A DISCUSSION OF SECTION 15 OF THE <u>CHARTER OF RIGHTS AND FREEDOMS</u>

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

(2) Sub-section (1) does not preclude any law, program or activity that have as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or physical disability.[1]

INTRODUCTION

Section 15 of The Canadian Charter of Rights and Freedoms (hereinafter referred to as the Charter) will come into force on April 17, 1985. In 1982, the provincial and federal governments decided that a three-year postponement of the section coming into force would be necessary to bring their statutes, regulations and policies into line with the language and intent of section 15. It is suggested that the political leaders of the day correctly predicted the potentially broad application of the section. Virtually all laws classify in one way or another. The purpose of most legislation is to extend or deny a benefit to a group of people or to outline the burdens and/or responsibilities placed upon various groups in society. Therefore, it is not surprising that many of these laws will be challenged under section 15 upon its proclamation. However, this is not to suggest that all laws that classify or categorize will be found to be unconstitutional. Clearly the legislative process would grind to a halt if that were the meaning of equality. Therefore, one of the purposes of the discussion which follows is to offer some suggestions as to the nature and definition of the soon to be entrenched right to equality.

In anticipation of the proclamation of section 15 on April 17, 1985, both the provincial government and the federal government have been actively carrying out "statute audits" to identify, and in some cases repeal or amend, statutes, or sections thereof, which they view as offending the principles of section 15. The Government of Saskatchewan recently released a study done by the Attorney General's Department in which they reviewed all Saskatchewan statutes and identified approximately 35 statutes which they felt clearly offended the language of section 15.[2] In November, 1984 the Attorney General of Alberta introduced in the Legislative Assembly Bill 95, the Charter Omnibus Act in which 34 statutes are amended on the basis of various sections of the Charter. A large number of these amendments are in response to section 15. The Attorney General's Department reviewed the approximately 450 statutes in force in the Province and initially identified 250 as possibly being affected by the Charter. According to a press release from the Attorney General dated November 9, 1984:

> ...nearly 50 lawyers in the Attorney General's Department were each assigned a number of statutes to review. Where they were able to identify possible conflicts with the Charter, a further review was done by the Constitutional Law Branch of the Department. This review process resulted in some 30 statutes being referred to a special Cabinet/Caucus Committee to consider possible amendments which are now set out in Bill 95.

The statutes amended by the Charter Omnibus Bill are clearly not the only statutes which may be found to offend section 15. It seems that the Charter Omnibus Bill identifies those sections which the Government felt were unquestionably unconstitutional. There are many statutes which have been identified as raising possible section 15 challenges but since the Government evidently feels there are reasonable explanations for the *prima facie* inequalities found therein, their approach is to leave this legislation as is and wait for legal challenges to determine its constitutionality.

This paper hopefully will provide an outline of the major interpretative issues involved in section 15 and will offer some of the author's thoughts on how these issues may be resolved. The paper is divided into three broad sections:

(A) Pre-Charter History of Equality Rights;

(B) "Equal Protection"--The American Experience

(C) Some Thoughts on the Interpretation of Section 15

(A) Pre-Charter History of Equality Rights

Little time will be spent outlining the existing law in Canada in relation to equality rights. A great deal has been written by others in response to the Supreme Court of Canada's sorry record in this area.[3] After a promising start for section 1 (b) of the Canadian Bill of Rights in the case of R. v. Drybones,[4] the subsequent history of this section has been a litany of irreconcilable and poorly reasoned judgments by the Supreme Court of Canada.[5] It must be stated, in fairness to the Supreme Court of Canada, that the Canadian Bill of Rights was not viewed as a constitutional document. At most, it was considered "quasi-constitutional" in nature.[6] The judicial deference displayed to the doctrine of parliamentary supremacy may be explained in some part by this fact.

The judgment of Mr. Justice MacIntyre in the case of MacKay v. The Queen[7] is the first clear indication that the Court may consider applying a method of analysis similar to that adopted by the American courts when confronted with issues of equality. In MacKay, the appellant was a member of the Canadian Armed Forces who was tried by a Standing Court Martial on seven charges under section 120 of the National Defence Act, six of the charges relating to trafficking of a narcotic, contrary to section 4 (1) of the Narcotic Control Act, and one relating to possession of a narcotic, contrary to section 3 of the Narcotic Control Act. He was found not guilty on one of the trafficking charges and guilty on the other six charges and sentenced to sixty days detention. On appeal to the Court Martial Appeal Court, his conviction on one of the trafficking charges was set aside and his conviction on the remaining five charges was affirmed. The trafficking offences of which he was convicted involved other members of the armed forces and three of these offences took place on army barracks.

The Court was asked to answer a number of constitutional questions, but the one of relevance to this discussion was whether the trial of servicemen by court martial under military law for an offence under the criminal law of Canada deprived servicemen of equality before the law contrary to the provisions of section 1(b) and section 2 of the Bill of Rights. Mr. Justice MacIntyre, in a thoughtful and considered judgment on the meaning of equality before the law in section 1(b) of the Bill of Rights, summarized the existing Canadian law in relation to equality in the following terms:[8]

> ... Judicial construction of the words "equality before the law" found in such cases as The Queen v. Burnshine; Prata v. The Minister of Manpower and Immigration; and Bliss v. A. G. Canada have advanced the proposition that legislation passed by Parliament does not offend against the principle of equality before the law if passed in pursuance of a "valid federal objective". The significance of these words must be examined.
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> Prior to the passing of the Canadian Bill of Rights, Parliament could have passed in the exercise of its power under Section s. 91 (7) of the British North America Act without restriction such legislation in respect of the governance and control of the armed forces as it wished. The Canadian Bill of Rights, however, has introduced another dimension and federal legislation must now be construed according to its precepts. Certainly, the creation and the maintenance of the armed forces of the land constitute a valid federal objective within the legislative competence of the federal Parliament. A valid federal objective, however, must mean something more than an objective which simply falls within the federal legislative competence under the British North America Act. Even in the absence in the Canadian Bill of Rights, a federal enactment could not be supported constitutionally if it did not embody such an objective. The word "valid" in this context must import a concept of validity not only within the field of constitutional legislative competence, but also valid in the sense that it does not offend the Canadian Bill of Rights. Our task then is to determine whether in pursuit of an admittedly constitutional federal objective Parliament has, contrary to the provisions of the Canadian Bill of Rights, created for those subject to military law a condition of inequality for the law.
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> It seems to be me that it is incontestable the Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to the Canadian Bill of Rights. The problem

> arises however when we attempt to determine an acceptable basis for the definition of such a separate class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and conditions affecting different groups which will dictate different treatment. The question which must be resolved in each case is whether such inequality that may be created by legislation effecting a special class--here the military--is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of the universal application of law to meet special conditions and to attain a necessary and desirable social objective.
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> ... I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motivesoffensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the Canadian Bill of Rights.

Mr. Justice MacIntyre, with Mr. Justice Dickson (as he then was) concurring, concluded that in so far as the provisions of the National Defence Act conferred jurisdiction upon courts martial to try servicemen in Canada for offences which were offences under the penal statutes of Canada for which civilians might also be tried, and where the commission and nature of such offences had no necessary connection with the service they are inoperative as being contrary to the Bill of Rights. The Justices concluded that in the case before them the offences were sufficiently connected with military service to come within the jurisdiction of the military courts. They concluded the trafficking and possession of narcotics in the military establishment could have no other tendency than to attack the standards of discipline and efficiency of the service.[9]

It appears that Mr. Justice MacIntyre was in effect adopting the American test of minimal scrutiny,[10] since his analysis concentrates upon a rational connection between the stated legislative objective and the means chosen to achieve that objective. It should be noted that Mr. Justice MacIntyre referred to the requirement of a rational connection as being, at least, the minimum that would be required to save a classification from being found unconstitutional on the basis of Section 1(b) of the Canadian Bill of Rights. Therefore, it seems that the door is left open for the future articulation of a more stringent test, at least, in certain circumstances. With the exception of Mr. Justice MacIntyre's judgment, there has been virtually no attempt by the Supreme Court of Canada to offer a principled analytical framework under which questions of equal protection could be considered. With the proclamation of section 15 of the Charter, it is unlikely that the Supreme Court can avoid any longer its clear responsibility to develop a legal framework under which issues of equality can be addressed and resolved.

