Section 15 Remedies for Systemic Inequality: You Can't Get There From Here

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This paper examines remedies for systemic inequality within the context of section 15 of the *Canadian Charter of Rights and Freedoms*.[1] Twenty-five years after the introduction of section 15, there is little doubt among equality-seekers that it has fallen well short of its original promise, namely to be a strong substantive remedy against entrenched systemic discrimination. Although the Supreme Court's early section 15 decisions seemed to understand this purpose, the same cannot be said of cases from *Law v. Canada*[2] forward. The Court, in its section 15 jurisprudence, has deserted the idea that section 15 is a remedy for substantive inequality that imposes positive obligations on the state. It sees the remediation of inequality as something that governments must be permitted to do on a voluntary basis, especially where expenditure of funds is involved. It has reduced entrenched equality rights to one of the plurality of interests to be balanced in post-Charter policy-making.

Given that the failure of section 15 as a remedy against systemic inequality occurred on a substantive level, it seems almost redundant to consider as a separate question the Court's jurisprudence on procedural questions affecting remedies in the section 15 contexts. What can be said of the technical remedies jurisprudence of the Court that has not already been said about its substantive abandonment of the equality-promoting purpose of section 15? Will improvements in remedies jurisprudence "writ small" be possible, or, more importantly, of any help in reviving the original purpose of section 15, as long as the Court continues to deny the remedial purpose of section 15 "writ large"?

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K. 1982, c. 11 [hereinafter "*Charter*"].

2 *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12 [1999] 1 S.C.R. 497 [hereinafter "*Law*"].

To ask this question is to answer it. There is no real hope that section 15 will be an effective remedy against systemic inequality as long as the Court's prevailing interpretation holds fast at a *substantive* level. However, a consideration of the Court's technical remedies jurisprudence may perhaps provide some further illumination of the various ways in which the original purpose and promise of section 15 have been curtailed. Such an understanding will allow us to draw a more accurate blueprint of the steps necessary for the rehabilitation of section 15 as a substantive remedy against systemic inequality.

In *Doucet-Boudreau*,[3] the Supreme Court specifically linked its view that section 23 of the Charter imposes positive obligations on *government* with its willingness to embrace a flexible, generous and creative approach to the technical aspects of Charter remedies. There is no one case in which it similarly clarifies that its narrow interpretation of section 15 is responsible for a restricted view of technical remedies questions vis-à-vis that section. Rather, the evolution of a narrow approach to technical remedies issues has proceeded in parallel with the Court's development of its restrictive view of the substance of section 15, and the Court has not explicitly connected these two courses of case law.

There is, nonetheless, no doubt that the Court's narrow approach to technical remedies questions proceeds from a narrow view of the substance of section 15. In turn, the narrow approach to technical remedies questions has produced a tight exoskeleton for section 15 that restricts its growth and development on a substantive level, and limits the availability of remedial options even where the Court is willing to find an unjustifiable breach of section 15. Just as the *Law* case has created elaborate logical and evidentiary machinery through which substantive section 15 claims must be processed, so has the Court's technical remedial jurisprudence created a tight formulaic route to achieving an actual beneficial result in a successful case. Skillful manipulation of that route, as a technical matter, may keep the equality door slightly ajar during what could be a long process of rehabilitation of section 15 as a substantive remedy for systemic inequality.

I do not repeat in this paper the analysis of the Court's substantive equality jurisprudence which is so ably done elsewhere in this volume.

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[3] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] [illegible] (hereinafter "*Doucet-Boudreau*")

However, some attention to substantive matters, especially to case law at the hinge of substance and procedure, provides a context for the consideration of remedies. Before dealing with the Court's remedial jurisprudence, I examine the Court's continuing deference to Parliamentary sovereignty in its decisions on section 15, and consider substantive and procedural rulings which construct section 15 litigation as narrowly individualistic, incommensurate with the depth, breadth and longevity of systemic inequality.

I. Systemic Inequality and the Purpose of Section 15

Nearly 20 years ago, a unanimous Supreme Court of Canada asserted that in order to identify and destroy the web of policies, practices and attitudes that construct systemic inequality, courts must fashion group-based systemic remedies to foster conditions in which equality will flourish.[4] Section 15 of the *Charter of Rights and Freedoms* was promulgated in light of decades of experience with the shortcomings of non-constitutional legal mechanisms for attacking and remedying systemic inequality. During its passage through the Parliamentary process, section 15 was specifically recharacterized as an equality measure, although it had been introduced as a non-discrimination provision.[5]

Justice McIntyre in *Andrews v. Law Society of B.C.*[6] recognizes that the purpose of section 15 is to ensure equality in the formulation and application of the law, quoting with approval the Ontario Court of Appeal statement that section 15, read as a whole, is "a compendious expression of a positive right to equality in both the substance and the administration of the law".[7] The promotion of equality, according to McIntyre J., entails 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. It has a large remedial

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[4] *C.N.R. v. Canada (Human Rights Commission)*, [1987] S.C.J. No. 42, [1987] 1 S.C.R. 1114 (*sub nom. Action Travail des Femmes v. Canadian National Railway et al.*) 40 D.L.R. (4th) 193.

[5] Robin Elliot, "Interpreting the Charter – Use of the Earlier Versions as an Aid" (1982/Charter Edition) U.B.C.L. Rev. 11.

[6] *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143.

