

BALANCING INDIVIDUAL RIGHTS TO EQUALITY AND SOCIAL GOALS

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In this paper the author analyzes how the Court balances equality rights and social goals in relation to the forty four cases in which the Supreme Court has been asked to consider section 15. After a review of basic principles describing the relationship between s.15 and s.1, an overview of decided s.15 cases is provided. The evolving test for establishing a breach of section 15 is explored in order to analyze whether there is balancing built into the rights definition/breach stage. The general and evolving standards of review under s.1 are canvassed and then analyzed to determine how they have been applied to the equality cases which have reached this stage of analysis. The author questions the soundness and applicability of rationales put forward by the Court to justify infringement to equality rights, including a critique of a deferential standard of review, and concludes with suggestions on how to integrate more fully the purpose of equality rights and the seriousness of the breach into the s.1 analysis.

Dans cet article, l'auteure examine comment la Cour suprême établit l'équilibre entre les droits à l'égalité et les objectifs sociaux, en rapport avec les quarante-quatre affaires dans lesquelles la Cour s'est vu demander de considérer l'article 15. Après l'examen des principes de base qui décrivent les relations entre les articles 15 et 1, on trouvera une vue d'ensemble des décisions sur l'article 15. L'auteure se penche sur le test, en évolution, pour établir s'il y a eu violation de l'article 15, en vue d'examiner s'il y a équilibrage au stade de la définition du droit et de sa violation. Elle passe en revue et analyse les standards généraux, et toujours en évolution, de contrôle en vertu de l'article 1, afin de déterminer comment ils ont été appliqués aux affaires de droit à l'égalité qui ont atteint ce stade d'analyse. L'auteure met en doute la justesse et l'applicabilité des explications avancées par la Cour pour justifier la violation de droits à l'égalité, y compris un standard de révision fondé sur la différence; elle conclut par des suggestions sur la manière de mieux intégrer le but des droits à l'égalité et la gravité de la violation d'un droit dans l'analyse selon l'article 1.

I.	Introduction	300
II.	Basic Principles	303
III.	What is Happening: The Results of Supreme Court Equality Decisions	305
IV.	The Evolving Test for Establishing a Breach of Section 15	307
	A. The Andrews Approach	308
	B. The Trilogy	315
	C. The Aftermath of the Trilogy	317
	D. The Restatement in Law	319

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E.	<i>Balancing at the Breach Stage</i>	327
i)	<i>Rejecting Irrelevant Personal Characteristics</i>	327
ii)	<i>Limits to Human Dignity</i>	328
iii)	<i>A Contextual Approach and Enumerated and Analogous Grounds</i>	330
iv)	<i>Discrimination and Ameliorative Purpose</i>	331
V.	<i>Flexible Standards of Review Under Section 1</i>	333
A.	<i>The Evolution of Section 1 Generally</i>	333
i)	<i>The Initial Test in Oakes</i>	333
ii)	<i>Oakes Restated and the Contextual Approach to s.1</i>	335
B.	<i>Section 1 in Equality Cases</i>	336
i)	<i>There is No Lesser Section 1 Standard for Equality Rights</i>	336
ii)	<i>The Characterization of the Government's Objective</i>	338
iii)	<i>A Pressing and Substantial State Interest</i>	340
iv)	<i>The Proportionality Test</i>	344
a.	<i>Rational Connection</i>	344
b.	<i>Minimal Impairment</i>	346
c.	<i>Deleterious Impact</i>	347
C.	<i>Judicial Deference in Equality Cases</i>	347
i)	<i>The Concept and Categories of Judicial Deference</i>	348
ii)	<i>Deference and Discrimination</i>	352
VI.	<i>A Principled Approach to Balancing</i>	362
	<i>Appendix 1 — Overview of Cases</i>	370
	<i>Appendix 2 — Division of Cases by Reasons</i>	372

I. Introduction

In its one hundred and twenty-five years the Supreme Court has balanced conflicting rights and weighed competing claims across many different areas of law. With the introduction of the *Canadian Charter of Rights and Freedoms* in 1982 the role and responsibilities of the Court were altered significantly. The Court now faces the distinctive, different and difficult task of defining constitutionally entrenched rights and then balancing them against the social goals of elected officials.¹ This change has led to many questions on the limits and legitimacy of judicial review in our new constitutional democracy.

Section 1 has proven to be an obvious focus of comment and critique. Under its terms Courts now uphold or invalidate state action based on whether a limitation is reasonable and demonstrably justified in a free and democratic

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982 c. 11 (hereinafter the *Charter*).

society. Established standards of review under section 1 require the Court to evaluate evidence on the importance of the state's objective and the proportionality of the means selected to achieve the desired end. The principles first enunciated in *R. v. Oakes*,² have been modified so that in accordance with the nature of judicial review, section 1 could be applied with different levels of strictness in different circumstances. Patterns and principles are beginning to emerge which establish variable intensities of review under which the Court balances the state's social goals against individual rights differently in different contexts.

The relationship between substantive equality rights in section 15 and attempts to justify discriminatory state action under section 1 becomes a discrete topic because under a contextual and flexible approach to section 1 the considerations for balancing may be different when an equality right is infringed.³ In addition, equality rights are themselves so complex and contextual they present an interesting case study of where and how the Court weighs the numerous competing interests.

The Court has recognized that equality rights are conceptually difficult:⁴ equality rights rest on comparisons, competing characterizations, and larger social political, historical and economic contexts; they are enjoyed by individuals but may involve connection to groups and collectivities; and they often involve redistributive justice, rather than corrective justice, the more traditional terrain of courts. It is also clear that equality claims challenge the government's ability to pursue certain policies in particular ways. To the extent legislatures are in the business of making distinctions, section 15 claimants question the equality, fairness and inclusiveness of existing allocations. The "me too" aspect of equality claims makes more apparent the court's overseeing of the distribution of benefits and burdens and issues of judicial restraint are ever present. For these reasons, equality claims almost inevitably lead to discussions about judicial deference to legislative choices: equality seekers fear that courts have numerous

² *R. v. Oakes*, [1986] 1 S.C.R. 103.

³ It is important to highlight that equality and social goals are not necessarily in competition. As section 15 requires the state to protect equality rights there will be many instances when the social goal of state action is in fact equality. The Court has used equality rights to uphold and justify Criminal Code restrictions on hate propaganda in *R. v. Keegstra*, [1990] 3 S.C.R. 697; obscenity *R. v. Butler*, [1992] 1 S.C.R. 452 and restrictions on an accused's access to the private records of sexual assault complainants in *R. v. Mills* [1999] S.C.J. No. 68, November 25, 1999.

⁴ In *Law v. A.G. Canada*, [1999] 1 S.C.R. 497 at par. 2 Iacobucci J. states that s.15 is "perhaps the *Charter's* most conceptually difficulty provision" and "Part of the difficulty in defining the concept of equality stems from its exalted status. The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s.15(1) of the *Charter* is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision." See generally P. Blache "Le Droit à L'Égalité: Interface Entre Droits Individuels et Droits Collectifs" (2000) 79 Can. Bar Rev. 1.

ways to defer to the legislature, while others argue the courts have endless opportunities to override the will of the people and second guess the actions of elected officials.

In this paper I analyze how the Court balances equality rights and social goals.⁵ In terms of methodology, I have reviewed and analyzed forty four cases in which the Supreme Court has been asked to consider section 15.⁶ I first provide a set of basic principles describing the relationship between section 15 and section 1. Second, I outline how the Court has decided section 15 cases. Third, I explore the evolving test for establishing a breach of section 15 in order to analyze whether there is balancing built into the rights definition/breach stage. Fourth, I canvass the general and evolving standards of review under section 1 and then consider specifically how they have been applied to the

⁵ When there is a competition between section 15 and state action the Court is not balancing rights so much as it is choosing between alternative arguments. The concept of balancing may be misleading if it conjures images of mediation, compromise or Solomon like divisions. Under the *Charter* the Court is required to decide whether or not there has been a breach and whether it is saved under section 1, and generally, considering how constitutional questions are stated, in the form of a yes or no response. The process of balancing discussed in this paper is thus the value laden exercise of weighing, considering and choosing which value or claim prevails.

⁶ I have not included cases in which equality rights were argued but not relied upon by the Court in its decision. 2000: *Lovelace v. A.G. Ontario*, [2000] S.C.C. 37; *Granovsky v. Canada (Minister of Employment and Immigration)* [2000] S.C.C. 28. 1999: *R. v. Mills*, [1999] S.C.J. No. 68, November 25, 1999; *Deslisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, September 2, 1999; *R. v. LePage*, [1999] 2 S.C.R. 744; *Orlowski v. B.C.*, [1999] 2 S.C.R. 733; *Bese v. B.C.*, [1999] 2 S.C.R. 722; *Winko v. B.C.*, [1999] 2 S.C.R. 625; *Corbière v. Canada*, [1999] 2 S.C.R. 203; *M. v. H.*, [1999] 2 S.C.R. 3; *Law v. Canada*, [1999] 1 S.C.R. 497; *Vancouver Society of Immigrant and Visible Minority Women v. Canada*, [1999] 1 S.C.R. 10. 1998: *Vriend v. Alberta*, [1998] 1 S.C.R. 493. 1997: *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241. 1996: *Adler v. Ontario*, [1996] 3 S.C.R. 609. 1995: *Thibadeau v. Canada*, [1995] 2 S.C.R. 627; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418. 1994: *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627; *R. v. Finta*, [1994] 1 S.C.R. 701. 1993: *Symes v. Canada*, [1993] 4 S.C.R. 695; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Weatherall v. Canada*, [1993] 2 S.C.R. 872; *Ward v. Canada (Attorney General)*, [1993] S.C.R. 689. 1992: *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Chaiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *R. v. G  n  reux*, [1992] 1 S.C.R. 259. 1991: *T  trault-Gadoury v. Canada (  CIC)*, [1991] 2 S.C.R. 22; *R. v. Swain*, [1991] 1 S.C.R. 933. 1990: *Douglas/Kwanitien Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906; *Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695; *Dywidag Systems Int'l Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705. 1989: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Re Workers Compensation Act, 1983 (Newfoundland)*, [1989] 1 S.C.R. 922; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

equality cases which have reached this stage of analysis. I question the soundness and applicability of rationales put forward by the Court to justify infringement to equality rights, including a critique of a deferential standard of review. I conclude with suggestions on how to integrate more fully the purpose of equality rights and the seriousness of the breach into the section 1 analysis.

II. *Basic Principles*

The *Charter* forms part of the supreme law of Canada, applies to government action, binds both federal and provincial powers, and has given the judiciary a broad supervisory jurisdiction over the purpose, content and impact of government action and a panoply of remedies to address unjustified infringements. The *Charter* protects certain rights and freedoms, subject to the government's power to impose reasonable limits under section 1 or to expressly declare that certain infringements may operate notwithstanding the *Charter* under section 33. Section 1 acknowledges that certain limitations on rights and freedoms are both possible and proper. Section 1 reads:

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

The general structure of the *Charter* is to confer rights under separate sections and to scrutinize the justification for any limitation under section 1. This results in a two step analysis for assessing the constitutionality of impugned government action: the first step is determining whether there has been a denial of a *Charter* right and the second step is asking whether the proven infringement can be saved under section 1.

This two stage approach applies to breaches of equality rights. At the first step the claimant bears the burden of proof, on the balance of probabilities, and is required to establish every element of the guarantee invoked. Thus a claimant would need to meet the requirements outlined by section 15, as interpreted by the Court, to establish a breach of equality rights. If a *Charter* section is infringed the burden shifts to the government to establish, again on the balance of probabilities, that the infringement is reasonable and demonstrably justified in a free and democratic society under section 1. This two step test is firmly established, widely respected and mirrors the standard employed by other countries with a constitutional democracy.⁷ It is intended to promote clarity and

⁷ See D. Beatty, "Law & Politics", [1996] Am. J. of Comp. L. 131 where he argues that the protection of human rights can be harmonized with democratic institutions and processes and that a comparative assessment of other countries illustrates that there exists a universal method of constitutional validation which involves two stages. In the first stage the focus is on the text of the constitution and the individual is required to establish the facts giving rise to the alleged breach. The second stage involves the government providing its justification, which involves showing how the impugned action promotes the public welfare and establishing the proportionality of the means selected to achieve the desired end. Such a process is familiar as it forms the cornerstone of the Canadian Charter.

purposive protections by keeping rights distinct from their limitation and also recognizes that the government is in the best position to justify its action. The reasons for the two stage approach were clearly articulated by McLachlin J. in *Miron*⁸ and are worth quoting at length:

“This shift of the burden through the use of section 15 and section 1 is appropriate. It places the duty of adducing proof upon the parties who are in the best position to adduce it. It is for the claimant to show that he or she has been denied a benefit or suffers a disadvantage compared with another person. It is also for the claimant to show the basis for imposing the burden or withholding the benefit. These matters are within the knowledge of the claimant. Once these have been made out the burden shifts to the state. It is the state’s law that has violated the individual’s equality on suspect grounds, and it is the state that most appropriately defends the violation. To require the claimant to prove that the unequal treatment suffered is irrational or unreasonable or founded on irrelevant considerations would be to require the claimant to lead evidence on state goals, and often to put proof of discrimination beyond the reach of the ordinary person. Nor is the resultant burden unjust to the state: while it is open to the state to attempt to differentiate on suspect stereotypical grounds, it must be prepared to justify such suspect differentiation if it wishes its law to stand. In cases such as the present, where the party upholding the law is a non-actor, it is always open to the state to defend its law as an intervener in the proceedings. (If still in doubt as to the law’s purpose and rationale, the court may also appoint an *amicus curiae* to assist the court by providing an impartial assessment, as was done in this appeal.)

This division of the analysis between section 15(1) and section 1 accords with the injunction to which this Court has adhered from the earliest *Charter* cases: courts should interpret the enumerated rights in a broad and generous fashion, leaving the task of narrowing the *prima facie* protection thus granted to conform to conflicting social and legislative interests to section 1 [....] It is significant that where the *Charter* seeks to narrow rights by concepts like reasonableness, it does so expressly, as in section 8 and section 11(b). Section 15(1) does not contain this sort of limitation.”

The initial reasons for this approach remain valid. However, what actually happens at each step is of crucial significance.

As noted by McLachlin J., the wording of section 15 indicates there are no inherent limits or internal qualifications which authorize the explicit balancing of interests at the rights definition stage. Section 15, the main, substantive protection of equality rights reads:⁹

“15(1) Every individual is equal before and under the law and has the right to 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.

⁸ *Miron v. Trudel*, *supra* note 6 at 485-6.

⁹ There are different types of equality rights in the *Charter*. Sometimes there is an equality component in other rights. For example, in s.3 the right to vote has been read as requiring a certain measure of equality, or equality considerations have sometimes been seen as part of the principles of fundamental justice under s.7. See also ss. 27, 28 and 35.

15(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.”

There are, however, threshold requirements to establish a breach and how the Court interprets and applies these requirements will determine the level of protection initially afforded to equality rights:

III. What is Happening: The Results of Supreme Court Equality Decisions

There have been 44 decisions by the Supreme Court involving a direct attack to legislation under section 15. An Appendix is attached which outlines the findings of these cases. For the purposes of analysis the cases have been divided into four categories based on whether the Court 1) decided the case on some other basis; 2) found no breach of section 15; 3) found a breach of section 15 which was saved by section 1; or 4) found a breach of section 15 which was not saved by section 1. The cases are classified according to their results: i.e. by majority judgment. Sometimes it was difficult to classify a particular case and this is noted in the relevant section of the paper. The reasons for decision were then analyzed to see what, if any requirement was found lacking. The following trends emerge:

First, as can be expected, section 15 cases are sometimes decided on the basis of general questions.¹⁰ For example, In *Eaton*¹¹ the Court held that proper notice was not given to the Attorney General. In the mandatory retirement cases part of the claim was dismissed because the impugned policies were not state action.¹² In other cases the question was moot¹³ or one judge thought the question was not justiciable.¹⁴

Second, sometimes cases are decided on the basis of a breach of another *Charter* right, making it unnecessary for the Court to discuss section 15.¹⁵

¹⁰ *Borowski v. Canada (Attorney General)*, *supra* note 6; *Edmonton Journal v. Alberta (A.G.)*, *supra* note 6; *R. v. Swain*, *supra* note 6; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, *supra* note 6. *Canada (Attorney General) v. Ward*, *supra* note 6; *R. v. Mills*, *supra* note 6.

¹¹ *Eaton v. Brant County Board of Education*, *supra* note 6.

¹² *McKinney v. University of Guelph*, *supra* note 6; *Stoffman v. Vancouver General Hospital*, *supra* note 6; *Harrison v. University of British Columbia*, *supra* note 6; *Douglas/Kwantlen Faculty Association v. Douglas College*, *supra* note 6.

¹³ *Borowski v. Canada (Attorney General)*, *supra* note 6.

¹⁴ See the judgment of McLachlin J. in *Native Women's Association of Canada*, *supra* note 6.

¹⁵ *Edmonton Journal v. Alberta (A.G.)*, *supra* note 6 the provisions of the *Alberta Judicature Act* which limited a prohibited publication of certain information offended s.2(b) and could not be saved under s.1. In *R. v. Swain*, *supra* note 6 a majority of the Court found that the common law criteria concerning the defence of insanity violated s.7 and were not saved by s.1. See also *Canada (Attorney General) v. Ward*, *supra* note 6.

When alternative claims are put forward, the Court seems to prefer to resolve the matter using individual rights under sections 2-14 first and to the extent it can.

Third, around seventy percent of equality cases are dismissed because a breach of section 15 has not been established. This is in contrast to cases involving freedom of expression under section 2(b) where virtually every restriction on speech has been found to be a violation and the balancing takes place under section 1.¹⁶ This makes the test for section 15 especially important.

Fourth, the role of enumerated and analogous grounds under section 15 has raised key jurisprudential questions and seven cases have been found wanting on this basis.¹⁷

Fifth, most section 15 cases have failed because the claimant cannot establish "discrimination".¹⁸ This is especially true after the Court's restatement in *Law* concerning the requirements under section 15.¹⁹

Sixth, if there is a breach of an equality right it is rarely saved under section 1. While there are a few instances of individual judges²⁰ or dissenting judges²¹

¹⁶ P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) c. 40 at 9.

¹⁷ *Re Worker's Compensation Act, 1983* (Newfoundland), *supra* note 6; *R. v. Finta*, *supra* note 6; *R. v. Genereux*, *supra* note 6; *Haig v. Canada (Chief Electoral Officer)*, *supra* note 6; *Delisle v. Canada (Deputy Attorney General)*, *supra* note 6; *Lovelace v. Ontario*, *supra* note 6; *R. v. Turpin*, *supra* note 6.

¹⁸ *Rudolf Wolff & Co. v. Canada*, *supra* note 6; *Dywidag Systems Int'l Canada Ltd. v. Zutphen Brothers Construction Ltd.*, *supra* note 6; *R. v. Hess*; *R. v. Nguyen*, *supra* note 6; *Chiarrelli v. Canada (Minister of Employment and Immigration)*, *supra* note 6; *Symes v. Canada*, *supra* note 6; *R. v. Finta*, *supra* note 6; *Native Women's Assn. of Canada v. Canada*, *supra* note 6; *Adler v. Ontario*, *supra* note 6; *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue- M.N.R.)*, *supra* note 6; *Egan v. Canada*, *supra* note 6; *Thibaudeau v. Canada*, *supra* note 6; *Eaton v. Brant County Board of Education*, *supra* note 6; *Weatherall v. Canada*, *supra* note 6. I have classified *Weatherall* as a no discrimination case even though La Forest J. seemed to be equivocal in this finding. He said at 877-78: "because only that there 'may not be' discrimination, and that it was 'doubtful' that s.15 had been violated. But he held that, even if there was a breach of s.15, it was saved by s.1. The 'humanizing effect' of having women in male prisons and the enhancement of 'employment equity' constituted sufficient justification for the practices.

¹⁹ *Winko v. British Columbia (Forensic Psychiatric Institute)* *supra* note 6; *Bese v. British Columbia (Forensic Psychiatric Institute)*, *supra* note 6; *Orlowski v. British Columbia (Forensic Psychiatric Institute)*, *supra* note 6; *R. v. LePage*, *supra* note 6; *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 6; *Granovsky v. Canada (Minister of Employment and Immigration)*, *supra* note 6; *Lovelace v. Ontario* *supra* note 6.

²⁰ In *Miron v. Trudel*, *supra* note 6 Sopinka J. held that the *Act* breached s.15 but was saved under s.1 but he wrote only for himself. The other four judges, who made up the majority found no breach.

²¹ In *R. v. Hess*, *supra* note 6 a majority of the Supreme Court of Canada held that the offence of statutory rape did not offend s.15, although the offence could only be committed

saving discriminatory legislation, only in the mandatory retirement cases did a majority of the Court find a proven inequality to be reasonable and justified in a free and democratic country.²² (The *Rodriguez* case is not included in this category).²³

Seventh, cases which involve breaches of other *Charter* sections normally fail the section 1 test because they did not impair rights as little as possible. In equality cases the Court has invalidated legislation under section 1 based on the absence of a pressing and substantial purpose,²⁴ and has used the rational connection²⁵ as often as the minimal impairment aspect of the proportionality test.²⁶

Eighth, although judicial deference to legislative choices is often discussed, it has only been used to provide a lower level of scrutiny in the mandatory retirement cases.

IV. *The Evolving Test for a Breach of Section 15*

While justification is supposed to be required only at the section 1 stage, there are numerous ways for balancing to occur at the rights definition/determination of breach stage under section 15. How and where the equality bar is set is therefore of fundamental significance to a range of issues. For example, if there is no breach of section 15 there is no recourse to section 1, there may be overlap/confusion between the supposedly distinct stages of analysis, and/or the

by "a male person" because there was no discrimination. McLachlin J. writing in dissent for two others held that the offence did constitute discrimination by sex, although it could be justified under s.1 as a measure for the protection of young females who, unlike young males, would run the risk of pregnancy through intercourse.

²² The mandatory retirement cases include: *McKinney v. University of Guelph*, *supra* note 6; *Harrison v. University of British Columbia*, *supra* note 6 and *Stoffman v. Vancouver General Hospital*, *supra* note 6.

