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Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010

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Abstract: Through a study of the Court's disposition of 177 leave to appeal applications in s.15 cases since 1989, the authors examine the role of the Supreme Court of Canada in guiding the development of *Charter* equality rights jurisprudence. The data reveals that the grant rate on leave applications in s.15 cases has declined markedly since the late 1990s, reaching historic lows in the past five years. The grant rate in s.15 cases has declined more precipitously than the grant rate in *Charter* cases as a whole, even though s.15 jurisprudence remains in an unsettled and unsatisfactory state, and even though the Court continues to be presented with compelling applications for leave to appeal in s.15 cases. When the Court has granted leave in s.15 cases in recent years, the Court has dismissed s.15 claims perfunctorily in a majority of cases as other legal issues took centre-stage. The data also reveals that the chances of being granted leave in s.15 cases, and of succeeding on appeal to the Supreme Court, are much higher for governments. The authors conclude that the Court has played a significant role, through its management of the appeal process, in directing a restricted scope for *Charter* equality rights.

Keywords: Supreme Court of Canada, Charter, Equality Rights, s. 15, Leave Applications, Rate.

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Managing *Charter* Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010

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When scholars study the work of the Supreme Court of Canada, we typically focus our attention on the Court's written opinions. In this volume of papers drawn from Osgoode Hall Law School's annual Constitutional Cases conference, as in legal writing and analysis more generally, scholars carefully parse the Court's rulings – the words with which the justices have chosen to speak. We pay less attention to what the Court has chosen *not* to say. But the Court's silences may speak more loudly than its words. The Court has the power to control the cases it will hear through the process of deciding whether to grant leave to appeal. Through the leave process, the Court decides when it will speak and when it will remain silent. Excavating how the Court has gone about exercising the power to choose which issues to address strikes us as an important task of scholarship.

The existing scholarship on the leave to appeal process tends to focus on the general approach taken by the Court, as well as general trends in the number of leave applications and their disposition by the Court.[1] Less study has been undertaken of the Court's handling of leave applications in specific areas of the law. This understudied part of the Court's work can provide revealing information about the issues the Court does and does not want to address.

This paper seeks to add to our understanding of the Court's work by conducting a close examination of how it has disposed of leave applications in cases involving alleged violations of the equality rights in s.15 of the *Charter of Rights and Freedoms*. We were drawn to this topic in part because the Court's relative silence on *Charter* equality rights in recent years has been more notable than what it has said in its rulings on s.15. For example, in its 2009 rulings that are the focus of this volume, the Court summarily dismissed s.15 claims in three rulings preoccupied with other legal issues.[2] In each case, equality rights were a sideshow to the main event.

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[1] See Brian A. Crane and Henry S. Brown, "Leave to Appeal Applications: The 1998-89 Term" (1990) 2 S.C.L.R. 483 (and subsequent reports published annually in the Supreme Court Law Review); Henry S. Brown, *Supreme Court of Canada Practice 2010* (Scarborough, ON: Carswell, 2009); Roy B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: UBC Press, 2004); Donald R. Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008), chapter 3, "Setting the Agenda"; Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998) at 107-112; Ian Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada", (1982) 3 S.C.L.R. 479; Bertha Wilson, "Leave to Appeal to the Supreme Court of Canada" (1983) 4 Adv. Q. 1; Robert G. Richards, "Motions for Leave to Appeal to the Supreme Court of Canada" (1979-1981) 2 Adv. Q. 460.

[2] *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 at paras. 109-11 per Abella J., paras. 150-2 per McLachlin C.J., paras. 226-31 per Binnie J.; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at paras. 105-8 per McLachlin C.J.; *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. at paras. 185-202, per Rothstein J.

We were also drawn to this topic because of our awareness, from following equality rights jurisprudence and scholarship[3] closely, that s.15 claims are at the moment a rapidly diminishing feature of the Canadian legal landscape,[4] and that the courts are significantly more likely to dismiss s.15 claims than they were in the past.[5] Not so long ago, in 1997, the Supreme Court declared that "[t]he rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society."[6] Since then, *Charter* equality rights seem to inhabit a less exalted place in the Canadian legal imagination. What has happened to the dreams, hopes and aspirations enshrined in s.15? To what extent have they been realized? To what extent and in what ways are litigants continuing to pursue the transformational promise of s.15?

While these broader questions form a backdrop to our ongoing investigations, we cannot begin to answer them in this paper. Our modest aim here is to shed some light on the Supreme Court of Canada's role in guiding the development of *Charter* equality rights jurisprudence by focusing on its decision-making record in leave to appeal applications in s.15 cases. To what extent has the Court's interest in hearing s.15 appeals shifted over time? What *Charter* equality rights issues has the Court chosen to address or not to address?

We will begin by briefly describing the leave to appeal process. We will then describe the dataset of s.15 leave cases we have assembled, and the trends in s.15 grant rates it reveals over the course of the past two decades. We will compare the decline in the rate at which the Court grants leave to appeal in s.15 cases with the grant rate in *Charter* cases generally, and will speculate about why the grant rate in s.15 cases has declined more sharply in the past decade than it has for *Charter* cases as a whole. We then turn to an examination of whether the grant rate in s.15 cases, and the rate at which appeals are allowed when the Court does grant leave, differ depending on whether the s.15 claim was found to be established at the Court of Appeal. In both regards, our data reveal that the Court's record leans heavily in favour of governments in s.15 cases. We conclude that the Supreme Court has played a significant role, through its management of the appeal process, in directing a restricted scope for *Charter* equality rights.

[3] Two excellent collections of essays that address the contemporary challenges facing Canadian equality rights jurisprudence are Fay Faraday, Margaret Denike and M. Kate Stephenson eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) and Sheila McIntyre and Sanda Rodgers eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006) (the same essays also appear in (2006) 33 S.C.L.R. (2d) 1-412).

[4] From 1989 to 2009, the number of reported judicial rulings disposing of claims alleging violations of s.15 of the *Charter* has hovered around an annual average of 40. In the first half of 2010, we have found only 7 reported court rulings disposing of s.15 claims.

[5] Our data on all reported judicial rulings in s.15 claims since 1989 reveals that the rate at which courts find s.15 claims to be established has dropped by close to 50% in the 2004-2009 period compared to the previous 15 years.

[6] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at para. 67.

I. THE LEAVE TO APPEAL PROCESS

Apart from a significant minority of criminal appeals that reach the Supreme Court as of right, and a small number of reference questions directed to the Court by government, the Court exercises discretionary control over its docket through the power to grant or dismiss applications for leave to appeal. First enacted in 1975, s.40(1) of the *Supreme Court Act*[7] empowers the Court to grant leave to appeal to a case when it

> …is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it...

As Songer has noted, "the statute does not define 'public importance' and the court has not published any clarifying guidelines".[8] Based on interviews with and articles published by the justices, and the testimony of former clerks, we know that the Court's exercise of discretion on leave applications is driven primarily by the need to develop or clarify the law on issues of national importance. Leave is more likely to be granted when issues have a national scope, as is the case with the interpretation of federal statutes and the constitution, particularly if there is a new point of law or a need to resolve conflicting rulings from appellate courts. Because of the limited number of appeals the Court can hear, correcting what the Court perceives to be mistakes in the lower courts is a secondary consideration.[9]

Several kinds of silence characterize the leave process. First, the decision-making process on leave applications itself is shrouded in silence. For reasons of economy dictated by the sheer volume of leave applications (over 500 annually in recent years), the Court issues no reasons when it decides whether to grant or dismiss applications for leave to appeal. As a result, the leave process is characterized by a lack of transparency and accountability. Apart from the statutory criterion of "public importance", a formulation similar in its breadth and vagueness to ones the Court has condemned in other contexts as "standardless",[10] the Court controls its docket according to undisclosed criteria.

Second, when the Court dismisses applications for leave to appeal, it chooses to remain silent on the issues at stake. It chooses not to comment on the dispute between the parties. It chooses not to use cases denied leave to contribute to the development or clarification of the law. In addition, denials of leave close off the final avenue of appeal, thereby confirming the precedential value of the appeal court rulings from which leave to appeal was sought. The

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[7] R.S.C. 1985, c.S-26.

[8] Songer, *supra* note 3 at 46.

[9] For an overview of the literature, see Songer, *id.*, at 46-53.

[10] See, e.g., *R.* v. *Morales*, [1992] 3 S.C.R. 711 (holding that the "public interest" is too vague and imprecise a standard to structure judicial discretion in bail hearings in a meaningful way).

power to deny leave to appeal is thus an important part of the Court's role in supervising the development of Canadian law. As Flemming concluded in his recent book investigating the leave to appeal process,

> The administrative justification for this authority should not obscure the power that comes from the exercise of this discretion. Agenda-setting authority in a tournament of appeals constructed by the justices in which they are the key players augments and bolsters their impact on public policies and on the day-to-day concerns of government officials, Parliament, and Canadian citizens.[11]

II. DATASET OF SECTION 15 LEAVE CASES

Using Quicklaw, CanLii and the Supreme Court's case information database,[12] we compiled a dataset consisting of all of the Court's decisions on leave to appeal applications in s.15 cases since September 1, 1989.[13] We included a case in our dataset if it met the following criteria:

- the lower courts addressed a claim alleging a violation of s.15 of the *Canadian Charter of Rights and Freedoms*, finding it to be established or not established;[14]
- a party sought leave to appeal to the Court on the s.15 violation issue; and
- the Court granted or dismissed the application for leave to appeal after September 1, 1989.

When we refer to "s.15 leave cases" or "s.15 leave applications", we are referring to cases that meet these three criteria.

We adopted these three criteria of inclusion to meet our objective of measuring patterns of Supreme Court decision-making over time on applications for leave to appeal from lower court rulings dealing with alleged violations of s.15 of the *Charter*. We did not include cases where s.15 is enlisted solely as an aid to the interpretation of a statute or other legal rule. We did not include cases that involved arguments based on "equality values" (as opposed to equality *rights*). We did not include cases involving alleged violations of non-constitutional equality

[11] Flemming, *supra* note 3 at 106.

[12] We conducted searches on Quicklaw's "Supreme Court of Canada Rulings on Applications for Leave to Appeal" database and on CanLii's "Supreme Court of Canada – Applications for Leave" database. We also used searches on Quicklaw and CanLii to compile a list of all appellate rulings on s.15 claims, and then searched the case information database on the Court's website using the names of the parties. After compiling cases from these three sources, we are confident that our dataset represents a comprehensive record of the Court's decision-making on s.15 leave applications (that otherwise meet our criteria of inclusion) since September 1, 1989.

[13] We used the Court's 1989-1990 Term as our starting point because judicial interpretation of *Charter* equality rights was particularly chaotic prior to the Court's first s.15 ruling in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, released on February 2, 1989. To track patterns of decision-making in s.15 leave applications over time, we decided to exclude the leave record in the doctrinally unstructured earliest days of judicial interpretation of s.15.

[14] We characterize s.15 claims as "established" at the Court of Appeal if the court found a violation of s.15 that was not demonstrably justified as a reasonable limit pursuant to s.1. We characterize s.15 claims as "not established" at the Court of Appeal if the court did not find a violation of s.15 or if the court found a violation of s.15 that was demonstrably justified as a reasonable limit pursuant to s.1.

rights. Moreover, in an effort to focus our dataset on "genuine" s.15 appeals, if an applicant alleged a violation of s.15 for the first time as part of the leave to appeal application,[15] we excluded the case from our dataset.[16] We made the same decision if a s.15 violation was alleged in the lower courts, but the courts did not address it. If we had included these cases in our dataset, the grant rate in "genuine" s.15 appeals would have been distorted.[17]

Using our criteria of inclusion, we generated a dataset consisting of 177 s.15 leave cases from 1989 to 2010. For each of these cases, we recorded the following information:

- whether the s.15 claim was established or not established at the Court of Appeal;
- whether the application for leave to appeal to the SCC was granted or dismissed;
- the date of the SCC decision on the leave application; and
- whether the SCC allowed or dismissed the appeal on the s.15 issue.[18]

The full list of cases, and a summary of these features of each case, appears in Appendix B below.

