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Foundations for 15(1): Equality Rights in Canada

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FOUNDATIONS FOR 15(1): EQUALITY RIGHTS IN CANADA†

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On May 25, 1995, the Supreme Court of Canada released a trilogy of decisions[1] interpreting the section 15 equality guarantee of the *Canadian Charter of Rights and Freedoms*.[2] The decisions appeared to be a dramatic departure for our highest court; it was a bad day for equality seekers.

Prior to the trilogy, the widely accepted view was that the Supreme Court of Canada had rejected the similarly situated test in

1. *See* Thibaudeau v. Canada [1995] 2 S.C.R. 627; Egan v. Canada [1995] 2 S.C.R. 513; Miron v. Trudel [1995] 2 S.C.R. 418, discussed *infra* Part IV.
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, Schedule B of the *Canada Act* (U.K.), 1982, c. 11 [hereinafter *Charter*].

favour of a substantive approach to equality.[3] The first decisions under section 15, *Andrews* and *Turpin*,[4] were hailed as great achievements in equality jurisprudence. According to the Canadian Supreme Court, discrimination was to be evaluated by situating the equality rights claimant in the larger social and political context.[5] Section 15 was meant to prevent and remedy the continuing inequality of historically disadvantaged groups, promoting a society that respects the equal dignity of all.[6] David Lepofsky summarized the promise of the first equality decisions under the *Charter*:

> When the *Andrews/Turpin* analogous grounds test is juxtaposed with the Court's potent definition of equality, section 15 becomes an unprecedented promise of equality to the disadvantaged in Canada. It is extricated from the bog of rationality review cases which pervaded the lower courts and American courts. It avoids the prospect that the section 1 test would have to be seriously diluted, to the detriment of women and the minorities, in order to save for government a reasonable latitude for legitimate legislation and governance. *Andrews/Turpin* also dismissed a U.S.-style "levels of scrutiny" view of equality rights, which would have led some to enjoy more equality than others, and which places courts in the unacceptable position of judging for themselves whose claims to equality among those recognized in section 15 are more important. It thus frees Canada from the jurisprudential quicksand in which the U.S. is now struggling to cope.[7]

As we reach the first decade of litigation under section 15, the unprecedented promise of Canada's equality jurisprudence is already in jeopardy. In the 1995 trilogy, the Supreme Court of Canada split

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3. *See* discussion *infra* Part II.F; *see also* McKinney v. University of Guelph [1990] 3 S.C.R. 229, 229 ("I do not believe [the similarly situated test] survived *Andrews*."); R. v. Turpin [1989] 1 S.C.R. 1296, 1332 ("[T]he similarly situated similarly treated test [was] clearly rejected by this Court in *Andrews*.").
4. Andrews v. Law Soc'y of B. C. [1989] 1 S.C.R. 143; *Turpin* [1989] 1 S.C.R. 1296, discussed *infra* Parts II.D–E.
5. R. v. Swain [1991] 1 S.C.R. 933, 992; *Turpin* [1989] 1 S.C.R. at 1331–32 (Wilson, J.).
6. Eldridge v. British Columbia (Att'y Gen.) [1997] 3 S.C.R. 624, 667; *see also Andrews* [1989] 1 S.C.R. at 175.
7. M. David Lepofsky, *The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?*, 1 N.J.C.L. 315, 321 (1992) [hereinafter Lepofsky, *Rollercoaster*].

4-4-1 on the appropriate test for discrimination. Justices La Forest, Gonthier, Major, and Chief Justice Lamer adopted a relevance test, which is merely the similarly situated test with a new name. These Justices became preoccupied with "biological realities," the "purity" of marriage, maintaining tradition, and deference to legislative will.[8] Justices McLachlin, Sopinka, Cory, and Iacobucci appeared to have narrowed and individualized their view of equality; their notion of discrimination emphasized "irrational" distinctions.[9] Only Justice L'Heureux-Dubé seemed committed to providing substantive equality for victims of discrimination.[10] So, in preparing the factum for our Supreme Court of Canada equality case, *M. v. H.*,[11] we decided to go back and review the major section 15 cases.

Re-reading *Hess*, *McKinney*, *Weatherall*, and *Symes*,[12] it became clear that the Court's first equality case under the *Charter*, *Andrews*,[13] had not completely eliminated the lure of formal equality thinking and the related appeals to history, biology, morality, tradition, and democracy. The trilogy simply highlights long-standing problems. Although there have been a series of unanimous equality decisions since the trilogy, the Court has yet to resolve the underlying split.

This brings us to a crucial moment in Canadian equality jurisprudence. The long-awaited decision in *M. v. H.* is likely to force the Court to reexamine its division over section 15. Like the trilogy cases, *M. v. H.* addresses equality in the family context, and requires the Court to consider the effects of differential treatment from the perspective of an unpopular minority. The case will truly test the Court's commitment to substantive equality.

At this critical juncture in equality jurisprudence, our paper advocates a return to first principles, to an evaluation of the meaning and purposes of equality.[14] At the outset, we summarize the competing

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8. *See* discussion *infra* Part IV.D.
9. *See, e.g.*, Miron v. Trudel [1995] 2 S.C.R. 418, 484–85.
10. *See* discussion *infra* Part IV.A.3.
11. M. v. H. [1996] 132 D.L.R. (4th) 538 (Epstein, J.), *aff'd.* [1996] 142 D.L.R. (4th) 1 (Charron, J., & Doherty, J., concurring; Finlayson, J., dissenting).
12. R. v. Hess [1990] 2 S.C.R. 906; McKinney v. University of Guelph [1990] 3 S.C.R. 229; Weatherall v. Canada (Att'y. Gen.) [1993] 2 S.C.R. 872 [also known as Conway v. Canada]; Symes v. Canada (M.N.R.) [1993] 4 S.C.R. 695.
13. Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143.
14. This paper proceeds from a position of engagement with law as one strategy for social change. There are innumerable critiques of attempts to use law as a vehicle to pursue equality rights. *See* MICHAEL MANDEL, THE CHARTER OF RIGHTS AND FREEDOMS AND THE LEGALIZATION OF POLITICS IN CANADA (1994); CAROL SMART, FEMINISM

concepts of formal and substantive equality and discuss the relationship between equality and other values. We argue that there should be no insecurity about the Court's role in reviewing legislative decisions, since democracy and equality are aspects of the same ideal. We identify "biology," "morality," and "tradition" as threats to constitutional integrity, which attempt to return the Court to the similarly situated test. In our view, "biological realities" are socially constructed mechanisms of power; it is the role of the equality guarantee to challenge these realities. There is no place for prejudicial views in equality rights reasoning. The governing morality should be that expressed by the *Charter*. Tradition is no justification for discrimination, since discrimination is itself traditional. A substantive approach to equality involves challenging biological essentialism, the dominance of sectarian morality, and the reification of tradition.

The balance of the paper discusses a selection of important cases under section 15 of the *Canadian Charter of Rights and Freedoms*. It traces the development of equality jurisprudence from the introduction of section 15 to early approaches in *Andrews*, *Hess*, *Weatherall*, *Symes*, and *McKinney*.[15] This review illustrates the persistence of formal equality analysis and the threats of biology, morality, and tradition to the realization of substantive equality. The May 25, 1995, trilogy of *Egan*, *Miron*, and *Thibaudeau* is critiqued in detail.[16] Finally, we turn to more recent jurisprudence[17] and offer a brief discussion of *M. v. H.*[18]

AND THE POWER OF LAW (1989); Judy Fudge, *The Effect of Entrenching a Bill of Rights Upon Political Discourse*, 17 INT'L. J. SOC. L. 445, 448 (1989); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982); Harry J. Glasbeek & Michael Mandel, *The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms*, 2 SOCIALIST STUD./ETUDES SOCIALISTS 84, 87–88 (1984); Michael Mandel, *Marxism and the Rule of Law*, 35 U.N.B.L.J. 7 (1986); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). *But see* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARVARD C.R.-C.L. L. REV. 301 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructuring Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. 103 (1987).

15. *See infra* Parts II.D.–III.G.
16. *See infra* Part IV.
17. *See infra* Part V.
18. *See infra* Parts VI.B–VII.

At times, we dissect cases in painstaking detail. We considered editing the discussion, but decided to err on the side of over-inclusiveness, since we ourselves had learned so much in the study.

I. Essential Concepts

A. Giving Meaning to the Concept of Equality

In *Andrews*,[19] the first Supreme Court of Canada decision under section 15, Justice McIntyre stated that equality "is an elusive concept . . . which may be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."[20] The notion of equality is accordingly not strictly individualistic in nature, but must be determined by examining group disadvantage. The main consideration is the impact of the law on the individual or the group concerned.

This inquiry into the broader social and political context, with a primary focus on the negative impact on the group concerned, is the essential element which distinguishes the Court's approach from a formal equality analysis. A formal approach to equality focuses on sameness of treatment where individuals are similarly situated. The underlying rationale of human rights provisions is that people are "all the same inside," because each person has access to the same Reason and Truth. History reflects a tradition of incrementally coming to the realization of our essential similarity, grounded in certain universal and basic moral principles and overcoming our superficial differences. Each individual should receive the same treatment at law because all persons should succeed or fail on the basis of their personal merit and capacities. While there are certain essential biological differences, these either make no difference because "we are all the same inside" or must be taken into account by "special treatment" in certain cases. Given the profound changes to society in eliminating discrimination, the current modes of social organization are basically fair. Courts are impartial arbitrators, which apply the law of non-discrimination so as to preclude irrational categorizations which overlook the essential similarity of all human beings. However, courts are not meant to

19. Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143.
20. *Andrews* [1989] 1 S.C.R at 164.

address any pre-existing disadvantages arising outside of law, which are created by broader social structures. That role is for the democratic body of the legislature.

An alternative to the formal approach just described is understanding that all persons are created by and through the exercise of power, and so their identities are products of power. Under this approach, Reason and Truth are not universal, absolute concepts, but merely reflect the experience of those who have the power to define reality for others, thereby silencing actual and potential alternate visions and realities. Similarly, there are no essential biological differences. Rather, our perception of "difference" is socially constructed. Courts participate in reinforcing and actively creating meanings and identities; they are necessarily political, and superbly so, since they may perpetuate power behind a veil of rationalizations, such as "reasonableness," "precedent," "justice," and "impartiality." Judges, lawyers, legislation, common law, and court structure all reflect the overwhelming white, middle-class, Christian, heterosexual, able-bodied, male interest, and experience[21]—all of which entail blissful ignorance of huge realms of being. Outside of this narrow vision, the current modes of social organization are basically unfair. They correspond to the interests of the same group who make up the Bench, the heads of Industry, and the heads of Government. The facilitation and elevation of these dominant interests, the very notions of Reason and Truth, depend on the continued subjugation of the Other.[22] Tradition is the history of this subordination; dominant morality becomes the justification for domination by the few.

For the Other, equality is not about being "basically the same inside" as current rights holders. The problem is not a historical failure

21. "[I]t would be ironic and, in large measure, self-defeating to the purposes of s. 15 to assess the absence or presence of discriminatory impact according to the standard of the 'reasonable, secular, able-bodied, white male.'" Egan v. Canada [1995] 2 S.C.R. 513, 546 (L'Heureux-Dubé, J., dissenting); *see also* Symes v. Canada [1993] 4 S.C.R. 695, 798 (L'Heureux-Dubé, J., dissenting)("[W]hen only one sex is involved in defining the ideas, rules, and values in a particular domain, that one-sided standpoint comes to be seen as natural, obvious and general.").

22. The concept of the "Other" originated with Simone de Beauvoir, who explains how woman is constituted as object, the Other to man's "Absolute." See SIMONE DE BEAUVOIR, THE SECOND SEX xvi (H.M. Parshley ed. & trans., Alfred A. Knopf 1964)(1949). Enlightenment thought is structured by such fundamental dichotomies: rational/irrational, subject/object, culture/nature, man/woman. The first element, valorized and neutral, derives its meaning in hierarchical opposition to the Other.

to recognize essential similarity. Rather, there is a need for recognition of plurality and heterogeneity that will challenge the notion of the universal. Recognizing the value of diversity, the difference that difference makes, would require dramatic changes to current ways of being, thinking, and living. This approach would not merely provide limited inclusion to those who "fit" within the current social structure, but would create whole new social conversations and communities.

Substantive equality requires changing the material conditions, the substance, of people's lives. It necessitates an examination of the concrete effects of government action, and demands that rights claims be examined within a broader social and political context. The current order is one of systemic inequality, which imposes a positive duty on the state to achieve equality, not just to make sure legislation achieves a minimum threshold of narrowly-conceived non-discrimination.

Given these conflicting visions between formal and substantive equality, the Supreme Court of Canada has vacillated in its approach to the equality guarantee. On the one hand, it has recognized that formal equality has been used as a tool to deny human rights protections simply by defining persons as outside the protected class.[23] Indeed, the Court has emphasized the necessity of considering the broader context and the effect of the impugned provision on the concerned group.[24] It has recognized that the equality guarantee "expresses a commitment . . . to the equal worth and human dignity of all persons . . . [and] instantiates a desire to rectify and prevent discrimination against particular groups 'suffering social, political and legal disadvantage in our society.' "[25]

At the same time, however, the Court fails to give full expression to a substantive approach to equality, perhaps because inequality is often invisible to it. If section 15 of the *Charter* is to mean anything, it requires a fundamental re-evaluation of "basic" tenets, a reconfiguration of judicial perception to centre on the experiences[26] of the groups whom the equality guarantee was meant to protect.

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23. *See Andrews* [1989] 1 S.C.R. at 164-67.
24. *See* R. v. Turpin [1989] 1 S.C.R. 1296, 1331–32.
25. *Andrews* [1989] 1 S.C.R. at 175 (citation omitted).
26. For a helpful discussion of the multiplicity and particularity of experience, and the ability to centre on the experience of another, without the need for comparison and without adopting that framework as one's own, see Elsa Barkley Brown, *African-American Women's Quilting: A Framework for Conceptualizing and Teaching African-American Women's History*, 14 SIGNS 921 (1989).

Although the Court claims to have rejected the similarly situated test, it must focus on the broader social and political context, not the 'context' of social norms or biology, in order to detect systemic inequality. The Court needs to examine the effect of government action on the lives of the people that the action touches. A substantive approach to equality will challenge the judiciary to study inequality, to observe its perpetuation through the effects of government action, and to provide a concrete remedy that will materially affect relations of power.

At the time of this writing, the Supreme Court's most recent equality decisions hold significant promise in this regard.[27] The Court seems to have returned to a more substantive, generous, and purposive interpretation of section 15, aimed at ameliorating the condition of disadvantaged groups. *Eldridge* defined the purposes of section 15 in a two-fold manner:[28] as a commitment "to the equal worth and human dignity of all persons,"[29] and as a means "to rectify and prevent discrimination against particular groups 'suffering social, political and legal disadvantage in our society.'"[30] In our view, it is crucial that these two purposes be considered simultaneously. A focus on dignity alone might otherwise individualize discrimination, but in conjunction with an examination of contextual group disadvantage, it provides real assistance in identifying discrimination and promoting equality.

B. The Relationship Between Equality and Other Values

The Court has often had difficulty articulating the relationship between substantive equality and other values. Abdicating its role as a guardian of minority rights, the Court has been hesitant and deferential in response to popular appeals to democracy, tradition, and

27. See, in particular, our discussion of *Eldridge* and *Vriend*, *infra* Parts V.D–E.

28. *See* Eldridge v. British Columbia (Att'y Gen.) [1997] 3 S.C.R. 624, 667; *see also* discussion *infra* Part V.D.

29. *Eldridge* [1997] 3 S.C.R. at 667. Justice McIntyre remarked that section 15(1) "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration." *Andrews* [1989] 1 S.C.R at 171.

30. *Eldridge* [1997] 3 S.C.R. at 667 (citing R. v. Turpin [1989] 1 S.C.R. 1296, 1333); *see also* Beverley McLachlin, *The Evolution of Equality*, 54 ADVOCATE 559, 564 (1996)(discussing recent Supreme Court approaches to equality in Canada).

morality. In a regression to the equality jurisprudence under the *Bill of Rights*, a significant number of the Justices have introduced considerations of relevance, as a justificatory factor, under section 15.[31] While any notion of legislative deference undermines the *Charter's* effectiveness, it is particularly troublesome to inject deference into the equality guarantee. To illustrate this point, we consider the interplay between democracy and equality.

1. Equality and Democracy

All of the great social struggles of this era have involved, to some degree, a tension between the role of the Court and notions of democracy. The achievements of equal status for women, desegregation, and religious freedom have all been accompanied by breakthroughs in the courts, despite criticism that the judiciary should not interfere with the legislative function of fashioning social policy. Such criticisms stem from a misconception about the democratic ideal, rooted in the majoritarian premise. The issue must be reconsidered if we are to truly understand the connection between equality and democracy:

> [T]he majoritarian premise has had a potent—if often unnoticed—grip on the imagination of . . . constitutional scholars and lawyers. Only that diagnosis explains the near unanimous view . . . that judicial review compromises democracy, so that the central question of constitutional theory must be whether and when that compromise is justified. . . .

So a complex issue of political morality—the validity of the majoritarian premise—is in fact at the heart of the long constitutional argument. The argument will remain confused until that issue is identified and addressed.[32]

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31. See our discussion of *Miron* and *Egan*, *infra* Parts IV.A–B, and our critique, *infra* Part IV.D.

32. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 18 (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

a. The Majoritarian Premise

Ronald Dworkin rejects the majoritarian premise and emphasizes that democracy and equality are "aspects of the same ideal, [and] not, as is often supposed, rivals."[33] According to Dworkin, the "main reason" that most people want decisions about rights to be made by legislators stems from their view that democracy is compromised by judicial review.[34] From this perspective, "[t]he reason [for legislative decision making] is one of fairness. Democracy supposes equality of political power, and if genuine political decisions are taken from the legislature and given to courts, then the political power of individual citizens, who elect legislators but not judges, is weakened, which is unfair."[35]

Dworkin notes that "if *all* political power were transferred to judges, democracy and equality of political power would be destroyed."[36] He emphasizes, however, that we are not talking about all political decisions, only political decisions relating to rights. He continues:

> It is no doubt true, as a very general description, that in a democracy power is in the hands of the people. But it is all too plain that no democracy provides genuine equality of political power. Many citizens are for one reason or another disenfranchised entirely. . . .

33. DWORKIN, FREEDOM'S LAW, *supra* note 32, at 29. Dworkin's most extensive discussion of the issue is in A MATTER OF PRINCIPLE 24–28 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE]. In A MATTER OF PRINCIPLE, Dworkin discusses his argument that judges can and should make political judgments, including political judgments about rights, without lessening the public's respect for the law. DWORKIN, A MATTER OF PRINCIPLE, *supra*, at 25–26. This will be possible if lawyers, judges, and all citizens embrace the idea that judicial decisions about rights "are consistent with democracy and recommended by an attractive conception of the rule of law." DWORKIN, A MATTER OF PRINCIPLE, *supra*, at 26. As an example, he notes that the "Warren Court achieved almost miraculous compliance with extremely unpopular decisions when popular understanding of the Court's role still insisted on historical rather than political interpretation of the Constitution. . . . Popular opinion, in this case, has followed the Court." DWORKIN, A MATTER OF PRINCIPLE, *supra*, at 26.

34. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 33, at 26–27.

35. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 33, at 27.

36. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 33, at 27.

> . . . If courts take the protection of individual rights as their special responsibility, then minorities will gain in political power to the extent that access to the courts is in fact available to them, and to the extent to which the courts' decisions about their rights are in fact sound. The gain to minorities, under these conditions, would be greatest under a system of judicial review of legislative decisions . . . [T]here is no reason to think, in the abstract, that the transfer of decisions about rights from the legislatures to courts will retard the democratic ideal of equality of political power. It may well advance that ideal.[37]

John Ely, in his acclaimed work *Democracy and Distrust*, argues that majoritarian neglect compels a rights conception of democracy.[38] As the Supreme Court of Canada has noted, there are "groups in society to whose needs and wishes elected officials have no apparent interest in attending."[39]

To achieve an effective democracy, there must be an overriding respect for equality and human dignity. "[P]olitical authority will, at some point, be exercised oppressively; that is, it will be exercised to impose very serious burdens on groups of people when there is no rational justification for doing so."[40]

Given the pervasiveness of discrimination, an attitude of judicial deference will undermine democratic values. As Martha Jackman suggests:

> [I]f the *Charter* is to fulfill its initial promise—not only to protect individual rights, but to promote a more truly democratic society—the courts must be more attuned to the *Charter*'s democracy-related objectives. In other words, government decisions which violate individual rights should not automatically be assumed to be legitimate and defensible in democratic terms. At the same time, individual rights should not be perceived simply as barriers surrounding individuals,

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37. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 33, at 27–28.
38. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
39. Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143, 152 (quoting ELY, *supra* note 38, at 151).
40. John D. Whyte, *On Not Standing for Notwithstanding*, 28 ALTA. L. REV. 347, 355 (1990).

> protecting them from government and from community, but rather as affirmative mechanisms for ensuring that individuals can participate fully in Canadian society and its democratic institutions.[41]

In his most recent book, *Freedom's Law*, Dworkin summarizes his conclusion as follows:

> The constitutional conception of democracy, in short, takes the following attitude to majoritarian government. Democracy means government subject to conditions—we might call these "democratic" conditions—of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better.[42]

b. The Charter's Promise of Democracy and Equality

Of course, it might be argued that there is no need to consider American philosophy of law, since Canadian equality rights have quite a different history. The *Charter's* equality guarantee recognizes the connection between democracy and equality in our political morality. However, our rights jurisprudence still falls prey to courts' feelings of insecurity and illegitimacy, founded in deference to "democracy."[43]

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41. Martha Jackman, *Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter*, 34 OSGOODE HALL L.J. 661, 663 (1996); *see also* Morton J. Horwitz, *Foreword: the Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 63 (1993) ("Democracy and judicial review are not concepts diametrically opposed. Judicial review can potentially enhance democracy. The supposed conflict between majority rule and minority rights can be reconciled by a greater social inclusiveness and empowerment of minorities. This is an extension of democratic values. Some degree of political inclusiveness is a necessary precondition for a healthy and well-functioning democracy.").

42. DWORKIN, FREEDOM'S LAW, *supra* note 32, at 17.

43. The insecurity may also be "borrowed" from U.S. jurisprudence. Canada should not emulate the American deferential attitude towards the government for at least two

Canadian judges and academics have recognized from time to time that democracy and equality are aspects of the same ideal.[44] As the late Honorable Justice Sopinka said in his last address:

> Courts do more than resolve disputes. They help to protect the constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, and the preservation of the democratic process.... [The halls of Parliament] are filled with people who would love to be able to determine the outcome of legal disputes. Indeed, such people, especially if they represent a majority, would prefer that all disputes be political, rather than legal, because politics lets the powerful win. Only the law allows the weak to win against the strong.[45]

Several other decisions have emphasized the idea that courts must be active and vigilant in the protection of minority rights.[46] However,

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reasons. Firstly, we operate within a constitutional democracy, or "responsible government," rather than the U.S. model of "separation of powers." Secondly, our section 15 is more potent than the Equal Protection Clause of the American Fourteenth Amendment, which is restricted to purposeful discrimination alone, and our equality jurisprudence since *Andrews* has avoided the "levels of scrutiny" assessment that undermines the fluidity of rights. *Compare* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), *and* Personnel Adm'r. v. Feeney, 442 U.S. 256 (1979), *with* Canada (Canadian Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892. *See also* Lepofsky, *supra* note 7, at 321 (discussing Canadian judicial deference to Parliament). Paradoxically, even one of the most adamant proponents of legislative deference, Justice Scalia, said, "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law." James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991).

44. *See* Jackman, *supra* note 41, at 663; *see also* Martha Jackman, *Rights and Participation: The Use of the Charter to Supervise the Regulatory Process*, 4 CAN. J. ADMIN. L. & PRAC. 23 (1990).

45. Justice John Sopinka, Address at the Ukrainian-Canadian Conference on Judicial Independence and Accountability, (October 2 1997). An excerpt appeared in John Sopinka, *Sopinka: On Telling the Majority It Is Wrong*, THE [TORONTO] GLOBE AND MAIL, Nov. 28, 1997, at A21 [hereinafter *Sopinka's Address*]. The point is echoed by *Miron v. Trudel* [1995] 2 S.C.R. 418, 495 (McLachlan, J.) ("In the course of the past century, free and democratic societies throughout the world have recognized that the elimination of such discrimination is essential, not only to achieving the kind of society to which we aspire, but to democracy itself."). *See also*, Hill v. Church of Scientology [1995] 2 S.C.R. 1130, 1175 (Cory, J.)("Democracy has always recognized and cherished the fundamental importance of the individual.").

46. *See* Beauregard v. Canada [1986] 2 S.C.R. 56, 72 (Dickson, C.J.); Edward Books & Art Ltd. v. R. (*sub nom.* R. v. Videoflicks Ltd.) [1986] 2 S.C.R. 713, 794–95 (La

we fear that the courts' willingness to be aggressively proactive is proportionate to the perceived popularity of any particular decision. As the decisions discussed in this paper illustrate, the Court often defers to legislative decisions rather than challenge public opinion or long-standing social policy. As Professor Hogg reminds us, the protection of judicial review is vital in a constitutional democracy: "If the state could count on the courts to ratify all legislative and executive actions, even if unauthorized by law, the individual would have no protection against tyranny."[47]

c. The Democratic Origins of the Charter

In response to increasing judicial and popular misconceptions about the relationship of democracy and equality, Supreme Court Justices have occasionally reminded us of the history of the *Charter*.[48] In 1985, Justice Lamer (as he then was) wrote:

Forest, J.); Operation Dismantle Inc. v. R. [1985] 1 S.C.R. 441, 472 (Wilson, J., concurring).

47. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 168 (3d ed. 1992).

48. In *Sopinka's Address, supra* note 45, at 10, he constructed an interesting analogy to explain judicial activism and its democratic origins:

> A Ulysses metaphor helps us to understand the relationship between the judiciary and the legislature in a system that constitutionalizes rights. Legislature is like Ulysses. The Sirens are short-term expediency or the passion of the moment or a quick and effective but brutal solution to a complex social problem. By enacting a *Charter*, the legislature, like Ulysses, tells the courts, like his men: "In future, in response to unusual circumstances, we may become irrational and irresponsible. We may not pay sufficient attention to what we are doing. We will pass laws that do harm to society or to individuals in society. And we will do so without any proper justification. It will seem to us to be the right thing to do–it may even seem unavoidable. But now, in this moment of calm reflection, we order you to strike down these laws when they come before you. At the time you do this, we will be angry with you. We will thrash about, and yell at you for daring to question our orders–our laws. But we want you, when this happens, to ignore our pleas and the threat of our displeasure. We want you to be independent and to do what is right–that is, to be faithful to this first and most important command."

