

THE EQUALITY RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

W.S. TARNOPOLSKY*
Ottawa

The three sections of concern here are 15, 27 and 28. Sections 15 and 28 are dealt with together, while section 27 is discussed separately at the end. Similar equality clauses are to be found in nearly all Bills of Rights in the world, whether domestic or international.

In considering the reason for the inclusion of the four equality rights in section 15(1), it is necessary to review the history of the "equality before the law" and the "equal protection of the law" clauses as well as the decisions of the Supreme Court of Canada, with respect to the former in the Canadian Bill of Rights. In reaction to these decisions, section 15(1) includes not only the two clauses mentioned, but also two others concerning "equality under the law" and "equal benefit of the law".

Section 15(2) is not a substantive provision in the same sense as section 15(1). Although the United States Supreme Court has never held affirmative action programmes to be in contravention of the "equal protection" clause, section 15(2) was inserted for absolute certainty.

Section 27 appears to be an "aims" clause, comparable to a clause in a preamble. Because group rights require positive government action, it is difficult to envisage section 27 being used to obtain a court order for a government to spend money. Nevertheless, it can be an important factor in encouraging legislative action.

Les trois articles étudiés ici sont les articles 15, 27 et 28. On étudiera ensemble les articles 15 et 28, tandis qu'on traitera de l'article 27 séparément à la fin. On trouve des clauses pratiquement semblables sur les droits à l'égalité dans presque toutes les lois ayant trait aux droits de l'homme, qu'elles soient nationales ou internationales.

Si l'on veut comprendre la raison qui a fait inclure à l'article 15(1) les quatre droits à l'égalité, il faut faire l'historique des clauses portant sur "l'égalité devant la loi" et la "même protection de la loi" contenues dans la Déclaration canadienne des droits, ainsi que des décisions rendues à propos de ces clauses par la Cour suprême du Canada. L'article 15(1), en réaction à ces décisions, comprend non seulement les clauses ci-dessus mentionnées mais aussi deux autres portant sur "l'application de la loi également à tous" et sur le droit de tous "au même bénéfice de la loi."

* W.S. Tarnopolsky, Q.C., of the Faculty of Law, Common Law Section, University of Ottawa, Director of the Human Rights Centre, Ottawa.

L'article 15(2) ne constitue pas une disposition de fond au même titre que l'article 15(1). Quoi que la Cour suprême des États-Unis n'ait jamais jugé que les programmes de promotion sociale contrevenaient à la clause de "la même protection", l'article 15(2) a été ajouté pour éviter toute incertitude.

L'article 27 semble être une clause comparable à une clause contenue dans un préambule exposant les objectifs de la loi. Parce que les droits des groupes minoritaires exigent une action positive de la part du gouvernement, il est difficile d'envisager que l'article 27 soit utilisé dans le but d'obtenir un jugement qui oblige un gouvernement à dépenser de l'argent. Néanmoins, cet article peut être important pour inciter à une action législative.

There are three "equality rights" provisions in the Canadian Charter of Rights and Freedoms¹—sections 15, 27 and 28:

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

These are the provisions which probably received the greatest attention from lobbying groups both before and after the November Accord of 1981. In addition, if the experience in Canada since 1960 under the Canadian Bill of Rights, and in the United States since 1954 under the Fourteenth Amendment, are any guide, these are the provisions that are most likely to be raised most frequently in litigation under the new Charter. This prediction, however, cannot be tested until after April 17th, 1985 because, by section 32(2) of the Charter, section 15, the foundation provision, does not come into effect until three years after the Charter came into force. Although there is no similar delay with respect to sections 27 and 28, most of the impact of these will be determined within the context of the equality rights in section 15. Further, since sections 15 and 28 are "individual rights" provisions, while section 27 is a "group rights" provision, section 27 will be dealt with separately at the end, after a discussion of the other two.

I. *Historical and Comparative Setting.*

Although equality rights provisions in basic constitutional documents began appearing only within the last two hundred years, the notion of

¹ Part I of Constitution Act which is Schedule B of Canada Act 1982, c. 11 (U.K.).

“equality” dates at least as far back as the time of the Greek city-states, in the arguments of the Aristoteleans. Later, it was revived as a religious concept, pursuant to which it was preached that all men were equal in the eyes of God, despite their earthly inequality.² Another dimension to the concept, namely that it derived from “the state of nature”, was added by philosophers like Locke,³ near the end of the seventeenth century, and Rousseau,⁴ in the eighteenth century. The spirit of all of these historical antecedents were combined by Jefferson into the justification for the American Declaration of Independence:

We hold these truths to be self-evident, That All Men Are Created Equal. . . .

Similarly, and just a few years later, the French Declaration of the Rights of Man and of the Citizen, 1789, proclaimed:

Men are born and remain free and equal in respect of rights.

And, it will be recalled, one of the three slogans of the French Revolution was “égalité”.

At this point, two observations must be made. The first is that in the Greek city-states the equality of “citizens” was not shared with slaves, that for almost ninety years after the American Declaration of Independence slavery was practiced in the United States and, further, that in all countries at various times the reference to the rights of “men” meant just that, and to a large extent did not include women. The second is that strict numerical or absolute equality of treatment was never contemplated. The argument of Aristotle that “equality consists of treating equals equally and unequals unequally”, has been accepted as an obvious fact. The acute question, of course, is how to identify unequals and how to evaluate when unequal treatment is justified and when it is not. This is a subject to which it is necessary to return later.

As mentioned previously, despite the American Declaration of Independence proclamation that “all men are created equal”, it was not until after the American Civil War that practical effect was given to this aim through the “equal protection of the laws” clause in the Fourteenth Amendment. This amendment has been described, together with the Thirteenth and Fifteenth, as “the new constitution which emerged from the Second American Revolution”.⁵ Although these amendments were added to the Constitution to guarantee to the emancipated black population a full and equal status in American society, the United States Supreme Court

² For a brief survey of this history and works related to it, see P.G. Polyviou, *The Equal Protection of the Laws* (1980), ch. 1, especially the list of studies relating to this history in note 14, p. 5.

³ *Second Treatise on Civil Government* (Oxford: Blackwell, 1956), ch. 2.

