SECTION 15 OF THE CHARTER AND RELATED PROVISIONS: A STRUCTURAL ANALYSIS

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I. INTRODUCTION

First, I should say that I am always a little reluctant to be introduced as an expert, although the C.B.C. and other media agents do it to me all the time, so I should be used to it. At least I can claim in this panel that since I am the closest to Halifax of the four speakers, I am the least expert of the four. Since by definition an expert is somebody from far away. So I'll begin with that disclaimer.

In a more serious vain, however, I have carefully examined the Charter but I haven't looked all that extensively at Section 15; nor for that matter has anyone else. Accordingly, what I'm going to do is simply to throw out some of my ideas and some of my general analysis of the Charter and try to apply it to Section 15. I encourage you to interrupt me at any point with questions which I will try to handle. I was talking elsewhere this morning and I don't really know what you were told this morning. Although I got a quick précis from your Chairperson, I may still run into some overlap. If I am doing that please let me know.

The first thing I mentioned to Mr. Justice Nunn before we started is that as a teacher of constitutional law over the last six years, which isn't all that long, I have observed the course undergo significant changes. In the early days of teaching constitutional law, and certainly when I took it as a student, constitutional law was seen as a rather esoteric kind of subject and I suspect perhaps in most of your cases that was the way that you viewed it. It certainly was not something that was the every day "bread and butter" of a general law practice, although distribution of powers issues did occasionally arise. If you were not a

government lawyer or if you were not a constitutional advisor, it wasn't really an every day subject of legal discourse. That has rather drastically changed and I usually start off my constitutional law classes these days by saying that I am in the embarrassing situation of teaching a "bread and butter" course. At least the Charter side of the course and to some extent ever increasingly the distribution of powers side are very practical every day legal issues.

Those of you who are involved with criminal cases already see the practical impact of the Charter. One of the interesting things that Section 15 is going to do is to shift that same pragmatic phenomenon to the civil law side of practice as well as the criminal law side. That may be one of the first significant things to note. Section 15, whatever it means, is likely to be the most pervasive section of the Charter. This would be my estimation and certainly that is true in relation to the civil law side as well as to the criminal. It is because of the predicted sweeping impact that the equality provision was delayed for three years.

With sections 7 to 14 - the legal rights package - of the Charter, many of you already have great familiarity, perhaps more than you like, but we haven't seen as much application to civil law cases and I think that's one of the important changes that Section 15 is going to have. It will extend the Charter net and the practical application of the Charter to a whole other branch of law and as I will suggest in a few minutes probably most areas of law. One bit of evidence of the pervasive impact of Section 15 is that it was the only part of the Charter which was delayed. Everything else came into effect, subject to rain on the parchment when the

Queen came to Canada back on April 17, 1982; but Section 15 was delayed until 1985 specifically because the Provinces felt that it was going to be so pervasive and so alter the legislative and judicial roles that they wanted three years to get their houses in order. During this three year delay various provinces and the federal government have engaged in statute audits to try to find out to what extent their legislation and their policies may violate Section 15. The other point, and I presume this was raised by Professor Mark Gold or Dr. Kinsella, is the fact that the theory of equality that you adopt is going to have a great impact upon how you interpret Section 15.

II. DEFINITIONS OF EQUALITY

The simple reality is that there isn't going to be any one theory of equality either among judges or among Canadians generally. If you ask people to define what they mean by equality you would be hard pressed to get a concensus on any particular definition. That is going to be a problem that is going to bedevil judges as you try to give meaning to Section 15. Not only are you collectively unlikely to agree upon what equality means; moreover, society generally doesn't necessarily agree and is unlikely to agree upon what equality means. This is a fundamental built-in problem.

There is already considerable academic literature on the various meanings of equality. Professor Mark Gold, who spoke to you this morning, has written on this topic in various journals. I shall only raise the definitional issue in a simplistic way. It is important to note that the heading for Section 15 is "Equality Rights" which is a broader concept than

simple non-discrimination. At an earlier stage of Charter making the title for this section was "Non-Discrimination Rights" but it was dropped in favour of the equality label. According to Estey J. speaking for the Supreme Court of Canada in Skapinker, the headings of the various Charter provisions should be used in interpreting the sections which come under them. Thus the touchstone is equality.

In broad terms there are three major ways of defining equality in Section 15.

1. Non-discrimination
2. Equal opportunity
3. Equal outcomes

As already indicated I do not think that Section 15 can be interpreted as just a non-discrimination clause. However, it is clearly a non-discrimination guarantee. The clause is a general prohibition against discrimination and in particular it bans discriminations on particular specified grounds.

Even in relation to this simplest aspect of Section 15 there are many difficult problems. Must the prohibited discrimination be intentional or is it enough that the impact or result is de facto discrimination. This issue is presently before Canada's Supreme Court in respect to provincial human rights codes. In the United States the courts have required an element of intent before they would find unconstitutional discrimination. Another perplexing problem is whether there must be an adverse impact to the discrimination or is different treatment in and of itself a prima facie violation of equality.

In addition to non-discrimination there is broad support for the view that Section 15 guarantees equality of opportunity to all Canadians. This view of equality could involve the courts in a positive as well as negative role in upholding the Charter. Judges could be required under this view of equality to mandate programs in order to produce real equality of opportunity. A more traditional and negative role for courts would be preventing judges and the other branches of government from infringing upon equal opportunity. In American cases they sometimes talk about a guarantee of equality of laws and not necessarily equality of results. Other American cases do take note of the "disparate impact" of facially neutral laws. A simple removal of express government barriers to equal opportunity will not allow people who are factually disadvantaged to achieve real equality.