²³ *Rodriguez v. British Columbia*, *supra* note 6, is a difficult case to classify. In that case a plaintiff who suffered from a debilitating, fatal disease (Lou Gehrig's disease), challenged the constitutionality of the *Criminal Code* offence of assisting a person to commit suicide. She pointed out this provision had the effect of prohibiting the commission of suicide by a person who was so physically disabled that she was unable to kill herself without assistance, and discriminated on the ground of physical disability. This argument was accepted by Lamer C.J. and Cory J., who dissented. Sopinka J., who wrote for the majority, did not deal with the argument. He assumed a breach of s.15 without analysis and then holds that the prohibition would in any case be justified under s.1. McLachlin J., with L'Heureux-Dubé J., also dissented, but she relied exclusively on s.7, asserting (at 616) that "this is not at base a case about discrimination under s.15." The prohibition was therefore upheld. In my view the Majority did not treat this as a case involving substantive equality rights.

²⁴ *Vriend v. Alberta*, *supra* note 6; *Andrews v. Law Society of British Columbia*, *supra* note 6.

²⁵ *Miron v. Trudel*, *supra* note 6; *Benner v. Canada (Secretary of State)*, *supra* note 6; *M. v. H.*, *supra* note 6. In most of the cases the Court also finds against the Crown on minimal impairment.

²⁶ *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, *supra* note 6; *Eldridge v. British Columbia (A.G.)*, *supra* note 6; *Corbière v. Canada*, *supra* note 6.

requirements of section 15 may be such that a breach could almost never be justified in a free and democratic society.

While equality rights may not be subject to inherent limits, section 15 does impose threshold requirements. The true test of the strength of equality rights therefore requires an examination of what happens under both section 15 and section 1. McLachlin J. in *Miron* explained the relationship between the requirements of section 15 and balancing interests under section 1:²⁷

"The early days of the *Charter* saw debate on the division of the equality analysis between section 15(1) and section 1. Some thought that denial of equality on any ground would establish discrimination under section 15(1), propelling the analysis immediately to section 1 [...] The other extreme held that section 15(1) could be satisfied only by showing that there had been a denial of equality which was irrational or unreasonable, leaving little for section 1. This court in *Andrews* [...] rejected both approaches charting instead a middle course." (footnotes omitted)

To evaluate whether the Court has chosen criteria which effectively incorporate balancing techniques into the rights definition stage, it is necessary to review the various tests for establishing a breach of section 15. This will be examined throughout 4 time frames or stages. First, the *Andrews*²⁸ decision and the cases which followed it (1989-1995). Second, the trilogy of cases where deep divisions arose (1995). Third, the cases after the trilogy and before *Law*²⁹ (1996-1999) and fourth, the restatement and summary in *Law* and the cases which followed it (1999-present).

A. *The Andrews Approach*

The first case dealing with section 15 was *Andrews v. Law Society of British Columbia* in which the Court invalidated the citizenship requirement in the *British Columbia Barristers & Solicitors Act*.³⁰ The Court established important interpretative principles and outlined the basic structure for an equality analysis. The Court refused to follow the narrow approach to equality adopted under the Canadian *Bill of Rights*;³¹ rejected the American approach to

²⁷ *Miron v. Trudel*, *supra* note 6 at 484.

²⁸ *Andrews v. Law Society of B.C.*, *supra* note 6.

²⁹ *Law v. Canada*, [1999] *supra* note 6.

³⁰ [1985] 1 S.C.R. 143.

³¹ While there were equality provisions in the *Canadian Bill of Rights*, they were narrowly stated, restrictively interpreted and cautiously applied. Their limited utility was a function of many factors: the Bill's status as an ordinary statute which bound only the federal government; the courts reluctance to declare offensive distinctions as to be "inoperative", and because the Bill was said to be declaratory only, it gave rise to the "frozen rights theory" under which rights crystallized as they existed at the time the Bill was introduced in 1960. In *Andrews v. Law Society of British Columbia*, *supra* note 6 at 170 Mr. Justice McIntyre stated:

"The principle of equality before the law has long been recognized as a feature of our constitutional tradition and it found statutory recognition in the *Canadian Bill of*

equality;³² developed a purposive interpretation for equality rights; rejected the similarly situated test as "seriously deficient"³³ and made it clear that equality may require more than identical treatment.³⁴ The Court recognized that

Rights. However, unlike the *Canadian Bill of Rights*, which spoke only of equality before the law, s.15(1) of the *Charter* provides a much broader protection. Section 15 spells out four basic rights: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit under the law. The inclusion of these last three additional rights in s.15 of the *Charter* was an attempt to remedy some of the shortcomings of the right to equality in the *Canadian Bill of Rights*."

³² American equality jurisprudence is a complex mixture of distinct tests under which there are variable levels of scrutiny for different forms of inequality and the primary focus of the inquiry is on rationality, relevance and the fit between legislative means and ends. See J. Ross, "Levels of Review in American Equal Protection and Under the *Charter*" (1986), 26 Alta. L. Rev. 441. While the American precedents address different social problems and are part of a unique legal and political structure, there are significant structural and textual differences between the *Charter* and the U.S. Constitution. For example, under the American Bill of Rights there is a mingling of the definition of the right and its limitation. In contrast, under the *Charter*, rights are defined apart from their limitation. In *Re Public Service*, [1987] 1 S.C.R. 313, at 345 Chief Justice Dickson commented in dissent at 345:

"A second important difference between the United States Constitution and the *Charter* is the absence, in the former, of a provision such as s.1. The balancing of the protection of rights and freedoms with the larger interests of the community, therefore, must be done in the context of defining the right or freedom itself. Whereas a Canadian court could endorse constitutional protection for 'strike activity, for example, under s.2(d) of the *Charter* and yet still uphold certain limits on the freedom to strike under s.1, this approach is not open to courts in the United States. Accordingly, one would expect a more limited approach to the delineation of the freedom itself.

Limiting the scope of *Charter* protections to their American counterparts could unduly erode their content if inherent limitations are incorporated into the definition of the right at the same time as limitations are superimposed under s.1. Canada also has ss. 33 and 28 and unlike the American equal protection of laws provision s.15 of the *Charter* protects equality in expansive terms, expressly articulates suspect categories and specifically authorizes affirmative action programs.

³³ In *Andrews v. Law Society of B.C.*, *supra* note 6 at 166. The judgment written by Mr. Justice McIntyre and concurred in by Mr. Justice Lamer was the dissenting judgment. The majority concurred in his treatment of s.15 but disagreed with his test for s.1 and its application to the facts. Wilson J. wrote for herself, Dickson C.J. and L'Heureux-Dubé. Mr. Justice La Forest provided a separate majority judgment. In a subsequent decision, Mr. Justice La Forest contends that no part of the similarly situated test survived the *Andrews* decision. In *McKinney v. University of Guelph* *supra* note 6 at 279 he states:

The second argument was that the similarly situated test is still the governing test, provided it is not applied mechanically. Simply put, I do not believe that the similarly situated test can be applied other than mechanically, and I do not believe that it survived *Andrews v. Law Society of British Columbia*.

³⁴ An identical treatment model is insufficient because this approach fails to take into account how the same state actions may not have the same impact on different people. The Court stated in *Andrews v. Law Society of B.C.*, *supra* note 6 at 169 that, "... for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.

equality was a comparative concept, requiring a contextual determination grounded in an understanding of political, social and legal disadvantage.

Equality rights, like many of the other *Charter* rights, are to receive a large, liberal and purposive interpretation. The purpose of equality guarantees was expressed in the following way in *Andrews v. The Law Society of British Columbia*:³⁵

“the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.”

In *Andrews* Justice McIntyre organized his analysis around three questions:

1. Has there been a denial of one of the four basic equality rights?
2. Is there discrimination?
3. Is the discrimination based on enumerated or analogous ground?

This framework and the Court's decision on other important issues have a major impact on balancing individual rights and social goals. For example, the Court made it clear in *Andrews* that section 15 does not provide a general or abstract guarantee of equality between individuals or groups within society. Rather, section 15 is concerned with the application of the “law”. The Supreme Court also recognized that section 15 was not intended to protect all legal distinctions. In its view the words “without discrimination” ... are a form of qualifier built into section 15 ... [to] limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

The Court also outlined a general definition of discrimination:³⁶

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

This basic definition was selected on the basis of its similarity with provincial, national and international human rights enactments, its consistency with the purpose of section 15 and the established role of section 1 as the appropriate section under which the infringement of *Charter* rights are justified.³⁷ It was intended to apply across all prohibited grounds of discrimination and it focussed attention on the disadvantage suffered by the group.

³⁵ *Andrews v. Law Society of B.C.*, *supra* note 6 at 162. Wilson J. said in *McKinney v. University of Guelph*, *supra* note 6 at 387 & 391 “what lies at the heart of s.15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations.” Moreover, the “purpose of the equality guarantee is the promotion of human dignity.”

³⁶ *Andrews v. Law Society of B.C.*, *supra* note 6 at 174.

³⁷ *Ibid.* at 172-76.

While the Court decided that discrimination is required and must be proven before section 15 is breached, such discrimination need not be irrational, unreasonable or intentional. In *Andrews* the British Columbia Court of Appeal required a consideration of the reasonableness and fairness of the impugned legislation under section 15(1). It was contended that only "unfair" or "unreasonable" discrimination could trigger a breach of section 15 and that "discrimination" must be invidious or pejorative in nature and must result from an unreasonable classification or unjustifiable differentiation. However, building such justifications into section 15 grafted an inherent limitation and left a circumscribed role for section 1. Courts and commentators spoke in terms of possible duplication and raised the issue of what type of and level of evaluation is appropriate under each section, especially considering the Supreme Court's previous decisions which held that the right guaranteeing sections of the *Charter* must be kept analytically distinct from section 1.³⁸

The Supreme Court in *Andrews* rejected the distinction between reasonable and unreasonable discrimination and its approach has been consistently followed in subsequent cases. Where a distinction based upon a personal characteristic has been found, the rationale behind it is meaningless under section 15.³⁹ In *R.*

³⁸ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter the *Charter*). For more recent articles see A.F. Bayefsky, "A Case Comment on the First Three Equality Rights Cases under the *Canadian Charter of Rights and Freedoms: Andrews, Workers' Compensation Reference; Turpin*", (1990) 1 Sup. Ct. C. Rev. (2d) 503; D.C. Galloway, "Three models of (in)equality: the Supreme Court of Canada's interpretation of s. 15(1) of the *Charter*", (1993), 38 McGill L.J. 64; D. Majory, "Equality and discrimination according to the Supreme Court of Canada", (1991) 4 Can. J. Women & L. 407; D. Gibson, "Equality for some", (1991), 40 U.N.B.L.J. 2; N. Iyer, "Categorical denials: equality rights and the shaping of social identity", (1993), 19 Queen's L.J. 179; M.H. Rioux, "Towards a concept of equality of well-being: overcoming the social and legal construction of inequality", (1994) 7 Ca. J.L. & Juris 127; D. Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?", [1991] I.N.J.C.L. 315; C. Sheppard, "Equality in Context: Judicial Approaches in Canada and the United States", (1990), 39 U.N.B.L.J. 111; R. Yalden, "Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty", (1989), 47 U.T. Fac. L. Rev. (vol. 1) 132; G. Brodsky & S. Day, "Canadian Charter equality for women: one step forward or two steps back?", (1993), 6 Can. J. Women & L. 465. (See critiques.); L.G. MacDonald, "Promoting social equality through the legislative override", (1993) 4 N.J.C.L. 1; M. Peirce, "A Progressive interpretation of subsection 15(2) of the *Charter*", (1993), 57 Sask. L. Rev. 263; B. Cossman, "Dancing in the Dark": a review of G. Brodsky & S. Day's "Canadian Charter Equality Rights for Women: one step forward or two steps back?", (1990), 10 Windsor Y.B. Access Justice 223; H. Orton, "Section 15. Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*", (1990), 19 Man. L.J. 288; D. Pothier, "Charter challenges to underinclusive legislation: the complexities of sins of omission", (1993), 19 Queen's L.J. 261.

³⁹ In *Andrews* the distinction between citizens and non-citizens with respect to the practice of law was found to impose a burden in the form of delay:

"A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of education or professional qualifications or the other attributes or merits of individuals in the group, would ... infringe s.15 equality rights."

v. Turpin,^{39a} the deprivation of the right to choose one's mode of trial was found to result in the requisite disadvantage or burden for the purposes of s.15 analysis. The policies, agreements and regulations imposing mandatory retirement on university professors, college professors and physicians were found to create burdens on these employees on the basis of their age. In *Rodriguez v. B.C. (Attorney General)*,^{39b} the Chief Justice construed the disadvantage as a deprivation of the plaintiff's right to choose suicide, and her ability to decide on the conduct of her life. For example, in *Stoffman*, the Court did not review the reasonableness of mandatory retirement under section 15 once it found discrimination in the form of a special burden imposed on a protected group. Madam Justice Wilson, in dissent, clearly makes the point.⁴⁰

"First, it should be emphasized that the question whether a basis exists for treating groups in a discriminatory manner is not a concern of section 15 but of section 1. Section 15 deals with prejudice, disadvantage and stereotype regardless of its origin and section 1 deals with its justification."

In *Tétreault*,⁴¹ the federal government claimed that the failure to extend certain benefits to individuals over 65 years of age were not discriminatory because the legislative differentiation was not based on stereotypical assumptions. Even though the federal government claimed that its policy was motivated by "administrative, institutional and socio-economic considerations" and not prejudice, the Supreme Court reaffirmed that questions of motivation are not relevant under section 15 when assessing whether there is discrimination.

The Court in *Andrews* established other enduring standards: not every individual within the relevant class must suffer from discrimination before it exists and discrimination may be of different types, for example, indirect, adverse effect or systemic.⁴² Its concept of discrimination allows that equality may require the elimination of distinctions between groups, or conversely, it may require the different treatment of groups or individuals. In *R. v. Turpin* it was said that:⁴³

"It is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage."

Discriminatory consequences are more important than subjective motivations, and impacts and effects, not intent, can be determinative.

^{39a}Supra note 6.

^{39b}Supra note 6.

⁴⁰ *Stoffman v. Vancouver General Hospital*, supra note 6 at 550.

⁴¹ *Tétreault-Gadoury v. Canada (E.C.I.C.)*, supra note 6 at 41.

⁴² In a recent Supreme Court case distinctions between types of discrimination were rejected under human rights codes; *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, September 9, 1999.

⁴³ *R. v. Turpin*, supra note 6. See also *Eldridge v. British Columbia (A.G.)*, supra note 6, where the Court found the failure to provide the sign language interpretation required by deaf persons to access medically necessary services is discriminatory even though not everyone needs them.

The Court also addressed whether citizenship was a protected ground of distinction. As the wording of section 15 clearly indicates, the *Charter's* equality guarantees address forms of discrimination not explicitly mentioned in it.

In *Andrews*⁴⁴ the Court recognized a need to retain flexibility when recognizing unlisted categories of discrimination. Mr. Justice McIntyre noted in *Andrews v. Law Society of B.C.*,⁴⁵ that "the enumerated grounds in section 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition". In the same case Madam Justice Wilson pointed out that the categories of individuals whose experience of discrimination has been politically and legally recognized has expanded over time and will continue to expand with changing political and social circumstances.⁴⁶ As a result she stressed the importance of establishing sufficient flexibility to ensure that section 15 could provide for the unremitting protection of equality rights in the years to come. She expressly stated: "I agree with my colleague that it is not necessary in this case to determine what limit, if any, there is on the grounds covered by section 15 and I do not do so."⁴⁷

In finding "analogous grounds", the requirement that a distinction based on "personal characteristics" has been stressed. Under a purposive standard it can be expected that not every interest alleged will be seen as sufficiently important to be recognized as an unlisted but proscribed basis of discrimination. For example, the Supreme Court of Canada withheld inclusion under section 15 from injured workers in *Re Workers' Compensation Act*,⁴⁸ and persons accused of first degree murder in *R. v. Turpin*.⁴⁹

Different judges employed different considerations when deciding whether an alleged interest is sufficiently analogous under section 15. In *Andrews v. Law Society of B.C.*, Madam Justice Wilson granted protection to the unspecified category of non-citizens because :

"Relative to citizens, non-citizens are a group lacking in political power and as such are vulnerable to having their interest overlooked and their rights to equal concern and respect violated. They are among those groups in society to whose needs and wishes elected officials have no apparent interest in attending."⁵⁰

All principles advanced to help define what should qualify as an unlisted but protected interest under section 15 must be read subject to the overriding

⁴⁴ *Andrews v. Law Society of B.C.*, *supra* note 6.

⁴⁵ *Ibid.* at 308.

⁴⁶ *Ibid.* at 323-24.

⁴⁷ *Ibid.* at 323-24.

⁴⁸ *Supra* note 6.

⁴⁹ *Supra* note 6.

⁵⁰ *Ibid.* at 323.

qualification of judicial flexibility.⁵¹ In *R. v. Turpin*,⁵² Madam Justice Wilson reiterates that "section 15 mandates a case by case analysis." After rejecting the appellant's equality argument, in that case she cautions that the search for discrete and insular minorities:

"is not an end in itself, but merely one of the analytical tools which are of assistance in determining whether the interest advanced by a particular claimant is the kind of interest section 15 of the *Charter* is designed to protect. It is a means of ensuring that equality rights are given the same kind of broad, purposive interpretation accorded to other *Charter* rights."

She went on to comment that

A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.⁵³

It is important to remember that in her formulation an independent form of disadvantage is not required in every case.

Recognizing an unlisted but prohibited ground of discrimination under section 15 is also approached as a purposive, contextual and circumstantial determination. It requires both an examination of the interest in issue and the context in which it is raised. It should not be approached as an abstract question or on a categorical basis because an interest may properly merit protection in one context and be denied it in another. For example, in *Andrews*,⁵⁴ citizenship was held to be a prohibited but unspecified basis of discrimination in relation to employment restrictions but Mr. Justice La Forest stated that "There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives." It is therefore the particular nature of the interest involved, and the case in which it is alleged, which determines whether the ground of discrimination falls within the protectorate of section 15.

In *Andrews*, Mr. Justice La Forest focussed on the immutability of citizenship as a reason why it was similar to the interests listed in section 15.⁵⁵

⁵¹ Commentators such as Lynn Smith have suggested that it would be an overly narrow interpretation of s. 15 to restrict it only to application to "discrete and insular minorities" since, as she points out, women would not fit into this category. She suggests that under s. 15, there will be a violation when one of two situations arises: (1) when a provision worsens the situation of a member of a disadvantaged group (as defined by one of the named or akin characteristics) in comparison with its counterpart; or (2) when a provision is prejudiced to a member of an advantaged group, is unreasonable or unfair, and where the remedy will not be to remove benefits from the disadvantaged counterpart of that group. Smith, Lynn "Judicial Interpretation of Equality Rights under the *Canadian Charter of Rights and Freedoms*: Some Clear and Present Dangers" (1988) 23 U.B.C.L.R. 65 at 93-94.

⁵² *Supra* note 6.

⁵³ *Ibid.* at 126.

⁵⁴ *Supra* note 6 at 331.

⁵⁵ *Ibid.* at 330.

"The characteristic of citizenship is typically not one within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable except on the basis of unacceptable costs. Moreover, non-citizens are an example without parallel of a group who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions."

Professor Gibson⁵⁶ explains that not all of the grounds listed in section 15 are unchangeable and that "it cannot be contended, therefore, that the lowest common denominator of the grounds listed in section 15 is 'immutability in the usual sense of the word.'" He claims that Mr. Justice La Forest was "clearly using the word in a special sense." In fact, subsequent cases have not required immutability. While there is a strong sense that legislated benefits and burdens should not be allocated on the basis of criteria over which no one has control, there is also support for the proposition that penalties should not fall on individuals because they have exercised choices the constitution itself grants to them.

B. *The Trilogy*

The *Andrews* human rights approach was followed quite faithfully until 1995. In what has become known as the trilogy, a major difference of opinion arose. While some judges reorganized the three questions in *Andrews* into a two step analysis, with two components in the second step: the divisive issue was the role that irrelevant personal characteristics should play under section 15(1) in relation to distinctions made on enumerated or analogous grounds.

In *Miron v. Trudel*,⁵⁷ *Egan v. Canada*,⁵⁸ and *Thibaudeau v. Canada*⁵⁹ four judges (McLachlin, Cory, Iacobucci and Sopinka JJ.) would continue the *Andrews* approach, emphasizing the importance of alleviating historical

⁵⁶ D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 157.

⁵⁷ *Miron v. Trudel*, *supra* note 6.

⁵⁸ *Egan v. Canada*, *supra* note 6. For comments on *Egan*, see B.A. Schnurr, "Claims by Common Law Spouses and Same Sex Partners Against Estates" (1996) Spec. Lect. L.S.U.C. 35; H. Lessard et al., "Developments in Constitutional Law: The 1994-95 Term" (1996), 7 Supreme Court L.R. (2d) 81; D. Ponthier, "M'Aider, Mayday ..." (1995), 6 N.J.C.L. 295; M. Bailey, "Developments in Family Law: The 1994-95 Term" (1996), 7 Supreme Court L.R. (2d) 327; R. Wintemute, "Discrimination Against Same Sex Couples: Sections 15(1) and 1 of the Charter: *Egan v. Canada*" (1995), 73 Can. Bar Rev. 682; J. Keene, "Discrimination in the Provision of Government Services and s.15 of the Charter: Making the Best of the Judgments in *Egan*, *Thibaudeau* and *Miron*" (1995), 11 J.L. & Soc. Pol'y 107; and C.F. Stychin, "Novel Concepts: A Comment on *Egan* and *Nesbit v. The Queen*" (1995), 6 Const. F. 101.

