When the equality provisions in section 15 came into effect in 1985, they were deliberately drafted in a manner to mark a clear departure from the jurisprudence under section 1(b) of the *Canadian Bill of Rights*. For convenience, the wording of section 15 and of some related provisions in the Charter is set out:

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.*

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6. Lamer C.J.C. has provided leadership in developing the human rights approach in cases such as *R. v. Swain*, [1991] 1 S.C.R. 933 and *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519. He did not write any reasons in the trilogy, but signed on with Gonthier, LaForest and Major JJ. in *Miron* and *Egan*. (He was not involved in *Thibaudeau*.) It is conceivable that, upon further reflection, the Chief Justice will resume his previous position as a supporter of the "human rights" approach. Sopinka J. signed on with McLachlin, Cory and Iacobucci JJ. in *Miron* and with Cory J. in *Egan*, but his support appears to be equivocal, given the approach he takes to justifying violations of section 15 at the section 1 stage, which echoes that of the "internal relevance" supporters.

7. The analysis and review in this section are developed in more depth and detail in W. Black & L. Smith, "The Equality Rights" in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms* 3d ed., published simultaneously (Toronto: Carswell, 1996), (Montreal: Wilson & LaFleur, 1996) 14-1.

- (2) *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
- 27 *This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi cultural heritage of Canadians.*
- 25 *The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada including*
- (a) *any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and*
- (b) *any rights or freedoms that now exist by way of land claims agreements or may be so acquired.*
- 28 *Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

Our interpretive approach to section 15 will depend upon our conception of its purpose. In turn, our conception of section 15's purpose depends upon our view as to the meaning of equality. Does equality mean, as Aristotle stated, that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness"? That principle is sometimes called the "formal principle of equality" and it is tautologous. Like a mathematical formula, it can be useful, but does not solve any equality problems until the variables (things, likeness and unlikeness as well as like or unlike treatment) have been identified. "Things" (i.e., situations and people) can be seen as either similar to or different from one another in an almost unlimited number of ways. In order to reach conclusions about whether or not there is "equality", we must consciously select the criteria for comparison. It is not a question of pure logic, but of moral and political choice.

Thus, in order to develop a meaningful understanding of equality, we must go beyond the formal principle. In *Andrews*, the Supreme Court of Canada recognized this point and acknowledged that the comparisons inherent in equality analysis must be made in the social and political setting from which the particular questions arise, and in the Canadian historical context. In other words, some criteria for comparison are consistent with our history and values and others are not.

The adherence of Canada to certain international agreements (for example, the *Convention on the Elimination of Discrimination against Women*) shows a direction, as does the range of "grounds" commonly selected for protection under human rights legislation. Drawing on these sources, the Supreme Court concluded that the central limitation on section 15 derives from the grounds of distinction that come within its protection. The fact that grounds were named, and that the particular grounds that were named were chosen, signals that the purpose of section 15 is not to guarantee "equality"

in the abstract, but concretely — to provide a legal basis for rectification of certain kinds of inequalities between people, where members of certain groups have been systematically disadvantaged in comparison with others.

In equality analysis, the first step is to identify the individuals or groups that are to be compared. Sometimes this is fairly straightforward, as in *Drybones*<sup>8</sup>, where the law made it a crime for Indians to commit an act (drunkenness on a reservation) that was not a crime when committed by non-Indians. However, sometimes it is not. For example, in *Schachter*<sup>9</sup> the birth father who was going to take care of the couple's baby was not entitled to Unemployment Insurance benefits. However, birth mothers and adoptive mothers and fathers were entitled. Mr. Schachter's choice of comparison with adoptive parents rather than birth mothers was dictated by considerations of policy and strategy.<sup>10</sup>

The other side of the equation requires a determination of what counts as equal treatment. As with the determination of the persons or groups to compare, there is usually a large element of choice. If the choice is not made explicitly, it will be made silently and perhaps unconsciously. Comparisons as to outcomes illustrates one of the principles first enunciated by Aristotle, then by the Supreme Court of Canada in *Andrews*, namely, that identical treatment does not always afford equality. For example, suppose that a law school requires one group of applicants to pass a written examination and another group to pass an oral examination. This may violate the equality principle if that principle is simply conceived as requiring a single test for all applicants. But if the measure is whether the applicants are given equal opportunity to demonstrate their ability, then tests in different formats may be necessary for different applicants, for example those with sight or hearing impairments.

What the Supreme Court did in *Andrews* flowed from an understanding of equality inspired by human rights jurisprudence and by egalitarian aspirations of the late 20th century. It therefore marked a clear departure from the previous Canadian model under the *Canadian Bill of Rights*, as well as from the U.S. and European ones. In summary, the Court adopted the following analytical approach:

1. There is to be a three-stage inquiry:

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8. *R. v. Drybones*, [1970] S.C.R. 282.

9. *Schachter v. Canada*, [1992] 2 S.C.R. 579.

10. A comparison with birth mothers would have been problematic for several reasons, including the fact that a birth mother has not only just become a parent — she has also just been through a challenging physical process from which recovery is needed. To treat all persons who have just become parents the same way is not necessary even under the principle of formal equality (which contemplates treating unlike in proportion to their unlikeness) and would be undesirable given the direction shown by section 15, which is to promote gender equality. There is a real likelihood that the consequence of a judicial compulsion for legislatures to treat becoming a parent as a generic experience, rendering invisible the impact of pregnancy and childbirth, would be a reduction of benefits for birth mothers — a perverse outcome, given the purpose of sections 15 and 28 of the Charter.

- a) Is there a denial of equality before or under the law, or of the equal protection or equal benefit of the law, to an individual?;
- b) If there is a denial of equality, is it with discrimination, as defined by the Supreme Court in *Andrews*? There are two aspects to the determination of discrimination:
  - i) The identification of the ground upon which the claim is based, to exclude cases not based upon enumerated or analogous grounds;
  - ii) Meeting the definition of "discrimination" set out by McIntyre J. (for the majority in *Andrews*):

*[...] 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, obligation, 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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.*<sup>11</sup>

- iii) If there is a denial of equality with discrimination, is the provision or practice nevertheless a reasonable limit demonstrably justified in a free and democratic society, under section 1 of the Charter?;
2. There is a limitation to the claims which may be brought: they must involve those personal characteristics named in section 15 ("enumerated grounds") or characteristics analogous to them ("analogous grounds");
  3. The purpose of section 15 is connected with 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;
  4. Identical treatment may not amount to equal treatment, as confirmed by the existence of subsection 15(2). Instead, equality requires consideration of differences affecting groups;
  5. Equality must be measured in relation to the larger social, political and legal context and must take account of persistent disadvantage experienced by certain groups independent of the law or conduct under scrutiny;
  6. Section 15 gives the right to equality not only with respect to express differentiation and to the intentional creation of disadvantage but also with

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11. *Supra* note 1 at 174-175.

respect to provisions that are neutral on their face and to unintentionally discriminatory effects;

7. There is to be no assessment of reasonableness or unfairness at the stage of determining whether section 15 is violated. Justificatory factors come into play only at the section 1 stage, where the *Oakes* test applies in the usual way.