Douglas Elliott makes a similar point in his paper, Sexual Orientation and the Charter: Canada at the Crossroads, Presented to the Canadian Bar Association National Conference (Ottawa, August 26, 1997): "[The legislature] wanted the courts to act as watchdogs, to curb the impulse to pander to popular prejudice by restricting the rights of unpopular minorities."

> It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.[49]

Years later, in a speech to the Empire Club, Chief Justice Lamer was even more aggressive in articulating this view and added:

> As for the suggestion that judges intrude into the legislative sphere, the truth is that many of the toughest issues we have had to deal with have been left to us by the democratic process. The legislature can duck them. We can't. Think of abortion, euthanasia, same-sex benefits to name a few. Our job is to decide the cases properly before us to the best of our abilities. We can't say we are too busy with other things or that the issue is too politically sensitive to set up a royal commission. We do our duty and decide.[50]

d. The Democracy Argument Exposed

The preceding discussion leaves no doubt that the role of the judiciary in reviewing legislative decisions is crucial to equality and constitutional democracy. We have argued that equality is required to preserve the essential meaning of democracy. Morton Horwitz suggests that hostility to change and a desire for neutrality are

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49. British Columbia Motor Vehicle Act Reference [1985] 2 S.C.R. 486, 497; *see also* John D. Whyte, *Charter* Rights Without Remedies, Paper presented to the Canadian Bar Association—Ontario, 1997, Institute of Continuing Legal Education, Lesbian and Gay Issues and Rights Program (January 31, 1997) at 9; William Black & Lynn Smith, *The Equality Rights*, *in* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 14-40, (Gérald A. Beaudois & Errol Mendes eds., 3d ed. 1996).

50. Chief Justice Antonio Lamer, Address to the Empire Club of Canada (April 1995). This was quoted with approval by Justice Epstein in M. v. H. [1996] 132 D.L.R. (4th) 538, 564 (Epstein, J.), *aff'd* [1996] 142 D.L.R. (4th) 1.

components of deference; these correlate with a substantively conservative approach to constitutional law.[51]

> Fear of change manifests itself in content neutrality as a reaction to "subjectivity" and "discretion." In turn, content neutrality reinforces resistance to change by creating reified and abstract conceptions that are out of touch with life. As a consequence, the legitimating promise of content neutrality is revealed to be misleading.[52]

At a minimum, the "democracy" arguments against judicial activism should not be raised with regard to equality. Justice Abella, whose comments on human rights issues continue to be fresh and substantive, makes this point nicely: "The *Charter* is about human rights, not about judicial versus legislative roles, nor about judicial activism versus restraint, nor about the politicization of the judiciary."[53] Both governments and courts have heavy responsibilities under the *Charter.*

2. Equality and Tradition

Along with "democracy," legal and religious "traditions" are used to justify discrimination. This approach was openly successful[54] in 1995 when four out of nine justices of the Court held that they would not question traditions related to "fundamental values" until there is a dramatic and clear change in public opinion.[55]

This reliance on tradition as a bar to equality is itself a long-standing tradition.[56] In the Supreme Court of Canada's decision to

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51. *See* Horwitz, *supra* note 41, at 100.
52. Horwitz, *supra* note 41, at 99–100.
53. Rosalie Silberman Abella, *Public Policy and the Judicial Role, in* THE CANADIAN AND AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 167, 177 (Marion C. McKenna ed., 1993).
54. See, for example, the minority section 15 judgments in *Miron v. Trudel* [1995] 2 S.C.R. 418 and *Egan v. Canada* [1995] 2 S.C.R. 513, discussed *infra* Parts IV.A–B.
55. *See Egan* [1995] 2 S.C.R. at 464 (Gonthier, J., dissenting) ("Barring evidence of a change in these values by a clear consensus that there should be a constitutional constraint on the powers of the state to legislate in relation to marriage, the matter must remain within the scope of legitimate legislative action.").
56. *See, e.g.*, Symes v. Canada (M.N.R.) [1993] 4 S.C.R. 695; Rodriguez v. British Columbia (Att'y Gen.) [1993] 3 S.C.R. 519; *Egan* [1995] 2 S.C.R. at 516 (Sopinka, J., concurring); R. v. Hess [1990] 2 S.C.R. 906, 908 (McLachlan, J., dissenting); McKinney v. University of Guelph [1990] 3 S.C.R. 229.

deny women status as "persons" in *Edwards v. Canada (Att'y Gen.)*,[57] the Court was guided by the absence of clear legislative intent to signal a departure from the common law.[58] Accordingly, women were found ineligible to be called to the Senate. In contrast, the Privy Council, which granted the appeal, noted that women had historically been excluded from public office, but stated:

> The fact that no woman had served or has claimed to serve [in public office] is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive.[59]

Tradition, and hence traditional values, are contrary to the notion of substantive equality. A tradition-based focus, then, completely disregards the mandate of section 15(1), the "unremitting protection" of minorities who have been *traditionally* disadvantaged at the hands of the majority.[60] As Douglas Elliott wrote:

> [I]t has been traditional values . . . which have left us our rich legacy of discrimination. Tradition was used to defend slavery. Tradition was used to justify denying African Americans citizenship rights. Tradition was used to justify miscegenation prohibitions. Tradition was used to justify denying equality for women. Discrimination is traditional. To say a particular discriminatory law reflects tradition is to state the obvious and forgo [sic] the analysis.[61]

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57. Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867 [1928] S.C.R. 276.
58. Reference as to the Meaning of the Word "Persons" [1928] S.C.R. at 282–83 (noting that "[an] outstanding fact[] or circumstance[] of importance bearing upon the present reference [was that] . . . by the common law of England (as also, speaking generally, by the civil and canon law . . .) women were under a legal incapacity to hold public office").
59. Edwards v. Canada (Att'y Gen.) [1930] A.C. 124, 134.
60. Hunter v. Southam Inc. [1984] 2 S.C.R. 145.
61. Elliott, *supra* note 48, at 27–28.

3. Equality and Biology

"Natural biological differences" are another persistent rationalization for discrimination. Often accompanied by appeals to tradition and morality, biological arguments long prevented access by women and people of colour to the franchise, professions, and well-paid employment. When the United States Supreme Court refused to grant Myra Bradwell a license to practice law, Justices Bradley, Swayne, and Field explicitly rejected her arguments under the Fourteenth Amendment, writing:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman .... The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[62]

Far from being matters of historical interest, "biological realities" are still frequently used as outright justifications for inequality. The determinism of a biological approach circumvents legal and moral arguments; it precludes change. By accepting a "natural" division between women and men, "we naturalize history, we assume that men and women have always existed and will always exist. Not only do we naturalize history, but also consequently we naturalize the social phenomena which express our oppression, making change impossible."[63]

Substantive equality demands a recognition that so-called "essential biological differences," like sex and race, are socially constructed, not "natural," and are historically and culturally specific, not universal. The discourses that create "sex" are a major structural support for patriarchy and heterosexism; those that create "race" buttress

62. Bradwell v. Illinois, 83 U.S. 130, 141 (1872)(Bradley, J., concurring).

63. Monique Wittig, *One is Not Born a Woman, in* FEMINIST FRAMEWORKS 148, 149 (Alison Jaggar & Paula Rothenberg eds., 2d ed. 1984).

racism.[64] Accordingly, the language of "biological realities" is not descriptive, but prescriptive; it enforces relations of inequality.

4. Equality and Morality

Justifications for discrimination have frequently been grounded in religious rhetoric, thinly disguised as "universal standards of morality." In 1995, Supreme Court of Canada Justices cited a 19th century case to describe the "purity" of the institution of marriage, and to justify its failure to recognize the interdependency of unmarried cohabitees.[65] "[R]espect for women, and a sense of decorum" were used to explain the failure to recognize women as "persons."[66] Clearly, it undermines the interests of substantive equality for the Court to dictate standards of morality premised on disparaging particular groups.[67] As the Court itself has recognized, "to impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."[68]

History and sectarian views, then, provide no answers in and of themselves, except perhaps as proof of the need to ameliorate the situation of disadvantaged groups. The underlying morality that should guide the Court's discussion of equality issues is found in the

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64. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE (1990); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., Vintage Books 1980) (1976); CHRIS WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY (1987); Jayne Chong-Soon Lee, *Navigating the Topology of Race, in* CRITICAL RACE THEORY (Kimberle Crenshaw et al. eds., 1995); Wittig, *supra* note 63, at 148.

65. Miron v. Trudel [1995] 2 S.C.R. 418, 448 (citing Maynard v. Hill, 125 U.S. 190, 211 (1888)).

66. In *Edwards*, the Court states:

> [B]y the common law of England . . . women were under a legal incapacity to hold public office, referable to the fact . . . that in this country in modern times, chiefly out of respect to women, and a sense of decorum, and not for their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.

Edwards v. Canada (Att'y Gen.) [1928] S.C.R. 276, 283 (citing Chorlton v. Lings, L.R. 4 C.P. 374 at 392).

67. *See* Richard Nordahl, *Ronald Dworkin and the Defence of Homosexual Rights* 8:1 CAN. J. LAW & JUR. 19, 24 (1995).

68. R. v. Butler [1992] 1 S.C.R. 452, 492.

Charter itself.[69] As Laurence Tribe writes, "[t]he Constitution serves both as a blueprint for government operations and as an authoritative statement of the nation's most important and enduring values."[70]

C. *Conclusion: The Importance of Essential Concepts*

We hope that this discussion of the essential concepts of equality will illuminate our section 15 case commentaries. It is only by returning to such basic principles that we will be able to move the law towards realization of the *Charter's* promises. The more we stray from the basics, the more we risk becoming caught up in the grips of mechanical jurisprudence. Professor Horwitz provides the following criticism of the American jurisprudence:

> There is no recognition that the world is rapidly changing and that the Court's understanding of the role of law may be growing dangerously out of touch with American society. Instead, most of this Court's opinions are surrounded by a thick undergrowth of technicality. With three or four "prong" tests everywhere and for everything; with an almost medieval earnestness about classification and categorization; with a theological attachment to the determinate power of various "levels of scrutiny"; with amazingly fine distinctions that produce multiple opinions designated in Parts, subparts, and sub-sub-parts, this is a Court whose Justices appear caught in the throes of various methodological obsessions.[71]

While this criticism may not be as applicable to the Supreme Court of Canada, the reality is that substantive equality will never be achieved unless we re-examine the concepts behind our tests and subtests. The "fundamental falseness and perversity of the similarly situate[d] test"[72] continues to jeopardize our equality jurisprudence.

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69. *See Butler* [1992] 1 S.C.R. at 492 (citing D. Dyzenhaus, *Obscenity and the Charter: Autonomy and Equality* (1991), 1 C.R. (4th) at 367 ("Moral disapprobation is recognized as an appropriate response when it has its basis in the *Charter* values.")).

70. LAURENCE TRIBE, CONSTITUTIONAL CHOICES 26 (1985).

71. Horwitz, *supra* note 41, at 98–99.

72. GWEN BRODSKY AND SHELAGH DAY, CANADIAN CHARTER EQUALITY RIGHTS FOR WOMEN: ONE STEP FORWARD OR TWO STEPS BACK? 160 (1989).

> [T]he test does not help the court get at the truth. It does not encourage the court to ask whether there is a problem of long standing disadvantage or prejudice inherent in the circumstances. It does not lead the court to explore the full social dimensions of the case, or even to grapple fully with the facts. Rather, it encourages the court to concentrate on superficial comparisons with other classes.[73]

As the discussions of equality decisions in the balance of this Article indicate, misplaced notions of equality, democracy, deference, morality, biology, history, context, and relevance have threatened to choke the life out of section 15. We who study, argue, and believe in equality must fashion our own ways to intervene.

II. Defining Discrimination

The language of the *Charter* was introduced to ensure that the courts would move away from the merely formal approach to equality that had been applied under the *Canadian Bill of Rights*. Despite the early promise of *Andrews* and *Turpin*, subsequent decisions failed to consistently apply a substantive equality analysis. The 1995 "equality" trilogy of *Egan*, *Miron*, and *Thibaudeau* brought this long-standing problem to the forefront, as misplaced notions of equality, democracy, deference, morality, biology, history, context, and relevance threatened to gut the equality guarantee of meaning. In order to understand the persistence and problems of a formal approach to equality in the section 15 jurisprudence, we return to the very beginning, back to the reason section 15 was included in the *Charter*.

A. Bill of Rights

The Canadian *Bill of Rights* was introduced in 1960 to protect civil liberties against infringement by the federal government. Its equality provision states:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without

73. Brodsky & Day, *supra* note 72, at 160–61.

> discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely . . .
>
> (b) the right of the individual to equality before the law and the protection of the law . . .[74]

The *Bill of Rights* was essentially a failure.[75] Many cases adopted a "frozen rights" approach, whereby only rights already in existence when the legislation was introduced were covered by the *Bill.*[76] Further, the section was held only to protect "equality before the law," that is, equal process of law.[77] The Supreme Court of Canada held that legislation "[d]ealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective."[78] This meant that citizens bore the burden of proving how their rights were adversely affected and that only minimal judicial scrutiny was required.[79] The conclusion was that courts should be exceedingly deferential to the will of Parliament in assessing the compatibility of federal laws with the *Bill of Rights.*[80]

Most important, the *Bill's* definition of discrimination was ineffective, as illustrated by the decision in *Bliss v. Attorney General.*[81] In that case, a pregnant worker challenged her exclusion from unemployment benefits as a violation of her right to equality before the law. The court held that any inequality in the plaintiff's case had been created by nature, not by legislation.[82] There was differential treatment,

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74. 1990, S.C. 1960, c. 44.
75. *See* C. Lynn Smith, *Judicial Interpretation of Equality Rights Under the Canadian Charter of Rights and Freedoms: Some Clear and Present Dangers* [1988] 23 U.B.C. L. REV. 65, 71; Black & Smith, *supra* note 49, at 14–15; Lepofsky, *Rollercoaster, supra* note 7, at 321.
76. *See* R. v. Burnshine [1975] 1 S.C.R. 693; DALE GIBSON, THE LAW OF THE CHARTER, EQUALITY RIGHTS 24 (1990) [hereinafter LAW OF THE CHARTER].
77. Attorney Gen. v. Lavell [1973] 38 D.L.R. (3d) 481 (S.C.C.).
78. Bliss v. Attorney Gen. [1978] 92 D.L.R. (3d) 417, 425 (S.C.C.)(citing Prata v. Minister of Manpower and Immigration [1975] 52 DLR (3d) 383, at 387 (SCC)).
79. *See Prata* [1975] 52 D.L.R. (3d) at 387. In *Burnshine,* Justice Martland said, "[I]n order to succeed . . . it would be necessary for the respondent, at least, *to satisfy this Court* that . . . Parliament was not seeking to achieve a valid federal objective." *Burnshine* [1975] 1 S.C.R. at 694–95 (emphasis added).
80. *See* LAW OF THE CHARTER, *supra* note 76, at 25; Lepofsky, *Rollercoaster, supra* note 7, at 321.
81. *Bliss* [1978] 92 D.L.R. (3d) at 417 (S.C.C.) *overruled by* Brooks v. Canada Safeway Ltd. [1989] 4 W.W.R. 198, 212 (S.C.C.).
82. *See Bliss* [1978] 92 D.L.R. (3d) at 422.

not on the basis of sex, but on the basis of pregnancy.[83] Since all pregnant persons were treated alike, there was no discrimination.[84]

Bliss sparked outrage among feminists and libertarians, who began to petition for a constitutionally entrenched charter of rights with stronger equality guarantees. At the same time, then Prime Minister Trudeau decided to proceed with a charter of rights and freedoms. Feminists were able to ensure that the *Charter* guaranteed "the equal *benefit* of the law," not just equal process of law, and moreover that the section was entitled "Equality Rights," not "Non-Discrimination Rights," reflecting the need for a broad and purposive interpretation.[85] In fact, section 15 was written almost completely in accordance with the recommendations of the Canadian Advisory Council on the Status of Women (CACSW).[86]

B. The Introduction of Section 15 of the Charter

The *Charter's* equality guarantees were expressly designed to overcome the difficulties that had plagued the *Canadian Bill of Rights*.[87] Section 15 of the *Charter* was adopted as follows:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic

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83. *See Bliss* [1978] 92 D.L.R. (3d) at 422 (citing Bliss v. Attorney Gen. of Can. [1978] 77 D.L.R. (3d) 609, 613 (F.L.A.) (Pratte, J.).

84. *See Bliss* [1978] 92 D.L.R. (3d) at 422.

85. *See generally,* Lelsie A. Pal & F. L. Morton, Bliss v. Attorney General of Canada: *From Legal Defeat to Political Victory,* 24 OSGOODE HALL L.J. 141 (1986); *see also,* Chaviva Housek, *Women and The Constitutional Process, in* AND NO ONE CHEERED 280, 283 (Keith Banting & Richard Simeon eds., 1983); PENNY KOME, THE TAKING OF TWENTY-EIGHT: WOMEN CHALLENGE THE CONSTITUTION 34–37 (1983).

86. *See* Canadian Advisory Council on the Status of Women (CACSW), *Women, Human Rights and the Constitution: Submission to the Special Joint Committee on the Constitution* (November 18, 1980) at 4; Canada, Special Joint Committee of the Senate of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence,* vol. 9 at 59 (November 20, 1980). The section 15 wording recommended by the CACSW brief was: "(1) Every person shall have equal rights in law including the right to equality before the laws and to the equal protection and benefit of the law." CACSW, *supra,* at 13.

87. *See* Smith, *supra* note 75, at 74; *see also* Black & Smith, *supra* note 49, at 14–15.

> origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[88]

In accordance with section 32(2) of the *Charter*, section 15 did not come into force until April, 1985, in order to give governments three years to bring statutes in line with the equality guarantees.[89]

Like all rights and freedoms under the *Charter*, section 15 is subject to section 1, which states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[90]

C. Early Approaches to Section 15(1)

When section 15 was introduced, commentators and courts advanced three approaches to interpreting the meaning of equality.[91] The first, described by Canadian constitutional scholar Peter Hogg, would

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88. *Charter*, *supra* note 2. This paper does not address section 15(2) of the *Charter*. Further, many important equality decisions under section 15(l) are not discussed, as we felt that if the Article were any longer, it would be a book. Generally, the courts are accessible to the most privileged groups, and we recognize that the cases discussed do not reflect the prevalence and variety of systemic inequality in Canada, particularly the discrimination against the poor and people of colour.

89. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 32(2). *See* Pal & Morton, *supra* note 85, at 157–58 on the "legislative audits."

90. *Charter*, *supra* note 2. The proper approach to section 1 was articulated in R. v. Oakes [1986] 26 D.L.R. (4th) 200, 201 (stating that a party seeking to uphold a limit on a right or freedom guaranteed by the *Charter* must show, on a balance of probabilities, that the objective of limiting the right is pressing and substantial, and that the means chosen are reasonable and demonstrably justified. The measures adopted must be rationally connected to the objective, impair the right as little as possible, and there must be proportionality between the effects of limiting the right and the objective).

91. *See* Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143, 178; *see also* Black & Smith, *supra* note 49, at 14–15.

have treated every distinction drawn by law as discrimination under section 15.[92] The distinction would then be considered under section 1 of the *Charter*. Professor Hogg wrote:

> I conclude that section 15 should be interpreted as providing for the universal application of every law. When a law draws a distinction between individuals, on any ground, that distinction is sufficient to constitute a breach of section 15, and to move the constitutional issue to section 1. The test of validity is that stipulated by section 1, namely, whether the law comes within the phrase 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[93]

According to this view, section 15 was expressed in unqualified terms, so the word "discrimination" should not be read as introducing a qualification in the section itself. Instead, section 1 would supply the standard of justification for any abridgment of the right.

The second approach proposed was that there should be no discrimination where those who are similarly situated are similarly treated.[94] This is the essence of formal equality: "[L]egislative distinctions must be relevant to the purposes of the law. . . . [E]quality is violated where a law distinguishes between two classes that are similarly situated with respect to the purpose of the law. In this view, formal equality is a demand for legislative rationality (if not reasonableness)."[95]

A more sophisticated articulation of the formal equality approach was applied by Justice McLachlin for the British Columbia Court of Appeal in *Andrews v. Law Society of British Columbia*.[96] She considered the reasonableness and fairness of the impugned legislation under section 15(1), examining both its purposes and its effect on the person

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92. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 800–01 (2d ed. 1985).
93. HOGG, *supra* note 92, at 800–01 (citations omitted).
94. *See* Marc Gold, Comment, Andrews v. Law Society of British Columbia, 34 MCGILL L.J. 1063 (1989).
95. Gold, *supra* note 94, at 1065–66.
96. Andrews v. Law Soc'y of B.C. [1986] 27 D.L.R. (4th) 600 [hereinafter *Andrews* (B.C.C.A.)]; *see also Re* McDonald and the Queen [1985] 51 O.R. (2d) 745 (C.A.) (applying the same test as *Andrews* (B.C.C.A)); Century 21 Ramos Realty Inc. v. The Queen [1987] 58 O.R. (2d) 737 (C.A.); R. v. R.L. [1986] 14 O.A.C. 318 (C.A.); Bregman v. A.G. [1986] 18 O.A.C. 82 (C.A.).

concerned. Justice McLachlin framed the issue as "[w]hether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair."[97]

This approach leaves little room for the application of section 1, although Justice McLachlin said that the latter would still apply to permit discrimination in extraordinary circumstances, in times of emergency, war, or other crises.[98]

A third approach, the "enumerated or analogous grounds" method, was designed to prevent discrimination based on the grounds enumerated under section 15 and those analogous to them.[99] The following excerpt from *Smith, Kline & French* illustrates the approach:

> As far as the text of section 15 itself is concerned, one may look to whether or not there is "discrimination," in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others.[100]

This approach would limit discrimination under the *Charter* to those distinctions which involve prejudice or disadvantage. These three approaches were outlined and discussed in the first Supreme Court of Canada decision on the meaning of section 15, *Andrews v. Law Society of British Columbia.*

D. Andrews v. Law Society of British Columbia[101]

The first case under section 15 of the *Charter* was a victory for a white, male professional, and was, ironically, a great victory for disad-

97. *Andrews* (B.C.C.A.) [1986] 27 D.L.R. at 610.
98. *See Andrews* (B.C.C.A.) [1986] 27 D.L.R. at 610.
99. Smith, Kline & French Lab. v. Canada [1987] 2 F.C. 359.
100. *Smith* [1987] 2 F.C. at 367–69.
101. *Andrews* [1989] 1 S.C.R. at 143.

vantaged minorities as well, due to its articulation of the concept of equality. Andrews was a British citizen, residing in British Columbia, whose application for a lawyer's practicing certificate was denied on the grounds that he was not a Canadian citizen, as required under the *Barristers and Solicitors Act.* He was successful under section 15 of the *Charter*; the Supreme Court of Canada held that the impugned provision discriminated against non-citizens.

1. The Meaning of Equality

Justice McIntyre, speaking for the majority on section 15,[102] rejected the Hogg approach, because it went directly from finding a distinction to a determination of its validity under section 1, denying any role for section 15(l).[103] Justice McIntyre also criticized the approach adopted by Justice McLachlin, noting that defining discrimination under section 15(l) as an unjustifiable or unreasonable distinction would leave virtually no role for section 1.[104]

The Court held that the third or "enumerated and analogous grounds" approach most closely accorded with the purposes of section 15.[105] However, it was not enough to focus only on the alleged ground of discrimination and decide whether or not it was an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant also had to be considered.[106]

Equality is an elusive concept that may only be discerned by a comparison with the condition of others in the social and political setting in which the question arises:[107]

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102. Justices Dickson, Lamer, Wilson, and L'Heureux-Dubé concurred with Justice McIntyre as to the way in which section 15(1) of the *Charter* should be interpreted and applied and the way in which section 15(1) and section 1 of the *Charter* interact. Justice La Forest stated that he did not need to enter into an extensive examination of the law regarding the meaning of section 15(1) because, insofar as it was relevant, he was in substantial agreement with the views of Justice McIntyre. *Andrews* [1989] 1 S.C.R. at 193. He did add that he restricted "discrimination [in] the sense in which my colleague has defined it, *i.e.*, on the basis of 'irrelevant personal differences' such as those listed in section 15 and, traditionally, in human rights legislation." *Andrews* [1989] 1 S.C.R. at 193. Note also that Justice Wilson wrote additional reasons that received the support of Justice Dickson and Justice L'Heureux-Dubé.

103. *Andrews* [1989] 1 S.C.R at 181.

104. *Andrews* [1989] 1 S.C.R at 181–88.

105. *Andrews* [1989] 1 S.C.R at 181.

106. *See Andrews* [1989] 1 S.C.R at 182.

107. *See Andrews* [1989] 1 S.C.R at 164.

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law—and in human affairs an approach is all that can be expected—*the main consideration must be the impact of the law on the individual or the group concerned.* Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.[108]

2. Similarly Situated Test Rejected

Justice McIntyre noted that the "similarly situated" test had been widely adopted and had been applied by Justice McLachlin at the Court of Appeal. Nevertheless, he characterized the test as a restatement of the principle of formal equality, and as such, "seriously deficient in that it excludes any consideration of the nature of the law."[109] He pointed out that a literal application of the similarly situated test would justify the Nuremberg laws of Adolf Hitler, the formalistic "separate but equal" doctrine of *Plessy v. Ferguson*,[110] and the results of *Bliss*.[111] He agreed with Justice Kerans in *Mahe v. Alberta (Government)*, who, in criticizing the similarly situated test, noted that:

> the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the

108. *Andrews* [1989] 1 S.C.R at 165.
109. *Andrews* [1989] 1 S.C.R at 166–68.
110. Plessy v. Ferguson, 163 U.S. 537 (1896).
111. Bliss v. Attorney Gen. [1978] 92 D.L.R. 3d 417, 425.

> distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.[112]

Justice McIntyre concluded that the similarly situated test could not be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*.[113] Instead, the content of the law, its purpose, and its impact both upon those to whom it applies, and whom it excludes, should be considered.[114] Such an approach would advance the purpose of section 15 by promoting "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[115]

3. Meaning of Discrimination

Section 15(1) was not meant to address all differential treatment. The section would only be engaged by those inequalities which lead to "discrimination."[116] Justice McIntyre defined "discrimination" as:

> a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of

112. Mahe v. Alberta (Government) [1989] 54 Alta. L.R. (2d) 212 at 244.
113. *See Andrews* [1989] 1 S.C.R. at 168.
114. *See Andrews* [1989] 1 S.C.R. at 168.
115. *Andrews* [1989] 1 S.C.R. at 168.
116. *See Andrews* [1989] 1 S.C.R. at 182.

> discrimination, while those based on an individual's merits and capacities will rarely be so classed.[117]

Both the enumerated grounds themselves and other possible grounds of discrimination recognized under section 15(1) were to be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights.[118] In addition, Justice McIntyre indicated that discrimination under the *Charter* would be of the same nature and in descriptive terms would fit the concept of discrimination developed under the human rights acts.[119]

Accordingly, the words "without discrimination" limited impermissible distinctions to those which involved prejudice or disadvantage within the context of the enumerated grounds and those analogous to them.[120] The central consideration was the effect of the impugned distinction or classification on the complainant.[121]

4. Relationship between Section 15 and Section 1

Discrimination was to be considered under section 15(1) and "any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under section 1."[122] These justificatory factors had to be analytically distinct, given the shifting burden of proof. The citizen would have to establish that his or her *Charter* right had been infringed and the state would have to justify the infringement.

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117. *Andrews* [1989] 1 S.C.R. at 174.
118. *Andrews* [1989] 1 S.C.R. at 175 (citing Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 155).
119. *Andrews* [1989] 1 S.C.R. at 176.
120. *Andrews* [1989] 1 S.C.R. at 181.
121. *See Andrews* [1989] 1 S.C.R. at 182.
122. *Andrews* [1989] 1 S.C.R. at 182.

5. Summary of Test

In short, Justice McIntyre established the following test for an analysis under section 15:

> (1) The rights claimant is not receiving equal treatment before and under the law or the law has a differential impact on him or her in the protection or benefit accorded by law, and
>
> (2) [T]he legislative impact of the law is discriminatory. This involves a finding with respect to the effect of the law on the complainant, within the context of the enumerated grounds and those analogous to them. Any justification takes place under section 1.[123]

6. Justice McIntyre's Application to the Facts of *Andrews*

Justice McIntyre concluded that section 42 of the *Barristers and Solicitors Act* had drawn a legislative distinction between citizens and non-citizens with respect to the practice of law by imposing a burden in the form of delays in licensing permanent residents who had acquired all or some of their legal training abroad.[124] A rule which barred an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes of individuals in the group, infringed section 15.[125]

Non-citizens, lawfully permanent residents of Canada, were a good example of a "discrete and insular minority" who came within the protection of section 15. Justice La Forest added that citizenship was a personal characteristic sharing many similarities with those listed in section 15.[126] Furthermore, citizenship was typically not within the control of the individual. It was, at least temporarily, a characteristic of personhood not alterable by conscious action and, in some cases, not alterable without unacceptable costs.[127]

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123. *Andrews* [1989] 1 S.C.R. at 182.
124. *See Andrews* [1989] 1 S.C.R. at 182–183.
125. *See Andrews* [1989] 1 S.C.R. at 183.
126. *Andrews* [1989] 1 S.C.R. at 195.
127. *See Andrews* [1989] 1 S.C.R. at 195.

Justice La Forest allowed that citizenship might, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives.[128] Nonetheless, it was, in general, irrelevant to the legitimate work of government in all but a limited number of areas.[129] Although granting benefits on the basis of citizenship might be acceptable in a free and democratic society, such legislation would require justification under section 1 because there was discrimination under section 15.[130]

7. Justice Wilson's "Group Disadvantage" Additional Reasons

Justice Wilson emphasized group disadvantage and found that the differential treatment imposed a burden.[131] A rule barring an entire class of persons from a form of employment solely because they were non-citizens violated the equality rights of the class; it discriminated on the basis of a personal characteristic. According to Justice Wilson, non-citizens were a "'discrete and insular minority,'"[132] who lacked political power and were "vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[133] They were "among 'those groups in society [to] whose needs and wishes elected officials have no apparent interest in attending.'"[134] Justice Wilson further stated that the determination of whether a group is a "discrete and insular minority" was to be made in the context, not of the challenged law, but in the context of the group's location in the larger social, political, and legal fabric of society.[135] She wrote that "[w]hile legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others."[136]

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128. *See Andrews* [1989] 1 S.C.R. at 196.
129. *See Andrews* [1989] 1 S.C.R. at 196.
130. *See Andrews* [1989] 1 S.C.R. at 197.
131. *See Andrews* [1989] 1 S.C.R. at 151 (Wilson, J., concurring).
132. *Andrews* [1989] 1 S.C.R. at 152 (Wilson, J., concurring)(quoting United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938)).
133. *Andrews* [1989] 1 S.C.R. at 152 (Wilson, J., concurring).
134. *Andrews* [1989] 1 S.C.R. at 152 (Wilson, J., concurring) (quoting ELY, *supra* note 38, at 151).
135. *Andrews* [1989] 1 S.C.R. at 152.
136. *Andrews* [1989] 1 S.C.R. at 152.

E. R. v. Turpin[137]

The issue in *R. v. Turpin,*[138] another section 15 case decided the same year, was the constitutionality of *Criminal Code* provisions which permitted accused persons in Alberta, but not in the rest of the country, to elect a bench trial rather than trial by jury on a murder charge. In a unanimous decision written by Justice Wilson, the Court concluded that there was no discrimination.[139]

The Court of Appeal below had applied a formal equality analysis,[140] finding that there were a class of individuals who were treated differently, even though they were similarly situated to accused persons charged with the same offences in the rest of Canada. However, the appeals court held that this difference in treatment was not discriminatory because the disadvantage was not "invidious," "unfair," or "irrational," there being many such variations in criminal procedure among the provinces.[141]

Justice Wilson rejected this approach:

> The argument that s[ection] 15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a violation would be novel and disturbing is not, in my respectful view, an acceptable approach to the interpretation of *Charter* provisions. Moreover, the Court of Appeal's test of whether a distinction is "unreasonable," "invidious," "unfair" or "irrational" imports limitations into s[ection] 15 which are not there. It is inconsistent with the proper approach to s[ection] 15 described by McIntyre J. in *Andrews.* The equality rights must be given their full content divorced from justificatory factors properly considered under s[ection] 1. Balancing legislative purposes against the effects of legislation within the rights sections themselves is fundamentally at odds with this Court's approach to the interpretation of *Charter* rights. . . . [T]he Ontario Court of

137. R. v. Turpin [1989] 1 S.C.R. 1296.
138. *Turpin* [1989] 1 S.C.R. 1296.
139. *Turpin* [1989] 1 S.C.R. at 1332–34.
140. R. v. Turpin [1987] 22 O.A.C. 261, 262–72, 36 C.C.C. (3d) 289, 296–304 (Ont. Ct. App.).
141. *Turpin* [1987] 22 O.A.C. at 270.

> Appeal's approach places an unfair burden on the *Charter* claimant to prove that a law is unreasonable and . . . it invites a less onerous balancing of the interests of the state against those who suffer violations of s[ection] 15 than would be allowed under s[ection] 1 of the *Charter*.[142]

1. A "Contextual" Approach to Discrimination

Justice Wilson concluded that the appellants had been denied at least one of the equality rights listed in section 15 of the *Charter*, but noted that differential treatment "without discrimination" was permitted under section 15.[143] This necessitated an inquiry as to whether there was differential treatment on the basis of an enumerated or analogous ground of discrimination. A determination that a group was subject to an analogous ground of discrimination was " 'not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society.' "[144] Without a contextualized approach, Justice Wilson warned that the section 15 analysis would become a mechanical and sterile categorization process conducted entirely within the four corners of the challenged legislation. This would likely "result in the same kind of circularity which characterized the similarly situated similarly treated test clearly rejected by this Court in *Andrews*."[145]

2. Result

In *Turpin*, there was no disadvantage that existed "independent of the particular legal distinction being challenged."[146] Different trial options for murder defendants in Alberta versus those in other provinces did not trigger section 15, because its purpose was to remedy or prevent discrimination against groups suffering social, political, and

142. *Turpin* [1989] 1 S.C.R. at 1328 (citations omitted).
143. *Turpin* [1989] 1 S.C.R. at 1330.
144. *Turpin* [1989] 1 S.C.R. at 1332 (quoting Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143, 152).
145. *Turpin* [1989] 1 S.C.R. at 1332.
146. *Turpin* [1989] 1 S.C.R. at 1332.

legal disadvantage in society. A search for discrimination markers such as stereotyping, historical disadvantage, or vulnerability to political and social prejudice would be fruitless since the comparison was between those accused of section 427 offences in the rest of Canada and those accused of the same offences in Alberta. To recognize the appellant's claims under section 15 of the Charter would " 'overshoot the actual purpose of the right or freedom in question.' "[147]

Justice Wilson noted that a person's province of residence or place of trial might, in some circumstances, constitute a personal characteristic of the individual or group for purposes of finding discrimination.[148] However, in this case, residents outside Alberta, charged with section 427 offences, did not constitute a disadvantaged group in Canadian society within the contemplation of section 15. There was no discrimination and thus no need to consider the provision under section 1.[149]

F. Commentary: Interpretations of Andrews *and* Turpin

1. Similarly Situated Test Explained

The similarly situated test had been the favoured analysis of American courts[150] as well as both trial and appeal courts in Canada.[151] However, it was generally accepted that *Andrews* and *Turpin* rejected

147. *Turpin* [1989] 1 S.C.R. at 1333 (quoting R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, 344).

148. *See Turpin* [1989] 1 S.C.R. at 1333.

149. *See* Turpin [1989] 1 S.C.R. at 1333.

150. For a discussion of the difficulties with the similarly situated test in American equality jurisprudence, see Wendy W. Williams, *The Equality Crisis: Some Reflections On Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982); Wendy W. Williams, *American Equality Jurisprudence, in* EQUALITY AND JUDICIAL NEUTRALITY 115 (Sheila L. Martin & Kathleen E. Mahoney eds., 1987); *see also* Rostker v. Goldberg, 453 U.S. 57 (1981); Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Reed v. Reed, 404 U.S. 71 (1971).

151. *See* Century 21 Ramos Realty Inc. v. The Queen [1987] 58 O.R. (2d) 737; R. v. Ertel [1987] 35 C.C.C. (3d) 398 (Ont. C.A.), *leave ref'd* [1987], 24 O.A.C. 320 (S.C.C.); Wilson v. British Columbia (Med. Serv. Comm.) [1988] 53 D.L.R. (4th) 171 (C.A.). For an extensive critical examination of the application of the "treat likes alike" definition of equality in Canadian courts, see BRODSKY & DAY, *supra* note 72, at 147–64.

the principle of formal equality and its "similarly situated test"[152] as "seriously deficient,"[153] and "not . . . a realistic test for a violation of equality rights."[154] Whether rejection of the formal equality test would actually assist in achieving equality was more controversial.[155]

Some critics suggested that the Court had misunderstood the similarly situated test and that there was still support for a formal equality analysis within Justice McIntyre's judgment.[156] Marc Gold commented:

> [T]he Court does not say that the principle of formal equality has no role to play in any case whatsoever, only that it would be wrong to attempt to resolve all issues "within such a fixed and limited formula." Second, notwithstanding the

152. *See* McKinney v. University of Guelph [1990] 3 S.C.R. 229, 234 (Dickson, C.J., La Forest & Gonthier, J.J.) ("The similarly situated test has not survived *Andrews.*"); *Turpin* [1989] 1 S.C.R. at 1332 (Wilson, J.) ("[T]he similarly situated similarly treated test [was] clearly rejected by this Court in *Andrews.*").

153. Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143, 166.

154. *Andrews* [1989] 1 S.C.R. at 167.

155. *See* Anne F. Bayefsky, *A Case Comment on the First Three Equality Rights Cases Under the Canadian Charter of Rights and Freedoms: Andrews, Workers' Compensation Reference, and Turpin*, 1 SUP. CT. L. REV. 503 (1990); William Black and Lynn Smith, Note, Andrews v. Law Society of British Columbia, 68 CAN. BAR. REV. 591 (1989)[hereinafter Black & Smith, *Note*]. There were some commentators who applauded the Court's approach. *See* Dale Gibson, *Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing*, 29 ALTA. L.REV. 772 (1991) [hereinafter *Too Much Ado*]; Dale Gibson, *Equality for Some*, 40 U. NEW BRUNSWICK L.J. 2 (1991)[hereinafter *Equality for Some*]; Gold, *supra* note 94. *See also, e.g.*, Diana Majury, *Equality and Discrimination According to the Supreme Court of Canada*, 4 CAN. J. WOMEN & L. 407 (1990–91); Colleen Sheppard, *Recognition of the Disadvantaging of Women: The Promise of* Andrews v. Law Society of British Columbia, 35 MCGILL L.J. 206 (1990).

156. *See* Catholic Children's Aid Soc'y v. S.(T.) [1989] 69 O.R. (2d) 189, 205–06 (Tarnapolksy, J.); LAW OF THE CHARTER, *supra* note 76, at 73; Bayefsky, *supra* note 155, at 505–07; Black & Smith, *Note*, *supra* note 155, at 599–601; *Too Much Ado*, *supra* note 155; *Equality for Some*, *supra* note 155; Gold, *supra* note 94; *see also* Lisa Philipps and Margot Young, *Sex, Tax and the Charter: A Review of* Thibaudeau v. Canada, 2 REV. OF CONST. STUD. 221, 262 (1995) (suggesting that equality is necessarily comparative and that the similarly situated test was never rejected, but was rather shifted in form to consider the impact of the impugned provision on the contextualized individual).

> harshness of its criticisms, the Court does not reject the underlying premise of this principle.[157]

Gold outlined two conceptions of formal equality. The first examines categories as set out in the law itself and asks only if those identified by law as "similarly situated" are treated similarly.[158] For example, legislation defines "spouse" as two persons of the opposite sex who cohabit. All those of the opposite sex who cohabit are treated similarly. Thus, according to Gold's first test, there is no discrimination if same-sex cohabitors are treated differently.

The second test forms the basis of equal protection jurisprudence in the United States and has been most influentially advocated by Joseph Tussman and Jacobus tenBroek.[159] Under this approach, the similarly situated test asks whether legislative distinctions are relevant to the law's purpose.

Tussman and tenBroek characterize the first conception of formal equality, which defines as similarly situated all persons who possess the classifying trait, as a complete misapplication of formal equality. They note that "[a]ll members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test."[160] The result of such an approach is, they suggest, "the easy dismissal of the equal protection issue on the grounds that the law applies equally to all to whom it applies."[161]

Critics noted that Justice McIntyre directed his critique at the difficulties inherent in the circular form of the similarly situated test, but retained the language of comparison, relevance, and merit that

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157. Gold, *supra* note 94, at 1065 (citation omitted). Note that Gold's belief in the persistence of a formal approach to equality was specifically disapproved of by Justice Wilson in *McKinney*, [1990] 3 S.C.R. at 391 ("Unhappily, the parties involved in these appeals as well as some of the academics who have commented upon the *Andrews* decision have continued to resort to that test.").

158. Most trace the origin of this version of the similarly situated test to Aristotle's statement that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness" in THE NICOMACHEAN ETHICS, Book V.3, at 1131a6 (D. Ross trans., 1925). However, reading an alternate translation, and the whole of Book V, suggests that this sentence was taken out of context. Aristotle was writing about corrective justice. *See* NICOMACHEAN ETHICS, Book V, at 118 (Martin Ostwald trans., Macmillan Publishing Company, 1986).

159. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949).

160. Tussman & tenBroek, *supra* note 159, at 345.

161. Tussman & tenBroek, *supra* note 159, at 345.

reflect a formal view of equality.[162] Justice McIntyre stated that equality is "a comparative concept."[163] The equality ideal was that a law of general application should not "because of irrelevant personal differences" have a more onerous or less advantageous effect on one than on another.[164] Further, Justice McIntyre suggested that distinctions "based on an individual's merit[] and capacit[y]" will rarely be considered discriminatory.[165]

These comments indicate that Justice McIntyre maintained at least some of the formal equality language, if not its underlying concepts.

2. Did Justice McIntyre Adopt the Tussman and tenBroek Relevance Test?

Accordingly, critics argued that Justice McIntyre had addressed his critique of the similarly situated test only to its obviously circular form, and not to the Tussman and tenBroek purpose-driven test.[166] This led some commentators to suggest that the Court had adopted a relevance standard of discrimination.[167] Dale Gibson wrote:

> The "similarly situated" label is not the only one by which this essential judicial task could be designated. Both McIntyre J. and La Forest J. described inequality in terms of detrimental differential treatment based on "irrelevant personal differences." This was perhaps an invitation to substitute a "relevance" test for the long-standing but occasionally misapplied "similarly situated" standard.[168]

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162. *See* BRODSKY & DAY, *supra* note 72, at 205–12.
163. Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143, 164.
164. *Andrews* [1989] 1 S.C.R. at 165 (McIntyre, J., dissenting in part).
165. *Andrews* [1989] 1 S.C.R. at 174–75 (McIntyre, J., dissenting in part).
166. *See* BRODSKY & DAY, *supra* note 72, at 209; LAW OF THE CHARTER, *supra* note 76, at 73–75; David M. Beatty, *The Canadian Conception of Equality*, 46 U. TORONTO L.J. 349, 351–55 (1991); Gold, *supra* note 94, at 1065–66; Sheppard, *supra* note 155, at 218–22.
167. *See* David W. Elliott, *Comment on* Andrews v. Law Society of British Columbia *and Section 15(1) of the* Charter*: The Emperor's New Clothes?*, 35 MCGILL L.J. 235, 237–38, 241 (1989); Dale Gibson, *Canadian Equality Jurisprudence: Year One, in* EQUALITY AND JUDICIAL NEUTRALITY 128 (Sheila L. Martin & Kathleen E. Mahoney eds., 1987).
168. LAW OF THE CHARTER, *supra* note 76, at 74 (footnote omitted).

According to David Elliott, the test adopted by the Court as a whole might be outlined as follows:

> (i) determine the legislative purpose; (ii) look for those who are similarly situated to the complainant in the broad sense of being in the same social and political setting (and not simply subject to the same law or within the same group) which is relevant to the legislative purpose; (iii)determine if the claimant is affected differently as a result of an irrelevant personal difference; and (iv) determine if this different effect amounts to a relative disadvantage for the complainant.[169]

Elliot concluded that, if this analysis was correct, the Court was "in the confusing position of rejecting the similarly situated test but retaining much of its comparative framework."[170]

3. A Substantive Equality Analysis

Many factors, however, support the Court's insistence that *Andrews* rejected the similarly situated test in any form. Justice McIntyre expressly rejected the "reasonable classification" approach adopted by Justice McLachlin in the Court of Appeal. Relevance was not listed as a determinative element under section 15 and was not mentioned in the unanimous judgment of the Court in *Turpin*.[171] There was no relevance test for discrimination in the human rights context, with which section 15 jurisprudence was supposed to be aligned.[172] Furthermore, Justice McIntyre never stated that an equality rights claimant must prove that a distinction was "irrelevant" to the

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169. Elliott, *supra* note 167, at 238.

170. Elliott, *supra* note 167, at 238 (footnote omitted).

171. As Laura Fraser suggests, Justice McIntyre did not require irrelevance to support a finding of discrimination. Laura Fraser, *Rights Without Meaning: Failing to Give Effect to the Purpose of Section 15(1)*, 6 DALHOUSIE J. LEGAL STUD. 347, 356–57 (1997). If Justice McIntyre had intended such emphasis to be placed on relevance, "such a limitation to an individual's equality rights would have been discussed in greater detail as the section 15(1) test was developed." Fraser, *supra*, at 356. For instance, in *Andrews*, Justice McIntyre specifically outlined certain factors which must be considered when resolving equality questions under the *Charter*. The factor of irrelevance is notably absent. *See* Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143, 168 (McIntyre, J., dissenting in part).

172. *See Andrews* [1989] 1 S.C.R. at 175 (McIntyre, J., dissenting in part).

functional values of the legislation. To the contrary, he stated clearly that there was no place for a reasonableness analysis, except under section 1.[173]

Following *Andrews* and *Turpin*, discrimination was to be given a broad interpretation emulating human rights jurisprudence, by situating the equality rights claimant in the larger social and political context.[174] A primary objective of section 15 would be to assist politically vulnerable groups in overcoming inequality, thereby promoting a society that respects the equal dignity of all.

4. Foreshadowing the *Miron/Egan* Resurrection of Relevance

Equality seekers were clearly hopeful about the *Andrews* decision,[175] but most worried that the Court was not sufficiently clear in rejecting the similarly situated test.[176] For example, Gwen Brodsky and Shelagh Day noted that the discussion of disadvantage was underdeveloped,[177] and that the Court had rejected the similarly situated test without a clear or thorough analysis.[178] They wrote: "[t]his deficiency in the Court's analysis creates a real danger that the similarly situate [sic] test and formal equality theory, though they appear to have been repudiated here, will seep back into the jurisprudence because they have not been properly examined and clearly rejected."[179]

Over the years, these concerns about the Court's commitment to a substantive equality analysis would be validated. In hindsight, they

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173. *Andrews* [1989] 1 S.C.R. at 182 (McIntyre, J., dissenting in part).

174. *See* R. v. Swain [1991] 1 S.C.R. 933, 992; R v. Turpin [1989] 1 S.C.R. 1296, 1331–33.

175. The decision offered "clear encouragement to . . . disadvantaged groups by moving towards a substantive view of equality." BRODSKY & DAY, *supra* note 72, at 205. Another source notes that "*Andrews* appears to have laid the groundwork for innovative legal developments sensitive to the realities of the various inequalities women face." Sheppard, *supra* note 155, at 234. Finally, "[t]here is the clear statement in *Andrews* that equality does not mean treating likes alike and unalikes unalike. The rejection of such a formulaic approach to equality opens the door to a more contextualized, inequality-based understanding of equality." Majury, *supra* note 155, at 437.

176. *See* BRODSKY & DAY, *supra* note 72, at 209; Majury, *supra* note 155; Sheppard, *supra* note 155.

177. BRODSKY & DAY, *supra* note 72, at 207.

178. BRODSKY & DAY, *supra* note 72, at 209.

179. BRODSKY & DAY, *supra* note 72, at 209; *see also* Majury, *supra* note 155, at 425–26, 437; Sheppard, *supra* note 155, at 218–19.

foreshadow the dramatic reversal back to formal equality analysis that we have seen during section 15's second decade.

III. Dealing With Discrimination

The reversal back to the similarly situated test, and the reliance on biology and tradition to justify discrimination that arises in *Egan* and *Miron*, appear less dramatic after a critical reading of some decisions from the first decade of equality jurisprudence.[180]

A. R. v. Hess[181]

In *Hess*, the accused was charged under section 146(1) of the *Criminal Code* which made it an offence for a man to have sexual intercourse with a female under age 14 who was not his wife.[182] The accused alleged that the offence violated section 15 of the *Charter* since only men could be charged and only women could be complainants.

Justice Wilson, for a majority,[183] found that the provision was contrary to the principles of fundamental justice because it did not provide a due diligence defense.[184] Her comments with respect to section 15(1) of the *Charter* are (thankfully) *obiter dicta.*

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180. The decisions we discuss in this section of the paper are: *R. v. Hess* [1990] 2 S.C.R. 906, *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, *Weatherall v. Canada (Att'y Gen.)* [1993] 2 S.C.R. 872, and *Symes v. Canada* [1993] 4 S.C.R. 695. We argue that the equality analysis in *R. v. Hess*, a case about statutory rape, centered on the concept of natural biological differences and supported deference to widely-held moral standards. In *McKinney v. University of Guelph*, the Court assumed that age and declining capacity were interrelated, focusing on the reasonableness of the distinction instead of considering the effect of mandatory retirement and the lack of human rights protection. In upholding women's right to work in male penitentiaries, the Court in *Weatherall v. Canada* relied on biological essentialism. *Symes v. Canada* illustrates the Court's reluctance to recognize adverse impact discrimination. A majority of the Court failed to view the differential treatment from the perspective of the equality seeker, as situated in the larger social and historical context.

181. *Hess* [1990] 2 S.C.R. at 906.

182. *Criminal Code*, R.S.C., ch.C-34, § 3(6), (1970).

183. Justices Lamer, La Forest, and L'Heureux-Dubé concurring.

184. *Hess* [1990] S.C.R. at 927.

1. Majority Section 15 Reasons of Justice Wilson

Justice Wilson suggested that section 15 was not obviously infringed merely on the grounds that the offence could, as a matter of fact, be committed only by men.[185] She stated that because women could not commit a physical act that could be readily equated with penetration by a male, the question of whether a female should be punished for sex with a male under 14 years of age was a policy matter best left to the legislature.[186] It would, she asserted, place a discriminatory burden on males only if there had been "no reason related to sex for imposing such a burden."[187]

Justice Wilson noted that arguments based on "popular yet ill-conceived notions about a given sex's strengths and weaknesses or abilities and disabilities"[188] had often been used to justify discrimination.[189] Nevertheless, Justice Wilson held that certain biological "realities" could legitimately shape the definition of particular offences.[190]

With respect to alleged discrimination in the differential treatment of complainants, Justice Wilson suggested that the legislature chooses to punish a male who engages in intercourse with a girl under 14 differently from a male who engages in "sodomy" or "buggery," these being "distinctions aimed at biologically different acts that go to the heart of society's morality and involve considerations of policy . . . best left to the legislature."[191]

Justice Wilson went on to say that the *Charter* could not provide relief if the *Criminal Code* failed to provide a statutory rape provision anywhere in the *Code* for the benefit of young male victims. It would not be appropriate for the court to use section 15(1) to create an offence which the legislature had not chosen to create. There could be sound policy reasons for protecting one group and not the other, and these reasons might be based on the biological distinctions between them.[192]

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185. *Hess* [1990] S.C.R. at 928.
186. *Hess* [1990] S.C.R. at 930.
187. *Hess* [1990] S.C.R. at 928.
188. *Hess* [1990] S.C.R. at 929.
189. *Hess* [1990] S.C.R. at 928–29.
190. *Hess* [1990] S.C.R. at 929–31.
191. *Hess* [1990] S.C.R. at 931.
192. *Hess* [1990] S.C.R. at 931–32.