[7] *Id.*, at para. 34.

component.[8] The right to equal protection and benefit of the law enshrined in section 15 rests on the moral and ethical principle fundamental to a truly free and democratic society that "all persons should be treated by the law on a footing of equality with equal concern and respect".[9]

The framers of the Charter contemplated that legislatures would be the primary actors in promoting equality under section 15. Subsection 15(2) protects government laws, programs and activities aimed at ameliorating disadvantage, reflecting the expectation that governments would, indeed, use such measures to promote equality. The hiatus in the coming into force of section 15 was justified on the basis that significant amendments would be required to bring laws into conformity with section 15 and governments would need three years to effect the necessary changes.[10]

The 1985 Report of the Parliamentary Committee on Equality Rights, entitled *Equality for All*,[11] urged, "It is much better, in our view to anticipate the effect of section 15 and put Parliament at the leading edge of change rather than simply leave it to respond, by picking up the pieces, after the courts have developed and applied their concept of equality to various federal laws".[12] The federal government stated in its discussion paper, *Equality Issues in Federal Law*: "When legislation conforms to the *Charter*, the need for litigation to assert *Charter* rights is minimized".[13]

Governments' responses to section 15 were, however, disappointing. Statute amendment acts addressed only overtly discriminatory statutory provisions with modest social impacts.[14] Significant legislative reform to address historical inequalities was not seen as part of the three-year Charter compliance process. There was a dichotomy between complying with section 15 on the one hand, and "real" policy formulation on the

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8 *Id.*

9 *Id.*

10 Canada, Department of Justice, *Equality Issues in Federal Law: A Discussion Paper* (Ottawa: Minister of Supply and Services Canada, 1985), at 1 [hereinafter "*Equality Issues in Federal Law*"].

11 Canada, Parliamentary Committee on Equality Rights, *Equality for All* (Ottawa: Queen's Printer, 1985) [hereinafter "*Equality for All*"].

12 *Id.*, at 12.

13 *Equality Issues in Federal Law*, *supra*, note 10, at 1.

14 *E.g.*, *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, S.C. 1985, c. 26.

other. The federal government, for example, made a distinction between the technical exercise of bringing statutes into compliance with the formal requirements of section 15 and the policy exercises of reforming the *Criminal Code*, *Unemployment Insurance Act*, and the *Indian Act* and dealing with the recommendations of the Special Committee on Visible Minorities, *Equality Now*.[15] Serious equality issues in all of these areas have had to be addressed in litigation, or remain outstanding, leading inevitably to an inference that the promotion of equality required by section 15 did not figure convincingly in these policy exercises.[16]

II. Retreat from the Positive Obligation to Promote Equality

The Supreme Court has departed from the vision of section 15 articulated in *Andrews*. Chief Justice McLachlin says in *Auton* that "This Court has repeatedly held that the legislature is under no obligation to create a particular benefit".[17] A legislature is free to target social programs to those it wishes.[18]

Although the Court has rejected the principle of incrementalism as a justification under section 1 of the Charter,[19] it has been willing to allow legislatures to proceed at their own pace in adjusting statutes to current social values. In *Hodge*, Binnie J. affirms that the legislature is free to target social programs to those whom "as a matter of public policy, it

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15 *Equality Issues in Federal Law*, *supra*, note 10, at 3, 27-28, 34.

16 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 [hereinafter "*Corbiere*"]; *Perron v. Canada (Attorney General)*, [2003] O.J. No. 1348, 105 C.R.R. (2d) 92 (Sup. Ct.) [hereinafter "*Perron*"]; *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688; *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128; *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 [hereinafter "*Schachter*"]; *Nishri v. Canada* [2001] F.C.J. No. 563, 84 C.R.R. (2d) 140; *R. v. Seaboyer*; *R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577; *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411; *R. v. Carosella*, [1997] S.C.J. No. 12, [1997] 1 S.C.R. 80; *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330; *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63; *Lucas v. Toronto Police Service Board*, [2001] O.J. No. 2334, 54 O.R. (3d) 715 (Div. Ct.) [hereinafter "Lucas"]; *R. v. M. (C.)*, [1995] O.J. No. 1432, 23 O.R. (3d) 629 (C.A.). See also S. McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49" in J. Roberts & R. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293.

17 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657, at para. 41.

18 *Id.*

19 *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 122 [hereinafter "*Vriend*"].

wishes to benefit".[20] The Court believes that governments must be afforded wide latitude to determine the proper distribution of resources in society, especially where Parliament, in providing specific social benefits, has to choose between disadvantaged groups.[21]

The Supreme Court has made the targeted social program virtually invulnerable to section 15 review. If the government aims a benefit program at a particular segment of disadvantaged persons, and the Court can conclude that it benefits such persons, it will refuse to extend it at the instigation of a challenger alleging that it is underinclusive.[22] Only when the Court is prepared to characterize a social program as broad and general is it ready to invalidate an exception from it.[23] The Court has articulated no test for distinguishing a general program from a targeted one.

This development in the jurisprudence coincides with the displacement of universal social programs as the policy instrument of choice. In *Toward Equality*, the government of Canada rejected the Equality Committee's goal of equality of results,[24] stating, "Equality and social justice require that social benefits be distributed to those who need them most".[25] It further argued, "Policies aimed at ensuring equality and social justice must be based on respect for the other important values in Canadian society – the freedom of the individual, federalism, Parliamentary democracy and the rights and interests of other individuals and society as a whole".[26] This articulation of equality policy by the government of Brian Mulroney does not ascribe any weight to constitutional equality rights, treating equality as only one consideration among many. Yet it is a virtual blueprint for the present

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[20] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357, at para. 16 [hereinafter "*Hodge*"].

[21] *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381, at para. 83 [hereinafter "*NAPE*"].

[22] *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 [hereinafter "*Lovelace*"]; *Law*, *supra*, note 2; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703; *Hodge*, *supra*, note 20.