⁴ *On the Social Contract* (New York: St. Martin's Press, 1978), pp. 143 *et seq.*

⁵ J.P. Frank and R.F. Monroe, *The Original Understanding of “Equal Protection of the Laws”* (1950), 50 *Col. L. Rev.* 131, at p. 166.

decided soon after their adoption that the protection therein granted was to extend to all races, and not just to blacks.⁶ However, when Congress passed the Civil Rights Act, 1875, which, *inter alia*, forbade denial of equal facilities in transportation and hotels, the Supreme Court invalidated important parts of it.⁷ Perhaps the most significant means of getting around the requirements of the Fourteenth Amendment was that of "segregation", approved of by the Supreme Court in *Plessy v. Ferguson*,⁸ where the doctrine was rationalized as permitting "separate but equal" facilities.

It was not until 1954, in the famous case of *Brown v. Board of Education*,⁹ that the Supreme Court finally held that separate facilities were inherently unequal and so unconstitutional. It has been suggested that in the decade following *Brown v. Board of Education* the dominant movement in the American Supreme Court was "the emerging primacy of equality as a guide to constitutional decision" and that this "egalitarian revolution in the judicial doctrine" made the equal protection principles of the Fourteenth Amendment dominant even over the "due process" clause.¹⁰

At this point it should be noted that, unlike the Americans and the French, the British never did formally proclaim "equality" as a fundamental principle of their Constitution. Nevertheless, in his classic definition of the United Kingdom Constitution, Dicey suggested that "equality before the law" was one of three meanings of the fundamental principle of the United Kingdom Constitution known as the "Rule of Law".¹¹ He defined "equality before the law" as follows:¹²

. . . [T]he equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. . . .

Although Dicey's definition was intended to serve his argument that, unlike the continental situation, the United Kingdom knew nothing of "administrative law" or "administrative tribunals", and although the subsequent development of "administrative law", both in the United Kingdom and in Canada, have disproved this distinction, his limitation on

⁶ *Yick Wo v. Hopkins* (1886), 118 U.S. 356, invalidating discrimination against Chinese laundrymen.

⁷ *The Civil Rights Cases* (1883), 109 U.S. 3.

⁸ (1896), 163 U.S. 537.

⁹ (1954), 347 U.S. 483. For a discussion of this case and a list of articles see Walter Gellhorn, *American Rights* (1960), ch. VIII. Also see R.A. Leflar and W.H. Davis, *Segregation in the Public Schools—1953* (1954), 67 *Harv. L. Rev.* 377.

¹⁰ P.B. Kurland, *The Supreme Court 1963 Term—Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"* (1964), 78 *Harv. L. Rev.* 143, at p. 144.

¹¹ *Introduction to the Law of the Constitution* (10th ed. by E.C.S. Wade, 1961).

¹² *Ibid.*, at pp. 202-203.

the "equality before the law" clause has continued to find favour, even in our Supreme Court as recently as 1973.¹³

More modern definitions of "equality before the law" have been provided by United Kingdom authorities, but these are still more restrictive than the "egalitarian" interpretation which has been given to the "equal protection of the law" clause in the American Fourteenth Amendment. Thus, Marshall¹⁴ suggests that the doctrine implies "equality of state and individual before the law". Although Marshall acknowledges that since the state imposes its will upon the individual, and since state servants are given specific powers, the state and citizen cannot really be equals, nevertheless, he suggests that it is the duty of the courts to hold an equal balance between citizens and officials. Sir Ivor Jennings, who is one of the leading modern critics of Dicey, expands the concept thus:¹⁵

It assumes that among equals the laws should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status or political influence.

Nevertheless, it will be noted that even this view of "equality before the law" basically restricts it to a procedural concept relating only to the even-handed operation of the legal system in its application and enforcement of the law.

In the twentieth century, particularly after World War II, both national and international Bills of Rights have included "equality" clauses. Essentially three formulations have been adopted. In addition to those of the American "equal protection" clause and the British "equality before the law" clause, a general non-discrimination provision has been introduced. Thus, the European Convention on Human Rights, which has been ratified by the United Kingdom and over twenty other West European countries, provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention should be secured without discrimination on any grounds such as . . .".¹⁶ Some, such as the Basic Law of the Federal Republic of Germany, provide that "[all] persons shall be equal before the law", that "men and women shall have equal rights" and that "no one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or religious or political opinions".¹⁷ Still others, such as the Indian Constitution, combine all three. Thus, article 15(1) provides that "[t]he State shall not discriminate

¹³ *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, at pp. 1365-1366.

¹⁴ *Constitutional Theory* (1971), ch. VII.

¹⁵ *The Law and the Constitution* (3rd ed., 1943), p. 49.

¹⁶ Art. 14.

¹⁷ Art. 3.

against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”, while article 14 provides that “the State shall not deny to any person equality before the law or the equal protection of the laws”. Similarly, the International Covenant on Civil and Political Rights, which was ratified by Canada in 1976 pursuant to a unanimous agreement of all the provinces and the federal government, utilizes all three formulations. Thus, paragraph 1 of article 2 provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similarly, article 25 provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

to take part in the conduct of public affairs, to vote and be elected, and to have access, on general terms of equality, to public service in his country. In addition, article 14(1) provides that:

All persons shall be equal before the courts and tribunals.

Furthermore, article 3 makes a special provision for the equal rights of men and women, while article 26 combines a non-discrimination provision along with the clauses on “equality before the law” and “equal protection of the law”:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

II. *From Section 1 of the Canadian Bill of Rights to Section 15 of the Charter.*

Section 1 of the Canadian Bill of Rights includes both a non-discrimination clause and one on “equality before the law”. The non-discrimination clause appears in the opening paragraph of section 1 and applies to all the rights and freedoms enumerated, namely, the fundamental freedoms in subsections (c) to (f), the “due process” clause in subsection (a), and the equality clause in subsection (b), which reads “the right of the individual to equality before the law and the protection of the law”. Rather than going into a long discussion of the relationship of the non-discrimination clause in the opening paragraph to the “equality before the law” clause in subsection (b), one could refer to the following summation of Laskin J. in *Curr v. The Queen*:¹⁸

¹⁸ [1972] S.C.R. 889, at p. 896.