⁵⁹ *Thibaudeau v. Canada*, *supra* note 6.

disadvantage.⁶⁰ Four judges (Lamer, C.J., Gonthier, La Forest and Major JJ.) would change that approach, adding to the section 15 analysis the question whether the law is based upon an irrelevant personal characteristic. "Irrelevance" is to be assessed with respect to the "functional values" underlying the legislation — for example, "whether a distinction rests upon or is the expression of some objective physical or biological reality, or fundamental value."⁶¹ The focus is on the relevancy of the impugned distinction to the purpose of the legislation, where that purpose is not itself discriminatory. The finding of discrimination requires an analysis of the nature of the personal characteristic and its relevancy to the functional values underlying the law. The grounds of distinction must not be irrelevant to the values underlying the legislation. Justice L'Heureux-Dubé would not rely on the enumerated or analogous grounds to identify discrimination, but instead would look to the impact of the legislation on the core values of equal concern, respect and consideration for all members of Canadian society. She held, the question whether discrimination existed should be determined on a case-by-case basis by analyzing (1) the nature of the group affected by the distinction and (2) the nature of the interest affected by the distinction.

These differences of opinion about the correct approach to analysis of section 15 claims resulted in different judicial conclusions in two of the three cases. In *Miron*, McLachlin J. wrote for the plurality (and L'Heureux-Dubé made it a majority in the outcome) which concluded that an automobile insurance policy that distinguished between married and unmarried partners with respect to uninsured motorist claims breached section 15(1) and was not saved by section 1. The four dissenting judges considered that there was no violation of section 15, both because the distinction was relevant to the definition of the fundamental social institution of marriage, and because marital status should not be considered an analogous ground. In *Egan*, the balance was reversed, and the four dissenting judges in *Miron* formed a majority with the addition of Sopinka J. who would have found a violation but considered it a reasonable limit under section 1. Thus, in *Egan*, the claim of the same-sex partner of a retired person for spousal allowance under the *Old Age Security Act* was unsuccessful. All members of the Court agreed that sexual orientation was an analogous ground in the context of the case. However, the plurality considered that the legislation was designed to promote marriage, that marriage was by nature heterosexual, and that there was no violation of section 15 through the exclusion of same-sex partners from benefits. The four dissenting judges (L'Heureux-Dubé, Cory, McLachlin and Iacobucci JJ.) would have found a violation of section 15, not saved under section 1. In the third case of the trilogy,

⁶⁰ This overview is taken from C. Lynn Smith, "Does Section 15 Have a Future" in *Human Rights in the 21st Century: Prospects, Institutions and Processes* (Montreal: Editions Themes, 1997).

⁶¹ Gonthier J. in *Miron v. Trudel*, *supra* note 6 at 438.

Thibaudeau, only two members of the Court would have found that the *Income Tax Act* treatment of child maintenance payments (taxable in the hands of the recipient, deductible by the payer) violated section 15. The other judges, applying the two different approaches they articulated in the other cases, concluded that it did not.

C. *The Aftermath of the Trilogy*

In the aftermath of the trilogy, the Court purported to use both approaches, while consistently rephrasing the tests to reduce the mandatory nature of the irrelevant personal characteristic requirement. In *Adler v. Ontario*,⁶² *Eaton v. Brant County Board of Education*,⁶³ *Benner v. Canada (Secretary of State)*,⁶⁴

⁶² *Adler v. Ontario*, *supra* note 6. Parents of children in Jewish and Christian schools in Ontario sought funding of their separate schools on the basis that such funding was made available to both secular public and Catholic schools. Also, special "School Health Support Services" which were made available to disabled children in the public and Catholic schools were not provided to children with similar needs in the separate schools. The majority of the Court decided that the difference was not caused by the law, but by the parents' selection of religion. Withholding funding to these schools was claimed to further the objectives of multiculturalism and tolerance. Furthermore, s. 93 of the *Constitution Act (1867)* was a complete code for the funding of separate schools, which was included as part of the Constitutional bargain between Québec and Ontario. While this may not prevent a province from choosing to fund non-Catholic separate schools, it created an immunity in the sense that fulfilling the requirements of s.93 would not be open to *Charter* review. If a province were to extend funding to separate schools beyond those prescribed by s.93, however, this would need to be done according to *Charter* principles.

⁶³ *Eaton v. Brant County Board of Education*, *supra* note 6. The issue in *Eaton* (placement of a 12-year-old girl with cerebral palsy in a special education class against her parents wishes) was resolved without recourse to s.15, but the Court unanimously said that there was no violation of s.15 whichever of the competing approaches was applied. The Court held that the Board had used a thorough and fair procedure which focused on the best interest of the child and that such personalized decisions should be unencumbered by a *Charter* mandated presumption favouring integration. The Court was unanimous on this point but Justices Lamer and Gonthier go on to comment on how the Court of Appeal applied the *Straight Reference* decision at 248.

⁶⁴ *Benner v. Canada (Secretary of State)*, *supra* note 6. The issue in *Benner* was the *Citizenship Act* provision for children born abroad of mixed (i.e., Canadian and non-Canadian) parentage. It preserved the former patrilineal system for persons born abroad before 1977, which conferred entitlement to citizenship where the Canadian parent was the father, but not where the Canadian parent was the mother. Iacobucci J. wrote for the unanimous Court, stating that he was applying the approach he had used in the trilogy (the *Andrews* approach) but that it was not necessary to say determinatively which of the several approaches to s.15 was the most appropriate since the same result was obtained whichever one was used. The Court found that the legislation was unconstitutional.

*Eldridge v. Attorney General*⁶⁵ and then *Vriend v. A.G. Alberta*⁶⁶ the Court noted, in a most understated way:

“While this Court has not adopted a uniform approach to section 15(1), there is a broad agreement on the general analytic framework”

In all four cases the Court held that either approach would support the same result, a reassuring, hopeful, if sometimes unexplored conclusion.

There is still recurring argument concerning the relevance of particular factors or the proper place of certain arguments. As recently as 1997 in *Benner* the Crown argued that the *Citizenship Act*'s different treatment of Canadian mothers was a product of historical and legislative circumstances and was not a result of discriminatory and stereotypical thinking. The Court held that there was the stereotypic treatment of women because they could not pass on their citizenship.⁶⁷ Justice Iacobucci stated:

“Parliament's reasoning in deciding to maintain the differential treatment established by the earlier *Act* may be relevant to section 1 analysis, but I do not believe it affects the legislation's status under section 15.”⁶⁸

⁶⁵ *Eldridge v. B.C. (Attorney General)*, *supra* note 6. In *Eldridge* deaf patients claimed that their s.15 equality rights were violated through the failure of hospitals and of the Medical Services Commission to provide sign language interpreters for their communication with physicians and hospital personnel. The Court said that the result would be the same on any of the competing tests — the failure to provide funding for interpreters infringed s.15 and was not a reasonable limitation under s.1. The unanimous decision of the Court in *Eldridge* was written by La Forest J., who had endorsed the “internal relevance” approach in the trilogy. The Court held that deaf patients are entitled to interpretation services and made a declaration (suspended for six months) directing the government of British Columbia to administer the *Medicare Protection Act* and the *Hospital Insurance Act* in a manner consistent with the requirements of s.15(1) as defined by the Court. In *Eldridge* the federal government was still pressing the argument that s.15(1) does not oblige governments to implement programs to alleviate disadvantage, like deafness, that exist independently of state action. This argument was rejected at 677 and 678.

⁶⁶ *Vriend v. Alberta*, *supra* note 6 at 533, when Vriend attempted to file a complaint with the Alberta Human Rights Commission, he was advised that sexual orientation was not a protected ground and he thus could not make the complaint. Vriend and others challenged the *Alberta Individual's Rights Protection Act* as violating s.15 of the *Charter*. Cory J. for the majority stated that the legislation was underinclusive and this resulted in continued discrimination against homosexual couples on the ground which often mattered the most to them. The Act was designed to remedy historic tendencies of discrimination based on prejudice. Homosexual persons had suffered a long history of this discrimination and yet were excluded from the protection of the Act. This ran counter to the objective of the Act. Iacobucci J., speaking for the majority on the question of s.1 concluded that the omission was not saved by s.1 as there was no pressing and substantial reason for the omission.

⁶⁷ *Benner v. Canada (Secretary of State)*, *supra* note 6 at 402: “For reasons never justified before a court, women were deemed incapable of passing their citizenship to their children unless there was no legitimate father from whom the child could acquire citizenship.” per Iacobucci J.

⁶⁸ *Ibid.* at 403.

Similarly, for example, in *Eldridge* the Court gave strong protections to equality rights and La Forest J. stated that arguments about the government's ability to make reasonable accommodation for disabilities were best addressed under the section 1 analysis.⁶⁹

D. *The Restatement in Law*

In *Law* the Court found that a thirty year old woman was not discriminated against when the *Canada Pension Plan* refused to provide her with a survivor's benefit upon the death of her husband.⁷⁰ The case is a unanimous decision which clarifies and consolidates the method for interpreting and applying section 15. The Court reiterated that section 15 requires a purposive reading and that a fixed and limited formula is to be avoided. Iacobucci J. goes through an analysis of previous judgments on the purpose of equality rights, noting the great continuity of the Court's jurisprudence and provides the following overview.⁷¹

"It may be said that the key purpose of section 15 is to prevent the violation of the essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to the differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society."

He cautions that while no single word or phrase can capture the purpose of section 15 the focus is quite properly placed on the goal of assuring human dignity by the remedying of discriminatory treatment. While he acknowledges that there are alternative conceptions of human dignity, a non exhaustive list

⁶⁹ *Eldridge v. B.C. (A.G.)*, *supra* note 6 at 682. See also W. Black, "Vriend, Rights & Democracy" (1996), 74 Const. Forum 126; M. Young, "Change at the Margins: *Eldridge* v. *British Columbia* and *Vriend v. Alberta*" (1998), 10 Can. J. Women & L. 244.

⁷⁰ *Law v. Canada*, *supra* note 6. The *Canada Pension Plan* established a mandatory scheme of benefits to provide contributors and their families with reasonable minimum levels of income upon the retirement, disability or death of the wage earner. The scheme allowed for a survivor's pension on a reduced basis for able bodied surviving spouses without dependent children. If such a surviving spouse was between the ages of 35-45 the amount of the pension was reduced by 1/120th of the full rate for each month that the claimant's age was less than 45. Able bodied surviving spouses below of the age of 35 received nothing. (Par. 8, 9) Mr. Law had contributed to the plan for 22 years.

⁷¹ *Ibid.* at 529.

includes, the realization of personal autonomy and self determination, self-respect, and physical and psychological integrity and empowerment.⁷²

The framework set out in *Law* for section 15(1) is expressly stated to provide a guideline for analysis and a point of reference. It is not intended to operate as a rigid test or to be applied mechanically. It involves three broad inquiries:⁷³

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?

(b) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

(c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

A purposive and contextual analysis is required at all three stages.⁷⁴ A court considering a discrimination claim is required to examine the legislative, historical and social context of the distinction, the reality and the experience of the individuals affected by it, and the purposes of section 15(1), being the promotion of human dignity. The Court views equality and discrimination "in a substantive sense, bringing into play the purpose of section 15(1) of the Charter".⁷⁵ In making this assessment the Court must adopt the point of view of a reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.⁷⁶ Iacobucci J. listed four important contextual factors which may influence the determination of whether section 15(1) has been infringed and help Courts assess whether legislation demeans an individual's dignity.

A first factor which may demonstrate that legislation that treats the claimant differently has the effect of demeaning the claimant's dignity is the existence of

⁷² *Ibid.* at 530:

"Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking in to account the context underlying their differences."

⁷³ *Ibid.* at 524.

⁷⁴ However subsequently in *Corbière v. Canada*, *supra* note 6 the majority noted at 216 that the enumerated and analogous grounds are not contextual — they are always markers of suspect conduct. What is contextual is whether there is discrimination.

⁷⁵ *Law v. Canada*, *supra* note 6 at para 39.

⁷⁶ *Ibid.* at paras. 532-33.

pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.

A second contextual factor is the correspondence, or the lack of it, between the ground on which a claim is based and the actual need, capacity, or circumstances of the claimant or others. Iacobucci J. nonetheless cautioned that the mere fact that the impugned legislation takes into account the claimant's actual situation will not necessarily defeat a section 15(1) claim, as the focus of the inquiry must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity.

Third, another contextual factor is whether the impugned legislation has an ameliorative purpose or effect for a group historically disadvantaged group:

"An ameliorative purpose or effect which accords with the purpose of section 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Under inclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination."⁷⁷

In other words, the existence of an ameliorative purpose or effect may help to establish that human dignity is not violated. This may happen when the person or group that is excluded is more advantaged with respect to the circumstances addressed by the legislation — the Court's very conclusion in *Law*.

A fourth contextual factor specifically raised by Iacobucci J. was the nature of the interest affected by the impugned legislation.⁷⁸ Drawing upon the reasons of L'Heureux-Dubé J. in *Egan*,⁷⁹ Iacobucci J. stated that the discriminatory calibre of differential treatment cannot be fully appreciated without considering whether the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group.

The approach taken in *Law* clearly recognizes the need for flexibility and takes an expansive view of what conduct is discriminatory. The Court includes stereotyping, irrelevant personal characteristics, and differential burdens, benefits, obligations and exclusions. The Court does not even mention irrelevant personal characteristics as either a factor or prerequisite to discrimination, ignoring the deep division in the trilogy and replacing it with more generally phrased standards.

⁷⁷ *Ibid.* at 539.

⁷⁸ *Ibid.* at para. 74.

⁷⁹ *Egan v. Canada*, *supra* note 6.

In cases after *Law*, the Court has adopted this approach consistently and with a remarkable level of cohesion and unanimity. Cases which could have been decided by using the relevancy of the claimant's characteristic to the government objective, have been decided based on the criteria outlined in *Law*.

In every case subsequent to *Law* all members of the Court recognized that they are seeking the existence of discrimination in a purposive sense. While the degree of analysis and the length of the discussion may vary the central role played by the purpose of section 15 and the dignitary interest is used consistently.⁸⁰ In *Granavosky v. Canada (Minister of Employment & Immigration)*⁸¹ the appellant challenged the requirements under the *Canada Pension Plan* under section 15 because they failed to take into account the fact that persons with temporary disabilities may not be able to make contributions for the minimum qualifying period because they are periodically unable to work. The Court used the test in *Law* and in a unanimous decision held that while there was a distinction on an enumerated ground, it was not discriminatory. The appellant had not demonstrated a convincing human rights dimension to his claim because there is nothing which demeans the dignity of persons with temporary disabilities or doubts their worthiness as human beings. This case involved eligibility for benefits and the Court held that there was an ameliorative purpose.⁸²

The presence of a personalized decision making standard led the Court to uphold, in a set of four cases, the validity of section 672.42 of the *Criminal Code*, which dealt with the accused being found not criminally responsible by reason of mental disorder. The Court held that the statutory scheme was carefully crafted, provided individualized assessments and did not promote the stereotypic treatment of people found to have a mental disorder.⁸³

Methodologically, the Court in subsequent cases has tended to organize its analysis around the three questions and four contextual factors outlined in *Law*.⁸⁴ In *M. v. H.*⁸⁵ the majority held that the impugned definition of "spouse"

⁸⁰ In *M. v. H.*, *supra* note 6 at 53 per the majority: Major J. at 156; Bastarache J. at 160 and Gonthier J. in dissent at 147, *Corbiere v. Canada*, *supra* note 6 per L'Heureux-Dubé at 257.

⁸¹ *Supra* note 6.

⁸² This is also a decision which could have been explained on the basis of failing the irrelevant personal characteristics standard, i.e. the limits on those with temporary disabilities was consistent with a regime designed to benefit individuals with a history of severe and prolonged disabilities.

⁸³ See *R. v. LePage*, *supra* note 6; *Orlowski v. B.C.*, *supra* note 6; *Bese v. B.C.*, *supra* note 6; and *Winko v. B.C.*, *supra* note 6. In *Winko* the court noted that the provisions at issue were the very antithesis of discrimination that the individualized assessment recognizes and enhances the dignity and worth of mentally ill offenders. The purpose of the impugned section was to eliminate the stereotyping and stigmatization that the mentally ill had historically suffered, at 678.

⁸⁴ *Law v. Canada*, *supra* note 6 at 256.

⁸⁵ *M. v. H.*, *supra* note 6.

under the *Family Law Act* discriminated in a substantive sense by violating the human dignity of individuals in same-sex relationships. The Court conducted the case in the substantive and contextual manner required under *Law* and found several factors to be important. First, individuals in same-sex relationships face a significant pre-existing disadvantage and vulnerability, which is exacerbated by the impugned legislation. Second, the legislation failed to take into account the claimant's actual situation. Third, there was no compelling argument that the ameliorative purpose of the legislation did anything to lessen the charge of discrimination in this case. Fourth, the nature of the interest affected was fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. The exclusion of same-sex partners from the benefits of the spousal support scheme implied that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances. Taking these factors into account, the majority held that the human dignity of individuals in same-sex relationships was clearly violated by the definition of "spouse" in section 29 of the *FLA*. In dissent Gonthier J. argued that there was an ameliorative purpose to the *Family Law Act* but the majority disagreed: "We reject the idea that the allegedly ameliorative purpose of this legislation does anything to lessen the charge of discrimination in this case".⁸⁶

In *Corbière*, L'Heureux-Dubé J. in a concurring judgment considered the four contextual factors in *Law* but added another because of the particular circumstances of this appeal. In that case non-resident aboriginal claimants attacked a provision which limited the right to vote in the band council to members who lived on the reserve. In *Corbière* aboriginal residence was an analogous ground because the government "has no legitimate interest in expecting us to change to receive equal benefit under the law."⁸⁷ The Court used actual or constructive immutability to recognize this ground.⁸⁸ The voting provisions for band members implicate in a direct way, that does not affect other Canadians, the interests of two groups who have generally experienced a pre-existing disadvantage, vulnerability, stereotyping, or prejudice. All band members affected by this legislation, whether on-reserve or off-reserve, have been affected by the legacy of the stereotyping and prejudice against Aboriginal peoples. L'Heureux-Dubé stated:

"When analyzing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. This is inherent in the nature of a subjective-objective analysis, since a court is required to consider the perspective of someone possessed of similar characteristics to the claimant. Thus, in the case of equality rights affecting

⁸⁶ *Ibid.* at 57 per Cory J.

⁸⁷ *Corbière v. Canada*, *supra* note 6 at 219.

⁸⁸ In *Corbière v. Canada*, *supra* note 6 at 275 L'Heureux-Dubé J. focused on the objective of the restriction of voting rights because that was the limitation at issue, but also took into account the broader scheme of the legislation.

Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of Aboriginal and treaty rights guaranteed in the Constitution, the history of Aboriginal people in Canada, and with respect for and consideration of cultural attachment and background of all Aboriginal women and men. It must also always be remembered that section 15(1) provides for the “unremitting protection” of the right to equality, in whatever context the analysis takes place, whether there is one disadvantaged or minority group affected or more than one.”⁸⁹

In *Lovelace v. Ontario*⁹⁰ the Court considered the underinclusiveness of what it called a “targeted ameliorative program”. Previously the Court had been called upon to address exclusions from programs which were more generally available, like old age pensions, unemployment insurance schemes, or spousal support. The appellants were First Nations people whose bands were not registered under the *Indian Act*. They were excluded from profiting from the First Nations fund, a fund derived from reserve-based gaming activities. The establishment of casinos on reserves was the result of a joint venture between the bands and the province of Ontario and the profits were to be used to strengthen band economic, cultural and social development. The province of Ontario decided to allocate profits from the gaming activities only to bands registered under the *Indian Act*. The appellants were members of aboriginal communities who were not registered bands and therefore could not participate in the distribution or decision-making of the Fund. They claimed that this violated their section 15 rights. The Supreme Court of Canada ruled that a violation of section 15 did not occur because, from the view of a reasonable person, the appellants’ human dignity had not been undermined.

The Court held that the activities related to the First Nations Fund qualified as “law” under section 15(1) and was therefore subject to review. The Court then used the three questions and four contextual factors established in *Law*. The Court noted that all aboriginal people have suffered historic disadvantage but held that “the relative disadvantage of the claimant, as assessed in relation to the comparator group, does not stand alone as a fifth contextual factor in *Law*.”⁹¹ The two groups of appellants agreed that the Fund created differential treatment for categories of aboriginal people but disagreed as to the appropriate comparator group.⁹² The Court chose to compare band and non-band-aboriginal communities.⁹³ The Court had no difficulty concluding that the appellant’s exclusion from the Fund and the negotiation process used to create it constituted differential treatment.

⁸⁹ *Ibid* at 274.

⁹⁰ *Lovelace v. Ontario*, *supra* note 6.

⁹¹ *Ibid.* at para. 58.

⁹² The *Lovelace* appellants argued that the appropriate comparison was between aboriginal communities registered as bands and rural non-registered aboriginal communities. The Be-Wab-Bon appellants submitted that since the majority of non-registered aboriginal communities are made up of non-status Indians and Métis, the appropriate comparison was between status Indians and non-status Indians and Métis.

⁹³ *Ibid.* at para. 64.

The Court assumed the existence of an enumerated or analogous ground but held that there was no discrimination. The Court held that the appellants suffered pre-existing disadvantage stereotyping and vulnerability — not only because of their aboriginal origins but also because as non-status communities they claimed to be subject to the stereotype of being seen as “less aboriginal”, more disorganized and less accountable than other aboriginal peoples. The Court held that despite their history and current social position, the First Nations Fund did not function “by device of stereotype” and that the “distinction corresponded to the actual situation of individuals it affects, and the exclusion did not undermine the ameliorative purpose of the targeted program.”⁹⁴ In determining whether there was a breach of section 15 the Court focussed on the nature of the government’s decision:

“Specifically, it is critical to recognize that the province did not merely and unilaterally allocate this First Nation Fund from their general consolidated revenue pool. Rather, the First Nations Fund represents the proceeds of a partnered initiative designed to address several issues at once, namely: (i) to reconcile the differing positions of the province and First Nations bands with respect to the need to regulate reserve-based gambling activities, (ii) to support the development of a government-to-government relationship between First Nations bands and the provincial government, as a concretization of the SPR, and (iii) to ameliorate the social, cultural and economic conditions of band communities.”⁹⁵

The appellants argued that they had the same need to ameliorate poor social, cultural and economic conditions in their communities and the same desire to use this process to advance their aspirations towards self-government. The Court recognized a common need but stated:

“However, the correspondence consideration requires more than establishing a common need. If only a common need were the norm, governments would be placed in the untenable position of having to rank populations without paying any attention to the unique circumstances and capabilities of potential program beneficiaries. I turn, therefore, to a consideration of the correspondence between the actual needs, capacities, and circumstances on the one hand, and the program on the other. In so doing, it becomes evident that the appellant aboriginal communities have very different relations with respect to the land, government, and gaming from those anticipated by the casino program.”⁹⁶

The Court considered the particular position of the appellants, noting that the bands included were given significant decision-making input at every step of the project’s development and concluded that “it is not surprising that there is a very high degree of correspondence between the program and the actual needs, circumstances and capacities of the bands.”⁹⁷ The Court stated the issue in the following manner:

⁹⁴ *Ibid.* at para. 73.