(B) "Equal Protection"--The American Experience

The constitutional requirement of equal protection of the law is specifically found in the 14th Amendment to the United States Constitution and clearly applies only to the States. However, the Fifth Amendment's due process requirements which apply to Congress have been held to include an equal protection component. Consequently, the doctrine of equal protection has been applied not only to state laws but to federal laws.

The constitutional requirement of equal protection does not prevent legislative classifications. The doctrine has never required that all persons, regardless of characteristic or situation, be treated exactly the same way for all purposes. Such an approach would make legislative activity virtually impossible. In essence, what is required is that all persons similarly situated be treated in the same way. Clearly the tests developed by the United States Supreme Court in the area of equal protection require one to engage in a "means and ends" analysis. If a court concludes that the challenged legislation has as its objective a legitimate public purpose, then it must address the constitutionality of the means chosen to

achieve that objective. At this stage of the analysis, it becomes difficult to clearly articulate the analytical framework followed by the courts. The Supreme Court, itself, has commented on the confusion that prevails in this area of American constitutional law.[11] However, it appears that the the Supreme Court has adopted an approach which involves three levels of scrutiny. Which level is applied in a given fact situation depends upon the purpose and the basis of the classification being challenged.

The three levels of scrutiny articulated by the Supreme Court are minimal scrutiny, strict scrutiny, and intermediate scrutiny. Minimal scrutiny requires that a classification be reasonably related to a legitimate state purpose. As Laurence Tribe has stated in his book, American Constitutional Law:[12]

> "without such a requirment of legitimate public purpose, it would seem useless to demand and discover even the most perfect congruence between means and ends, for each law would supply its own indisputable fit: if the means chosen burdens one group and benefits another, then the means perfectly fits the end of burdening just those whom the law disadvantages and benefitting just those whom it assists."

However, the courts have exhibited extreme deference to the legislative definition of the general good, either out of judicial sympathy for the difficulty of the legislative process, or out of a belief in judicial restraint generally. Professor Tribe suggests that it is this deference to legislative purpose which has often led the Supreme Court to treat the rationality requirement as the equivalent of the strong presumption of constitutionality.[13]

In applying the test of minimal scrutiny, the courts, after establishing a legitimate government purpose, will then consider the means adopted by the legislature to achieve its purpose. It would appear that for minimal scrutiny, courts only require that the means adopted in the legislative scheme (and which are now being challenged as a denial of equality) are at least one means by which the objective of the state could be achieved. With minimal scrutiny, there is no requirement of perfect congruence between the end sought to be achieved and the means chosen to achieve it. Therefore, as long as the means adopted by the legislature be viewed as one of a number of reasonable or rational methods of achieving the stated objective, that will be sufficient to have the classification or category upheld as constitutional.

An example of an application of these principles can be found in Califano v. Jobst.[14] An action was brought challenging a section of the federal Social Security Act which had the effect of continuing a disabled dependent child's insurance benefits after he or she married, if the person who they married also was eligibile for social security benefits. The section discontinued benefits for a dependent disabled child who married a person who was ineligible to receive social security benefits. Mr. Jobst, who was disabled by cerebal palsey and who had qualified for child's insurance benefits under the Social Security Act, married another cerebal palsey victim. However, his wife was not entitled to benefits under the federal Act and consequently the statute required the Secretary to terminate his benefits. The District Court had held that the statute violated the requirement of equal protection found in the Fifth Amendment. This was because all children's insurance beneficiaries were not treated alike when they married disabled persons. Beneficiaries who married other social security beneficiaries continued to receive benefits whereas those who married non-beneficiaries lost their benefits permanently. The District Court held this distinction was irrational. However, Mr. Justice Stevens speaking for the Supreme Court of the United States made the following comments:[15]

> ... a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons. Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character.

Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status.... there can be no question about the validity of the assumption that a married person is less likely to be dependent on its parents for support then one who is unmarried.

Since it was rational for Congress to assume that marital status is a relevant test of probable dependency, the general rule which obtained before 1958, terminating all child's benefits when the beneficiary married, satisfied the constitutional test normally applied in cases like this. That general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby. For the marriage rule cannot be criticized as merely in an unthinking response to stereotyped generalizations about a traditionally disadvantaged group or as an attempt to interfere with the individual's freedom to make a decision as important as marriage.

The general rule, terminating upon marriage the benefits payable to a secondary beneficiary is unquestionably valid.

In essence, the challenged section created a statutory classification distinguishing between (1) the marriage of a disabled beneficiary to another disabled person who was receiving social security benefits and (2) the marriage of a disabled beneficiary to another disabled person who was not receiving benefits. The Court admitted that persons in the former category were clearly treated more favourable than those in the latter category. It also admitted that the persons in the latter category may have as great a need for benefits as those in the former category. However, the Court did not feel that these findings necessitated a conclusion that the legislative classification was wholly irrational. The Court felt that the broad legislative classification must be judged by reference to characteristics typical of the affected classes, rather than by focusing on selected, atypical examples. Mr. Justice Stevens determined that:[16]

The 1958 amendment reflects a legislative judgment that a marriage between two persons receiving benefits will not normally provide either spouse with protection against the economic hardship that would be occasioned by the termination of the benefits.

... Mr. Jobst argues, however, that the reasons for the amendment applies equally to his situation. He urges that his hardship is just as great as that which the amendment avoids when one beneficiary marries another, because his spouse is also disabled. He therefore attacks the exception is being irrationally underinclusive. We are persuaded, however, even if the benign purpose of the 1958 amendment encompasses this case, legitimate reasons justify the limits that Congress placed on it. ... The exception, like the general rule itself, is simple to administer. It requires no individualized inquiry into degrees of hardship or need. It avoids any necessity for periodic review of the beneficiaries' continued entitlement. In the cases to which the exception does apply, it is a reliable indicator of probable hardship. Since the test is one that may be applied without introducing any new concepts into the administration of the trust fund, Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation ... Even if it might have been wiser to take a large step, the step Congress did take was in the right direction and had no adverse impact on persons like the Jobsts.

It is clear that under the test of minimal scrutiny it is not necessary for the government to devise a plan or policy which attempts to solve or resolve a problem in its entirety. The test of minimal scrutiny permits a government to undertake legislative initiatives to deal with a perceived problem on a step-by-step basis. It seems the Court's view, and probably quite correctly, is that it is better in cases where government is extending a benefit to people in situations of hardship to permit government to deal with only part of the problem at one time. This deference to legislative choice is particularly noticeable in cases where the legislative scheme or category under attack involves government programs which government is under no constitutional obligation to provide, and the purpose of which program is to ameliorate the situation of poor, disabled or otherwise disadvantaged members of American society.

If the test of minimal scrutiny can be described as creating a presumption of constitutionality, the application of the test of strict scrutiny can fairly be described as being

inevitably fatal to the challenged legislation.[17] The courts use strict scrutiny when a statute operates to the disadvantage of a suspect class, for example, a racialminority, or infringes upon a fundamental right explicitly or implicitly protected by the Constitution. The underlying rationale for strict scrutiny has been described in the following terms by Professor Laurence Tribe:[18]

> ...the idea of strict scrutiny acknowledges that other political choices--those burdening fundamental rights, or suggesting prejudices against racial or other minorities--must be subjected to close analysis in order to preserve substantive values of equality and liberty. Although strict scrutiny in this form ordinarily appears as a standard for judicial review, it may also be understood as admonishing law-makers and regulators as well to be particularly cautious of their own purposes and premises and of the effects of their choices.

To successfully withstand challenge, the state must convince the court that there is a compelling state interest to be achieved in creating the classification and that there is no other, less restrictive means, by which the state objective can be achieved. Classifications, the basis of which is race, probably provide the best example, in American equal protection analysis, of the application of the test of strict scrutiny. This is due in part to the unique, yet tragic, history of racial discrimination which was for so long a part of American society. But it is also due to the fact that it is very difficult to envision any legitimate government purpose for which a classification would need to be created the basis of which of was an individual's race.