[23] *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22; *Vriend*, *supra*, note 19; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 [hereinafter "*Martin*"].

[24] *Equality for All*, *supra*, note 11, at 5.

[25] Canada, Government of Canada, *Toward Equality: The Response to the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services Canada, 1986), at 3 [hereinafter "*Toward Equality*"].

[26] *Id.*, at 4.

Supreme Court's jurisprudence on equality and targeted social programs.

In *NAPE*,[27] the Court portrays the promotion of equality by way of a pay equity settlement with female hospital workers, involving substantial resources, as a measure aimed at special interests which could detract from policy goals directed toward the more general well-being. Justice Binnie for the Court says of the Newfoundland government's legislation deferring implementation of the pay equity settlement: "The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures and the allocation of the necessary cuts, was undertaken to promote other values of a free and democratic society".[28] This observation ignores the fact that there is no constitutional right to hospital beds, jobs or the other values set up in opposition to equality, but there are equality rights under section 15. Nor does the Court acknowledge that its decision legitimizes using women's inequality to subsidize other groups, or to elevate the general welfare.

Justice Binnie in *NAPE* emphasizes that judicial deference to legislative supremacy in the area of equality promotion includes deference to legislative changes of mind about whether to promote equality. Legislative adoption of a remedial measure does not "constitutionalize" it so as to fetter its repeal.[29] A legislature is free to "experiment" with different "machinery" to accomplish equality, repealing one that is likely to be more effective, in favour of one that has less effectiveness against systemic inequality.[30] No attempt is made to reconcile this holding with the previous strong jurisprudence of the Supreme Court that human rights legislation is quasi-constitutional in nature.[31]

Even where a Court has declared unconstitutional a particular legislative provision, it will not force the actual repeal of that provision.

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27 *NAPE*, *supra*, note 21.

28 *Id.*, at para. 75.

29 *Id.*, at para. 33.

30 *Id.*, at para. 35.

31 *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554; *Insurance Corp. of B.C. v. Heerspink*, [1982] 2 S.C.R. 145; *Winnipeg School Division No. 1 v. Craton*, [1985] S.C.J. No. 50, [1985] 2 S.C.R. 150.

The Ontario Divisional Court states in *Lucas*, "the court cannot purport to impose a duty to repeal or amend legislation as this would constitute a fetter on the sovereignty of Parliament, which in our federal system of government has unfettered freedom to formulate, amend and repeal legislation".[32] It refused a remedy under the Charter, even though police had laid criminal charges against Lucas pursuant to a *Criminal Code* section previously declared unconstitutional.

The high degree of deference to Parliamentary sovereignty in the interpretation of section 15 relieves government of any obligation to make policy as if section 15 matters. In strong contrast is the Court's characterization of Nova Scotia's treatment of section 23 minority language rights in educational policy-setting. The majority of the Court in *Doucet-Boudreau* is critical of the province for treating section 23 rights "as if they were but one more demand for education programs and facilities", and for failing to accord them "due priority as constitutional rights".[33]

Even more fundamentally, deferring to Parliamentary choice about whether, when and how to address systemic inequality is at odds with the provisions, and the ethos, of post-World War II human rights instruments. At the core of the expansion of human rights protections in the last half of the 20th century was the recognition that even democratically elected governments ignore, or override, the interests of minorities. Simply allowing majoritarian politics to take its natural course will not protect such interests; rather, it can entrench minority disadvantage. Human rights instruments, including entrenched bills of rights like the Charter, act as a countervail to majoritarian legislatures, and are necessary to protect "discrete and insular minorities"[34] who have no voice in such assemblies.

III. No Accounting for the Systemic Nature of Inequality

In so deferring to Parliamentary sovereignty, the Supreme Court of Canada is overlooking one of the most intractable attributes of systemic inequality: the political powerlessness of those whom it disadvantages.

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32 *Lucas*, *supra*, note 16.

33 *Doucet-Boudreau*, *supra*, note 3, at para. 6.

34 *R. v. Hess*; *R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906, *per* Wilson J., citing *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

The Court also overlooks the facts that systemic discrimination has deep historical roots and affects broad classes of persons. It leads to serious economic and social disadvantage that make financing litigation virtually impossible.

1. No Retrospective Application

In *Benner v. Canada (Secretary of State)*,[35] the Court holds that the Charter cannot apply retroactively or retrospectively. Section 15 will not address the lingering discriminatory effects of a government act which took place before the Charter came into effect. They will respond only where the pre-Charter law imposes an ongoing discriminatory status or disability.[36]

This holding was applied to defeat the claims of the Chinese Head Tax Payers in *Mack v. Canada (Attorney General)*.[37] Surviving Head Tax payers and the widows and first generation descendants of deceased payers brought a class action to recover the sums paid to Canada under the *Chinese Immigration Act*[38] before its repeal in 1923. In striking their action, Cumming J. says that to recognize their claims would mean that "just about every instance of past discrimination since the turn of the century could be reviewed under section 15, provided the victims still suffer from that past discrimination".[39] Moreover, in dealing with the plaintiffs' arguments that Head Tax payments extracted from them under the Act had unjustly enriched the government of Canada, the Ontario Supreme Court and Court of Appeal both accepted that a law which they characterized as racist, repugnant, and reprehensible, and which would be against Charter norms if passed today, could serve as a juristic reason for the payments, defeating the unjust enrichment claim.[40]

In rejecting the claimants' arguments, the Court of Appeal relies on the statements of McLachlin J., as she then was, in *Peel (Regional*

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35 *Benner v. Canada (Secretary of State)*, [1997] S.C.J. No. 26, [1997] 1 S.C.R. 358.