Finally the broadest and I would argue most desirable, interpretation of equality is one which calls for equal outcomes. This theory will focus attention on the actual impact and results of legal and government policies. There would need to be empirical data to assess whether particular laws and policies have a disparate impact on particular groups or individuals in society. Judges would be involved in mandating positive programs to promote equal outcomes. This theory would produce the greatest expansion of the policy-making role of judges in Canadian society. It appears to me that this theory would best fulfill the "purposive" interpretation of the Charter advocated by Chief Justice Dickson in Southam v. Hunter.

Defining equality will be a major challenge for judges. In some cases, the concepts of equality and non-discrimination may even be in conflict. This is in part recognized by the approval of affirmative action programs in subsection 15(2). Equality may mean different rather than similar treatment in many situations. Simplistic notions about equality such as gender neutrality will not meet the spirit of Section 15 of the Charter. Furthermore, acceptable definitions of equality will change over time. There are different but challenging days ahead for judges in giving content to the concept of equality.

III. APPLICATION OF THE CHARTER

One of the things to emphasize in talking about Section 15 is to emphasize that the general sections of the Charter all apply to Section 15, as they do to the other sections. One of the interesting ones is the application section. I understood there was some discussion about that this morning but I'll just start with that.

How extensive the impact of Section 15 is will depend in part on whether the Charter and Section 15 apply only to state actions or whether they apply also to private actions. That is obviously a very basic question. Most of the early academic commentators and judges suggest that it is likely to be applied only to state action for a host of reasons; one being that the drafters and creators of the Charter clearly had government actions in mind. Second, the most literal interpretation of section 32 is that it applies to the legislatures and the governments of both the federal and provincial levels but not by implication to the private sector.

However, it is not a completely shut case. Professor Dale Gibson of Manitoba, in particular, and a few cases have said that they think the Charter does apply to private action for a couple of reasons. Gibson advocates a broad application on the basis that you really can't divide public and private any more so why bother trying to do it. That is the essense of his argument. But perhaps the more compelling argument in relation to Section 15 is, that if you take what we might call an affirmative action or a positive approach to Section 15 and say that equality in Section 15 means not simply that you as judges can tell people what they can't do but also that you can exercise power in a positive and affirmative way and mandate people to do things, then it makes little sense to stop at the public sector. If the duty of judges under Section 15 is to positively promote equality and I'll come to this in a bit more detail, then their decisions will have to have an impact in both the public and private sector.

What do you mean by equality rights? Well, one argument is that equality rights would require a Court to not simply tell governments what they cannot do but to actually require governments to do things. Let me give you an example. One would be to require provincial legislatures to add to the various human rights codes equivalent grounds of discrimination to those found in Section 15. If the duty under Section 15 is a positive one, you could mandate legislatures to add equivalent grounds to the human rights codes. For example, most provinces do not have protection for discrimination based on mental disability. Nova Scotia doesn't and many other provinces are in the same situation. Since mental disability now is

in Section 15, on at least one theory of equality, if a person came to Court who was excluded because of mental disability they could at least argue that the judge's duty under Section 15 is to require the legislature to add a ground to the human rights code. Now, of course, that is quite shocking to Canadian judges. I'm not saying they are going to do that but I am saying that is a potential interpretation if you take an affirmative or a positive approach to equality.

If we take that broad an approach then I think you do indirectly start invading the private sector to some extent. First of all, you certainly are mandating the public sector and when you start talking about adding grounds to the human rights code you are affecting the private sector. There are many other possible examples.

Secondly, even the definition of what is the public sector and what is state action isn't self-evident. A nice little fact situation which I put before my students is, what do you do with a situation like an oil rig that is operated by Petro Canada which is within the territorial waters and you have a rule made by the manager or the person who operates the oil rig which says no distribution of political phamplets on the oil rig during an election. It is a clear violation, in one sense at least, of freedom of expression and perhaps even freedom of association; however, the first question is, is this the kind of situation caught by the Charter. Is Petro Canada operating an oil rig part of the government? Well, we seem to pay a reasonably healthy public salary to Mr. Hopper and Petro Canada has a red maple leaf flag on its gas pumps. Does that make it part of the federal government?

Petro Canada is a Crown corporation. Does that make it state action or a part of the government? That's the first question. There's even another interesting twist when you get into American doctrines of state action because they say even if it's not part of the state by way of statutory powers, grants of funds or government nexus, so long as you are performing a governmental function you may still be part of the state action doctrine and covered by the Bill of Rights. The best example of the government function test and why I like my oil rig example is the company town cases exemplified by Marsh v. Alabama. This was a case in the United States Supreme Court where a company town operated by a completely private company was found to be subject to the Bill of Rights. The company did not allow Jehovah Witnesses to distribute phamplets in the company town. For all intents and purposes the company was the government. They ran the town. The U.S. Supreme Court looked at that fact and said even though there is no state connection, there's no public funding and there's no statutory authority, they function like a government and therefore they in fact are caught by the Bill of Rights. It seems to me on that analysis you might well say at least Petro Canada operating the oil rigs is functioning like a government and you might even say if it were Mobil Oil or Esso, they are still functioning like a government although they don't have any kind of government connections or funding such as Petro Canada has. I'm really saying that even once we adopt state action we still have a pretty broad impact depending on how you define the state.