2. Minority Section 15 Reasons of Justice McLachlin

Justice McLachlin[193] came to a different conclusion with respect to section 15. In her view, section 15 is violated by a distinction drawn on the basis of an enumerated or analogous ground, where such distinction results in a burden being placed on the complaining individual or group.[194] The analysis then moves to section 1. So, having established that men face a burden under section 146(1) not faced by women, or that females enjoy a benefit not enjoyed by men, the question of whether "the larger context" supports the burden or benefit would be a matter for section 1 of the *Charter*.[195]

a. Application to Disadvantaged Groups

Justice McLachlin acknowledged that *Turpin* could be read as requiring a finding of disadvantage existing apart from and independent of the particular legal distinction being challenged.[196] This approach suggests that a distinction working against men as compared with women was not sex discrimination per section 15 because male plaintiffs could not claim membership in a "discrete and insular minority," nor show disadvantage apart from the provision they were challenging.[197]

Justice McLachlin, arguing that these arguments took the language in *Turpin* further than was justified, pointed out that

> [T]he Court must be taken to have had in mind section 28 of the *Charter*, which provides that notwithstanding any other provisions, the rights and freedoms referred to in the *Charter* are guaranteed equally to male and female persons. The Court in *Turpin* . . . states that the search for independent disadvantage applies "in most but perhaps not all cases" and says that finding a "discrete and insular minority" is "merely one of the analytical tools which are of assistance."

193. Justices Sopinka and Gonthier concurring.
194. *Hess* [1990] S.C.R. at 942.
195. *See Hess* [1990] S.C.R. at 940.
196. *Hess* [1990] S.C.R. at 942.
197. *See Hess* [1990] S.C.R. at 943.

> In my view, the essential requirements for discrimination under section 15 remain as set forth in *Andrews*.[198]

Applying this test, Justice McLachlin found that the impugned provision, in drawing distinctions on the enumerated ground of sex, discriminated under section 15 of the *Charter*.[199] "It burdens men as it does not burden women. It offers protection to young females which it does not offer to young males."[200]

However, Justice McLachlin would have upheld the section as a reasonable section 1 limit on equality rights, because of the important objectives of "protect[ing] . . . female children from the harms that may result from premature sexual intercourse and pregnancy," and protecting society from the impact of the social problems which sexual intercourse with children may produce.[201] Justice McLachlin stated that these were pressing and substantial objectives, to which the exclusion was rationally connected, and the rights violation impaired equality rights to a minimum degree. The only question was whether the infringement of section 15 was justified, given the laudatory objectives of section 146(1).[202]

Justice McLachlin argued that:

> Singling out . . . males as the only offenders is justified given the fact that only males can cause pregnancies. . . . The protection of female children to the exclusion of male children may also be justified on the same ground; only females are likely to become pregnant. . . . Moreover, while adult females may prey on males under the age of fourteen, the gravamen of the problem of intercourse with young juveniles involves intercourse by men with young girls.[203]

198. *Hess* [1990] S.C.R. at 943–44.
199. *Hess* [1990] S.C.R. at 944.
200. *Hess* [1990] S.C.R. at 944.
201. *Hess* [1990] S.C.R. at 948–49.
202. *Hess* [1990] S.C.R. at 949.
203. *Hess* [1990] S.C.R. at 957.

3. Commentary: "Sex" and the Similarly Situated Test

Hess illustrates that no member of the court had a serious understanding of or commitment to the substantive equality promised by *Andrews* and *Turpin*. All Justices reverted back to the similarly situated test, with different results, based on whether the "sameness" or "difference" of men and women was considered. Justice Wilson focussed on the essential "difference" between men and women to conclude that there was no discrimination. Justice McLachlin presumed "sameness" between men and women, so that all differential treatment based on gender would have to be justified under section 1.

a. Purpose of Statute

Hess demonstrates that the result of the similarly situated test transforms the purpose of the statute into the pivotal consideration of section 15. Had the purpose of the law been defined as the protection of children from sexual exploitation by adults, the exclusion of boys from its protections would have violated section 15.[204] The formal equality approach also places an onus on rights claimants to show that they are not differently situated as a matter of fact from those who are included by the impugned provision.

b. A Substantive Equality Analysis

A substantive equality analysis, following *Andrews* and *Turpin*, would have considered the effect of the statutory rape provision to determine whether it perpetuated pre-existing inequality or whether it helped remedy past discrimination. Focussing on the larger social and political context, the Court would have to ask the following questions: Is the construction and development of sexuality the same for young gay men as for heterosexual women? Because of the current dynamics

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204. *See also* Lepofsky, *Rollercoaster*, *supra* note 7. Justice McLachlin articulates a number of different statutory purposes under section 1. In initially defining the objective as pressing and substantial, she found the purpose of the provision was not only the protection of young girls from pregnancy, but also to protect children from prostitution and the emotional harm of sexual intercourse at a young age. Yet, she was still willing to describe the "gravamen" of the offence as focused on the protection of young women, to the exclusion of boys, in the proportionality analysis.

of these differences, do we need to take into account sex, maturity, and sexual orientation, rather than having a blanket age of consent? Also, in view of the current construction of sexuality, do we need a more complex analysis of consent in all circumstances, perhaps requiring a shift in onus to prove consent, subject to a due diligence defense?

c. Biology and Discrimination

Justice Wilson's comments on biological "realities" are extremely problematic. For example, she asserts that a provision criminalizing self-induced abortion could not be considered discriminatory, since it is a biological fact that only women may experience pregnancy. Criminalizing self-induced abortion would be constitutionally suspect,[205] however, for the same reason that a legislative provision disentitling pregnant women from employee benefits was held to be discriminatory in *Brooks*.[206] Both provisions would perpetuate women's disadvantaged position in society. As the Supreme Court would later conclude in *R. v. Morgentaler*,[207] *Daigle v. Tremblay*,[208] and *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*,[209] women cannot be equal members of society if they are denied control over their own bodies.[210]

Justice Wilson makes a specious distinction between "popular yet ill-conceived notions" and "biological realities."[211] Women's intellectual and social "incapacity" was once considered a biological reality. Any consideration of biological realities invites a discriminatory approach that is absolutely contrary to the spirit of section 15.

The "identification" of "biological realities" is not merely a neutral definition; it contributes to the discourses which create difference. The creation of difference is a means of domination. In other words,

205. *See* Black and Smith, *supra* note 49, at 14–43.
206. Brooks v. Canada Safeway Ltd. [1989] 4 W.W.R. 193, 217.
207. R. v. Morgentaler [1988] 1 S.C.R. 30.
208. Daigle v. Tremblay [1989] 2 S.C.R. 530.
209. Winnipeg Child and Family Servs. (Northwest Area) v. G. (D.F.) [1997] 3 S.C.R. 925.
210. *See, e.g., Winnipeg Child and Family Servs.* [1997] 3 S.C.R. at 959, ("[T]o make orders protecting fetuses would radically impinge on the fundamental liberties of the pregnant woman, both as to lifestyle choices and how and as to where she chooses to live and be.").
211. R. v. Hess [1990] 2 S.C.R 906, 928–29.

"biological realities" are socially constructed as rationalization for the established power structure, so that what we perceive to be natural and essential differences are in fact historically and culturally rooted. Gender is viewed as a natural differentiation, a "biological reality." This "reality" has served historically to constrain women's possibilities, because difference is constructed not only as difference, but as a hierarchy of domination. The revelation that gender is not natural or real, but constructed, permits the recognition that possible modes of being are much broader than we are currently able to imagine within our limited, dualistic conceptualizations. The exercise of freedom lies in articulating these alternative ways of being.

In conclusion, as Lisa Philipps and Margot Young suggest:

> These manifestations of a biological or natural understanding of sex inevitably fold the section 15 analysis back into the similarly situated test. Somehow eclipsed is earlier jurisprudential insistence that section 15 is not the place for considerations of reasonableness or attempts at justification. Conceptions of sex differentiation as invoking possibly natural and therefore legitimate distinctions foil attempts to move beyond the similarly situated test. This slippage serves as a strong reminder of the dangers the similarly situated test represents to the progression of equality law. Such eagerness to locate natural differences facilitates the unchallenged assertion of traditional notions of sex difference in precisely the context—equality law—where such notions are most appropriately reexamined.[212]

d. Morality

Justice Wilson also suggested that courts should not question moral principles which are widely held within a community.[213] She claimed that the legislature is the proper forum in which to examine and scrutinize the ethical norms of a society, and that courts must simply ensure these norms are not informed by "ill-conceived notions."[214] Although this deference to majority will is antithetical to the

212. Philipps and Young, *supra* note 156, at 256.
213. *See Hess* [1990] 2 S.C.R. at 930–31.
214. *Hess* [1990] 2 S.C.R. at 931.

equality guarantees, American and Canadian courts have been preoccupied with injecting this kind of independent morality into equality jurisprudence.[215] Insecurity related to the legitimacy of judicial review, especially in matters of public morality, has resulted in a failure to address inequality.

The contradictions between the notion of equality and concepts of biological realities, deference, and normative standards have been discussed in detail in the Essential Concepts section of this Article. We merely note at this point that the themes of biology, deference, and morality emerged in *Hess*, and pose very real threats to the promise of section 15. The Court's reliance on such concepts, departing from the ethics of the *Charter*, is an ominous sign of worse things to come.

B. McKinney v. University of Guelph[216]

In *McKinney*, a number of university professors and a librarian challenged the universities' policies mandating retirement at age 65.[217] Only those under 65 were protected against age discrimination in employment under the Ontario *Human Rights Code*.[218] The claimants argued that the Ontario *Code* and the mandatory retirement policies discriminated on the basis of age.[219]

1. The La Forest Majority

For the majority,[220] Justice La Forest held that the *Human Rights Code* contravened section 15(1) of the *Charter*, but should be upheld under section 1. The differential treatment clearly constituted discrimination for the purposes of section 15 because "it deprives

215. *See* discussion *infra* Part I.B.4.

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

217. The respondent universities were The University of Guelph, Laurentian University, York University, and The University of Toronto.

218. S.O. 1981, c.53, s.9(a).

219. *McKinney* [1990] 3 S.C.R. at 231.

220. Chief Justice Dickson and Justice Gonthier concurred with the reasons of Justice La Forest. Justice Sopinka stated in separate reasons that he agreed with the reasons of Justice La Forest that the mandatory retirement policies and practices and *Human Rights Code* provisions were not saved under section 1.

[persons] of a benefit under the *Code* on the basis of age, a ground specifically enumerated in the *Charter*."[221]

Justice La Forest suggested, however, that age was significantly different from some of the other enumerated grounds.[222] There was nothing inherent in most of the specified grounds of discrimination to support any general correlation between those characteristics and ability. In his view, however, "[t]here is a general relationship between advancing age and declining ability."[223]

The universities argued that section 15 required "proof of irrationality, stereotypical assumptions and prejudice," and that "a mandatory retirement policy is not based on irrelevant personal differences or stereotypical assumptions, but rather is motivated by 'administrative, institutional and socio-economic' considerations."[224] Justice La Forest responded that such arguments were "irrelevant, since as *Andrews v. Law Society of British Columbia* made clear . . . not only does the *Charter* protect from direct or intentional discrimination, it also protects from adverse impact discrimination, which is what is in issue here."[225]

The universities argued that the similarly situated test was still the governing test, as long as it was not applied rigidly.[226] Justice La Forest, noting that the similarly situated test could be applied no other way, relied on *Andrews* to dismiss the universities' argument that there was no discrimination.[227]

Although the impugned section of the *Ontario Human Rights Code* was found to violate section 15, Justice La Forest found that it was demonstrably justified under section 1, balancing the consequences for older workers with ramifications for the labour market and pension benefits.[228] Mandatory retirement was a long-standing feature of the labour market, about which the Legislature was faced with competing socio-economic theories.[229] The Government was

221. *McKinney* [1990] 3 S.C.R. at 290.
222. *McKinney* [1990] 3 S.C.R. at 297.
223. *McKinney* [1990] 3 S.C.R. at 297.
224. *McKinney* [1990] 3 S.C.R. at 279.
225. *McKinney* [1990] 3 S.C.R. at 279.
226. *McKinney* [1990] 3 S.C.R. at 279.
227. *McKinney* [1990] 3 S.C.R. at 279. This comment has interesting implications for Justice La Forest's later return to formal equality analysis in *Egan v. Canada*, [1995] 2 S.C.R. 513, and *Miron v. Trudel*, [1995] 2 S.C.R. 418.
228. *McKinney* [1990] 3 S.C.R. at 302–03, 319–20.
229. *See McKinney* [1990] 3 S.C.R. at 302, 309.

therefore entitled to choose between them and to proceed cautiously in making any change.[230] Furthermore, mandatory retirement reflected a private sector arrangement "only tangentially related to government action. . . ."[231] Justice La Forest concluded that, in general, "the courts should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality."[232]

2. Justices Wilson and L'Heureux-Dubé's Dissenting Opinions

In dissent, Justice Wilson joined in the criticism of the similarly situated test, finding that it had no place in equality jurisprudence and that the court had clearly rejected the analysis.[233] Instead, according to Justice Wilson, section 15 should be directed against stereotype and prejudice; its purpose was to promote human dignity.[234] It was not necessarily discriminatory to draw distinctions on the basis of the listed grounds. The list of grounds was merely intended to assist in recognizing the existence of prejudice. "At the same time, however, once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory."[235]

Justice Wilson posed two questions: 1) Is there prejudice in the mandatory retirement schemes?, and 2) "Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity?"[236] She concluded that the answer to both questions was yes and that the mandatory retirement policy infringed section 15.[237]

Justices Wilson and L'Heureux-Dubé also held that the *Ontario Human Rights Code* infringed section 15 of the *Charter*.[238] Justice Wilson noted that the section 9(a) allowed employers to freely engage in all forms of age-based discrimination against persons over 65, who

230. *See McKinney* [1990] 3 S.C.R. at 309.
231. *McKinney* [1990] 3 S.C.R. at 312
232. *McKinney* [1990] 3 S.C.R. at 318.
233. *McKinney* [1990] 3 S.C.R. at 391.
234. *McKinney* [1990] 3 S.C.R. at 392–93.
235. *McKinney* [1990] 3 S.C.R. at 393.
236. *McKinney* [1990] 3 S.C.R. at 393.
237. *McKinney* [1990] 3 S.C.R. at 393.
238. *McKinney* [1990] 3 S.C.R. at 414.

would be powerless to complain about discrimination in hiring, demotion, transfer, or remuneration.[239]

C. *Commentary: Remembering* McKinney

1. The Reasonableness of the Distinction

The most problematic aspect of the *McKinney* decision is its deferential approach to legislative decisions under section 1 of the *Charter*.[240] However, there are significant problems with the reasoning under section 15 as well. Although he found discrimination in the universities' policies, Justice La Forest remarked that age is correlated with ability and a loss of capacity.[241] This statement, relying on stereotyped generalizations that have no place in an equality analysis, diminishes the seriousness of age discrimination, and focuses on the reasonableness of the distinction rather than its impact on the victim. Whenever the reasonableness of the distinction shifts the focus away from the context of the rights-holder, there is a real danger that the stereotyped views and preferences will supersede the *Charter's* ethics.

2. Administrative, Institutional, and Socio-Economic Purposes are Irrelevant

McKinney confirmed that the similarly situated test did not survive *Andrews*. According to Justice La Forest, establishing discrimination should not require proof of irrationality or stereotypical assumptions.[242] The mandatory retirement policy's relationship to a legitimate "administrative, institutional and socio-economic" purpose was irrelevant since the *Charter* protects from both direct or intentional discrimination and adverse impact discrimination.[243]

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239. *McKinney* [1990] 3 S.C.R. at 414.

240. The details of Justice La Forest's approach to section 1 in *McKinney* are beyond the scope of this Article. However, the notion of deference and equality in a constitutional democracy is addressed *infra* Part I, because the reasoning of section 1 in *McKinney* later parallels the reasoning of the minority under section 15 in the trilogy of *Thibaudeau v. Canada* [1995] 2 S.C.R. 627, *Egan v. Canada*, [1995] 2 S.C.R. 513, and *Miron v. Trudel* [1995] 2 S.C.R. 418.

241. *McKinney* [1990] 3 S.C.R. at 297.

242. *McKinney* [1990] 3 S.C.R. at 279.

243. *McKinney* [1990] 3 S.C.R. at 279.

Justice La Forest incorrectly identified the direct age discrimination at issue as adverse effect discrimination.[244] His point, however, seems to be that the *Charter* protects not only when the discrimination is completely illogical, but also when there are "legitimate" institutional considerations for differential treatment. The issue is whether there is an adverse effect on a group suffering pre-existing inequality. In that respect, Justice La Forest begins to incorporate the substantive equality ideal.

D. Weatherall v. Canada (Attorney General)[245]

Weatherall involved a prison inmate who challenged the constitutionality of female guards conducting frisk searches and patrolling cells in male penitentiaries.[246] The inmate alleged that this practice was discriminatory because female prison inmates "were not subject to cross-gender frisk searches and surveillance."[247]

Justice La Forest, delivering the judgment of the court, doubted that section 15(1) was violated, but stated that if it was, the violation could be justified under section 1.[248] The claim was founded on the demand that likes be treated alike. The Court held, however, that different treatment was sometimes necessary to promote equality.[249]

Justice La Forest stated that the historical, biological, and sociological differences between men and women permitted differential treatment.[250] "[T]he historical trend of violence perpetrated by men against women [was] not matched by a comparable trend [in] which men are the victims and women the aggressors."[251] Further, he suggested that "[b]iologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate."[252] He pointed also to women's disadvantaged position in society in relation

244. *McKinney* [1990] 3 S.C.R. at 279.
245. Weatherall v. Canada (Att'y Gen.) [1993] 2 S.C.R. 872.
246. *Weatherall* [1993] 2 S.C.R. at 875.
247. *Weatherall* [1993] 2 S.C.R. at 877.
248. *Weatherall* [1993] 2 S.C.R. at 877–78.
249. *Weatherall* [1993] 2 S.C.R. at 877.
250. *Weatherall* [1993] 2 S.C.R. at 877.
251. *Weatherall* [1993] 2 S.C.R. at 877.
252. *Weatherall* [1993] 2 S.C.R. at 877.

to men.[253] Given these considerations, it was obvious that there was a different, more threatening impact on women than men in being searched by guards of the opposite sex.[254] Justice La Forest ultimately failed, however, to decide the section 15(1) issue, noting that, even if there was a violation of section 15(1), the practices would be approved by section 1 of the *Charter*.[255]

E. Commentary: Failing to Contextualize

1. Biological Differences

Once again, the Court failed to consistently apply a definition of discrimination as that which furthers a group's pre-existing inequality within the larger social and political context. Instead, it returned to considerations of natural biological "differences."[256]

Although the result in this case was unobjectionable, its analytic approach was unsatisfactory. Justice Gonthier would later rely on *Weatherall* and *Hess* to suggest that "distinctions drawn on the basis of relevant biological differences between the sexes do not necessarily constitute discrimination."[257] This misses the point. The issue is not whether the distinction rests on biological differences, but whether the law has the effect of imposing a real disadvantage in the social and political context of the claim.[258]

As Black and Smith suggest, *Brooks*, not *Hess* and *Weatherall*, represents the court's approach to sex-specific conditions.[259] They highlight the following passage of Justice McLachlin from *Miron*:

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253. *Weatherall* [1993] 2 S.C.R. at 877.
254. *See Weatherall* [1993] 2 S.C.R. at 877.
255. *Weatherall* [1993] 2 S.C.R. at 878.
256. *See* Black and Smith, *supra* note 49, at 14-44.
257. Miron v. Trudel [1995] 2 S.C.R. 418, 439.
258. *See* Black and Smith, *supra* note 49, at 14-45 (citing *Miron* [1995] 2 S.C.R. at 490) ("In *Miron*, [McLachlin J.] makes it clear that in her view, even with sex-specific conditions, it will only be the exceptional case in which section 15 will not be violated by provision based on the enumerated ground of sex—the exception will be cases such as *Weatherall*, in which the social context is found to reveal no perpetuation of disadvantage. This is in stark contrast with the approach of Gonthier J., which suggests that the sheer "relevance" of biological differences will be enough to prevent a finding that section 15 is violated.").
259. Black & Smith, *supra* note 49, at 14-44 to 14-45.

> Following the lesson of *Brooks*, I would respectfully suggest that . . . if we are not to undermine the promise of equality in s[ection] 15(1) of the *Charter*, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s[ection] 15(1) aims to eradicate.[260]

Looking at the broader context, it is clear that at this point in history chest searches of male and female prisoners are very different. This should not be explained, however, by any reference to essential biological differences. As we have discussed, the meaning and even the perception of the "difference" is socially constructed.

2. Perpetuation of Disadvantage

The issue in *Weatherall* was whether there was a constitutional basis for distinguishing between searches of male penitentiary inmates when performed by female and male guards.[261] If the Court had considered the larger context in which the discrimination was alleged,[262] it might have noted that the conduct at issue in this case was widely accepted when women engaged in "women's work" that involved similar viewing of unclothed males, such as nursing. A substantive approach to equality would also recognize the continuing disadvantagement of women by occupational segregation.[263] Finally, a contextual analysis would have examined the differential social meaning of cross-gender surveillance for men and women.

Substantive equality requires women-only guards in women's penitentiaries, since at this current cultural and historical moment, women's bodies have been sexualized to a degree that men's bodies have not; most female prison inmates are the survivors of male sexual

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260. *Miron* [1995] 2 S.C.R. at 490–91.

261. Weatherall v. Canada (Att'y Gen.) [1993] 2 S.C.R. 872.

262. The substantive approach to equality we describe here is drawn from the *Factum of the Women's Legal Education and Action Fund* (LEAF), Weatherall [1993] 2 S.C.R. at 872, *reprinted in* LEAF EQUALITY AND THE CHARTER 348 (1996) [hereinafter Factum].

263. *But see* Amy Bartholomew, *Achieving a Place for Women in a Man's World: Or, Feminism with No Class*, 6 C.J.W.L. 465, 477 (1993).

or physical violence;[264] and, given the prevalence of rape of women by men, women reasonably fear sexual violence from men. A substantive equality analysis would have viewed the differing treatment of male and female prisoners as a positive measure aimed at reducing women's systemic inequality.

F. Symes v. Canada [265]

In *Symes*, a partner in a law firm challenged Revenue Canada's decision that her child care expenses were not deductible as business expenses.[266] Symes argued that these were expenses incurred for the purpose of gaining or producing income from business as required under section 18(1)(a) of the *Income Tax Act*.[267] Revenue Canada considered the expenses to be personal or living expenses, the deduction of which was prohibited by section 18(1)(h) of the *Act*.[268] The Court split along gender lines in determining whether child care expenses should be deductible as business expenses.[269] The men, making up a majority of the Court, held that there was no discrimination.[270]

1. The Men

Justice Iacobucci[271] held that child care expenses were difficult to classify as business expenses, but that in any case, there was a complete legislative response to their treatment given the specific deduction for "child care expenses" under section 63.[272] There was no ambiguity in the *Act*, so the *Charter* could not be used as an interpretative aid.[273]

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264. *See* Factum, *supra* note 262, ¶ 37(b) (citing CREATING CHOICES: REPORT OF THE TASK FORCE ON FEDERALLY SENTENCED WOMEN 106–107 (1990)).
265. Symes v. Canada [1993] 4 S.C.R. 695.
266. *Symes* [1993] 4 S.C.R. at 706–07.
267. R.S.C. 1952, c.148, as amended and applicable to tax years 1983 to 1985, § 18(1).
268. *Symes* [1993] 4 S.C.R. at 706.
269. Justices Iacobucci, Cory, Major, La Forest, and Chief Justice Lamer denied Symes's claim. Justices L'Heureux-Dubé and McLachlin found that child care expenses should be deductible. *Symes* [1993] 4 S.C.R. 695.
270. *Symes* [1993] 4 S.C.R. at 765.
271. Chief Justice Lamer and Justices La Forest, Sopinka, Gonthier, Cory, and Major concurring. *See Symes* [1993] 4 S.C.R. at 765.
272. *Symes* [1993] 4 S.C.R. at 745–51.
273. *Symes* [1993] 4 S.C.R. at 752.