36 *Id.*, at para. 44.

37 *Mack v. Canada (Attorney General)*, [2001] O.J. No. 2794, 55 O.R. (3d) 113 (Sup. Ct.), aff'd [2002] O.J. No. 3488, 60 O.R. (3d) 737 (C.A.) [hereinafter "*Mack*" cited to C.A.].

38 The *Chinese Immigration Act 1885*, S.C. 1885, c. 71 as amended.

39 *Mack*, *supra*, note 37, at para. 11.

40 *Id.*, at paras. 2, 49-50.

Municipality) v. Canada[41] that the law must define what is unjust, not only to ensure a measure of certainty, but also to ensure due consideration of factors such as the legitimate expectation of the parties, the right of parties to order their affairs by contract, and *the right of legislators in a federal system to act in accordance with their best judgment without fear of unforeseen future liabilities.*[42] This same principle will inform the Court's thinking on whether damages are available for enactment of laws found to violate the Charter.

2. Standing

The test for standing in *Canadian Council of Churches*[43] accords standing to a public interest group only where there is no reasonable alternative way of bringing forward the case. If there are individuals who could, in the mind of the Court, mount the challenge, then public interest standing will not be recognized. In focusing on the theoretical availability of an individual litigant, the Court takes no account of the fact that not all those affected by a law will have the personal and community resources possessed by, for example, Dr. Henry Morgentaler, the affected individual whose standing prevailed over that of the Canadian Abortion Rights Action League in *CARAL v. Nova Scotia.*[44]

This holding gives the governmental respondent in a Charter challenge enormous power over whether the case goes ahead. Where the plaintiff is an affected individual, the government can offer an individual remedy, which may not include any general relief against the systemic inequality of the rest of the group. The government can also exhaust a group litigant's resources by forcing a battle on standing. Only

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[41] *Id.*, at para. 51 citing *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, [1992] S.C.J. No. 101, [1992] 3 S.C.R. 762, at paras. 67-69 [hereinafter "*Peel*"].

[42] *Peel*, *id.*, at paras. 68-69 (emphasis added).

[43] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236.

[44] *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)*, [1990] N.S.J. No. 106, 96 N.S.R. (2d) 284 (C.A.), leave to appeal refused, [1990] 2 S.C.R. v

rarely will it agree to the standing of a public interest plaintiff and allow the substantive issue to be considered.[45]

3. Class actions

The refusal to award damages under section 24 where legislation is declared unconstitutional, discussed below, has undermined the class action as a Charter strategy. Further to legislation in Ontario and British Columbia, for example, a representative seeking certification must establish that the class action is the preferable method of proceeding. If damages cannot be obtained, the class action may have no advantage over its alternative, an application or action for a declaration of invalidity. Indeed, this was the holding in *Perron v. Canada (Attorney General)*.[46]

The refusal to award monetary damages upon finding that legislation is unconstitutional, and the consequent sidelining of the class action as a vehicle for equality claims, deprive section 15 claimants of an effective means of attracting counsel. Legal aid is almost never available for civil actions under the Charter.

IV. The Court's Remedial Jurisprudence

1. Striking Out, Reading Down, Reading In

Section 52 of the *Constitution Act, 1982* mandates the invalidation of any law that is inconsistent with the provisions of the Constitution, to the extent of that inconsistency. The Supreme Court identifies in *Schachter*[47] a range of possible actions pursuant to section 52: striking down legislation (or severing a statutory provision) either with immediate effect or with a temporary suspension of the declaration of invalidity; reading down (also known as reading out) or reading in (also known as reading up).[48]

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[45] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2002] O.J. No. 61, 57 O.R. (3d) 511 at para. 7 (C.A.), aff'd [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76.

[46] *Perron*, *supra*, note 16.

[47] *Schachter*, *supra*, note 16.

[48] *Id.*, at paras. 84-85.

"Reading down" in the Charter context is derived directly from the remedy of severance traditionally employed in federalism cases to invalidate legislation found to be *ultra vires*. It is a conservative remedy in both the federalism and the Charter contexts, designed to interfere as little as possible with legislative enactments.[49]

Severance and reading down require a precise definition of the offending statutory provisions, which are then declared inoperative in a way that will best preserve the original legislative purpose.[50] Sometimes this can be done by invalidating only the offending portions. Where such limited excision would be more intrusive to the legislative purpose than would invalidating a broader segment of the statute, then a broader segment will be invalidated, even if it contains some constitutionally inoffensive material.[51] The guidance in performing both severance and reading down is provided by asking whether the legislature would have enacted the statute without the portion proposed to be excised.[52] If this question cannot be answered affirmatively, then the Court may consider it has no alternative but to declare the whole statute invalid and leave repair to the legislature; the Court will not use severance, reading in or reading down to reconstruct a statute.[53]

The remedy of severance or reading down will often be applied to words or phrases expressing a limitation on availability of a statutory benefit. Removing the limitation thus makes the benefit available to the previously excluded group. Alternatively, it can be used to excise a burden which the court considers inappropriately applied. As a remedy, reading down can thus affect both underinclusive and overinclusive legislation.[54]

The Court in *Schachter* stresses that drafting style should not be the critical factor in availability of a remedy under section 52.[55] It states that the remedy of reading in, closely akin to severance, may be used where a statute is drafted so as to wrongfully exclude, rather than wrongfully include. Both of these can be considered "inconsistent" with the *Constitution Act, 1982* within the meaning of section 52. Where the

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49 *Id.*, at paras. 26, 28.

50 *Id.*, at para. 29.

51 *Id.*

52 *Id.*

53 *Id.*, at paras. 52, 56.