The originality and force of this human rights approach stem from several factors: its rejection of the similarly situated test, its inclusion of group rights to equality, its ability to account for systemic patterns of disadvantage, its ability to address instances of indirect as well as direct discrimination, and finally, its recognition that identical treatment is not necessarily equal treatment.

First, the human rights approach to section 15 rejects formal equality (the "similarly situated test"), as circular in its reasoning. The treatment of likes alike, and unlike in proportion to their unlikeness begs the question as to what is being compared — people are like and unlike each other in many ways. Physical and social differences can be used to justify any number of differences in treatment, and similarities between people may equally blind decision makers into ignoring important differences. Even the U.S. version of this principle, which breaks out of the circle to the extent that it measures the legitimacy of the distinction in relation to the purpose of the legislation or activity under challenge, is only a marginal improvement since the purpose can be framed at almost any level of generality and this makes the test highly manipulable. (A criticism which also applies to the internal relevance approach adopted by four members of the Supreme Court of Canada in the recent trilogy). The similarly situated test is not well suited to deal with situations in which identical treatment causes unintended disadvantage to a group. Nor is it of much use in dealing with the way in which biological differences have been used to create societal disadvantage for women. This is because, once people or groups are classified as "different" with respect to the purposes of a law, the similarly situated test does not contemplate a further determination as to whether the way the law treats that difference is consistent with external norms such as gender equality.

Thus, in order to develop a meaningful understanding of equality, we must go beyond the formal principle. In *Andrews*, the Supreme Court of Canada recognized this point and acknowledged that the comparisons inherent in equality analysis must be made in the social and political setting from which the particular questions arise, and in the Canadian historical context. In other words, some criteria for comparison are consistent with our history and values and others are not.

Second, the approach makes it clear that section 15 not only provides a right of equality to individuals, but also requires that the courts take account of inequality related to membership in groups. This flows from the wording of the section as a whole, and from the conclusion that the central limitation on section 15 is that it applies only to discrimination based on enumerated and analogous grounds.

Third, this human rights approach requires that there be an assessment of patterns of disadvantage. This is because the most plausible explanation for the choice of grounds



listed in section 15 is that they define groups that have been subject to persistent disadvantage in our society. As Wilson J. said in *Turpin*:<sup>12</sup>

*[I]t is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context [...]. [I]t 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 which would in the particular context result in inequality or foster disadvantage. 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.*

Fourth, the human rights approach borrows from Canadian human rights jurisprudence in encompassing discrimination flowing from neutral provisions with disproportionately adverse effects on particular groups, even where there is no evidence that such effects were contemplated or intended. A good example is found in *Symes*,<sup>13</sup> where the Court held that the *Income Tax Act* provisions for deduction of child care expenses would violate section 15 if they had an unintended adverse effect on women (though the majority found that such an effect had not been proved).

Fifth, following from the recognition that the uniform application of a law may adversely affect a group in a discriminatory fashion, and that identical treatment may be discriminatory, the Court recognized that elimination of discrimination may require accommodation of differences — "reasonable accommodation" in the human rights lexicon.

## **B. The Challenges of Path-Breaking**

As is evident from the above description, the human rights approach and direction taken in *Andrews* is innovative, and uniquely Canadian. Overarching legal and constitutional guarantees of equality and non-discrimination for persons despite their gender, race, physical or mental ability, age, or religion are themselves very new. Indeed, there were no guarantees of this kind anywhere until late in this century. For most of our history there has been unquestioned legal and constitutional entitlement for governments to pass legislation or to operate in ways which perpetuate inequality.

The human rights approach is dissonant with the U.S. discourse which has had considerable popular currency in our country. This is well illustrated by the tenor of the discussion about "affirmative action". Despite the fact that the clear purpose of subsection 15(2) is to eliminate any doubt about the constitutionality of programs whose purpose is to ameliorate the disadvantage of individuals or groups defined by enumerated or

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12. *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-1332 [hereinafter *Turpin*].

13. *Symes v. Canada*, [1993] 4 S.C.R. 695 at 753-772 [hereinafter *Symes*].

analogous grounds of discrimination, and that this purpose did not descend from the sky but rather grew from indigenous roots in the Canadian experience,<sup>14</sup> there is still a strong tendency for commentators to fix on the notion that any deviation from identical treatment is discrimination, and that any recognition of differences between genders or among groups is *per se* unconstitutional. That is the U.S. approach, and it has not resulted in a highly effective constitutional equality guarantee, in the view of most commentators.

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14. For example, in 1867, constitutional provisions for two languages and religious schools.

These two challenges (the path is new anywhere, and the path deviates from the U.S. "norm") join a third: the topography is difficult, no matter what path is chosen. Either the moral and political choices as to persons, treatment, and level of outcomes to compare are made *sub rosa*, leading to incoherence and unpredictability, or they are made openly and against a set of criteria. These criteria will inevitably be somewhat complex if they are to be effective, because inequality problems are complex. Either way, assessing equality claims is not going to be like assessing whether a set of cut-and-dried statutory criteria has been met. It may be more like the assessment, which also took some time to ripen, as to whether "equity" has been done between parties.

A final challenge is created by the changing economic and political climate in which the decisions are made. While the Court may have been able to say early on in cases such as *Singh*,<sup>15</sup> that when rights are at stake, financial cost is irrelevant, undeniably the financial consequences of allowing equality claims is a factor in judicial analysis (whether openly or silently).<sup>16</sup> Some equality claims, if allowed, would have significant financial consequences. To continue with the "path" metaphor, the price tag for a completed journey may be very expensive.

In my view, these four challenges (a new path, different from the U.S. one, through difficult territory and potentially expensive) have led some members of the judiciary, including some in the Supreme Court of Canada, to regret the bold direction set in *Andrews*. I will describe the direction in which those regrets have led them, and then I will argue that a more resolute stance will not only be more logically coherent, but it will also give effect to the purpose of the section.

### C. Back-Tracking

There has always been a division of opinion on the Supreme Court about setting off in the *Andrews* "human rights" direction. It manifested itself in *Andrews* with respect to both the section 15(1) analysis and the test to be followed in section 1 when violations of section 15 are found. In the trilogy of decisions rendered in May, 1995, it re-emerged very clearly into the open, again with respect to both of these issues.