For some time it appeared that there were only two levels of scrutiny available to the courts when considering challenged classifications. However, in past 20 years there has developed what is now called intermediate scrutiny. Professor Tribe described the circumstances in which intermediate scrutiny is triggered in the following terms:[19]

> First, intermediate scrutiny has been triggered if important, though not necessary "fundamental", or "preferred", interests are at stake. Thus the Court has treated "ineligibility for employment in the major sector of the economy" as "of sufficient significance to be characterized as a deprivation of an interest in liberty" and thus to warrant more than minimal scrutiny. And the Court has employed intermediate forms of review where governmental deprivations affected such important interests of the individual as the interest in retaining drivers licences, in obtaining a higher education at an affordable tuition, or in receiving such subsistence benefits as food stamps. In sum, either a significant interference with liberty or denial of a benefit vital to the individual triggers intermediate review.
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> Second, intermediate review has been triggered if sensitive, although not necessarily suspect, criteria of classification are employed. Thus the Court has stressed the role of increasingly outdated stereotypes in gender cases, and the place of a long history of disadvantageous treatment in the alienage and illegitimacy cases. Whether or not the groups in question might qualify for treatment as "discrete and insular minorities", they bear enough resemblance to such minorities to warrant more than casual judicial response when they are injured by law.

The single most significant characteristic which is subject to intermediate scrutiny is that of sex. At one time it was thought that sex would be elevated to the inherently suspect category and subject to strict scrutiny. However, it is now clear that the Supreme Court of the United States has no intention of viewing classifications, the basis of which are sex, in the same way as classifications, based on race. This is probably because the Court still feels there are legitimate government purposes to be pursued where the sex of the affected individuals is relevant to the pursuit of that objective.[20] The case of Frontiero v. Richardson[21] is probably the high water mark in the attempt to have sex elevated to an inherently suspect category. In that case, four of the Justices of the Supreme Court were willing to regard it as an inherently suspect characteristic, one which was immutable and one which had a history as a basis for unjustified discrimination.[22] Other characteristics which appear to be subject to an intermediate level of scrutiny are age, poverty and illegitimacy.

An interesting case in which the United States Supreme Court applied intermediate scrutiny is that of Stanley v. Illinois[23] in which an unwed father, whose children on the

mother's death were declared state wards and placed in guardianship, attacked the Illinois statutory scheme as violative of the equal protection clause. Under the scheme the children of unmarried fathers, upon the death of the mother, were declared dependents without any hearing on parental fitness and without any proof of neglect, though such hearing and proof were required before the state assumed custody of children of married or divorced parents and unmarried mothers. The statute had the effect of presuming that all unwed fathers were unfit to raise their children. Such a father was accorded no hearing in which he could attempt to satisfy the state that he was a fit person to raise his children. It is important to note that the statutory scheme allowed married fathers and those who were divorced, widowed or separated, and mothers, even if unwed, the benefit of the presumption that they were fit to raise their children. Mr. Justice White, writing the decision of the Court, concluded that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him. He also concluded that by denying him a hearing, but extending one to all other parents whose custody of their children was challenged, the state had denied Stanley the equal protection of the laws guaranteed by the 14th Amendment.

It appears that the Court did not apply the test of minimal scrutiny in Stanley, but chose instead, to apply the intermediate level of scrutiny. Mr. Justice White described Stanley's interest in retaining custody of his children as "cognizable and substantial".[24] The Court had to consider not only a classification based upon the marital status of Stanley but also had to consider an important issue of personal liberty, a parent's right to raise his children. Mr. Justice White used the following language in determining that the statutory provision in question was unconstitutional:[25]

> ... We are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the state registered no gain towards its declared goal when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the state spites its own articulated goals when it needlessly separates him from his family.

This was a case in which the challenged legislation created an irrebuttable presumption. The Legislature provided no hearing mechanism whereby Stanley could offer evidence of his fitness as a parent. Stanley was presumed to be unfit and that was the end of the matter. One of the important remedial devices the United States Supreme Court has developed in relation to intermediate level scrutiny is the conversion of an irrebuttable presumption into a rebuttable presumption.[26] In essence, in a case like Stanley,[27] what this means is that, while the state may in fact legislate creating a presumption that someone in the position of Stanley is an unfit parent, they must provide in the legislative scheme a hearing mechanism under which Stanley can rebut the presumption of unfitness. The Court seems attracted to this remedial device because it does not require an entire legislative scheme to be declared unconstitutional by them. The scheme remains intact but the court adds the requirement that a hearing procedure be made available to those people affected adversely by the legislation. It appears that this remedial flexibility is one of the major attractions of the intermediate level of scrutiny.

In conclusion, it is not possible to define with certainty those characteristics which will be subject to strict scrutiny, intermediate scrutiny or minimal scrutiny. The categories are never closed. However, it is fair to summarize in the following terms: (i) strict scrutiny will be invoked where classifications are based upon inherently suspect categories, such categories generally involving immutable characteristics such as race and where fundamental rights such as the right to vote[28] and the right to litigate[29] are burdened or adversely affected; (ii) intermediate scrutiny will be invoked where the Court feels important but not fundamental rights are at stake. In addition, intermediate review is appropriate

where sensitive, although not necessarily suspect, criteria of classification are employed; for example, sex; (iii) minimal scrutiny will be used in virtually all other circumstances; but will be especially attractive where government is extending benefits, such as pensions, which government is under no constitutional obligation to provide. Equally, in relation to the creation of classifications for the purposes of taxation and zoning, the courts generally only apply minimal scrutiny analysis.

It should be noted that the foregoing approach has not gone on unchallenged by members of the Supreme Court itself: for example, Mr. Justice Harlan in the case of Dandridge v. Williams stated:[30]

> I find no solid bases for the doctrine ... that certain statutory classifications will be held to deny equal protection unless justified by a "compelling" governmental interest, while others will pass muster if they meet traditional equal protection standards ... Except with respect to racial classifications, to which unique historical considerations apply, I believe the constitutional provisions assuring equal protection of the law impose a standard of rationality of classification, long applied in the decisions of this court, that does not depend upon the nature of the classification or interest involved.

(C) Some Thoughts on the Interpretation of Section 15

Section 15 is remarkable in the contrast it provides to the equality provision found in The Canadian Bill of Rights.[31] Section 15(1) was designed to overcome the many shortcomings of section 1(b) of the Bill of Rights, or at least those shortcomings exposed by the Supreme Court of Canada through a number of major decisions during the 1970's.[32]

Keeping in mind Mr. Justice Ritchie's interpretation of the concept of "equality before the law" in Lavall v. A. G. Canada,[33] the drafters of section 15 wanted to ensure that the rights guaranteed included more than "equality in the administration or application of the law by the law enforcement authorities and in the ordinary courts of the land."[34] Consequently, the drafters added the phrase "under the law" and thereby hoped to ensure equality not only in the administration of the law, but in the substantive content of the law.[35]

The second phrase of section 15(1) guarantees the right to equal protection and equal benefit of the law without discrimination.[36] It can be predicted that because of the choice of phraseology "equal protection", that our courts will have pressed upon them many of the arguments American courts receive regularly when dealing with alleged violations of an individual's constitutional right to equal protection of the law. It should be noted that this one phrase in American constitutional jurisprudence has been held to encompass the various notions of equality particularized in Section 15(1).