Another interesting question is the extent to which judges are covered as part of state action. Can Mr. Ryan sue Judge Harrigan in the Premier

Hatfield drug trial for a violation of Charter Rights, assuming there were some? That's quite jaring and you would say, of course not. Surely one of the sacred judicial principles is that what a judge says in a courtroom is covered by absolute privilege, which I think is correct. The problem is, has the situation changed post Charter? We have other constitutional doctrines that talk about free expression and security of the person. There are really two debates in issue here. One, is a judge subject to the Charter as part of the government - a concept which jars us when we think of the independence of the judiciary? Judges don't normally get lumped in as part of the government but yet their authority is statutory. Second, even if they are subject to the Charter can we really talk about eliminating a value like absolute privilege in the courtroom? I think really the debate is easily resolved on the latter question in the sense that most any court is going to say that absolute privilege is a reasonable limitation on free speech. But on the first question as to whether judges are caught by the Charter it's not so clear at all. There are some cases already that make it clear that a judge making common law is bound by the Charter.

The Sunday Times case decided in the European Court of Human Rights, and I think there are some early Canadian cases, that say that a judge in making the common law is subject to the Charter in the same way that the Federal government making statutes and the Provincial government making statutes is subject to the Charter. That is an entirely different thing, I might add, from saying that you can acquire damages from judges for a violation of Charter rights. It is simply saying that common law is part

of the law that you then can challenge on appeal. If a judge gets it wrong on common law grounds, then you can go to court and say in reaching this decision you violated some Charter right and that is a ground of appeal. That's a different matter from suing judges. I'm just throwing this out to demonstrate how open-ended this whole concept of government and state action is. There have been some early cases such as the Germain v. The Queen, decided by Justice David MacDonald from Alberta, where one of the main defendants was a judge. In that case, if I remember it correctly, he did say that he had no difficulty with the general concept that a judge was part of state action and to a limited extent subject to the Charter of Rights.

That is different from ruling out absolute privilege. I think the point is that even if you adopt state action as the proper interpretation of section 32, you can go a long way into the private sector with state action. Corporations acquire their authority under the Companies Act, either the provincial or federal versions and one of the basis that Americans have used to define state action is whether you derive your authority from statute. All companies in a sense derive their authority from statute because they are incorporated either under the Federal Companies Act or the Provincial Companies Act. The same argument could be made for unions certified under general labour law statutes. Does that mean that companies and unions thereby become tainted with the state and are subject to the Charter. I think the answer is no but it is not immediately self-evident. To this extent there is some sympathy for

Professor Gibson's point that when you start trying to draw the line it is difficult to separate the public and private spheres.

IV. THE EQUALITY PROVISION: SECTION 15

There are four phrases in Section 15 that all basically add slightly different elements to the equality concept. In fact, anybody outside Canada would think that Canadian draftsmen stutter because we have quality before the law, under the law, equal protection of the law and equal benefit of the law. Most Americans would say, why did you say the same thing four times. They are, I think, all rather different and the difference may go to the affirmative role for courts. Section 15(1) basically includes four somewhat different rights. Let's start with the first one - equality before the law. Well that is simply the Bill of Rights language. In fact it is the exact same language as we have in the Bill of Rights which even in the rather narrow rulings of the Lavell and Bliss cases in the Supreme Court, gives us equal administration of the law before the ordinary courts. I think the predominant interpretation after Lavell and Bliss is that equality didn't guarantee equal content of the law, but whatever the law's content, it had to be equally applied before the courts of the land. The various groups who basically designed Section 15, tried to have it worded to avoid the narrow interpretations under the Bill of Rights.

There is another point that lawyers in particular tend to forget; that Section 15 was not developed by a group of legislators going to some Tibetan mountain and meditating on the words of the Charter. These are not

moral principles descended from on high. The Charter was politically negotiated in the sense that most of the kinds of rights that got put into Section 15 are in there because rather well-organized and articulate groups appeared before the joint House and Senate Committee and convinced the legislators and drafters that their group should be added to the protected list - whether it is mental disability or sex discrimination or whatever. Those were rights that were essentially lobbied into the Charter. I am not saying that's wrong or right. I'm just saying it's a fact of life. That is how Section 15 was designed.

When you take that into account consider the next section which says equality under the law, which was negotiated into Section 15 by a very effective and articulate women's lobby, was put in there to indicate that you can challenge not just the application of the law but the content of the law as well. In other words, that was their answer to Lavell. Equality under the law could be read as containing in brackets - repealing the Lavell decision. Now the judges have a mandate not only to talk about equal application of the law but whether the content of the law itself is equal. You can question the actions of legislators and not just of bureaucrats and administrators. This is very clear when you read the transcripts of the Joint Senate and House Committee. This extension in itself gets judges into a much more active kind of role with respect to the legislatures than courts have traditionally adopted.

The third version of equality speaks of equal protection of the law which is an exact borrowing from the United States. I think Mark Gold talked to you this morning about the extent to which Canadian judges might

draw on the United States. It is obviously significant that this is exactly the wording used in the Fourteenth Amendment so we are going to use that as a way of bringing in some American case law on equality. This American caselaw is much more extensive, much more affirmative,, than is the Canadian Bill of Rights jurisprudence but yet they didn't stop there. They went one more which is equal benefit of the law. That is why I say Americans think we stutter because we keep saying the same thing. I think they are different formulations.

Equal benefit of the law can be read as containing in brackets - repealing the Bliss decision. Again women's groups were very upset with the ruling in Bliss which as most of you know was the unemployment insurance case denying equivalent claims to men and pregnant women. Ritchie J. said that any discrimination is based on pregnancy and not on sex. It seems to me that it is a little hard to entirely divorce those two things but that was one of the parts of the ruling. The second part of the ruling, and this is what the equal benefit thing is aimed at, was to say that Drybones is a different case from Bliss because Drybones concerned penalties and what equality before the law means is nobody is to be unequally penalized under the law. Bliss suggests that it is acceptable if you distribute benefits under the law, unequally. It's one thing to penalize unequally but it's a different thing to give benefits unequally and since U.I.C. is in the nature of benefits, they need not be distributed equally according to the Bill of Rights.