54 See *e.g.*, *Schachter*, *id.*, at para. 74.

55 *Id.*, at para. 33.

inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency will be to extend the statutory scheme to include the excluded group.[56]

As with severance and reading down, the purpose of reading in is to be as faithful as possible within the Constitution to the scheme enacted by the legislature.[57] However, in *Schachter*, the Court signals in several ways what might be seen as even greater caution in using reading in, than in using reading down. It observes that one cannot assume that the legislature would have enacted a benefits scheme if it were not permitted to exclude particular groups.[58] It also emphasizes that defining with precision the inconsistency may be more difficult to do in cases of reading in, with the result that the Court will simply declare inconsistency and completely defer to the legislature for repair.[59]

The Court also worries that reading in, while possible within the statutory framework and purpose, may involve an insupportable incursion into budgetary decisions.[60] Although the Court says in *Schachter* that budgetary concerns cannot be used to justify a violation under section 1, they are "clearly relevant" to the question of remedy.[61] A remedy which entails an incursion into budgetary considerations so substantial that it would change the nature of the legislative scheme would be inappropriate.[62] The scale or degree of the budgetary implications of reading in, and even of reading down, are thus clearly at play in making remedies decisions.

The reading down and reading in remedies in *Schachter* are shaped by the same deference to Parliamentary spending decisions as is the Court's substantive equality jurisprudence. Given this deference to Parliament in the realm of budget, one can question the "real world" helpfulness of the other remedies principle articulated in *Schachter:* where the standards of the Charter permit more than one remedial approach, the purpose of the Charter may encourage one response over another.

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56 *Id.*

57 *Id.*, at para. 37.

58 *Id.*, at para. 38.

59 *Id.*, at para. 52.

60 *Id.*, at para. 62.

61 *Id.*

62 *Id.*, at para. 63.

The Court gives the example of *Attorney-General of Nova Scotia v. Phillips*,[63] where it was held that giving a particular welfare benefit to single mothers but not single fathers violated section 15. The Supreme Court observes that reading in to extend the benefit to fathers (equal vineyards) would be more consistent with the remedial purpose of section 15 than would achieving equality of treatment by striking down the benefit for mothers (equal graveyards).[64] The Court's willingness to be guided by statutory purpose here probably had a great deal to do with the fact that extending the benefits to the small number of single fathers would have only a modest financial impact. Where the price tag of equal vineyards is seen as too high, the Supreme Court might well conclude that equal graveyards are sufficient, and leave to the legislature as a matter of policy, unfettered by Charter concerns, the extent to which it wished to redistribute benefits.

In *Schachter*, the Chief Justice emphasizes that choice of remedy under section 52 is an entirely separate question from whether to delay the effect of a declaration of nullity.[65] He is troubled by the fact that a delayed declaration allows a continuation of a state of affairs that has been found to violate the Charter,[66] but would nonetheless support such a delay where simply striking down poses a danger to the public[67] or otherwise threatens the rule of law.[68]

Chief Justice Lamer also acknowledges that a delayed declaration may be appropriate in cases of underinclusiveness, since striking down would deprive of benefits the group now receiving them while not delivering them to the successful litigant (equal graveyards).[69]

This situation is, however, much more problematic for him than the other two, given the Court's desire to intrude as little as possible into the legislative realm. He states that reading in to correct underinclusiveness would be preferable since it immediately reconciles the legislation with the requirements of the Charter. It also allows the legislature to consider

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[63] *Id.*, at para. 40, citing *Attorney-General of Nova Scotia v. Phillips*, [1986] N.S.J. No. 401, 34 D.L.R. (4th) 633 (C.A.).

[64] *Schachter*, *id.*, at para. 41.

[65] *Id.*, at para. 80.

[66] *Id.*, at para. 81.

[67] *Id.*, at para. 79, citing *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933.

[68] *Schachter*, *id.* citing *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721.

[69] *Schachter*, *id.*

the matter "in its own good time" and take whatever action it wishes.[70] A delayed declaration of nullity, by contrast, "forces the matter back onto the legislative agenda at a time not of the choosing of the legislature and within time limits under which the legislature would not normally be forced to act".[71]

In *Corbiere*,[72] the Court delays by 18 months the coming into effect of a decision declaring section 77 of the *Indian Act* contrary to section 15 because it denies off-reserve members the right to vote in Band Council elections. While L'Heureux-Dubé J., for the four concurring members of the Court, expresses a desire that the government consult in the Aboriginal community about possible amendments to the Act, and even sketches some possible themes for such consultation, the Court does not order that any consultation occur. To do so would be to trench on the Parliamentary domain.[73] In *Vriend*,[74] the Court reads up the *Individual's Rights Protection Act* of Alberta to include sexual orientation as a ground of discrimination, citing the resistance of the Alberta government to initiating such change itself. Even here, however, it purports to identify this course of action as one which Alberta as much as invited the Court to do, by public statements refusing to amend the legislation and deferring to the result of the litigation.[75]

2. Section 24

Section 52 of the *Constitution Act, 1982* is engaged when the law is itself held to be unconstitutional.[76] Section 24 of the Charter extends to a court of competent jurisdiction the power to grant "such remedy as the court considers appropriate and just in the circumstances" to anyone whose Charter rights and freedoms have been infringed or denied, construed as being available to address government action under legislation which is not itself unconstitutional.[77]

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70 Presuming such action is necessary because the legislature disagrees with the solution accomplished by the reading in, or wishes to make other consequential amendments.

71 *Schachter*, *supra*, note 16, at para. 82.

72 *Corbiere*, *supra*, note 16.