It seems the phrase "equal benefit of the law" was included to deal with situations such as found in Bliss v. The Queen,[37] where because the federal Parliament had established a special programme of unemployment insurance for pregnant woman, an applicant such as Bliss, who did not qualify under this special program, could not apply under the regular scheme applicable to all non-pregnant individuals.[38] The Supreme Court concluded that she had not been denied equality of treatment in the administration and enforcement of the law nor had the federal Parliament created a legislative classification based on irrational or irrelevant distinctions.[39] It seems the Court was influenced by the fact that the scheme provided for additional benefits for a certain group of women, thereby extending to those who qualified, assistance where none existed before. This could be described as "discrimination for" a group as contrasted with "discrimination against" a group. The Court seemed unconcerned that, in the fact situation before them, Bliss could not receive the benefits Parliament had intended to bestow upon pregnant women, and at the same time, she was excluded from applying for regular benefits which were open to all men and non-pregnant women. Now, it seems someone in the position of Bliss could argue that a section such as section 46 of the Unemployment Insurance Act does deprive her of equal benefit of the law, in that the section prohibited her from applying for regular benefits, for which she did have the necessary qualifications.[40]

It should be emphasized that an individual is guaranteed the right to the equal protection and equal benefit of the law without discrimination. In fact, The Proposed Resolution Respecting the Constitution of Canada (1980)[41] described section 15 as "non-discrimination rights". Clearly, some consideration will have to be given to the definition of the word "discrimination".[42] It should not be synonymous with the act of mere classification. Discrimination, as it has been defined for the purposes of human rights legislation generally has included an element of adverse treatment.[43] However, it has also been defined simply as "treating differently",[44] which seems very akin to the act of classification. Practically, an individual will only challenge a classification when he believes he has suffered adversely because of it, either because it burdens him in a way others are not or because it deprives him of benefits to which others have access. Therefore, an applicant should probably establish, on the basis of prima facie proof, that he has been subjected to differential treatment which has adversely affected him in some way. Then the onus of proof will shift to the government under section 1 of the Charter to justify the provision and its effects.[45]

The question will arise as to whether a challenged classification, the basis of which is an enumerated ground, will be subject to higher or stricter scrutiny than those classifications based upon non-enumerated grounds. For instance, Professor Tarnopolsky (as he then was) takes the position that these enumerated or listed grounds must now be considered as "inherently suspect".[46] The notion of "inherently suspect" categories comes from American jurisprudence dealing with equal protection. The American courts have treated classifications based upon characteristics such as race and alienage as inherently suspect and, consequently, attracting the test of strict scrutiny.[47] In the United States, inherently suspect classifications are those which virtually never could be relevant to achieving a legitimate governmental objective. For example, it is hard to imagine any classification, the basis of which is race, serving any legitimate or permissible government purpose or interest. Generally, the only purpose for such a classification would be to discriminate against a group or individual. This thought has been expressed succinctly by Mr. Justice Stevens of the United States Supreme Court in the case of Michael M. v. Superior Court of Sonoma County:[48]

> Equal protection analysis is often said to involve different "levels of scrutiny". It may be more accurate to say that the burden of sustaining an equal protection challenge is much heavier in some cases than others. Racial classifications, which are subjected to "strict scrutiny", are presumptively invalid because there is seldom, if ever, any legitimate reason for treating citizens differently because of their race. On the other hand, most economic classifications are presumptively valid, because they are a necessary component of most regulatory programs ...

There are some problems with arguing that all the prohibited bases found in section 15(1) are to be treated as inherently suspect categories if courts do choose to adopt the U.S. approach to defining equality rights. Certainly race, national or ethnic origin, colour, religion and sex[49] should be treated as inherently suspect since they will hardly ever be relevant to legitimate government at purposes. However, the addition of age and mental or physical disability destroys the persuasiveness of the argument that all enumerated grounds in section 15 should be treated as inherently suspect categories. Clearly, there will be many situations in which legislators or administrative agencies have quite legitimate reasons for creating classifications which treat people differently on the basis of age or mental or physical disability. For example, consider legislation which establishes a minimum age at which one can vote, acquire a driver's licence or purchase alcoholic beverages.

While there is nothing in the structure or wording of section 15(1) to indicate that different levels of scrutiny were anticipated in relation to the enumerated grounds, it is suggested that practically the courts will have to make such differentiations. Consequently, some of the enumerated grounds in section 15(1) will probably not attract strict scrutiny but will be subjected to either intermediate or minimal scrutiny.[50]

Some may object to the use of American equal protection terminology in discussions of section 15 of the Charter. It is the writer's opinion that it doesn't really matter what

language is ultimately used to describe the process of analysis the courts will be forced to go through when dealing with questions of equal protection. It is suggested that Canadian courts will go through exactly the same process of classification as their American counterparts, although not necessarily reaching the same conclusions or using the same constitutional language. Our courts will be just as suspicious of legislative classifications based on race or colour or religion as the American courts have been. It doesn't matter whether this heightened level of suspicion is referred to in terms of "strict scrutiny" or some other indigenous Canadian phrase. What will be important ultimately is the methodology adopted by the Supreme Court of Canada in dealing with the various bases of challenged classifications and determining their respective positions on the Court's "scale of suspicion". One must remember, however, that in relation to classifications based upon non-enumerated grounds, such as marital status, the degree of suspicion exhibited by a court will probably be somewhat less than that exhibited in relation to the enumerated grounds.[51]

So far, this discussion has not considered section 1 of the Charter. Section 1 rests like an umbrella over the substantive rights and freedoms guaranteed in the Charter.[52] Section 1 recognizes the obvious, that no right or freedom is absolute. There are justifiable limitations which can be placed upon the exercise of an individual's various rights and freedoms. Once that is admitted, the difficult task is to determine which limitations are, in fact, justifiable. Section 1 attempts to offer guidelines in relation to answering that question. Any limitation has to be reasonable,[53] prescribed by law,[54] and demonstrably justified in a free and democratic society.[55] So then, every individual's right to equality before and under the law and every individual's right to the equal protection and equal benefit of the law is subject to reasonable limitations which are demonstrably justified in a free and democratic society.

Section 1 requires a means and ends analysis very similar to that already described in relation to the American equal protection clause.[56] However, it is suggested that the onus of proof will be somewhat more favourable to an applicant alleging a violation of section 15(1) than the situation in many American cases alleging a violation of the equal protection clause.[57] Once an applicant has established a prima facie violation of a right guaranteed by the Charter, the onus of proof shifts to the party attempting to justify the limitation.[58] The effect of section 1 is to destroy any presumption of constitutionality in relation to legislation that allegedly infringes or violates any of the guaranteed rights and freedoms set out in the Charter.[59] Regardless of whether we are considering an enumerated or non-enumerated ground in Section 15(1), once a prima facie violation of the section, has been established, the onus of proof will shift to the Crown to justify any limitation. This will probably mean that any discussion of minimal, intermediate and strict scrutiny or similar concepts will take place within the framework of section 1 as opposed to section 15 per se.

It should be much more difficult for a government to prove the demonstrable justification for some limitations than for others. Because of the enumeration in section 15 of certain bases upon which discrimination is prohibited, courts should interpret this as a signal that the drafters, and one would presume, Canadian society, are particularly concerned about denials of equality on those bases. However, even within the enumerated bases, it will be easier for government to justify limitations on some bases than on others. For example, the Canadian Parliament might pass legislation denying all Indians the opportunity to apply for combat positions in the Canadian Armed Forces. Under section 1, the Crown would be hard pressed to justify such a limitation on the rights of Indians. Such a classification, based, as it is, upon race, and seemingly serving no other government purpose than a desire to discriminate, would never be demonstrably justified in a free and democratic society. However, given a similar fact situation but with the classification based upon some physical disability, it is very likely that the classification would be upheld as one which was reasonable and one which was demonstrably justified in a free and democratic society. To summarize,

the Crown will find it easier to discharge its burden of proof under section 1 when dealing with certain classifications or when seeking to achieve certain government objectives than with others.

To conclude this discussion, it might be useful to remember the admonition of Mr. Justice Marshall in the case of Danbridge v. Williams where he stated:[60]

> In my view, equal protection analysis ... is not appreciably advanced by the a priori definition of a "right", fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relevant importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification. As we said only recently, "in determining whether or not a state law violates the equal protection clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting and the interests of those who are disadvantaged by the classification."

It is this balancing of the interests of the individual against those of the state which is required under section 1 of the Charter.