⁹⁵ *Ibid.* at para. 74.

⁹⁶ *Ibid.* at para. 75.

⁹⁷ *Ibid.* at para. 82.

"Here, the focus of analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program in question was targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society. In other words, we are dealing here with a targeted ameliorative program which is alleged to be underinclusive, rather than a more comprehensive ameliorative program alleged to be underinclusive.

Having said this, one must recognize that exclusion from a targeted group or partnership program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society.

The ameliorative purpose of the overall casino project and the related First Nations Fund has clearly been established. In particular, the First Nations Fund will provide bands with resources in order to ameliorate specifically social, health, cultural, education, and economic disadvantages. It is anticipated that the bands will be able to target the allocation of these monies within these specified areas, thereby increasing the fiscal autonomy of the bands. This aspect of the First Nations Fund is consistent with the related ameliorative purpose of supporting the bands in achieving self-government and self-reliance. Without a doubt, this program has been designed to redress historical disadvantage and contribute to enhancing the dignity and recognition of bands in Canadian society. Furthermore, both of the above ameliorative objectives can be met while, at the same time, ensuring that on-reserve commercial casino gaming is undertaken in compliance with the strict regulations applicable to the supervision of gaming activities. The First Nations Fund has, therefore, a purpose that is consistent with section 15(1) of the *Charter* and the exclusion of the appellants does not undermine this purpose since it is not associated with a misconception as to their actual needs, capacities and circumstances."⁹⁸

This passage needs to be quoted at length because it is somewhat perplexing and raises many questions. First, the Court does not explain why the stereotyping is less when disadvantaged persons are excluded or why common need is not sufficient. Second, the Court fails to relate its comments with its observation earlier in the decision that "this Court has long recognized that the purpose of section 15(1) encompasses both the prevention of discrimination and the amelioration of the conditions of disadvantaged persons."⁹⁹ Third, the Court focuses on the purpose of the Fund as consistent with section 15(1) without a full consideration of its effects. Fourth, the exclusion of the appellants did not breach section 15(1) because it did not *undermine* this purpose. Undermining is a very strong term and departs from the previous approach which allowed a breach of section 15 when the purpose or effect of an impugned activity was *inconsistent* with the purposes of section 15.

The Court's decision in *Lovelace* was influenced by many factors. It remains to be seen whether it will be restricted to targeted programs but it clearly introduces elements into the section 15 analysis which call for the extensive balancing of interests.

⁹⁸ *Ibid.* at para. 85-87.

⁹⁹ *Ibid.* at para. 60.

E. *Balancing at the Breach Stage*

Changes in how the Court established threshold requirements to establish a breach of section 15 have a bearing on whether there is a balancing of competing interests which occurs at the rights definition/breach stage. In *Andrews* the Court established strong equality rights and a clear place and test for their restriction. The decision was significant because it established that not all distinctions were discriminatory and that equality did not merely mean the formally identical treatment of similarly situated individuals. If equality sometimes requires different treatment it is important to distinguish between the types of different treatment which alternatively breach or bolster equality rights. The approach to defining equality rights and the threshold requirements set to establish a breach in the *Law* decision will have a significant impact on how cases are argued and decided and how and where balancing occurs. In this section, I review the rejection of the irrelevant personal characteristic standard, express some concerns over the shift from historic disadvantage to human dignity as the underlying purpose of equality rights; comment on the contextual approach and the place of enumerated and analogous grounds; and review the Court's approach to discrimination, especially whether the concept of ameliorative purpose invites or authorizes the Court to balance competing interests under section 15.

i) *Rejecting Irrelevant Personal Characteristics*

The Court's reformulation implicitly rejects the much criticized irrelevant personal characteristic approach introduced in the trilogy. In my opinion this is the correct position. While discrimination may sometimes involve an irrelevant personal characteristic it should not be elevated into a mandatory requirement. Inequality has many faces and insisting on this formulation was unduly restrictive. It made discrimination into a fit between means and ends, without subjecting the ends to sufficient scrutiny or gauging the law's social underpinnings or impacts and without calling on the government to justify its actions.

The internal relevance approach also repeated the inquiry of the rational connection test under section 1. This duplication affected, and perhaps skewed the rights definition stage by grafting on an aspect of the rights limitation stage. Under this approach to section 15 the complainant was required to show that the impugned distinction was irrelevant to the functional values of the legislature's purpose. Under section 1 and the rational connection test the state must establish the relevance of the distinction created to the objective in the legislation.

The similarity between the irrelevant personal characteristic standard under section 15 and the rational connection aspect of the proportionality test under section 1 was illustrated in *Benner*,¹⁰⁰ where the Court held that a two tiered application system for Canadian citizenship, based on the sex of the

¹⁰⁰ *Benner v. Canada (Secretary of State)*, *supra* note 6.

applicant's parent, both breached section 15 and failed the rational connection test. This case arose in the aftermath of the trilogy and the Court said that it did not matter which approach to equality was used. It is interesting to note that the gender of the parent was both irrelevant to the values of personal safety, nation-building and national security that underlie the differential treatment in the *Citizenship Act* and also failed the rational connection test under section 1.¹⁰¹ Although Gonthier J. argued in *Miron*¹⁰² that these tests were different, it is difficult to see how a Court could find that a distinction was irrelevant under section 15 but rational under section 1, without casting the undue aspersion that a legislature acts rationally when its standards are irrelevant.¹⁰³

The identity of subject matter between an irrelevant personal characteristic and a rational connection is thus apparent but the burden of proof is different, and perhaps determinative. By filtering out cases on the basis that the law had relevant internal standards, the Court was using the balancing techniques properly reserved for section 1 to limit the definition of rights. The reasons originally articulated for separating the definition of their rights and limitations remain valid. It is important not to set the bar so high that claimants are defeated at the section 15 stage without requiring the state to justify its action.

While the cases after *Law* do not refer to or employ this approach expressly, the Court's treatment of the contextual factor of correspondence with need in *Lovelace*¹⁰⁴ operated very much like the personal characteristics test. Under the Court's analysis the functional values of the First Nations Fund were to redress social and financial problems and to promote the self-government of "bands". The needs of non-bands were therefore outside the scope of the targeted program. It remains to be seen if fit between means and ends will now be reviewed under this contextual factor.

ii) *Limits to Human Dignity*

The Court has also provided welcome guidance by reaffirming that section 15 should be read and applied purposively. The Court's attempt to further delineate the values behind equality rights is a necessary step in the right direction. Courts need to return to basic principles and seek out the fundamental purposes underlying *Charter* rights. We cannot expect that our short experience with entrenched rights

¹⁰¹ *Ibid.* at 393.

¹⁰² Gonthier J. argues in *Miron v. Trudel*, *supra* note 6 at para. 31-35 that there is still a difference between relevance under s.15 and rational connection under s.1.

¹⁰³ However, in *Eldridge v. B.C. (Attorney General)*, *supra* note 6 at 670, the Court said that deafness was an irrelevant personal characteristic to the fundamental values of the health care system but it then assumed the existence of a rational connection under s. 1. In that case the Court concluded that the Board's decision failed the minimum impairment standard. The absence of analysis on rational connection and the use of minimum impairment to invalidate this legislation robs this case of any probative value on this issue.

¹⁰⁴ *Lovelace v. Ontario*, *supra* note 6.

has produced immutable conceptualizations on such complex questions. In addition, the Court has made it clear that the purposes of section 15 are to inform every stage of the analysis. This principle was established explicitly and it promotes coherence and consistency. Human dignity has in fact been pulled through and applied at every stage of the analysis: when assessing whether there is a distinction, in determining whether there is an enumerated or analogous ground and discrimination and how the various contextual factors apply.

My concern with *Law*, is not with the process of seeking the purpose of equality rights. My fear is that the Court's selection of human dignity as the main defining standard may not prove as helpful as it initially appears. Dignity is a basic value and it is hard not to be in favour of it but the first problem is one of definition. The Court notes that "no single word or phrase can fully describe the content and purpose of section 15(1)" and that is true. However, the focus on human dignity and defining rights by reference to other general concepts provides little clarity. If constitutional rights enshrine vague but meaningful generalities, human dignity suffers the defect that it is a proxy which is even less meaningful and more vague. In *Law* the Court took pains to cover the range of purposes within section 15 and to delineate certain characteristics of human dignity which should inform the equality analysis. However, it is easy for lawyers and judges in subsequent cases to lose sight of some of the nuances and to adopt the comfort of the singular phrase, without an appreciation that human dignity is a composite notion, and without a full exploration of how inequality works to undermine it. In *Law* and *Lovelace* the Court spoke at times of "essential human dignity", raising the possibility that there will be further distinctions between the essential and non-essential aspects of dignity.

Second, a dignity based equality standard is inherently malleable. While it may be easier to determine when human dignity is demeaned, it will be more difficult to articulate why it is not. The Court's approach in cases after *Law*, and most noticeably in *Lovelace*, illustrates the temptation in this approach to replace analysis with conclusions.

Third, even though the Court's review of the elements of human dignity is expansive and impressive, dignity belongs more to the realm of individual rights than to group based historical disadvantage. While the markers of enumerated and analogous grounds fulfill this function in part, the essence of inequality is that dignity is asymmetrically distributed or enjoyed. While it is appropriate that individuals who are not members of historically disadvantaged groups have access to equality rights, dignity may prove to be too low or too ambiguous a common denominator if it removes from view how oppression operates. The Court said that the interests protected by human dignity relate to the realization of personal autonomy and self determination, self-respect, and physical and psychological integrity and empowerment. These rights fall within the classic liberal tradition and they are also key elements of the right to life, liberty and security of the person, protected in section 7. Such a reading of the purpose of equality rights may reduce section 15 protections to little more than the equal right to what is otherwise guaranteed under section 7. In that case, given that the

principles of fundamental justice under section 7 require some measure of equality, it may be difficult to see what separate role is played by section 15. Section 15 was clearly intended to confer its own guarantees and to have a wide scope and an expansive purpose. Too great a focus on equal individual rights yields a restricted and impoverished view. The move from historic disadvantage to human dignity may dilute section 15. Substantive equality rights ought to purchase more social justice than equal dignity.

A fourth problem is the Court's subjective/objective test for determining whether the person's dignitary interest is infringed. Someone who has taken the trouble to become a complainant under section 15 will almost always meet the subjective portion of this standard. The Court will therefore be left to determine the reasonableness of that person's subjective experience of inequality. Someone whose claim is rejected under section 15 is therefore either suffering from false consciousness (subjectively) and/or else is being unreasonable (objectively). The reasonable person is a notoriously malleable construct, often invoked to put distance between decision-makers and their conclusions, but why is it needed here?

iii) *A Contextual Approach and Enumerated and Analogous Grounds*

In addition to rejecting the irrelevant personal characteristics approach, stressing a purposive review of equality rights, the Court in *Law* has clearly opted for contextual determinations. In that case it held that facially different treatment was not discriminatory. Other pre-*Law* cases reached the same result. For example in *Weatherall v. A.G. Canada*¹⁰⁵ the Supreme Court concluded that female guards could supervise male prisoners under different terms and conditions than the male supervision of female inmates. The Court's enunciation of a contextual standard confers all the benefits and drawbacks of flexibility but it is important that contextualism does not become fact based decision-making. Context is an important and more precise concept in relation to equality rights, especially as explained in *Andrews*. Context was meant to focus attention on the

¹⁰⁵ *Supra* note 6. In that case, female guards were required to observe male inmates in their cells, including undressing or using the toilet, and sometimes conduct hand searches of the inmates. While touching of genitals was not precluded, it was avoided. The Court found that there was no violation of the male prisoners' ss. 7 or 8 rights on the grounds that an inmate had no reasonable expectation of privacy with respect to prison practices adopted to ensure the security interests of the other inmates and the public. The Court held it was "also doubtful that s.15(1) is violated" because equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality." The Court justified this holding based on the historical, biological and sociological differences between men and women: and went on to conclude that even if s.15(1) had been violated, the practice was saved by s.1. It was held that the important government objectives of inmate rehabilitation and security of the institution were promoted by the "humanizing effects" of employing female guards. Because the ideal of achieving employment equity for women was given "material application" by the initiative, the Court found that the means used to justify any violation of the Appellant's s.15 rights were proportional.

impact of particular practices on protected individuals and groups: "[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application."¹⁰⁶ The focus is on the effect of a rule or practice, acknowledging the varied life circumstances of disadvantaged people, with the goal of providing each with what he or she needs to have equal rights.

A contextual approach also requires a review of the place of the group in Canadian society and the prior response of the legal system to that place. This determination is "to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society".¹⁰⁷ Decision-makers are asked to take into account whether or not the individual is part of a group which has a history of exclusion; the source, frequency and form of any types of past discrimination, any special laws which impose disadvantageous treatment, power relations, disadvantage and privilege, any political marginalization, the complex causes of social inequality and a clear sense of the inherent dignity of all people. In this way, courts are invited to consider the social context in which inequality arises and remedies are requested.

The presence of an enumerated or analogous ground has been a requirement of section 15 since the beginning. The tests formulated have varied somewhat over time but the Court approaches prohibited grounds by reference to the context of the case and whether human dignity is brought into jeopardy. Recently, aboriginal residence was protected in *Corbiere*;¹⁰⁸ whereas membership in the R.C.M.P. was not sufficiently immutable in *Delisle*.¹⁰⁹ A restrictive view of what qualifies as an enumerated or analogous ground would prevent individuals from having access to section 15. In this way, governments are told that, at least for constitutional law purposes, they need not balance the rights or consider the interests of certain people. This is therefore the type of question which has a profound influence on both the scope of section 15 and the balancing of competing interests.

iv) *Discrimination and Ameliorative Purpose*

The Court's broad approach to discriminatory conduct is to be welcomed. *Dicta* in other cases perhaps placed an increasing emphasis on the need to establish a form of stereotyping before there would be a finding of discrimination. As noted by the Court in *Law* stereotyping is but one form of inequality. Too great a reliance on stereotyping would require litigants to formulate complaints

¹⁰⁶ *Andrews v. Law Society of British Columbia*, *supra* note 6 at 168.

¹⁰⁷ *Ibid* at 152. See W. Black & L. Smith, "Comment" (1989) 68 Can. Bar Rev. 591; *R. v. Turpin*, [1989] 1 S.C.R. 1296.

¹⁰⁸ *Corbiere v. Canada*, *supra* note 6.

¹⁰⁹ *Delisle v. Canada*, *supra* note 6.

only in these terms and this runs counter to both a purposive and contextual approach to section 15.

After *Law* it is most likely that the work of section 15 will continue to be done by the concept of "discrimination". Even though individuals claiming a breach of their equality rights will benefit from having the *prima facie* ability to define the comparator group, there will be more cases dismissed for want of proof of discrimination. The Courts may be tempted to balance competing claims under this concept. More specifically, the Court's use of the contextual factor of ameliorative purpose may open the door for a great deal of balancing at the section 15 stage. To the extent that any comparison based on social position is required, the Court reviews the position of the person and the ameliorative purpose of legislation as contextual factors in determining whether discrimination exists. While the Court has warned that this involves more than a comparison of relative disadvantage under section 15, there is nevertheless a canvassing of the vulnerability of affected individuals and groups.

In *Law* the government's choice to protect a defined class of potential beneficiaries was not even scrutinized under section 1. Similarly, in *Granovsky* the differential treatment of persons with temporary disabilities was not discriminatory because the legislation ameliorates the position of those with a history of severe and permanent disabilities. The Court recognized that Parliament needed to set limits but did so under section 15. In *Lovelace*, as explained in the previous section, the Court took into account that the First Nations Fund was intended to reconcile the different positions of the Province and bands on the need to regulate reserve based gambling, to support government to government relations between First Nations bands and Ontario, and to ameliorate social, cultural and economic conditions of band communities. These are precisely the type of matters normally considered under section 1 when assessing whether the government has demonstrated a pressing and substantial purpose. In equality cases there will always be a distinction between claimants and the state can be presumed, by the very act of providing benefits to some, that it is seeking to ameliorate their prior conditions. There are other signs that the *Law* case may allow for more balancing to take place at the section 15 stage. For example, the Court said that Parliament can premise remedial legislation on informed generalizations and that "legislation need not always correspond perfectly with social reality to comply with section 15(1) of the *Charter*."¹¹⁰

In addition, although the claimant chooses the comparator the Court selects the characterization of the government's purpose. The Court's ability to select the government's purpose allows for a great deal of analytical leeway under both section 15 and section 1. In *Law* the Court accepted that the government's purpose was to provide for the long term needs of surviving spouses. Had it accepted the plaintiff's characterization that the Act was meant to provide also for the immediate needs of those who are widowed, the result may have been different.

¹¹⁰ *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 6 at 561.

V. Flexible Standards of Review Under Section 1

Like section 15, section 1 has also evolved. In this section I present the initial approach adopted in *R. v. Oakes* and explain the changes to it.

A. The Evolution of Section 1 Generally

(i) The Initial Test in *Oakes*

R. v. Oakes dealt with the constitutionality of a reverse onus provision for trafficking under the *Narcotics Act*. Dickson C.J. wrote for the majority and faced the daunting task of formulating a coherent and principled approach to section 1 determinations.¹¹¹ Dickson C.J. began by noting the unique role played by section 1. It both "guarantees the rights and freedoms set out in the *Charter*" and allows their reasonable limitation. In evaluating competing "interests":

"any section 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms which are part of the supreme law of Canada."¹¹²

Therefore, under section 1 not only must one consider that a breach has occurred, but also in assessing the relevant type of free and democratic society one should also be cognizant of the fact that in this free and democratic society certain rights and freedoms, including equality rights, have been constitutionally guaranteed in the supreme law of the land.

The *Charter* was both the origin of rights and the basis for their limitation:

"The underlying values and principles of a free and democratic society are both the genesis of the rights and freedoms guaranteed by the *Charter*, and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justifiable."¹¹³

The Chief Justice identified two inter-related standards of justification. The first standard was normative and called for judicial reasoning which took into

¹¹¹ In previous cases the Court did not attempt to establish a general approach to s.1. See for example: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *A.G. (Québec) v. Québec Protestant School Boards*, [1984] 2 S.C.R. 66; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295; *R. v. Therens*, [1985] 1 S.C.R. 613; *Reference re Section 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486.

¹¹² *R. v. Oakes*, [1986] 1 S.C.R. 103 at 135-36, Dickson C.J. It is important to understand that while the basic structure of *Oakes* remains, there have been certain modifications and refinements. Such evolutions are to be expected as new issues face the Court and test the suitability and limits of existing statements of principles. Courts are required to answer the precise questions put before them, but they will also be influenced by the larger jurisprudential and constitutional question of the day. For example, with the advent of the *Charter* the main question was what role the Court would take for itself. The response came in *R. v. Oakes* that the Court was taking its new responsibilities seriously.

¹¹³ *Ibid.* at 136.

account the underlying values of a free and democratic society.¹¹⁴ Illustrations of a few such values include:

“respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”¹¹⁵

Chief Justice Dickson articulated a second justification in a four-part test. Basically:

A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all section 1 cases the burden of proof is with the government to show a balance of probabilities that the violation is justifiable.¹¹⁶

At the first of two stages of the proportionality test the Court is measuring the degree to which legislation reflects the legislature's goals.¹¹⁷ The third question, according to Chief Justice Dickson, required courts to balance the interests of society with those of individuals and groups. He recognized:¹¹⁸

¹¹⁴ Early in *Big M Drug Mart*, *supra* note 11 the Court adopted a large and liberal interpretation to the *Charter* to give effect to its larger objects and stated at 136 “principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom.”

¹¹⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

¹¹⁶ This test was used by Iacobucci in *Egan v. Canada*, *supra* note 6 at para. 182 and in other equality cases like *Eldridge v. British Columbia (Attorney General)*, *supra* note 6, at para. 84, in *Vriend v. Alberta*, *supra* note 6 at para. 108, and in *M. v. H.*, *supra* note 6, at para. 76, per Iacobucci J.

¹¹⁷ See L. Weinrib, “The Supreme Court of Canada: Section 1 of the *Charter*” (1988), 10 Sup.Ct.L.R. (2d) 469 who supports the Court's choice of a proportionality test in which the first two question concern fit and avoid “policy-laden evaluations of reasonableness.”

¹¹⁸ *R. v. Oakes*, *supra* note 11. On section 1 generally see: A. York, “The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1)” (1996), 54 U.T. Fac. L. Rev. 327; R. Kerans, “The Future of Section One of the *Charter*” (1989), 23 U.B.C.L. Rev. 567; N. Siebrasse, “The *Oakes* Test: An Old Ghost Impeding Bold New Initiatives” (1991), 23 Ottawa L. Rev. 99; I. Grant & J. Mosoff, “Hearing Claims of Inequality: *Eldridge v. British Columbia (A.G.)* (1998), 10 Can. J. Women & L. 229; D. Greschner, “The Right to Belong: The Promise of *Vriend*” (1993), 9 N.J.C.L. 417; C. Nowlin, “The Relevance of Stereotypes to s.15 Analysis — *Little Sister's Book and Art Emporium et al. v. The Minister of Justice*” (1996), 30 U.B.C.L. Rev. 333; W.R. Lederman, “Assessing Competing Values in the Definition of *Charter* Rights and Freedoms” in E. Ratushny and G.A. Beaudoin eds. *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) at 127; B. McLachlin, “Charter Myths” (1999), 33 U.B.C.L. Rev. 23; J.

"Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society."

While this four part test has "taken on some of the character of holy writ"¹¹⁹ some argue that it is too often separated from its normative foundation.¹²⁰ Professor Trakman claims that Dickson C.J.'s formulation of section 1 sought to integrate a normative analysis of the fundamental values underlying Canada's free and democratic society. Until 1995 he claims the Court applied this test formalistically and indiscriminately and although there have been some attempts to reintegrate the two strands of the *Oakes* test, there is still no clear, principled and predictable normative analysis.¹²¹

ii) *Oakes Restated and the Contextual Approach to section 1*

In many cases judges have warned that the balancing of interests required under section 1 should not be approached mechanistically.¹²² Early in the development of the balancing test, Dickson C.J. underlined this point by stating in *R. v. Edwards Books and Art Ltd.*,¹²³ : "Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards." Flexibility finds its origins in a contextual and purposive approach. Justice Wilson in *Edmonton Journal* stated that "the particular right or freedom may have a

Cameron "The Original Conception of Section 1 and Its Demise: A Comment on *Irwin Toy Ltd. v. Attorney General of Québec* (1989), 35 McGill L.J. 253; P.A. Chapman, "The Politics of Judging: Section 1 of the *Charter of Rights and Freedoms*" (1986), 24 Osg. Hall L.J. 867; D. Newman, "The Limitation of Rights" A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* tests" (1999), 62 Sask. L. Rev. 543; D. Gibson, "The Deferential Trojan Horse: A Decade of *Charter* Decisions" (1993), 72 Can. Bar Rev. 417; R. Elliot, "The Supreme Court of Canada and Section 1 — The Erosion of Common Front" (1987), 12 Queen's L.J. 277; J. Pickel, "Exorcizing the Demons of *Egan: Vriend v. Alberta* and the Application of Section 1 of the *Charter*" (1986), 6 Can. Lab. & Emp. L.J. 279.

¹¹⁹ P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) C.35 at 16. See also S.R. Peck, "An Analytical Framework for the Application of the *Canadian Charter of Rights and Freedoms*" (1987), 25 Osg. Hall L.J. 1.

¹²⁰ For an excellent analysis see L.E. Trakman, W. Cole-Hamilton & S. Gatién, "R. v. *Oakes* 1986-1997: Back to the Drawing Board" (1998), 36 Osg. Hall L.J. 83-149.

¹²¹ A return to a more normative framework is apparent in the decisions of Justice Sopinka in *Egan v. Canada*, *supra* note 6 Justices McLachlin and La Forest in *R.J.R. MacDonald v. Canada* (A.G.), [1995] 3 S.C.R. 199 and Justice La Forest in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

¹²² See *United States of America v. Cotroni*, [1989] 1 S.C.R. 1467 at 1489-90: "While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature."

¹²³ *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 768-69.

different value depending on the context.”¹²⁴ One result of this approach has been that: “From the whirlpool of doctrine surrounding the words ‘reasonable limits’ in section 1, eddies spin off under each of the substantive rights and freedoms.”¹²⁵

This contextualism therefore makes it necessary to review the equality cases separately.

B. *Section 1 in Equality Cases*

In this section I explain that while there is no categorically distinct section 1 standard of review for breaches of equality rights, the Court’s adoption of contextualism under section 1 provides necessary flexibility. Similarly, the Court exercises considerable discretion in its characterization of the government’s objective. It is also important to appreciate how the Court has assessed whether a pressing and substantial state interest has been demonstrated and how each part of the proportionality test has been applied to discriminatory infringements. It is noteworthy that in relation to breaches of equality rights the Court has invoked all aspects of the section 1 test to invalidate unconstitutional state action.

i) *There is No Lesser Section 1 Standard for Equality Rights*

The basic structure for section 1 determinations set out in *Oakes* was intended to be of general application.¹²⁶ The distinctive nature of equality rights led some to question whether *Oakes* should apply to infringements of section 15. In *Andrews*,¹²⁷ the Crown proposed a lesser and categorically distinct standard for justifying breaches of equality rights. The Court split on this issue, as well as being divided on how section 1 should be applied to the facts of

¹²⁴ *Edmonton Journal v. Alberta (Attorney General)*, *supra* note 6 at 1355 per Wilson J.

¹²⁵ A. Lokan, “The Rise and Fall of Doctrine Under Section 1 of the *Charter*” (1992) 24 *Ottawa L. Rev.* 163 at 185.

¹²⁶ The test for s. 1 determinations was established in *R. v. Oakes*, *supra* note 112, and it involves two separate inquiries. First, the party seeking to uphold the provision must demonstrate that the objective of the provision is of sufficient importance to warrant overriding a constitutionally protected right or freedom. To do so, the state interest must be “pressing and substantial”. Second, the means chosen in overriding the right or freedom must be reasonable and demonstrably justified in a free and democratic society. In assessing whether the legislative means are proportional to the legislative ends, the Court in *Oakes* referred to three useful considerations. One, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Two, the legislative means should impair as little as possible the right or freedom under consideration. Three, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

¹²⁷ *Andrews v. Law Society of British Columbia*, *supra* note 6.

the case.¹²⁸ Wilson J. and two others required the government to demonstrate a pressing and substantial state interest to justify a breach of section 15: adopting not only the two step analysis but applying the *Oakes* standard with the same degree of rigour to discrimination as other *Charter* breaches. Mr. Justice McIntyre, in dissent, however, suggested that this aspect of the general *Oakes* test was too stringent when applied to breaches of the equality guarantees because legislatures need to differentiate among individuals and groups to govern effectively.¹²⁹ He replaced the *Oakes* standard of a pressing and substantial interest with the less onerous one of whether the government can establish a desirable social objective. In *Andrews*, Madam Justice Wilson stated that:

"Given that section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on the government to justify the type of discrimination against such groups is appropriately an onerous one."¹³⁰

A lower level of judicial scrutiny for equality rights has not been adopted subsequently. The use of the normal section 1 standard is important because a categorically lower level of judicial scrutiny could impair the evolution of equality theories and discourage the use of equality arguments.

While there is no categorically different standard for evaluating equality rights, the contextual approach to section 1 has been used in equality cases.¹³¹ As early as *Andrews*¹³² Mr. Justice La Forest stated:

"The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focussing on the

¹²⁸ The Court in *Andrews* split evenly on the question whether it was appropriate to apply the strict *Oakes* standard of justification to laws that violated s.15. Applying the onerous *Oakes* standard, Wilson J. (with whom two other judges agreed) held that the citizenship requirement could not be justified under s.1. But McIntyre J. (with whom one other judge agreed) took the view that the *Oakes* test was too stringent for s.15 violations, on the basis of a lower standard of review he held that the citizenship requirement could be justified under s.1. La Forest J. agreed with McIntyre J. that a lower standard of review under s.1 was appropriate; but he held that even on the lower standard of review the citizenship requirement could not be justified under s.1. In the result, there was a four to two majority on the six-judge bench for the position that the citizenship requirement, which all agreed was a breach of s.15 was not justified under s.1 and was therefore invalid.

¹²⁹ *Ibid.* at 183. See also the judgment of La Forest J.

¹³⁰ *Ibid.* at 154.

¹³¹ See *M. v. H.*, *supra* note 6 per Cory and Iacobucci JJ. at para 76 (see, e.g., *Egan v. Canada*, *supra* note 6 per Cory and Iacobucci JJ., at para 182; *Eldridge v. British Columbia (Attorney General)*, *supra* note 6, at para. 84, per La Forest J.; *Miron v. Trudel*, *supra* note 6 at para. 163, per McLachlin J. and *Vriend v. Alberta*, *supra* note 6 at para. 108 per Cory and Iacobucci. JJ.).

¹³² *Andrews v. Law Society of British Columbia*, *supra* note 6 at 198.

character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.”

This flexibility may mean that variations will emerge to influence the intensity of the review for infringements to equality rights. How the Court uses the reformulated *Oakes* test in section 15 cases is therefore important. It can also be expected that changes to the requirement under section 15 will have an impact on the Court’s section 1 analysis.¹³³ Given that most section 15 cases are dismissed because the claimant has not established a breach, the number of cases which fall to be considered is somewhat limited, but they are sufficient to discern some interesting factors and features.

ii) *The Characterization of the Government’s Objective*

It is important to distinguish between the formula for determining justification under section 1 and the variables that go into the *Oakes* test.¹³⁴ Before the four part *Oakes* formula can be applied, the Court must identify, characterize and define the government’s objective and the means used to implement it. Through this process of interpretation the Court retains a degree of flexibility:

“The process of characterizing the objective, means and right allows judges a good deal of room to manoeuvre, so that the *Oakes* test can be channelled in the direction they view as appropriate.”¹³⁵

In equality cases, characterization of the government’s purpose or objective therefore plays a key role in both determining if there is a discriminatory distinction and in assessing whether the government can demonstrate a pressing and substantial interest and proportional means. Indeed one writer claims:

“How the Court characterizes the objective of the impugned legislation essentially determines whether legislation should be struck down or upheld.”¹³⁶

In many cases the characterization selected by the Court is virtually dispositive. For example, in *M. v. H.*¹³⁷ there was a significant difference of opinion

¹³³ Since *Law* there have been two cases in which legislation breached s. 15 and the infringement could not be justified under s. 1. In *Corbière v. Canada* the Court invalidated the provision in the *Indian Act* which required that band members be “ordinarily resident” on the reserve in order to vote in band elections. While the Court’s conclusion was unanimous, two sets of majority reasons were issued. See also *Bennerv. Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

¹³⁴ T. Macklem & J. Terry, “Making the Justification Fit the Breach” (2000) 11 Sup. Ct.L. Rev. (2d) 575 at 580.

¹³⁵ *Ibid.* at 581. This discretion can be used at any stage although the authors note that it happens more commonly that the objective is defined with an eye to the proportionality test.

¹³⁶ E.P. Mendes, “The Crucible of the *Charter*: Judicial Principles v. Judicial Deference in the Context of s.1” in G.A. Beaudoin & E. Mendes, *The Canadian Charter of Rights & Freedoms* (3rd ed., 1996, Toronto: Carswell.)

¹³⁷ *M. v. H.*, *supra* note 6.

concerning the purpose of the impugned provisions of the *Family Law Act*. The *Act* provided a regime for spousal support upon the breakdown of the relationship but only for married or common law opposite sex couples. The *Act* was challenged by a lesbian in a long term intimate relationship who sought support from her former female partner. The majority decided the *Act* was intended to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down and to alleviate the burden on the public purse by shifting the obligation to provide support to others with the capacity.¹³⁸ Justice Bastarache wrote a separate concurring opinion because he found the purpose of the legislation was to deal with individuals in permanent and serious relationships which cause or enhance economic disparity between the partners and to address the subordinated position of women in non-marital relationships. In dissent, Justice Gonthier stated that the purpose of the *Act* was to recognize the social function specific to opposite-sex couples and their position as a fundamental unit in society and to address the dynamic of dependence unique to men and women in opposite-sex relationships. He then used the test in *Law* to conclude that the impugned differentiation was not discriminatory.

A similar difference of judicial opinion arose over the proper characterization of the legislature's purpose arose in *Miron v. Trudel*¹³⁹ and *Egan v. Canada*.¹⁴⁰ In *Miron* Justice Gonthier held that the purpose of legislation limiting insurance claims to married spouses was to assist married persons.¹⁴¹ Other judges took a broader approach and said that the legislative objective was to sustain families when a member is injured in a car accident.¹⁴² In *Egan*¹⁴³ Justice La Forest said that restricting pensions to opposite sex couples was intended to support couples with children, whereas other judges said the *Act* was meant to mitigate poverty among elderly households.

It is therefore possible for the Court to choose an objective which virtually ensures that the legislation cannot be justified. The Court is cognizant of this possibility and insists that the objective be stated properly. As McLachlin J. recognized in *R.J.R. MacDonald*:

¹³⁸ The majority judgment was written by Cory J. and Iacobucci J.: Justice Cory wrote on the breach of s. 15 and Justice Iacobucci addressed justification under s. 1. Lamer C.J., L'Heureux-Dubé J., McLachlin and Binnie J.J. endorsed this approach. Justices Major and Bastarache each wrote their own concurring reasons and Gonthier J. dissented. The majority rejected arguments that the *Act* was also intended to remedy disadvantages suffered by women in opposite-sex relationships and to protect children from the financial consequences of the breakdown of an intimate relationship.

¹³⁹ *Miron v. Trudel*, *supra* note 6.

¹⁴⁰ *Egan v. Canada*, *supra* note 6.

¹⁴¹ *Miron*, *supra* note 6 at 461 per Gonthier J.

¹⁴² *Ibid.* at 503 per McLachlin J.

¹⁴³ *Egan v. Canada*, *supra* note 6 at 534 per La Forest J. and at 606 per Cory and Iacobucci JJ.

"Care must be taken not to overstate the objective. The objective relevant to the section 1 inquiry is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.¹⁴⁴

Issues of characterization affect each stage of the analysis.

iii) *A Pressing and Substantial State Interest*

In *Oakes* the Court held that a valid objective must accord with the values of a free and democratic society and must "relate to concerns which are pressing and substantial" before it is of sufficient importance to override a constitutionality protected right.¹⁴⁵ A valid government objective must also be *intra vires* and further "the realization of collective goals of fundamental importance."¹⁴⁶ It is at this stage that the Court faces the issue of balancing the worth of equality rights against the worth of government policy.

The Court has held that it is the purpose of the discriminatory action which is at issue because the wording of section 1 requires justification of the "limitation". While it is therefore the objective of the limitation which must be established and reviewed, the Crown is given some latitude. The fuller the context, the more easily a pressing and substantial purpose can be demonstrated. In *Vriend*, where the inequality arose from an omission, as many cases of equality do, the Court considered the legislation as a whole, the impugned provisions and the omission itself.¹⁴⁷

In one case, the Court has gone so far as to state that if one purpose is improper or blatantly discriminatory, the government may rely on a second or dual purpose to satisfy this requirement. In *Delisle v. Canada (Deputy Attorney General)*¹⁴⁸ the two dissenting judges who found a breach of section 15 said that this legislation was one of the limited cases in which Parliament's purpose infringed the *Charter* under section 15(1) because the government sought to keep R.C.M.P. members vulnerable to management interference with their associational activities. Nevertheless the government was said to have a sufficiently important objective, despite this one impermissible purpose, because the general goal was to assure a stable national police force. The judges were of the view that where the impugned legislation had two objectives the first stage of section 1 is satisfied if only one of the objectives is pressing and substantial in a free and democratic society.

The test of having a sufficiently important objective has played a limited role under the section 1 analysis. A pressing and substantial purpose is often

¹⁴⁴ *R.J.R. MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 335.

¹⁴⁵ *R.v. Oakes*, *supra* note 112 at 138.

¹⁴⁶ *Ibid.* at 136.

¹⁴⁷ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 555.

¹⁴⁸ *Delisle v. Canada (Deputy Attorney General)*, *supra* note 6.

conceded or assumed. Even when in issue the Court rarely weighs the wisdom or propriety of a proffered legislative purpose. In this way, the Court shows a strong recognition of and respect for the ability of a legislature to pursue policies of its choosing, a respect which arises in respect of all *Charter* rights.¹⁴⁹ In the context of section 15 cases, in *Andrews* three of the six judges said the province lacked a pressing and substantial purpose in imposing a citizenship requirement on lawyers. In *Vriend v. A.G. Alberta* a unanimous Court decide that the government had failed to establish a pressing and substantial objective.¹⁵⁰ That case involved the exclusion of sexual orientation as a prohibited ground of discrimination in the provincial human rights act. It may be tempting to suggest that the egregious nature of this deprivation prompted this response. The irony of excluding gays and lesbians from human rights protection was not lost on Justice Iacobucci who recognized that the "legislative omission is on its face was the very antithesis of the principles embodied in the legislation as a whole."¹⁵¹ One ground of decision could have been that in a free and democratic country an overtly discriminatory purpose can never be sufficiently important. However, the Court's decision is based on different reasoning. In *Vriend* the Alberta government did not provide any justification for failing to list sexual orientation as a prohibited ground of discrimination in its otherwise comprehensive human rights code. Justice Iacobucci stated:

"In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission, the respondents have failed to establish their evidentiary burden and thus, I conclude that their case must fail at this first stage of analysis."¹⁵²

Justice Major, who dissented on the remedy, also drew attention to the fact that the government provided no explanation for the exclusion of sexual orientation and none was apparent from the evidence filed by the province.¹⁵³ The Courts cannot create justifications out of whole cloth.

While there has been little substantive review of the government's purpose to test it against a normative standard there are some indications that this may become more important. The majority in *M. v. H.*¹⁵⁴ said that the *Family Law*

¹⁴⁹ A rare example is *R. v. Big M Drug Mart*, *supra* note 111 where the Court held that the purpose of the federal *Lord Days Act* was to compel the observance of a Christian Sabbath and this was contrary to the *Charter*.

¹⁵⁰ See also *Schachter v. Canada*, [1992] 2 S.C.R. 679 where the Supreme Court addressed the sole issue of remedy. A breach of s.15 had been conceded and the government chose not to attempt a justification under s.1 at trial. The Court commented at 695 on its dissatisfaction with such an approach as it was precluded from examining the s.15 issue on the merits and it had no access to the kind of evidence a s.1 analysis called for or would bring to light.

¹⁵¹ *Vriend v. Alberta*, *supra* note 6 at 557.

¹⁵² *Ibid.* at 580.

¹⁵³ *Ibid.* at 585.

¹⁵⁴ *M. v. H.*, *supra* note 6.

Act had a pressing and substantial purpose because its two objectives, of promoting social justice and the dignity of individuals, were values that underlie a free and democratic society.¹⁵⁵ In *M. v. H.* Bastarache J. decided that to qualify as a pressing and substantial objective the impugned law “must be respectful of the equality of status and opportunity of all persons.” In his view, unless legislation is consistent with the *Charter* value of equality it cannot be sufficiently important.¹⁵⁶ The majority held that this approach was too narrow because:

“It may be that a violation of section 15(1) can be justified because, although not designed to promote equality, it is designed to promote *other* values and principles in a free and democratic society. (emphasis in the original.)”¹⁵⁷

While the Court has not generally taken upon itself the task of second guessing the wisdom, propriety or importance of the objective, it retains and exercises the ability to define what the objective of legislation is. Like the Court’s general practice in relation to all *Charter* rights, it has not accepted the purpose exactly as argued by the Crown but tests them against established standards and the evidence presented. Professor Trakman notes that in applying the “sufficiently important objective test”, the Supreme Court has varied the degree of precision with which the objectives of impugned legislation have been characterized. Its approach has led to varying characterizations of governmental objectives, without reasons being given for the degree of precision accorded in specific cases. He argues that this approach appears to be manipulative. However, in equality cases when the Court has redefined, rephrased or restated the purpose, it has always found the new purpose to be pressing and substantial. The selected statement of purpose, even when valid, is however, sometimes dispositive at the proportionality stage of the analysis. General objectives typically appear more pressing and substantial than specific ones but they may be more difficult to justify at the minimum impairment stage.¹⁵⁸

¹⁵⁵ See also *Corbière v. Canada*, *supra* note 6 at 275, where L’Heureux-Dubé J. held that Parliament’s objective in restricting voting rights to band members was properly classified as ensuring that those with the most immediate and direct connection to the reserve have a special ability to control its future and concluded that this objective was pressing and substantial. The plurality assumed this point.

¹⁵⁶ *M. v. H.*, *supra* note 6 at para. 354.

¹⁵⁷ *Ibid.* at 72 per Cory and Iacobucci JJ.

¹⁵⁸ For example in *Andrews* the minority characterized the objective of the law more generally, as restricting entry to the legal profession to those qualified to practice law. The majority characterized the objective more specifically, as restricting entry to the legal profession to Canadian citizens. As a result, the majority could not justify the citizenship requirement in order to strike down the legislative objective, which the majority could do so. See P.W. Hogg *Constitutional Law in Canada*, 4th ed. (Toronto: Carswell, 1997). Neither of these characterizations is logically flawed and both rest upon factual foundations. But it is necessary to resort to an analysis of normative values in order to differentiate the two.

¹⁵⁹ *Stoffman v. Vancouver General Hospital*, *supra* note 6 at 555.

Whether a state interest will be sufficiently important to override equality rights will depend on the facts of the case. However, it is interesting to note that the Supreme Court has consistently rejected government arguments based solely on administrative convenience, cost and overall legislative fit. In relation to administrative convenience, Madame Justice Wilson pointed out:¹⁵⁹

It seems to me that it will always be more convenient from an administrative point of view to treat disadvantaged groups in society as an indistinguishable mass rather than to determine individual merit. But section 15(1) demands otherwise. In discrimination claims of the kind involved here, if the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as individuals deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less.

While cognizant of reduced resources and the need to allocate them fairly, in *Schachter* the Court noted that:¹⁶⁰

This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under section 1.

and

Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money.

Nor can claims of legislative coherence alone support a pressing and substantial state interest. In *Tétreault*, the government claimed that its unemployment insurance benefits should not be tampered with because they were established in conjunction with the old age benefits scheme.¹⁶¹ The Supreme Court disagreed, with Mr. Justice La Forest commenting:¹⁶²

I doubt whether the objective of fitting the Act within the government's particular legislation scheme of social programs could, in itself, be sufficiently important to justify the infringement of a Charter right. In theory, the government could advance the same rationale to support virtually any piece of legislation that is challenged. In the end, the impact on the individual or group is what is of primary concern.

In *Corbière* the Crown argued that it would be too costly and administratively difficult to create a system allowing the participation of off-reserve members in band council voting. This argument was dismissed by McLachlin J. in the following terms:

"But they present no evidence of efforts deployed or schemes considered and costed and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of the constitutional right."¹⁶³

¹⁶⁰ *Schachter v. Canada*, *supra* note 6 at 709.

¹⁶¹ *Thétreault-Gadoury v. Canada (E.C.I.C.)*, *supra* note 6.

¹⁶² *Ibid.* at 42-43.

¹⁶³ *Corbière v. Canada*, *supra* note 6.