In Drybones they say it is not fair to attach a different penalty to an Indian on a reserve to a non-Indian on a reserve and they emphasize

Drybones concerns penalties. The Bliss case involves benefits. So those two are different cases. Not to be outdone the women's groups said we'll put in equal benefit of the law. So now Bliss is repealed, at least arguably. You are going to decide whether Bliss and Lavell are repealed but that's what they intended to do. There are those four very broad kinds of equality guarantees but to muddy the waters a little bit further, they then go on to say in Section 15(1) that all of these are to be without discrimination.

So first of all you have four kinds of equality and secondly, all of these equalities are to be accorded without discrimination which is perhaps redundant, but I don't think it is entirely redundant. Sometimes in order to promote equality you may have to discriminate and the effect of 15(2) is to give a license to discriminate in the broad sense, in the name of affirmative action. So that at least Section 15(2) is still an equality right but it is not in some senses a non-discrimination right. So that's another argument to say maybe there is a broader more affirmative duty under Section 15(1).

The general rule is no discrimination. Then they go on to list certain listed categories which are suspect categories; race, religion, sex, mental disability, physical disability, ethnic origin and so on. This is a list but it's not a complete list. Other unenumerated grounds are also available so you can still go under Section 15 and argue discrimination based on marital status or go under 15 and argue discrimination based on sexual preference or argue discrimination based on social and economic status. All of those are discrimination in the broad

sense but they're not one of the listed categories. It says no discrimination and in particular no discrimination based on this list but simply by saying "in particular", the list, implies there must be other grounds. That's all by way of saying that in that one little section 15(1) you pack quite a few concepts and quite a few avenues by which to try to pursue rights in the courts.

The result is an incredibly complex thing to try to parse. It is a real contrast with the American equivalent. It has five words - equal protection of the law. Nothing else. And we have encountered these words in Section 15 but there are many more words than five and we have many more concepts than five. It fits the rest of the Charter because it's a classic Canadian compromise. We put in a little bit of Britian and a little bit of United States and a little bit of Canada and we stirred it around and we got equality rights. In that sense it's a bit of a mismash. When you read the general thrust of it, however, there is a clear intent to create broad equality rights in contrast to the interpretations under the Canadian Bill of Rights. Throw away the Bill of Rights except maybe for the phrase equality before the law. We are starting over again with a whole new much broader concept of equality. I think that's one of the most important messages that I could impart.

V. METHODS OF ANALYSIS

I have said there are at least the four rights - equal before, equal under, equal protection and equal benefit. One of the interesting questions that judges have already had to consider is how do you analyze

Section 15. This is part of the broader question about how judges should approach the *Charter* and in particular how to use section 1. I understand that this morning you have already looked at the three levels of scrutiny that you might import from the United States. This raises the vital question about what standards of review judges should apply when dealing with the *Charter*.

By way of review the three levels of American scrutiny are - the highest level referred to as the compelling state interest, the intermediate category which requires a substantial state interest and the minimum scrutiny test where the person alleging the violation has the burden of showing that no valid purpose is achieved. This is sometimes described as showing that there is no rational connection. For the other two levels of scrutiny the burden is on the state.

I have heard that Gold's view was that there was no particular hierarchy of grounds of discrimination. Canada was not going to take the same approach that the Americans have where they say for example, that race is at the top of the list. Race is an automatically suspect category and the state is going to have to really pull out all the stops to justify discrimination based on race. It really has to be a terribly compelling state interest to get away with that one. But if you talk about sex that moves down one notch to intermediate category and you simply have to show a substantial state interest not a compelling state interest. Economic discriminations have normally been subjected to only minimal scrutiny.

If we go this hierarchy route in Canada and I would rather suspect we would, I think sex discrimination will be the top category. I say that for

a whole host of reasons but the most direct one being that section 28 of the Charter gives additional protection to sex discrimination in addition to whatever is said in Section 15. One of the list of grounds in Section 15 is sex discrimination but in addition you have Section 28 which says that all persons are to have equal application of the Charter of Rights regardless of whether they are male or female persons. Therefore I think you could make the case for sex discrimination as the most protected category. In think there will be a hierarchy of rights with different standards applied and the top category is going to be solely and singularly sex discrimination.

Within the listed grounds there is going to be a kind of hierarchy and I suspect race would be next to sex as a protected category. Then you go down to the next category and at the bottom of those listed rights is probably age. Age discrimination will be the easiest listed right to justify. We can all think of age discriminations that can be justified. A rule that says you have to be a certain age to drive a car, a rule saying that you can't go into a tavern at age six are obvious examples. It's not too hard to say those are reasonable limits. A rule that says you can't enter a certain profession until you are of a particular age is another example. All of those are easily seen as being justified, whereas race discrimination and sex discrimination are not. I would tend to think there will be a hierarchy.

The third category in the hierarchy of discrimination rights will be the unenumerated rights. You have sex discrimination at the top, listed rights in some order within themselves, probably going from race to age,

and then a third tier which is unlisted rights, such as, marital status, sexual preference, social and economic discriminations, regional discrimination and any number of other things that you might read into Section 15. I would think that judges probably are going to apply different standards of justification depending on where you are in he hierarchy. The hardest one to justify is going to be sex. The easiest one in the listed categories will be age.