In considering the reach of s. 1(a). . .

I would observe . . . that I do not read it as making the existence of any of the forms of prohibited discrimination a *sine qua non* of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any of the clauses (a) to (f) of s. 1. It is, *a fortiori*, offensive if there is discrimination by reason of race so as to deny equality before the law. That is what this Court decided in *Regina v. Drybones* and I need say no more on this point.

The main focus of the Supreme Court was on the "equality before the law" clause. Since all of the leading cases have been extensively discussed previously,¹⁹ it is not proposed to do so here but rather to summarize briefly.

The only case in which the Supreme Court held that a federal provision contravened the "equality before the law" clause and was therefore inoperative, was *Regina v. Drybones*.²⁰ In this case Mr. Justice Ritchie, on behalf of the majority of the Supreme Court, held that the provision in the Indian Act which made it an offence for Indians to be intoxicated off a reserve contravened the "equality before the law" clause, and gave that clause the following meaning:²¹

. . . I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.¹⁸

However, in the *Lavell* case²² Mr. Justice Ritchie, held that section 12(1)(b) of the Indian Act,²³ which provides that an Indian woman who married someone who is not an Indian would thereby lose her band membership, whereas an Indian man not only did not lose his band membership, but gave it to his spouse, did not contravene the "equality before the law" clause. In doing so he made two assertions which have had a clear effect upon the formulation of section 15 of the Charter. The first was that he rejected any "egalitarian concept exemplified by the Fourteenth Amendment of the U.S. Constitution as interpreted by the courts of

¹⁹ For some of this discussion and for reference to many relevant authorities see W.S. Tarnopolsky, *The Equality of Rights*, being ch. 13 in Tarnopolsky and Beaudoin (eds), *Canadian Charter of Rights and Freedoms: Commentary* (1982), p. 395.

²⁰ [1970] S.C.R. 282. For a list of some of the leading articles on this case see Tarnopolsky, *The Equality Rights*, *op. cit.*, *ibid.*, p. 408, note 48.

²¹ *Ibid.*, at p. 297.

²² *Supra*, footnote 13. For some of the leading commentaries see Tarnopolsky, *op. cit.*, footnote 19, p. 408, note 49.

²³ R.S.C. 1970, c. I-6 as am.

that country”²⁴. Rather, and this was his second assertion, he purported to apply the concept of “equality before the law” as it would have been understood at the time the Bill of Rights was enacted, and adopted Dicey’s definition of “equal subjection of all classes to the ordinary law of the land administered by the ordinary courts”.²⁵

Therefore, to the extent that he, as well as Fauteux C.J.C. in *Smythe v. The Queen*²⁶ rejected any possible references to the American “egalitarian” conception, section 15 now includes the “equal protection of the law” clause. To the extent that he adopted the Dicey definition and suggested that *Lavell* could be distinguished from *Drybones* on the basis that in the former case no “inequality of treatment between Indian men and women flows as a necessary result of the application of section 12(1)(b) of the Indian Act”, or, in other words, to the extent that he implied there was a distinction between clauses like “equality before the law” and “unequal treatment under the law”, section 15 now includes a reference to equality “under the law”.

In order to understand the motivation behind the addition of the fourth equality clause, namely “equal benefit of the law”, it is necessary to recall the *Bliss* case.²⁷ Stella Bliss was a pregnant woman who had worked long enough to have qualified for ordinary unemployment benefits, that is eight weeks, but not the ten weeks necessary to qualify for maternity benefits. However, she could not claim ordinary benefits because it was assumed that during the maternity period women are not capable of and available for work. She, therefore, challenged section 46, the relevant provision in the Unemployment Insurance Act, 1971,²⁸ on the ground that it contravened the “equality before the law” clause in the Canadian Bill of Rights. In the Federal Court of Appeal Pratte J. held that this was not discrimination because of sex, but rather a distinction between pregnant women and all other unemployed persons, male or female. When the case reached the Supreme Court of Canada, Ritchie J. gave the unanimous decision upholding the judgment of Pratte J. and, in addition, suggested that there was no contravention of “equality before the law” because section 46 did not involve denial of equality of treatment in the administration and enforcement of the law before the ordinary courts of the land:

... There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *R. v. Drybones* (1969), 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282, and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during

²⁴ *Ibid.*, at p. 1365.

²⁵ *Ibid.*, at p. 1366.

²⁶ [1971] S.C.R. 680, at p. 687.

²⁷ *Bliss v. Attorney General for Canada* (1978), 92 D.L.R. (3d) 417.

²⁸ S.C. 1970-71-72, c. 48.

which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefits. . . .²⁹

Since this assertion implied a distinction between "equality before the law" or "equal *protection* of the law", on the one hand, and "equal *benefit* of the law", on the other, this presumed gap, too, has now been covered in section 15 of the Canadian Charter.

This very brief survey of how majority³⁰ decisions on the Supreme Court of Canada limited the "equality before the law" clause in the Canadian Bill of Rights, and how these limitations led directly to the incorporation of four equality clauses in section 15(1), also explains, partly, why various women's groups lobbied so hard, both before and after the November, 1981 Accord, for the inclusion of section 28. Although one might have expected that the equality clauses, particularly since section 15(1) lists "sex" as one of the forbidden grounds of discrimination, must require equality between men and women, there was sufficient suspicion amongst women, based upon the Supreme Court judgments referred to above, to press for an "equal rights amendment" in the Charter. Another motivation for the action of women in asking for a section 28 will be explained in the succeeding discussion of what might be acceptable distinctions despite an equality provision.

Apart from not providing a more "egalitarian" definition for the "equality before the law" clause, another major limitation on this clause arose from assertions, by majorities on the Supreme Court of Canada, with respect to acceptable distinctions. Without going into a detailed discussion, it might be recalled that in *Regina v. Burnshine*,³¹ the Supreme Court was concerned with the provision in the federal Prisons and Reformatories Act³² by which courts in Ontario and British Columbia may sentence anyone apparently under the age of twenty-two, who is convicted of an offence punishable by imprisonment for three months or more, to a fixed term of not less than three months and an indefinite period thereafter of not more than two years less one day, to be served in a special correctional institution, rather than a common jail. Burnshine was sentenced to this maximum, even though the offence for which he had been charged had a maximum punishment of six months. Although the minority judgment, given by Laskin J. would not have found the provision inoperative, but

²⁹ *Supra*, footnote 27, at p. 423.