For the purposes of argument alone, Justice L'Heureux-Dubé first assumes that cost could legitimately constitute a section 1 justification but then held that the government presented no evidence to show that a system that would respect equality rights is particularly expensive or difficult to implement. The government failed therefore to discharge its burden.¹⁶⁴

iv) *The Proportionality Test*

a) *Rational Connection*

At this stage the Court is asked to question whether the government has pursued its objective rationally; meaning whether the legislation is well designed, arbitrary, unfair or based on irrational considerations. Under the rational connection test the focus is on whether the government is proceeding rationally in the sense that there is some logical connection between the means it has employed to pursue its desired end. Some authors predicted that it would be conceptually difficult to establish that a law was irrational¹⁶⁵ and generally speaking, it is not very difficult for the government to establish some rational connection between its end and means.¹⁶⁶

However, in a few notable equality cases a rational connection has been found lacking.¹⁶⁷ In *Andrews*¹⁶⁸ three of six justices held that there was no

¹⁶⁴ *Ibid.* On the general point of the role of cost consideration she commented:

"Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to find cost-effective ways to respect equality cannot constitute a minimal impairment of those rights."

¹⁶⁵ P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987), 21 U.B.C.L. Rev. 87 at 109: It is always possible to object to the policy underlying a law, but how can it ever make sense to claim that a law is "irrational"? Taken literally, this claim suggests that a law has been enacted without reasons. The legislature has apparently drafted a law that is unconnected to the purposes that give rise to law in the first place.

¹⁶⁶ *Corbière v. Canada*, *supra* note 6 at 224 the Court held that the restriction on voting to those ordinarily resident on the reserve was rationally connected to the aim of the legislation, which is to give a voice in the affairs of the reserve only to the persons most directly affected by band council decisions. See *McLachlin* at 224 and *L'Heureux-Dubé* at 276. In *Tétreault-Gadoury v. Canada (E.C.I.C.)*, *supra* note 6 at 43, La Forest questions whether a rational connection exists in a brief statement but then goes to minimum impairment.

¹⁶⁷ The Supreme Court held that the government had failed to pass the rational connection test in the following cases. In *R. v. Morales*, [1992] 3 S.C.R. 711, (five out of seven justices). In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 four out of seven justices held the impugned law had failed the rational connection test. In *R. v. Zundel*, [1992] 2 S.C.R. 731 four out of seven justices held that there was no rational connection. In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, five out of seven justices held that there was no rational connection.

¹⁶⁸ *Supra* note 6. The majority in *Andrews* also said that citizenship had no logical link with the goal of having knowledgeable lawyers.

rational connection between a citizenship requirement and competency to practice law.¹⁶⁹ In *Miron v. Trudel*¹⁷⁰ five of the nine justices held there was no rational connection between marital status and motor vehicle benefits. In dissent in *Stoffman*, Madame Justice Wilson suggested that close scrutiny of the rational connection should take place and that a vigilant examination of the correlation advanced and a careful review of the assertions regarding the extent of the relationship between the grounds of the infringement and its justification is required.¹⁷¹

In *Benner v. Canada (Secretary of State)* a unanimous Court invalidated different citizenship eligibility standards, which depended on whether the claimant's father or mother had been the Canadian citizen because they lacked a rational connection.¹⁷² In *M. v. H.* the majority held that limiting spousal support to same-sex couples under the *Family Law Act* could not be justified under section 1 of the *Charter* because there was no rational connection between the objectives of the spousal support provisions and the means chosen to further this objective. The objectives were identified as providing for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and alleviating the burden on the public purse to provide for dependent spouses. Neither of these objectives was said to be furthered by the exclusion of the individuals in same-sex couples from the spousal support regime. If anything, these goals were undermined by this exclusion.¹⁷³

¹⁶⁹ Five of the nine justices found an infringement of s.15. However, Sopinka J., in holding that the provision passed the *Oakes* test saved the provision. Sopinka J. construed the rational connection test more restrictively than the five justices who found that the impugned law was not rationally connected to its objective.

¹⁷⁰ *Miron v. Trudel*, *supra* note 6.

¹⁷¹ *Stoffman v. Vancouver General Hospital*, *supra* note 6.

¹⁷² *Benner v. Canada (Secretary of State)*, *supra* note 6. Justice Iacobucci, writing for a unanimous Court, stated:

"The relevant question is whether the discrimination is rationally connected to the legislative objectives. We must therefore ask not whether it is reasonable to demand that prospective citizens swear an oath and to make these demands only of children of Canadian mothers, as opposed to those of Canadian fathers. There is clearly no inherent connection between this distinction and the desired legislative objectives: children of Canadian mothers are not in and of themselves less committed or more dangerous than those of Canadian fathers."

¹⁷³ *M. v. H.*, *supra* note 6 at 27. The majority also held that even if one of the purposes of the *Family Law Act* was to address the systemic inequality associated with opposite-sex relationships the impugned provision was gender-neutral and therefore was not rationally connected to the goal of improving the economic circumstances of heterosexual women upon relationship breakdown. The protection of children also failed the rational connection test as the *Act* does not make parenting a requirement for opposite-sex couples and fails to take into account that same-sex couples may also raise children. Major J. in a separate concurring judgment, holds that the exclusion of same-sex couples undermines the intention of the legislation, which was designed in part to reduce the demands on the public welfare system and is therefore not rationally connected to the *Act's* valid aims.

b) *Minimal Impairment*

The *Oakes* test initially required that any impairment should be “as little as possible”.¹⁷⁴ According to a general study of all *Charter* cases between 1986-1997, Professor Trakman *et al.* finds that the minimal impairment test has been pivotal to section 1 analysis and Professor Hogg calls it “the heart and soul of section 1 justification.”¹⁷⁵ In their study the former conclude:

“To date, a majority of the Court has found fifty out of eighty-seven violations to be unconstitutional by virtue of its application of the *Oakes* test. Forty-three, or 86 per cent, of these fifty infringements passed both the objective and rational connection tests but failed the minimal impairment test. Additionally, where a majority of the Court applied the *Oakes* test, every piece of legislation that survived scrutiny under the minimal impairment stage was held to have passed the *Oakes* test.”¹⁷⁶

A slightly different pattern emerges in relation to equality rights. As has been noted, the rational connection test has figured much more prominently in equality cases and has been relied upon as frequently as minimum impairment. Even where the Court finds no rational connection, it often goes on to find that the limit also fails the minimal impairment standard. In cases of minimal impairment the Court is not questioning the legislature’s ability to pursue a particular policy, it is merely saying that the state has not been a careful tailor. In this way the institutional competencies of the legislatures and courts are maintained and respected.

The case law indicates that a total exclusion or absolute denial of a constitutional right will rarely pass the minimal impairment test. For example, in *Corbière* in a brief review, McLachlin J., speaking for the majority held that “it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through the democratic process of elections is necessary.”¹⁷⁷ In her concurring judgment, L’Heureux-Dubé J., reiterated that:

“Those seeking to uphold this law have not demonstrated that a *complete* exclusion of non-residents from the right to vote, which violates their equality rights, constitutes a minimal impairment of these rights.”¹⁷⁸

She canvassed other available options and commented that the government failed to establish why these less restrictive options had not been considered or implemented.¹⁷⁹

¹⁷⁴ *R v. Oakes*, *supra* note 112 at par. 34.

¹⁷⁵ L.E. Trakman, W. Cole-Hamilton & S. Gatien, “*R. v. Oakes* 1986-1997: Back to the Drawing Board” (1998), 36 Osg. Hall L.J. 83-149.

¹⁷⁶ *Ibid.* at 148.

¹⁷⁷ *Corbière v. Canada*, *supra* note 6 at 225 per McLachlin.

¹⁷⁸ *Ibid.* at 277 per L’Heureux-Dubé.

¹⁷⁹ *Ibid.* at 278. “The appellants have not shown why solutions like special majorities, representative band councils, not based directly on population, dividing the local functions from broader powers of the band council, or other solutions that would not have the effect of suggesting off-reserve members are less worthy of concern, respect and consideration.”

There is sometimes a modification to *Oakes* at the minimal impairment stage, one not limited to the equality context. In *R. v. Edwards Books*¹⁸⁰ the Court relaxed the requirement that the legislation infringe the right as little as possible. The least drastic means requirement was perceived as unduly onerous if rigorously applied. Dickson C.J., the author of *Oakes*, reformulated the test and asked whether the Sunday closing law at issue abridged the freedom of religion of Saturday observers "as little as is *reasonably* possible."¹⁸¹ The test focussed on what was reasonable and satisfactory. He did not want to substitute judicial opinions for legislative determinations on where to draw a precise line.¹⁸² Professor Hogg points to this case and others to suggest that minimal impairment now contains a margin of appreciation its name might not suggest. Under this zone of discretion there is a range of legislative options which a reasonable legislator may enact while still respecting *Charter* rights.¹⁸³ For example, the majority in *McKinney v. University of Guelph*,¹⁸⁴ held that in cases involving a balancing between the claims of legitimate but competing social values where there was conflicting social science evidence, "the question is whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives".¹⁸⁵ This approach focuses on the government's belief and may be motivated by judicial deference to legislative action.

c) Deleterious Impact

This third part of the proportionality test has rarely had any effect on the result. The real work is done by the tests which proceed it and often the Court is not required to reach this stage of the analysis. When it does there is rarely any independent scrutiny which does not repeat what has already taken place under the rational connection or minimum impairment standards. In many ways this is to be regretted. This standard calls for an explicit balancing between interests which is clear and confrontational.

C. Judicial Deference in Equality Cases

The *Oakes* standard looked as if it was intended to provide a uniform method of analysis across all *Charter* rights to which section 1 applied. In subsequent years the Court sought various ways to infuse some flexibility into a potentially mechanistic analysis. The Court was required to scrutinize justifications of various distinct rights and in a myriad of factual situations.

¹⁸⁰ [1986] 2 S.C.R. 713.

¹⁸¹ *Ibid.* at 772.

¹⁸² *Ibid.* at 782.

¹⁸³ P. Hogg, "Section 1 Revisited" (1991), 1 N.J.C.L. 1.

¹⁸⁴ *McKinney v. University of Guelph*, *supra* note 6.

¹⁸⁵ *Ibid.* at 652.

Given the nature of judicial review it became clear that the Court would need to find a way to make the justification fit the breach and to separate trivial from serious infringements. The revisions and changes to *Oakes* have been explained elsewhere, but two main adaptations involved contextualism and deference to legislative choices. These modifications are stated in such a way as to affect all *Charter* rights. The previous discussion shows that the Court has embraced contextualism in equality cases. In contrast, it refers to, but rarely relies upon judicial deference to uphold discriminatory legislation.¹⁸⁶

i) *The Concept and Categories of Judicial Deference*

In a few key equality decisions the Court identified certain types of cases in which deference is thought appropriate, with the result that a lower standard of review under section 1 is said to be justified. While deference was at first invoked to protect vulnerable groups, its present application concerns primarily complex social legislation, the limits of judicial expertise, and the legitimacy of judicial review.¹⁸⁷

The Court first used judicial deference to insulate government action intended to protect vulnerable groups. The origin of any emerging doctrine of deference can be traced to *Edward Books*¹⁸⁸ where the Sunday repose legislation was upheld because it was aimed at protecting vulnerable

¹⁸⁶ It also must be important to note the time frame for cases as the evolving test for establishing a breach of s.15 interfaces with the evolving standards of judicial review under s.1.

¹⁸⁷ Many authors argue that judicial legitimacy must be approached as a problem and not a premise. See J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osg. Hall L.J. 123 who argues that notions of constraint and trust, which provide the structural dimension to the discourse on the legitimacy of judicial power, are an insufficient basis for legitimacy. See also R.F. Devlin, "Ventriloquism and the Verbal Icon: A Comment on Professor Hogg's 'The Charter and American Theories of Interpretation'" (1988) 26 Osg. Hall L.J. 1; A. Petter & A.C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) 3 U.B.C.L. Rev. 531; P. Monahan, Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada (Toronto: Carswell, 1987). See B. Slaterry, "Are Constitutional Cases Political?" (1989) 11 Sup. Ct. L. Rev. 507; P. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C.L. Rev. 87; A. Petter, "The Politics of the Charter: Lessons From the Early Charter Decisions of the Supreme Court of Canada" (1986) 8 Sup. Ct. L. Rev. 473. For other general comments see: P. Bobbitt, "Methods of Constitutional Argument" (1989) 3 U.B.C.L. Rev. 449; M. Gold, "The Rhetoric of Constitutional Argumentation" (1985) 35 U.T.L.J. 154; B. Langille, "The Politics of Despair, Again" (1989) 3 U.B.C.L. Rev. 549; M. McMahon, "The Canadian Charter of Rights and Freedoms: A Study in the Creation and Use of Legal Authority" (1984) 6 Can. Crim. Forum 131; P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117; R.E. Robinson, S.C. Coval & J.C. Smith, "The Logic of Rights" (1983) 33 U.T.L.J. 267.

¹⁸⁸ *R. v. Edwards Books & Art Ltd.*, *supra* note 123.

employees. Dickson C.J. commented that the *Charter* should not be used by "better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."¹⁸⁹ Similarly, in *Irwin Toy* the advertising ban was intended to protect children,¹⁹⁰ in *Slaight Communications v. Davidson* there was also an issue of unequal power between an employee and employer,¹⁹¹ in the *Prostitution Reference*¹⁹² Lamer J. characterized the criminal legislation at issue as representing a balance between competing interests and protecting vulnerable young persons and consumers were protected in *Rocket v. Royal College of Dental Surgeons*.¹⁹³

In *Irwin Toy* the Court gave many other, often inter-related reasons why courts should defer to legislatures. In that case the Court upheld an advertising ban on commercials directed at children even though it breached section 2(b). The Court proffered the following justifications for deference:¹⁹⁴

"... in matching means to an end and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims for competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.

....

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's function

....

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in sections 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions. ..."

¹⁸⁹ *Ibid.* at 722.

¹⁹⁰ *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927.

¹⁹¹ *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038.

¹⁹² *Prostitution Reference*, [1990] 1 S.C.R. 1123.

¹⁹³ *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232.

¹⁹⁴ *Irwin Toy v. Québec (A.G.)* *supra* note 190 at 993-94.

The Court has subsequently emphasized various features of this statement. In some cases the strict *Oakes* standard of impairing the right as little as possible is restricted to when the government is the "singular antagonist of the individual whose rights have been infringed."¹⁹⁵ In *Stoffman*, Mr. Justice La Forest, stated:¹⁹⁶

"As in *McKinney*, it is important in considering the issues raised by a case like the present to note that judicial evaluation of the state's interest will differ depending on whether the state is the "singular antagonist" of the person whose rights have been violated, as it usually will be where the violation occurs in the context of the criminal law, or whether it is instead defending legislation or other conduct concerned with "the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources."

Sometimes the Court explains that deference is appropriate where the impugned legislation involves the balancing of claims of competing groups.¹⁹⁷ In *R.J.R. MacDonald*, La Forest J., in dissent, sought to explain the lower standard:¹⁹⁸

"In drawing a distinction between legislation aimed at "mediating between different groups", where a lower standard of section 1 justification may be appropriate, and legislation where the state acts as the "singular antagonist of the individual", where a higher standard of justification is necessary, the Court in *Irwin Toy* was drawing upon the more fundamental institutional distinction between the legislative and judicial functions that lies at the very heart of our political and constitutional system. Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elective representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary."

Sometimes deference is explained by reference to the subject matter of the impugned legislation. As stated in *Delisle v. Canada*:¹⁹⁹

"Labour relations law is typically an area in which courts have shown the legislature a degree of deference, owing to the complexity and delicacy of the balance sought to be struck by legislation among the interests of labour, management and the public."

However, most such cases tend to be examples of complex legislation requiring the balancing of competing claims, rather than their own distinct subset.

¹⁹⁵ *Irwin Toy v. Québec (A.G.)*, *supra* note 190.

¹⁹⁶ *Stoffman v. Vancouver General Hospital*, *supra* note 6 at 521.

¹⁹⁷ E.g., *Irwin Toy v. Québec (A.G.)*, *supra* note 6 at 999-1000, *McKinney v. University of Guelph*, *supra* note 6, at 317-19, per La Forest J.; and *Egan v. Canada*, *supra* note 6 at para. 29, per La Forest J. and at paras. 105-8, per Sopinka, J. As Dickson C.J. and Lamer and Wilson JJ. stated in *Irwin Toy*, at 993.

¹⁹⁸ *R.J.R. MacDonald v. Canada (A.G.)*, *supra* note 144 at 277.

¹⁹⁹ *Delisle v. Canada (Deputy Attorney General)* *supra* note 6 at para. 126. See also McIntyre J. in the *Alberta Reference*, [1987] 1 S.C.R. 313 and *Royal Oakes Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at para. 57.

In other cases evidentiary difficulties are said to justify deference. Again in *R.J.R. MacDonald*, La Forest J. in dissent stated:²⁰⁰

"It appears, then, that there is a significant gap between our understanding of the health effects of tobacco consumption and of the root causes of tobacco consumption. In my view, this gap raises a fundamental institutional problem that must be taken into account in undertaking the section 1 balancing. Simply put, a strict application of the proportionality analysis in cases of this nature would place impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern every time it wishes to address its effects. This could have the effect of virtually paralyzing the operation of government in the socio-economic sphere. As I noted in *McKinney*, *supra*, at pp. 304-5, predictions respecting the ramifications of legal rules upon the social and economic order are not matters capable of precise measurement, and are often "the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components." To require Parliament to wait for definitive social science conclusions every time it wishes to make social policy would impose an unjustifiable limit on legislative power by attributing a degree of scientific accuracy to the art of government which, in my view, is simply not consonant with reality."

However, in that case La Forest J. in dissent justified deference on multiple grounds.²⁰¹

"It is clear that the *Act* is the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate."

In other cases the Court talks about deference because of the costs or administrative difficulties.

However, McLachlin J. in writing for the majority in *R.J.R. MacDonald*, cautioned about the general limits to deference:²⁰²

"... care must be taken not to extend the notion of deference too far, Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."

²⁰⁰ *R.J.R. MacDonald v. Canada (A.G.)*, *supra* note 144 at 275.

²⁰¹ *Ibid.* at 279.

²⁰² *Ibid.* at para. 136.

In *R.J.R. MacDonald*, McLachlin J. recognized that legislative context must be taken into account by the Court, both in assessing the legislature's objectives and in determining whether the proportionality criteria have been met. However, she insisted that a complex legislative problem or context does not vitiate the need for a high level of section 1 scrutiny, and that the judiciary cannot abdicate its supervisory role in the name of judicial deference to the institutional competence or legitimacy of the legislature. In a constitutional democracy, McLachlin J. emphasized, the legislatures and the courts each have their respective roles and responsibilities.

ii) *Deference and Discrimination*

Given the general features of cases in which deference was said to be appropriate, one could reasonably expect that the Court would be quite deferential to the legislature in equality rights cases. Equality arguments often arise in the context of complex social legislation, where the state is not acting as the singular antagonist but is mediating between competing interests, there may be conflicting scientific or social scientific evidence and there is often differing demands on scarce resources.

However, deference is rarely relied upon in equality cases. Sometimes deference is not even discussed²⁰³ and when raised, it is not normally pivotal to the decision. In most equality cases the Court emphasizes its role as the protector of *Charter* rights. A strong statement can be found in *Vriend*, where the Court explained how judicial review is legitimate, mandated by the *Charter* and contributes to larger democratic values.²⁰⁴

²⁰³ See for example, *Corbière v. Canada*, *supra* note 6 in neither judgment. In *Delisle v. Canada (Deputy A.G.)*, *supra* note 6 in dissent the judges held there was a breach of s.2 in associated rights, not s.15 so there is relevant analysis.

²⁰⁴ *Vriend v. Alberta*, *supra* note 6 at 562- 65 per Cory and Iacobucci JJ. The Court calculates the impact that the *Charter* has had on the relationship between the Courts and the Legislatures. The Court stresses that the *Charter* has created a new social contract grounded on the principle of constitutional supremacy. The people of Canada, through their elected representatives, chose to enact the *Charter*. To give the *Charter* a voice, the Courts were assigned the interpretative role and were given the power to declare unconstitutional legislation invalid under s.52 of the *Constitution Act, 1982*. However, the Legislature reserved unto itself the ability to utilize s.33, the notwithstanding clause, to exclude the application of the *Charter*. The Courts' ability to scrutinize legislation and the Legislatures' ability to utilize s.33 or draft new legislation has created a dialogue between the different branches of government. The Courts give voice to the principles of a democratic society embedded in the *Charter* while remaining mindful of the roles of the legislatures and the executive. The Courts role in upholding the *Constitution* is the cornerstone of a concept of democracy which embraces principles beyond the will of the majority. The language of the *Charter* provides the boundaries for this new concept of democracy. This broader concept of democracy enhances the democratic process as it allows society to examine issues from a principled basis through the Courts' decisions and allows the will of the majority, as reflected in the Legislatures' choices, to be examined and tested by the democratic principles mandated in the *Charter*.

In *Tétreault-Gadoury* La Forest J. stated:²⁰⁵

"the deference that will be accorded to the government when legislating in these matters does not given them an unrestricted licence to disregard an individual's *Charter* rights."

In *M. v. H.*, the most recent decision involving sections 15 and 1 and one employing the section 15 test established in *Law*, the majority discussed deference in general terms but did not apply it. Cory and Iacobucci JJ. chose to first stress the importance of the words "free and democratic" as standards of justification under section 1 (quoting Dickson C.J. in *Oakes*). They then cited *Vriend* to establish the Court's legitimate role. On deference generally they note that "this Court has often stressed the importance of deference to the policy choices of the legislature in the context of determining whether the legislature has discharged its burden of proof under section 1 of the *Charter*."²⁰⁶ They then cite four cases in support of this proposition. All such cases deal with freedom of expression and not equality rights.²⁰⁷ They quote from Cory J. in *Vriend*²⁰⁸ and warn that:

"The notion of judicial deference to legislative choices should not ... be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny."

They repeat the admonition in other equality cases that deference is not appropriate in all cases.²⁰⁹

"[d]eference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable."