An interesting question that doesn't come out of the American experience but does come out of the Canadian Charter is where do you do this justification? Is the Charter a one stage or a two stage process. You first of all go to Section 15 and say is there a violation of a Section 15 right? Let's not worry about reasonable limits, prescribed by law, free and democratic society - set all those aside. Is there in fact a violation of equal before the law, equal under the law or some of the listed discriminations? If you answer yes, there is a prima facie violation, then you go to the second stage and say yes this is sex discrimination or yes this is age discrimination, but is this a reasonable limit prescribed by law in a free and democratic society. The burden at this second stage is on the state.

I think the correct approach is the two stage analysis and on the second step is where judges are going to bring in the American standards of review, not at the first step. My clairvoyance is no better than anybody else's but I think it makes more sense to talk about compelling state interests and various other standards in relation to section 1. Furthermore, it is going to make a difference where your right is in the

hierarchy of Section 15 rights. In other words, if you are dealing with a sex discrimination case it is going to be difficult to use section 1. If you are dealing with a non-enumerated discrimination, it is going to be fairly easy to use section 1. In a strictly practical sense that's the way I would see Canada using the American experience.

The American experience cannot be immediately transposed into Canada. In particular I can think of two difficulties. First, we are not the United States and Chief Justice Dickson and others are increasingly calling for Canadian jurisprudence and a creative new jurisprudence. Second, a practical difficulty in applying American law to Canada's Charter is that they don't have anything like section 1. There is no general limitation clause in the American Bill of Rights, so what the Americans have to do is read the limitation into each particular right. Let me give you an easier example than equality.

In the United States the only way you talk about reasonable limits on free expression is to say that obscenity is not part of free expression. They simply defined obscenity out and said whatever free speech means it doesn't include obscenity. Obscenity is not protected. Canada doesn't have to do that. Canada can say obscenity is a form of expression - not one we like but it's a form of expression like everything else - but we are going to go to section 1 and say anti-obscenity laws are reasonable limits. So yes it's free expression but under reasonable limits we are going to allow anti-obscenity laws.

Canada could do the same thing with hate propaganda. We could say, yes racist comments are expression but it's reasonable in a free and

democratic society to say we're not going to tolerate that. I think we have an advantage over the Americans in the sense that we can make purer law about what the rights mean and do our justification as a separate step - whereas the Americans are forced to do it all as one package because they don't have an equivalent to section 1. Americans have to say, well yes on the one hand free expression values and on the other hand equality values aimed at preventing anti-semitism or racism and so on. I think the two stage process makes a big difference. Canada can more clearly articulate her value choices.

VI. AFFIRMATIVE ACTION AND THE CHARTER

In order to avoid the arguments that affirmative actions programs violate the principle of equality, subsection 15(2) expressly states that affirmative action programs are constitutional. This phraseology was intended to avoid controversial court challenges such as the *Bakke* case in the United States which challenged preferential quotas for Blacks in medical schools. It is clear in Canada that affirmative action programs do not violate the *Charter*. As discussed earlier, some advocates of equality argue that courts must mandate affirmative action in order to give effect to equality. At a minimum affirmative action programs and policies are permitted in Canada.

I should not say very much about subsection 15(2) other than to state the above and play a little statutory teaser with you, which I am sure you can play better than I. Subsection 15(2) in one way of looking at it, is simply a subtraction from 15(1). Section 15(1) says equality and no

discrimination. Subsection 15(2) says, however, if you have an affirmative action law program, policy or activity, that is intended to benefit a disadvantaged group, then that is deemed not to violate Section 15. We have defined "reverse discrimination" as not being a problem by way of 15(2).

An interesting question that comes out of this is what is the impact of section 28 on affirmative action. A useful way to look at the equality development is as a kind of poker game. Start out with Section 15(1) and you play your card that says full equality across the board - no discrimination. But because of the kind of political lobby process, various groups come along, such as, native groups, and say we're not sure we really want full equality because the Indian Act and various related programs actually benefit Indians and we prefer some special status. Accordingly, we're going to play sections 25 and 35 which say full equality but existing aboriginal rights. Then the ethnic groups come along and say well that's all very nice but what about ethnics. We really don't want to be treated exactly equally, after all we get some special money from the Secretary of State. Why don't we play section 27 which says that all the rights from the Charter must be interpreted consistent with the multi-cultural heritage of Canada. So we have Section 15 that says no ethnic origin discrimination and we have Section 27 which says take account of the ethnic diversity in Canada. Then there are denominational schools and they say well this is all very nice to talk about no religious discrimination and equality but what does that do to Roman Catholic schools and what does that do to denominational school boards.so Premier Peckford

and a few others play section 29 which says the Charter doesn't apply to denominational school boards. In a sense you have three subtractions from Section 15.

Once all these cards are on the table some of the original players, the women in particular, get a little concerned that we've had a subtraction from the full equality principle. They now play the trump card which is section 28 which says notwithstanding anything else in the Charter all the rights in the Charter are to be guaranteed equally to male and female persons. You may say all of those rights, 15, 25, 27 and 29 are now set aside by 28. So at least if one pulled out of the poker game at this point, you would conclude that the very articulate and effective women's group won a significant victory and that they have got the top card. They probably still do.

One interesting and ironic twist to section 28 is that if you apply to the affirmative action subsection 15(2) it could be argued that the only group that cannot have an affirmative action program are women. Section 28 says notwithstanding anything in the Charter, male and female persons have to be treated equally. Subsection 15(2) says you can actually have affirmative action programmes for groups based on sex, religion and so on but that is set aside by 28 which says full equal treatment. On a strict literal interpretation you would have the ironic and perverse result that women would be excluded from affirmative action programs. I don't think that's what you should say or will say but at first glance it's not a bad argument.