III. TRENDS IN DECISION-MAKING IN SECTION 15 LEAVE CASES

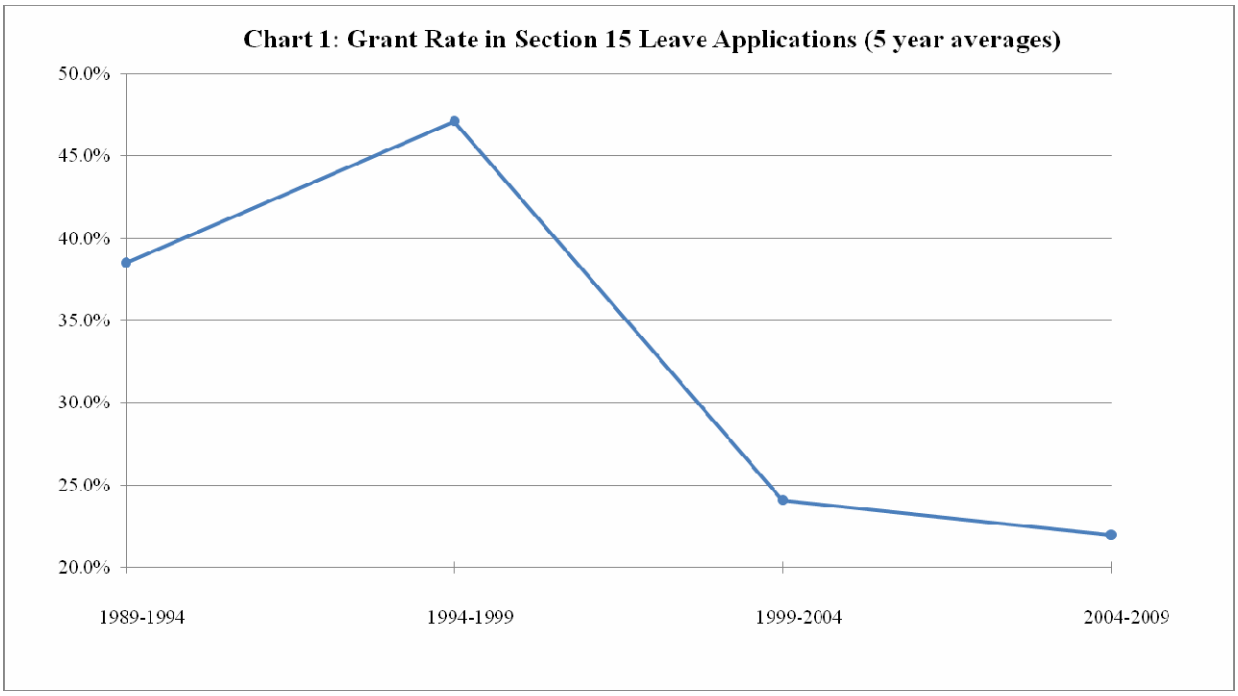
The annual grant rate in s.15 leave applications is reproduced in Appendix A, below. While the percentage of s.15 cases granted leave fluctuates from year to year because of the small number of cases, a more discernible pattern emerges if the grant rate in s.15 cases is aggregated over five year periods. From 1989-1994, the grant rate in s.15 cases was 38.5% and from 1994-1999, it was 47.1%. The grant rate declined dramatically to 24.1% from 1999-2004, and declined further, to 22.0%, from 2004-2009. These numbers are illustrated in Chart 1 below.

[15] This happens fairly regularly as applicants for leave strive to convince the Court that their appeals raise issues of public importance. Some leave applicants take a "kitchen-sink" approach, thinking, mistakenly, that adding a constitutional issue or two will add *gravitas* to their leave applications.

[16] Thus, for example, while leave was granted to argue s.15 in *Charkaoui* v. *Canada*, [2007] 1 S.C.R. 350, since none of the proceedings below (involving the claimants Almrei, Charkaoui and Harkat) considered s.15, the case is not included in our dataset.

[17] When a claimant seeks leave to appeal to argue a s.15 violation, it is almost always denied if the s.15 violation has not been considered in the lower courts. Examples of exceptions to the general practice include *Charkaoui*, *id.*, and *R.* v. *Malmo-Levine*; *R.* v. *Caine*, [2003] 3 S.C.R. 571 (in any case, in both cases the Court ended up devoting little attention to the s.15 arguments).

[18] We did not record whether the Court allowed or dismissed the appeal on other grounds; we focused exclusively on the result of the appeal on the question of whether a violation of s.15 was established.



If one compares the numbers cumulatively by decade, from 1989-1999, the Court granted leave in 31 of 73, or 42.5%, of s.15 cases; from 1999-2009, the Court granted leave in 22 of 95, or 23.2%, of s.15 cases. If one includes the partial data (see Appendices A and B, below) available at the time of writing from the first eleven months of the 2009-2010 Term (1 in 9 cases granted leave), the cumulative grant rate in s.15 cases since 1999 has dipped to 22.1%.

In sum, applicants for leave in section 15 cases in the late 1990s had a close to even chance of being granted leave. Now, the odds of s.15 applicants being granted leave are less than one in four and the trend towards increasingly longer odds is continuing. How can we explain the decline of over 20% in the grant rate for s.15 leave applications since the 1990s?

Part of the explanation lies in the fact that the Court's grant rate in all leave applications has declined steadily in recent decades as the number of leave applications has increased. Between 1970 and 1990, the Court granted leave to 25-35% of leave applications.[19] In the 1990s, the grant rate declined from 22% at the beginning of the decade to 13% by its conclusion.[20] The average grant rate in all leave applications through the 1990s was 15%.[21] The overall grant rate

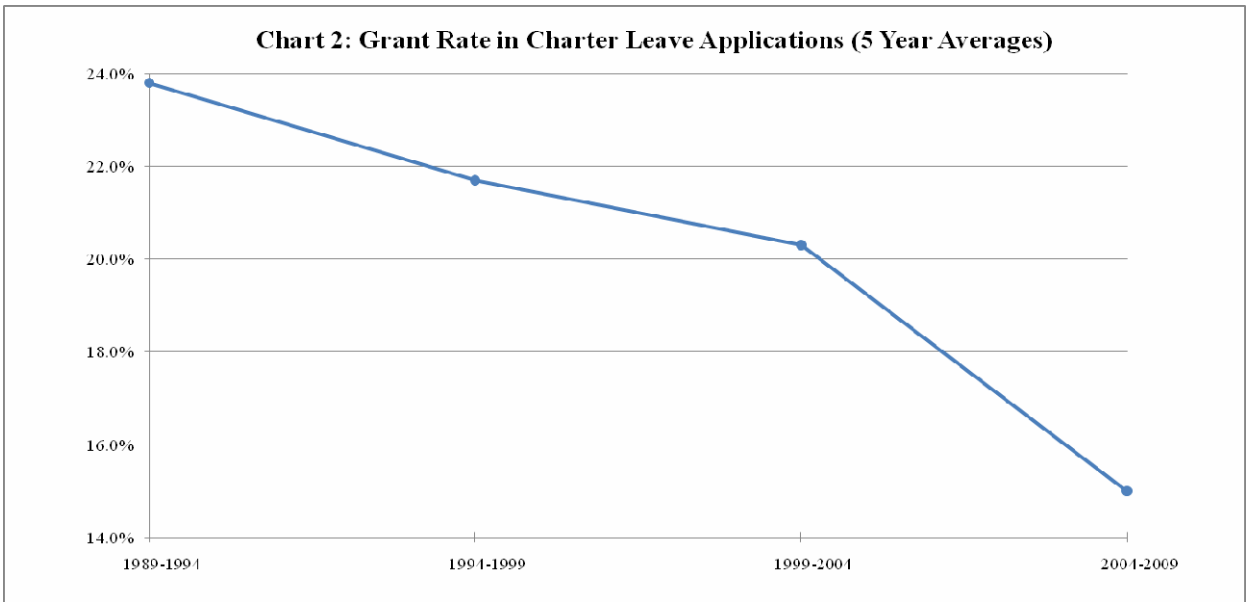
[19] Flemming, *supra* note 3, at 30.

[20] *Id.* at 12.

[21] *Id.*

has slipped even lower in recent years: from 2004-09 it was 11.8%.[22] In sum, over the period covered by our study, the Court has faced increasing pressures on its docket that have forced it to be more selective in granting leave to appeal. The grant rate in s.15 cases is significantly higher than the grant rate in leave applications as a whole. However, most of the drop in the Court's overall grant rate took place in the 1990s; since then it has declined relatively slowly. On the other hand, with s.15 cases, the grant rate was at its highest in the late 1990s. The sharp decline in s.15 grant rates has occurred in the past decade, whereas most of the decline in the Court's overall leave granting rate took place earlier, in the 1990s.

It is also helpful to consider our data on declining s.15 grant rates in relation to changes over time in the Court's grant rate in *Charter* cases as a whole. Since 1990, Brian A. Crane, Henry S. Brown and their co-authors have published annual data in the Supreme Court Law Review on grant rates in various categories of cases, including criminal and non-criminal *Charter* cases.[23] Chart 2 below aggregates their data over five-year periods to depict the decline in the grant rate in all *Charter* cases (both criminal and non-criminal) since 1989.



Source: Compiled from data in Brian A. Crane and Henry S. Brown et al, annual reports on applications for leave to appeal to the Supreme Court of Canada, Supreme Court Law Review, 1990 to 2009.

[22] This number is an aggregate of the data on leave applications from 2004-09 drawn from the annual reports published by Henry S. Brown and his co-authors. See Henry S. Brown and Marion Van de Wetering, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2008-09 Term", (2009) 48 S.C.L.R. (2d) 323 (67 of 517, or 13%, of applications granted); Henry S. Brown and Joshua A. Krane, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2007-08 Term", (2008) 43 S.C.L.R. (2d) 343 (53 of 576, or 9.2%, of applications granted); Henry S. Brown and Maegan M. Hough, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2006-07 Term", (2007) 38 S.C.L.R. (2d) 557 (68 of 544 applications, or 12.5%, of applications granted); Henry S. Brown and Adam J. Patenaude, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2005-06 Term", (2006) 35 S.C.L.R. (2d) 311 (44 of 494, or 8.9%, of applications granted); Henry S. Brown, Brian A. Crane and M. Warren Mucci, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2004-05 Term", (2005) 30 S.C.L.R. (2d) 423 (91 of 595, or 15.3%, of applications granted).

[23] The five most recent articles are cited in note 24, *supra*.

As Chart 2 depicts, the grant rate in *Charter* leave applications as a whole has declined at a relatively steady pace over the past twenty years, from a high of 23.8% from 1989-1994, to a low of 15% from 2004-09. If one compiles the total leave numbers by decade, from 1989 to 1999 the Court granted leave in 145 of 632, or 22.9%, of *Charter* cases; from 1999 to 2009, the Court granted leave in 131 of 742, or 17.7%, of *Charter* cases.

The decline in the grant rate in *Charter* cases over time is understandable in light of the increasing pressures on the Court's docket and the declining need to provide guidance on *Charter* interpretation. The need for the Court to establish the parameters of each section of the *Charter* was more urgent in the early years of *Charter* adjudication. As *Charter* jurisprudence has matured over the course of the past quarter century - as the judiciary has added jurisprudential flesh to the *Charter*'s textual bones - one would expect the Court's grant rate in *Charter* leave applications to decline accordingly.

What is true of the *Charter* as a whole is also true of s.15 equality rights. In the 1990s, by granting leave to a high percentage of s.15 cases, the Court responded to the pressing need to provide guidance on a new and challenging area of the *Charter*. Developing the contours of a substantive equality approach to the interpretation of s.15 was a shiny new judicial enterprise in the 1990s. Section 15 came into force in 1985, three years after the rest of the *Charter*. The Court's first s.15 ruling, in 1989 in *Andrews*,[24] put in place many of the basic principles of interpretation. The details needed to be filled in to provide further guidance to lower courts, governments and potential litigants. In short, the high s.15 grant rate in the 1990s was in large part attributable to the need for the Court to develop nascent equality rights doctrine in its first decade interpreting s.15. Moreover, as divergent approaches to the interpretation of s.15 prevailed among members of the Court through the 1990s,[25] the high grant rate may have been driven additionally by the Court's attempts to bring stability and coherence to its s.15 jurisprudence.

The Court finally united around a common approach to the interpretation of s.15 in 1999 in *Law* v. *Canada*.[26] Justice Iacobucci, writing for a unanimous Court in *Law*, set out a detailed test for the adjudication of s.15 claims.[27] The *Law* ruling put the need to prove a violation of human dignity at the heart of the s.15 test, guided by four "contextual factors". While Justice Iacobucci acknowledged that a need for "further elaborations and modifications" might emerge as the jurisprudence evolves,[28] the sharp decline in the grant rate in s.15 leave applications after 1999

[24] *Supra* note 15.

[25] These differences came to the fore in a trilogy of decisions released in 1995: *Egan* v. *Canada*, [1995] 2 S.C.R. 513; *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 and *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627.

[26] [1999] 1 S.C.R. 497.

[27] *Id.* at para. 88.