Furthermore, Justice Iacobucci argued that section 63 was not discriminatory because it did not draw a distinction on the basis of sex.[274] Although women disproportionately incurred the *social* costs of child care, it had not been shown that women disproportionately *paid child care expenses.*[275] Justice Iacobucci noted that parents had a *joint* legal responsibility to care for children and, therefore, a joint legal obligation to pay the costs of child care.[276] He also emphasized the importance of "[distinguishing] between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision."[277] The social costs of child care were found to exist outside of the *Act.*[278]

Although not expressing an opinion on the point, Justice Iacobucci suggested that:

> [a] different subgroup of women with a different evidentiary focus . . . might well be able to demonstrate the adverse effects required by s[ection] 15(1). For example . . . if [it] . . . could be established that women were more likely than men to head single-parent households . . . an adverse effects analysis involving single mothers might well take a different course, since child care expenses would thus disproportionately fall upon women.[279]

Justice Iacobucci also noted that Symes's equality argument should have recognized the relevance of parental status.[280]

2. The Women

Justices L'Heureux-Dubé and McLachlin concluded that Symes was entitled to deduct her child care costs as a business expense under the *Act* pursuant to her section 15 equality rights of the *Charter.*[281] In their view, the *Income Tax Act* should be interpreted in a manner

274. *Symes* [1993] 4 S.C.R. at 765.
275. *Symes* [1993] 4 S.C.R. at 765.
276. *Symes* [1993] 4 S.C.R. at 764.
277. *Symes* [1993] 4 S.C.R. at 764–65.
278. *Symes* [1993] 4 S.C.R. at 763–65.
279. *Symes* [1993] 4 S.C.R. at 766–67.
280. *Symes* [1993] 4 S.C.R. at 767.
281. *Symes* [1993] 4 S.C.R. at 820.

consistent with the *Charter*'s equality principles, thus permitting the deduction.[282] Justice L'Heureux-Dubé, pointing out that the definition of "business expense" had been articulated on the basis of the needs of business*men*, noted that "when only one sex is involved in defining the ideas, rules, and values in a particular domain, that one-sided standpoint comes to be seen as natural, obvious and general."[283]

Accordingly, the dissenting Justices "connected the dots" for Justice Iacobucci,[284] finding that it was obvious that women pay child care expenses—it was "part and parcel of a recognition that child care responsibilities present a significant obstacle for women in the social and economic domain, that this issue is an equality issue and that the interpretation of legislation can and must accommodate equality and the changing realities of our society."[285]

According to Justice L'Heureux-Dubé, equality demanded that Symes have the right to deduct her business expenses even if such expenses were not generally incurred by businessmen.[286] While she acknowledged the difficulties of subsidizing child care through the tax system and the disparate treatment of employed persons and business persons under the *Act*, she nonetheless pointed out that the "complex quandary of the disadvantagement of women generally through the continuing social and economic cost of child care" was not the issue before the court.[287] The issue was the differential treatment of expenses incurred for the purpose of gaining or producing income from business, which advantaged business*men* in relation to business*women*.[288]

Justice L'Heureux-Dubé pointedly stated that, although single mothers might more obviously suffer hardship due to child care expenses than did the married Symes, the latter's rights should still be protected since "[d]iscrimination cannot be justified by pointing to other discrimination."[289] In particular, Justice L'Heureux-Dubé noted the relative privilege of Andrews, a white male lawyer of British

282. *Symes* [1993] 4 S.C.R. at 819.
283. *Symes* [1993] 4 S.C.R. at 798.
284. *See* Philipps and Young, *supra* note 156, at 242.
285. *Symes* [1993] 4 S.C.R. at 821.
286. *Symes* [1993] 4 S.C.R. at 822.
287. *Symes* [1993] 4 S.C.R. at 823–24.
288. *Symes* [1993] 4 S.C.R. at 825.
289. *Symes* [1993] 4 S.C.R. at 825.

descent who was found to have suffered discrimination on the basis of citizenship.[290]

> The fact that Ms. Symes may be a member of a more privileged economic class does not by itself invalidate her claim under s[ection] 15 of the *Charter*. She is not to be held responsible for all possible discriminations in the income tax system, nor for the fact that other women may suffer disadvantages in the marketplace arising from child care. As the appellant argues, we cannot "hold every woman to the position of the most disadvantaged women, apparently in the name of sex equality."[291]

The female Justices, and in particular, Justice L'Heureux-Dubé, emphasized the importance of examining issues in context, since only then would it become clear that "so-called 'objective truths' may only be the reality of a select group in society."[292] The perspective of the group suffering discrimination must be central to the equality analysis. In that manner, the experience of both women and men could shape the definition of business expense.[293]

G. Commentary: Privileging the Privileged?

Audrey Macklin, writing about the contrasting contextual approaches to the case between the trial judge and the Court of Appeal, also compellingly describes the differences between the Supreme Court's male and female Justices:

> The simplest way to decipher the diverging views . . . on the Charter issue is to imagine the judges peering at Beth Symes through different pairs of glasses. When [Justices L'Heureux-Dubé and McLachlin] looked at her, they saw a business woman standing next to a businessman. When [the male Justices] looked at her, they saw a self-employed, professional woman standing next to a salaried woman. In

290. *Symes* [1993] 4 S.C.R. at 825; *see also* Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143.
291. *Symes* [1993] 4 S.C.R. at 825–26.
292. *Symes* [1993] 4 S.C.R. at 826.
293. *See Symes* [1993] 4 S.C.R. at 826–28.

> the former scenario, Symes was disadvantaged by her sex contrary to section 15 and deserved to have her business expenses treated the same as a businessman's. In the latter, she was privileged by her class and made a mockery of section 15 of the Charter by attempting to use her status as a business woman to obtain greater benefits than those available to salaried women.
>
> [An underlying element of Justice Iacobucci's] position is that it is absurd to grant Symes parity with businessmen if, in so doing, she is placed in a superior position to other women. To put it another way, it is preferable that all women be equally disadvantaged relative to men if the alternative is to improve the situation of the best-off women.[294]

Some feminists supported the majority decision as a victory for social equality,[295] on the theory that success in *Symes* would have benefited those who are already privileged by the tax system.[296]

While we agree with Justice L'Heureux-Dubé that the tax system is not the best means of subsidizing day care, change will only be effected though legal and extra-legal strategies. It is offensive that business people cannot deduct "women's costs" like daycare expenses, but are free to deduct "men's expenses" like fancy cars and golf holidays.[297]

Symes's arguments were also criticized as being based on the similarly situated test.[298] It was said that more disadvantaged women, who could not claim to be the "same as" a businessman, would be denied subsidization of their child care expenses.[299] Again, this critique is not properly directed at Symes, but at the limitations of the *Charter*. Section 15 does not guarantee the means to achieve substantive

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294. Audrey Macklin, Symes v. M.N.R.: *Where Sex Meets Class*, 5 C.J.W.L. 498, 508–09 (1992)(replaced names of Justices to show parallels in the argument).

295. The National Action Committee on the Status of Women described the decision as "a victory for social equality, not a blow to women." *Women's Group Backs Court Ruling*, THE [TORONTO] GLOBE AND MAIL, December 18, 1993, at A5.

296. *See* Claire F.L. Young, *Child Care and the Charter: Privileging the Privileged*, 2 REV. CONSTITUTIONAL STUDIES 20, 24 (1994).

297. We use the quotations around "women's costs" and "men's expenses" to illustrate that these expenses are gendered, even though men may incur childcare costs and women may have expenses for golf holidays.

298. *See* Young, *supra* note 296, at 30–31.

299. *But see Symes* [1993] 4 S.C.R. at 821–22 (L'Heureux-Dubé, J.).

equality. It only permits complaints of government *action* which infringe substantive equality rights. Although Symes compared her inability to deduct daycare expenses to men's ability to deduct golf holidays, this did not invoke the similarly situated test. Rather, it challenged the court to reflect on the conceptualization of "business expenses" from the perspective of business women. Symes asked the court to consider the broader context of disadvantage and the particular discourses which perpetuate the subordination of women. In this manner, the court might have recognized that differential treatment of expenses on the basis of sex contributes to the continuing inequality of women as a group and ignores the importance of women's perspectives in articulating legal meanings.

IV. THE (IN)EQUALITY TRILOGY

The decisions in *Egan*, *Miron*, and *Thibaudeau* were all released on May 25, 1995, and revealed that the Supreme Court of Canada had dramatically divided as to the meaning of the equality guarantee. If there had been faint signals since *Andrews* that the similarly situated test had not been completely abandoned, the new minority approach to section 15 of the *Charter* made it perfectly clear that formal equality thinking was still alive and well, particularly where it was necessary to preserve male privilege by upholding the superiority of the heterosexual married family.

In *Egan*, an elderly gay couple sought recognition as spouses for the purposes of a low-income seniors benefit. A majority of the Court recognized discrimination, but justified the exclusion of same-sex spouses.[300] In *Miron*, a majority of the Court held that opposite-sex common law couples should be considered spouses under automobile insurance legislation. In these two cases, the minority approach to section 15 is marked by biological determinism, references to morality and tradition, deference to majority will, and a clear return to the similarly situated test.[301] The third case, *Thibaudeau*, concerned the constitutionality of the inclusion/deduction scheme for child support payments.[302] In *Thibaudeau*, a majority of the Court was unwilling to conceptualize the custodial parent as a separate person from her ex-

300. Egan v. Canada [1995] 2 S.C.R. 513.
301. Miron v. Trudel [1995] 2 S.C.R. 418.
302. Thibaudeau v. Canada [1995] 2 S.C.R. 627, 665.

spouse.[303] Instead, the majority focussed on the abstract benefit to the separated or divorced couple.[304] Again, the Court failed to conduct a substantive equality analysis, becoming confused by comparator groups and causes of adverse impact.

A. Miron v. Trudel[305]

In 1987, Miron was injured while a passenger in an uninsured motor vehicle driven by an uninsured driver.[306] After the accident, Miron, no longer able to work and contribute earnings to his family, made a claim for accident benefits against his female common law spouse's insurance policy, but was denied on the ground that unmarried couples were not spouses under the policy.[307] Miron argued that he was a spouse under the terms of the policy and, alternatively, that the terms of the policy, which were those of the standard automobile policy prescribed by the *Insurance Act*, discriminated against him in violation of section 15(1) of the *Charter*.[308] A majority of the Court agreed that the policy was discriminatory and that the definition of spouse should be extended to include opposite-sex common law couples.[309] A minority of the Court, in dissent, introduced a radical new approach to section 15, relying on tradition, morality, and biology, and reintroducing the similarly situated test.

1. The Gonthier Dissent

In dissent, Justice Gonthier found that, although "marital status may constitute an analogous ground of discrimination under s[ection] 15 of the *Charter*," in this case, the institution of marriage was relevant "to the distinction that was being drawn by the legislation."[310] There was therefore no discrimination. Justice Gonthier characterized marriage as:

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303. *Thibaudeau* [1995] 2 S.C.R. at 687–88.
304. *Thibaudeau* [1995] 2 S.C.R. at 691.
305. *Miron* [1995] 2 S.C.R. 418.
306. *Miron* [1995] 2 S.C.R. at 481.
307. *Miron* [1995] 2 S.C.R. at 481–82.
308. *Miron* [1995] 2 S.C.R. at 482.
309. *Miron* [1995] 2 S.C.R. at 510.
310. *Miron* [1995] 2 S.C.R. at 429 (La Forest, Lamer, and Major JJ. concurring).

> an institution entered into by choice which carries with it certain benefits and burdens. Among these is the obligation of mutual support .... Where the legislature draws a distinction premised on a characteristic relevant to the institution of marriage, such as these support obligations, then the distinction is not discriminatory and is therefore permissible.[311]

a. Test for Discrimination

Justice Gonthier said that discrimination analysis involves three steps. The first step is to determine whether the law has drawn a distinction between the claimant and others. The second step is to ask if the distinction results in disadvantage to the claimant's group and not to others. The third step is to determine whether the distinction is based on an irrelevant personal characteristic listed in section 15(1) or an analogous characteristic.[312] This third step comprises two aspects: "On the first aspect of the third step of the ... analysis, the individual's membership in a group is an essential condition."[313] Although Justice Gonthier believed that membership in a *disadvantaged* group could serve as an indicium of discrimination, he did not find it to be a necessary precondition to bringing a claim. The second aspect was the "nature of the personal characteristic and its relevancy to the functional values underlying the law."[314] Justice Gonthier found that "the functional values underlying the law may themselves be discriminatory" when the underlying values are unrelated to any legitimate legislative purpose.[315]

Justice Gonthier claimed to recognize the need for "a contextual approach in order to prevent the s[ection] 15 analysis from becoming a mechanical and sterile categorization process."[316] In particular, the contextual approach required an inquiry into whether a distinction

311. *Miron* [1995] 2 S.C.R. at 429–30.
312. *Miron* [1995] 2 S.C.R. at 435.
313. *Miron* [1995] 2 S.C.R. at 436.
314. *Miron* [1995] 2 S.C.R. at 436.
315. *Miron* [1995] 2 S.C.R. at 436.
316. *Miron* [1995] 2 S.C.R. at 437.

was based on some objective physical or biological reality, or on a fundamental value, as in *Hess* and *Weatherall*.[317]

b. Relevance of the Distinction

In essence, Justice Gonthier found that an otherwise prejudicial distinction drawn on a relevant basis is not discriminatory. Although the "enumerated and analogous grounds" were characteristics commonly used to make irrational distinctions, distinctions on the basis of these characteristics were not necessarily discriminatory since the distinction might reflect a fundamental reality or value.[318]

According to Justice Gonthier, marital status could not be an analogous ground with respect to the essential, definitional elements of marriage. Marriage in itself could not be discriminatory because "it is a matter of choice and a basic institution of society." [319] If a law reflects a distinction relevant to functional values which are not discriminatory, the distinction itself is not discriminatory. Furthermore, the legislature should have an ambit of legitimate legislative discretion "in defining the attributes of a fundamental social institution, namely the rights and obligations attached to marriage."[320]

c. Addressing the Concerns

Justice Gonthier cautioned that the minority's approach was not novel:

> I should also emphasize that the approach to s[ection] 15 in these reasons in no way departs from this Court's approach in *Andrews*, *supra*, and in subsequent jurisprudence. My concern has only been to clarify a qualification which must be made in the application of the analogous grounds approach, a qualification which merely calls for a heightened sensitivity to the nature of the ground in issue in any given case, and a recognition that a ground which may be the basis

317. *Miron* [1995] 2 S.C.R. at 438. *See* discussion of *Hess* and *Weatherall*, *supra* Parts III.A.&D.

318. *Miron* [1995] 2 S.C.R. at 441.

319. *Miron* [1995] 2 S.C.R. at 442.

320. *Miron* [1995] 2 S.C.R. at 434.

> of discrimination in one context may be innocuous in another.[321]

He claimed that:

> [I]f both the larger context and the varieties of context are kept firmly in mind in assessing the nature of an analogous or enumerated ground, then there can be no danger that the purpose of the equality guarantees would somehow be eclipsed or overlooked in a relevance approach to s[ection] 15. Indeed, a criterion defined in terms of stereotype based on presumed group characteristics, rather than on the basis of merit, capacity or circumstances, is but an elaboration of the concept of relevance.[322]

This did not mean that superficial biological differences should re-emerge as a justification for discrimination. According to Justice Gonthier, *Bliss* reminds us that a court must look to the larger context to "sensibly separate biological differences which are normatively relevant and hence benign, from those which are irrelevant and thus discriminatory."[323]

Justice Gonthier also addressed concerns that his approach would import a justificatory analysis into section 15, stating that:

> [I]t is important to clarify the relationship between the requirement of *relevance* under s[ection] 15(1) of the *Charter* and that of *reasonableness* under s[ection] 1. It should be emphasized that determining the relevancy of a distinction does not amount to importing under s[ection] 15(1) the principles of justification found within s[ection] 1 of the *Charter*.[324]

Under the "reasonableness test," a court had to ascertain whether the impugned distinction was reasonable or fair, taking into account the purposes, the aims and the effect of the legislation on the person. Under this test, both the finding of whether a distinction resulted in

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321. *Miron* [1995] 2 S.C.R. at 442.
322. *Miron* [1995] 2 S.C.R. at 442–43.
323. *Miron* [1995] 2 S.C.R. at 443.
324. *Miron* [1995] 2 S.C.R. at 444.

discrimination and, to a large extent, the justification of that discrimination were done under section 15(1).[325]

Although Justice Gonthier emphasized the separateness of reasonableness, a consideration under section 1, and relevance, a basis for differential treatment under section 15,[326] he acknowledged that, under his approach, "there may indeed be significant overlap between the assessment of the functional values of the legislation under s[ection] 15, and the purpose of the legislation under s[ection] 1."[327]

Still, Justice Gonthier defended his approach as placing no additional burden on a *Charter* claimant[328] by claiming that the issue of relevance appeared throughout the Court's section 15 jurisprudence. Also, the claimant has always had the burden of proving that a *Charter*-guaranteed right or freedom has been violated.[329]

d. Relevance Applied

According to Justice Gonthier, Miron's whole argument rested upon the premise that his relationship was identical to that of married couples and carried with it the same consequences.[330] Marriage was a basic social institution, however, and a fundamental right that was legitimately fostered through legislation by distinguishing it from other kinds of relationships.[331] For Justice Gonthier, "[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[332] Furthermore, argued Justice Gonthier, extending all the attributes of marriage to unmarried couples would interfere directly with the individual's freedom to choose whether to enter the institution of marriage, imposing consequences on cohabitation without any regard to the will of the parties.[333]

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325. *Miron* [1995] 2 S.C.R. at 444–45.
326. *Miron* [1995] 2 S.C.R. at 444–46.
327. *Miron* [1995] 2 S.C.R. at 447.
328. *Miron* [1995] 2 S.C.R. at 446.
329. *See Miron* [1995] 2 S.C.R. at 446.
330. *Miron* [1995] 2 S.C.R. at 452.
331. *See Miron* [1995] 2 S.C.R. at 450.
332. *Miron* [1995] 2 S.C.R. at 448 (citing Maynard v. Hill, 125 U.S. 190, 211 (1888)).
333. *Miron* [1995] 2 S.C.R. at 450.

Section 15 of the *Charter*, noted Justice Gonthier, did not require that common law spouses be covered by all the provisions of the *Insurance Act* merely because the *Family Law Act* imposed support obligations in particular circumstances on some unmarried couples, nor would the relationship's economic interdependence gain it automatic section 15 protection. For the purposes of determining the scope of policy coverage, economic interdependence was only relevant insofar as it related to the institution of marriage. According to Justice Gonthier, "unmarried couples are not in a situation identical to married spouses with respect to mutual support obligations."[334]

In modern society, unmarried couples were not a distinct group suffering from stereotypes or prejudice. Since there was no stigma or stereotyping of unmarried couples as a result of the institution of marriage, the functional value of supporting marriage was not itself discriminatory.[335]

Justice Gonthier felt that it was the responsibility of the legislature to make social policy choices relating to the status, rights, and obligations of marriage.[336] The legislature was therefore authorized to define spousal entitlements, unless the values of society so fundamentally changed as to create a clear consensus that the power of the state to legislate in relation to marriage should be limited by the courts.[337]

2. The McLachlin Majority

Writing for the majority,[338] Justice McLachlin found that the "exclusion of unmarried partners from accident benefits available to married partners violated the *Charter*'s equality guarantees."[339] She criticized the minority's requirement that claimants prove that they suffered irrational or unreasonable unequal treatment.[340] This requirement, Justice McLachlin argued, would force "the claimant to lead evidence on state goals."[341] Furthermore, the Justice Gonthier analysis failed to focus on the effect or impact of the distinction in the

334. *Miron* [1995] 2 S.C.R. at 459–60.
335. *Miron* [1995] 2 S.C.R. at 455.
336. *See Miron* [1995] 2 S.C.R. at 463.
337. *See Miron* [1995] 2 S.C.R. at 461–62, 463–64.
338. Sopinka, Cory, and Iacobucci, JJ. concurring.
339. *Miron* [1995] 2 S.C.R. at 481.
340. *Miron* [1995] 2 S.C.R. at 485.
341. *Miron* [1995] 2 S.C.R. at 485.

social and economic context of the legislation and in the lives of the affected individuals.

a. Critique of Justice Gonthier's Approach

Justice McLachlin also suggested that Justice Gonthier employed circular reasoning in identifying the Legislature's intention as providing assistance to those couples who are married.[342] For Justice Gonthier, differential treatment on the ground of marital status is relevant to the purpose of advancing married couples and fostering the institution of marriage. The legislation was therefore not discriminatory.[343] This begs the question. As Justice McLachlin wrote, "The focus of the s[ection] 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom."[344]

Justice McLachlin also noted that any "relevance" analysis should be done under section 1, where the court may weigh the legislative purpose against the impact of the unequal treatment.[345] A claimant should only have to show that the unequal treatment is based on one of the grounds expressly mentioned in section 15(1) or some analogous ground, and that the treatment is a "violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics, rather than on the basis of individual merit, capacity or circumstance."[346]

b. Discrimination

In applying this test to the situation in *Miron*, Justice McLachlin found that the law, in treating Miron and his spouse differently from

342. *Miron* [1995] 2 S.C.R. at 489.
343. *Miron* [1995] 2 S.C.R. at 489.
344. *Miron* [1995] 2 S.C.R. at 489.
345. *Miron* [1995] 2 S.C.R. at 491.
346. *Miron* [1995] 2 S.C.R. at 491–92.

married couples, denied "a person in an unmarried relationship benefits granted a similar person in a married relationship."[347]

The characteristic of not having been in a state recognized marriage was held by the *Miron* majority to constitute a ground of discrimination within section 15(1).[348] It touched the individual's freedom to live life with the person of one's choosing, in the fashion of one's choosing—"a matter of defining importance to individuals."[349] Persons "living in sin" constituted an historically disadvantaged group who traditionally suffered social inequality and prejudice.[350] Furthermore, persons exercise limited control over whether they are married, and distinguishing between cohabiting couples on the basis of marital status fails to connect with current social values or realities.[351] Many of the markers of discrimination were present: the "violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making."[352]

Finally, Justice McLachlin noted that marriage could be good and honourable, and yet still be a source of discrimination.[353] "The issue was not whether marriage was good, but rather whether it may be used to deny equal treatment to people on grounds having nothing to do with their true worth or entitlement."[354]

3. Reasons of Justice L'Heureux-Dubé

Justice L'Heureux-Dubé agreed in the result with Justice McLachlin, but engaged in a separate section 15 analysis.[355] She noted that there was a distinction under the legislation, which had the effect of imposing a burden, obligation, or disadvantage on Miron and Valliere that was not imposed on married couples.[356]

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347. *Miron* [1995] 2 S.C.R. at 493.
348. *Miron* [1995] 2 S.C.R. at 497.
349. *Miron* [1995] 2 S.C.R. at 497.
350. *See Miron* [1995] 2 S.C.R. at 498.
351. *See Miron* [1995] 2 S.C.R. at 498–99.
352. *Miron* [1995] 2 S.C.R. at 499–500.
353. *See Miron* [1995] 2 S.C.R. at 500.
354. *Miron* [1995] 2 S.C.R. at 501.
355. *Miron* [1995] 2 S.C.R. at 465.
356. *Miron* [1995] 2 S.C.R. at 468.

a. Similarly Situated Test Distinguished

The insurance company argued that Miron and Valliere could not compare themselves to persons who were married because this would be returning to the rejected similarly situated test.[357] Justice L'Heureux-Dubé disagreed. While it was still necessary to draw comparisons between groups to discern the differential effect of the legislation, it was not necessary to compare "the entire collective, heterogeneous group of non-married persons against the essentially homogeneous group of married persons."[358] In fact, such an uncritical comparison of dissimilar groups would undermine the purposes of section 15.[359] According to Justice L'Heureux-Dubé, comparison was useful only between groups possessing sufficiently analogous qualities.[360] The appropriate comparison was between married couples and unmarried couples who were in a relationship analogous to marriage.[361] Unmarried persons were denied equality simply because they were not married.[362]

b. Discrimination

The last element in Justice L'Heureux-Dubé's section 15 analysis was a determination of whether the distinction was 'discriminatory' on the basis that it could either promote or perpetuate "the view that the individual adversely affected by the distinction [was] less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration."[363]

Justice L'Heureux-Dubé found that unmarried persons suffered "some disadvantage, disapproval, and marginalization in society."[364] In a significant number of cases, persons within this group did not have meaningful control over their circumstances, and the consequences of excluding unmarried persons from the benefits or protections of the

357. *Miron* [1995] 2 S.C.R. at 466.
358. *Miron* [1995] 2 S.C.R. at 467.
359. *See Miron* [1995] 2 S.C.R. at 467.
360. *Miron* [1995] 2 S.C.R. at 467.
361. *Miron* [1995] 2 S.C.R. at 467–68.
362. *See Miron* [1995] 2 S.C.R. at 468.
363. *Miron* [1995] 2 S.C.R. at 468.
364. *Miron* [1995] 2 S.C.R. at 470.

law would generally be experienced more severely by the dependent spouse.[365] The legislation was designed to further a very important interest: "protection of family units from potentially disastrous financial consequences due to the injury of one of their members."[366]

Justice L'Heureux-Dubé therefore concluded that the distinction had the potential to affect significantly an interest of extremely high societal value.[367] Furthermore, *all* couples in a relationship analogous to marriage were categorically excluded from joint insurance coverage.[368] This reasonably could be perceived as "a clear message that society did not consider this genre of relationship to be worthy of equal protection."[369] Accordingly, the impugned interest was "sufficiently pressing, the possible economic consequences to be sufficiently severe, and the manner of exclusion to be sufficiently complete" to produce significant discriminatory potential.[370]

Considering all these factors together, Justice L'Heureux-Dubé concluded that the challenged distinction might reasonably perpetuate the attitude that unmarried persons were "less worthy of recognition or value as human beings," and was thus in violation of section 15(1) of the *Charter*.[371]

B. Egan v. Canada[372]

Jim Egan and Jack Nesbit have lived together in a same-sex relationship since 1948. When Egan became 65 in 1986, he began to receive old age security and guaranteed income supplements under the *Old Age Security Act*.[373] On reaching age 60, Nesbit applied for a spousal allowance under section 19(1) of the *Act*, which is available to spouses between the ages of 60 and 65 whose combined income falls below a fixed level.[374] His application was rejected because his relationship did not fall within the definition of "spouse" in section 2, which

365. *See Miron* [1995] 2 S.C.R. at 471–74.
366. *Miron* [1995] 2 S.C.R. at 475.
367. *Miron* [1995] 2 S.C.R. at 476.
368. *See Miron* [1995] 2 S.C.R. at 476.
369. *Miron* [1995] S.C.R. at 476.
370. *Miron* [1995] 2 S.C.R. at 477.
371. *Miron* [1995] 2 S.C.R. at 477.
372. Egan v. Canada [1995] 2 S.C.R. 513.
373. R.S.C. 1985, c. 9.
374. *Egan* [1995] 2 S.C.R. at 578.

includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.[375] They brought an action seeking a declaration that the definition violated section 15(1) of the *Charter* on the basis that it discriminated on the ground of sexual orientation, and furthermore that the definition should be extended to include "partners in same-sex relationships otherwise akin to a conjugal relationship."[376]

A unanimous court agreed that sexual orientation was an analogous ground, but the majority, by upholding a heterosexuals-only definition of "spouse," failed to give any content to this recognition. Chief Justice Lamer and Justices La Forest, Gonthier, and Major found no violation of Egan and Nesbit's equality rights.[377] Justices Cory, Iacobucci, Sopinka, McLachlin, and L'Heureux-Dubé held that the definition of "spouse" in section 2 of the *Old Age Security Act* violated section 15.[378] However, Justice Sopinka joined Chief Justice Lamer, and Justices La Forest, Gonthier, and Major in holding that any discrimination could be reasonably justified under section 1.[379]

1. The La Forest Minority

For a minority with respect to section 15, Justice La Forest[380] followed the three-step analysis advocated by Justice Gonthier in *Miron*:

1) Does the law draw a distinction between the claimant and others?
2) Does the distinction result in disadvantage—does the impugned legislation impose a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others, or not provide them with a benefit which it grants others?