In *Miron*,<sup>17</sup> the issue was whether unmarried partners were denied equality before the law when they were denied accident benefits for uninsured motorist claims under the standard automobile policy prescribed by the *Ontario Insurance Act*. Overruling the Ontario Court of Appeal on this point, the Supreme Court of Canada held that marital status is an analogous ground, that there was a violation of section 15(1) not saved by section 1, and that the new definition of "spouse" to include unmarried partners which had

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15. *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177.

16. It seems plausible, for example, that such consequences were present in the minds of the members of the Court in *Eaton*, *supra* note 5.

17. *Supra* note 2.

already been made law should be "read in" retroactively to apply to the plaintiffs. The plurality of judges in the case<sup>18</sup> followed the *Andrews* model and strongly defended it against the suggestions for change coming from the minority. The dissenters<sup>19</sup> began from an initial premise about the ambit of legitimate legislative choice in defining the attributes of a fundamental social institution — marriage. Gonthier J. proposed (asserting that it was not a new approach) to add an element to the third step in the analysis: is the distinction drawn by the law based upon an *irrelevant* personal characteristic shared by a group that is enumerated or analogous? This question of "relevancy" is to be assessed with respect to the "functional values" underlying the legislation — for example, "whether a distinction rests upon or is the expression of some objective physical or biological reality, or fundamental value".<sup>20</sup> Examples given were cases involving "objective biological differences"<sup>21</sup> and the fundamental importance of employment in a person's life.<sup>22</sup> The approach is tied back into that of LaForest J. in *Andrews*:<sup>23</sup>

*[I]t was never intended in enacting section 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 [...]. 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.*

McLachlin J., for the plurality, points out the indeterminacy and circularity of LaForest J.'s internal relevance approach:<sup>24</sup>

*Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under section 15(1). The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under section 15(1). The focus of the section 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the*

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18. Per McLachlin, Sopinka, Cory and Iacobucci JJ. concurring. L'Heureux-Dubé reached the same conclusion on the basis of different reasoning.

19. Lamer C.J.C, Gonthier, LaForest and Major JJ. dissented.

20. *Supra* note 2.

21. Such as in *R. v. Hess*, [1990] 2 S.C.R. 906 and *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872.

22. *Supra* note 2 at 439, citing *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 278, a quotation from *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368.

23. *Supra* note 1 at 194, LaForest J., quoted in *Miron*, *supra* note 2 at 463, Gonthier J.

24. *Supra* note 2 at 489, McLachlin, J.

*imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.*

In *Egan v. Canada*<sup>25</sup> the plurality<sup>26</sup> disallowed the claim of the same-sex partner of a retired person for spousal allowance under the *Old Age Security Act*, on the basis of the internal relevance approach advanced by Gonthier J. in *Miron*. Although all members of the Court agreed that sexual orientation is an analogous ground under section 15, the plurality reasoned that the distinction, which did result in disadvantage, was based upon a relevant personal characteristic, given the legislative objective, which was characterized by LaForest J. as the promotion of heterosexual marriage. Citing the reference in *Miron* to marriage as a fundamentally important social institution, LaForest J. added:<sup>27</sup>

*[M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.*

Five judges<sup>28</sup> concluded that the exclusion of same-sex couples violated section 15. Four (a minority) found that it was not saved by section 1, and considered that the appropriate remedy would have been a suspended declaration of invalidity with some reading-in and reading-out of statutory language. These four were particularly critical of Sopinka J.'s section 1 analysis, suggesting that he had "relied heavily on select passages"<sup>29</sup>

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25. *Supra* note 3.

26. Per LaForest J., Lamer C.J.C., Gonthier and Major JJ. concurring. Sopinka J. found that there was an infringement, agreeing with the dissent on that point, but concluded that the infringement was saved under section 1, applying a different and more lenient test at the section 1 stage than the dissenting group (Cory, Iacobucci, L'Heureux-Dubé and McLachlin JJ.).

27. *Supra* note 3 at 536.

28. In two sets of reasons: by Cory and Iacobucci JJ., with McLachlin J. writing a very brief concurrence, and L'Heureux-Dubé J. taking her own approach. Sopinka J. concurred with the reasons of Cory J. finding that section 15 was violated, but formed part of the plurality because he also found that the violation was justified under section 1.

29. *Supra* note 3 at 617.

from *McKinney v. University of Guelph*<sup>30</sup> which did not support his extremely deferential approach. Further, they said:<sup>31</sup>

*However, what causes me greater concern is my colleague's position that, because the prohibition of discrimination against gays and lesbians is "of recent origin" and "generally regarded as a novel concept" (p. 576), the government can be justified in discriminatorily denying same-sex couples a benefit enuring to opposite-sex couples. Another argument he raises is that the government can justify discriminatory legislation because of the possibility that it can take an incremental approach in providing state benefits.*

*With respect, I find both of these approaches to be undesirable. Permitting discrimination to be justified on account of the "novelty" of its prohibition or on account of the need for governmental "incrementalism" introduces two unprecedented and potentially undefinable criteria into section 1 analysis. It also permits section 1 to be used in an unduly deferential manner well beyond anything found in the prior jurisprudence of this Court. The very real possibility emerges that the government will always be able to uphold legislation that selectively and discriminatorily allocates resources. This would undercut the values of the Charter and belittle its purpose. I also find that many of the concerns raised by Sopinka J. — such as according the legislature some time to amend discriminatory legislation — ought to inform the remedy, and should not serve to uphold or legitimize discriminatory conduct [...].*

On the part of the members of the plurality, there is only a brief reference to section 1 LaForest J. writes:<sup>32</sup>

*Had I concluded that the impugned legislation infringed section 15 of the Charter, I would still uphold it under section 1 of the Charter for the considerations set forth in my reasons in McKinney [...], some of which are referred to in the reasons of my colleague Justice Sopinka [...].*

The third decision, *Thibaudeau*, concerned the taxation scheme regarding child maintenance payments. The plaintiff single mother claimed that the fact that such payments are taxable income in the hands of the recipient parent and deductions from the taxable income of the paying parent violated section 15. The majority<sup>33</sup> (using both the

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30. *Supra* note 22.

31. *Ibid.* at 618-619.

32. *Ibid.* at 539-540.