³⁰ Note, however, that the judgment of Ritchie J. in the *Lavell* case, *supra*, footnote 13, was not a majority decision, as the court split four-four-one, with Pigeon J. joining Ritchie J. in constituting a majority to dismiss the challenge to s. 12(1)(b) of the Indian Act, *supra*, footnote 23, but on the basis that he maintained his position previously expressed in the *Drybones* case, *supra*, footnote 20, that the Canadian Bill of Rights could not have been intended to override the whole of the Indian Act.

³¹ [1975] 1 S.C.R. 693.

³² R.S.C. 1970, c. P-21.

would rather have so "construed and applied" it that the maximum term of detention could not have exceeded that provided under the Criminal Code, the majority decision, given by Martland J., held that the provision challenged did not contravene the "equality before the law" clause. The main reason given for coming to this conclusion was that since the object of the law was to reform young offenders by incarceration in an institution other than a jail, "it would be necessary for the respondent, at least, to satisfy this Court that, . . . Parliament was not seeking to achieve a valid federal objective".³³ This "valid federal objective" test was picked up and affirmed again by the Supreme Court of Canada in *Prata v. Minister of Manpower and Immigration*.³⁴ The case concerned provisions in the Immigration Appeal Board Act³⁵ providing for a discretion to permit certain deportable persons to remain in Canada on compassionate grounds, unless they are thought to be a threat to national security. In giving the unanimous judgment of the Supreme Court of Canada holding that this discretion did not constitute an infringement of the "equality before the law" clause, Martland J. stated:³⁶

. . . This Court has held that s. 1(b) of the *Canadian Bill of Rights* does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective (*R. v. Burnshine*):

This test was applied again in the *Bliss* case as one of the reasons given for deciding that there was no contravention of the "equality before the law" clause.

In the most recent Supreme Court decision on the topic, *MacKay v. The Queen*,³⁷ the issue was whether the provision in the National Defence Act³⁸ providing for prosecution and trial before a military tribunal of an offence under the Narcotic Control Act³⁹ offended, *inter alia*, section 1(b) of the Canadian Bill of Rights. In giving the majority decision to the effect that there was no such contravention, Ritchie J. referred to the cases discussed above and added very little other than to assert that the National Defence Act was enacted by Parliament "constitutionally competent to do so and exercising its powers in accordance with the tenets of responsible government"⁴⁰ and that the Act dealt with a particular class of individuals and, "as it is enacted for the purpose of achieving a valid federal objective, the provisions of s. 1(b) of the Bill of Rights do not require that its

³³ *Supra*, footnote 31, at pp. 707-708.

³⁴ [1976] 1 S.C.R. 376.

³⁵ R.S.C. 1970, c. I-3.

³⁶ *Supra*, footnote 34, at p. 382.

³⁷ [1980] 2 S.C.R. 370.

³⁸ R.S.C. 1970, c. N-4, as am. by S.C. 1972, c. 13, s. 73.

³⁹ R.S.C. 1970, c. N-1.

⁴⁰ *Supra*, footnote 37, at p. 412.

provisions contain the same requirements as all other federal legislation".⁴¹

Although McIntyre J. agreed with Ritchie J. in the result, he suggested that the "valid federal objective" test had to mean more than just the issue of whether there was valid legislative competence, because even apart from the Bill of Rights an enactment could not be supported constitutionally unless it was within legislative jurisdiction. He suggested that the word "valid" required an analysis beyond the issue of legislative competence, namely, the determination of whether the Bill of Rights is also affected.⁴²

. . . 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 before the law.

Further, he suggested, in distinguishing between valid distinctions and those that contravene the clause,

. . . [t]he question which must be resolved in each case is whether such inequality as may be created by legislation affecting 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 universal application of law to meet special conditions and to attain a necessary and desirable social objective.⁴³

The new test he suggested would require an inquiry into

. . . whether any inequality has been created . . . rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive 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. . . .⁴⁴

Although there can be no question but that the making of distinctions between individuals or classes of individuals is an indispensable ingredient of most legislation, and even that the application of an equal law to unequals will not only perpetuate inequality, but even exaggerate it, one must still question whether the test of a "valid legislative objective", or even the more appropriate gauge of "necessary and desirable social objective", is sufficient for all purposes in applying section 15(1). In fact, it may be questioned whether "valid legislative objective" is a test at all.⁴⁵ How can one argue successfully that a piece of legislation enacted by a majority does not have a valid legislative objective? Surely, at least, one must accept the argument of McIntyre J. that legislative competence is merely the first

⁴¹ *Ibid.*, at p. 418.

⁴² *Ibid.*, at p. 406.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ M.E. Gold, *Equality Before the Law in the Supreme Court of Canada: A Case Study* (1980), 18 O.H.L.J. 336.

step. Legislation valid from the point of view of legislative jurisdiction must still be subjected to the equality test. His suggestion that the test is whether the law "is arbitrary, capricious or unnecessary" or whether instead "it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective", is surely more appropriate. Nevertheless, it is suggested that even this test, which might have been acceptable under section 1(b) of the Canadian Bill of Rights, is not sufficient for section 15(1) of the new Charter. Even though section 1 of the Charter does provide for "reasonable limitations", which clearly contemplates the acceptability of certain legislative distinctions, it would be useful to consider the kinds of tests which the United States Supreme Court developed under the Fourteenth Amendment.

In the United States the equal protection clause does not automatically rule out all legislative classifications. It has not, for instance, been applied to invalidate graduated tax laws, nor special legislation for the protection of infants or mental defectives.⁴⁶ Not long after *Brown v. Board of Education* the equal protection clause was described in the following terms:⁴⁷

What the clause appears to require today is that any classification of "persons" shall be reasonably relevant to the recognized purposes of good government; and furthermore, that there shall be *no* distinction made on the sole basis of race or alienage as to certain rights.