I think the reason that you shouldn't and won't say this in the end is twofold. First, it is clearly contrary to the legislative intent of section 28. The intent was to improve women's position in Canada, not to diminish it. It goes back to your definition of equality. If your definition of equality is one that's more positive or at least more active then affirmative action is part of equality. It's not really a subtraction at all. It's an addition to equality.

I think the second argument is better but it gets rather convoluted. John Whyte from Queens University puts forward this argument. The real question for section 28 is what rights are guaranteed equally to male and female persons. Is it the gross rights prior to the section 1 and other subtractions? I will speak in income tax terms of gross rights and net rights. If you say what is guaranteed equally to male and female persons under section 28 is gross rights, you don't think about section 1. You don't think about any internal subtractions just the total right which is guaranteedequally to everybody. More likely says Whyte, and I think he's right about this, it's the net right that is guaranteed. What's really guaranteed by section 28 is the right that's left after you have subtracted section 1 or in relation to Section 15(1) after you have subtracted 15(2). If you look at 15(2) as a limitation on broad equality rights what's guaranteed equally by section 28 still allows for women's affirmative action programs. In a common sense way judges are going to say no, section 28 can't be read to reduce the rights of women in Canada, which would be a complete travesty of the whole intent.

I think it's also a good illustration of my earlier point that the _Charter_ was not an immaculate conception. In fact I think there might be some other more relevant models. It was very much a political document and section 28 was drafted in response to a lobby at the last moment, without necessarily thinking through what impact it would have on the rest of the sections in the _Charter_. If you remember the process the original November Accord did not include rights for women, nor native rights and many of these were added in that short period after the original accord and before it was sent to London. Thus the draftsmen had to move rather quickly. This would be my own theory.

One other little brain teaser and I'll move on to other sections. The other interesting effect of section 28 is that it starts with notwithstanding anything in the _Charter_ but that is also the effect of section 33. The override clause allows notwithstanding clauses to escape the Charter. Can you or can you not opt-out of section 28? Section 28 says notwithstanding 33 and 33 says notwithstanding 28. Who is notwithstood here? I'm not sure. I suppose there are two possible statutory interpretation answers. One would be since 28 came later the better argument would be that the notwithstanding clause in section 28 has more power. When section 28 came in section 33 was already there so it was set aside by 28. But when 33 came in 28 was not there so it couldn't be set aside. The other is simply to say the particular prevails over the general. If you take the particular over the general the more particular is section 28 and the more general is 33; so 28 should again prevail. So there is a down side and an up side to section 28. Section 28 may be one

of those rights that you can't opt out of whereas Section 15 is not. In that sense it was a very clever move by the women's groups. This goes to my earlier point that if you are going to get into hierarchies of rights I think sex is probably at the top and the rest of the Section 15(1) list comes after that.

VII. OTHER RELEVANT CHARTER SECTIONS

The other point I am supposed to raise is the other sections of the *Charter* that are relevant to Section 15. There is a whole host of other sections that will in fact have an effect on 15 besides the general sections that I have mentioned, such as, sections 1 and 32. One of the arguments, and I think it's a good one, is that the whole package of legal rights have an equality component to them. Sections 7 to 14 of the *Charter* can be seen as minority rights. The rights are intended to protect the criminal accused. Maybe we are getting to a state in society where the accused person is in the majority but I don't think so. If we are still at a state where the accused person is in the minority group, the legal rights can be seen as promoting equal rights. To use American terminology, those accused of a criminal offence may be a "discrete and insular minority".

Another more obvious related provision is section 6. Section 6 which guarantees mobility is really a non-discrimination right because it prohibits discrimination based on place of residence. The best illustration of the connection is in the United States case law. Citizenship requirements for bars were struck down as they were in violation of the equal protection clause of the Fourteenth Amendment. The

Americans do not have a separate mobility rights clause. Now, we might achieve the same result under either, mobility rights - no regional discrimination and no provincial discrimination - but such conduct also may come under Section 15. What I am saying is, there are other sections of the Charter that have equality impacts. Democratic rights proclaimed in sections 3-5 of the Charter are another obvious example.

All those rights that I listed earlier, such as, native rights, denominational school rights, multicultural rights, are all equality rights in a different way. They either subtract from or add to equality rights, depending upon how you define them. Whether the guarantees in sections 25, 27, 29 and 35 are seen as promoting or limiting equality gets back to the problem of defining what we mean by equality. This same problem is inherent in the protection of language rights in sections 16-23 of the Charter. These provisions promote equality for Francophones and Anglophones but third language groups do not have the same protections. Is this equality or inequality?

The most important related section is section 7 which some of you have undoubtedly run into already.

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Most of us would say, rather quickly, well surely people are to be treated equally as one aspect of fundamental justice. Second, the American experience with the Fourteenth Amendment puts the concept of due process and equal protection together. The Fourteenth Amendment speaks, more or

less in one breath, about due process and equal protection of the law. Canadians do not have it all lumped into one section. We have very extensive equality rights in Section 15 and our version of a due process caluse in section 7 but the fact that the Americans have wedded these two concepts I think is going to lead some courts astray. Judges are going to see tandem arguments under sections 15 and 7. First, try on Section 15 and if you don't like that, let's try section 7 which also has an element of equality to it. There are common elements to the two provisions but there are also differences.

Other relevant sections of the Charter include the package of fundamental freedoms in section 2. There are two ways in which the section 2 rights are related to equality. The section on religious discrimination obviously is an equality right. If you say freedom of religion that's an equality right in a sense. First, Section 15(1) talks about religious grounds as one of the listed prohibitions but more particularly the groups are minority groups - Jehovah Witnesses, Northeast Kingdom of God members, or any other religious group. It's either religious discrimination under Section 15(1) or you could simply say it's a violation of freedom of religion under section 2(a). There is more than one way to skin a cat.