33. Cory and Iacobucci JJ. followed the human rights (*Andrews/Miron*) approach; Gonthier J. followed his internal relevance approach; Sopinka J. with LaForest J. concurring, said at 641 "I agree with Gonthier J. and with Cory and Iacobucci JJ. that the impugned provisions of the *Income Tax Act* [...] do not impose a burden or withhold a benefit so as to attract the application of section 15(1) of the *Canadian Charter of Rights and Freedoms*. Accordingly, I would dispose of the appeal as suggested by Gonthier J."

relevancy and human rights approaches) concluded that there was no violation. The two dissenting judges, McLachlin and L'Heureux-Dubé JJ., found that there was a violation (on the premise that separated or divorced custodial parents were an analogous group) and that it was not saved by section 1, each giving different reasons consistent with their approaches in the other two cases.

In all three of these decisions, L'Heureux-Dubé J. attempted a new approach to equality analysis. It would give independent content to the concept of "discrimination" rather than relying on the definition of the grounds to do so. L'Heureux-Dubé, J.'s definition of "discrimination" is:<sup>34</sup>

*To summarize, at the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. These are the core elements of a definition of "discrimination" — a definition that focuses on impact (i.e., discriminatory effect) rather than on constituent elements (i.e., the grounds of the distinction).*

She proposes a subjective/objective test, invoking "the reasonably held view of one who is possessed of similar characteristics, under similar circumstances, and who is dispassionate and fully apprised of the circumstances".<sup>35</sup> Both the nature of the group adversely affected by the distinction and the nature of the interest adversely affected by the distinction need to be considered.

#### **D. Where Are We?**

The *Andrews* decision and those following it remain good law. There has been no case in which a majority of the Supreme Court has followed either of the new approaches (the internal relevance one or the L'Heureux-Dubé one) while majorities have, on numerous occasions, followed the human rights approach. (A flow chart, setting out the analytical framework which the Court has adopted, and showing where the differences between the approaches come into play, is included in this paper).

There are two reasons why it seems to matter whether or not the Gonthier/LaForest internal relevance approach gains acceptance. First, it is highly

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34. Articulated in *Egan*, *supra* note 3 at 545.

35. *Ibid.* at 546.

manipulable and almost inevitably circular, for the reasons pointed out by McLachlin J.<sup>36</sup> As well, the relevancy approach is likely to give the least relief to members of those groups which are most disadvantaged in society when norms shaped by discrimination are used to justify or "make relevant" legislative discrimination. *Egan* itself provides an example of the dangers inherent in this test: the invocation of "nature" in the assertion that "marriage is by nature heterosexual" reminds us that "nature" has too often been invoked to justify social and cultural discrimination, including slavery and the barring of women from all forms of participation in public life.

Second, this approach replicates what normally goes on under section 1 analysis. The Supreme Court in *Andrews* was explicit in its rejection of the proposition that issues as to reasonableness should come up for consideration at the stage of deciding whether or not there had been a violation. At that stage, the onus is on the claimant to prove a section 15 infringement. At the section 1 stage, the onus is on the defender (usually the government) to show that the infringement is a reasonable limitation, demonstrably justifiable in a free and democratic society. To move assessments about reasonableness into section 15 is to finesse the Charter's scheme for allocating responsibility as between claimant and defender. The limitation of section 15 to discrimination on the basis of enumerated and analogous grounds already provides a filter. There is a risk that applying highly deferential tests at both the section 15 and section 1 stage in addition to the internal limits provided by that "grounds" filtering process will result in a set of equality rights which fail completely to restrict discriminatory acts by government. Five of the nine Supreme Court of Canada Justices in the trilogy continue to uphold the two-stage process with its shift in onus to the government at the second section 1 stage. However, Sopinka J., who was the "swing vote" in *Egan*, expresses the view that there should be a particularly deferential approach at the section 1 stage.

Some of the inclination towards deference may stem from concerns about the process of judicial review, and may be a reaction to the sometimes overheated arguments of persons expressing concern about the impact of judicial review on our democratic system and political process.<sup>37</sup> With respect to arguments about the legitimacy of judicial review, William Black and I recently summarized our views as follows:<sup>38</sup>

*The deference of the courts in applying section 1 may reflect, at least in part, doubts about the legitimacy of judicial review and the capacity of the courts to analyze broad social policy issues. The debate about these issues is legitimate, but routine deference by the courts, particularly when it denies a remedy to members of groups that do not have their share of political, economic and social power, seems to us an inappropriate response to the points raised in this debate. Section 15 was enacted in part because of the belief that legislatures do not always give the interests of these groups the consideration they deserve. Antipathy, stereotypes and lack of political power may affect the legislative*

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36. *Supra* note 22 and accompanying text.

37. For a recent example, see R.E. Hawkins & R. Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1.

38. W. Black & L. Smith, *supra* note 7 at 14-40.



*process, just as they affect other social and economic activities, and the limitation of section 15 to the enumerated and analogous grounds focuses it on those situations in which persistent disadvantage is most common and the democratic process is most likely to go awry. Sometimes, these factors result in discriminatory legislation and on other occasions, they discourage legislatures from taking steps to correct unintended adverse effects or to reform the law to remove exclusions dating from earlier times. Judicial intervention often prompts further legislative consideration rather than dictating the final result. Therefore, the response to concerns about the scope of judicial review should, in our opinion, reflect the many factors relevant to this issue rather than serving as a generic justification for judicial inaction.*

Most trial courts have continued (correctly, in my view) to follow the human rights approach set out in *Andrews*.<sup>39</sup> Their level of comfort in doing so may be reinforced by the very recent decision in *Benner*,<sup>40</sup> in which Iacobucci J. (for the Court) reviews the three different approaches taken in the trilogy and, stating that "the result in this appeal is in my opinion the same no matter which test is applied",<sup>41</sup> applies the Cory/McLachlin approach in *Miron*.

Some trial courts, however, have adopted the internal relevance approach of Gonthier J. in *Miron* and LaForest J. in *Egan*.<sup>42</sup> For example, Smith J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*<sup>43</sup> followed this approach in his analysis of a claim that the provisions of the *Customs Act* and *Customs Tariff* and the manner in which they were applied infringed the right to equality before and under the law of the plaintiff bookstore, which caters to a gay and lesbian clientele. Beginning from the premise that "[a] distinction based on an analogous ground will be discriminatory only if the distinction is irrelevant to 'the functional values of the legislation'",<sup>44</sup> Smith J. went on to observe that there is a disproportionate impact on homosexuals from the prohibition on obscenity incorporated into the customs legislation, but that:

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39. See, for example, *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment & Labour Relations)* (1995), 127 D.L.R. (4th) 694 (Nfld. S.C.); *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen. Div.); *Rosenberg v. Canada (Attorney-General)* (1995), 25 O.R. (3d) 612 (Gen. Div.); *Bahlsen v. Canada (Minister of Transport)* (1995), 97 F.T.R. 81 also illustrates this approach, and though the decision was overturned on appeal on the section 1 issue (*Bahlsen v. Canada (Minister of Transport)*, [1996] F.C.J. No. 1520 (F.C.A.)), the Court of Appeal agreed with the section 15(1) analysis employed by the trial judge.