Although this definition would appear to have continuing validity, during the past two decades the United States Supreme Court seems to have developed and applied three levels or intensities of scrutiny: strict, intermediate and minimal. In order to understand the distinction between these three levels, it is useful to start with the first, to then contrast it with the third, and finally to try to identify the second.

The "strict scrutiny" test is applied with respect to what have been termed "inherently suspect" classifications, that is those based on race, religion and nationality,⁴⁸ particularly if the classifications are enacted for the purpose of denying the fundamental rights and liberties set out in the Constitution. When faced with an "inherently suspect" classification, the court has applied "close judicial scrutiny" to require proof that the classification was for "an overriding state interest" which could not be accomplished in any less prejudicial manner.⁴⁹ The strictness of the scrutiny can be seen in the fact that, if one sets aside the special situation concerned with

⁴⁶ *Buck v. Bill* (1927), 274 U.S. 200, but cf. *Skinner v. Oklahoma* (1942), 316 U.S. 535, where a similar Act applicable to third offenders was held invalid.

⁴⁷ E.S. Corwin, *The Constitution and What it Means Today* (13th ed., 1973), p. 268.

⁴⁸ The use of the last-mentioned term in the United States would appear to correspond with Canadian usage of the terms "national or ethnic origin".

⁴⁹ For some of the pertinent cases and the jurisprudence related thereto see Tamopol-sky, *op. cit.*, footnote 19, 403-405, at notes 31 to 38.

acceptance of segregation until 1954, the only case of racial discrimination which has passed this test is *Korematsu v. United States*,⁵⁰ which was a decision dealing with wartime powers applied to exclude Japanese Americans from the west coast.

“Minimal scrutiny” would appear to apply where the classification involves neither an “inherently suspect” group, nor a fundamental constitutional right. These are classifications made essentially for economic or social reasons, and in this instance the court uses a “rational relationship” test. The onus is upon the one who challenges the classification to prove that the legislature did not have a legitimate purpose in mind and that the classification chosen did not have a reasonable rational relationship to the object of the legislation.⁵¹

It might be noted at this point that the “valid legislative objective” or the “necessary and desirable social objective” tests of the Supreme Court of Canada, developed under the Canadian “equality before the law” clause, would appear to be equivalent to the “minimal scrutiny” test.

Obviously, the test known as “intermediate scrutiny” comes somewhere between “strict” and “minimal” scrutiny. This test has come to be applied with respect to gender- and legitimacy-based classifications. What is important from the point of view of understanding the campaign for the enactment of the Equal Rights Amendment in the United States, as well as the inclusion of section 28 in the Canadian Charter, is that “sex” was never included in the “inherently suspect” category along with race, religion and nationality. Whether this was because the courts were male-dominated, or because some of the earlier challenges under the Fourteenth Amendment were with respect to statutes which clearly were enacted for the purpose of protecting women from certain arduous or dangerous occupations, is not clear. In any case, by the mid-1970s the United States Supreme Court had evolved what has come to be called “intermediate scrutiny”. The test used is that of “an important governmental objective” which is “substantially related to achievement of those objectives”.⁵²

Applying this American experience to the Canadian situation one could suggest the following. The inclusion in section 15(1) of four equality clauses must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well. Since section 15(1) now lists a number of grounds upon which these clauses are to be interpreted and applied, without discrimination, and since section 28 guarantees the rights and freedoms in the Charter equally to male and female persons “notwithstanding anything in this Charter”, the listed

⁵⁰ (1944), 323 U.S. 214.

⁵¹ See, for example, *McGowan v. Maryland* (1961), 366 U.S. 420; *Geduldig v. Aiello* (1974), 417 U.S. 484; *Cleland v. National College of Business* (1978), 435 U.S. 213.

⁵² *Craig v. Boran* (1976), 429 U.S. 190; *Califano v. Goldfarb* (1977), 430 U.S. 199; *Califano v. Webster* (1977), 430 U.S. 313.

grounds must now be considered "inherently suspect" and subject to "strict judicial scrutiny". Perhaps, in the light of section 1 of the Charter, and in light of the fact that some of the listed grounds, such as age and mental or physical disability, are clearly subject to *bona fide* qualifications or requirements, a less stringent test might be applied to these grounds, similar to that of "intermediate scrutiny" in the United States. Finally, with respect to distinctions made on grounds not listed in section 15(1), particularly with respect to legislation having an economic or social purpose, one should expect the courts to defer to legislative opinion on these issues. As in the United States, or under either of the two tests suggested by Justices Ritchie and McIntyre, the legislation would withstand challenge unless the one who challenges it can show that there is no rational relationship between the means and ends chosen and valid legislative activity.

As mentioned earlier, it will not be until after April, 1985 that our courts will come to deal with the meaning and application of section 15(1). In the meantime, however, it should not be forgotten that the "equality before the law" clause in section 1(b) of the Canadian Bill of Rights continues to operate.⁵³ In addition, of course, section 28 is not subject to the three-year delay and operates now "notwithstanding anything in this Charter". Therefore, there should be some hope that the earlier decisions concerning contraventions of the "equality before the law" clause, because of sex discrimination, could now be reconsidered in the light of section 28 of the constitutionality entrenched Charter of Rights and Freedoms.

III. *Application of Sections 15 and 28 of the Charter.*

In the first place it should be noted that although, by section 52(1) of the Constitution Act, 1982, the Charter is given primacy over all other laws in Canada, including the Canadian Bill of Rights, the three provincial bills of rights of Alberta, Quebec and Saskatchewan, and the anti-discrimination laws of all eleven jurisdictions, none of these has been repealed by section 53(1) of the Constitution Act, 1982. In addition, by section 26 of the Charter, the guarantees of Charter rights and freedoms "shall not be construed as denying the existence of any other rights or freedoms that exist in Canada". Therefore, all the anti-discrimination laws in the country continue to operate except in the very unlikely event that they are found to be inconsistent with the Charter. Which, then, is to apply to discrimination within this context—the various anti-discrimination laws or the Charter? It will be argued here that discrimination by legislative action will be determined under the Charter, discrimination by private action will continue to be dealt with under the anti-discrimination laws, and that discrimination by executive or government action may be challenged under either.