The provision which perhaps subtracts rather than adds to equality, is freedom of expression in section 2 of the Charter. A good example is the hate propaganda issue. Given that the laws against hate propaganda are aimed at protecting a certain minority - whether it's a Jewish minority, a racial minority or whatever - it is a kind of equality or non-discrimination law. So you put that on one side of the balance but on the other

side of the balance you have free expression. The Keegstra case in Alberta is a classic example of free expression on one side and an equality value on the other, which says you don't discriminate against a particular group or subject them to hate propaganda. In that sense section 2, in respect to free expression, may often be used to attack equality values. Another good example is pornography. Section 2 will be used to defend pornographers but such arguments attack sexual equality. Pornography can be seen as sex discrimination so once again you are going to weigh one right against the other - the equality right to equal sexual treatment against individual free expression rights.

It is evident from my foregoing comments that on some interpretations of the Charter the concept of equality is all pervasive. The other sections of the Charter either add to or subtract from equality, depending upon how judges define the concepts and interpret the sections. One of the important issues that arises from such analysis is whether Section 15 itself guarantees group rights or individual rights to equality. Often group rights and individual rights will be in conflict as illustrated in the debates about hate propaganda and pornography. Throughout the Charter there is a tension between individualistic and communitarian values but this tension will grow once Section 15 comes into effect. Whether or not the separate rights are communitarian or individualistic in their orientation, the section 1 reasonable limits clause guarantees that the rights of the larger social group cannot be ignored. This applies to Section 15 as well as the other sections of the Charter.

VIII. REMEDIES FOR INEQUALITY

Finally, I shall make a quick comment on remedies. Remedies under section 24 are quite open-ended. Even section 52 of the *Constitution Act, 1982* can be sweeping. So long as the challenged law is in conflict with the constitution, then the law is struck down and is of no force or effect. The combined effect of these remedial provisions is to give judges a potentially expansive role in shaping Canadian society. When these broad remedial powers are combined with Section 15 the possible results are staggering. The net effect is that judges can give any remedy that is just and appropriate. First, there is an interesting debate about whether section 24 adds a remedial jurisdiction. Can the Provincial Court or the Family Court now give injunctions, perogative writs or award damages of millions of dollars? One theory was that the effect of section is to give a whole new remedial jurisdiction to all courts. Most of the early cases say no, that is not what the effect is. These cases hold that you still have to pick the proper court and be limited by whatever remedies that court can give within its statutory or inherent limits. The court can give whatever remedies it thinks are just and appropriate within its remedial limits. As yet, there is no Supreme Court ruling on any of this.

But even if no remedial jurisdiction is added by section 24, when you start talking about superior courts or courts that aren't of strictly of statutory jurisdiction, these judges have an open ended authority under section 24 to give whatever remedy is just and appropriate, including mandatory remedies as they have done in the United States. If you discover that the prisons are violating the cruel and unusual provision of the

Charter then you can order the prison to be structured so that they are not so violating. Let's say double bunking violates the cruel and unusual provision; then you can order the relevant authority to take out the double bunking and build the necessary extra cells.

Another interesting example is special education. One could argue under the equality section of the Charter that special education classes have to be equally available throughout the Province and of course that is not the case. In Nova Scotia there is much better access to special education in Halifax/Dartmouth than you are going to get in Mount Thom or Guysborough or most other places. Could you then argue that this violates Section 15 since it says no discrimination based on handicap? Why should you be treated differently depending on whether you live in Halifax or other parts of the Province? If the court concludes that this is a violation, then I think it is open to the court under section 24 to go to the offending school boards and say you have to provide special education classes. In the same way the American courts banned segregated schools and said school boards have to integrate.

Another interesting question comes out of the last couple of examples. Is it going to be a defence to say that we can't afford it? Can the school boards or prison officials rely upon reasonable limits? What if the school board, to use an earlier example, says we agree in principle that we should have special education classes but the simply reality is that we in Guysborough cannot afford to hire special education teachers. There are a couple of options open. One is to say, that may be true and we can't force you to spend money that you don't have, but how do you spend

your money? They respond that we spend quite a bit on sports programs. Is there anything in the constitution that protects sports programs? Well, no, I don't think there is. But there is something in the constitution that bans discrimination against the disabled. Perhaps you will have to cut the necessary amounts out of your sports programs and provide a special education class because the constitution tells you that this is a superior value to whatever is not in the constitution. That is just one example and I think it is a frightening example of the extent to which courts must become policy-makers.

Another option left open to the legislatures is section 33 of the Charter. Let's say that special education case goes all the way to the Supreme Court and they say out goes the sports program and in comes special education. Then that particular Province can put a provision in the Education Act saying that notwithstanding the Charter of Rights, we are going to make education policy in Nova Scotia and for five years at least that is the law and they can renew it after five years.

A better example is abortion. Let's say the Supreme Court of Canada ruled that abortion is unconstitutional and a particular gallop poll is done after this ruling. The federal government decides that there is a lot more political support for pro-life than there is for pro-choice. It would be politically wise to put in a section 33 override to say we override the Supreme Court ruling on abortion and re-enact the abortion section in the Criminal Code.

This is where I disagree with the salesmen of our Charter, Crétien, Trudeau and others, when they told us nobody is ever going to use section

33 because it would be political suicide. It depends on how you are using it whether it's political suicide or not. It's not political suicide to limit rights of prisoners or to limit the rights of the accused. It may, indeed, be politically very popular. The death penalty would be a better example. If you had the Supreme Court of Canada ruling that the death penalty is unconstitutional, an override would not be politically unpopular. That I suspect would be good politics and not bad politics. It might be bad morals but it's good politics. Thus if judges go too far beyond the public in there exercise of discretion they may be overriden. This can be taken as an indication of the need for caution or a mandate for boldness at the judicial level. In either case the legislators can have the last words.