73 *Id.*, *per* L'Heureux-Dubé J., at paras. 116-21.

74 *Vriend*, *supra*, note 19.

75 *Id.*, at paras. 170-71.

76 *Schachter*, *supra*, note 16, at para. 84.

77 *Id.*, at para. 87.

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, Iacobucci and Arbour JJ., for the majority, state that section 24 must be given a purposive interpretation, that provides a full, effective and meaningful remedy for Charter violations, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.[78] A purposive approach for remedies means that the purpose of the right being protected as well as the purpose of the remedies provision must be promoted. Courts must craft responsive and effective remedies.[79] Justices Iacobucci and Arbour state that it is difficult to imagine a wider and less fettered grant of discretion than the language of section 24. This wide discretion may not be reduced to some sort of binding formula for general application in all cases, and it is not for an appellate court to pre-empt it or cut it down.[80] Being part of the supreme law of Canada, the power in section 24 cannot be strictly limited by statutes or rules of the common law.[81]

While not wishing to confine the discretion in section 24, the majority nonetheless offers five broad considerations to guide its exercise. First, an appropriate and just remedy in the circumstances of a Charter claim is one that meaningfully vindicates the rights and freedoms of the claimants.[82] Secondly, it must employ means that are legitimate within the framework of our constitutional democracy,[83] observing the division of powers among legislature, executive and judiciary. Thirdly, the remedy must be a judicial one, which vindicates the right while invoking the function and powers of a court.[84] Fourthly, while vindicating the rights of the complainant, the order must be fair to the party against whom it is made. "The remedy should not impose substantial hardships that are unrelated to securing the right".[85] Finally, the majority reasons state that section 24 should be allowed to evolve to meet the challenges and circumstances of particular cases. Such evolution may require novel and creative features because traditional remedial practice cannot be a barrier to what reasoned and compelling

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78 *Doucet-Boudreau*, *supra*, note 3, at para. 25.
79 *Id.*
80 *Id.*, at para. 50.
81 *Id.*, at para. 51.
82 *Id.*, at para. 55.
83 *Id.*, at para. 56.
84 *Id.*, at para. 57.
85 *Id.*, at para. 58.

notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.[86]

Damages have been awarded under section 24 for unconstitutional conduct by government officials pursuant to a statute whose validity was not at issue. In *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*,[87] the claimant received damages in tort and also under section 24(1), for the violation of her rights under section 15 and section 7. Knowing a rapist's pattern of behaviour, and having a suspect in mind, police deliberately refrained from warning women in the target neighbourhood, hoping to arrest the suspect during an attack in progress. The claimant, who fit the profile of the women the suspect had previously attacked, was raped.[88]

Madam Justice MacFarland of the Ontario Supreme Court agreed with the claimant that the conduct of the investigation and, in particular, the failure to warn were motivated and informed by systemic discrimination within the police force affecting all women, and specifically survivors of sexual assault who came into contact with the force.[89]

The Supreme Court of Canada observes in *RJR-MacDonald Inc. v. Canada (Attorney General)*[90] that although it has accepted the principle that damages might be awarded for a breach of Charter rights, no body of jurisprudence has yet developed setting out principles for the award of damages under section 24(1). This observation remains true over ten years later, in light of the small number of Charter damages cases, particularly in the section 15 context. In *Eldridge*, the successful claimants had not asked for damages to recompense them for interpretation services denied in their past efforts to access health care.[91]

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[86] *Id.*, at para. 59. In *Doucet-Boudreau* the Court upheld an order by which a trial judge gave himself continuing oversight of the status of government "best efforts" to provide school programs and facilities by particular dates.

[87] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] O.J. No. 2681, 39 O.R. (3d) 487 [hereinafter "*Jane Doe*"].

[88] *Id.*, at 524.

[89] *Id.*, at 519.

[90] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311, at para. 61 [hereinafter "*RJR-MacDonald*"].

[91] *Eldridge v. British Columbia (Attorney General)*, [1992] B.C.J. No. 2229, 75 B.C.L.R. (2d) 68 at para. 1 (Sup. Ct.); *Eldridge v. British Columbia (Attorney General)*, [1995] B.C.J. No. 1168, 7 B.C.L.R. (3d) 156 at para. 1 (C.A.); *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 11.

A Supreme Court of Ontario decision awarding damages for government action violating section 15, *Wynberg et al. v. Her Majesty the Queen,*[92] is currently under appeal. In *Bonnie Mooney v. British Columbia* ,[93] the Court refused to acknowledge any causal link between police attitudes and behaviour, and the catastrophe which affected a woman, her child, and her friend at the hands of a violent estranged husband from whom she had unsuccessfully sought police protection, and found no liability at all.

3. Sections 24 and 52 Damages for Unconstitutional Statutes

Chief Justice Lamer holds in *Schachter* that a retroactive individual remedy under section 24 will rarely be available in conjunction with a remedy under section 52. Where a provision is declared unconstitutional and immediately struck down pursuant to section 52 that will usually be the end of the matter.[94]

Even where the declaration of invalidity is temporarily suspended, *Schachter* holds that a section 24 remedy will not be available in the interim, for to grant one would be to give the declaration of invalidity retrospective effect.[95] This holding was later confirmed by the Court in *R. v. Demers.*[96] There, however, Iacobucci and Bastarache JJ. clarify that the rule in *Schachter* does not stop courts from awarding *prospective* remedies under section 24(1) along with section 52 remedies. In *Demers,* it was decided that if Parliament did not repair the defect in the *Criminal Code* within one year of the Court's decision, an accused who met certain conditions would be at liberty to apply under section 24(1) for a stay of proceedings against him.[97]

The Supreme Court has followed pre-Charter precedent in holding that damages will not be available for harm suffered as a result of legislation later found to be contrary to the Charter, whether those damages are claimed in ordinary civil actions or pursuant to section

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92 *Wynberg v. Ontario*, [2005] O.J. No. 1228, 252 D.L.R. (4th) 10 (Ont. Sup. Ct.).