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375. R.S.C., C.0-9, s.2.
376. *Egan* [1995] 2 S.C.R. at 578.
377. *Egan* [1995] 2 S.C.R. at 529.
378. *Egan* [1995] 2 S.C.R. at 565–68 (L'Heureux-Dubé, J.); *Egan* [1995] 2 S.C.R. at 572 (Sopinka, J.); *Egan* [1995] 2 S.C.R. at 604 (Cory & Iacobucci, JJ.); *Egan* [1995] 2 S.C.R. at 625 (McLachlin, J.).
379. *Egan* [1995] 2 S.C.R. at 572.
380. Lamer, C.J., Gonthier, and Major, JJ., concurring.

3) Is the distinction based on an irrelevant personal characteristic which is either enumerated in section 15(1) or one analogous thereto?[381]

a. Relevance

Justice La Forest advocated a comparative analysis, linked to an examination of the larger context.[382] Relevance must be assessed by considering "the nature of the personal characteristic and its relevancy to the functional values underlying the law."[383] In particular, Justice La Forest noted that the *Charter* was not enacted in a vacuum, but must be placed in its proper linguistic, philosophic, and historical context.[384] This context was described as follows:

> The singling out of legally married and common law couples as the recipients of benefits necessarily excludes all sorts of other couples living together, whatever reasons these other couples may have for doing so and whatever their sexual orientation. . . . [W]hat Parliament clearly had in mind was to accord support to married couples who were aged and elderly, for the advancement of public policy central to society.[385]

This public policy favouring the relationships of cohabitation of heterosexual senior citizens was said to be rooted in tradition and biology. Justice La Forest wrote:

> [M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most

381. *Egan* [1995] 2 S.C.R. at 530.
382. *Egan* [1995] 2 S.C.R. at 530.
383. *Egan* [1995] 2 S.C.R. at 532 (quoting Miron v. Trudel [1995] 2 S.C.R. 418, 436).
384. *Egan* [1995] 2 S.C.R. at 532. *See also Miron* [1995] 2 S.C.R. at 436; R. v. Turpin [1989] 1 S.C.R. 1296, 1331–32; R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, 334.
385. *Egan* [1995] 2 S.C.R. at 535.

> children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.[386]

The relevant comparators were therefore same-sex couples and other non-procreative familial-type groupings—for example, siblings or grandparent-grandchild pairs who lived together.

> None of the couples excluded from benefits under the Act are capable of meeting the fundamental social objectives thereby sought to be promoted by Parliament. These couples undoubtedly provide mutual support for one another . . . [and may] occasionally adopt or bring up children, but this is exceptional and in no way affects the general picture . . . . [H]omosexuals differ from other excluded couples in that their relationships include a sexual aspect. But this sexual aspect has nothing to do with the social objectives for which Parliament affords a measure of support to married couples and those who live in a common law relationship . . . . [T]he distinction adopted by . . . Parliament is relevant here to describe a fundamental social unit . . . to which some measure of support is given.[387]

Accordingly, the Justice La Forest minority concluded that there was no discrimination. Senior same-sex couples were relevantly different from senior heterosexual couples, because (when they were some years younger, no doubt) the latter had the potential to procreate. Justice La Forest added that distinctions based on marital status were pervasive in both provincial and federal legislation, and that all such distinctions should not have to be reviewed under the *Charter*.[388] The extent of such a review would interfere with the desirable balance between legislatures and the judiciary.[389]

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386. *Egan* [1995] 2 S.C.R. at 536.
387. *Egan* [1995] 2 S.C.R. at 538–39.
388. *Egan* [1995] 2 S.C.R. at 539.
389. *See Egan* [1995] 2 S.C.R. at 539.

2. The Cory/Iacobucci Majority

The section 15 majority held that section 2 of the *Old Age Security Act* violated the equality guarantee.[390] Justices Cory and Iacobucci[391] supported the traditional *Andrews* test, described as follows:

> 1) Determine whether, owing to a distinction created by the questioned law, a claimant's right to equality has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> 2) Determine whether the distinction created by the law results in discrimination by considering the following:
>
> (a) whether the equality right is denied on the basis of a personal characteristic which is either enumerated in section 15(1) or which is analogous to those enumerated, and
>
> (b) whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others. This assessment should be conducted against the larger social, political and legal context. The analytical separation between section 15(1) and section 1 is essential, because the government has to bear the onus of justifying its discriminatory legislation.[392]

According to Justice Cory, there was direct discrimination in denying gay and lesbian common law couples the benefit of the spousal

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390. *Egan* [1995] 2 S.C.R. at 604.

391. Sopinka J., concurring; McLachlin J., in substantial agreement, stating that she would follow her reasons in *Miron*. In those reasons, all references to spouses were gender neutral. Accordingly, some speculate that she believes that all benefits associated with marriage should also be extended to same-sex couples. Time will tell. . . . See our discussion of *M. v. H.*, *infra*.

392. *Egan* [1995] 2 S.C.R. at 584.

allowance available to heterosexual common law couples.[393] In addition to being denied the equal economic benefit of the law, the couple was denied the opportunity to be publicly recognized as spouses, an interest of potentially tremendous importance.[394] In summary:

> The legislation denies homosexual couples equal benefit of the law . . . not on the basis of merit or need, but solely on the basis of sexual orientation. The definition of "spouse" as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The appellants' relationship vividly demonstrates the error of that approach. The discriminatory impact cannot be deemed to be trivial when the legislation reinforces prejudicial attitudes based on such faulty stereotypes.[395]

Justice Cory strongly criticized the reasoning of Justice La Forest, describing his analysis as circular and noting the absurdity of relying on the capacity to procreate as "relevant" when the spousal allowance was provided to couples regardless of whether they actually had any children.[396] Quite simply, "procreation ha[d] nothing to do with the qualifications to receive the benefit."[397]

3. Justice L'Heureux-Dubé's Approach to Section 15

Justice L'Heureux-Dubé took a unique approach to section 15, arguing that the "grounds" of the distinction would not be dispositive of the question of whether discrimination exists.[398] Rather, the court would focus on the social context of the distinction. While her approach still followed the basic outline of the *Andrews* model,[399] Justice L'Heureux-Dubé adopted an effects-based approach to

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393. *Egan* [1995] 2 S.C.R. at 587.
394. *See Egan* [1995] 2 S.C.R. at 594.
395. *Egan* [1995] 2 S.C.R. at 604.
396. *Egan* [1995] 2 S.C.R. at 607.
397. Thibaudeau v. Canada [1995] 2 S.C.R. 627, 701 (Cory & Iacobucci, JJ., concurring).
398. *Egan* [1995] 2 S.C.R. at 548–52.
399. *See Egan* [1995] 2 S.C.R. at 552.

discrimination. As her starting point, she advocated a return to the fundamental purpose of section 15(1):

> Disagreement, no matter how small, at the foundational level of establishing the right's purpose will only magnify over time in terms of how that right is *applied*. . . . I believe that this phenomenon is beginning to manifest itself in the divergent approaches to section 15 taken in recent cases before this Court, of which this case, *Miron v. Trudel*, and *Thibaudeau v. Canada*, are no exception. The emergence of these differences suggests to me that we may not necessarily be operating with the same underlying purpose in mind. For section 15 jurisprudence to continue to develop along principled lines, I believe that two things are necessary: (1) we must revisit the fundamental purpose of section 15; and (2) we must seek out a means by which to give full effect to this fundamental purpose.[400]

For Justice L'Heureux-Dubé, the fundamental purpose of section 15 was to guarantee equality "without discrimination," which included the important purpose of preventing or reducing distinctions which might worsen the circumstances of those who had already suffered marginalization or historical disadvantage.[401] She described "discrimination" as follows:

> A distinction is discriminatory within the meaning of s[ection] 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.[402]

A subjective-objective standard—the reasonably held view of one who is possessed of similar characteristics, under similar circumstances, and who is dispassionate and fully apprised of the circumstances—should be applied to determine whether there is a

400. *Egan* [1995] 2 S.C.R. at 541.
401. *See Egan* [1995] 2 S.C.R. at 542.
402. *Egan* [1995] 2 S.C.R. at 552–53.

discriminatory impact.[403] Justice L'Heureux-Dubé noted "that groups that are more socially vulnerable experience the adverse effects of legislative distinctions more vividly." [404] Judges must have an awareness of, and sensitivity to, the realities of those experiencing the distinction, in order to evaluate the impact of the distinction on members of the affected group.[405] Where the interest affected is fundamental or where the distinction has serious consequences, the impugned distinction will be more likely to have a discriminatory impact even with respect to groups in an advantaged position in society.[406]

Justice L'Heureux-Dubé listed other criteria for identifying discrimination, as had been identified in *Andrews*:

- whether the impugned distinction is based upon fundamental attributes that are generally considered to be essential to our popular conception of 'personhood' or 'humanness';
- whether the adversely affected group is already a victim of historical disadvantage;
- whether this distinction is reasonably capable of aggravating or perpetuating that disadvantage;
- whether the person is a member of a "discrete and insular minority," lacking in political power and thus vulnerable to having his or her interests overlooked;
- whether group members are currently vulnerable to stereotyping, social prejudice and/or marginalization; and
- whether this distinction exposes them to the reasonable possibility of future vulnerability of this kind.[407]

However, the absence or presence of some of these factors would not be determinative of the analysis.[408]

Justice L'Heureux-Dubé found that gay and lesbian couples were denied the equal benefit of the law on the basis of sexual

403. *See Egan* [1995] 2 S.C.R. at 553.
404. *Egan* [1995] 2 S.C.R. at 553.
405. *See Egan* [1995] 2 S.C.R. at 563.
406. *See Egan* [1995] 2 S.C.R. at 556.
407. *Egan* [1995] 2 S.C.R. at 554–55.
408. *See Egan* [1995] 2 S.C.R. at 557.

orientation.[409] Considering the nature of the group and the interest affected, the distinction was discriminatory. Justice L'Heureux-Dubé recognized that "same-sex couples are a highly socially vulnerable group, in that they have suffered considerable historical disadvantage, stereotyping, marginalization, and stigmatization within Canadian society."[410] The denial of spousal recognition for benefits purposes affected gay and lesbian individuals who were also elderly and poor. The interest was quite fundamental; "the rights claimants were directly and completely excluded, *as a couple*, from any entitlement to a basic *shared* standard of living for elderly persons cohabiting in a relationship analogous to marriage."[411] Justice L'Heureux-Dubé noted:

> Given the marginalized position of homosexuals in society, the metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex. This fundamental interest is therefore severely and palpably affected by the impugned distinction.[412]

The distinction was therefore reasonably capable of being discriminatory, and thus violated section 15 of the *Charter*.[413]

C. Thibaudeau v. Canada[414]

Thibaudeau was awarded custody of her two minor children and child support of $1,150 a month from her ex-husband. Section 56(1)(b) of the *Income Tax Act* ("*ITA*") required a separated or divorced parent to include child support in income, and section 60(b) of the *ITA* allowed a parent who had paid such amounts to deduct them from income.[415] Thibaudeau challenged the constitutionality of section 56(1)(b). She argued that by imposing a tax burden on money

409. *Egan* [1995] 2 S.C.R. at 565.
410. *Egan* [1995] 2 S.C.R. at 566–67.
411. *Egan* [1995] 2 S.C.R. at 567.
412. *Egan* [1995] 2 S.C.R. at 567.
413. *See Egan* [1995] 2 S.C.R. at 567–68.
414. Thibaudeau v. Canada [1995] 2 S.C.R. 627.
415. S.C. 1970–71–72, c. 63.

which she was to use exclusively for the benefit of her children, section 56(1)(b) infringed her right to equality.[416] A majority of the Court, once again splitting along gender lines, held that there was no discrimination.[417]

1. The Men: The Post-Divorce Family Unit

For a majority, Justice Gonthier[418] held that the impugned provisions of the *ITA* neither imposed a burden nor withheld a benefit so as to attract the application of section 15(1) of the *Charter*.[419] He insisted that the inclusion/deduction system was designed to increase the available resources that could be used for the benefit of the children and that the system did confer such a benefit in most cases.[420] A comparison of non-separated couples against separated or divorced parents showed that, *on the whole,* separated or divorced parents derived a benefit from inclusion/deduction: the tax burden of the *couple* was reduced.[421]

Justices Cory and Iacobucci[422] wrote separate reasons, rejecting Justice Gonthier's approach to section 15. They noted that the Gonthier/La Forest approach imports the justificatory analysis which properly belongs under section 1 of the *Charter*; "it focuses narrowly on the *ground* of distinction and . . . omits an analysis of the discriminatory *impact* of the impugned distinction;" it "permits proof of relevance, standing alone, to negate a finding of discrimination;" and it invites circular reasoning.[423]

Like Justice Gonthier, however, Justices Cory and Iacobucci concluded that:

> [I]f anything, the legislation in question confers a benefit on the post-divorce 'family unit.' . . . The fact that one member of the unit might derive a greater benefit from the legislation

416. *Thibaudeau* [1995] 2 S.C.R. at 665.
417. *Thibaudeau* [1995] 2 S.C.R. at 641.
418. Justices La Forest, Sopinka, Iacobucci, and Cory concurred; Chief Justice Lamer and Justice Major did not hear the case.
419. *Thibaudeau* [1995] 2 S.C.R. at 692 (Gonthier, J.); *see also Thibaudeau* [1995] 2 S.C.R at 641 (Sopinka, J.).
420. *Thibaudeau* [1995] 2 S.C.R. at 678–79.
421. *Thibaudeau* [1995] 2 S.C.R. at 691.
422. Justice Sopinka concurred. *Thibaudeau* [1995] 2 S.C.R. at 641 (Sopinka, J.).
423. *Thibaudeau* [1995] 2 S.C.R. at 700–01.

> than the other does not, in and of itself, trigger a s[ection] 15 violation, nor does it lead to a finding that the distinction in any way amounts to a denial of equal benefit or protection of the law.[424]

Justices Cory and Iacobucci felt that the family courts' ability to gross up child support awards to account for taxes was a satisfactory means to ensure equality.[425] Any disproportionate displacement of the tax liability between the former spouses was the result not of the *ITA*, but of the family court, which "provides avenues to revisit support orders that failed to take into account the tax consequences of the payments."[426] There was no additional burden on divorced or separated parents traceable to the *ITA*, and accordingly, no violation of section 15.[427]

2. The Women: Recognizing Women's Separate Personhood[428]

In contrast, Justices McLachlin and L'Heureux-Dubé found that the inclusion/deduction scheme violated section 15(1) of the *Charter*.[429] In their view, the appropriate unit of analysis was not the post-divorce family unit; such an approach would conceal the unequal effect on the parties to the unit. Instead, the Justices argued, "the effects on separated or divorced *custodial* parents should be compared with the effects on separated or divorced *non-custodial* parents."[430]

Both Justices found that the family law regime could not rectify the inequality created by the deduction/inclusion scheme.[431] Often, the courts either failed to consider tax impact or calculated an insuffi-

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424. *Thibaudeau* [1995] 2 S.C.R. at 702.
425. *Thibaudeau* [1995] 2 S.C.R. at 703.
426. *Thibaudeau* [1995] 2 S.C.R. at 703.
427. *Thibaudeau* [1995] 2 S.C.R. at 703.
428. For a discussion of the failure to recognize legal personhood, see KATHLEEN A. LAHEY, ARE WE "PERSONS" YET: LAW AND SEXUALITY IN CANADA (forthcoming Aug. 1999), and Kathleen A. Lahey, *Legal "Persons" and the* Charter of Rights*: Gender, Race, and Sexuality in Canada*, 77 CAN. B. REV. 402 (1998).
429. *Thibaudeau* [1995] 2 S.C.R. at 725 (McLachlin, J.); *Thibaudeau* [1995] 2 S.C.R. at 661 (L'Heueux-Dubé, J.).
430. *Thibaudeau* [1995] 2 S.C.R. at 644–45 (L'Heureux-Dubé, J.); *Thibaudeau* [1995] 2 S.C.R. at 715–17 (McLachlin, J.).
431. *Thibaudeau* [1995] 2 S.C.R. at 718–20 (McLachlin, J.); *Thibaudeau* [1995] 2 S.C.R. at 649–50 (L'Heureux-Dubé, J.).

cient adjustment. Judges exercised very wide discretionary power in the assessment process.[432] To ensure a constant and complete "gross-up," the custodial parent would be required to make frequent applications for variation of the original support order and would bear all the attendant psychological and economic costs of variation. The custodial parent might hesitate to pursue variation, not wanting to antagonize the non-custodial parent. Moreover, the government's own figures indicated that the inclusion/deduction regime was a net detriment to the "post-divorce family unit" in 29 percent of all cases, because "the marginal tax rate of the payor was lower than that of the recipient."[433]

Being a separated or divorced custodial parent "involves the individual's freedom to form family relationships," and "touches on matters intrinsically human, personal, and relational."[434] Separated or divorced custodial parents are a discrete and insular minority, having been historically subject to disadvantageous treatment, and they continue to face economic, social, and personal difficulties not faced by non-custodial parents or those in two-parent families.[435] Another consideration was that most separated or divorced custodial parents are women, already members of a disadvantaged group.[436] The status of separated or divorced custodial parent therefore constituted an analogous ground of discrimination.[437] It could "give rise to adverse distinctions on the basis of immutable personal characteristics, rather than on the merit and actual circumstances of the particular individual."[438]

A distinction based on an enumerated or analogous ground was likely to produce an infringement of section 15(1) of the *Charter*, except in "rare cases."[439] Here, the differential treatment had the effect of disadvantaging separated or divorced custodial parents, based not on merit or individuality, but solely and arbitrarily by reference to

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432. *See Thibaudeau* [1995] 2 S.C.R. at 719 (McLachlin, J.).
433. *Thibaudeau* [1995] 2 S.C.R. at 717 (McLachlin, J.); *Thibaudeau* [1995] 2 S.C.R. at 650 (L'Heureux-Dubé, J.).
434. *Thibaudeau* [1995] 2 S.C.R. at 722 (McLachlin, J.).
435. *See Thibaudeau* [1995] 2 S.C.R. at 722–23 (McLachlin, J.).
436. *See Thibaudeau* [1995] 2 S.C.R. at 657–58 (L'Heureux-Dubé, J.); *Thibaudeau* [1995] 2 S.C.R. at 724 (McLlachlin, J.).
437. *See Thibaudeau* [1995] 2 S.C.R. at 724–25 (McLachlin, J.).
438. *Thibaudeau* [1995] 2 S.C.R. at 724 (McLachlin, J.); *Thibaudeau* [1995] 2 S.C.R. at 657–59 (L'Heureux-Dubé, J).
439. *Thibaudeau* [1995] 2 S.C.R. at 725 (McLachlin, J.).

membership in a group.[440] The inclusion/deduction regime was contrary to section 15 and was not justified under section 1.[441]

D. Commentary: Responses to the Trilogy

1. Competing Analyses of Discrimination: Formal or Substantive Equality

In her solitary effort to highlight the impact of the differential treatment on the equality rights claimant, Justice L'Heureux-Dubé ventured away from the enumerated and analogous grounds approach altogether, stating her desire to begin a dialogue about the purpose of section 15 and the meaning of discrimination. Nobody was willing to join in her discussion.[442] In fact, the rest of the Court regressed to pre-*Andrews* reasoning. The majority adopted an increasingly individualized approach, focused on irrational stereotypes rather than the protection of vulnerable minorities.

A sizeable minority of the court, Chief Justice Lamer and Justices La Forest, Gonthier, and Major,[443] were strongly deferential within section 15, holding that there can be no discrimination by legislatures when defining the limits of fundamental social institutions such as marriage and the family.[444] Furthermore, the minority focussed entirely on the purpose of the legislation rather than on its effect on the disadvantaged group. The legislative purpose was defined with reference to the reason for exclusion, supporting legislation on the basis of tradition and social consensus. These Justices clearly prefer a formal approach to equality, at least when faced with a challenge to the dominance of married heterosexual couples. They have reintroduced the similarly situated test with a new name, the "relevantly different"

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440. *See Thibaudeau* [1995] 2 S.C.R. at 725 (McLachlin, J.).

441. The scheme did not impair the custodial parent's equality rights as little as possible, and its deleterious effects outweighed its salutary effects. *See Thibaudeau* [1995] 2 S.C.R. at 725–33 (McLachlin, J.).

442. *See* Egan v. Canada [1995] 2 S.C.R. 513, 541 (L'Heureux-Dubé, J.); Dianne Pothier, *M'Aider, Mayday: Section 15 of the Charter in Distress*, 6 NAT'L J. CONST. L. 295, 306 (1995).

443. We will refer to the reasoning of this group as the "Gonthier/La Forest" approach as these are the authors of the reasons in *Egan*, [1995] 2 S.C.R. at 513, and in *Miron v. Trudel* [1995] 2 S.C.R. 418.

444. *See Egan* [1995] 2 S.C.R. at 561 (La Forest, J.).

test.[445] Despite their strong assertions to the contrary, this "amounts to a very dramatic reversal back toward the approach rejected by the Supreme Court in *Andrews*."[446]

2. Misapplication of the Similarly Situated Test

Even supporters of a formal approach to equality have criticized the results in *Egan* and *Miron*. They suggest that the difficulty was not in the general approach, but simply that the similarly situated test was misapplied.[447] Under the "correct" application of the formal equality

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445. For an illustration of how clearly *Egan* is an application of the similarly situated test, compare the approach in *Andrews v. Ontario (Ministry of Health)* [1988] 9 C.H.R.R. D/5089, a decision which expressly followed that test. In that case, Karen Andrews was denied Ontario Hospital Insurance Plan (OHIP) coverage for her lesbian partner and their two children because OHIP defined a spouse as a person of the opposite sex. In response to Andrews's claim that this infringed her equality rights under the *Charter*, Justice McRae held that same-sex couples were not similarly situated to opposite-sex couples. He wrote: "Heterosexual couples procreate and raise children. They marry or are potential marriage partners and most importantly they have the legal obligations of support for their children whether born in wedlock or out and for their spouses pursuant to the *Family Law Act*. A same-sex partner does not and cannot have these obligations." *Andrews* [1988] 9 C.H.R.R. at D/5091 (citation omitted).

446. Black and Smith, *supra* note 49, at 14-35; *see also* Hester Lessard *et al.*, *Developments in Constitutional Law: The 1994–95 Term*, 7 SUP. CT. L. REV. 81 (1996), in which the authors concur that the Gonthier/La Forest analysis is a strong rejection of earlier jurisprudence and in particular the previous focus on the "contextualized individual." They state: "[T]his test bears no conceptual link to the enumerated or analogous grounds approach [in *Andrews*] and the pre-existing group context of disadvantage that approach required." Lessard *et al.*, *supra* at 91; *see also* Leon E. Trakman, *Section 15: Equality? Where?*, 6 CONST. FORUM 112, 114(1995) ("In this new trilogy, despite assertions to the contrary, Lamer C.J., La Forest, Gonthier and Major JJ. have varied from *Andrews*."). In fact, the minority approach may be even more narrow than the similarly situated test rejected in *Andrews*. In *Miron* [1995] 2 S.C.R. at 460–61, Justice Gonthier held that there was no discrimination because "unmarried couples were not in a situation identical to married spouses with respect to mutual support obligations."

447. *See* Beatty, *supra* note 166, at 362–63:

> The judgments of the La Forest-Gonthier coalition . . . provide textbook examples of one of the most common mistakes that judges make in applying the [formal] equality principle. In both cases, these four judges tested the relevance of the classification of 'married' (opposite sex) couples 'literally,' against itself, rather than, as one is supposed to do, in terms of the overarching objectives of welfare and security that these legislative regimes were designed to secure.

See also Tussman and tenBroek, *supra* note 159, at 345–46.

model, the legislation would have been found discriminatory, because the impugned provisions denied benefits to same-sex couples that were provided to others who are similarly situated. For the purposes of the legislation, same-sex spouses should have been adjudged in exactly the same position as heterosexual couples because of the similar functional values underlying the relationships. The sexual orientation of the claimants would have been an irrelevant distinction.[448]

3. Critique of the Gonthier/La Forest Approach

In our view, the Gonthier/La Forest test, with its formalistic conceptual approach, invites discrimination and cannot be applied in a more "correct" manner under section 15. "While appearing to infuse equal protection doctrine with objective rationality, certainty and fairness, the similarly situated test provides a doctrinal mask for what ultimately depends on the values and biases of judges."[449] Accordingly, the test rightly has been condemned, by a majority of the Supreme Court, by lower courts, and by academics.[450]

a. Not Reflective of the Language and Jurisprudence Defining the Section 15 Test

The question of relevance openly brings section 1 issues into section 15, in the same manner as the similarly situated test rejected by the court in *Andrews*.[451] As Justice L'Heureux Dubé wrote, "I believe that it is more accurate and more desirable to treat relevance as, in fact, a *justification* for distinctions that have a discriminatory impact on persons or groups, to be considered under s[ection] 1 of the *Charter*."[452]

While Justice Gonthier admitted that "the assessment of the functional values of the legislation under s[ection] 15 and the purpose

448. *See* Beatty, *supra* note 166, at 362.

449. Sheppard, *supra* note 155, at 220.

450. *See* Brad Berg, *Fumbling Towards Equality: Promise and Peril in* Egan, 5 N.J.C.L. 263 (1995); Bruce Ryder, Egan v. Canada: *Equality Deferred, Again,* C.L.E.L.J. 101 (1996); Smith and Black, *supra* note 49, at 14–36; Trakman, *supra* note 446, at 112; Robert Wintemute, *Discrimination Against Same Sex Couples: Sections 15(1) and 1 of the Charter:* Egan v. Canada, 76 CAN. BAR REV. 682 (1995).

451. *See* discussion *supra* at Part II.D.2.

452. Egan v. Canada [1995] 2 S.C.R. at 513, 548 (L'Heureux-Dubé, J.); *see also* Miron v. Trudel [1995] 2 S.C.R. 418, 491; Thibaudeau v. Canada [1995] 2 S.C.R. 627, 700.

of the legislation under s[ection] 1" overlap using his approach, he countered that the rights claimant always had the onus of proving discrimination.[453] This is misleading. Although the claimant had the onus of proving a disadvantaging distinction at law on the basis of an enumerated or analogous ground of discrimination, the claimant did not have to establish the purpose of the legislation or prove that the differential treatment was irrelevant to the law's purpose.