Possible Applications of Section 15

In this section of the paper, I will deal briefly with some of the possible applications of section 15 to existing laws and policy.

1. Section 109(1)(a) of the Income Tax Act[61]

Section 109(1)(a) of the Income Tax Act permits an individual to make a deduction from his income where such an individual is a married person who supported his spouse during the taxation year. This section has been challenged under the Canadian Human Rights Act on the basis that it discriminates against those individuals who are living in "marriage like relationships" but who are in fact not legally married. In a fact situation such as Bailey v. The Minister of National Revenue[62], it is clear that because of the operation of section 109(1)(a), similarly situated individuals are accorded different treatment on the basis of their marital status. Ms. Bailey was someone who supported her partner during the relevant taxation year, just as many married taxpayers supported their spouses during the same taxation year. If the underlining rational for a personal exemption such as section 109(1)(a) is that "taxpayers need some income to meet the basic necessities of life for themselves and their dependents, and the threshold for income taxation should exempt such basic amount of income"[63], the relevant factor in determining the deduction should be dependency and not the marital status of the individual taxpayer involved.[64]

While it appears Parliament was quite aware of the discrimination created by Section 109(1)(a)[65], it seems that the provision was passed in its present form in the interests of administrative efficiency. The Honourable Edgar J. Benson, then Minister of Finance, made the following comments when Bill C-259[66] was being debated in the House of Commons:[67]

> ... it is very difficult to establish what a common law relationship is. Do you allow people to claim married status because somebody has a girlfriend whom he visits every now and then? The law is pretty definitive in respect of what married status is .... at least there is some evidence in that case .... I believe that in the law it would be impossible to define the kind of relationship that is recognized if you were to consider allowing common law marriages under the Income Tax Act.

It is clear that problems of definition will arise if Section 109(1)(a) is extended to common law relationships. However, other statutes have dealt with this definitional problem[68] and most of these definitions have as their basis a requirement that the relationship have lasted a minimum period of time.[69]

A taxpayer in the position of Ms. Bailey should have no problem discharging the burden of proof placed upon him or her by virtue of section 24(1) of the Charter.[70] However, then the question becomes whether or not the limitation upon his or her right to the equal benefit of the law is a reasonable limit which is demonstrably justified in a free and democratic society. It is certainly arguable that the classification created by Section 109(1)(a) does

not bear a rational relationship to the espoused legislative objective. If the legislative objective was in fact to provide taxpayers with sufficient funds to provide necessities of life for themselves and their dependents, such amount to be free from taxation, then there is no rational connection between the classification created by section 109(1)(a) and the legislative objective. As noted above, dependency would appear to be the operative consideration and any classification, to be rationally related to the legislative objective, should have as its basis dependency, and not marital status. Since Section 109(1)(b) recognizes other forms of dependency for which deductions can be made from income, it seems that the exclusion of a relationship of dependency based upon a "living together" arrangement is arbitrary. If such a classification were proven to be irrational and arbitrary, then arguably it could not be demonstrably justified in a free and democratic society.[71]

The main argument for the federal government in justifying the classification created in section 109(1)(a) will be that of administrative efficiency and convenience[72]. The government will probably admit their classification is "under-inclusive",[73] in that it does not include all taxpayers who have a dependent, the most notable exclusion being dependencies created by "living together" or "common law" relationships. However, their argument will be that such under-inclusiveness is not fatal to the classification. Mathematical precision normally is not demanded of government in the creating of classes which deal with economic regulation and social welfare[74]. As well, government has a legitimate concern in defining classification in such a way as to minimize the difficulty of proof and the possibility of fraud. As noted above[74], the federal government expressed concern about the definition of common law relationships and did not want to create a situation where two people could live together for a few weeks and qualify for the exemption.

A classification created to pursue the normal purposes of a taxing statute will probably only require some rational connection to the stated objective to be upheld since the courts have had, and, it is predicted, will continue to have substantial sympathy for the government's need for revenue and the problems government faces in collecting those revenues[76]. However, this judicial tolerance should not lead to the rubber stamping of classifications in this area. At a minimum, government should have to prove that the classification was created in pursuit of a legitimate or permissible government at objective and that the means selected have a real and substantial relationship to the objective sought to be achieved. Certainly the classifications created by section 109(1)(a) and 109(1)(b) do have a real and substantial connection to the legislative objective. The only argument is that there are others who should be included in the classification, and by not including them, government has denied them equality before the law and the equal protection and benefit of the law.

In summary, it is certainly open to a court to find the legislative classification in question unconstitutional because of under-inclusiveness. If one is concerned with providing taxpayers and their dependents with sufficient tax free income for the necessities of life, then to exclude certain situations of dependency seems unreasonable, especially when there are means by which such under-inclusion can be minimized, if not totally avoided[77]. However, it seems likely that courts will be reasonably deferential to legislative classifications in areas such as this and not demand perfect, or near perfect, congruence between the means chosen and the objective sought to be achieved. Therefore, it is unlikely a court will find a provision such as section 109(1)(a) of the Income Tax Act an unreasonable limitation upon a individual's right to the equal protection and equal benefit of the law.[78]

2. Individual's Rights Protection Act[79]

The Individual's Rights Protection Act is an Act of the Alberta Legislature and therefore an Act to which the Charter applies by virtue of section 32 of the Charter. It is suggested that one of the major questions which will confront the courts in their early

deliberations on section 15 and its application will be how it relates to provincial and federal human rights legislation.

For example, in the Individual's Rights Protection Act as it presently exists, there is no prohibition against discrimination on the basis of mental disability. However, if one looks at section 15 of the Charter, one finds mental disability set out as one of the enumerated grounds upon which it is impermissible to discriminate. Therefore, the argument will be made that the Individual's Rights Protection Act, itself, is denying equal benefit of the law to those people who suffer from a mental disability and for whom no protection against such discrimination is provided in the Province's own human rights legislation.[80] Arguably, the effect of section 15 will be to force legislators to amend their human rights legislation to ensure that at a minimum, this legislation includes, as prohibited grounds of discrimination, those grounds set out in section 15 of the Charter.[81] It should be noted that on July 24th, 1984 the Alberta Human Rights Commission proposed amendments to the Individual's Rights Protection Act, many of which seem to be motivated, at least in part, by a desire to bring Alberta's human rights legislation in line with section 15 of the Charter. For example, mental disability was recommended to be included as a prohibited ground for discrimination.

3. The Use of Factors Such As Age, Sex and Marital Status in Automobile Insurance Ratings

Recently, public hearings were held in Alberta by the Alberta Automobile Insurance Board to seek submissions from interested members of the public in relation to the present rating system used by automobile insurers.[82] The factors presently used which seem susceptible to attack are those of age, sex and marital status. Automobile insurers, for acturial and efficiency reasons, group those people they insure into broad classifications; for example, all people under 25 years of age, all people over 60, etc. Clearly, these categories classify individuals and extend or refuse the benefits of insurance to these individuals on the basis of characteristics subject to attack under section 15. For example, it appears that most automobile insurers initially divide prospective customers into a broad category of those over 25 and those under 25. Then, it is quite common for automobile insurers to take the under 25 category and further subdivide it; first, a subdivision is made on the basis of sex; males under the age of 25 are treated differently in relation to rates than females under the age of 25; then a further subdivision may be made dividing all males under the age of 25 into those who are married and those who are not married. Those males under the age of 25 who are unmarried are expected to pay higher insurance rates than those males under the age of 25 who are married or females under the age of 25. It will be encumbent upon the insurance business to provide justification for these classifications if they are challenged and it is likely acturial data will provide them with the heart of their defence.