93 *B.M. v. British Columbia (Attorney General)*, [2004] B.C.J. No. 1506, 31 B.C.L.R. (4th) 61 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 428.

94 *Schachter, supra*, note 16, at para. 89.

95 *Id.*, at para. 89.

96 *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489.

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24(1) of the Charter.[98] The refusal to hold legislatures responsible in tort rests on the absence of a duty of care owed by the legislature toward a member, or members, of the public.[99] In the context of section 24(1) of the Charter, the question is whether such damages would be "appropriate and just in the circumstances". While the Supreme Court has refused to say that damages can never be obtained following a declaration of constitutional invalidity, it strongly suggests that to obtain such damages, there would have to be a showing of wrongful conduct, bad faith, negligence, or collateral purpose, with a bare finding of unconstitutionality being insufficient.[100]

Given the unwillingness of the Court to link damages under section 24 with a declaration under section 52, the only possibility for financial recovery from a successful section 15 claim is to have the offending statute read up, or read down, to eliminate the unconstitutional barrier to eligibility. If that is done, then the straightforward application of the statute itself will deliver the desired benefit, and it may even be possible to backdate recovery from the time the claim was filed at first instance. This remedy is not retroactive damages, but simply the application of constitutional entitlement rules from the date of application. This approach was followed in the successful workers' compensation claim in *Martin*.[101] Among the issues in *Hislop*[102] was the constitutional validity of Parliament's attempt to set a time limit on the ability to recover back benefits in this way. The limit was struck down in the Ontario Court of Appeal, but leave to appeal was granted by the Supreme Court of Canada. The Court's ruling in *NAPE* and its dislike in general of permitting financial recovery where a statute has been found unconstitutional may, unfortunately, result in the closing of this small avenue of redress for historical inequality.

The refusal to award damages to those harmed by wrongful denial of equality has practical implications for the ability of the disadvantaged to bring section 15 challenges at all. With little prospect of financial recovery after a long and gruelling course of litigation, and no option of

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98 *Guimond v. Quebec (Attorney General)*, [1996] S.C.J. No. 91, [1996] 3 S.C.R. 347, at paras. 12-19 [hereinafter "*Guimond*"]; *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405, at paras. 78-81.

99 *Guimond*, *id.*, at paras. 13-14.

100 *Id.*, at paras. 17-19.

101 *Martin*, *supra*, note 23.

102 *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 4815, 73 O.R. (3d) 641 (C.A.)

group public interest claims, the individual section 15 claimant will have to be both hardy and altruistic. Counsel acting *pro bono* will have to be willing to forego one possible means of eventual remuneration, namely being paid from the proceeds of the case, and depend entirely on the possibility that a court will award costs against the government.

More profoundly, the unavailability of retroactive damages for legislation violating section 15 means that the disadvantaged will continue to bear the financial burden of their inequality. The adverse economic consequences of inequality will not be shared among all citizens. This runs directly counter to the Court's own decisions emphasizing that the margin of appreciation accorded to legislatures balancing competing claims on state resources arises, in part, because "democratic institutions are meant to let us all share in the responsibility for these difficult choices".[103] Shared responsibility for decision-making means little if the adverse financial consequences of such decision-making are borne only by the vulnerable individuals directly affected.

4. Interim Relief

The principles governing applications for interim relief in Charter applications are a somewhat surprising departure from the deference to Parliamentary sovereignty characterizing the Court's substantive and remedial jurisprudence under section 15. In the interim relief context, the Court specifically embraces the idea that the interests of government and of the Charter applicant must be balanced. It begins its analysis in *RJR-MacDonald* by observing that on the one hand, courts must be sensitive to and cautious of making rulings which deprive of its effect legislation enacted by elected officials.[104] On the other hand, it observes, the Charter charges the courts with the responsibility of safeguarding fundamental rights. It continues:

> For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

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[103] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at para. 79.

[104] *RJR-MacDonald*, *supra*, note 90, at para. 38.

> *Charter* and might encourage a government to prolong unduly final resolution of the dispute.[105]

The Court applies the same principles whether the remedy sought is a stay or an injunction.[106] Its three-part test requires a preliminary assessment of the merits to ensure that there is a serious case to be tried, a determination whether the applicant would suffer irreparable harm if the application were refused, and a "balance of inconvenience" determination of which party would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[107]

The threshold to be met on the first two branches of the test is relatively low[108] and many interlocutory proceedings are determined at the third stage.[109] At this stage, as in all constitutional cases, the public interest is a special factor to be considered. Significantly, the Court takes a broad view of the public interest, refusing to confine it to the government side of the Charter challenge. It holds that public interest includes both the concerns of society generally and the particular interests of identifiable groups. It is open to both private and government parties in a Charter dispute to invoke considerations of the public interest, although the burden of proof falling on the private party is higher than that imposed on government.[110]

The Court also holds in *RJR-MacDonald* that in assessing the balance of inconvenience in Charter cases, there is no merit in applying the dictum that when all else is equal, the status quo should be maintained. It states, "One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things...".[111]

The *RJR-MacDonald* and *Metropolitan Stores*[112] cases in which these principles were articulated were not challenges brought by disadvantaged individuals under section 15. The non-governmental actors in these cases were major corporations with the resources to take interlocutory matters up to the Supreme Court of Canada. However, this case law has been successfully applied on behalf of vulnerable

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105 *Id.*, at para. 39.
106 *Id.*, at para. 41.
107 *Id.*, at para. 43.
108 *Id.*, at paras. 49-50, 58-59, 61.
109 *Id.*, at para. 62.
110 *Id.*, at paras. 66, 68, 71.
111 *Id.*, at para. 75.
112 *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [illegible]

individuals, most notably in a series of successful injunction applications on behalf of autistic children arising out of an Ontario government program funding therapy until the age of six.[113]

V. The Way Forward

In order to rehabilitate section 15 as a substantive remedy for systemic inequality, it will be necessary to return to the purpose of the section as perceived by the Dickson Court in the *Andrews* case, which truly reflects the hopes of those involved in framing section 15. There are two ways of doing this.