[28] *Id.*

likely reflects, at least in part, the Court's view that it had put in place a comprehensive approach that provided adequate guidance to lower courts.

We do not doubt that the decline in the grant rate in *Charter* cases generally, and in s.15 cases specifically, can be explained at least in part by the growth in *Charter* jurisprudence over time. Can the sharp decline in the grant rate in s.15 cases be explained entirely by this maturation of the jurisprudence? In our view, it cannot, for two reasons. First, as we will describe below, the s.15 jurisprudence remains unsettled in important and troubling ways. Second, while the "maturing jurisprudence" hypothesis should apply equally to s.15 and other provisions of the *Charter* (with the exception that the s.15 jurisprudence started to develop three years later than the rest of the *Charter*), the decline in the grant rate in s.15 cases has been more dramatic than the decline in the grant rate in *Charter* cases as a whole.

IV. THE UNSETTLED STATE OF SECTION 15 JURISPRUDENCE

As it turned out, the *Law* test did not achieve the stable and satisfying approach to the adjudication of s.15 claims the Court sought. The decade following *Law* was a period of continuing turbulence in the s.15 jurisprudence. The human dignity test introduced in *Law* proved to be unpredictable and overly burdensome on claimants. Furthermore, in a series of rulings, particularly in *Auton*[29] and *Hodge*,[30] both decided in 2004, the Court took a remarkably narrow and technical approach to the question of the "appropriate comparator group", one that had dire consequences for many s.15 claims. While commentators were quick to point out these problems with the *Law* test and its *sequelae*, it was not until 2008, in *R.* v. *Kapp*,[31] that the Court recognized the need to address them. Chief Justice McLachlin and Justice Abella, writing the joint opinion for the Court,[32] acknowledged that

> …as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.[33]

Two footnotes included in this passage cited nineteen scholarly sources - an unusually large number - signaling the Court's awareness of the depth and breadth of concern about the ongoing problems in its s.15 jurisprudence. The Court's diagnosis quoted above is clear: the s.15

[29] *Auton* v. *British Columbia*, [2004] 3 S.C.R. 657;

[30] *Hodge* v. *Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 657.

[31] *R.* v. *Kapp*, [2008] 2 S.C.R. 483.

[32] Bastarache J. wrote a separate concurrence based on s.25 of the *Charter*. He noted that he was "in complete agreement with the restatement of the test for the application of s.15 that is adopted by the Chief Justice and Abella J. in their reasons for judgment." *Id.* at para. 77.

[33] *Id.* at para. 22 (emphasis in original; footnotes omitted).

test it created has turned out to be confusing, unpredictable, overly burdensome and excessively formalistic. Yet, the Court in *Kapp* did not offer a convincing prescription to cure these ills. It took three modest steps to reformulate its approach to s.15(1). First, it simplified the statement of the test for establishing a violation of s.15(1), producing a stripped-down version, strikingly minimalist in comparison to the prolix statement in *Law*.[34] The test for determining whether s.15(1) has been violated is now as follows:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[35]

Second, while the Court did not explicitly say so in *Kapp*, it now seems clear, following the 2009 rulings in *Ermineskin*,[36] *A.C.*[37] and *Hutterian Brethren*,[38] that s.15 claimants no longer need to prove a violation of human dignity.[39] Third, the Court in *Kapp* suggested that the four contextual factors set out in *Law* would continue to play a role in the s.15(1) analysis, albeit in a reformulated manner that remains to be worked out.[40] Note that the Court has not yet given any indication of how it will reformulate its approach to comparator groups, despite its acknowledgement of the artificiality and formalism of this part of the s.15(1) test.[41]

Moreover, the Court reformulated its approach to s.15(2), the ameliorative program clause, in *Kapp*. The Court held, for the first time, that s.15(2) plays an "independent role"[42] in protecting governmental ameliorative programs from being challenged pursuant to s.15(1) so long as the

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[34] *Supra* note 28.

[35] *Kapp*, *supra* note 33, at para. 17.

[36] *Supra* note 4.

[37] *Supra* note 4.

[38] *Supra* note 4.

[39] The s.15(1) test as stated in *Kapp*, *supra* note 33, was reproduced in *Ermineskin*, *supra* note 4 at paras. 188 and 201 per Rothstein J.; *A.C.*, *supra* note 4 at para. 109 per Abella J., and at para. 150 per McLachlin C.J.; and *Hutterian Brethren*, *supra* note 4 at para. 106 per McLachlin C.J.. Human dignity is conspicuously absent from the s.15(1) discussion in these cases. Instead of asking whether the claimant's human dignity has been violated, the key question now is whether "a distinction based on an enumerated or analogous ground creates a disadvantage by perpetuating prejudice or stereotyping" (*A.C.*, *supra*, at para. 150). Note that an explicit consideration of the four contextual factors set out in *Law* was also absent from these three 2009 rulings.

[40] *Kapp*, *supra* note 33, at para. 23: "The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)"

[41] The intervener LEAF has urged the Court to address the comparator group issue in its pending ruling in *Withler* v. *Canada (Attorney General)*, 2008 BCCA 539 (appeal heard and reserved 17 March 2010).

[42] *Kapp*, *supra* note 33 at para. 38.

program has an ameliorative purpose and it targets a disadvantaged group identified by prohibited grounds of discrimination.[43] After setting out this test, the Chief Justice and Justice Abella immediately cautioned that

> In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point — one that is adequate for determining the issues before us on this appeal, but leaves open the possibility for future refinement.[44]

In sum, the s.15(1) jurisprudence remains confusing, unpredictable, overly burdensome and excessively formalistic, while the s.15(2) jurisprudence remains in its infancy. Given the persistence of significant ongoing challenges in fully developing satisfying approaches to both s.15(1) and s.15(2), we doubt that the sharp decline in the grant rate in s.15 leave applications in the past decade can be explained entirely by a "maturing jurisprudence" hypothesis. This conclusion is fortified by taking note of the sharper decline in the grant rate for s.15 cases compared to the decline in the grant rate in *Charter* cases generally, a point to which we will now return.

V. THE SHARPER RATE OF DECLINE IN THE GRANT RATE FOR SECTION 15 CASES

Our five-year aggregations of Brown et al's annual data (depicted in Chart 2 above) show that the grant rate in *Charter* cases has declined over the past 20 years from a high of 23.8% to a low of 15%, while our data on the grant rate in s.15 cases over the same five-year periods (depicted in Chart 1 above) shows a decline from a high of 47.1% to a low of 22%.[45] If we aggregate and compare the data for the two decades under study (1989-1999 and 1999-2009), the grant rate in all *Charter* cases dropped from 22.9% to 17.7%, whereas the grant rate in s.15 cases dropped from 42.5% to 23.2%. It appears that the grant rate in s.15 cases has been consistently higher than the grant rate in *Charter* cases generally,[46] although the gap has closed substantially in recent years as the grant rate in s.15 cases has declined more sharply.

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[43] *Id.* at para. 41.

[44] *Id.*

[45] Note that the grant rate in *Charter* cases over this period has been consistently higher than the grant rate in leave applications generally (on the latter, see text accompanying notes 21-24, *supra*). This is hardly surprising, as *Charter* cases are more likely to raise issues the Court considers of "public importance".

[46] The higher grant rate in s.15 cases compared to the grant rate in *Charter* cases as a whole would be consistent with the Court's view that equality rights "reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society" (*Vriend*, *supra* note 8) and also "the most difficult right" (Beverley McLachlin, "Equality: The Most Difficult Right", (2001) 14 S.C.L.R. (2d) 17). Nevertheless, we caution against drawing this conclusion without further investigation. The reason for our caution is that a comparison of the grant rate for our dataset with Brown et al's grant rate may be misleading. As we described above (text accompanying notes 14-19, *supra*), we used narrow criteria of inclusion in an effort to limit our dataset to "genuine" s.15 appeals (for example, we excluded cases raising s.15 issues on leave applications if they had not been addressed by the courts below). Brown et al, in their annual reports (*supra* note 24), do not describe the criteria they used to label a case a *Charter* case. For example, if they used more inclusive criteria, that could account for the lower grant rate they found in all *Charter* cases compared to the grant rate we found in our dataset of s.15 cases.

The proportionate decline in the grant rate over these two decades for s.15 cases was exactly twice as high as it was for *Charter* cases as a whole over the same period (45.4% and 22.7% respectively).[47] In other words, while the odds of being granted leave in a *Charter* case dropped by about a quarter from 1999-2009 compared to the previous decade, the odds of being granted leave in a s.15 case dropped by almost half over the same period. This data provides further support for the view that the decline in the s.15 grant rate cannot be explained entirely by evolutions in the jurisprudence. The Court's interest in developing *Charter* equality rights jurisprudence has declined dramatically since the late 1990s for reasons that cannot be explained entirely by a diminished need to fulfill its role in guiding the development of the law in the area.

VI. THE MARGINALIZATION OF SECTION 15 IN RECENT SUPREME COURT OF CANADA RULINGS

The Court's declining interest in *Charter* equality rights in recent years becomes even clearer when one considers how little attention the Court ended up giving to equality rights issues in the s.15 cases to which it granted leave to appeal. In this section, we will review what the Court had to say in the s.15 cases to which it granted leave to appeal from 2004-09. This was the period with the lowest leave grant rate in s.15 cases - 9 of 41 - in any of the five year periods depicted in Chart 1 above. Even then, the Court's reasons disposing of the s.15 appeals in 5 of these 9 cases – *B.C. Health Services*,[48] *Baier*,[49] *Ermineskin Indian Band and Nation*,[50] *A.C.*,[51] and *Hutterian Brethren*[52] – relegated s.15 issues to the sidelines as other constitutional issues took centre stage. In a sixth case in this group, *Fraser* v. *Ontario*,[53] a ruling on appeal is pending. It is likely that s.15 arguments will be given brief consideration when the Court releases its ruling in *Fraser*, as they were in the reasons of the Ontario Court of Appeal. In a seventh case, *Hislop*,[54] the Court had little to add on the issue of the s.15(1) violation to what had been said by the Ontario Court of Appeal.[55] The real issue in *Hislop* was the appropriate remedy. That leaves only

[47] We calculated the proportionate decline as follows: the grant rate in s.15 cases declined 19.3% from 42.5% to 23.2%; 19.3 of 42.5 amounts to a proportionate decline of 45.4%. The grant rate in *Charter* cases declined 5.2% from 22.9% to 17.7%; 5.2 of 22.9 amounts to a proportionate decline of 22.7%.

[48] *Health Services and Support – Facilities Subsector Bargaining Association* v. *British Columbia*, [2007] 2 S.C.R. 391.

[49] *Baier* v. *Alberta*, [2007] 2 S.C.R. 763.

[50] *Ermineskin*, *supra* note 4.

[51] *A.C.*, *supra* note 4.

[52] *Hutterian Brethren*, *supra* note 4.

[53] *Fraser* v. *Ontario (Attorney General)*, (2008) 301 D.L.R. (4th) 335 (Ont. C.A.), appeal to the Supreme Court of Canada heard and reserved, 17 December 2009.

[54] *Canada (Attorney General)* v. *Hislop*, [2007] 1 S.C.R. 429.

[55] The Court affirmed the Ontario Court of Appeal's ruling that the challenged federal legislation discriminated on the basis of sexual orientation by not conferring eligibility to Canada Pension Plan survivor benefits on survivors whose same-sex partner died prior to January 1, 1998 and by

two of the cases granted leave from 2004 to 2009 - *Kapp*[56] and *Withler*[57] – in which the Court engaged, or in the case of *Withler*, will engage, with s.15 in any depth.