⁵³ Note that as a result of ss 26 and 53 of the Constitution Act, 1982, all Bills of Rights in Canada continue to operate unless over-ridden by the Charter.

By section 32(1), the Charter is specifically made applicable only to the Parliament and government of Canada and to the legislatures and governments of the provinces “*in respect of all matters within the authority*” of the respective legislative body. It has to be noted that the words “*in respect of*” were specifically substituted for the words “*and to*” in the earlier draft of the Charter. Therefore, although legislative and executive actions are covered by the Charter, the Charter is not *per se* applicable to private action.

Second, section 15 refers to equality before and under the *law*, as well as equal protection and benefit of the *law*. Therefore, although an anti-discrimination law would *itself* have to conform to section 15, it, and not section 15, would be directly applicable to discriminatory actions by private persons.

Third, although the United States Supreme Court has extended the “*state action*” protection of the Fourteenth Amendment to such private activities as privately-owned parking garages on municipally-managed parks, private restaurants on publically-owned facilities, and restrictive covenants, because these could only be enforced through court action,⁵⁴ the reason for the extension must be considered. At the time of such extension there were anti-discrimination laws in only some thirty-five states and very little at the federal level. When, in 1964, Congress enacted the Civil Rights Act to apply to the federal sphere, to override any state Civil Rights Acts which were deficient, and to apply to those states which did not have their own, resort to the Fourteenth Amendment became less crucial. Now, private discrimination cases are pursued under the various Civil Rights Acts, and the Fourteenth Amendment is resorted to only for cases involving “*state action*”. In our own case every jurisdiction in Canada has an anti-discrimination statute and so the same extension of “*state action*” to private activities is unnecessary.

Finally, every anti-discrimination statute in Canada is explicitly made applicable to the Crown. Therefore, executive or governmental discrimination can be challenged either under those statutes or under the Charter. However, since a challenge under the Charter involves the challenger assuming the cost of the action, unless special provision is made otherwise, whereas under the anti-discrimination laws the various Human Rights Commissions of the various jurisdictions assume the cost of pursuing a complaint of discrimination, it is unlikely that a complainant would resort to a constitutional action in the courts, rather than the complaint process under the anti-discrimination laws, unless such complainant disagrees with the evaluation of his complaint by the Commission. In that event, however, his or her chances of success in the courts under the Charter cannot be assumed to be very high.

⁵⁴ See *Evans v. Newton* (1966), 382 U.S. 296; *Burton v. Willington Parking Authority* (1961), 365 U.S. 715; *Shelley v. Kraemer* (1948), 334 U.S. 1.

IV. *Section 15(2) of the Charter.*

Subsection (2) of section 15 is entitled "affirmative action programs" and provides:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of . . . [the grounds listed in subs. 1].

It would appear that this provision was added to the Charter out of excessive caution. In line with the argument suggested earlier, that equal laws can result in inequality if applied to persons in unequal circumstances, it is suggested that "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups" cannot be a contravention of subsection (1) of section 15, even without subsection (2) saying so. It would appear that subsection (2) was included partly because of the fear that courts which gave such a limited definition to the "equality before the law" clause, under section 1(b) of the Canadian Bill of Rights, might also be inclined to find affirmative action to be discriminatory. The second reason appears to be a mistaken apprehension of the meaning of the *Bakke* case in the United States.⁵⁵

Bakke was a white male who challenged the special admissions scheme of the Medical School of the University of California at Davis, under which sixteen of the one hundred admissions positions were reserved for "economically and/or educationally disadvantaged" members of minority groups defined as blacks, Chicanos, Asians and American Indians. Bakke was able to show that his "bench mark score", although below that of the regular entering class, was higher than that of the sixteen entrants in the special group. Bakke challenged the special admission programme as being contrary to the Fourteenth Amendment, the California Constitution, and section 601 of Title VI of the Civil Rights Act of 1964,⁵⁶ which provides:

No person in the United States shall, on the ground of race, colour or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programs or activity receiving federal financial assistance.

The United States Supreme Court held, five to four, that the Davis programme was invalid. Nevertheless, a number of points concerning that decision must be noted: (1) Four of the five judges who upheld Bakke's contention based their decisions explicitly and only upon the strict terms of section 601 of the Civil Rights Act: *not* on the equal protection clause of the Fourteenth Amendment. Only Mr. Justice Powell, who joined the majority, based his decision upon the equal protection clause, while the other four members held that the scheme was in accordance with that clause.

⁵⁵ *Regents of the University of California v. Bakke* (1978), 98 S. Ct 2733. The articles on this case are legion. One might just draw attention to two symposia: (1979), 14 Harv. C.R.-C.L.L. Rev. 1, at pp. 1 to 327 and (1979), 67 Calif. L. Rev. 1, at pp. 1 to 263.

⁵⁶ 42 U.S.C.A. §§ 2000 *d et seq.*

(2) The four judges who held that the scheme was in accordance with the equal protection clause, were joined by Mr. Justice Powell in holding that race *could* be a factor in admissions decisions and also that racial classifications could be used to eliminate or ameliorate “the disabling effects of identified, specific instances of discrimination”, even “at the expense of other innocent individuals”, where there have been “judicial, legislative, or administrative findings of constitutional or statutory violations”, as part of remedies “for the vindication of constitutional [and statutory] entitlement”.

Furthermore, the *Bakke* case was followed exactly one year and one day later by the Supreme Court decision in *United Steel Workers of America v. Weber*.⁵⁷ This case concerned a challenge to an affirmative action programme undertaken by Kaiser Aluminium Corporation, pursuant to a collective bargaining agreement with the Union. In this case the equal protection clause was not even relied upon, but rather Title VII of the Civil Rights Act, 1964, which is similar to Title VI, dealt with in the *Bakke* case, except that it applies to employment. By a five to two decision the Supreme Court upheld the validity of the affirmative action program. The majority group held that private, voluntary, race-conscious affirmative action plans were valid for the purpose of overcoming manifest racial imbalances or traditional patterns of segregation.