They discuss the burden resting on the legislature and the necessity for evidence and arguments on why the legislature made certain choices and why, in the circumstances it considered those choices to be reasonable. Their concept of judicial deference is definitely grounded in concerns over institutional competence.²¹⁰

"These policy choices may be of the type that the legislature is in a better position than the Court to make, as in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research.

²⁰⁵ *Thétreault-Gadoury v. Canada (Employment and Immigration Commission)*, *supra* note 6 at 44.

²⁰⁶ *M. v. H.*, *supra* note 6 at 60.

²⁰⁷ See for example, *Irwin Toy Ltd. v. Québec (Attorney General)*, *supra* note 190 at pp. 993-94 per Dickson C.J. and Lamer J. (now Chief Justice) and Wilson J.; *R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 502-4, per Sopinka J.; *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, *supra* note 144 at paras. 135-37, per McLachlin J.

²⁰⁸ *Vriend v. Alberta*, *supra* note 6 at para. 54.

²⁰⁹ See *M. v. H.*, *supra* note 6 at 82 per Cory and Iacobucci JJ. See also *R.J.R. MacDonald v. Canada (A.G.)*, *supra* note 144 at para. 136 per McLachlin J. See also *Eldridge v. B.C. (A.G.)*, *supra* note 6; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, *supra* note 6 and *Vriend v. Alberta*, *supra* note 6.

²¹⁰ *M. v. H.*, *supra* note 61 at 60-61.

Courts must be cautious not to overstep the bounds of their institutional competence in reviewing such decisions.” (References deleted)

They then decide that deference should not affect the general application of section 1, but may arise in relation to its specific inquiries. It is noteworthy that the Court does not specifically address the relationship between equality rights and deference and clearly does not rely on deference to decide the case, making its assumptions and statements *obiter dicta*.

The Court has also done more than emphasize its role as the guardian of equality rights.²¹¹ When it has specifically addressed the rationales generally put forward for deference it has done so in a way which sharply contrasts with the freedom of expression cases. In relation to competing interests, in *Corbiere* L'Heureux-Dubé noted that the section 1 analysis must start from the recognition that section 15 protects substantive equality rights. She downplays the significance of competing interests as a ground for judicial deference.²¹²

“The fact that various minorities or vulnerable groups may have competing interests cannot alone constitute a justification for treating any of them in a substantially unequal manner, nor can it relieve the government of its burden to justify a violation of a *Charter* right on a balance of probabilities.”

However, she later suggests that restricting voting rights to members ordinarily resident on the reserve represents a pressing and substantial interest in part because “Parliament is also moderating the interests of groups with different and possibly conflicting interests.”²¹³

In only two sets of equality cases did the deferential approach have an impact on the result.²¹⁴

²¹¹ There are two basic scripts on the proper role of the Court in equality cases: one emphasizes judicial deference, the other justifies judicial review. In my view these are not contradictory positions given the diverse responsibilities of the Court. However, it is sometimes difficult to explain why one line of reasoning is invoked or given priority in a particular circumstance. It is also curious that in some cases complex issues are resolved without any explicit exploration of the Court's role. In part, the answer may lie in how the case was argued by counsel for the parties and the intervenors. In *Vriend* it is clear that the Alberta Government took the position, on every issue and at every stage that it would be illegitimate for the Court to grant human right protections to gays and lesbians that the legislature had withheld. The “you can't make us” *liet* motif of the government's case coupled with the failure to submit evidence of its purpose or objectives, quite understandably provoked a comparative lengthy and fulsome response. It is, however, not entirely clearly the circumstances in which one will be preferred to the other.

²¹² *Corbiere v. Canada*, *supra* note 6 at 274. There is no extensive discussion of deference in either set of reasons.

²¹³ *Ibid.* at 276.

²¹⁴ I have not considered *Rodriguez v. British Columbia (Attorney General)*, *supra* note 6 because the Court relied extensively on s.7, assumed a breach of s.15 in a perfunctory manner and upheld the legislation under s.1. The majority in *Rodriguez* referred to s.7 as the “most substantial issue in this appeal” and found no infringement of the principles of fundamental justice. They spend much time on this issue at pp. 583-608. By contrast the section 15 argument takes up less than one page and at 612-3 it is acknowledged that equality issues “would require the Court to make fundamental findings concerning the

The first set of cases dealt with the issue of mandatory retirement. The majority decisions in *McKinney*, *Stoffman*, *Harrison* and *Douglas* were written by La Forest J., a chief architect and proponent of deference. As early as 1986 in *R. v. Jones*²¹⁵ he was of the opinion that *Charter* rights could only be protected "within the limits of reason". In all contexts he supported a flexible and functional interpretation of section 1 but he argued for deference in equality cases also.²¹⁶ The majority held that the university policy in *McKinney* and the hospital policy in *Stoffman* were not government action and did not qualify as "law" under section 15. Technically, the discussion on those mandatory retirement policies was *obiter*. However, in *McKinney*, the Court also addressed the constitutionality of a provision in the Ontario human rights act which limited age based protections to people between 18 and 65. That portion of the case, as well as the state action in the college's mandatory retirement policy forced the Court to decide whether section 15 had been breached and whether any infringement was saved under section 1. Only in these cases was there a finding that discrimination could be demonstrably justified in a free and democratic country and it is in this set of cases in which judicial deference figured prominently.

The dicta in these decisions are quite consistent with the Court's general view of deference espoused in freedom of expression cases. In *Stoffman*, Justice La Forest stated that special considerations apply in cases which involve the allocation of resources or those that attempt to strike a balance between competing social groups.²¹⁷ In such cases, neither the experience of judges nor the institutional limitations of judicial decision making prepares a court to make a precise determination as to where the balance between legislative objective and the protection of individual or group rights and freedoms is to be drawn. Similarly in *McKinney* the Court emphasized that deference was owed to the legislature because this was a difficult topic on which there were competing interests and much conflicting social scientific evidence. The Court was also influenced by the nature of mandatory retirement policies: mentioning that they were contracts, agreed to by the parties. The majority also stressed that mandatory retirement was both a benefit and a burden to each employee. It was not that some enjoyed the benefit and others were left with the burden. This was a contractual compromise which was

scope of s.15. Since I am of the opinion that any infringement is clearly saved under s.1 of the *Charter*, I prefer not to decide these issues in this case. They are better left to a case in which they are essential to its resolution." Lamer C.J. found a breach of s.15 which failed to impair the rights of persons with disabilities as little as reasonably possible, even though he expressly adopted a deferential approach, allowing Parliament a range of options to safeguard the interests of the vulnerable and still ensure the equal right of self-determination of persons with physical disabilities.

²¹⁵ *R. v. Jones*, [1986] 2 S.C.R. 284 at 300 per La Forest J.

²¹⁶ See *Edwards Books & Art Ltd. v. The Queen* *supra* note 123; *Andrews v. Law Society of British Columbia*, *supra* note 6 at 198; *Law Society of British Columbia v. Black*, [1989] 1 S.C.R. 591; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1569; and *Edmonton Journal v. A.G. (Alberta)*, *supra* note 6.

²¹⁷ *Stoffman v. Vancouver General Hospital*, *supra* note 6 at 527-28, per La Forest J.

available to all workers in time. The Court held that mandatory retirement had become part of the fabric of the labour market in Canada. There was also conflicting evidence on the effect of mandatory retirement policies and the possible implications for a range of issues should it be declared invalid.

In *McKinney* La Forest J. goes through the various conflicting views and explains how the legislature's decision making process was solicitous and respectful of the various interests at stake. He quotes extensively from the relevant legislative debates to establish that limiting age restrictions were the result of careful review. Professor Jackman argues:²¹⁸

"In *McKinney* deference to the government's legislative choice at the minimal impairment stage of the *Oakes* analysis was warranted on several grounds. First, the legislature itself made the impugned decision. Second, it did so after considering carefully the competing social and economic issues and interests involved. And, third, the decision to limit the rights of one group was in fact taken in order to promote the rights of others: older workers who would be adversely affected by a change in the mandatory retirement age and younger workers facing serious obstacles to labour market entry."

In contrast, Professor Jackman claims the *Egan*²¹⁹ decision does not reflect or reinforce democratic principles or values.

In *Egan* the impact was less clear as four judges held there was no discrimination but Sopinka J. used his own approach to deference to save the legislation under section 1, thereby tipping the balance in favour of upholding the legislation. In *Egan*, Sopinka J. began by assuming that "it is not realistic for the Court to assume that there are unlimited funds to address the needs of all."²²⁰ He cautioned that government may not create new social benefit programs at all if the Court did not show due deference. He believed that the government's decision to exclude same-sex spouses from the old age security regime was the type of socio-economic question, where the legislature mediates between competing groups and the courts should be reluctant to second guess allocation. He also introduced the idea that because of the novelty of same-sex relationships, Parliament should be allowed to take a measured and incremental legislative approach.²²¹ He argued that in novel cases incrementalism was appropriate. This approach was rejected in strong and convincing terms in the judgment itself. Referring to the reasons of Sopinka J., Iacobucci J. stated:²²²

"However, what causes me greater concern is my colleague's position that, because the prohibition of discrimination against gays and lesbians is "of recent origin" and "generally regarded as a novel concept" (p.6) [at para. 111], the government can be

²¹⁸ See M. Jackman, "Protecting Rights & Promoting Democracy: Judicial Review under s.1 of the *Charter*" (1996), Osg. Hall L.J. 661 at 666.

²¹⁹ *Egan v. Canada*, *supra* note 6.

²²⁰ *Ibid.* at 572.

²²¹ *Ibid.* at 575-76.

²²² *Ibid.* at para. 215-16. L'Heureux-Dubé J. rejected Sopinka J.'s reasoning also claiming that it was "novel."

justified in discriminatorily denying same-sex couples a benefit ensuring to opposite-sex couples. Another argument he raises is that the government can justify discriminatory legislation because of the possibility that it can take an incremental approach in providing state benefits.

With respect, I find both of these approaches to be undesirable. Permitting discrimination to be justified on account of the "novelty" of its prohibition or on account of the need for governmental "incrementalism" introduces two unprecedented and potentially indefinable criteria into section 1 analysis. It also permits section 1 to be used in unduly deferential manner well beyond anything found in the prior jurisprudence of this Court. The very real possibility emerges that the government will always be able to uphold legislation that selectively and discriminatorily allocates resources. This would undercut the values of the *Charter* and belittle its purpose."

Incrementalism has been extensively criticized in academic writing and it has found no favour subsequently with the Court. In *Vriend* all judges rejected incrementalism in principle²²³ and explained why, in any event, it did not apply on those facts. The Court stated:

"Groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equality rights while governments move toward reform one step at a time."

However, the Crown has continued to argue incrementalism in one form or another. In *M. v. H.* the majority rejected incrementalism (and the dissent never got to section 1) because "the notion that government ought to be accorded time to amend discriminatory legislation, is generally an inappropriate justification for *Charter* violations."²²⁴ It was also held that incrementalism did not apply to the facts of that case because there was no evidence that the government was making any progress on same-sex spousal benefits and there was no cost to the public in extending benefits to gays and lesbians. Bastarache J. explicitly disagreed with Sopinka J.'s view that incrementalism justifies a lower standard but allowed some room for a consideration of evolving social realities.²²⁵

In *Eldridge* the Court reviews cases where deference was invoked but does not decide whether the deferential approach should be adopted, and concludes that the state action would fail even under a deferential standard.²²⁶

It is interesting to consider why deference is not often invoked to justify discrimination. A first possible explanation is that in this context the Court realizes that a dubious doctrine need not be extended in aid of the flexibility *Oakes* already contains. The nature of the issues in equality cases may present in sharp relief the general difficulties in the Court's doctrine of deference. These difficulties includes problems of definition, the juridical effect of deference and when it will be applied.

²²³ *Vriend v. Alberta*, *supra* note 6 at 559. All judges signed on to the judgment of Cory and Iacobucci JJ. on this point. See L'Heureux-Dubé J. at 579 and Major J. at 588.

²²⁴ *M. v. H.*, *supra* note 6 at 81.

²²⁵ *Ibid.* at 173.

²²⁶ *Eldridge v. British Columbia (A.G.)*, *supra* note 6 at 685.

First, it is not always clear what deference means. The term sometimes connotes the respect each branch of government ought properly to show the other. In this case the complementary roles of courts and legislatures are recognized as legitimate and mutually reinforcing. In other cases, deference imports not merely separate spheres, but hierarchy. The undercurrent is that courts should leave certain matters to legislatures and elected representatives, even though it is clear that courts do not initiate legislation and their role in the constitutional dialogue is limited to that of an actor of second instance. Deference is invoked to encourage the Court to perform its reviewing function with a different mind set and to employ a lower level of scrutiny. Professor Beatty suggests that "deference means that even when a court recognizes that a law impinges on someone's constitutional rights, it will not enforce the test of constitutional validation with their full force or effect."²²⁷ When the Court uses deference in this manner no constitutional basis, textual reference or interpretation of the *Charter* is cited to support its approach.

A second problem with the general concept of deference is that the effect deference has on legal analysis is rarely considered explicitly. The recent decision of *M. v. H.* highlights a division of opinion on the basic question of how deference operates. Bastarache J. considers at the outset of the section 1 inquiry whether, using contextual factors he establishes, deference ought to be shown to the government's decision.²²⁸ In that case he finds no reason to dilute the strict application of the *Oakes* standard. The majority disagreed with this approach. They said deference is not a general question, to be determined at the outset of the section 1 inquiry. Instead deference is "intimately tied up with the nature of

²²⁷ D. Beatty, "Law & Politics" [1996] Am. J. of Comp. L. 131 at 133.

²²⁸ *M. v. H.*, *supra* note 6 at 162.

1. The nature of the interest actually affected — the more fundamental the interest affected, the less deference a court should accord.
2. The vulnerability of the group.
3. Complexity and the level of expertise required of the decision-maker and the extensive of inter-locking legislative schemes.
4. Incremental legislative change does not provide a basis for deference but social realities may evolve over time.
5. The source of the rule with common law rules and delegated decisions to be accorded less deference.
6. the role of moral judgments in setting social policy.

He reviewed these factors and concluded that there was no need for deference:

"The nature of the interest affected by the exclusion is fundamental, the group affected is vulnerable, it is possible to isolate the challenged provision from the complex legislative scheme, there is no evidence of the government establishing priorities or arbitrating social needs, the legislative history indicates that there was no consideration given to the Charter right to equal concern and respect, and the government's interest in setting social policy can be met without imposing a burden on non-traditional families."

He then proceeds to a "strict application" of the traditional test set out in *Oakes*.

the particular claim or evidence at issue and not in the general application of the section 1 test.”²²⁹ Deference therefore impacts on specific inquiries, even though it is motivated by general limits to institutional competence. Even though the majority tethered deference to specific inquiries, they allowed deference a wide application because it was said to apply to any of the steps of the section 1 test, or even discussions of remedy. In most other cases deference only operated at the minimal impairment part of the proportionality test. Even then it remains somewhat unclear exactly how it operates. It is unlikely that it affects the burden of proof because such a departure from the section 1 jurisprudence would surely require express justification. More probably, deference affects the standard of proof: the balance of probabilities may not be as rigorously applied or the standard may remain constant but the Court modifies the type or weight of evidence accepted to discharge it. The majority in *M. v. H.* suggest that deference operates when the Court considers whether the government has discharged its burden of proof, but neither this case or the others articulate what type or extent of a departure deference authorizes. Perhaps *M. v. H.*, gives greater guidance on the effects of deference but the mere presence of this level of uncertainty at this stage in *Charter* development is troubling because if deference permits the easy defense of discrimination, its contours and consequences should be clear, convincing and based on *Charter* values.

The categories for establishing deference are also highly problematic. Justice McLachlin, as she then was, noted in *R.J.R. MacDonald* that it is not always easy to know when the government is a singular antagonist and when it is mediating between competing interests.²³⁰ That is true, but the problem with this proposed distinction is more fundamental than indeterminacy. In a constitutional democracy legislatures are obliged to respect all *Charter* rights and freedoms. It is therefore always balancing rights and mediating between competing interests, even in traditional domains like criminal law. *Mills*, *Keegstra* and *Butler* all illustrate that the state is not even a singular antagonist when enacting criminal laws. McLachlin J. also acknowledged that in all *Charter* cases there will be a conflict between the state and the victim of the rights violation and the state will be pursuing some broader social purpose. As a result she rejected differing levels of section 1 scrutiny based on whether the impugned legislation is classified as “criminal” or “social”. In *M. v. H.* Bastarache J. agrees that “the degree of deference cannot be determined by a crude distinction between legislation that pits the state against the individual and legislation that mediates between different groups within society.”²³¹

A second tantalizing suggestion to explain why deference does not figure prominently in equality cases is based on the origins of deference being tied to

²²⁹ *M. v. H.*, *supra* note 6 at 61.

²³⁰ *R.J.R. MacDonald v. Canada (A.G.)*, *supra* note 144. *Contra* see dicta in *Stoffman v. Vancouver General Hospital*, *supra* note 6.

²³¹ *M. v. H.*, *supra* note 6 at 162.

the protection of vulnerable groups. To the extent deference to the legislature was intended to protect vulnerable individuals and groups, it will rarely be relevant to equality rights, because it is often those very vulnerable individuals and groups who experience state imposed discrimination. The protection of vulnerable groups may have been at the root of judicial deference but it is also at the heart of the *Charter*'s equality guarantee. Similar points were made in *Adler* by Justice L'Heureux-Dubé in her dissenting judgement:²³²

"As *La Forest J.* concluded in his dissenting reasons in *R.J.R. MacDonald*, *supra*, at para. 63, in determining the degree of flexibility and deference to be shown Parliament in a section 1 analysis, this jurisprudence directs courts to take a contextual approach to the legislation in question, to evaluate both the nature of the right infringement and that of the social interest or values meant to be promoted by the legislation. For example, where the objective legislation promotes the protection of a socially vulnerable group and the nature of the infringement lies far from the core *Charter* values, deference will be warranted."

and more fully:²³³

"Thus, while deference has been granted the state in its legislative role by the courts in undertaking a section 1 analysis, this deference has been designed to better give effect to the general purposes of the *Charter* and with an understanding that *Charter* values may at times require a sensitive balancing. Deference has not been found warranted where to do so would frustrate the very values of the *Charter*, but rather to give better effect thereto and to allow the legislature the flexibility to make those difficult policy choices.

A corollary to this principle should also be articulated: where the nature of the infringement lies at the core of the rights protected in the *Charter* and the social objective is meant to serve the interest of the majority as a whole, as represented by state action, courts must be vigilant to ensure that the state has demonstrated its justification for the infringement. A less deferential stance should be taken and a greater onus remain on the state to justify its encroachment on the *Charter* right in question. In each case, therefore, only after the objective of the legislation has been identified can the appropriate degree of deference be determined. Indeed, cases will be rare where it is found reasonable in a free and democratic society to discriminate."²³⁴

The initial rationale for deference would be utterly lacking if it was used to restrict the equality rights of the vulnerable people seeking to enforce them. While the Court may not have adopted the anti-disadvantage principle generally in relation to section 1, it may yet prove to have a special place in equality cases.²³⁵ While this explanation of the limited use of deference in equality cases may be conceptually neat it is not sufficient. The protection of vulnerable groups may have marked the beginning of deference but it is now only one of a number of factors cited, and it is not the most weighty.

²³² *Alder v. Ontario*, *supra* note 6 at 666.

²³³ *Ibid.* at 667.

²³⁴ See also *Andrews v. Law Society of British Columbia*, *supra* note 6 per Wilson J. at 154.

²³⁵ *Contra* see *Egan v. Canada*, *supra* note 6.

A third explanation is probably more accurate. The deference cases arose largely in relation to freedom of expression where it is relatively easy to establish a breach of section 2(b) and the difficult issues of limitation and seriousness of breach are resolved under section 1. In freedom of expression cases the degree of seriousness of breach is considered under section 1, under a contextual approach which involves the concrete weighting of values. Freedom of expression is assessed in light of its relative connection to a set of even more fundamental values. In *Keegstra*²³⁶ Dickson C.J. identified these fundamental or "core" values as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. The purpose of the right therefore informs its limitation but the level of appropriate limitation is entirely a function of section 1.²³⁷ In conjunction with context, deference becomes the second analytical tool for the Court to scrutinize the importance of the impugned expression under section 1.

However, under section 15, especially with the restatement in *Law*, establishing a breach of equality rights is an onerous task. Given that section 15 contains many difficult threshold requirements deference is not required to do the same job or to achieve the same level of differentiation as required in the freedom of expression cases. Generally, flexibility under section 1 is based on context and/or deference. When the context is equality rights, any categorical reduction in the level of justification required is to allow deference to discrimination. In equality cases the distinctions proposed to justify deference are even less compelling and would greatly restrict equality rights if adopted and applied. Timothy Macklen and John Terry argue that the flaw is even more fundamental:²³⁸

"A policy of deference, whether applied generally or limited to a certain class of cases, is incapable of bringing to the *Oakes* test the kind of assessment of *Charter* values that a principled application of that test requires."

²³⁶ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 762-763. For an exploration of the discrimination principle see: E.P. Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconceives the *Oakes* Test" (1990), 24 R.J.T. 1 at 5-6; R. Colker, "Section 1, Contextuality and the Anti-Disadvantage Principle" (1992), 42 U.T.L.J. 77.

²³⁷ Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, *supra* note 6. Not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious. In *Rocket v. Royal College of Dental Surgeons*, *supra* note 193 at 246-47, McLachlin J. affirmed Wilson J.'s contextual approach:

"While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s.1 analysis permits the courts to have regard to special features of the expression in question."

²³⁸ T. Macklen & J. Terry, "Making the Justification Fit the Breach" (2000), 11 Sup.Ct.L.R. (2d) 575 at 602.

VI. A Principled Approach to Balancing

In equality cases the Court faces the difficult task of deciding not only what equality means, but what level of discrimination is justified in a free and democratic society. Fifteen years of equality rights and over forty section 15 decisions provide some guidance as to how and where the balance between equality rights and social goals is best obtained. There are many lessons to be learned.