The *Baier* case involved a challenge based on s.2(b) and s.15 of the *Charter* to the validity of Alberta legislation that prohibited public school employees from running for election as school trustees. In opinions focused on the freedom of expression issue, the Court upheld the legislation by an 8-1 vote. Writing on behalf of five members of the Court, Rothstein J. quickly disposed of the s.15 claim on the basis that occupational status is not an analogous ground of discrimination.[58] In his concurring opinion for three members of the Court, LeBel J. agreed that "the appellants have not made out their claim of a breach of equality rights in the circumstances of this case."[59]

In *Ermineskin*, the Court held that the challenged provisions of the *Indian Act* did not violate the Crown's fiduciary obligations to the claimant Aboriginal bands by prohibiting the investment of the bands' share of royalties derived from oil and gas resources located on the bands' reserves. The bands had also argued that the prohibition on investing the money held in trust for them deprived them of significant potential returns, in violation of their rights under s.15 of the *Charter*. Writing for a unanimous Court dismissing the bands' appeal, Justice Rothstein had little difficulty rejecting the s.15 claim. While the law drew a distinction between funds held for Aboriginal and non-Aboriginal persons, its purpose was to place greater control over decisions in the hands of the bands. Therefore, he held, "the provisions of the *Indian Act* that prohibit investment of the royalties by the Crown do not draw a distinction that perpetuates disadvantage through prejudice or stereotyping. There is no violation of s. 15(1) of the *Charter*."[60]

The decision in *A.C.* focused on whether the s.2(a) or s.7 rights of a 15 year old Jehovah's Witness were violated by a Manitoba statute that authorized the administration of treatment without consent to "mature minors" under the age of 16. The Court, in a 6-1 opinion, dismissed A.C.'s *Charter* challenge to the legislation. In the course of its reasons, the Court commented briefly on the argument that the statute discriminated on the basis of age. Justice Abella, writing the principal majority opinion for four members of the Court, dismissed the s.15 claim in a few paragraphs, concluding that the legislation is based on "maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged."[61] In her concurring opinion, Chief Justice McLachlin likewise had little difficulty disposing of the s.15 claim. In her view, the distinction drawn by the legislation on the basis of the age "is

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failing to grant retroactive relief. In his opinion for the Court, Rothstein J. briefly dismissed the government's arguments challenging the conclusion that the legislation violated s.15. *Id.* at paras. 37-42.

[56] *Supra* note 33.

[57] *Supra* note 43.

[58] *Baier*, *supra* note 51 at para. 65.

[59] *Id.* at para. 77. Justice Fish's dissent was based on a violation of s.2(b). He did not consider the alleged violation of s.15.

[60] *Ermineskin*, *supra* note 4 at para. 202.

[61] *A.C.*, *supra* note 4 at para. 111.

ameliorative, not invidious."[62] In his dissent, Binnie J. found that the legislation at issue violated s.2(a) and s.7 of the *Charter*. In his view it was not necessary to pursue a full s.15 analysis, as "the real *gravamen* of A.C.'s complaint is [not] age discrimination. Her fundamental concern is with the forced treatment of her body in violation of her religious convictions."[63]

Like *A.C.*, the *Hutterian Brethren* ruling also focused on a claim based on freedom of religion, giving only cursory treatment to the argument that the claimants' equality rights were violated by Alberta's photo requirement for driver's licenses. McLachlin C.J., writing for a 4-3 majority dismissed the *Charter* challenge to the regulation. While a s.15 violation was assumed in the courts below, the Chief Justice found that "it is weaker than the s. 2(*a*) claim and can easily be dispensed with."[64] In her view,

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(*a*). There is no breach of s. 15(1).[65]

In separate dissents, Abella J. and LeBel J. found that the challenged regulation violated s.2(a) and could not be justified pursuant to s.1. Even though their analyses were founded on the burdensome impact of the law on a vulnerable religious minority, neither dissent made any mention of the s.15 claim.

The tendency to collapse equality rights concerns into an analysis focused on alleged violations of civil liberties evident in *A.C.* and *Hutterian Brethren* is also exemplified by the Court's earlier ruling in *B.C. Health Services*.[66] At issue was the constitutional validity of B.C. legislation that interfered with the collective bargaining rights of unions representing health care workers. The vast majority of the employees affected by the legislation were women. The unions argued that the Act discriminated on the basis of sex (among other grounds) and also violated their freedom of association. The Court focused its opinion on the latter argument, finding that parts of the Act violated freedom of association protected by s.2(d) of the *Charter*. The violation could not be upheld pursuant to s.1 because the government had failed to demonstrate that the Act impaired of freedom of association as little as reasonably possible in order to achieve its

[62] *Id.* at para. 152.

[63] *Id.* at para. 231.

[64] *Hutterian Brethren*, *supra* note 4 at para. 105.

[65] *Id.* at para. 108.

[66] *Supra* note 50.

objective of improving health care delivery.[67] After reaching this conclusion, McLachlin C.J. and LeBel J., in their joint majority opinion, disposed of the s.15 argument briskly in a single paragraph:

> …we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s.15 of the *Charter*. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.[68]

Like the Court's ruling in *Hutterian Brethren*, this passage seems to ignore the concept of adverse effects discrimination, supposedly a centerpiece of the Court's commitment to a substantive conception of equality.[69] Adverse effects discrimination occurs when neutral rules have a disproportionate impact on the basis of prohibited grounds of discrimination. There is no need to prove a discriminatory intention; the focus is on effects. In *B.C. Health Services*, even though the Act had "painful",[70] dramatic and unusual effects[71] on the rights of health care workers, a group composed predominantly of women, the Court found the Act was not discriminatory. Without further explanation from the Court regarding the difference between *B.C. Health Services* and successful adverse effects discrimination claims, it is difficult to understand why the disproportionate impact of the B.C. legislation on women was insufficient to get an adverse effects discrimination analysis "off the ground".[72]

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[67] *Id.* at para. 156.

[68] *Id.* at para. 165. In her reasons dissenting on the s.2(d) issue, Deschamps J. agreed with the majority that "no claim of discrimination contrary to s.15 of the *Charter* has been established." *Id.* at para. 170.

[69] In *Andrews*, *supra* note 15 at para. 37, in defining discrimination for the purposes of s.15, the Court adopted the definition of adverse effects discrimination put forward in *O'Malley* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551. The Court has reaffirmed the view that s.15(1) prohibits adverse effects discrimination on a number of occasions. For examples of decisions where the Court found that equality rights were violated by the adverse effects, or disproportionate impact, of neutral rules, see *Vriend*, *supra* note 8 at para. 82 (failure to prohibit discrimination on the basis of sexual orientation has disproportionate impact on gays and lesbians); *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (failure to provide public funding for interpretation in hospitals has disproportionate impact on the hearing impaired). The leading case in the statutory anti-discrimination context is *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU ("Meiorin")*, [1999] 3 S.C.R. 3 (aerobic test for firefighters has disproportionate negative impact on women).

[70] *Supra* note 50 at para. 166.

[71] *Id.* at para. 160.

[72] For an excellent discussion, see Judy Fudge, "Conceptualizing Collective Bargaining under the Charter: The Enduring Problem of Substantive Equality", (2008) 42 S.C.L.R. (2d) 213, 227-243. Fudge points out that "the impact of selecting health care workers was disproportionately to disadvantage women workers" (at 238) and that "the Court's analysis ignored the extent to which labour legislation reflects and reinforces historical patterns of labour market discrimination and segregation" (at 241).

In *Fraser*, the Ontario Court of Appeal found that the challenged Ontario statute violated the right to collective bargain of agricultural workers contrary to s.2(d) of the *Charter*. The claimants also challenged the statute as a violation of s.15. The Court of Appeal devoted the bulk of its reasons to the s.2(d) violation. It made brief comments dismissing the s.15 claim, citing and following the conclusions of the Supreme Court in *B.C. Health Services* and *Baier*. In the Court's view, "there is no basis for finding that 'agricultural worker' is an analogous ground." Differential treatment of workers in a particular "economic sector" does not implicate "a personal characteristic of the type necessary to support a s.15 claim."[73] If it follows the recent trend, the pending Supreme Court ruling on appeal in *Fraser* will focus on the s.2(d) claim, with the s.15 claim relegated to a sidebar.

The failure of the Court to engage with adverse effects discrimination arguments was also evident in *Charkaoui* v. *Canada (Citizenship and Immigration)*.[74] The Court did briefly discuss and dismiss a s.15 argument that the security certificate regime in the *Immigration and Refugee Protection Act* discriminates against non-citizens by subjecting them to lengthy periods of detention.[75] The Court did not consider worthy of comment arguments of adverse effects discrimination against Arab and Muslim men raised by three interveners.[76] These interveners pointed to the prejudice and stereotyping faced by Arab and Muslim persons in Canada post-9/11. They alleged that racial profiling had contributed to the discriminatory application of the *IRPA* contrary to s.15. They situated their arguments in Canada's history of discriminatory immigration laws and policies that discriminated against vulnerable and stigmatized immigrant communities during times of heightened security.[77] These issues had not been explored in the courts below, as the constitutional challenges brought by Almrei, Charkaoui and Harkat to the security certificate regime had focused on s.7 of the *Charter*.

One can understand the reluctance of the Court in *Charkaoui* to comment on the issue of adverse effects discrimination without the benefit of a full factual record and legal argument in the lower courts. The Court's reluctance may also be explained by the fact that the s.15 constitutional question it framed was limited to the question of discrimination between citizens and non-citizens. Nevertheless, the Court could have given some much-needed life support to the concept of adverse effects discrimination in s.15 jurisprudence by at least pointing to the reasons why it did not consider it to be established, or even worthy of serious consideration, in this case. By failing to comment on the interveners' arguments, the Court's ruling in *Charkaoui*

[73] *Fraser*, *supra* note 55, at para. 114.

[74] *Supra* note 18. The *Charkaoui* ruling is excluded from our dataset because the lower courts did not discuss s.15 of the *Charter*.

[75] *Id.* at at paras. 129-132.

[76] See the facta of the Canadian Arab Federation; the Canadian Council for Refugees, African Canadian Legal Clinic, International Civil Liberties Monitoring Group, and National Anti-Racism Council of Canada; and the Canadian Council on American-Islamic Relations, and Canadian Muslim Civil Liberties Association.

[77] For a full discussion of the equality arguments raised by the interveners in *Charkaoui*, see Karen Morimoto, "Section 15 of the *Charter* and the Supreme Court of Canada's Response in *Charkaoui*" (Unpublished manuscript, December 2009, on file with the authors).

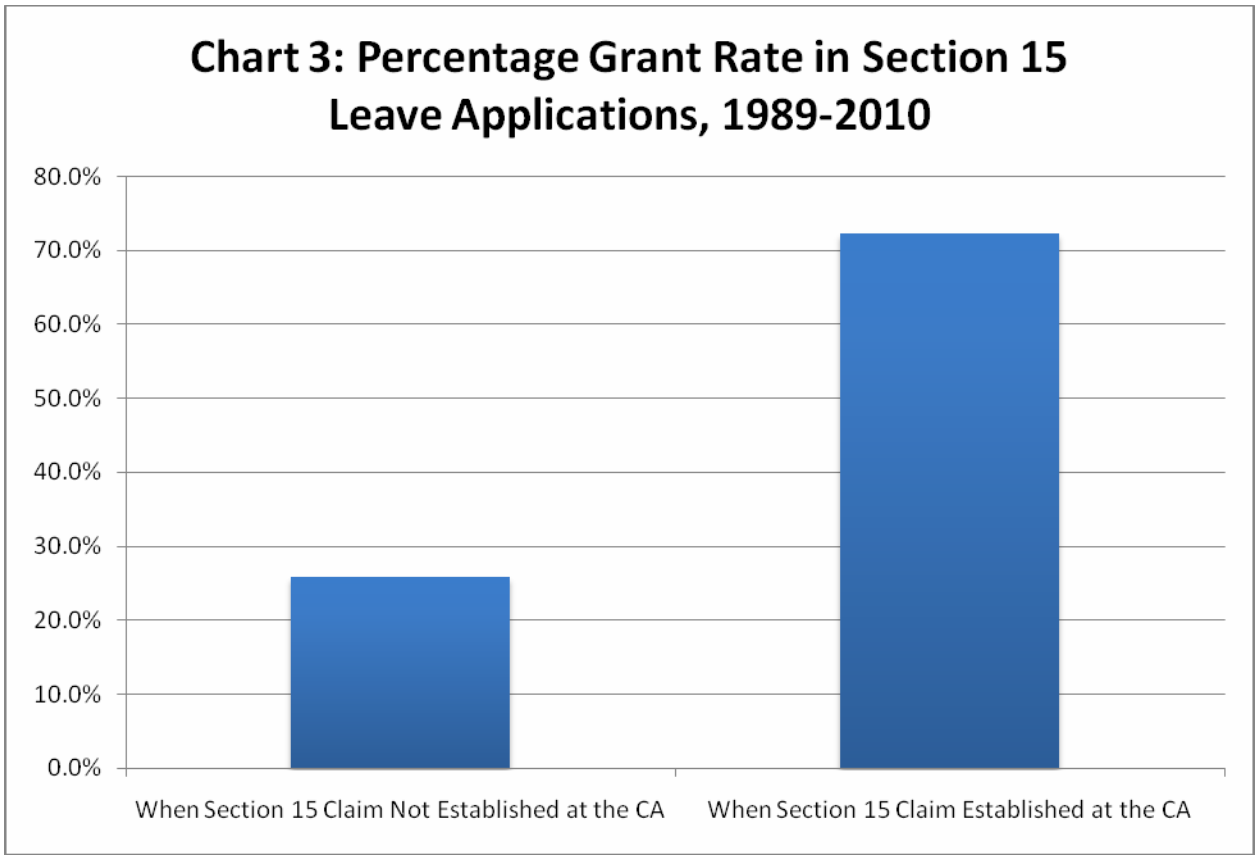
adds to the impression left by *BC Health Services* that the Court now views adverse effects discrimination arguments as being outside of s.15's purview altogether.