In applying the *Bakke* and *Weber* cases to the Canadian situation a number of points should be noted:

- (1) Neither case was decided upon the equal protection clause of the Fourteenth Amendment. Only one of the nine judges in the *Bakke* case found such contravention. Both cases were based upon the explicit wording of the Civil Rights Act of 1964. There is no exact Canadian equivalent of the relevant statutory provisions. In fact, the anti-discrimination statutes of all provinces, except Newfoundland and Quebec, as well as the Federal Act, make explicit provision for the adoption of “special” programmes or measures, that is affirmative action programmes, and each of these makes explicit provision that these are *not* to be considered to be in contravention of the anti-discrimination statutes concerned.
- (2) The *Bakke* case concerned only a “strict” quota for admission to professional schools, while the *Weber* case concerned voluntarily-adopted special recruitment plans. Neither dealt with the broad spectrum of measures that can be taken in pursuance of an “affirmative action program”, such as: special efforts to publicize these programmes; special recruitment measures; special training programmes; a reconsideration of the basis of assessment of “merit”, both with respect to initial employment and

⁵⁷ (1979), 99 S. Ct 2721.

subsequent promotion; special employment programmes in hinterland areas, taking account of hunting and fishing seasons, or arranging employment obligations by whole communities rather than by individuals; and, of course, the changing of patterns of recruitment and promotion which have resulted in exclusions of disadvantaged minorities and women.

One might add that the undertaking of affirmative action programs, in the context of a requirement to prohibit discrimination, is provided for under the International Convention on the Elimination of all Forms of Racial Discrimination, which has been ratified with the agreement of the federal and all provincial governments. Paragraph 4 of article 1 of that Convention provides:

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Finally, it might be pointed out that although section 28 applies "notwithstanding anything in this Charter"; this should not invalidate "affirmative action programs" in favour of women pursuant to section 15(2). Section 28 has to be seen in the light of its purpose, as outlined earlier, to overcome the limitations that had been placed by the courts upon the "equality before the law" clause in section 1(b) of the Canadian Bill of Rights, as well as in the light of the fact that under section 33 of the Charter a "non obstante clause" could be used to exempt a law which discriminates against women from the ambit of the Charter. Therefore, the purpose of section 28 is clear. In addition, subsection (2) of section 15 is not a substantive provision, but rather an explanation of the substantive provision, which is subsection (1). Subsection (2) does not in itself provide for a right, but is merely an amplification of what the right in subsection (1) includes. Therefore, section 28 applies to subsection (1) and not to subsection (2).

V. *The Effect of Section 27 on the Interpretation of the Charter.*

A. *The Distinction Between Individual Rights and Group Rights.*

There are at least two fundamental distinctions which must be emphasized for the sake of clarity. The first is that an assertion of an individual right emphasizes the proposition that everyone is to be treated the same *regardless* of his or her membership in a particular identifiable group. The assertion of group rights, on the other hand, bases itself upon a claim of an individual or a group of individuals *because of* membership in an identifiable group. This distinction should not be obscured by the fact that certain individual rights are either of no consequence unless enjoyed in community

with others, or are asserted on behalf of individuals who happen to be members of identifiable minority groups. Thus, although it is true that the fundamental freedoms of expression, religion, assembly, and association are intended to be exercised by several individuals in common or for the purpose of communication, the intention is that each of these freedoms is to be enjoyed equally by everyone. If one asserts the right to worship as one pleases within the law, this is asserted regardless of whether the person happens to be a Christian, a Jew, a Muslim or a Hindu. However, to the extent that certain rights of religion vary because of special protection for certain religious groups, such a right is no longer an individual right, but a group right. Conversely, although ordinarily one has in mind members of groups identifiable because of race, colour, or religion in asserting a right of equal access, this right is not set out specifically for separate identifiable groups, but for everyone regardless of the fact that that person happens to be a member of an identifiable group.

Certain rights, such as language rights, seem to lie in a borderland. When examined more closely, however, the distinction referred to above becomes clear. A guarantee of freedom of expression, for example, assures one the right to communicate, regardless of which language is used as the medium of communication. It does not, however, give any assurance that the communication will be understood, nor that the reply, if there be any, will be in a language which the initiator of the communication will understand. To put this in a different way, anyone who would like to use a particular language meaningfully is not helped by guarantees of free speech: what is needed is others who can understand and respond in the language of the initiator.

This leads to the second distinction between group rights and individual rights. The guarantee of an individual right like free expression essentially requires the non-interference of the state. A language right on the other hand, requires positive governmental action. It may be that the government is required to have civil servants who can comprehend the language of the citizen and reply in that language, or is required to expend funds to provide instruction in the language to promote cultural activities which protect and promote the guaranteed language. The important thing is that a language guarantee singles out certain groups from others. In a homogeneous country there is no need for constitutional protection for the language which is spoken by the people. For that matter, in a federal multilingual country, where the provincial boundaries coincide with language groups, there is also no need for constitutional guarantees or special government protection. Language rights need constitutional guarantees only in those places where there are minorities who want to safeguard a language other than that spoken by the majority of the country or the province, or where the majority language is threatened by the minority which is a majority in the rest of the country.

In discussing group rights, the matter of intent becomes extremely important. Enforcement of the fundamental freedoms is achieved mainly by invalidation of legislation which abridges or abrogates these freedoms. Similarly, guarantees of fundamental protection for the citizen in the administration of criminal justice, for instance, the right to counsel, could be made enforceable if provision is made for the invalidation of the criminal proceedings in the course of which certain rights were violated. However, how does one enforce the economic, social and cultural rights which require the state to provide something? For example, article 25 of the Universal Declaration of Human Rights proclaims:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

How are these rights to be enforced? Clearly, if legislation were enacted which would deny any of these rights or deprive a person of them, such legislation may be invalidated. However, the provision of these rights requires a whole series of activities on the part of legislatures and governments, as well as private individuals and corporations, which it would be very difficult to enforce in a court of law. These are the types of rights that can be proclaimed as an aim or goal of the state concerned. However, the enforcement is achieved mainly through the ballot box, and not a court of law.

On the other hand, constitutions have frequently set out the aims and principles of the particular state concerned, for instance, the "Directive Principles of State Policy" of the Indian and Irish Constitutions. Although not directly and specifically enforceable in courts, they do affect court interpretations of statutes and, what is more important, form an important basis of programmes of political action.