4. Citizenship Requirements

A number of provincial statutes presently require a person to be a Canadian citizen or British subject before applying for certain benefits; for example, admission to the legal profession as a practising lawyer.[83] See, for example, sections 39(2)(a), 40(a), 41(2)(a), 42(3)(a), 45(1)(a), and 46(1)(a) of the Legal Profession Act.[84]

It is arguable that a citizenship requirement is not discrimination on the basis of national origin per se and therefore not discrimination on the basis of one of the enumerated grounds in section 15. However, the wording of section 15 is open-ended and a law or rule which discriminates on any basis can be challenged under section 15. Hence, a challenge to the Law Society's rules requiring Canadian citizenship to be enrolled as a member will be challenged. The onus will then be on the Law Society to justify such a restriction as a reasonable one being demonstrably justified in a free and democratic society. The experience of the United States, our most obvious point of reference in issues of equality, does not augur well for such citizenship restrictions. In the case of Re Griffiths[85], a resident alien

was denied permission to take the Connecticut Bar examination solely because of a citizenship rule imposed by a state court rule.

The United States Supreme Court struck down the requirement as unconstitutional in that it violated the equal protection clause of the 14th Amendment. The Court stated:[86]

> The State's ultimate interest here implicated is to assure the requisite qualifications of persons licenced to practice law. It is undisputed that the State has a constitutionally permissible and substantial interest in determining whether an applicant possesses "the character and general fitness requisite for an attorney and counsellor-at-law". No question is raised in this case as to the appellant's character or general fitness. Rather, the sole basis for disqualification is her status as a resident alien.
>
> In order to establish a link between citizenship and the powers and responsibilities of the lawyer in Connecticut, the Committee contrasts the citizen's undivided allegiance to this country with a resident alien's possible conflict of loyalties. From this, the Committee concludes that a resident alien lawyer might in the exercise of his functions ignore his responsibilities to the courts or even his clients in favour of the interest of a foreign power.
>
> We find these arguments unconvincing. It in no way denigrates a lawyer's high responsibilities to observe that the powers "to sign writs and subpoenas, take recognizances, [and] administer oaths" hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens. Nor do we think that the practice of law offers meaningful opportunities adversely to affect the interest of the United States. Certainly the Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients.

It is suggested that this reasoning is compelling. For example, an American citizen may enroll to study law at the University of Alberta, may gradute and have done extremely well, may have completed his or her year of articling, and may have passed the Bar Admission Course. However, under the Legal Profession Act that student could not be admitted to the practice of law in Alberta.

In establishing the standards which must be met by prospective lawyers in the province, the Law Society surely should be motivated primarily by a concern for the level of competency exhibited by the practicing bar. It is quite understandable that the Law Society would establish standards and examinations which would have to be met before admission to the practice of law. However, in my example above, there is no question of the competency of the American citizen who is applying to practice law in Alberta. He or she will have completed successfully the same course of study, the same articling period and the same bar admission course as any Canadian citizen applying for admission to the Bar. Consequently, the Law Society cannot make an argument based on a desire to protect a consumer of legal services from incompetent lawyers. The only other possible basis on which the Law Society could attempt to justify such a restriction is that discussed by the United States Supreme Court in Re Griffiths, where it was argued that lawyers are intimately involved with the administration of justice and the courts and since these are viewed as fundamental to our democratic system of government, that unless one were a citizen, one would be unable or perhaps less likely, to defend that system with the requisite vigor and patriotic zeal. To say that this argument is unconvincing is to be kind. The opportunities for a lawyer to subvert the institutions of state are limited, if not non-existent in most circumstances, and there would appear to be no reliable evidence from any source to suggest that a lawyer who is not a citizen is less likely to defend diligently the system in which he or she works.

CONCLUSION

This paper has attempted to provide an overview of the issues which will confront the practicing bar and the judiciary after the coming into effect of section 15 of the Charter. Considerable time has been spent outlining the American jurisprudence in relation to equal protection. The reason for this is simple. American lawyers and courts have a long history of dealing with the challenges presented by a constitutionally entrenched right of equal

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protection. Therefore, to ignore their experiences and not to learn from their mistakes, as well as their successes, would appear to be extremely short sighted. Clearly, the Canadian legal, social, political and economic climates are sufficiently different that to argue uncritically for an adoption of American strategies or approaches would be dangerous and unrealistic. However, to ignore the American experience in relation to equal protection is equally unrealistic.

Section 15 opens the door to numbers and types of legal challenges so far unknown in Canadian jurisprudence.[87] Ultimately, it is my opinion that many of these challenges will be unsuccessful. Just as with other sections of the Charter, the government has the opportunity to justify categories or classifications which allegedly create an inequality on the basis that they are reasonable and demonstrably justified in a free and democratic society. Therefore, I do not forsee hundreds of laws being struck down on the basis of section 15. However, the section will have the effect of forcing government and legislators to carefully analyse not only the objectives they seek to achieve through legislation but more importantly, the motivation for such objectives and the means they have chosen to adopt in reaching those objectives. That process in and of itself should ensure that fewer laws will be enacted which unjustifiably deny individuals their constitutional right to the equal protection and equal benefit of the law.

ENDNOTES

1. Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.) c. 11, Sched. B].

2. Compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms, a discussion paper released by the Hon. J. Gary Lane, Q.C., Minister Justice and Attorney General, September, 1984.

3. For example, see Lysyk, "Equality Before the Law" (1968), 46 Can. Bar. Rev. 141; Tarnopolsky, "The Canadian Bill of Rights from Defienbaker to Drybones" (1971) 17 McGill L.J. 437 and "The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey?" (1975), 7 Ottawa L. Rev. 1; Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980), 18 O.H.L.J. 336.

4. [1970] S.C.R. 282.

5. For example, see: A.-G. Can. v. Lavell [1974] S.C.R. 1349; A.-G. Can. v. Canard [1976] 1 S.C.R. 170; R. v. Burnshine [1975] 1 S.C.R. 693; Bliss v. A.-G. Can., [1979] 1 S.C.R. 183.

6. See the comments of Laskin J. (as he then was) in Curr v. The Queen [1972] S.C.R. at 899-900.

7. [1980] 2 S.C.R. 370.

8. Id. at 405 - 407.

9. Id. at 411.

10. Infra pp. 7-13.

11. For example, see comments in Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982).

12. (1978) Foundation Press, at 995.

13. Id. at 996.

14. 98 S. Ct. 95 (1977).

15. Id. at 99.

16. Id. at 100-101.

17. See generally, Gunther, "The Supreme Court, 1971 term - Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 at 8 (1972).

18. *Supra* n. 11 at 1000.

19. *Id.* at 1089 - 1090.

20. See, for example, *Rosther* v. *Goldberg* 101 S. Ct. 2646 where a majority of the Supreme Court upheld the decision of Congress that women should not serve in combat and that therefore Congress was fully justified in not authorizing the registration of women since the purpose of the registration was to develop a pool of potential combat troops.

21. 93a S. Ct. 1764 (1972).

22. The four justices were Brennan, Douglas, White and Marshall.

23. 92 S. Ct. 1208 (1972). This case actually involves discrimination not only on the basis of marital status but discrimination on the basis of sex since unmarried fathers were treated differently for the purposes of the statute than unmarried mothers. It is common in cases where discrimination is alleged on the basis of marital status to also find allegations of sex discrimination.

24. *Id.* at 1213.

25. *Id.*

26. See generally Tribe, *American Constitutional Law*, *supra* n. 11 at 1092 - 1098.

27. *Supra* n. 22.

28. See, for example: *Harper* v. *Virginia Board of Educators* 383 U.S. 663 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

29. See, for example: *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

30. 90 S. Ct. 1153 (1970) at 1164.

31. S.C. 1960, c.44, s.1(b). It states:

    It is hereby recognized and declared that in Canada there have existed and shall continue to exit without

discrimination by reason of race, national origin, color, religion or sex, the following human rights and fundamental freedoms, namely,

(b) the right of the individual to equality before the law and the protection of the law;

32. Supra n. 5.

33. [1974] S.C.R. 1349.

34. Id. at 1365-6. and see Tarnopolsky, "The Equality Rights" in Canadian Charter of Rights and Freedoms - Commentary (1982) 395 at 410-412 for a criticism of the definition adopted by Mr. Justice Ritchie.

35. The original s.15 as set out in "Proposed Resolution for a Joint Address to Her Majesty The Queen Respecting the Constitution of Canada", tabled in the Senate and House of Commons on October 2, 1980 read:

15.(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, color, religion, age or sex.