In *Egan*, for example, the analysis mandated by *Andrews* would have required the rights claimant to show differential treatment with a disadvantaging impact. The government would have to demonstrate that the objective of the rights limitation, and of the legislation as a whole, was pressing and substantial; that there was a rational connection between limiting the spousal benefit to heterosexual senior couples and promoting the overarching purposes of the law; that the infringement was a reasoned, minimal impairment of the equality rights of a vulnerable group; and finally, that the objectives of the legislation were proportionate to the adverse effects of the rights violation. Even if the differential treatment had some relationship to the purpose of the legislation, it would have been much more difficult to uphold the law under this kind of scrutiny. Extending the *Old Age Security Act* benefits to same-sex spouses would not have threatened the stability and integrity of traditional family units, and the exclusion had the effect of significantly impairing the rights of gay men and lesbians.[454]

Indeed, the Supreme Court has consistently avoided placing internal limitations on *Charter* rights,[455] particularly since, as "between the rights claimant and the government, the government is clearly in the superior position to characterize properly the purpose of its own legislation."[456] Justice La Forest once recognized that the relevance of a

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453. *Miron* [1995] 2 S.C.R. at 447.

454. *See* Beatty, *supra* note 166, at 372.

455. *See Egan* [1995] 2 S.C.R. at 548 (citing Andrews v. Law Soc'y of B.C. 1 [1989] S.C.R. 143, 178); *see also Miron* [1995] 2 S.C.R. at 486 (McLachlin, J., concurring) ("It is significant that where the *Charter* seeks to narrow rights by concepts like reasonableness, it does so expressly, as in s[ection] 8 and s[ection] 11(b). Section 15(1) does not contain this sort of limitation.").

456. *Egan* [1995] 2 S.C.R. at 547; *see also Miron* [1995] 2 S.C.R. at 485 (McLachlin, J., concurring) ("To require the claimant to prove that the unequal treatment suffered is irrational or unreasonable or founded on irrelevant considerations would be to require the claimant to lead evidence on state goals, and often to put proof of discrimination beyond the reach of the ordinary person."); *Thibaudeau* [1995] 2

distinction should be considered under section 1.[457] For example, in *Andrews*, Justice La Forest noted that being a non-citizen might be "relevant" to some legislative benefits.[458] He specifically said, however, that this should only be considered under section 1.[459]

In short, the assessment of relevance to the functional values of the legislation must be left to the section 1 stage of analysis, where the onus is on the government and where the court has developed the *Oakes* test[460] for making such assessments and evaluations. Such an approach is consistent with the structure of the *Charter* and pre-trilogy equality jurisprudence.

b. A New and Meaningless "Formula"

It has been widely recognized that the similarly situated test is tautological.[461] It does not contribute to determining the appropriate comparators, and it may be used to support any objective, including a discriminatory purpose.[462] "To label reasoning as circular suggests it is unhelpful, but possibly benign. The Gonthier/La Forest reliance on

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S.C.R. at 700 (Cory & Iacobucci, JJ., concurring)(noting that this approach "places an additional and erroneous onus upon the claimant").

457. Justice La Forest noted that citizenship "bears an attenuated sense' of relevance .... That is not to say that no legislative conditioning of benefits ... on the basis of citizenship is acceptable, merely that legislation purporting to do so" requires justification. "I agree with McIntyre J. that *any such justification must be found under section 1 of the Charter,* essentially because, in matters involving infringements of fundamental rights, it is entirely appropriate that government sustain the constitutionality of its conduct." (emphasis added). Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 43, 197.

Similarly, in *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, 279, Justice La Forest dismissed the argument that a mandatory retirement policy was not discriminatory simply because it was motivated by relevant "administrative, institutional and socio-economic considerations." This was irrelevant because the *Charter* protects against treatment which has a discriminatory *effect. See also* Wintemute, *supra* note 450.

458. *Andrews* [1989] 1 S.C.R. at 197.

459. *Andrews* [1989] 1 S.C.R. at 197.

460. Regina v. Oakes [1986] 26 D.L.R. (4th) 200.

461. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

462. *See,* BRODSKY AND DAY, *supra* note 72, at 160 ("[T]he most important flaw in the similarly situate[d] test is that there is no fundamental truth to it. It does not assist judges to identify and address the real equality issues; rather, it keeps them away from these issues. It is also potentially perverse, since it has the capacity to perpetuate inequality and disadvantage.").

relevance is anything but benign; it validates government action antithetical to equality."[463]

The relevance test is merely an overlay for judicial discretion which invites discriminatory thinking. In particular, a court can define the purpose of legislation and the comparator groups in a manner to defeat or support a claim of discrimination. David Lepofsky and Hart Schwartz note that a "court wishing to uphold the law can define the law's purpose tautologically to fit closely the classes delineated in it. A court wishing to strike down the law can define the law's purpose to justify a finding of similar situation among differently treated classes."[464]

Egan is a perfect example of an "unfortunate alignment of judicial and legislative prejudice" in defining the objective of the legislation and the relevant comparators.[465] The Courts can define the purpose of the statute so as to exclude same-sex couples and could therefore claim that same-sex couples were equivalent to the non-spousal relationships of roommates.[466] Sexual orientation was relevant to the provision of spousal benefits because of the "biological and social realities that heterosexual couples have the unique ability to procreate" and the fact that "marriage is by nature heterosexual."[467] While Justice La Forest admitted that some gay men and lesbians bring up children, he insisted that child-rearing in the lesbian and gay community "is exceptional and in no way affects the general picture,"[468] but cited no evidence for this (incorrect) assertion.[469] Almost

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463. Pothier, *supra* note 442, at 310.

464. M. David Lepofsky and Hart Schwartz, *An Erroneous Approach to the Charter's Equality Guarantee:* R. v. Ertel, 1988 67 CAN. B. REV. 115, 123 (1988); *see also* Sheppard, *supra* note 155, at 220 ("[T]he definition of a law's purpose can always be formulated so as to correspond rationally to the legislative classification." (citation omitted)).

465. Lessard *et al.*, *supra* note 446, at 94.

466. *See* Miron v. Trudel [1995] 2 S.C.R. 418, 488–90(McLachlan, J., concurring); Thibaudeau v. Canada [1995] 2 S.C.R. 627, 701 (Cory & Iacobucci, JJ., concurring); Trakman, *supra* note 446, at 117; Westen, *supra* note 461, at 537.

467. Egan v. Canada [1995] 2 S.C.R. 513, 536. As Pothier remarks in *supra* note 442, at n. 54: "Implicit in the majority judgments in both *Mossop* and *Egan* was that relationship issues are in the highest resistance category as regards gay and lesbian rights."

468. *Egan* [1995] 2 S.C.R. at 538.

469. We note that such a generalized characterization of an already disadvantaged group, without evidentiary basis, might aptly be defined as stereotype or prejudice. Turning to the facts, there is substantial evidence that it is common for lesbians and gay men to rear children. In fact, the lesbian community is said to have recently witnessed a "lesbian baby boom." *See* KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS,

absurdly, the *Old Age Security* benefits legislation at issue had absolutely nothing to do with procreation or marriage.[470] It was a benefit programme for low income heterosexual, cohabitating seniors, and neither marriage nor procreative capacity were eligibility requirements.[471]

Some members of the Court also employed circular reasoning in *Miron*. For example, Justice Gonthier wrote that "the functional value of the benefits is not to provide support for *all* family units living in a state of financial interdependence, but rather, the Legislature's intention was to assist those couples who are married."[472] Such a circular approach fails to address discrimination. As Justice McLachlin suggests:

> This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under s[ection] 15(1). The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under section 15(1).[473]

KINSHIP ch. 7 (1991); *see also* Canada (Att'y Gen.) v. Mossop [1993] 1 S.C.R. 554, 627–28 (L'Heureux-Dubé, J., dissenting); *Re K* [1995] 23 O.R. (3d) 679 (Prov. Div); Kate Hill, *Mothers by Insemination: Interviews, in* POLITICS OF THE HEART: A LESBIAN PARENTING ANTHOLOGY 111–19, (Sandra Pollack & Jeanne Vaughn eds., 1987); Katherine Arnup, *We are Family: Lesbian Mothers in Canada*, RESOURCES FOR FEMINIST RES. 101 (1993); Dorothy Atcheson, *Semen Envy*, OUT, Oct. 1995, at 116; Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SH. J. HUM. RTS. 513 (1993); Brad Gooch, *My Two Dads*, OUT, Feb. 1996, at 90.

470. *See Egan* [1995] 2 S.C.R. at 588 (Cory & Iacobucci, JJ., dissenting).

471. The purposes of these laws were described, more reasonably, as the alleviation of poverty among elderly households in *Egan* [1995] 2 S.C.R at 535, 606–09 (Cory & Iacobucci, JJ., dissenting), and the reduction of economic dislocation and hardship in *Miron* [1995] 2 S.C.R. at 503.

472. *Miron* [1995] 2 S.C.R. at 461.

473. *Miron* [1995] 2 S.C.R. at 488–89; *see also* BRODSKY & DAY, *supra* note 72, at 156–57 (commenting on tautology in judicial decisions):

> [C]lasses are defined and the comparison made within the logic of the legislation itself; no perspective is brought to the analysis other than that of the challenged law. For the applicant, this means that there is no way to break out of the law that is the cause of the problem. It is a closed and self-perpetuating circle.

c. A Majoritarian View of Equality Rather Than a Focus on Effects

The similarly situated test is organized around similarities and differences between rights claimants and current rights holders. Accordingly, the sameness approach requires that rights claimants conform to a standard defined by the members of dominant social groups.[474] *Bliss* illustrates that, if there is no "norm" against which to set a standard for the treatment of a disadvantaged group, a court is likely to find no discrimination, only "difference."[475] In this manner, courts can deny equality to those who are the most 'different' and therefore the most vulnerable. As Catherine MacKinnon writes " to require that one be the same as those who set the standard—those which one is already socially defined as different from—simply means that sex equality is designed never to be achieved."[476]

The reasoning of formal equality transforms "problems of inequality, domination and subordination into problems of irrational classification."[477] Discrimination is not about "sameness" and "difference," "irrational," or "irrelevant" classifications. It is about oppression. MacKinnon explains:

> If gender were merely a question of difference, sex inequality would be a problem of mere sexism, of mistaken differentiation, of inaccurate categorization of individuals. This is what the difference approach thinks it is and is therefore sensitive to. But if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake.[478]

Because discrimination is an issue of imposed marginalization and disadvantage, rather than irrational characterization, it is crucial to consider the effect or impact of the distinction on the lives of the individuals it touches.[479] Although a distinction may be relevant to the

474. *See* Sheppard, *supra* note 155, at 212.
475. Bliss v. Attorney Gen. [1979] D.L.R. (3d) 417.
476. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 44 (1987)
477. Sheppard, *supra* note 155, at 220; *see also* BRODSKY & DAY, *supra* note 72, at 147–49.
478. MACKINNON, *supra* note 476, at 42.
479. *See* Miron v. Trudel [1995] 2 S.C.R. 418, 488.

goals and purposes of the legislation, such relevance does not end the inquiry into its discriminatory *effect*.[480] "If section 15 is about recognizing the equal worth and dignity of each human being, it seems counter-productive to say that this sense of equal worth has not been impugned merely because the legislative distinction is relevant to some legitimate legislative purpose."[481]

Although the *Egan* minority recognized that lesbians and gay men form a disadvantaged group, it failed to analyze the effects of the legislation in a social, historical, and political context of homophobia and lesbophobia. Furthermore, there was no recognition that the privileging of heterosexuality—that is, heterosexism—directly functions to subordinate lesbians and gay men.[482]

Despite Justice Gonthier's claim that his is a "contextual approach," he situates his analysis in the context of an oppressive majority. His perspective accepts the superiority of the heterosexual, married family unit; it celebrates the same oppressive context of traditional values and biological realities that equality theory is asked to challenge. Although Justice Gonthier seems to agree that "superficial biological differences" should not justify discrimination, he claims that a court must look to the larger context to "sensibly separate biological differences which are normatively relevant and hence benign, from those which are irrelevant and thus discriminatory."[483]

Justice Gonthier seems to suggest that biological differences relate to some universal set of values or standards which are harmless and cannot be discriminatory. Although the precise content of these universal, quasi-biological values are undefined, we do know that they support marriage as a permissibly privileged, fundamental, inherently heterosexual institution. Accordingly, the universal standards elevate heterosexual sexual intercourse within marriage to an ultimate constitutional value, seemingly unchallengeable by notions of equality, liberty, or freedom of conscience. As discussed earlier, the use of biological differences leads the court back into the similarly situated

480. *See* Egan v. Canada [1995] 2 S.C.R. 513, 546–47.

481. *Egan* [1995] 2 S.C.R. at 546–47; *see also* Sheppard, *supra* note 155, at 213.

482. *See* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories, in* FEMINIST LEGAL THEORY 263 (Katharine T. Bartlett & Rosanne Kennedy, eds., 1991); Lessard, *supra* note 446, at 91.

483. *Miron* [1995] 2 S.C.R. at 443. *But see* Judith Butler, *Contingent Foundations: Feminism and the Question of Postmodernism, in* FEMINISTS THEORIZE THE POLITICAL 3, 15–16 (Judith Butler & Joan W. Scott eds., 1992) ("Identity categories are never merely descriptions, but always normative, and as such, exclusionary.").

test,[484] and authorizes the discrimination which itself creates "biological difference."

Further, the Gonthier/La Forest approach in *Egan* and *Miron* openly permits legislatures to privilege certain family forms on the basis of particular moral and religious teachings.[485] Justice La Forest puts it bluntly: "Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions."[486]

A reliance on tradition to justify discrimination allows for a "judicial parade of the same sort of prejudice that plagues the legislation in the first place."[487] The *Charter* was meant to subject basic premises to strict examination.[488] It was not meant to authorize discriminatory government action because such discrimination is grounded in tradition. The extensive history and pervasiveness of discrimination is not a reason for deference to the legislature. It is a call to judicial action.

Finally, the Gonthier/La Forest approach supports an ambit of "legislative social policy choices relating to the status rights, and obligations of marriage, a basic institution of our society intimately related to its fundamental values."[489] Justice La Forest adds that distinctions based on marriage pervade both provincial and federal legislation and that all such distinctions should not have to be reviewed under section 1.[490]

This approach allows bigoted views to prevail over respect for the equal dignity of persons, without even a judicial recognition of the existence of discrimination.[491] The test supports a complete abdication of responsibility for minority rights, contrary to the very purpose of section 15. Leon Trakman states that it is on "account of the tendency of government to overrepresent popular interests that the section

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484. *See* Philipps & Young, *supra* note 156, at 256.

485. We have discussed the problems inherent in the reliance on tradition to justify discrimination in Part I.

486. *Egan* [1995] 2 S.C.R. at 536.

487. Lessard *et al.*, *supra* note 446, at 94.

488. *See* BRODSKY & DAY, *supra* note 72, at 160–65 (suggesting that the reliance on tradition does not subject the purported purposes to scrutiny, but takes them as given. This is especially problematic if the purposes themselves are based on history, biology, or moral standards).

489. Miron v. Trudel [1995] 2 S.C.R. 418, 463–64 (Gonthier, J., dissenting).

490. *See* Egan v. Canada [1995] 2 S.C.R. 513, 539.

491. *See* Trakman, *supra* note 446, at 121.

15(1) guarantee of equality is a necessary counterbalance. It is in recognizing that courts are bound to offset the government's underinclusion of unpopular values that section 15(1) is so vital to a free and democratic society."[492]

V. RECENT DECISIONS

In the wake of the divided Court of the trilogy, there has been a string of unanimous decisions on equality issues. The most recent decisions, *Eldridge*, *Vriend*, and *Law*, are particularly promising. However, the Court's new tendency to "agree to disagree" leaves many of the major issues of the trilogy unresolved.

A. Benner v. Canada (Secretary of State)[493]

Benner, born in the United States to a Canadian mother and an American father, applied for Canadian citizenship. The *Citizenship Act* provided that persons born abroad before February 15, 1977, would be granted citizenship on application if born of a Canadian father, but would be required to undergo a security check and to swear an oath if born of a Canadian mother. During Benner's security check, the Registrar of Citizenship discovered that he had been charged with several criminal offences. The Registrar advised that he was prohibited from acquiring citizenship and his application was rejected. Benner applied for an order requiring the Registrar to grant him citizenship without swearing an oath or being subject to a security check on the basis that the differential requirements for children of Canadian mothers as against Canadian fathers were discriminatory.

For the Court, Justice Iacobucci reviewed the different approaches to section 15 and applied the test of Justices Cory and McLachlin, noting, however, that "the result [would be] the same no matter which test was applied."[494] Under the Gothier/La Forest approach, the values of personal safety, nation-building, and national security underlying the *Citizenship Act* would not be advanced by differential treatment based on the gender of Canadian parent of a

492. Trakman, *supra* note 446, at 121.
493. Benner v. Canada [1997] 1 S.C.R. 358.
494. *Benner* [1997] 1 S.C.R. at 393.

citizenship applicant.[495] "Whether one's mother or father was Canadian is entirely irrelevant to the quality of one's candidacy for Canadian citizenship."[496]

Under Justices Cory, McLachlin, and Iacobucci's test, the impugned provisions of the *Citizenship Act* expressly disadvantaged children born abroad to Canadian mothers versus Canadian fathers.[497] This differential treatment constituted clear discrimination. The Government argued that the preference for applicants with Canadian mothers over those with Canadian fathers was a product of historical legislative circumstance, not of discriminatory stereotypical thinking, so there could be no discrimination. Justice Iacobucci rejected this argument. Parliament's decision to maintain a discriminatory denial of equal treatment did not make the continued denial any less discriminatory.[498] The legislation continued to suggest that children of Canadian mothers may be more dangerous than those of Canadian fathers. Justice Iacobucci concluded that "the impugned provisions of the *Citizenship Act* [were] indeed discriminatory and violate[d] section 15 of the *Charter*."[499]

B. Eaton v. Brant County Board of Education[500]

The *Education Amendment Act* required all school boards to provide special education programs and services for pupils with intellectual disabilities, and prescribed a system of Special Education Identification Placement and Review Committees (IPRCs) and rights of appeal.[501] In accordance with this process, the IPRC, after consultation with her teacher assistants and parents, determined that Emily Eaton should be placed in a special education class. The Ontario Special Education Tribunal (the "Tribunal") confirmed the placement, contrary to the wishes of Emily's parents.

The issue was whether the decision contravened the equality provisions of section 15(1) of the *Charter*. With all Justices concurring, Justice Sopinka concluded that the decision of the Tribunal was based

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495. *See Benner* [1997] 1 S.C.R. at 393.
496. *Benner* [1997] 1 S.C.R. at 393.
497. *See Benner* [1997] 1 S.C.R. at 394.
498. *See Benner* [1997] 1 S.C.R. at 396.
499. *Benner* [1997] 1 S.C.R. at 403.
500. Eaton v. Brant Cty. Bd. of Educ. [1997] 1 S.C.R. 241.
501. *See Eaton* [1997] 1 S.C.R. at 252–54.

on what was in the best interests of the child and that no violation of section 15(1) occurred in the circumstances.[502]

Justice Sopinka noted that, while there was no unanimity in the application of section 15,[503] the case could be resolved based on the following principles, on which there was agreement. To find a violation of section 15:

1) The claimant has to establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.
2) The claimant also has to show that the denial constitutes discrimination. That is:
3) The claimant has to show that the denial rests on one of the grounds enumerated in section 15(1) or an analogous ground,
4) that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics,
5) "[F]urthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate section 15."[504]

Justice Sopinka noted that, to ensure equal treatment of persons with disabilities, it would often be necessary to take into account the personal characteristics of individual disabled persons.[505] The purpose of section 15 of the *Charter* was not only to prevent discrimination by the attribution of untrue, stereotypical characteristics based on immutable conditions. It was also intended to ameliorate the position of groups within Canadian society who had suffered disadvantage by exclusion from mainstream society.[506]

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502. *See Eaton* [1997] 1 S.C.R. at 279.
503. *See Eaton* [1997] 1 S.C.R. at 270.
504. *Eaton* [1997] 1 S.C.R. at 270–71 (quoting Miron v. Trudel [1995] 2 S.C.R. 418, 487).
505. *Eaton* [1997] 1 S.C.R. at 272.
506. *See Eaton* [1997] 1 S.C.R. at 272.

Here, discrimination lay in the failure to make reasonable accommodations, constructing society along able-bodied standards.[507] It was therefore necessary to recognize the individual actual characteristics of persons with disabilities.[508] Disability was different from other enumerated grounds such as race or sex because there was individual variation with respect to disability.[509] Depending upon the person and the particular disability, integration in schooling could be either a benefit or a burden.

There was differential treatment.[510] The Tribunal, however, considered Emily's special needs to fashion a placement that would enable her to benefit most from an educational program. The Tribunal found, based on Emily's three years of experience in a regular class, that in her circumstances, integration had "the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting".[511] The best possible placement was in the special class. Thus, this decision could not have the effect of disadvantaging her.[512]

The Court of Appeal had held "that the Tribunal's reasoning infringed [section] 15(1) because the *Charter* mandate[d] a presumption in favour of integration. This presumption is displaced if the parents consent to a segregated placement."[513] Justice Sopinka found that a test focused on the best interests of the child should not be encumbered by a presumption because this would likely "render proceedings more technical and adversarial."[514] Moreover, a decision might "be made by default rather than on the merits as to what is in the best interests of the child."[515]

Justice Sopinka concluded that the placement of Emily was not discriminatory[516] and that both the Tribunal's order and its reasoning conformed with section 15(1) of the *Charter*.[517]

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507. *See Eaton* [1997] 1 S.C.R. at 272.
508. *See Eaton* [1997] 1 S.C.R. at 272.
509. *See Eaton* [1997] 1 S.C.R. at 273.
510. *See Eaton* [1997] 1 S.C.R. at 274.
511. *Eaton* [1997] 1 S.C.R. at 275.
512. *Eaton* [1997] 1 S.C.R. at 277.
513. *Eaton* [1997] 1 S.C.R. at 278.
514. *Eaton* [1997] 1 S.C.R. at 278.
515. *Eaton* [1997] 1 S.C.R. at 278–79.
516. *Eaton* [1997] 1 S.C.R. at 279.
517. *See Eaton* [1997] 1 S.C.R. at 279.

C. Commentary: Healing the Divide

In *Eaton*, Justice Sopinka understated the deep divisions on section 15 after the trilogy, noting that "there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of [section] 15 of the *Charter*."[518] Still, *Eaton* was resolved on the basis of undisputed principles. The unanimous Court stated that the claimant must show "that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics."[519] If the law did not have the effect of imposing a real disadvantage in the social and political context of the claim, it might not violate section 15.

In fact, Justice Sopinka's actual application of the test did not reflect his definition of discrimination as the attribution of untrue, stereotypical characteristics based on immutable conditions. He noted that section 15 was also intended "to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society."[520]

Although discrimination on the basis of disability forced Justice Sopinka to move away from the liberal individual, irrational stereotype model of discrimination, he did not succeed in fully developing an analysis of contextualized disadvantage from the perspective of the rights claimant. This was illustrated in his articulation of the test and reasoning for the court. Disability was described as a "real" difference that must be accommodated, rather than life experiences worthy of equal respect which have been constructed as "disability" from an ableist perspective.[521] There was no movement beyond determinism, toward the space for freedom that would allow for substantive change.[522]

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518. *Eaton* [1997] 1 S.C.R. at 270.
519. *Eaton* [1997] 1 S.C.R. at 270 (quoting Miron v. Trudel [1995] 2 S.C.R. 418, 485).
520. *Eaton* [1997] 1 S.C.R. at 272.
521. *See Eaton* [1997] 1 S.C.R. at 272.
522. *See generally* Vicky D'Aoust, *Competency, Autonomy, and Choice: On Being a Lesbian and Having Disabilities*, 7 CAN. J. WOMEN & L. 564 (1994).

D. Eldridge v. British Columbia (Attorney General)[523]

The provincial government of British Columbia failed to provide funding for sign language interpreters for deaf patients when they received medical services. Eldridge alleged that this violated section 15(1) of the *Charter*. Deaf persons would receive lower quality medical services than hearing persons because of the communication barrier. The Supreme Court of Canada unanimously concluded that the failure to pay for interpreters infringed upon the right to equal benefit of the law without discrimination based on physical disability.[524]

1. Purpose of Section 15

Justice La Forest commenced his section 15 analysis by noting that the provision was to be interpreted in a generous and purposive manner.[525] Section 15 was to serve two distinct but related purposes: "[f]irst, it expresse[d] a commitment . . . to the equal worth and human dignity of all persons;"[526] second, it was "to rectify and prevent discrimination against particular groups 'suffering social, political and legal disadvantage in our society.' "[527]

2. Disadvantaged Groups

While there might be discrimination against a member of a more advantaged group, historical disadvantage is an important *indicium* of discrimination.[528] An examination of "the larger social, political, and

523. Eldridge v. British Columbia (Att'y Gen.) [1997] 3 S.C.R. 624.
524. *Eldridge* [1997] 3 S.C.R. at 682.
525. *Eldridge* [1997] 3 S.C.R. at 666.
526. *Eldridge* [1997] 3 S.C.R. at 667 ("As McIntyre J. remarked in *Andrews*, [section] 15(1) 'entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.' " (quoting Andrews v. Law Soc'y of B. C. [1989] 1 S.C.R. 143, 171)).
527. *Eldridge* [1997] 3 S.C.R. at 667 (quoting R. v. Turpin [1989] 1 S.C.R. 1296, 1333).
528. *See Eldridge* [1997] 3 S.C.R. at 667; *see also* Egan v. Canada [1995] 2 S.C.R. 513, 554–55 (L'Heureux-Dubé, J., dissenting); Miron v. Trudel [1995] 2 S.C.R. 418, 436 (Gonthier, J., dissenting).

legal context" showed people with disabilities were clearly subject to exclusion and marginalization.[529]

3. Section 15 Test

Justice La Forest noted that:

> [w]hile this court has not adopted a uniform approach to [section] 15(1), there is broad agreement on the general analytic framework. A person claiming a violation of section 15(1) must first establish that because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in [section] 15(1) or one analogous thereto.[530]

Justice La Forest described the two approaches to discrimination. On one view, discrimination must be "based on an irrelevant personal characteristic."[531] In such cases, section 15(1) would not be infringed unless the distinguished personal characteristic was irrelevant to the functional values underlying the law, provided that those values were not themselves discriminatory.

Other members of the Court suggested that relevance was only one element of the test for discrimination.[532] As in *Benner*, either of the two approaches produced the same result.[533] The distinction was based on a personal characteristic that was irrelevant to the functional values of promoting health and preventing and treating illness and disease.