Our discussion above has described the short shrift given to s.15 arguments in 5 of the 9 cases to which the Court granted leave in the 2004-2009 period. This review demonstrates that the Court's diminishing engagement with s.15 is evident not only in the historically low grant rate in leave applications during this period; it is also evidenced by the alarming brevity and superficiality of the Court's dismissal of s.15 arguments in the majority of the s.15 cases to which it has granted leave.

VII. WHO IS GRANTED LEAVE TO APPEAL IN SECTION 15 CASES?

In addition to tracking changes over time in the grant rate in s.15 cases, our dataset allows us to determine whether the chances of being granted leave to appeal in s.15 cases differ depending on whether s.15 violation are established or not established at the Court of Appeal.

Beginning with the 1989-1990 Term, the Court has disposed of 177 applications for leave to appeal in s.15 cases (see Appendices A and B). In 159 of these cases, the claimant failed to establish a violation of s.15 at the Court of Appeal. The Court granted leave to appeal in roughly one quarter of these cases (41 of 159, or 25.8%). In a much smaller group of cases, the claimant established a violation of s.15 at the Court of Appeal. When leave was sought, usually by the government, from a finding that *Charter* equality rights had been violated, the Court granted leave most of the time – in 13 of 18 cases (or 72.2%). In other words, the odds of being granted leave if a s.15 violation was not established at the Court of Appeal are roughly 1 in 4; the odds of being granted leave if a s.15 violation was established at the Court of Appeal are roughly 3 in 4. These results are depicted in Chart 3 below.



Our finding that a substantial disparity exists in s.15 grant rates depending on whether a s.15 violation was established or not established at the Court of Appeal is unsurprising for a number of reasons. Often s.15 claims are made without a strong legal or evidentiary foundation. Among the 159 cases where a violation was not established at the Court of Appeal, therefore, are a significant number of misconceived or poorly presented s.15 claims. Of course these claims fail in the lower courts and then are denied leave to appeal. In contrast, each of the 18 cases where a violation was established at the Court of Appeal feature, by definition, viable s.15 claims. They are, as a result, much more likely to be granted leave. Furthermore, a finding by a Court of Appeal that a government law or policy has discriminated contrary to s.15 of the *Charter* in a manner that cannot be upheld pursuant to s.1 virtually guarantees that an issue of public importance is at stake.

Nevertheless, the size of the disparity is striking: when a s.15 claim is established at the Court of Appeal, the Supreme Court of Canada is almost three times as likely to grant leave to appeal compared to when a s.15 violation is not established at the Court of Appeal. The odds of being granted leave in s.15 cases lean heavily in favour of governments.

While the pressures on the Court's docket mean that it cannot grant leave to every case raising issues of public importance, the frequency with which the Court fails to hear appeals of strongly argued s.15 claims that were rejected at the Court of Appeal is difficult to square with the view that equality rights "reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society".[78] Those dreams, hopes and aspirations are frequently dashed in the leave process, particularly in recent years as the leave rate in s.15 cases has plummeted. Let us offer a few examples.

The Court has dismissed applications for leave to appeal in a series of cases, most recently in *Boulter* v. *Nova Scotia*,[79] raising the issue of whether poverty or receipt of social assistance is an analogous ground of discrimination.[80] As a result, a quarter century after s.15 came into force, litigants still have no authoritative ruling from the top court on whether the poor can benefit from *Charter* equality rights.

In addition to the issue of discrimination on the basis of poverty, the *Boulter* case involved a claim that Nova Scotia legislation precluding the adjustment of power rates for low income consumers amounted to adverse effects discrimination on the basis of race, sex, disability and marital status, among other grounds. Five low income claimants provided evidence, supported by nine experts and a public interest intervener. The claimants "impressive presentation", as Fichaud J.A. described it as the Nova Scotia Court of Appeal,[81] included demographic evidence of the over-representation among the poor of disabled persons, women, single mothers, racial minorities, recent immigrants, children and the elderly.[82] When a claim is this well-assembled and raises profound constitutional issues that the Court has yet to address (whether poverty is an analogous ground, whether the disparate impact of such a law amounts to adverse effects discrimination), issues that have long been the subject of academic debate[83] and conflicting lower court rulings,[84] the denial of leave to appeal is disconcerting to say the least.

As we described above, the Court's ruling in *Kapp* reformulated the tests for s.15(1) and s.15(2). At the same time, the Court signaled the need for further adjustments to the s.15(1) test to

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[78] *Vriend*, *supra* note 8.

[79] *Boulter* v. *Nova Scotia Power Incorporated*, 2009 NSCA 17. See also *Masse* v. *Ontario (Ministry of Community and Social Services)*, (1996) 134 D.L.R. (4th) 20 (Ont. Ct. Gen. Div.), leave to appeal to Ontario Court of Appeal refused, [1996] O.J. No. 1526; *R.* v. *Banks*, (2007) 275 D.L.R. (4th) 640 (Ont. C.A.).

[80] Had the appeal not been abandoned after leave was granted, the Court would have had an opportunity to address the issue of discrimination on the basis of receipt of social assistance in *Falkiner* v. *Ontario*, (2002) 212 D.L.R. (4th) 633 (Ont. C.A.).

[81] *Boulter*, *supra* note 80, at para. 84.

[82] *Id.* at para. 48.

[83] Martha Jackman, "The Protection of Welfare Rights Under the *Charter*", (1988) 20 Ottawa L. Rev. 257; Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queens L.J. 65; Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law", (1994) 2 Rev. Const. Studies 76; Margot Young ed., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007).

[84] Examples of cases supporting the view that receipt of social assistance or poverty is an analogous ground include: *Falkiner*, *supra* note 82; *Schaff* v. *Canada*, [1993] 2 C.T.C. 2695; *R.* v. *Rehberg*, (1993) 111 D.L.R. (4th) 336 (N.S.S.C.); *Dartmouth Halifax (County) Regional Housing v. Sparks,* (1993), 101 D.L.R. (4th) 224 (N.S.S.C.). Examples of cases supporting the view that receipt of social assistance or poverty is not an analogous ground include: *Boulter*, *supra* note 81; *Masse*, *supra* note 81; *Banks*, *supra* note 81; *Federated Anti-Poverty Groups of B.C.* v. *Vancouver*, 2002 BCSC 105; *Polewsky* v. *Home Hardware Stores Ltd.*, (2003) 229 D.L.R. (4th) 308 (Ont. S.C.J.); *Ross* v. *Charlottetown*, 2008 PESCAD 6; *Toussaint* v. *Canada*, 2009 FC 873.

relieve claimants of its overly burdensome and formalistic aspects. Likewise, it invited future refinements to the new s.15(2) test it offered as a "basic starting point". Despite the Court's recognition of the need for further guidance and development of the s.15 jurisprudence, it has granted leave to appeal in only 3 of 20 s.15 leave applications since the release of *Kapp*.[85] A number of the cases denied leave would have offered excellent opportunities to provide further clarification and development of the shift in direction signaled by *Kapp*.

For example, in *Downey*,[86] the first s.15 ruling issued by an appellate court following *Kapp*, the Nova Scotia Court of Appeal upheld Nova Scotia workers' compensation regulations capping benefits for chronic pain at a low level. The *Downey* case was a sequel to the Supreme Court's ruling in *Martin*,[87] in which the Court held, reversing an opinion written by Cromwell J.A. at the Court of Appeal,[88] that the complete denial of benefits for chronic pain under Nova Scotia's workers' compensation scheme constituted discrimination on the basis of physical disability contrary to s.15. The Nova Scotia government responded by providing benefits for chronic pain ranging from 3% to a maximum of 6% (of 75% of pre-accident gross weekly earnings).

In *Downey*, Justice Cromwell wrote the opinion for the unanimous Court of Appeal, upholding the 6% cap for reasons similar to those he gave in *Martin* for upholding the denial of any benefits to injured workers for chronic pain. Cromwell J.A.'s reasons in *Downey* applied the *Law* test as if it was "business as usual" after *Kapp*. After considering the appropriate comparator group, and the four contextual factors, he concluded that the 6% cap on benefits did not demean the dignity of workers suffering from chronic pain.[89] He gave no apparent weight to the Supreme Court's *dicta* in *Kapp* that human dignity should not be treated as a legal test, nor to the Court's suggestion that s.15(1) claimants need to be relieved of the excessive burdens and formalism that has characterized s.15(1) jurisprudence. Despite the fact that granting leave in *Downey* would have given the Court an opportunity to clarify these issues, the Supreme Court denied leave to appeal.

In *Harris*,[90] another post-*Kapp* s.15 case denied leave by the Supreme Court, the Federal Court of Appeal divided over whether the challenged provisions of the Canada Pension Plan discriminated on the basis of disability. To qualify for a disability pension, workers must have made mandatory contributions to the Plan in four of the last six years prior to the date of their application. In order to help parents meet these requirements, a "child-rearing drop out"

[85] See Appendix B. The three s.15 cases granted leave since the release of the ruling in *Kapp* are *Fraser*, *supra* note 55; *Withler*, *supra* note 43; and *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53.

[86] *Downey v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 65.

[87] *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504.

[88] *Martin* v. *Workers' Compensation Board (Nova Scotia)*, (2000) 19 D.L.R. (4th) 611 (N.S.C.A.).

[89] *Downey*, *supra* note 88 at para. 82.

[90] *Harris v. Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 22, [2009] 4 F.C.R. 330.

(CRDO) provision allows the years that a contributor stayed home to care for his or her children before they reach the age of seven to be dropped out of the contribution history. The assumption of the provision is that parents have a greater ability to return to the workforce once their children are in full-time school. The claimant had to stay home to care for her disabled child beyond the age of seven and was unable to meet the requirements for a disability pension as a result.

The majority of the Court of Appeal found that the CRDO provision did not violate s.15. One member of the majority, Ryer J.A., found that the claimant was not denied a benefit provided by the law.[91] The other member of the majority, Evans J.A., found that the law was aimed at the legitimate purpose of extending benefits to "parents who temporarily leave employment to look after *young* children";[92] it did not amount to differential treatment on the basis of disability.[93] In his dissent, Linden J.A. was alone in recognizing that the Supreme Court's ruling in *Kapp* "calls for a recommitment to the ideal of substantive equality".[94] In his view, the law was based on the stereotypical view "that children seven years of age and older are capable of attending school full-time", a view that does not reflect the "the different circumstances of disabled children who are not able to attend school full-time and continue to require ongoing full-time home care."[95]

Granting leave to appeal in *Harris* would have given the Supreme Court an opportunity to address the three different approaches to the s.15 issue articulated at the Court of Appeal. In particular, the Court could have explored the issue of whether the law imposed disadvantage through the operation of stereotype, the nub of the disagreement between Evans and Linden JJ.A., and a question at the heart of the s.15(1) test as reformulated in *Kapp*. In addition, the Court could have addressed whether the CRDO provision constitutes a program with an ameliorative purpose targeted at a disadvantaged group defined by prohibited grounds of discrimination, in accordance with the Court's approach to s.15(2) set out in *Kapp*. The Court's decision to deny leave in *Harris* unfortunately deprives us of answers to these questions.

In sum, even though it has acknowledged that the s.15(1) jurisprudence remains confusing, unpredictable, overly burdensome and excessively formalistic, and that the s.15(2) jurisprudence remains in its infancy, and even though it has been presented with a number of compelling s.15 leave applications, the Supreme Court persists in its recent tendency to deny leave in s.15 cases at historically high rates, particularly if a s.15 violation has not been established at the Court of Appeal.

[91] *Id.* at para. 106.

[92] *Id.* at para. 81.

[93] *Id.* at para. 92.