Then Minister of Justice Chretien signified his willingness to amend the proposed s.15(1) to ensure "that equality relates to the substance as well as the administration of the law ...", Special Joint Committee on the Constitution of Canada Proceedings, 32nd Parl., Sess. 1 (1980-81), No. 36 at 14.

36. The structure of s.15(1) leads one to the conclusion that this second phrase is separate and distinct from the opening words of the section and consequently the phrase "without discrimination" relates only to the guarantees of equal protection and equal benefit of the law.

37. [1979] 1 S.C.R. 183.

38. S.30 of the Unemployment Insurance Act, 1971, 1970-71-72 (Can.), c.48 stated that a claimant who was pregnant must have 10 or more weeks of insurable employment in the 20 weeks that immediately preceded the 30th week before her expected date of confinement. S.46 had the effect of denying a claimant the right to apply for regular benefits, if she did not qualify under the above described s.30.

39. Supra n. 36 at 192-193.

40. The inclusion of the guarantee of "equal benefit of the law" has the potential for making s.15(1) applicable to virtually all legislation since most legislation can be construed as extending a benefit or right to which someone does not or can not have access because of the presence or absence of a particular characteristic.

41. Supra n.34.

42. See generally Tarnopolsky, Discrimination and The Law (1982) Chap. IV at 83-122.

43. For example, see: Payne v. Calgary Sheraton Hotel, Alta. Bd. of Inquiry, 20th June, 1975, at 3-4 (unreported); MacKay v. Dominion Fruit Division of West Fair Foods, Alta. Bd. of Inquiry, 9th January, 1974 (unreported).

44. Simms v. Ford Motor Co., Ont. Bd. of Inquiry, 4th June, 1970 at 18 (unreported).

45. Infra 24-26.

46. Supra n.33 at 422. and see Deputy-Minister of Justice Tasse's comments, Special Joint Committee on the Constitution of Canada, supra n. 34 at 41: 23-24 when asked about the inclusion of the phrase "in particular" in s.15(1):

    We think that to use the expression "in particular" would have the effect of emphasizing, underlining that there are some grounds which are more invidious than other grounds they are the ones which are specifically mentioned in the clause.

47. However, the United States Supreme Court has not yet elevated sex to the inherently suspect category.

48. Micheal M. v. Superior Court of Sonoma County, 101 S.Ct. 1200, at 1218, n. 4 (1981).

49. The inclusion of s.28 in the Charter which guarantees the rights and freedoms set out in the Charter equally to male and female persons would seem to require that sex be treated as an inherently suspect category.

50. For example, age and mental disability.

51. This conclusion seems to flow naturally from the wording of s.15(1). The addition of the phrase "in particular" indicates the drafters greater concern in relation to discrimination on those bases than others. See supra n.45.

52. S.1 states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

53. See: Quebec Protestant School Boards v. A.-G. Que. (No. 2) (1983), 140 D.L.R. (3d) 33; Re Federal Republic of Germany and Rauca, 9 W.C.B. 325 (Ont. C.A.); affg. 141 D.L.R. (3d) 412; Re Southam Inc. and The Queen (No. 1), (1983) 41 O.R. (2d) 113. Reich v. College of Physicians and Surgeons (No. 2) (1984) 53 A.R. 321.

In Rauca, (1983) 141 D.L.R. (3d) 412 at 423, Mr. Justice Evans defined reasonable limits in the following terms:

> The phrase "reasonable limits" in s.1 imports an objective test of validity. It is the Judge who must determine a "limit" as found in legislation is reasonable or unreasonable. The question is not whether the Judge agrees with the limitation but whether he considers that there is a rational basis for it -- a basis that would be regarded as being within the bounds of reason by fair-minded people accustomed to the norms of a free and democratic society that is the crucible in which the concept of reasonableness must be tested.

54. See: Ontario Film and Video Appreciation Society v. Ontario Board of Censors, (1983), 41 O. R. (2d) 583 at 591 where the Court discussed the requirement for a limitation to be "prescribed by law" in the following terms:

> It is clear that statutory law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force. This is to ensure that it has

> been established democratically through the legislative process or judicially through the operation of precedent over the years. This requirement underscores the seriousness with which courts will view any interference with the fundamental freedoms.
>
> The Crown has argued that the Board's authority to curtail freedom of expression is prescribed by law in The Theatres Act, sections 3, 35, and 38. In our view, although there has certainly been a legislative grant of power to the Board to censor and prohibit certain films, the reasonable limits placed upon that freedom of expression of film makers have not been legislatively authorized. The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a Board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administration tribunal. However dedicated, competent and well meaning the Board may be, that kind of regulation can not be considered as "law". It is accepted that law can not be vague, undefined, and total discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression can not be left to the whim of an official; such limits must be articulated with some precision or they can not be considered to be law.

55. See generally: Rauca, supra n. 52; Ontario Film and Video Appreciation Society, supra n. 53; Re Southam Inc., supra n. 52 at 129 where Associate Chief Justice MacKinnon stated:

> In determining whether the limit is justifiable, some help may be derived from considering the legislative approaches taken in similar fields by other acknowledged free and democratic societies. Presumably this may also assist in determining whether the limit

> is a reasonable one. It may be that some of the rights guaranteed by the Charter do not have their counterpart in other free and democratic societies and one is sent back immediately to the facts of our own society. In any event I believe the court must come back, ultimately, having derived whatever assistance can be secured from the experience of other free and democratic societies, to the facts of our own free and democratic society to answer the question whether the limit imposed on the particular guaranteed freedom has been demonstrably justified as a reasonable one, having balanced the perceived purpose and objectives of the limiting legislation, in light of all relevant considerations, against the freedom or right allegedly infringed.

56. <u>Supra</u> 7-18.

57. In cases where American courts apply the test of minimal scrutiny, the onus of proof rests upon the applicant to prove that the classification being challenged is not reasonable or that the objective sought to be achieved is not permissible. However, where the courts apply the test of strict scrutiny, the onus of proof rests with the government to prove that there is a compelling state interest which justifies the challenged classification and that there is no less restrictive means by which this compelling State interest may be achieved. In cases of intermediate scrutiny, it seems the onus of proof lies with the government.

58. See: <u>Quebec Protestant School Boards</u> <u>supra</u> n. 52; <u>Ontario Film and Video Appreciation Society</u> <u>supra</u> n. 53; <u>Rauca</u> <u>supra</u> n. 52; <u>Re Skapinker</u> (1983) 40 O.R. (2d) 481 and <u>Re Southam Inc.</u> <u>supra</u> n. 52 for opinions which state that once an applicant has proven a <u>prima facie</u> violation of a guaranteed Charter right, the onus of proof shifts to the party attempting to justify the limitation under s. 1 of the Charter.

    Associate Chief Justice MacKinnon in <u>Re Southam Inc.</u> expressed this view in the following words at 124:

    > The wording imposes a positive obligation on those seeking to uphold

> the limit or limits to establish to the satisfaction of the court by evidence, by the terms and purpose of the limiting law, its economic, social and political background, and, if felt helpful, by references to comparable legislation of other acknowledged free and democratic societies, that such limit or limits are reasonable and demonstrably justified in a free and democratic society. I cannot accept the proposition urged upon us that, as the freedoms may be limited ones, the person who establishes that, prima facie, his freedom has been infringed or denied must then take the further step and establish, on the balance of probabilities, the negative, namely, that such infringement or limit is unreasonable and cannot be demonstrably justified in a free and democratic society.

59. See, for example, the comments of Associate Chief Justice MacKinnon in Re Southam Inc. supra n. 52 where he stated at 125:

> It does not appear to me that the so-called "presumption of constitutionality" assists in this type of case. There is no conflict here between two legislative bodies, federal and provincial, claiming jurisdiction over a particular legislative subject-matter. This rather is a determination whether a portion of a law is inconsistent with the provisions of the Constitution, the supreme law of Canada. This supreme law was enacted long after the Juvenile Delinquents Act and there can be no presumption that the leislators intended to act constitutionally in light of legislation that was not, at that time, a gleam in its progenitor's eye. In any event, like Chief Justice Deschenes, I am of the view that the complete burden of proving an exception under s. 1 of the Charter rests on the party claiming the benefit of the exception or limitation: Quebec Ass'n of Protestant School Boards et al. v. A.-G. Que. et al. (No. 2) (1982), 140 D.L.R. (3d) 33 at p. 59.