40. *Supra* note 5.

41. *Ibid.* at 393.

42. See, for example, *Tinkham v. Canada (Minister of Employment & Immigration)* (1995), 16 B.C.L.R. (3d) 79 (S.C.).

43. (1996), 131 D.L.R. (4th) 486 (B.C.S.C.)

44. *Ibid.* at 523.

*[...] the inequality of treatment does not arise from "the stereotypical application of presumed group or personal characteristics": per McLachlin J. in Miron v. Trudel [...] Rather, the group characteristic is a real one and one that is relevant to the goal of the impugned legislation. Sexuality is relevant because obscenity is defined in terms of sexual practices. Since homosexuals are defined by their homosexuality and their art and literature is permeated with representations of their sexual practices, it is inevitable that they will be disproportionately affected by a law proscribing the proliferation of obscene sexual representations.<sup>45</sup>*

Following a quotation from LaForest J. in *Egan* about the dangers in the courts' questioning "every distinction that had a disadvantageous effect on an enumerated or analogous group", Smith J. continued:

*The point is that homosexual obscenity is prohibited because it is obscene, not because it is homosexual. The disadvantageous effect on homosexuals is unavoidable and is within the ambit of the comment of LaForest J. quoted above. It follows that the unequal impact of the law on homosexuals has not been shown to be discriminatory within section 15(1) of the Charter.<sup>46</sup>*

An alternative and preferable analysis of the issue about the inordinate impact on homosexuals of the customs provisions would have been that there was a denial of equality, with discrimination on an analogous ground, and that the provisions should have to be justified under section 1. The Court did find a violation of section 2(b) freedom of expression and embarked upon a section 1 inquiry in any event. Even under the more stringent version of the section 1 test applied in freedom of expression cases, the Court found the legislation to be justified.

This case also illustrates how significant the reference to "relevance" can be in cases involving unintended effects of neutral provisions. With a provision that is clearly "aimed" at something else, but which accidentally creates a discriminatory impact on a group defined by an enumerated or analogous ground, will it not always be the case that the provision is relevant to the "functional values of the legislation"?

The lower courts find themselves in a difficult position: which way will the Supreme Court turn? Indeed, how long will it be before there is a clear direction, given the two Supreme Court decisions since the trilogy, leaving the situation unresolved? The uncertainty makes it difficult to continue to develop a clear understanding of some of the

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45. *Ibid.* at 523-524.

46. *Ibid.* at 524. Subsequently, Smith J. found that there was a violation of section 15 in Canada Customs' practice of systematically prohibiting representations of anal intercourse, since anal sex, by itself, was not obscene and the prohibition had a discriminatory impact on male homosexuals. It is not clear to me why the analysis here would not have been the same as in the first instance — it could have been said that the representations were prohibited not because they were homosexual activity but because they were anal intercourse. The unarticulated difference may lie in the fact that the former involved legislative activity and the latter the actions of administrative officers who, *ex hypothesi*, were exceeding their mandate.

issues left unresolved in *Andrews*. However, in the concluding section of this paper I will describe two of those issues, and comment on how they can be approached.

## II. SOME PARTICULAR ISSUES

### A. The Limitation to Enumerated and Analogous Grounds

Iacobucci J. said in *Benner*:

*Where the denial is based on a ground expressly enumerated in s. 15(1), or one analogous to them, it will generally be found to be discriminatory, although there may, of course, be exceptions: see, e.g., Weatherall v. Canada (Attorney General) [...].*<sup>47</sup>

In *Miron*, McLachlin J. explained the "exception" as follows:

*Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15[...].*<sup>48</sup>

The *Weatherall* case<sup>49</sup> concerned a complaint about the presence of female prison guards in a male prison, and the Court held that it was doubtful that section 15(1) was violated. LaForest J., for the Court, said:<sup>50</sup>

*In arguing that the impugned practices result in discriminatory treatment of male inmates, the appellant points to the fact that female penitentiary inmates are not similarly subject to cross-gender frisk searches and surveillance. The jurisprudence of this Court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. Biologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male*

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47. *Supra* note 5 at 393-394.

48. *Supra* note 2 at 487.

49. *Weatherall v. Canada (Attorney General)*, *supra* note 21.

50. *Ibid.* at 877-878.

*guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all.*

In my view, rather than an "exception", this reflects the meaning of section 15 as a whole — it is aimed at the rectification of disadvantage as between different groups of people based on the named characteristics or ones like them. Where it is not apparent that there is societal disadvantage to be rectified with respect to the group to which the claimant belongs, the section will not have a task to perform — even where there is a distinction based upon an enumerated ground such as sex. Where there is disadvantage, the section contemplates meaningful action to rectify it — which may or may not amount to identical treatment. Thus, a legislative scheme which is aimed at the accommodation of the needs of children within the education system, including children with disabilities, and which sets as its principles the best interests of each individual child, does not violate section 15 even though it does not embody a presumption in favour of integration into regular classrooms: *Eaton v. Brant County Board of Education*.<sup>51</sup>

This same purposive approach can be taken with respect to decisions about whether or not a ground is "analogous". The answer is not in a simple litmus test: "is this a discrete and insular minority"? That phrase has appeared in a number of cases, and occasionally judges have erroneously taken it as a touchstone. For example, in *Masse v. Ontario (Ministry of Community and Social Services)*,<sup>52</sup> in dismissing a claim by social assistance recipients that a 21.6% reduction in benefits constituted an infringement of their rights under section 15 of the Charter, O'Driscoll J. observed that impoverished people (those using food banks) constitute a heterogeneous group in terms of job-skills and occupations, and concluded:<sup>53</sup>

*Section 15 of the Charter protects discreet and insular minorities. It does not protect disparate and heterogeneous groups.*

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51. *Supra* note 5. *Eaton* was a unanimous decision of the Court, and disappointed disability rights advocates who would have liked to see a presumption in favour of integration. The Court's reasoning, at 272, was that "the purpose of section 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons". With respect to persons with disabilities, "discrimination does not lie in the attribution of untrue characteristics to the disabled individual. [...] Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them".

52. (1996), 134 D.L.R. (4th) 20; application for leave to appeal to Ontario C.A. dismissed [1996] O.J. No. 1526; application for leave to appeal to S.C.C. dismissed, S.C.C. Bulletin 1996 at 2103.

53. *Ibid.* at 45.