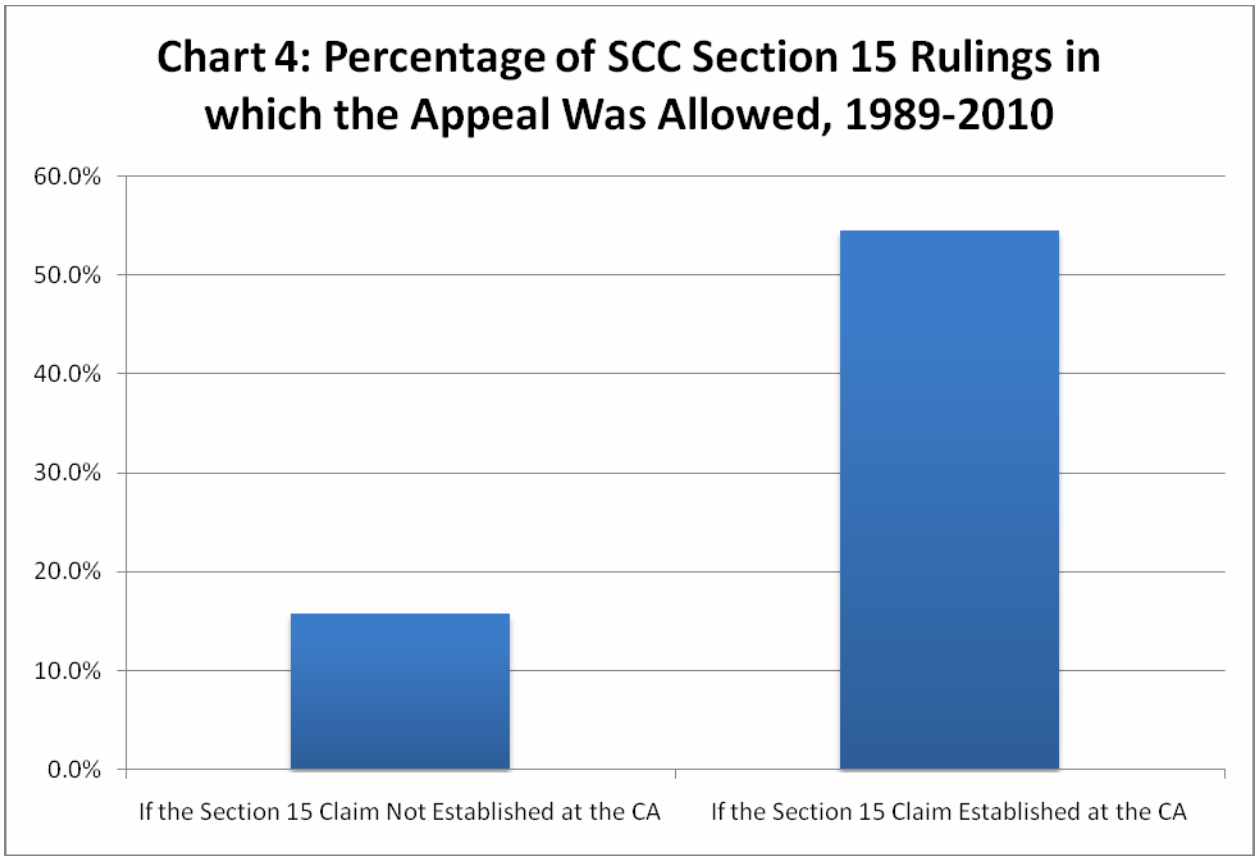
[94] *Id.* at para. 27.

[95] *Id.* at para. 57.

VIII. RESULTS OF APPEALS TO THE SUPREME COURT OF CANADA IN SECTION 15 CASES

When the Supreme Court of Canada does grant leave in s.15 cases, what does our dataset tell us about the results on appeal? Is the likelihood of the Court allowing the appeal different depending on whether the s.15 claim was established at the Court of Appeal?

We found that when a s.15 claim was established at the Court of Appeal, the Supreme Court has allowed the appeal and dismissed the s.15 challenge in 6 of 11 cases, or 54.5% of appeals. When the s.15 was not established at the Court of Appeal, the Court has allowed the appeal and found an unjustifiable violation of s.15 in 6 of 38 cases, or 15.8% of appeals. In other words, when the Supreme Court hears an appeal by a party, usually the government, from a Court of Appeal ruling that upheld a s.15 claim, the appellant has a better than even chance of prevailing at the Supreme Court on the s.15 issue. In contrast, when a claimant appeals from a Court of Appeal ruling dismissing a s.15 claim, the appellant has a less than 1 in 6 chance of prevailing at the Supreme Court on the s.15 issue. These results are depicted in Chart 4 below.



Our data reveals that just as governments have much better odds of being granted leave by the Supreme Court of Canada in s.15 cases (Chart 3), the odds of succeeding on appeal in s.15 cases likewise lean heavily in favour of governments (Chart 4).

IX. CONCLUSION

While equality rights have received little attention in the Court's recent case law (with the exception of *Kapp*), equality concerns have not been absent. For example, in *BC Health Services*, the Court placed emphasis on the *Charter* value of equality to support its recognition of a right to collective bargain as an element of freedom of association protected by s.2(d) of the *Charter*.[96] As the Chief Justice and Justice LeBel wrote, "[o]ne of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees".[97] Yet, as we described above, the Court tersely dismissed the claim based on equality rights in a manner that, as Judy Fudge has pointed out, "both reflects and promotes an idea of equality directed at fighting stereotypes to the exclusion of fostering substantive equality."[98]

While the Court regularly affirms its commitment to interpreting s.15 as embodying a commitment to substantive equality, it usually does so for the purpose of dismissing s.15 claims and narrowing the scope of equality rights. One lesson embodied in substantive equality is that differential treatment based on prohibited grounds is not necessarily discriminatory. Another is that treating people the same when they are differently situated can have discriminatory effects on the basis of prohibited grounds. The first lesson is a staple of the jurisprudence, leading regularly to the dismissal of s.15 claims. The second lesson is often ignored, leading regularly to the dismissal of claims based on adverse effects discrimination. As a result, rather than signaling the commencement of a rich contextual inquiry into historical disadvantage and the possible impact of a challenged law in sustaining relations of social subordination, the ritual incantation of a commitment to substantive equality has become, perversely, the death knell of *Charter* equality rights claims.

As we discussed above, the Court's ruling last year in *Hutterian Brethren*,[99] dismissing a *Charter* challenge to the addition of a photo requirement to Alberta driver's licence regulations, is typical of the Court's tendency to focus on other *Charter* rights and freedoms and their reasonable limits to the exclusion of any serious consideration of equality rights. The majority opinion of Chief Justice McLachlin dismissed the claim based on s.15 on the grounds that any negative impact of the law on the Hutterian Brethren "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice."[100] The dissenters, like

[96] *Supra* note 50 at paras. 81, 84 and 86.

[97] *Id.* at para. 84.

[98] Fudge, *supra* note 74, at 216.

[99] *Supra* note 4.

[100] *Id.* at para. 108.

the majority, focused exclusively on the unjustifiable violation of freedom of religion. Justice Abella's dissent emphasized the risks the photo requirement posed to the autonomy and self-sufficiency of the religious community.[101] She pointed out that the majority's opinion was inconsistent with the principle that once the state has provided a benefit (such as licensing operators of motor vehicles), it must do so in a non-discriminatory manner.[102] In his dissent, LeBel J. noted that a driver's licence "is often of critical importance in daily life and is certainly so in rural Alberta."[103] "A small group of people", he remarked, "is being made to carry a heavy burden."[104]

As Nathalie Des Rosiers points out in this volume, religious discrimination, including discrimination against the Hutterites, is "a well known fact of our history."[105] In *Hutterian Brethren*, the Court was confronted with a law that has a disproportionately burdensome impact on a vulnerable religious minority whose way of life has been targeted by the provincial government in the past. Is this not a scenario that ought to be addressed by the prohibition on religious discrimination in s.15 of the *Charter*? How has the jurisprudence come to a point where s.15 has been essentially taken out of the discussion even though a government policy has subordinating effects based on a prohibited ground of discrimination?

It is true, as Des Rosiers writes, that freedom of religion can do much of the work necessary to prevent state subordination of religious groups: "in Canada, freedom of religion has always had strong anti-discrimination and equality undertones."[106] Peter Hogg has noted that the Court has tended to interpret equality *rights* restrictively, while giving substantial weight to equality *values* in the interpretation of the scope and limits of other *Charter* rights and freedoms.[107] This phenomenon continues with recent rulings such as *BC Health Services* and *Hutterian Brethren* –

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[101] *Id.* at paras. 114, 164-170.

[102] *Id.* at para. 171, citing *Eldridge*, *supra* note 71.

[103] *Hutterian Brethren*, *id.*, at para. 201.

[104] *Id.*

[105] Nathalie Des Rosiers, "Freedom of Religion at the Supreme Court in 2009: Multiculturalism at the Crossroads?" at manuscript p.4. See William Janzen, *Limits on Liberty: The Experience of Mennonite, Hutterite and Doukhobor Communities in Canada*, (Toronto: University of Toronto Press, 1990). The *Hutterian Brethren* ruling is not the first time that the Court has been insensitive to the potential for majoritarian hostility to the Hutterites' religious beliefs and practices. The Hutterites live in rural colonies where the land is held in common in accordance with their religious beliefs. In *Walter* v. *Alberta (Attorney General)*, [1969] S.C.R. 383, the Court managed to ignore the history of anti-Hutterite *animus* that motivated the enactment of the *Communal Property Act* of 1947 (and its predecessors) and the lack of any plausible legislative purpose, related to "property and civil rights", to ground the Act in provincial jurisdiction. For background on the Act, see Douglas E. Sanders, "The Hutterites: A Case Study in Minority Rights", (1964) 42 Can. Bar Rev. 225. The Act was repealed in 1972, a few years after the *Walter* ruling.

[106] Des Rosiers, *supra* note 106, manuscript at p.3. On the relationship between equality and religious freedom, see also Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon ed., *Law and Religious Pluralism in Canada* 87 (UBC Press: Vancouver, 2008).

[107] Peter W. Hogg, "Equality as a Charter Value in Constitutional Interpretation", (2003) 20 S.C.L.R. (2d) 113. "[T]he Charter value of equality", he wrote, "is being imported into the definition of other Charter rights or into the section 1 analysis. In this way, what are really equality claims can be remedied under other rights without the need to bother with listed and analogous grounds or human dignity, the two severe restrictions on the application of s.15." *Id.* at 117 (footnotes omitted).

equality concerns are displaced to, and subsumed within, a discussion of civil liberties. Hogg speculated that there might be a connection, however elusive and difficult to understand, between the Court's warm embrace of equality values and its cool distance from equality rights.[108] He concluded with a cautious endorsement of the Court's approach, suggesting that it might make sense because it allows for heightened scrutiny of violations of the civil liberties of vulnerable or disadvantaged groups, while limiting s.15 to a restricted role of remedying "classifications that are based on listed or analogous grounds and impair human dignity."[109]

We are less comfortable than Professor Hogg with the tendency of the Court to shift equality concerns from s.15 to other *Charter* rights and freedoms. Of course, a basic constitutional value like equality should assist in the interpretation of all *Charter* provisions. Indeed, such an approach is mandated by Canada's international commitments to protecting all fundamental rights and freedoms without discrimination.[110] But a provision requiring non-discrimination in the enjoyment of other rights and freedoms should not be confused with a free-standing prohibition on discrimination. Section 15 should provide, through a large and liberal interpretation, an independent guarantee of equality rights that overlaps with and extends beyond protection provided by other *Charter* rights and freedoms.

In a case like *Hutterian Brethren*, by essentially ignoring religious equality rights, and focusing on religious freedom alone, we blinker our legal vision. The *Charter* protects from state interference with the practice of religion (s.2(a)) and from state discrimination on the basis of religion (s.15). The two provisions are closely related, but one does not exhaust the other. A meaningful, independent role ought to be accorded to each. What is lost when equality rights are submerged? Do equality rights not provide a way of viewing social and legal context that adds to the lens provided by civil liberties?

Equality rights jurisprudence recognizes a restricted number of personal characteristics as prohibited grounds of discrimination. The recognized grounds are ones that have been deployed persistently and pervasively as tools of power. As Reva Siegel has written,

> …antidiscrimination law regulates the social practices that sustain group inequality. The group inequalities that concern antidiscrimination law are typically those that are socially pervasive (articulated across social domains) and socially persistent (articulated over time). When inequality among groups is structurally pervasive and persistent in this way, we typically refer to it as a condition of social stratification.[111]

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[108] *Id.* at 133.

[109] *Id.* at 134.

[110] See Article 2(1) of the *International Covenant on Civil and Political Rights* ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."; Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

[111] Reva Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification", (2000) 88 Calif. L. Rev. 77 at 82.

Equality rights are meant to focus our attention on removing laws or practices whose effects perpetuate relations of social subordination based on the personal characteristics of historically disadvantaged groups. Are we confident that dynamics of this kind were absent from the Alberta government's treatment of the Wilson Colony or from the B.C. government's treatment of predominantly female health care workers?[112] How can we be confident of the answers to these questions when they were passed over so superficially in the Court's rulings in *Hutterian Brethren* and *BC Health Services*?