Given the breadth of the remedial provisions judges will be called upon to exercise prudent discretion in their fashioning of remedies. They should be creative and not feel bound by pre-*Charter* practices but they should also avoid going too far. Professor Dale Gibson, in a paper prepared for a 1985 Toronto equality conference, argues that the courts are the critical actors in the new *Charter* drama. Nonetheless, we should not too quickly assume that Canada will abandon her traditional doctrines about supremacy of parliament, the general *bona fides* of administrators and the need for courts to be deferential. The judges must be able to sing in harmony with the other branches of government at times and at other times sing solo. In Professor Gibson's words:

> ... judges must be more than spectators at the Charter Rights Opera. Their active participation is essential to a successful performance. Usually they will sing in

the chorus, or in duets with politicians. Occasionally they will have mere walk-on parts, carrying spears. From time to time, however, they must be prepared to sing solo.

IX. CONCLUDING THOUGHTS ON THE COURTS AND EQUALITY

As emphasized in the quotation from Professor Gibson, the equality provisions may signal a new role for courts in Canada. It is really only an extension of the role that judges have already been performing under the other provisions of the Charter. Moreover, the role of judges as policy-makers predates the Charter and to borrow a phrase from Chief Justice Dickson, Canadian judges have always been "law developers" if not judicial legislators. It is the open-ended nature of Section 15 which intrigues academics and intimidates some judges. The kinds of challenges that can be mounted under the name of equality seem endless.

I have already suggested that an affirmative approach to Section 15 could lead the courts to mandate legislators to bring provincial human rights codes in line with the Charter. Equality may place limits on government hiring practices and possibly even prerogative appointments, such as judges. Most commentators have concluded that affirmative action programs, while permitted, are unlikely to be mandated. Once again it depends upon how judges define the concept of equality.

Most legislation discriminates in the broad sense, but most of these discriminations could be defended as a "reasonable limit" on equality, if indeed they violate at all. An important question to be resolved is whether the real thrust of Section 15 is group discrimination based on immutable characteristics or socioeconomic status. This interpretation

would produce a narrower range of challenges then would an individualistic interpretation of Section 15 which could trigger court action whenever one person receives different treatment from another. The latter broad interpretation would not only tie up most of the judges' time; it would severely inhibit policy-making by the other branches of government.

Even on a communitarian analysis, citizenship requirements for admission to provincial Bar Societies would be open to challenge. So would provisions in the federal Income Tax Act which treat married people differently from thse who live in a common law relationship. Automobile insurance rates, to the extent that they flow from statute, would be questioned because they tend to be grouped on the basis of sex, age and marital status. Age classifications for purposes of driver's licences, school attendance and voting would also be subject to attack. Mandatory retirement provisions, either in statutes or collective agreements, will undoubtedly lead to a Charter argument. Many of these challenges will not succeed because the courts will find the challenged provisions to be a reasonable limitation on equality. The state will bear the burden of justification in such cases.

The concept of "disparate impact" for facially neutral laws also opens up a wide range of possible challenges. Equal access to special education programs or schooling generally already has been discussed. Another example would be the application of child apprehension laws so as to disadvantage particular minorities or the poor. Closer to the domain of judges the exclusion of the electronic media from courtrooms, while allowing the print media, is another issue that will likely materialize in

the form of an equality challenge. Thus equality can be violated at the administrative as well as the legislative level. Indeed, as explored earlier in respect to the application of the Charter, equality can also be violated at the judicial level.

What's the effect of Section 15 going to be for the judges and those who are appearing before the judges. The first impact is going to be a very different kind of evidence coming before your courts. For example, one of the theories of equality is equal outcomes. Under this theory judges should not just look at whether there is an intentional discrimination but rather at the outcome and whether the effect is discriminatory. Let me give you an example using the United States. Courts in some states discovered that the death penalty was unconstitutional in that the great majority of people subjected to it were Black. There was nothing unequal in the law itself. It didn't say the death penalty for Blacks and life imprisonment for Whites. There was nothing in the statute and nothing in the policy. As a matter of effect when they came to measure it, all the people being executed were Black.

A good example of neutral characteristics that could lead to discrimination would be height restrictions. The old rule said nobody gets into the R.C.M.P. unless they are six feet tall. There is nothing discriminatory about that. It doesn't say only tall males need apply. It just says you must be six feet tall. But it you look at the effect of that policy it is discriminatory. If you start defining equality in that way, if you start looking at effects and outcomes, it is almost inevitable that what you will see before the courts are studies about what the actual

effect of legislation is. What's the real impact of this law or policy? It looks fine on its face but does it actually discriminate.

Chief Justice Dickson has led the way in calling for more creative arguments from lawyers and emphasizing the need for extrinsic evidence in _Charter_ cases. This need will be emphasized when judges consider the true purposes of legislation, the disparate impact of a particular government policy or who is entitled to an affirmative action program under the _Charter_. There will also be an increased reliance on academics to assist judges in the difficult task of defining what we mean by the concept of equality. While the final decision will properly be made by judges, the legal academics do have something to offer.

Let me conclude by emphasizing the enormous responsibility that is placed on judges by the _Charter_ in general and Section 15 in particular. The other side of the coin is that judges have embarked upon an exciting if difficult new role. There is an ancient Chinese proverb which states in general terms, "the man is blessed who lives in exciting times". If we change "man" to "person", to be in accord with equality, it is an apt proverb for judges as they begin the exciting journey down the road to equality.