However, with respect, the Charter says no such thing. Remembering that the analogous grounds are meant to be analogous *with the enumerated ones*, it is useful to examine the enumerated ones. "Sex" is one. Women are pervasively distributed in the population and widely heterogeneous, not to mention a majority. Yet they are clearly meant to be protected by section 15 of the Charter. Aged persons, persons with disabilities, various racial and ethnic classifications of people, people with various religious preferences, all fail to meet this test as so defined. If it does not work to provide a common thread among the enumerated grounds, it can hardly provide the sole basis for making analogies with other grounds.

Fortunately, the Supreme Court has been clear about this issue. Most recently, in *Miron v. Trudel*, McLachlin J. said:<sup>54</sup>

*One indication of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction [...]. Another may be the fact that the group constitutes a "discrete and insular minority" [...]. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in Andrews, "[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed" [...]. By extension, it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1) [...]. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory [...].*

In *Egan*,<sup>55</sup> Cory and Iacobucci JJ. made the point this way:

*The reasons in Andrews [...] and Turpin [...] indicate that in order to determine whether the basis of distinction is analogous to the enumerated grounds, it is first necessary to identify the group which is affected. It is true that in some cases it may be useful to determine whether or not the affected group forms a "discrete and insular minority" which is lacking in political power and, thus, vulnerable to having its interests overlooked or its rights to equal concern and respect violated. Yet, that search is not really an end in itself. While historical disadvantage or a group's position as a discrete and insular minority may serve as indicators of an analogous ground, they are not prerequisites for finding an analogous ground. They may simply be of assistance in determining whether the interest advanced by a claimant is the sort of interest that s. 15(1) was designed to protect. The fundamental consideration underlying the analogous grounds analysis is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant. Since one of the aims of s. 15(1) is to prevent discrimination against groups which suffer from a social or political disadvantage it follows that it may be helpful to see if there is any indication*

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54. *Supra* note 2 at 496.

55. *Supra* note 3 at 599-600.

*that the group in question has suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political and social prejudice.*

There seem to be two threads uniting the criteria used by the courts<sup>56</sup> for identifying analogous grounds: historical powerlessness leading to exclusion from full participation in our society and association of the ground with an ongoing part of a person's life and with personal identity.

Despite the indication in *Turpin*<sup>57</sup> that province of residence might be an analogous ground in some circumstances, it is difficult to conceive what those circumstances could be if they did not exist in that case. The issue in *Turpin* concerned differential trial processes for persons facing murder charges in different provinces and there was no discernible connection between those processes and provincial needs or priorities. In *Canadian Egg Marketing Agency v. Richardson*,<sup>58</sup> de Weerd J. of the Northwest Territories Supreme Court held that egg producers in the Northwest Territories (who had been denied any "quota" by the Canadian Egg Marketing Agency) were a group which could claim a violation of equality rights on an analogous ground. On the basis of a finding of a violation of section 15(1), as well as of sections 2(d) and 6(2)(b) of the Charter, the Court declared that the applicants were exempt from the egg marketing legislation. The section 15 ruling was overturned on appeal, the Court of Appeal finding that discrimination on an enumerated or analogous ground had not been established.

In *Benner*<sup>59</sup> the Court had to decide whether to permit a claim under section 15 to be brought by a man who had been unable to obtain Canadian citizenship because it was his mother, not his father, who was a Canadian citizen when he was born outside Canada. Iacobucci J. said:

*While this case is not, strictly speaking, about analogous grounds but rather the extension of standing to raise discrimination upon an enumerated ground, I believe similar considerations may nevertheless be applied, in keeping with what McLachlin J. called in Miron [...] "the overarching purpose" of the section 15 guarantee of equality, namely:*

*[...] to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.*

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56. These have included: a history of prejudice and stereotyping; lack of political power; social and economic disadvantage; "immutability" — change only with unacceptable difficulty or cost; beyond a person's unilateral control; a fundamental choice in a person's life; characteristics related to a specific enumerated ground; and a consensus of legislatures and courts that a group deserves protection. See W. Black & L. Smith, *supra* note 7 at 14-62, 14-63.

57. *Supra* note 12 at 1332.

58. [1995] 8 W.W.R. 457 (N.W.T.S.C.); rev'd [1996] 3 W.W.R. 153 (N.W.T.C.A.).

59. *Supra* note 5 at 400-401.

Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant may, in my opinion, invoke the protection of section 15.

The necessity to determine what "counts" as an analogous ground or, indeed, whether a claim based upon an enumerated ground is well-founded, is problematic in the view of some, for varying reasons. These include a concern that this approach promotes the assumption that these are "real" characteristics pertaining to individuals, ignoring the extent to which they are constructions; a concern that ruling out claims based upon grounds other than the enumerated and analogous ones is to permit arbitrary state action; and the concern expressed by L'Heureux-Dubé J. that the approach is too rigid and results in losing sight of what the section is about — discrimination, not the possession of certain personal characteristics.

Recognizing the strength behind these points, I am of the view, nevertheless, that the restriction to enumerated and analogous grounds was the best method, given the wording of section 15 and the jurisprudential context in which it was born, to maximize the likelihood that section 15 would have meaning and force, and that the courts would find it to encompass adverse impact or unintended effects discrimination. The courts have found that section 15 encompasses adverse impact discrimination, but with mixed results, as will be described next.

## **B. The Extension to Unintended Adverse Effects**

What the Supreme Court did in *Andrews* amounted to a decision to give the equality rights a sharp and effective focus, and to forego giving them a broad but diffuse reach. The sharp and effective focus flows from the Court's conclusion that (departing from the U.S. constitutional model) effects as well as intent must be examined. The rejection of a potentially broad but diffuse reach flows from the decision to limit the section to claims based upon enumerated or analogous grounds. It may have been a necessary trade-off. If the reach of the section extended beyond enumerated and analogous grounds, virtually any activity could be found to have an adverse impact on a group defined in some manner. The almost inevitable outcome would have been equality rights that had little meaningful effect for anyone.

There was some seeming confusion in earlier cases about the difference between intentional discrimination and unintentional adverse effects discrimination. For example, in *McKinney*,<sup>60</sup> LaForest J. appeared to view an explicit mandatory retirement policy as adverse effects discrimination rather than intentional discrimination. This was reiterated

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60. *Supra* note 22 at 256, LaForest J.

in *Tétreault-Gadoury*<sup>61</sup> and seemed to flow from an assumption that since there was a benign purpose for the provision (allowing for renewal of university faculties and opportunities for young academics), it was not intentional discrimination despite the express age-based distinction. However, in more recent cases the Supreme Court has been expressing the difference more clearly. For example, in *Rodriguez*<sup>62</sup> the Chief Justice concluded that the prohibition against assisted suicide infringed the equality rights of the plaintiff, whose disability prevented her from the committing the act herself, on the basis that the prohibition constituted adverse effects discrimination related to disability.