60. _Supra_ n. 29 at 1179-1180.

61. S. 109(1)(a) states:

For the purposes of computing the taxable income of an individual for taxation year, there may be deducted from his income for the year such of the following amounts as are applicable:

MARRIED STATUS

(a) in the case of an individual who, during the year, was a married person who supported his spouse, an amount equal to the aggregate of(1) $1,600*, and (2) $1,400* less the amount, if any, by which the spouse's income for the year while married exceed $300*;

*The amounts set out in the section are subject to indexing.

62. (1980), 1 C.H.R.R. D/193 in which Roberta Bailey argued that s. 109 (1)(a) of the _Income Tax Act_ was discriminatory in that she could not obtain the deduction afforded by s. 109 (1)(a) due to her marital status. At the time of Ms. Bailey's complaint to the Canadian Human Rights Commission she was "living as though married without being married," to quote from the Board of Inquiry decision at 195.

63. _Id_. at D/220.

64. S. 109(1)(b) recognizes other relationships of dependancy. It states:

Wholly Dependant Persons

(b) in the case of an individual not entitled to a deduction under paragraph (a) who, during the year,

(i) was an unmarried person or a married person who neither supported or lived with his spouse, and

(ii) whether by himself or jointly with one or more other persons, maintained a self-contained domestic establishment (in which the individual lived) and actually

supported therein a person who, during the year, was

(A) wholly dependant for support upon, and

(B) connected, by a blood relationship, marriage or adoption, with the taxpayer or the taxpayer and such one or more other persons, as the case may be an amount equal to the aggregate of

(3) $1,600*, and (iv) $1,400* less the amount, if any, by which the income for the year of the dependant person exceeds $300*;

*Amounts subject to indexing.

65. Supra n. 61 at D/198-D/199.

66. An Act to Amend the Income Tax Act, 1st reading, 3rd Sess., 28th Parl., June 30, 1971; 2nd reading, 3rd Sess., 28th Parl., September 13, 1971.

67. Canada. Parliament. House of Commons. Debates, 3rd Sess., 28th Parl., October 26, 1971 at 9048.

68. See, for example Workers' Compensation Act, R.S.A. 1980, Chap. w-14, s. 1(3).

69. In addition, there is usually a requirement of some holding out in the community as husband and wife.

70. S. 24(1) states:

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

S. 24(1) places the initial onus of proof upon an applicant. To date, the courts have described this onus of proof in terms of establishing a prima facie case. In relation to s. 109(1)(a), an applicant would have to initially establish that the challenged law denied the applicant the equal benefit of the law because of the applicant's lack of marital status. At

this point, the onus of proof will shift to the government under s. 1 of the Charter to justify the section as drafted.

71. On the facts of Bailey, supra n. 61, Professor Cumming found the classification as defined in s. 109(1)(a) to be unreasonable and discriminatory.

The Canadian Human Rights Commission has also recommended to Parliament that the Income Tax Act be amended so as to remove the differential treatment of legally married and common law spouses in the claiming of the married exemption. See C.H.R.C. Annual Report, 1980.

72. See the comments of Professor Cumming in Bailey, supra n. 61 at D/199.

In the United States, administrative efficiency and convenience are not an acceptable justification for a classification which denies equal protection of the law, if it is a classification to which the courts apply intermediate or strict scrutiny. However, if the challenged classification is one to which a test of minimal scrutiny is applied, administrative efficiency and convenience seem to be relevant considerations in supporting the challenged classification.

73. The writer adopts the definition of under-inclusive classifications set out in Tribe, supra n. 11 at 997 where he states:

> Under-inclusive classifications do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end.
>
> It is also possible to create a legislative classification which is "over-inclusive" (i.e. - one which burdens or includes some who are not similarly situated with respect to the purposes of a rule).

74. Dandridge v. Williams, supra n. 29 at 1161.

75. Supra n. 66.

76. See, for example The Queen v. Albert Rolbin, an unreported decision of the Court of Sessions of the Peace, District of Montreal where Judge Rousseau considered an argument based on s. 13 of the Charter in defence to a charge under ss. (2) of the Income Tax Act. He stated:

> The Income Tax Act is in this case a law that restricts an individual's rights and freedoms.
>
> It is reasonable to think that the government was justified in enacting the Income Tax Act and in particular sections 150 and 231(3) to establish a uniform means of collecting taxes from its citizens and residents for purposes of public administration.
>
> Parliament has thereby restricted the rights and freedoms of individuals that are guaranteed by the Canadian Charter of Rights and Freedoms; however, the restrictions imposed are justified if we take into account the free and democratic society in which we live. The government needs funds to cover its administration costs and to establish a fair distribution of weath among its citizens.

77. See for example, the U.S. equivalent to s. 109(1)(b) where the Internal Revenue Code provides an exemption for a "dependant", such person being defined as:

> An individual [other than a spouse] ... who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household.

This definition of "dependant" could include one of the partners to a relationship where the couple were living together but not legally married.

78. For an example of a married couple asserting a denial of equal protection on the basis that they were precluded from taking advantage of lower combined rates applicable to unmarried taxpayers, see: Mapes v. U.S., 576 F. 2d 896 (1978).

79. R.S.A. 1980, Chap. I-2.

80. Other proposed changes are in relation to age, marital status, the definition of sex to include pregnancy and sexual orientation. See New Release by Marlene Antonio, Chairman Alberta Human Rights Commission, dated July 24, 1984.

81. If this is the legal affect of s. 15, then the charter will indirectly affect so-called "private action." It is this writer's view that the Charter applies only to "government action" and that provincial and federal human rights legislation will continue to protect the individual against discriminatory conduct by non-governmental persons or bodies. But see: R. v. Lerke (1984), 55 A.R. 216. However, if human rights legislation itself must not deny equal benefit or equal protection of the law by virtue of s.15, then upon the amendment of the human rights legislation to bring it in line with s. 15, it will provide additonal prohibited grounds upon which private citizens can not discriminate against other private citizens.

82. See Notice of Hearings into Automobile Insurance Rates Based on Age, Sex and Marital Status, dated August 31, 1984 and issued by the Alberta Automobile Insurance Board.

83. It should be noted that the Charter Omnibus Act, Bill 95 of the Alberta legislature contained a section, 16(1), repealing the reference to a British subject. In the future, only Canadain citizens would be eligible to practice law in Alberta.

84. R.S.A. 1980, Chap. L-9.

85. 413 U.S. 717.

86. Id. at 722-723.

87. This is the first time Canadian courts will have to interpret a reasonably clear and emphatic statement recognizing the principle of equality in Canadian society. As well, it is the first time the issue of equality will be dealt within the context of an entrenched constitutional document.

However, it should be noted that questions of discrimination and when it is and is not permissible are not new in Canada. All the provinces and the federal Parliament have passed human rights codes which prohibit discrimination in relation to a wide range of prohibited bases. (These bases bear a close resemblance to the enumerated grounds in s. 15.) In

fact, for years provincial and federal human rights bodies have dealt with issues of equality under the rubric of anti-discrimination legislation, be it in relation to employment, housing or advertising. It should be remembered that many issues of equality will continue to be dealt with under human rights legislation, either because the alleged violation involves "private action" or where "government action" is involved, but the applicant prefers the less formal and inexpensive procedures set out in human rights legislation rather commencing an expensive and lengthy constitutional challenge to laws or actions of government officials under s. 24(1) of the Charter.

Existing human rights legislation provides specific justifications, such as bona fide occupational qualifications, for otherwise prohibited forms of discrimination. These will continue to be relevant but will be couched in the language of s. 1 of the _Charter_, as reasonable limits demonstrably justified in a free and democratic society.