One is to work at changing the jurisprudence of the Supreme Court of Canada, moving it away from its view that it is really up to Parliament to decide how much equality it wants to promote, and how. Until that shift has taken place, securing any remedy for violations of section 15 will face a double test. First of all, one must navigate the many hurdles of the test in *Law*, to establish a violation of section 15. If the government cannot, in turn, establish justification under section 1, then the equality claimant will have to express her or his desired remedy in the language of reading down, reading in, or severance under section 52. At the remedial level, too, the claimant will face the Court's deference to Parliament, and its caution about treading too heavily on the legislative intent behind the statute. This is particularly the case if the legislation which violates the Charter provides a financial benefit.

The other possible way of returning to the original equality-promoting purpose of section 15 is to address reform efforts at the government actors originally identified as the first resort for equality promotion. Governments do not have to wait for the Supreme Court jurisprudence on equality to return to first principles. Governments themselves can choose to incorporate equality values into the policy

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[113] See *Burrows (Litigation Guardian of) v. Ontario*, [2003] O.J. No. 5858 (Sup. Ct.); *Burrows (Litigation Guardian of) v. Ontario*, [2004] O.J. No. 3217 (Div. Ct.); *Clough v. Ontario*; *Neiberg v. Ontario*, [2003] O.J. No. 1074 (Div. Ct.); *Eisler (Litigation Guardian of) v. Ontario*, [2004] O.J. No. 1864 (Sup. Ct.); *Juravsky v. Ontario (Attorney General)*, [2003] O.J. No. 5857 (Sup. Ct.); *L.S. v. Alberta (Child Welfare Appeal Panel)*, [2002] A.J. No. 1604 (Q.B.); *Lowrey (Litigation Guardian of) v. Ontario*, [2003] O.J. No. 1197 (Sup. Ct.); *Lowrey (Litigation Guardian of) v. Ontario*, [2003] O.J. No. 2009 (Sup. Ct.); *Naccarato (Litigation Guardian of) v. Ontario*, [2004] O.J. No. 3278 (Sup. Ct.); *Newfoundland and Labrador v. Sparkes*, [2004] N.J. No. 34 (T.D.); *Thomas v. Ontario*, [2004] O.J. No. 3340 (Sup. Ct.); *Wynberg v. Ontario*, [2004] O.J. No. 1066 (Sup. Ct.).

process in a way that gives weight and significance to rights-holding. From what we know of Charter analyses now performed by governments, it seems as if the Charter analysis at various stages of the policy and legislative process is more in the nature of risk-proofing against possible litigation than it is a thorough going incorporation of the values into policy-making from the outset.[114] To create a Charter-focused policy process, governments would have to embrace the promotion of equality as a desirable goal, and commit to measures that would accomplish it. No less was expected at the time section 15 was enacted.[115]

Experience has shown that equality-seekers cannot entirely escape the need to do section 15 litigation, even if the Court's jurisprudence offers little hope of success, and raises serious prospects that ground may be lost with each restrictive decision. Other parties invoke section 15, and equality-seekers may at least have to intervene in order to attempt damage limitation. Significantly, there were no interveners in the *Law* case, where the Court created its new blueprint for section 15 challenges.

What I am suggesting here is that working to reinstall Charter equality values in the policy process, in a way that gives real heft to rights-holding, is at least as worthy an activity for equality advocates as doing litigation. As worthy, and as necessary: perhaps one of the most effective ways to move the Court away from its equality-averse posture may be to establish that equality goals find favour with the governments to which the Court is so ready to defer.

In the meantime, equality advocates can try to pry open the procedural carapace which now encases the Court's conservative jurisprudence on the substance of section 15 by resorting more frequently to claims for interim relief, and pushing the limits of sections 24 and 52 in ways suggested by *Demers*, *Jane Doe*, *Doucet-Boudreau*,

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[114] Text for oral remarks, Will McDowell, Ministry of Justice "A Powerful Agent for Progress: Section 15" (4th Annual Charter Conference, Ontario Bar Association, Toronto, 30 September 2005); Text for oral remarks, David Zimmer, Attorney General of Ontario (4th Annual Charter Conference, Ontario Bar Association, Toronto, 30 September 2005); *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1.

[115] The argument that equality rights should be taken into account in public policy formulation has been forcefully put by Pearl Eliadis. "Pauvreté et exclusion: approches normatives des recherches stratégiques" (Exploring New Approaches to Social Policy, Policy Research Initiative, Ottawa, 15 December 2004); Pearl Eliadis, Inscribing Charter Values in the Policy Process" in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis, 2006).

Martin and *Vriend*. Amplifying the nature and effect of remedies in section 15 cases, particularly where such decisions reiterate the generous language of cases like *Doucet-Boudreau* and *RJR-MacDonald*, may provide needed space for the regeneration of the equality-promoting purpose of section 15.