In *Egan*<sup>63</sup> there is a succinct analysis of this issue, arising from the fact that the majority of the Court of Appeal in the case had found that the challenged law, which defined "spouse" in terms of "a person of the opposite sex", amounted to adverse effects discrimination. Cory J. wrote:

*I cannot agree with that argument.*

*Direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a law, rule or practice is facially neutral but has a disproportionate impact on a group because of a particular characteristic of that group. The distinction between direct discrimination and adverse effect discrimination was set out in Ontario Human Rights Commission v. Simpsons-Sears Ltd. [...].*

*Although that case dealt with the Ontario Human Rights Code, the same definition has been adopted in section 15(1) cases: see Andrews [...].*

*The law challenged in this case is, quite simply, not facially neutral. Section 2 of the Act defines "spouse" as being "a person of the opposite sex". It thereby draws a distinction between opposite-sex couples and same-sex couples. Thus, this case presents a situation of direct discrimination.*

In *Symes*<sup>64</sup> Iacobucci J. for the majority held that there does not need to be 100% correspondence between the group in question and the effects of the provision so long as there is a disproportionate effect on the group. Therefore, with respect to the child-care deduction provisions of the *Income Tax Act*:

*[...] in a case involving an adverse effects analysis under s. 63 of the Act, it would be possible to point to both men and women who would be negatively affected by a limitation on the child care expense deduction. [...] If a group or sub-group of women could prove the adverse effect required, the proof would come in a comparison with*

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61. *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22 at 41.

62. *Supra* note 6.

63. *Supra* note 3 at 587, Cory and Iacobucci JJ.

64. *Supra* note 13.



*the relevant body of men. Accordingly, although individual men might be negatively affected by an impugned provision, those men would not belong to a group or subgroup of men able to prove the required adverse effect. In other words, only women could make the adverse effects claim [...].*

Iacobucci J. thus said that an effects-based claim can only be brought by a member of the group which is disproportionately affected. It does not follow, despite the Federal Court of Appeal comments in *Thibaudeau*<sup>65</sup> to the contrary, that there is no sex discrimination when the few men who are affected by a provision are affected in exactly the same way as the many women who are affected by it. Iacobucci J.'s analysis suggests the precise opposite — that the women who are disproportionately affected can claim sex discrimination even when a few men are also affected.

Another misconception is that *Symes* stands for the proposition that, in adverse impact analysis, "[t]he Court must determine whether the impact flows from the impugned provision itself, or whether it relates to some pre-existing or independent condition".<sup>66</sup> This misconception seems to flow from a ruling in *Symes* about the standard of proof. Iacobucci J. held that, in order to succeed in the case, it would have been necessary for the appellant to prove that women are disproportionately the persons who pay child care expenses (which was not established on the evidence) rather than that women are disproportionately the persons who take responsibility for child care (which was conclusively demonstrated.)<sup>67</sup> He summarized this point as follows:<sup>68</sup>

*If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision. In this case, that means that one must be cognizant of the fact that s. 63 defines child care expenses as actual expense of money. In order to demonstrate a distinction between the sexes within an adverse effects analysis, one therefore needs to prove that s. 63 disproportionately limits the deduction with respect to actual expenses incurred by women.*

*In my opinion, the appellant taxpayer has failed to demonstrate an adverse effect created or contributed to by s. 63, although she has overwhelmingly demonstrated how the issue of child care negatively affects women in employment terms. Unfortunately, proof that women pay social costs is not sufficient proof that women pay child care expenses. Those social costs, although very real, exist outside of the Act. In the same fashion that our income taxation system does not recognize various forms of imputed income, it equally does not involve itself with any form of imputed expense. In this respect, this*

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65. *Thibaudeau v. M.N.R.*, [1994] 2 F.C. 189 (C.A.) at 203-204, 235.

66. *Sauvé v. Canada (Chief Electoral Officer)*, [1996] 1 F.C. 857 at 919.

67. *Supra* note 13 at 762-763.

68. *Ibid.* at 764-765.

*appeal was not argued to suggest that the government had a positive obligation to account for the social costs of child care prior to taxing its citizens. Such a suggestion would lead this Court well beyond the confines of the present appeal.*

Whether one agrees with the high standard of proof required by the majority or considers, as did the dissenting members of the Court,<sup>69</sup> that the appellant had in fact proved her case, it is clear that the unanimous Court would have found adverse impact discrimination if there had been proof that women disproportionately write the cheques to child care-givers. This would have been because of the combination of two factors: a neutral law (limiting the deductibility of child care expenses) and a set of independently-existing social circumstances (women disproportionately pay those expenses). The very essence of adverse impact discrimination is in those two factors. To go back to the case providing the genesis for the concept in Canada, in *O'Malley*<sup>70</sup> there was a combination of a facially-neutral requirement by the employer that employees work on Saturdays and an independently-existing social circumstance that Seventh-Day Adventist employees are required by their religion to observe a Saturday Sabbath. The Court said:

*It [adverse effect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.*

What *Symes* says is that, where adverse effects discrimination is claimed, it must be proved. Adverse effects upon a particular group flowing from a neutral provision must be established, not assumed. But those effects will exist because of the social or other circumstances of the group in question. The fact that such circumstances enter into the analysis is a central feature of such analysis. It cannot be a basis for rejecting the conclusion that there is discrimination.

It follows that the Federal Court decision in *Sauvé v. Canada (Chief Electoral Officer)*<sup>71</sup> was incorrect in its analysis of the adverse impact discrimination claim brought by federally-sentenced prisoners, established to be disproportionately poor and Aboriginal people, that the denial of the right to vote in federal elections infringed their section 15 equality rights. Wetston J. considered that the plaintiffs would have had to show that they were more severely affected than other prisoners (which goes against Iacobucci J.'s statement that it is not necessary for there to be 100% correlation between the impact and the group affected — rather, disproportionate impact is sufficient). Further, after referring to the passages from *Symes* discussed above, Wetston J. concluded "[o]ver representation

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69. L'Heureux-Dubé and McLachlin JJ.

70. *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551.

71. *Supra* note 66.

does not in any way result from the impugned provision".<sup>72</sup> With respect, that is not the point. Denial of the right to vote to a disproportionate number of poor and Aboriginal people, including some of the plaintiffs, did result from the impugned provision. The case is exactly parallel with *O'Malley*. Assuming that the evidence was there of the disproportionate impact, it affected Aboriginal people (surely an enumerated ground) and poor people (arguably an analogous ground). It affected them in an area which is fundamental to participation in our society, namely, the franchise. It seems appropriate to require justification under section 1.