529. *Eldridge* [1997] 3 S.C.R. at 668–69 (quoting *Turpin* [1989] 1 S.C.R. at 1331).
530. *Eldridge* [1997] 3 S.C.R. at 669 (citations omitted).
531. *Eldridge* [1997] 3 S.C.R. at 669.
532. *See Eldridge* [1997] 3 S.C.R. at 670.
533. *See Eldridge* [1997] 3 S.C.R. at 670.

4. Discrimination

Eldridge had been denied the "equal benefit of the law without discrimination."[534] Although there was no unequal treatment on the face of the Legislation as between deaf and hearing persons, the failure to fund sign language interpretation meant that deaf persons were denied the full benefit of medical services.[535]

Justice La Forest noted the *Charter* offered protection against adverse effects discrimination. The *Charter* "was intended to ensure a measure of substantive, and not merely formal, equality."[536] Accordingly, it was not necessary to show a discriminatory purpose or intention to prove a section 15(1) violation.[537]

5. Adverse Effects

Justice La Forest wrote that legislation was discriminatory when it had the effect of denying a person the equal benefit of law.[538] As Justice McIntyre stated in *Andrews*, "[t]o approach the ideal of full equality before and under the law . . . the main consideration must be the impact of the law on the individual or the group concerned."[539] True equality required the affirmation of differences.[540]

> [T]he purpose of [section] 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.[541]

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534. *Eldridge* [1997] 3 S.C.R. at 670.
535. *See Eldridge* [1997] 3 S.C.R. at 670.
536. *Eldridge* [1997] 3 S.C.R. at 671.
537. *See Eldridge* [1997] 3 S.C.R. at 671.
538. *Eldridge* [1997] 3 S.C.R. at 671.
539. Andrews v. Law Soc'y of B. C. [1989] 1 S.C.R. 143, 165.
540. *See Andrews* [1989] 1 S.C.R. at 169.
541. Eaton v. Brant Cty. Bd. Of Educ. [1997] 1 S.C.R. 241, 272; *see also Eldridge* [1997] 3 S.C.R. at 673.

6. Legislative Inaction

The Government argued that section 15(1) did not oblige governments to implement programs to alleviate disadvantages that existed independently of state action. Instead, governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.

According to Justice La Forest, this was "a thin and impoverished vision of [section] 15(1)."[542] Although [section] 15(1) of the *Charter* may or may not require proactive efforts by the state to remedy systemic inequality, once the government offered a benefit, it was required to provide the benefit without discrimination.[543]

> In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons. . . . Moreover, it has been suggested that, in taking this sort of positive action, the government should not be the source of further inequality. . . . If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the [section] 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.[544]

7. Relationship Between Section 15 & Section 1

If there were policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies should be considered under section 1 of the *Charter*. Accordingly, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where necessary for effective communication constituted a *prima facie*

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542. *Eldridge* [1997] 3 S.C.R. at 678.

543. *See Eldridge* [1997] 3 S.C.R. at 678; Thibaudeau v. Canada [1995] 2 S.C.R. 627, 655; Miron v. Trudel [1995] 2 S.C.R. 418, 418; Native Women's Assn. of Can. v. Canada [1994] 3 S.C.R. 627, 655; Haig v. Canada (Chief Electoral Officer) [1993] 2 S.C.R. 995, 1041–42; *see also* Tétreault-Gadoury v. Canada [1991] 2 S.C.R. 22.

544. *Eldridge* [1997] 3 S.C.R. at 678–680.

violation of the [section] 15(1). "This failure denie[d] [deaf persons] the equal benefit of the law and discriminates against them in comparison with hearing persons."[545]

E. Vriend v. Alberta[546]

Vriend v. Alberta involved a gay man who was fired from his job as a laboratory coordinator because of his sexual orientation. His complaint to the Alberta Human Rights Commission was rejected because sexual orientation was not expressly a ground of discrimination under the *Individual's Rights Protection Act (IRPA).*[547] The comprehensive provincial human rights statute protected against discrimination on the basis of "race, religious beliefs, colour, gender, physical disability, marital status, age, mental disability, ancestry and place of origin" in a wide range of areas, including employment.[548] At the Alberta Court of Appeal, Justice McClung issued a majority judgment which characterized homosexuality as an immoral sexual aberration that was legitimately excluded from human rights protection.[549]

In April 1998, a unanimous[550] Supreme Court of Canada, overruling Justice McClung, read in protection against discrimination on the basis of sexual orientation into the *IRPA.*[551] Yet again, the Court did not reconcile the different approaches to section 15, stating that any differences in approach would not affect the result.

Justice Cory held that the *IRPA* created a "distinction between homosexuals, on one hand, and other disadvantaged groups which are

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545. *Eldridge* [1997] 3 S.C.R. at 682.

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

547. *Individual's Rights Protection Act,* R.S.A. 1980 ch. I-2.

548. *See Vriend* [1998] 1 S.C.R. at 507–08.

549. *See Re* Vriend v. Alberta [1996] 132 D.L.R. (4th) 595, 609, 611; *Vriend* [1998] 1 S.C.R. at 507–08. Justice McClung was later reprimanded for his discriminatory comments.

550. The Court was unanimous except with respect to remedy. On that issue, Justice Major dissented; he would have declared the sections denying protection to gays and lesbians unconstitutional but would have granted a declaration of invalidity, suspended for a period of one year. "Reading in" was inadvisable since it was clear that the Legislature was opposed to including sexual orientation as a prohibited ground of discrimination. The Legislature might prefer no human rights act over one that included sexual orientation as a prohibited ground of discrimination or it might want to invoke the notwithstanding clause.

551. *Vriend* [1998] 1 S.C.R. at 578.

protected under the *Act*, on the other."[552] It also created a "second distinction . . . a more fundamental one . . . between homosexuals and heterosexuals."[553] Given the social reality of discrimination against gays and lesbians, the exclusion of sexual orientation protections clearly had a negative impact on gays and lesbians as opposed to heterosexuals.[554] Therefore, the *IRPA* denied substantive equality to gays and lesbians, excluding them from the government's statement of policy against discrimination, and denying them access to the remedial procedures established by the *Act*. Justice Cory observed:

> It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned.[555]

The Court held that the absence of a remedy for sexual orientation discrimination had "dire and demeaning consequences for those affected."[556] It could reasonably be inferred that the failure to provide human rights protection condoned and even encouraged discrimination against gays and lesbians.[557] Justice Cory wrote:

> The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. . . .

552. *Vriend* [1998] 1 S.C.R. at 541.
553. *Vriend* [1998] 1 S.C.R. at 541.
554. *See Vriend* [1998] 1 S.C.R. at 543–44.
555. *Vriend* [1998] 1 S.C.R. at 536.
556. *Vriend* [1998] 1 S.C.R. at 549.
557. *See Vriend* [1998] 1 S.C.R. at 550.

> Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.[558]

All of the Justices recognized that the failure to include protection on the basis of sexual orientation under the human rights statute was discrimination that could not be justified under section 1 of the *Charter*. It was a dramatic departure from *Egan*.[559] In his section 1 analysis, Justice Iacobucci wrote:

> [G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words.[560]

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558. *Vriend* [1998] 1 S.C.R. at 551.

559. As discussed in *supra* Part IV.B., four of the nine justices (La Forest, Major, Gonthier, JJ. and Lamer, C.J.) advocated a new approach to section 15(l) in *Egan*. A finding of discrimination would require that a distinction be irrelevant to the purposes of the legislation. *Egan* [1995] 2 S.C.R. at 526–40. Under section 1, they were joined by Justice Sopinka in upholding the opposite-sex definition of spouse under the *Old Age Security Act*. *Egan* [1995] 2 S.C.R. at 572–57. Although *Vriend* represents an important, unanimous, and progressive result in favour of equality for Canadian lesbians and gay men, it is politically easier to provide protection under human rights legislation than to amend the definition of spouse. The true test of the Court will be *M. v. H.*, discussed *infra* Part VI.A.

560. *Vriend* [1998] 1 S.C.R. at 559–60.

a. Commentary: Reason to Hope?

Eldridge and *Vriend* return the Court to a more generous and purposive interpretation of section 15 which is focussed on ameliorating the situation of disadvantaged groups and ensuring the human dignity of all persons. In considering an instance of adverse effects discrimination, the *Eldridge* court had to highlight the impact of the legislation on the rights claimants in order to find discrimination.[561] In *Vriend*, the human rights statute failed to include sexual orientation as a protected ground. The discrimination was only apparent in examining the larger social context. It then became clear that the exclusion of sexual orientation protections had a negative impact on gays and lesbians. By focussing on effects, the Court was able to recognize that disability and sexual orientation discrimination were not pre-existing disadvantages for which the Government had no responsibility. Instead, the inequality was perpetuated by the state's failure to give equal consideration to a group of citizens.[562] Further, the government had a responsibility to "ameliorate disadvantage in the provision of benefits and services" and any limitations on this obligation were to be considered under section 1 of the *Charter*.[563]

These are very progressive decisions in contrast to the trilogy. According to *Eldridge* and *Vriend*, the government is required to act in a manner that does not have the effect of disadvantaging groups experiencing pre-existing inequality. It remains to be seen, however, whether the court has truly embraced a substantive equality analysis.

561. Eldridge v. British Columbia [1997] 3 S.C.R. 624.
562. *Vriend* [1998] 1 S.C.R. at 493.
563. *Vriend* [1998] 1 S.C.R. at 493.

VI. THE FUTURE OF SECTION 15(1) OF THE *CHARTER*

A. Law v. Canada

On March 25, 1999, as we were editing this paper for publication, the Supreme Court of Canada released *Law v. Canada (Minister of Employment and Immigration).*[564] Nancy Law was denied survivor's benefits under the Canadian Pension Plan,[565] because she was thirty years old and without dependent children or a disability. The unanimous Court held that there was no discrimination, because the differential treatment did not "reflect or promote the notion that [those excluded from the benefit scheme] are less capable or less deserving of concern, respect and consideration.... Given the contemporary and historical context of the differential treatment and those affected by it, the legislation [did] not stereotype, exclude, or devalue adults under 45."[566]

In *Law*, Canada's highest court was finally able to provide assistance in defining discrimination under the *Charter.*[567] In effect, the Court recognized that it was necessary to "revisit the fundamental purpose of s[ection] 15 [and] seek out a means by which to give full effect to this fundamental purpose."[568] Justice Iacobucci reviewed *Andrews*[569] and subsequent decisions, concluding that the aim of section 15 is to:

> prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable of and equally deserving of concern, respect and consideration.[570]

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564. Law v. Canada (Minister of Employment and Immigration) [1999] S.C.J. No. 12 (QL).
565. Canada Pension Plan, R.S.C., ch. C-8, §§ 44(1)(d), 58 (1985).
566. *Law* [1999] S.C.J. No. 12 (QL).
567. *Law* [1999] S.C.J. No. 12 (QL).
568. Egan v. Canada [1995] 2 S.C.R. 513, 541.
569. Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143.
570. *Law* [1999] S.C.J. No. 12 (QL).

The Court again stated that equality is a comparative concept. It is necessary to consider the purpose and effect of the legislation and "biological, historical, and sociological similarities or dissimilarities"[571] to locate the appropriate comparator.[572] Importantly, however, the perspective of the rights claimant will suggest the appropriate comparator, and will determine whether the impugned law has a detrimental effect on the claimant's dignity.[573] It is a subjective-objective assessment. A discrimination claim may involve more than one ground simultaneously.[574]

Pre-existing disadvantage is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory."[575] Historic disadvantage is not, however, a necessary pre-condition to proving discrimination.[576] In determining whether the claimant's dignity has been violated, another factor to be assessed is the relationship between the ground of discrimination and the nature of the differential treatment. In some cases, differential treatment may reflect the claimant's actual needs, capacities, or circumstances, and so it may not be discriminatory.[577] Still, differences must be recognized in a manner that respects a person's value as a human being and member of Canadian society:

> The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity. The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s[ection] 15(1) guarantee.[578]

Where legislation has an ameliorative purpose or effect for a more disadvantaged person or group in society, this "will likely not violate

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571. *Law* [1999] S.C.J. No. 12 (QL).
572. See *Law* [1999] S.C.J. No. 12 (QL).
573. See *Law* [1999] S.C.J. No. 12 (QL).
574. *See Law* [1999] S.C.J. No. 12 (QL).
575. *Law* [1999] S.C.J. No. 12 (QL).
576. *See Law* [1999] S.C.J. No. 12 (QL).
577. *See Law* [1999] S.C.J. No. 12 (QL).
578. *Law* [1999] S.C.J. No. 12 (QL).

the human dignity of more advantaged individuals."[579] At the same time, "[u]nderinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination."[580] A further contextual factor is the nature and scope of the interest affected by the legislation. The court must evaluate "the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation."[581]

Referring to *Andrews*, Justice Iacobucci reiterated that section 15 and section 1 must be kept analytically distinct. In contrast to the minority's approach in the trilogy, reasonableness and justification are not to be dealt with under section 15. "It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement."[582]

Justice Iacobucci held that a three-step approach is appropriate for the assessment of equality claims. The claimant must establish differential treatment, the presence of enumerated or analogous grounds, and discrimination which brings into play the purpose of section 15(1).[583] He then explored an alternative approach under which the definition of "substantive inequality" is "discrimination."[584] He rejected this methodology because:

> [T]here may be cases where a law which applies identically to all fails to take into account the claimant's different traits or circumstances, yet does not infringe the claimant's human dignity in so doing. In such cases, there could be said to be substantively differential treatment between the claimant and others, because the law has a meaningfully different effect upon the claimant, without there being discrimination for the purpose of s[ection] 15(1).[585]

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579. *Law* [1999] S.C.J. No. 12 (QL).
580. *Law* [1999] S.C.J. No. 12 (QL); *see also* Vriend v. Alberta [1998] 1 S.C.R. 493.
581. *Law* [1999] S.C.J. No. 12 (QL).
582. *Law* [1999] S.C.J. No. 12 (QL) (quoting Andrews v. Law Soc'y of B.C. [1989] 1 S.C.R. 143, 178).
583. *Law* [1999] S.C.J. No. 12 (QL).
584. *Law* [1999] S.C.J. No. 12 (QL).
585. *Law* [1999] S.C.J. No. 12 (QL).

B. M. v. H[586]

M. v. H. will test the Court's commitment to giving substance to the *Charter*'s guarantees for gays and lesbians. When M. and H. separated, after a ten year relationship, M. had no home,[587] no access to her capital,[588] and was shut out of her joint business and cut off from its income.[589] She had $5.64 in her bank account. If she had been in an opposite sex relationship, she would have had immediate remedies—not just to support, but a forum for the resolution of all issues, a forum that governs the breakdown of intimate relationships with courtesy and civility.

Instead, the next five and a half years were consumed by aggressive, costly, and intensely personal litigation. For more than four years into the proceedings, H. refused to provide any documentary disclosure.[590] Rather than a mandated early settlement

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586. M. v. H. [1996] 132 D.L.R. (4th) 538, (Ont. Gen. Div.) aff'd (1999), 171 D.L.R. (4th) 577. Further information about the case, including a copy of our Supreme Court of Canada factum and a statement by "M," is available at the McMillan Binch website at <http://www.mcbinch.com/>.

587. H. changed the locks to the city home (title to which was held by H. alone) and the joint country property, days after the separation. *M. v. H.* [1996] 132 D.L.R. (4th) at 545.

588. Most notably, M. had no access to her one-half interest in the country property, worth about $85,000 at the time of the property trial (and eventual settlement). Apart from the obvious disadvantage that M. suffered as a result of being denied access to her capital for almost six years, the property also declined in value over that period.

589. The parties started a jointly-owned advertising business in 1980, shortly after commencing cohabitation. H. had the majority of client contact, and M. assisted with day-to-day operations. Although M. was never paid for her services, H. drew $6,500 per month (net) out of the business, and the parties shared this income in the usual way. H shut down the joint business at separation, but she continued to perform the same work for the same clientele, and her lifestyle remained unchanged after separation.

590. In Ontario, Rule 70.04 provides that a spouse who has been served with a Financial Statement must file his or her own Financial Statement within 30 days, whether or not that spouse intends to defend the proceeding. Similar provisions exist across the country. Since the introduction of mandatory Financial Statements, courts have consistently articulated the principle that former spouses will face serious cost consequences if they fail to provide full and true financial disclosure. *See* Heron v. Heron [1987] 9 R.F.L. (3d) 41 (Ont. H.C.), rev'g 59 O.R. (2d) 666 (Master); leave to appeal to Ont. Div. Ct. refused 19 C.P.C. (2d) 218n. These rules must be applied to same sex couples. In *M. v. H.*, we had thirteen motions over disclosure issues.

conference,[591] there were 65 months of litigation in which M.'s debt increased by more than $30,000. M. brought three unsuccessful motions for partition and sale of the country property and was unable to borrow against her interest in it. In her forties, she left a ten year relationship with some clothing and personal items, without any furniture at all,[592] and moved into shared accommodation with university students.

In the lower courts, the opposite-sex definition of "spouse" for the purpose of spousal support under the Ontario *Family Law Act* was ruled to be unconstitutional.[593] Same-sex spouses were "read-in" to remedy the legislation. An appeal was heard by the Supreme Court of Canada on March 18, 1998.

M. v . H. can be distinguished from *Egan*, where the legislation would have been found unconstitutional but for Justice Sopinka upholding the violation of section 15 under section 1. Justice Sopinka showed deference to the legislature because of the "novelty" and pervasiveness of the discrimination and public cost involved in providing the benefit. *M. v. H.* involves only private funds; and it has been three years since *Egan*. More broadly, however, *M. v. H.* asks for a reconsideration of the *Egan* decision. With the retirement of Justice La Forest and the sudden death of Justice Sopinka, the composition of the bench has changed significantly. After the progressive result in *Vriend*, we hoped that a majority of Justices would be committed to giving effect to equality for gay men and lesbians where it is closest to the heart—the family.

1. Commentary: More Than a Great Idea in the Abstract?

Law is a very exciting decision for substantive equality rights. The full Court has approved aspects of L'Heureux-Dubé's unique and very

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591. Case Management Rules in Toronto require that parties in family disputes must attend a case conference with a judge before bringing any interim motion, except in the case of dire emergency.

592. Just imagine the amount of mutually-acquired property she left behind after ten years of living together, running joint businesses, and building a country home—couches, cookbooks, and rubber boots. The parties never divided any household contents; the final settlement was a cash payment only.

593. *M. v. H.* [1996] 132 D.L.R. (4th) 538.

progressive approach to section 15(1).[594] Perhaps most promising is the focus on adopting the perspective of the rights claimant in equality analysis, the emphasis on considering the effects of differential treatment on the rights claimant, and the professed commitment to substantive equality.

Still, the decision retains many of the same problems that have threatened equality analysis since *Andrews*—the very problems discussed at length in this paper. While the minority's "relevance" step was not expressly accepted as a guideline in assessing equality claims, the Court also failed to explicitly condemn it. Indeed, the Court continued to advocate a three-step comparative approach that may invite a formal equality analysis.

The first step of Justice Iacobucci's three-step test focuses on differential treatment or the drawing of a distinction on the face of the legislation. It requires comparison between 'analogous' groups. To determine the relevant sameness or difference of comparator groups, the Court may turn to a consideration of the purpose of the legislation. This was the approach taken by the minority in *Egan.* By defining the purpose of the legislation in relation to heterosexual procreation, sexual orientation was a relevant difference in determining entitlement to Old Age Security benefits. Citing *Weatherall,* Justice Iacobucci affirms that differential treatment may be required because of actual biological and historical differences. As we have discussed, biology and history serve as a means to authorize discrimination. Discrimination has a long history and so-called biological realities are socially constructed as a means of hierarchy and oppression. It is the role of equality analysis to interrogate "biology" and "history," not reinforce their discriminatory potential.

Justice Iacobucci touched on an alternative approach to the section 15 analysis. He stated that it is possible to understand the third step, determining whether there is discrimination, as "really being a restatement of the requirement that there be substantive rather than merely formal inequality."[595] In his articulation of a "substantive ine-

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594. *See* discussion *supra* Part IV.B.3. The Court accepted important elements of L'Heureux-Dubé's contextual, effects-focussed, substantive equality approach. It adopted a subjective-objective standard to determine whether there is a discriminatory impact, and it noted the importance of the nature and scope of the interest affected by the legislation.

595. Law v. Canada (Minister of Employment and Immigration) [1999] S.C.J. No. 12 (QL).

quality" approach, the third step of the test would be eliminated. Justice Iacobucci rejects such a two-step test, because he fails to recognize a distinction between the "substantively differential treatment" he terms a "substantive inequality" approach and the substantive equality analysis we would support.[596]

In a substantive equality analysis, a group is situated in the larger social, historical, and political context to determine whether members are likely to experience disadvantage, stereotyping, prejudice, and vulnerability in our society. The equality rights analysis then requires no further comparisons. Simply put, when treatment at law furthers a group's pre-existing inequality, by compounding and reinforcing the members' disadvantage and vulnerability and denying their human dignity, it furthers and promotes substantive inequality or discrimination. The proper application of a substantive equality test avoids the first step, with its focus on sameness and difference, and directly addresses the central problem: defining discrimination.

In contrast, the three-step test often gets side-tracked on the first step: finding a distinction. As Justice Iacobucci suggests, adverse effects discrimination does not neatly fit the traditional three-step test[597] since there is no distinction on the face of the legislation.[598] When the first step is to find a distinction, the Court's discrimination analysis is necessarily comparative, with all the attendant problems of establishing "relevant" similarities and differences. Justice Iacobucci states that the court must consider the purpose of legislation under section 15 and "biological, historical, and sociological similarities or dissimilarities" of groups claiming equality to current rights-holders.[599] This invites the reasoning of the minority in *Egan* and *Miron*.[600]

The Court's consistent focus on the perspective of the rights claimant may help to prevent a regression to formal equality reasoning, by encouraging the Court to recognize a more appropriate comparator. Still, the *Law* decision was written purely in the abstract: those denied the benefit were not victims of stereotyping or prejudice; they had no history of vulnerability; their exclusion was not a threat to

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596. *See* discussion *supra* Part IV.B.3 and *Law* [1999] S.C.J. No. 12 (QL).

597. *Law* [1999] S.C.J. No. 12 (QL).

598. Note that Justice Iacobucci does modify the traditional treatment of the first step so as to address adverse effects discrimination. He includes substantively differential treatment and not merely distinctions of the face of legislation as part of the first step.

599. *Law* [1999] S.C.J. No. 12 (QL).

600. *See* discussion *supra* Part IV.A.

their human dignity.[601] The Court had no need to actually "pivot the centre" and appreciate the experience of a vulnerable group.[602]

M. v. H. is about choosing a formal or substantive approach to equality. The court may interpret the purpose of the legislation in a circular fashion to legitimate the exclusion of gays and lesbians or it may interpret the object of the law in a broad and purposive manner that allows the equality issues before the court to be addressed. The Court may get lost in the search to find comparator groups and it may prevent analysis by disregarding the particular context of disadvantage. The case has been marked in the lower courts by formal equality's sameness-difference debates and corresponding arguments about anti-assimilationist viewpoints. Appeals to formal equality's unhappy companions of tradition, biology, democracy, deference, and morality continue to threaten to pull the attention away from where it belongs—on the disadvantage and subordination of gays and lesbians and the *Charter*'s promise of substantive equality.

VII. AFTERWORD: THE SUPREME COURT OF CANADA'S DECISION IN M v. H.

As we were completing the final edits of this Article, the Supreme Court of Canada released its decision in *M. v. H.* An 8-1 majority of the court, applying the section 15 test articulated in *Law*, concluded that Ontario's *Family Law Act* discriminated on the basis of sexual orientation by excluding same sex couples from the definition of "spouse" for the purposes of spousal support.[603] In an opening summary, Justices Cory and Iacobucci wrote for the majority:

> The crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human

601. *Law* [1999] S.C.J. No. 12 (QL) (holding that there was no discrimination because Nancy Law could not demonstrate that either the "purpose or effect of the impugned legislative provisions violate[d] her human dignity").

602. *See* discussion *supra* note 26.

603. Spousal support (alimony) has been available to unmarried opposite sex couples in Ontario since 1978. [See *Family Law Reform Act, 1978*, S.O. 1978, c. 2] Although the number of years required for cohabitation varies, all Canadian provinces except Québec have similar legislation. Generally, unmarried heterosexual spouses are granted many of the same benefits and responsibilities as married couples. See also *Miron v. Trudel*, discussed *supra* Part IV A, establishing that differential treatment between unmarried opposite-sex cohabitants and married spouses is unconstitutional.

> dignity of individuals in same sex relationships. . . . In the present appeal, several factors are important to consider. First, individuals in same sex relationships face significant pre-existing disadvantage and vulnerability, which is exacerbated by the impugned legislation. Second, the legislation at issue fails to take into account the claimant's actual situation. Third, there is no compelling argument that the ameliorative purpose of the legislation does anything to lessen the charge of discrimination in this case. Fourth, the nature of the interest affected is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. The exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances. Taking these factors into account, it is clear that the human dignity of individuals in same-sex relationships is violated by the definition of "spouse" in s[ection] 29 of the *FLA*.[604]

Canada's highest court held that the infringement of gays' and lesbians' equality rights was not justified under section 1[605] and the appropriate remedy was to declare section 29 of the *FLA* of no force and effect, and to suspend the application of the declaration for a period of six months.[606] Finally, the Court suggested that the legislature ought to address the rights of same-sex spouses in a more comprehensive fashion rather than burden private litigants and the public purse with piecemeal court reform.[607]

M. v. H. is a huge achievement for gays and lesbians and for all those who believe in equality and justice. The crisis over section 15 which culminated in the trilogy of *Miron*, *Egan* and *Thibeaudeau* inspired us to write this paper,[608] and forced us to reconsider first

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604. M. v. H., SCC decision, ¶ 3.

605. M. v. H., SCC decision at ¶ 117.

606. M. v. H., SCC decision at ¶ 145.

607. M. v. H., SCC decision at ¶ 147. For a discussion of the immediate political reaction to the decision, see Martha McCarthy and Joanna Radbord, *Reflections on the Impact of* M. v. H., MONEY & FAM. LAW (forthcoming August 1999).

608. Discussed *supra*, Part IV.

principles and to reflect anew on the meaning and purpose of section 15. The result in *M. v. H.* confirms that the Court has also fundamentally revisited its analysis and changed its perspective. Our highest court has embraced a clear and convincing commitment to substantive equality for all Canadians.