Returning to the Chief Justice's brief reasons dismissing the s.15 claim in *Hutterian Brethren*,[113] can we say that when laws pursue "rationally defensible policy choices" they should be immunized from scrutiny for discriminatory effects violating s.15? Can we say a law is "neutral" if it has adverse effects on the basis of a prohibited ground of discrimination? The jurisprudence on disability discrimination emphatically provides negative answers to these questions. For example, in *Eaton* v. *Brant County Board of Education*,[114] Justice Sopinka in his majority opinion eloquently described the "'mainstream' attributes" that can "act as headwinds to the enjoyment of society's benefits" for the disabled.[115] In his words:

> …it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses the 'attribution of stereotypical characteristics' reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignored his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and the reasonable accommodation of these characteristics which is the central purpose of s.15(1) in relation to disability.[116]

The type of "reverse stereotyping" to which Sopinka J. refers – the failure to consider the distinct needs and circumstances of politically vulnerable and socially subordinated groups – is particularly relevant to people with disabilities. But it is not a phenomenon restricted to the dynamics of disability discrimination. "Reverse stereotyping" may undergird incidences of discrimination involving any of the enumerated and analogous grounds of discrimination recognized by s.15. The grounds are recognized precisely because they have been persistently

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[112] Women constituted 85% and 90% of the membership of the two unions affected by the legislation at issue in *BC Health Services*. See *Fudge*, *supra* note 74, at 236, n.91.

[113] See text accompanying note 67, *supra*.

[114] [1997] 1 S.C.R. 241.

[115] *Id.* at para. 67.

[116] *Id.* See also the discussion of adverse effects discrimination in *Eldridge*, *supra* note 71 at paras. 60-80.

and pervasively deployed by the law – or ignored by the law – in ways that promote relations of social subordination.[117] A full *Charter* analysis must interrogate, *from an equality rights perspective*, the possibility that such dynamics continue to operate.

As the analysis we have presented makes clear, to say that *Charter* equality rights are not in judicial vogue is an understatement. Will the Supreme Court of Canada continue to preside over the twilight of *Charter* equality rights or will it invigorate the dreams, hopes and aspirations they embody? The mystery and silence that surrounds the leave to appeal process make this question difficult to answer. We are left to speculate on the reasons for the sharp decline in the Court's interest in *Charter* equality rights. Perhaps the Court is of the view that the dreams, hopes and aspirations expressed by s.15 have been accomplished. Perhaps the Court's recent record on equality rights is a reflection of broader political and cultural shifts which are unsupportive of a continuing strong role for anti-discrimination law, exemplified by the cancellation of the Court Challenges Program and of other funding for equality-seeking groups. Perhaps the main sources of systemic inequalities lie beyond the *Charter*'s reach.[118] Perhaps the Court's commitment to substantive equality will always be circumscribed by liberal legalism[119] and an unwillingness to utilize s.15 to redistribute material resources.[120] Whatever the explanations are for the increasing circumscription of *Charter* equality rights, wise potential claimants know that they need to be cautious before placing hopes in costly and burdensome s.15 litigation. Our analysis suggests that *Charter* equality rights may be reinvigorated, from a moribund to at least a modest role, particularly if the Court is willing to recognize new analogous grounds, to take seriously claims based on adverse effects discrimination, and to implement other shifts in the jurisprudence that relieve claimants of the onerous burdens they now face in proving that differential treatment on prohibited grounds amounts to discrimination.

[117] See Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences", (2001) 13 Can. J. Women & L. 37.

[118] See Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

[119] See Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), chapter 3, "Equality and the Liberal Form of Rights".

[120] See Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution and the Imperialism of the Courts", in T. Campbell, K.D. Ewing and A. Tomkin eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 335.

APPENDIX A: ANNUAL DISPOSITION OF LEAVE TO APPEAL APPLICATIONS IN SECTION 15 CASES

Term	# of Section 15 Leave Applications	# Granted	% Granted
1989-1990	8	1	12.5%
1990-1991	9	3	33.3%
1991-1992	10	4	40.0%
1992-1993	7	4	57.1%
1993-1994	5	3	60.0%
1994-1995	2	1	50.0%
1995-1996	5	2	40.0%
1996-1997	12	8	66.7%
1997-1998	11	3	27.3%
1998-1999	4	2	50.0%
1999-2000	12	3	25.0%
2000-2001	11	2	18.2%
2001-2002	9	2	22.2%
2002-2003	15	6	40.0%
2003-2004	7	0	0.0%
2004-2005	6	2	33.3%
2005-2006	7	1	14.3%
2006-2007	5	2	40.0%
2007-2008	13	2	15.4%
2008-2009	10	2	20.0%
2009-2010[121]	9	1	11.1%
Total	177	54	30.5%

[121] Up to 31 July 2010.

APPENDIX B: DISPOSITION OF LEAVE TO APPEAL APPLICATIONS IN SECTION 15 CASES SINCE 1989

We characterize s.15 claims to be "established" at the Court of Appeal if the court found a violation of s.15 that was not demonstrably justified as a reasonable limit pursuant to s.1. We characterize s.15 claims as "not established" at the Court of Appeal if the court did not find a violation of s.15 or if the court found a violation of s.15 that was demonstrably justified as a reasonable limit pursuant to s.1. The final column in the chart below for "result of appeal" refers to the result on the s.15 claim alone.

Case Name	SCC Case #	Est'd at CA?	Result of Leave Application	Result of Appeal
1989-1990 Term (1 of 8 granted)				
1. *R.* v. *Hess; R. v. Nguyen*	20809 21392	No	Granted, 19 Oct. 1989	Dismissed
2. *R.* v. *Paul Magder Furs Ltd*	21498	No	Dismissed, 9 Nov. 1989	-
3. *Mun. Cont. Ltd* v. *IUOE Loc. 721*	21531	No	Dismissed, 16 Nov. 1989	-
4. *NAPO* v. *Canada*	21585	No	Dismissed, 23 Nov. 1989	-
5. *Skalbania* v. *Wedge. Vill. Est. Ltd*	21547	No	Dismissed, 30 Nov. 1989	-
6. *Brochner* v. *MacDonald*	21609	No	Dismissed, 7 Dec. 1989	-
7. *Prior* v. *Canada*	21709	No	Dismissed, 22 Feb. 1990	-
8. *Richman* v. *Wheaton*	21722	No	Dismissed, 29 Mar. 1990	-
1990-1991 Term (3 of 9 granted)				
9. *Canada* v. *Chiarelli*	21920	No	Granted, 8 Nov. 1990	Dismissed
10. *R.* c. *Lortie*	21950	No	Dismissed, 8 Nov. 1990	-
11. *Schachter* v. *Canada*	21889	Yes	Granted, 15 Nov. 1990	Dismissed
12. *Canada* v. *Central Cartage Co.*	22057	No	Dismissed, 17 Jan. 1991	-
13. *R.* v. *Baig*	22167	No	Dismissed, 31 Jan. 1991	-
14. *R.* v. *Généreux*	22103	No	Granted, 7 Feb. 1991	Dismissed
15. *Alc. Found'n of Man.* v. *Wpg.*	22005	Yes	Dismissed, 14 Mar. 1991	-
16. *R.* c. *Genest*	22118	No	Dismissed, 18 Apr. 1991	-
17. *Wittman* v. *Emmott*	22340	No	Dismissed, 29 Aug. 1991	-
1991-1992 Term (4 of 10 granted)				
18. *R.* v. *Sawchuk*	22572	No	Dismissed, 7 Nov. 1991	-
19. *Murphy* v. *Welsh*	22542	No	Granted, 6 Feb. 1992	-(1)
20. *Auger* v. *Alberta*	22557	No	Dismissed, 6 Feb. 1992	-
21. *Weatherall* v. *Canada*	22633	No	Granted, 6 Feb. 1992	Dismissed
22. *Janitzki* v. *Canada*	22779	No	Dismissed, 5 Mar. 1992	-
23. *Symes* v. *Canada*	22659	No	Granted, 26 Mar. 1992	Dismissed
24. *Fenton* v. *B.C.*	22612	No	Dismissed, 9 Apr. 1992	-
25. *Mohr* v. *Scoffield*	22784	No	Dismissed, 7 May 1992	-
26. *Miron* v. *Trudel*	22744	No	Granted, 4 Jun. 1992	Allowed
27. *Cdn Assn of Reg'd Imp.* v. *Cda*	22871	No	Dismissed, 26 Jun. 1992	-
1992-1993 Term (4 of 7 granted)				
28. *Jones* v. *Ont; Rheaume* v. *Ont*	22935	No	Dismissed, 24 Sep. 1992	-
29. *Haig* v. *Canada*	23223	No	Granted, 22 Oct. 1992	Dismissed

30. *R.* v. *Finta*	23097	No	Granted, 10 Dec. 1992	Dismissed
31. *Penner* v. *Danbrook*	23122	No	Dismissed, 21 Jan. 1993	-
32. *NWAC* v. *Canada*	23253	No	Granted, 11 Mar. 1993	Dismissed
33. *Rodriguez* v. *British Columbia*	23476	No	Granted, 23 Mar. 1993	Dismissed
34. *Fernandes* v. *Manitoba*	23169	No	Dismissed, 15 Apr. 1993	-
1993-1994 Term (3 of 5 granted)				
35. *Nguyen* v. *Canada*	23474	No	Dismissed, 14 Oct. 1993	-
36. *Egan* v. *Canada*	23636	No	Granted, 14 Oct. 1993	Dismissed
37. *Benner* v. *Canada*	23811	No	Granted, 10 Mar. 1994	Allowed
38. *Thibaudeau* v. *Canada*	24154	Yes	Granted, 23 Jun. 1994	Allowed
39. *McCarten* v. *PEI*	24098	No	Dismissed, 25 Aug. 1994	-
1994-1995 Term (1 of 2 granted)				
40. *Adler* v. *Ontario*	24347	No	Granted, 2 Feb. 1995	Dismissed
41. *Schachtschneider* v. *Canada*	23698	No	Dismissed, 1 Jun. 1995	-
1995-1996 Term (2 of 5 granted)				
42. *Lewis* v. *Burnaby Schl Dist. #41*	24514	No	Dismissed, 21 Sep. 1995	-
43. *Eaton* v. *Brant Co. Bd. of Ed.*	24668	Yes	Granted, 26 Oct. 1995	Allowed
44. *Grant* v. *Canada*	24890	No	Dismissed, 15 Feb. 1996	-
45. *Eldridge* v. *British Columbia*	24896	No	Granted, 9 May 1996	Allowed
46. *Netupsky* v. *Canada*	25223	No	Dismissed, 15 Aug. 1996	-
1996-1997 Term (8 of 12 granted)				
47. *Vriend* v. *Alberta*	25285	No	Granted, 3 Oct. 1996	Allowed
48. *Huynh* v. *Canada*	25379	No	Dismissed, 24 Oct. 1996	-
49. *Law* v. *Canada*	25374	No	Granted, 5 Dec. 1996	Dismissed
50. *Masse* v. *Ontario*	25462	No	Dismissed, 5 Dec. 1996	-
51. *Vancouver SIVMW* v. *Canada*	25359	No	Granted, 6 Mar. 1997	Dismissed
52. *R.* v. *M.S.*	25742	No	Dismissed, 6 Mar. 1997	-
53. *M.* v. *H.*	25838	Yes	Granted, 24 Apr. 1997	Dismissed
54. *Corbiere* v. *Canada*	25708	Yes	Granted, 27 Apr. 1997	Dismissed
55. *Orlowski* v. *British Columbia*	25751	No	Granted, 8 May 1997	Dismissed
56. *Bese* v. *British Columbia*	25855	No	Granted, 8 May 1997	Dismissed
57. *Winko* v. *British Columbia*	25856	No	Granted, 8 May 1997	Dismissed
58. *Bahlsen* v. *Canada*	25783	No	Dismissed, 19 Jun. 1997	-
1997-1998 Term (3 of 11 granted)				
59. *Delisle* v. *Canada*	25926	No	Granted, 16 Oct. 1997	Dismissed
60. *Gale Estate* v. *Hominick*	26002	No	Dismissed, 16 Oct. 1997	-
61. *Perry* v. *Ontario*	26167	No	Dismissed, 18 Dec. 1997	-
62. *Schafer* v. *Canada*	26246	Yes	Dismissed, 29 Jan. 1998	-
63. *Bal* v. *Ontario*	26116	No	Dismissed, 12 Feb. 1998	-
64. *Lovelace* v. *Ontario*	26165	No	Granted, 12 Feb. 1998	Dismissed
65. *R.* v. *LePage*	26320	No	Granted, 19 Feb. 1998	Dismissed
66. *A & L Inv. Ltd.* v. *Ontario*	26395	No	Dismissed, 19 Mar. 1998	-
67. *East York* v. *Ontario*	26385	No	Dismissed, 2 Apr. 1998	-
68. *Canada* v. *Wong*	26465	No	Dismissed, 11 Jun. 1998	-
69. *Villeneuve* c. *Quebec*	26499	No	Dismissed, 11 Jun. 1998	-