This brief review of some of the jurisprudence has shown that the concept of adverse effects discrimination is not a simple or easily-acquired one. It appears to pose particular challenges when combined with analogous grounds rather than enumerated ones, and when combined with the internal relevance approach. There is a further challenge in making the transition from the context of human rights legislation. In a human rights case, the issues might be relatively straightforward, such as an employer's height and weight requirement that has the effect of eliminating most women or Oriental men from employment opportunities. Either the height and weight requirements are imposed in good faith and are necessary for the jobs in question or they are not. However, in many instances, the governmental activity that is questioned amounts to an intricately-balanced set of related choices and the issues are not neat or straightforward. An example may be found in *Adler v. Ontario*,<sup>73</sup> in which the issue was the constitutional validity of the Ontario scheme for funding public and Roman Catholic schools. The majority of the Court<sup>74</sup> held that there could be no Charter review under either section 2(a) or section 15(1) because the source and origin of the requirement to fund Roman Catholic schools in Ontario stems from section 93 of the *Constitution Act, 1867* which, with section 29 of the Charter, forms a comprehensive code with respect to denominational school rights. However, the other four members of the Court did not consider the provisions were totally excluded from review, and although they all agreed that there was no infringement of section 2(a), disagreed about section 15. Two (L'Heureux-Dubé and McLachlin JJ.) found that section 15 was infringed on the basis that parents whose religious beliefs required them to send their children to religious schools were adversely impacted by the fact that their religious schools did not receive governmental funding. (These two judges differed as to the outcome, with McLachlin J. concluding that the infringement was justified under section 1, and L'Heureux-Dubé that it was not.) Two others (Sopinka and Major JJ.) reached the conclusion that there was no infringement of either section, based upon the reasoning that the legislation itself was not the cause of the parents' disadvantage — rather, the cause was their religious beliefs which prevented them from taking advantage of the publicly funded school system. This reasoning, as McLachlin J. pointed out in her reasons in the same case, flies in the face of the adverse impact analysis approved by the Court on other occasions. She wrote:<sup>75</sup>

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72. *Ibid.* at 921.

73. *Supra* note 5.

74. Per Iacobucci J., Lamer C.J.C., LaForest, Gonthier, and Cory JJ. concurring.

75. *Adler v. Ontario*, *supra* note 5 at 716-717.

*The respondents' second argument is that even if adverse effect discrimination is established, it is not caused by the Education Act, but by the appellants' religion. The cause of the inequality, they submit, is not government action, but the appellants' decision to belong to a religion which puts them in the position of having to reject the public secular schools and establish and fund their own independent schools. With all deference to those who hold otherwise, I cannot accept this defence. By definition the effect of a discriminatory measure will always be attributable to the religion, gender, disability and so on of the person who is affected by the measure. If a charge of religious discrimination could be rebutted by the allegation that the person discriminated against chose the religion and hence must accept the adverse consequences of its dictates, there would be no such thing as discrimination. This Court has consistently affirmed a substantive approach to equality. The substantive approach to equality is founded on acceptance of the differences which lie at the heart of discrimination. Be they differences of birth, like race or age, or be they differences of choice, as religion often is, the law proceeds from the premise that the individual is entitled to equal treatment in spite of such differences. The state cannot "blame" the person discriminated against for having chosen the status which leads to the denial of benefit. The person is entitled to the benefit regardless of that choice. The essence of section 15 is that the state cannot use choices like the choice of religion as the basis for denying equal protection and benefit of the law.*

Although there are difficulties in working through the consequences, it does not follow that it was a mistake for the Supreme Court to make the extension to adverse effects discrimination. Far from being a mistake, it was a necessity, I would argue, to permit section 15 to achieve its potential. Quite simply, the number of instances in which inequality is perpetuated by deliberate intent seems far less than the number of instances in which inequality is perpetuated by inadvertence. But the perpetuation of inequality is the same, however it comes about. Although it may take some time, the task of working through the analytical framework for adverse effects discrimination is necessary and is achievable, as may be seen by how far the analysis has advanced in just over ten years.

## CONCLUSION

I have argued that the human rights direction taken by the Supreme Court of Canada in its equality analysis is not only innovative and commendably Canadian, but also workable. I have also suggested that the internal relevance approach proposed by Justices Gonthier and LaForest is the opposite — a revival of a model rejected in *Andrews*, very similar to the U.S. approach, and circular (therefore prone to unpredictable and ineffective results.) The difference matters, although the extent to which one thinks it matters depends upon one's expectations for constitutional equality provisions. Obviously, a Charter skeptic would not take the trouble to parse the case law in the way I have. However, it is not necessary to be a Charter skeptic to recognize the distinct possibility that, after much ado, the equality rights will come to signify nothing.

Constitutional equality rights cannot be expected to be the major vehicle for addressing Canadian inequality problems, but there is the potential for the rights to make

a difference. Occasionally, a section 15 claim will result in legislative change that will remedy some aspect of inequality, as in *Miron* and *Benner*. More frequently, the norms that are articulated in section 15 will enter into decision-making under other sections of the Charter, in statutory interpretation or in the development of the common law. Whether the full potential of the section will be realized remains to be seen — in the 21st century.

**Section 15 Analysis**

(consolidated)

1) Is there a denial of the right to equality before the law, under the law, or equal protection and benefit of the law?

Does the law draw a distinction on its face? \_\_\_\_\_

Yes No

Does it nevertheless have a disproportionate impact on a particular group? No

Yes — Adverse Impact

2) Is the distinction / adverse impact discriminatory?

a) Is the denial of one of the 4 equality rights on the basis of an enumerated ground? \_\_\_\_\_

Yes No

L'Heureux-Dubé J. would not rely on the enumerated grounds to identify discrimination

Is the denial on the basis of an analogous ground? No

For example, are members subject to stereotyping, historical disadvantage, or vulnerable to political and social prejudice? \_\_\_\_\_

b) Does the denial of one of the equality rights perpetuate discrimination? No

i) no intention to discriminate required

ii) imposition of comparative disadvantage on a group or individual

iii) often based on harmful or prejudicial group stereotypes

Yes

Gonthier J. in *Miron & Laforest J.*

**Violation of s. 15**

in Egan further consider whether the discrimination was relevant to the objective of the legislation before finding a violation.

3. Can the Violation be justified under s. 1?

Does the violation of the equality right meet the Oakes test?

Sopinka J. in Egan, and MacIntyre J.  
in Andrews (in dissent on this point)  
would apply a more deferential test.