As a starting point and fundamental principle it remains important to distinguish the definition of rights from their limitation. The line of demarcation between the content of a guaranteed equality right and state action restricting that right should be strictly drawn. Attempts to build additional limitations at the rights definition stage present evidentiary difficulties for complainants and run counter to a large, liberal, purposive and remedial interpretation of *Charter* rights. The balance achieved in the two stage approach to *Charter* analysis should be maintained and care should be exercised so that its boundaries are not eroded by excessive, erroneous or extra threshold requirements for breach.

In terms of the relationship between section 15 and section 1 the Court should therefore continue to scrutinize the fit between means and ends under the section 1 proportionality standard and not build tests based on relevancy or rationality into section 15. Questioning the functional relationship between the impugned distinction and the legislative objectives is necessary but it is better to have government address its thinking at the section 1 stage. The demise of the irrelevant personal characteristics standard proposed in the trilogy is therefore to be applauded and sustained.

A defining feature of the Court's jurisprudence is that it uses a contextual, flexible and purposive approach to both sections 15 and 1.²³⁹ Both sections are said to provide guidelines or points of reference only, we are warned that they are not to be applied mechanistically, and both are to be interpreted and applied with a strong sense of their purpose. Given the flexibility in both sets of standards, the purpose of the right must in all ways inform context and there must be a strong sense of the proper relationship between section 15 and section 1.

Under section 15 the Court has demonstrated the importance of seeking out and employing the purpose of equality rights. As early as *Andrews* and as recently as *Law* there has been a conscious attempt to not only expressly delineate the purpose of equality rights but to interpret the requirements of section 15 and conduct all parts of the equality analysis by reference to this purpose. The Court uses the dignity standard in relation to enumerated and analogous grounds and analyzes discrimination by reference to contextual factors such as pre-existing disadvantage, stereotyping, prejudice or vulnerability;

²³⁹ In equality a "fixed and limited formula" is to be avoided and the Court established "guidelines for analysis" or "points of reference", eschewing a rigid test which could be applied mechanistically.

correspondence with need, capacity and circumstances, the ameliorative purpose of the law; and the nature and scope of the interest protected at the breach stage. Contextualism demands scrutiny of the right in issue and its nature and purpose, permitting the Court the ability to make and defend nuanced decisions. While I have expressed concerns about distilling equality into human dignity, it is still helpful to know that all people should be secure in the knowledge that they are equally deserving of concern, respect and consideration. As currently formulated, the tests foster a sophisticated and expansive analysis under section 15. Given how many cases fail at the breach stage of the analysis there does not appear to be a problem with section 15 being a lax gatekeeper.

However, the Court has been less thorough in its approach to articulating the purpose and values underlying section 1. There is scant discussion of the attributes of a free and democratic society when confronted by a breach of equality rights. Certain core characteristics of a free and democratic society have been canvassed in relation to the breach of other rights and general principles emerge. While the nature of our free and democratic society should display a degree of constancy, the absence of deep and detailed reflection on the relationship between equality, human dignity, freedom and democracy threatens the coherence and cohesion of the section 1 analysis in equality cases.

The Court should therefore more thoroughly canvass what values or characteristics of a free and democratic society should be protected under a purposive approach to section 1. A return and review of these principles is not simply a retelling of well worn terrain. It is a required and ongoing aspect of a purposive approach to the *Charter*, and fulfills the normative function of the *Oakes* case. Some argue that what is needed is a greater appreciation of the philosophical and political values of a free and democratic society. A theoretical or abstract review may prove fruitful. However, section 1 requires a concrete approach and there is a defining characteristic of our free and democratic society which cannot be ignored: that is, since 1982 Canada is a constitutional democracy with entrenched rights and freedoms. The importance of this characteristic or value cannot be over-emphasized because it underscores the complementary role of the courts and legislatures and the proper interpretive approach to and place of equality rights. Another point reinforces it: not only are rights and freedoms entrenched in the Constitution, particular rights and freedoms are expressly protected. It is probably no coincidence that the values of a free and democratic society mentioned by Dickson C.J. in *Oakes* reflect the rights contained in sections 2-15. In looking to the *Charter*, not only are equality rights contained in section 15, but our free and democratic country has entrenched selected base norms that respect gender equality in sections 27 and 35 and multiculturalism in 28. Thus a full range of equality values inform this free and democratic country.

A review of the cases demonstrates that breaches of section 15 are rarely saved under section 1. In setting out the values of a free and democratic society Chief Justice Dickson in *Oakes* included "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a

wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”²⁴⁰ If a “commitment to social justice and equality” is a core value of a free and democratic society it may be logically difficult to hold that a breach of equality rights is a reasonable limitation. Other judges have also made the point that discrimination will rarely be justified under section 1. In *M. v. H.* Bastarache J. was concerned that a discriminatory objective could never be pressing and substantial in a free and democratic society. Justice L’Heureux-Dubé in dissent in *Adler* took into account the nature of the infringement and opined that it may be very difficult for the government to justify discrimination because equality is a core value in our democracy.

The test for determining whether the government has met the burden of explaining why it should be allowed to demean the dignity of the vulnerable should be a strict and onerous one, but it should not be impossible. In fact, of the equality cases, only mandatory retirement schemes have been found to be both discriminatory and demonstrably justified. In my opinion a strong understanding of the interrelationship of equality, freedom and democracy under the *Charter* will provide the basis to distinguish between infringements which are reasonable and demonstrably justified. Without such a purposive and principled approach there may be a temptation to let section 15 do all the work. If the assumption is that a breach of section 15 leads almost automatically to a remedy the scope of equality protections may be improperly and prematurely restricted. Such an approach may actually thwart the emergence of new equality rights as it makes section 1 irrelevant and it ignores the sound reasons for the two stage process.

Equality rights should be widely enjoyed and well protected because too narrow a formulation has impacts well beyond the courtroom. The preferable starting point is that state decision makers should understand that they must respect equality rights and that they will be called upon to justify their breach. The dynamic is different when the state can say that it has not even discriminated. And if discrimination is a more difficult breach to justify in a free and democratic society than some other rights, there is nothing wrong with that conclusion as long as it can be supported by the purposes of both sections, the principles underlying the *Charter*, the nature of our free and democratic society and the process of evaluation established under it.

There is some indication that the Court understands the importance of addressing the relationship between the values of equality and the characteristics of a free and democratic country. In *Vriend* the Court explained that “the concept of democracy is broader than the notion of majority rule, fundamental as that may be.”²⁴¹ Under section 1 the “Court must inevitably delineate some of the attributes of a democratic society,”²⁴² and “judges are not acting

²⁴⁰ *R. v. Oakes*, *supra* note 112 at 136.

²⁴¹ *Vriend v. Alberta*, *supra* note 6 at 566.

²⁴² *Ibid.* at 566. Cory and Iacobucci JJ. refer to Dickson C.J. in *Oakes* and their comments remain instructive. See also *R. v. Keegstra*, [1990] 3 S.C.R. 697, per Dickson C.J.; *B.(R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 per La Forest J..

undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles maintained by the *Charter*.²⁴³ The Court should be encouraged to continue to articulate the values of a free and democratic society and to question the role of equality in this society. Such an approach will provide a principled analytical tool to distinguish between justified and unjustified breaches of equality rights.

The Court should also consider the purpose of equality and the seriousness of the discrimination more fully under section 1. The need to keep the definition of rights separate from their limitation does not mean that the constitutionality of limits cannot be measured against the purpose and importance of the right infringed and the effect of the infringement on the core values of a free and democratic society. The division between breach and limit is intended to protect the integrity and strength of the right, but there should be no insistence on false symmetry. There should not be watertight compartments because the section 1 analysis needs to flow backwards into a review of the purpose of equality rights. In doing so the contextual factors established in *Law* to determine whether there is a breach will provide an excellent starting point for assessing the seriousness of the infringement and whether that limitation is justified under section 1. Questions based on pre-existing disadvantage stereotyping prejudice and vulnerability; the claimant's actual need, capacity and circumstances; any ameliorative purpose and the nature of the interests affected should inform all aspects of a flexible section 1 inquiry. For example, in cases like *Corbière*, where the interest at stake is voting rights, which affect participation in democracy, it will be difficult to justify a total exclusion because, based on the *Charter* values, it is a serious breach and a complete ban is inconsistent with increased participation in democracy. In other cases these same factors may yield a different response.

The judgment of L'Heureux-Dubé J. in *Corbière* also has some interesting features which illustrate how the purpose of equality rights are relevant under section 1. First, at the rights justification stage there is an express recognition that a substantive right to equality has been infringed. Second, the presence of competing interests is not seen as a basis for a lower standard of review. Third, when applying the minimum impairment test she relates the balancing directly back to the purpose of the equality right infringed. She canvasses a less intrusive legislative "solution that speaks of the other would not have the effect of suggesting off-reserve members are less worthy of concern, respect and consideration."²⁴⁴

Given the scope allowed by a principled and purposive contextualism, the Court also needs to question the various rationales invoked in support of judicial deference to determine whether they ought to apply in the equality context. It is now clear that deference should not be a free-floating concept and if applied at all it should be tied to specific inquiries, and I add, exigent circumstances. In my opinion,

²⁴³ *Ibid.* at 567.

²⁴⁴ *Corbière v. Canada*, *supra* note 6 at 277.

greater attention also needs to be paid to whether deference, as developed and defined in relation to freedom of expression cases ought to have any, or a similar, significance to equality rights. The Court appears to be operating under the assumption that deference is a concept of general application and that it is relevant to section 15. This assumption should be more closely examined.

Deference now appears to be supported by two rationales: the protection of the vulnerable and the limits to judicial competence. To the extent that deference exists to protect vulnerable groups in other circumstances, there is no need to insulate state actions on this basis in relation to equality rights. It is the section 15 claimant who has already established the vulnerability of historic disadvantage, stereotypic treatment or the asymmetric allocation of benefits or burdens.

However, recent cases which discuss deference are based more on concerns over institutional competence than the protection of the vulnerable. In equality cases the Court refers to deference but almost never invokes it to support its conclusion. Unlike the approach taken in section 2 and freedom of expression, the Court has many opportunities to measure the seriousness of equality breaches; indeed some may say there are already too many balancing techniques built into the doctrinal requirements of section 15. To add another level of deference under section 1 is to bow too low at the expense of the disadvantaged, and without a clear textual imperative. There is already deference based on institutional competence when the Court critically reviews whether the government's purpose is pressing and substantial. The Court may characterize the objective in the manner of its choosing but it allows extensive sovereignty concerning the goals of legislative action.

The Court does not often decide cases based on a deferential approach to section 1 in equality cases. To the extent that references to deference are intended to meet arguments presented by counsel, it is likely that the more deference is mentioned in judgments, the more it will be plead in practice. The Court could easily distinguish the cases it cites as arising in the different constitutional context of freedom of expression claims. In relation to equality cases the approach of Sopinka J. in *Egan* may have determined the result in that case, but his approach to deference was not only his alone, it was rejected in principle by others in that case and subsequently it has not been applied. The approach taken by La Forest J. in *McKinney* carries more weight. However, La Forest J. was a chief architect of deference generally and he endorsed a narrow scope of review under section 1 from the outset. In *R.J.R.* his views on deference were rejected by the majority, even in a freedom of expression case. Since his retirement the voice of deference is muted. Perhaps mandatory retirement is a particular case with unique exigencies.

In my view, a clear view of the purpose of equality rights and where they fit under the Charter and in this free and democratic society would remove the need to invoke deference to legitimate or insulate government action. Problems with the definition, effect and application of deference could be avoided. The result in the mandatory retirement cases could have been reached without discussions of deference if the Court had focussed on the seriousness of the

discrimination and its relationship with the underlying values in a free and democratic society.

To the extent deference is used in cases of conflicting evidence, the Court may be better served if it just relied on general evidentiary principles. The Court sets standards of proof which accord with the circumstances in many areas of the law. In medical malpractice cases evidentiary difficulties are resolved by the express adoption of a robust approach. In *Charter* cases, as expressly mentioned in *Oakes*²⁴⁵ and *Irwin Toy*²⁴⁶ within the broad category of the civil standard of balance of probabilities, there exist different degrees of probability depending upon the nature of the case. It would be preferable to admit that in the presence of seriously conflicting evidence, whether about the causes of lung cancer or the consequences of mandatory retirement, the standard of proof could vary.

If deference continues to be invoked it should be applied more cautiously. If urges toward deference are based in concerns over institutional competence, the type of state action at issue should have a bearing on the appropriate standard of review. Accordingly, legislation would receive a high degree of protection as it represents the choice of political goals, and the balancing of competing claims within the democratic process. The rationale for deference does not have the same force for delegated decision-making. For example in *Eldridge* the legislation provided for the provision of medically necessary services. The decision not to fund sign language interpretation was not dictated by the legislation but was a decision of the Medical Services Commission and hospitals. In such a case the Court is clearly not second guessing the legislature — it is interpreting its intention. The Court has extensive expertise in matters of interpretation and has well formulated principles to review the exercise of discretion by statutory decision-makers.²⁴⁷ In *Lovelace* it appears that the Court was influenced by the nature of the state action involved, emphasizing that the government had agreed to a partnership with various interested parties. The deference in this case includes respect for freedom of contract.

In a cautious approach, the degree of any deference would also be linked to whether the legislation was in fact the result of a truly democratic process. A legislative act would not garner deference from its status alone. In *Oakes*, Dickson C.J. clearly believed democracy was more than the procedural notion of majoritarian dictate. In seeking the values and characteristics of a free and democratic society special attention needs to be paid to those “social and political institutions which enhance the participation of individuals and groups in society.”²⁴⁸ Only processes which lend themselves to enhanced participation,

²⁴⁵ *R v. Oakes*, *supra* note 112 at 139.

²⁴⁶ *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 992.

²⁴⁷ *Eldridge v. British Columbia (A.G.)*, *supra* note 6 at 643: “It is not the legislation that potentially infringes the *Charter*. Rather it is the actions of particular entities and hospitals and the Medical Services Commission exercising discretion conferred by that legislation to do so.”

²⁴⁸ *R. v. Oakes*, *supra* note 112 at 145.

perhaps even increased equality, will provide the necessary justification. Cases requiring that the government have a reasonable basis for thinking that it minimally impaired the right indirectly questions the democratic underpinnings of the decision by calling into question the basis on which the decision was made. The more a decision, like the one in the mandatory retirement cases involves consultation, compromise and a serious canvassing of the range of relevant interests, then the more likely the government has been acting in accordance with the values of a free and democratic society.²⁴⁹

When Courts talk of deference they often claim that the Court should not intervene in non traditional areas where it lacks experience. However, in discussing the limits of judicial competence it will be important to distinguish between experience and expertise:²⁵⁰

"On the other hand, the latter rationale for a policy of judicial deference, that based upon the limits of the Court's institutional expertise, as the Court has in practice given effect to it, accords heightened constitutional protection to those interests that the Court is more or less accustomed to protecting, such as the interests of those charged with an offence, while offering diminished protection to those interests that the Court is unaccustomed to protecting, such as the interests of those engaged in certain forms of commercial speech. This conception of the Court's institutional expertise once again lacks explicit constitutional foundation, and more important, tends to conflate with the genuine limits of the judiciary's institutional expertise with its institutional *experience*. The limits of the judiciary's institutional expertise are inherent in the very concept of a court of law, the forms of reasoning to which it is necessarily committed, and the remedies that it is capable of offering. These any court is bound to acknowledge and respect. The institutional experience of the Supreme Court, on the other hand, and the other courts to which it provides guidance, is no more than the record of the responsibilities traditionally undertaken by the courts in Canada, a record that the entrenchment of the *Charter* was manifestly intended to alter."

The Court's experience with equality rights has been very limited because section 15 only became operative in 1985 and equality rights are not traditional in so far as they are complex, comparative, conceptually difficult, contextual, involve collectivities and issues of distributive and social justice. The obligation to protect these new rights may be less familiar but it is no less imperative.

There are many ways to achieve balanced results without a resort to a general doctrine of deference. The contextual approach may supply the requisite flexibility without the highly problematic practice of invoking deference in some cases and trying, with unhappy results to provide guidance on when it is appropriate to give legislatures leeway.

²⁴⁹ M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review under s.1 of the *Charter* (1996), 34 Osg. Hall L. J. 661. Professor Jackman argues that:

"The courts must weigh carefully the democratic potential of rights guarantees against the democratic quality of government decisions which undermine their rights."

²⁵⁰ T. Macklem & J. Terry, "Making the Justification Fit the Breach" (2000), 11 Sup. Ct. L. Rev. (2d) 575 at 604.

In summary, the two stage process should be retained, and there should be no consideration of the fit between means and ends under section 15, whether under the irrelevant personal characteristics tests or otherwise. The purpose of equality rights should extend beyond the protection of human dignity and the contextual factors in *Law* should not be used to set too high a bar for a section 15 claimant. The purpose of equality rights should continue to inform all stages of the section 15 analysis and should be carried forward under section 1. Under section I the Court should explore the tolerance for inequality in this free and democratic society both generally and by reference to Charter values. The purpose of equality rights and the seriousness of the infringement to equality's core values should also be considered. The Court can retain the flexibility it needs to distinguish between justified and unjustified restrictions by resort to the values and characteristics of a free and democratic society. The Court should not assume that deference applies to equality cases and to the extent deference is applied it should be approached selectively, cautiously and it should be expressly justified.

APPENDIX I

OVERVIEW OF CASES

NO BREACH OF SECTION 15(1):

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342

Re Worker's Compensation Act, 1983 (Newfoundland), [1989] 1 S.C.R. 922

R v. Turpin, [1989] 1 S.C.R. 1296

Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326

Rudolf Wolff & Co. v. Canada, [1990] 1 S.C.R. 695

Dywidag Systems Int'l Canada Ltd. v. Zutphen Brothers Construction Ltd., [1990] 1 S.C.R. 705

R v. Hess; R v. Nguyen, [1990] 2 S.C.R. 906

Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570

R v. Swain, [1991] 1 S.C.R. 933

R v. Genereux, [1992] 1 S.C.R. 259

Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711

Weatherall v. Canada, [1993] 2 S.C.R. 872

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689

Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995

Symes v. Canada, [1993] 4 S.C.R. 695

R v. Finta, [1994] 1 S.C.R. 701

Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627

Egan v. Canada, [1995] 2 S.C.R. 513

Thibaudeau v. Canada, [1995] 2 S.C.R. 627

Adler v. Ontario, [1996] 3 S.C.R. 609

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241

Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue- M.N.R.), [1999] 1 S.C.R. 10

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

Winko v. British Columbia (Forensic Psychiatric Institute) [1999] 2 S.C.R. 625

Bese v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 722

Orlowski v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 733

R v. LePage, [1999] 2 S.C.R. 744,

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989

R. v. Mills, [1999] 3 S.C.R. 668

Lovelace v. Ontario, [2000] S.C.J. No.36

Granovsky v. Canada (Minister of Employment and Immigration), [2000] S.C.J. No. 29

BREACH OF SECTION 15(1) BUT SAVED UNDER SECTION 1:

McKinney v. University of Guelph, [1990] 3 S.C.R. 229

Harrison v. University of British Columbia, [1990] 3 S.C.R. 451

Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

BREACH OF SECTION 15(1) AND NOT SAVED UNDER SECTION 1:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Tetreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22.

Schachter v. Canada, [1992] 2 S.C.R. 679

Miron v. Trudel, [1995] 2 S.C.R. 418

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358

Vriend v. Alberta, [1998] 1 S.C.R. 493

Eldridge v. British Columbia (A-G), [1997] 3 S.C.R. 624

M v. H, [1999] 2 S.C.R. 3

Corbiere v. Canada, [1999] 2 S.C.R. 203

APPENDIX 2

DIVISION OF CASES BY REASONS

NO BREACH OF SECTION 15

1. General Reasons – or resolved on other bases

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342

Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326

Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570

R v. Swain, [1991] 1 S.C.R. 933

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689

R. v. Mills, [1999] 3 S.C.R. 668

2. No Analogous Ground

Re Worker's Compensation Act, 1983 (Newfoundland), [1989] 1 S.C.R. 922

R v. Turpin, [1989] 1 S.C.R. 1296

R v. Genereux, [1992] 1 S.C.R. 259

Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995

R v. Finta, [1994] 1 S.C.R. 701

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989

Lovelace v. Ontario, [2000] S.C.J. No.36

3. No Discrimination

Rudolf Wolff & Co. v. Canada, [1990] 1 S.C.R. 695

Dywidag Systems Int'l Canada Ltd. v. Zutphen Brothers Construction Ltd., [1990] 1 S.C.R. 705

R v. Hess; R v. Nguyen, [1990] 2 S.C.R. 906

Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711

Weatherall v. Canada, [1993] 2 S.C.R. 872

Symes v. Canada, [1993] 4 S.C.R. 695

Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627

Adler v. Ontario, [1996] 3 S.C.R. 609

Winko v. British Columbia (Forensic Psychiatric Institute) [1999] 2 S.C.R. 625

Bese v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 722

Orlowski v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 733

R v. LePage, [1999] 2 S.C.R. 744, *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue-M.N.R.)*, [1999] 1 S.C.R. 10

Egan v. Canada, [1995] 2 S.C.R. 513

Thibaudeau v. Canada, [1995] 2 S.C.R. 627

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

Granovsky v. Canada (Minister of Employment and Immigration), [2000] S.C.J. No. 29

BREACH – NOT SAVED BY SECTION 1*

1. Not Pressing and Substantial

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Vriend v. Alberta, [1998] 1 S.C.R. 493

2. No Rational Connection

Miron v. Trudel, [1995] 2 S.C.R. 418

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358

M v. H, [1999] 2 S.C.R. 3

3. Not Minimal Impairment

Tetreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22.

Eldridge v. British Columbia (A-G), [1997] 3 S.C.R. 624

Corbiere v. Canada, [1999] 2 S.C.R. 203

* *Schachter v. Canada* [1992] 2 S.C.R. 679 — the only issue on appeal was remedy

BREACH OF SECTION 15(1) BUT SAVED UNDER SECTION 1**

McKinney v. University of Guelph, [1990] 3 S.C.R. 229

Harrison v. University of British Columbia, [1990] 3 S.C.R. 451

Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483

***Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. — but is a special case