1998-1999 Term (2 of 4 granted)				
70. *Granovsky* v. *Canada*	26615	No	Granted, 8 Oct. 1998	Dismissed
71. *Gallant* v. *New Brunswick*	26785	No	Dismissed, 17 Dec. 1998	-
72. *Sutherland* v. *Canada*	26056	No	Dismissed, 28 Jan. 1999	-
73. *Little Sisters* v. *Canada*	26858	Yes	Granted, 18 Feb. 1999	Dismissed
1999-2000 Term (3 of 12 granted)				
74. *Ont. Pub. Sch. Bd. Assn.* v. *Ont.*	27490	Yes	Dismissed, 4 Nov. 1999	-
75. *Ferrell* v. *Ontario*	27127	No	Dismissed, 9 Dec. 1999	-
76. *Moxham* v. *Canada*	27180	No	Dismissed, 9 Dec. 1999	-
77. *Guillemette* v. *Canada*	27280	No	Dismissed, 16 Dec. 1999	-
78. *R.* v. *Nelson*	27594	No	Dismissed, 17 Feb. 2000	-
79. *Dunmore* v. *Ontario*	27216	No	Granted, 24 Feb. 2000	Dismissed
80. *Franks* v. *B.C.*	27414	No	Dismissed, 2 Mar. 2000	-
81. *Jazairi* v. *Ontario*	27500	No	Dismissed, 3 May 2000	-
82. *Lavoie* v. *Canada*	27427	No	Granted, 25 May 2000	Dismissed
83. *Gosselin* v. *Quebec*	27418	No	Granted, 1 Jun. 2000	Dismissed
84. *Pawar* v. *Canada*	27578	No	Dismissed, 8 Jun. 2000	-
85. *Cameron* v. *Nova Scotia*	27584	No	Dismissed, 29 Jun. 2000	-
2000-2001 Term (2 of 11 granted)				
86. *Cannella* v. *TTC*	27705	No	Dismissed, 14 Sep. 2000	-
87. *Pérusse* v. *Canada*	27835	No	Dismissed, 12 Oct. 2000	-
88. *Hogan* v. *Newfoundland*	27865	No	Dismissed, 9 Nov. 2000	-
89. *Nova Scotia* v. *Walsh*	28179	Yes	Granted, 15 Feb. 2001	Allowed
90. *Archibald* v. *Canada*	28116	No	Dismissed, 15 Mar. 2001	-
91. *Moffatt v. Canada*	27895	No	Dismissed, 22 Mar. 2001	-
92. *Vachon* c. *Société d'aménag.*	28098	No	Dismissed, 3 May 2001	-
93. *Nova Scotia* v. *Martin & Laseur*	28370	No	Granted, 14 Jun. 2001	Allowed
94. *Scheuneman* v. *Canada*	28344	No	Dismissed, 21 Jun. 2001	-
95. *Weeks* v. *Canada*	28421	No	Dismissed, 30 Aug. 2001	-
96. *McLean* v. *Canada*	28498	No	Dismissed, 30 Aug. 2001	-
2001-2002 Term (2 of 9 granted)				
97. *Théroux* c. *Comm'n Scolaire*	28166	No	Dismissed, 6 Sep. 2001	-
98. *Siemens* v. *Manitoba*	28416	No	Granted, 13 Sep. 2001	Dismissed
99. *Irshad* v. *Ontario*	28571	No	Dismissed, 13 Sep. 2001	-
100. *Bauman* v. *Nova Scotia*	28619	No	Dismissed, 13 Sep. 2001	-
101. *Trociuk* v. *British Columbia*	28726	No	Granted, 8 Nov. 2001	Allowed
102. *Westmount* c. *Quebec*	28869	No	Dismissed, 7 Dec. 2001	-
103. *Krock* v. *Canada*	28740	No	Dismissed, 21 Feb. 2002	-
104. *Ayangma* v. *P.E.I.*	29002	No	Dismissed, 25 Jun. 2002	-
105. *B.H.* v. *Alberta*	29174	No	Dismissed, 11 Jul. 2002	-
2002-2003 Term (6 of 15 granted)				
106. *CFCYL* v. *Canada*	29113	No	Granted, 17 Oct. 2002	Dismissed
107. *Collins* v. *Canada*	29189	No	Dismissed, 24 Oct. 2002	-
108. *Ent. W.F.H. Ltée.* c. *Quebec*	28978	No	Dismissed, 12 Dec. 2002	-
109. *Deol* v. *Canada*	29371	No	Dismissed, 20 Feb. 2003	-

110. *Falkiner* v. *Ontario*	29294	Yes	Granted, 20 Mar. 2003	-(2)
111. *Hodge* v. *Canada*	29351	Yes	Granted, 20 Mar. 2003	Allowed
112. *Brebric* v. *Niksic*	29388	No	Dismissed, 20 Mar. 2003	-
113. *Webb* v. *Waterloo Police S.B.*	29397	No	Dismissed, 20 Mar. 2003	-
114. *Miller* v. *Canada*	29501	No	Dismissed, 17 Apr. 2003	-
115. *Gosselin (Tutor of)* v. *Quebec*	29298	No	Granted, 24 Apr. 2003	Dismissed
116. *Mack* v. *Canada*	29475	No	Dismissed, 24 Apr. 2003	-
117. *McFadyen v. Canada*	29591	No	Dismissed, 24 Apr. 2003	-
118. *Auton* v. *British Columbia*	29508	Yes	Granted, 15 May 2003	Allowed
119. *Newfoundland* v. *N.A.P.E.*	29597	No	Granted, 5 Jun. 2003	Dismissed
120. *Canada* v. *Lesiuk*	29642	No	Dismissed, 17 Jul. 2003	-
2003-2004 Term (0 of 7 granted)				
121. *Chippewas of Nawash* v. *Cda*	29568	No	Dismissed, 18 Sep. 2003	-
122. *Bear* v. *Canada*	29666	No	Dismissed, 18 Sep. 2003	-
123. *Taylor* v. *Canada*	29678	No	Dismissed, 25 Sep. 2003	-
124. *MacKay* v. *B.C.*	29765	No	Dismissed, 25 Sep. 2003	-
125. *Power* v. *Canada*	29886	No	Dismissed, 22 Jan. 2004	-
126. *Burnett* v. *British Columbia*	29987	No	Dismissed, 26 Feb. 2004	-
127. *C.S.N. c. Québec*	30069	No	Dismissed, 1 April 2004	-
2004-2005 Term (2 of 6 granted)				
128. *Fitzgerald* v. *Alberta*	30453	No	Dismissed, 6 Jan. 2005	-
129. *R.* v. *Mackenzie*	30359	No	Dismissed, 3 Feb. 2005	-
130. *Health Services* v. *B.C.*	30554	No	Granted, 21 April 2005	Dismissed
131. *Simser* v. *Canada*	30746	No	Dismissed, 23 June 2005	-
132. *Canada* v. *Hislop*	30755	Yes	Granted, 23 June 2005	Dismissed
133. *R.* v. *Schneider*	30761	No	Dismissed, 25 Aug. 2005	-
2005-2006 Term (1 of 7 granted)				
134. *BCGEU* v. *B.C.*	30925	No	Dismissed, 22 Sept. 2005	-
135. *Kempling* v. *B.C.C.T.*	31088	No	Dismissed, 19 Jan. 2006	-
136. *Manoli* v. *Canada*	31039	No	Dismissed, 9 Feb. 2006	-
137. *R.* v. *Hy and Zel's Inc.*	31287	No	Dismissed, 30 Mar. 2006	-
138. *Arishenkoff* v. *B.C.*	31251	No	Dismissed, 27 April 2006	-
139. *Baier* v. *Alberta*	31526	No	Granted, 28 July 2006	Dismissed
140. *Métis N.C. of Women* v. *Cda*	31421	No	Dismissed, 17 Aug. 2006	-
2006-2007 Term (2 of 5 granted)				
141. *R.* v. *J.C.*	31406	Yes	Dismissed, 14 Sept. 2006	-
142. *Wetzel* v. *Canada*	31453	No	Dismissed, 12 Oct. 2006	-
143. *R.* v. *Kapp*	31603	No	Granted, 14 Dec. 2006	Dismissed
144. *R.* v. *Banks*	31929	No	Dismissed, 23 Aug. 2007	-
145. *Ermineskin Ind. Band* v. *Cda*	31875	No	Granted, 30 Aug. 2007	Dismissed
2007-2008 Term (2 of 13 granted)				
146. *Melanson* v. *New Brunswick*	32008	No	Dismissed, 20 Sept. 2007	
147. *A.C.* v. *Manitoba*	31955	No	Granted, 25 Oct. 2007	Dismissed
148. *Alberta* v. *Hutterian Brethren*	32186	Yes	Granted, 29 Nov. 2007	Allowed
149. *Howe* v. *Canada*	32198	No	Dismissed, 6 Dec. 2007	-

150. *Tomasson* v. *Canada*	32298	No	Dismissed, 24 Jan. 2008	-
151. *APPQ* c. *Sûreté du Québec*	32301	No	Dismissed, 31 Jan. 2008	-
152. *Zhang* v. *Canada*	32209	No	Dismissed, 7 Feb. 2008	-
153. *Veffer* v. *Canada*	32260	No	Dismissed, 14 Feb. 2008	-
154. *Moresby Explorers Inc.* v. *Cda*	32327	No	Dismissed, 21 Feb. 2008	-
155. *Soucy* c. *Québec*	32406	No	Dismissed, 24 April 2008	-
156. *Marchand* v. *Ontario*	32455	No	Dismissed, 24 April 2008	-
157. *Longley* v. *Canada*	32459	No	Dismissed, 24 April 2008	-
158. *Guzman* v. *Canada*	32409	No	Dismissed, 3 July 2008	-
2008-2009 Term (2 of 10 granted)				
159. *Giacomelli Estate* v. *Canada*	32690	No	Dismissed, 25 Sept. 2008	-
160. *Ross* v. *Charlottetown*	32734	No	Dismissed, 23 Oct. 2008	-
161. *Ali* v. *Canada*	32762	No	Dismissed, 20 Nov. 2008	-
162. *Sagharian* v. *Ontario*	32753	No	Dismissed, 4 Dec. 2008	-
163. *Downey* v. *Nova Scotia*	32822	No	Dismissed, 11 Dec. 2008	-
164. *Dodd* v. *Warden of I.M.H.*	32845	No	Dismissed, 18 Dec. 2008	-
165. *Fraser* v. *Ontario*	32968	No	Granted, 2 April 2009	Pending
166. *Withler* v. *Canada*	33039	No	Granted, 28 May 2009	Pending
167. *Mullins* v. *Levy*	33070	No	Dismissed, 11 June 2009	-
168. *Harris* v. *Canada*	33091	No	Dismissed, 09 July 2009	-
2009-2010 Term(3) (1 of 9 granted)				
169. *Boulter* v. *Nova Scotia*	33124	No	Dismissed, 10 Sept. 2009	-
170. *Gill* v. *Canada*	33144	No	Dismissed, 29 Oct. 2009	-
171. *McIvor* v. *Canada*	33201	Yes	Dismissed, 5 Nov. 2009	-
172. *Morrow* v. *Zhang*	33311	No	Dismissed, 17 Dec. 2009	-
173. *Sagen* v. *VANOC*	33439	No	Dismissed, 22 Dec. 2009	-
174. *R.* v. *Little*	33390	No	Dismissed, 14 Jan. 2010	-
175. *Cunningham* v. *Alberta*	33340	Yes	Granted, 11 April 2010	Pending
176. *Hartling* v. *Nova Scotia*	33572	No	Dismissed, 27 May 2010	-
177. *Ray* v. *The Queen*	33610	No	Dismissed, 24 June 2010	-

(1) After leave was granted in *Murphy* v. *Welsh*, the claimant did not pursue the s.15 violation issue. See [1991]
S.C.C.A. No. 283.
(2) After leave was granted in *Falkiner* v. *Ontario*, a notice of discontinuance was filed. See [2002] S.C.C.A. No. 297.
(3) Up to 31 July 2010.