In this line, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (the Molgat-MacGuigan Committee), which reported early in 1972,⁵⁸ rejected "the theory that Canada was divided into two cultures", pointed out that there is no "single English-speaking nation" in Canada, and therefore asserted:

In the face of this cultural plurality there can be no official Canadian culture or cultures.

The Committee recommended that a new Canadian Constitution should have a preamble "which would proclaim the basic objectives of Canadian federal democracy". Two of the six "objectives" suggested were:

1. To develop Canada as a bilingual and multicultural country in which all its citizens, male and female, young and old, native peoples and Métis, and all groups from every ethnic origin feel equally at home;

⁵⁸ Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (1972).

2. To present Canada as a pluralistic mosaic, a free and open society which challenges the talents of her people.

Even before the *Report* was submitted the federal government, in the fall of 1971, officially proclaimed a "policy of multiculturalism" to be at least partly implemented by provision of funds to support the activities of ethno-cultural groups. This had been preceded by the enactment of the Official Languages Act⁵⁹ and the establishment of an Official Languages Commissioner as an "ombudsman" to promote and protect the use, within the federal sphere of jurisdiction, of the two official languages.

The next proposals at the federal level were to be found in the proposed Constitutional Amendment Act of mid-summer, 1978—Bill C-60. Part of the proposed new Charter of Rights and Freedoms included rights with respect to the two official languages, while the "aims" provision, in section 4, included a recognition of the pluralism of Canada:

[one of] the stated aims of the Canadian federation shall be:

- (ii) to ensure throughout Canada equal respect for the many origins, creeds and cultures . . . that help shape its society, and for those Canadians who are a part of each of them. . . .

The Charter as submitted in October, 1980, however, contained no equivalent provision. Following representations from various ethno-cultural groups, and the Canadian Consultative Council on Multiculturalism, section 27 was introduced.

B. *The Possible Effect of Section 27.*

The first thing that can be noted about section 27 is that it is impossible to visualize what a court could grant pursuant to that section alone—it is a purely declaratory or interpretive provision. It has to be seen as being similar to a preamble, or an "aims" provision, which are not legally binding in the narrow sense. Nevertheless, it should be noted that in our constitutional history the preamble to the British North America Act⁶⁰ has proved very important. Although there is no reference to the most fundamental characteristics of our constitution, like responsible government, the existence of political parties, the position of the Prime Minister and his cabinet, or the role of the Leader of the Opposition, all of these elements are acknowledged as deriving from a clause in the preamble to the British North America Act, which refers to the Constitution as being "similar in Principle to that of the United Kingdom". Also it should not be forgotten that this same preamble was resorted to as one of the reasons given by several Supreme Court Justices for declaring the *Alberta Press Bill*⁶¹ invalid, and subsequently in restraining the Quebec Government of

⁵⁹ R.S.C. 1970, c. 0-2.

⁶⁰ 1867, 30-31 Vict., c. 3 (U.K.) now called the Constitution Act 1867.

⁶¹ *Reference Re Alberta Statutes*, [1938] S.C.R. 100.

Maurice Duplessis in his battle with the Jehovah's Witnesses and Communists.⁶² Thus, the importance of a preamble, or an "aims" clause, cannot be minimized.

Furthermore, it is quite clear that all of the provisions of the Charter have to be interpreted in the light of section 27. Nevertheless, for reasons mentioned earlier, this may not greatly affect the interpretation of the fundamental freedoms, because these in themselves provide protection for the use of one's language, for the practice of one's religion, and for one's right to assemble and associate with others, whether for cultural reasons, or for political or economic ones. So, too, section 27 is not needed with respect to the application of the democratic rights in sections 3, 4 and 5, or the legal rights in sections 7 to 14 inclusive. Whatever the reason for denial, whether for discriminatory ones or otherwise, the infraction should be challengeable. With respect to the language rights in sections 16 to 23 inclusive, section 27 would seem to have application only to section 22, which provides:

Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Although it would be difficult to see how any language other than those of the native peoples might claim any "customary right or privilege acquired or enjoyed . . . before" the coming into force of the Charter, one could envisage section 27 as an encouragement to provinces to recognize some linguistic education rights at least "wherever in the province the number of children of citizens . . . is sufficient to warrant the provision to them out of public funds of minority language instruction".⁶³ It must be stated, however, that the use of section 27 to these ends is more likely to have political success, than success in the courts.

The most important provision in respect to which section 27 could have effect is section 15. For the most part, of course, subsection 15(1) does not require the aid of section 27 to provide protection because of one's race, national or ethnic origin, or religion. However, it is possible to envisage that with respect to one of the equality clauses, that is "equal benefit of the law", a claim could be made for equal benefits, particularly concerning grants for cultural activities. Individuals who belong to ethno-cultural groups which do not receive grants equivalent to those received by the ethno-cultural groups that have sometimes been referred to as "the two founding peoples", might be able to invalidate the giving of disproportionate grants to such more fortunate groups. Although it is impossible to envisage a court being prepared to order a government as to whether such

⁶² See *e.g.*, *Boucher v. The King*, [1951] S.C.R. 265, and *Switzman v. Elbling*, [1957] S.C.R. 285.

⁶³ S. 23(3)(a).

money should be spent, or how much should be expended in total, nevertheless, if grants are made pursuant to laws which do not meet the test of "equal benefit" with respect to race, national or ethnic origin, or religion, then invalidity might be sought. Similarly, the granting of licenses to such culture-providing institutions as those in the broadcasting field, could be tested under section 27. The reflection of Canada's "multicultural" heritage in such broadcasting institutions as the Canadian Broadcasting Corporation might now be reviewable.

Furthermore, although subsection 15(2) does not provide for a right to compel the adoption of an "affirmative action program", to the extent that affirmative action programmes are adopted, it may be possible to use section 27 as an argument that all under-represented ethno-cultural groups should be considered. Again, this would appear to be a basis for persuasion of legislatures and governments, rather than courts.

For reasons mentioned earlier, it does not appear that a constitutional provision can go further than this with respect to protection of minority groups who make up Canada's "multicultural heritage".
