CHAPTER 3

The Arguments of the Opposition*

Introduction

What are the rationalizations offered for not giving full effect to Canada's equality commitments? This chapter is concerned with the rhetorical moves that are used to push the social and economic dimensions of inequality outside the equality rights frame. The equality rights guarantees that are intended to give effect to equality commitments are always in danger of being marginalized and diminished so that less powerful groups do not receive the full benefit of them. Because of this, it is essential to understand the rationalizations given for escaping from the equality commitments that are so important to women, and the form those rationalizations take in standard argumentation.

We draw on decisions of the courts to illustrate the rhetorical moves, noting, however, that the same arguments are made by governments outside the courts and by the media. They infect public debate.

Five *Charter* equality cases are drawn upon: *Egan* v. *Canada*,[1] a gay rights challenge to a public pension plan; *Masse* v. *Ontario (Ministry of Community and Social Services)*,[2] a challenge to cuts in social assistance programs, brought by welfare recipients; *Eldridge* v. *British Columbia*,[3] which challenges the lack of interpreter services for people who are deaf; *Symes* v. *Canada*,[4] and *Thibaudeau* v. *Canada*,[5] which are women's claims of sex discrimination in the income tax system. These cases have been chosen because they illuminate a range of problems in the way that courts have been dealing with *Charter* challenges in areas that are thought to engage social and/or economic policy considerations.[6] They also reveal what arguments government lawyers have been advancing in such cases.

The cases tell a story about how equality rights can get divorced from the social and economic dimensions of inequality and be rendered ineffectual. They also tell a story about a judiciary that is not yet reconciled to the task of responding to the equality rights claims of groups, and the discriminatory effects that certain taxation and expenditure choices may have on such groups. And some decisions reveal a judiciary that is divided, and — particularly at the level of the Supreme Court of Canada — divided along gender lines.

However, the obstacles that confronted the rights claimants in these cases are not necessarily confined to *Charter* litigation, because they are obstacles that can be traced back to the enduring influence of formal equality thinking. It follows that similar problems can be anticipated in connection with efforts to enforce Canada's human rights treaty commitments, notwithstanding that the treaties speak to issues of social and economic inequality explicitly, concretely, and unambiguously.

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It also bears underscoring that *Charter* equality rights law is not only a source of information about what judges think. The cases also reveal a lot about what governments consider their equality obligations to be. In particular, the cases reveal government ambivalence about having rights claims enforced against them, even though enforceability is essential to the definition of a right.

It appears that governments are especially reluctant to submit to adjudication of rights claims that are brought by women or other disadvantaged groups that raise questions about how government funds are raised and spent (or not spent) on social programs such as pensions, health care, and social assistance. Governments are not quite as reluctant to have their criminal laws subjected to review by a court, because judicial review of criminal laws and practices accords with an older recognition that in their police role governments threaten the liberty of some individuals. Governments are more or less resigned to the courts having a role as protectors of "the individual." However, when it comes to the more recently acknowledged and developed role of the state as regulator of the economy and provider of social programs, and to the insight that human rights violations have group dimensions, governments are ambivalent about giving up power to any independent oversight body. This ambivalence places Canada in a contradictory position. On the one hand, Canada wants to, and does, hold itself out as a world leader in its commitments to equality and social justice, pointing to the *Charter* and human rights statutes as evidence of those commitments. On the other hand, governments want to be free to abandon and minimize their commitments at will, as though they were merely policy objectives, and not real rights.

The goal of achieving equality for women cannot be served by interpretive approaches that either place issues of economic inequality outside the purview of equality rights or that allow governments to deny responsibility for legislated social and economic inequality.

Overview of the Cases

Egan v. *Canada*

The appellants Egan and Nesbit, two gay men who had lived together since 1948, challenged the spousal allowance provisions of the *Old Age Security Act*. When Mr. Egan became 65 years old in 1968, he began to receive old age security and guaranteed annual income supplements under the *Old Age Security Act*. On reaching age 60, Mr. Nesbit applied for spousal allowance under s. 19(1) of the *Act*, which is available to spouses between the ages of 60 to 65 whose combined income falls below a fixed level.

Mr. Nesbit's application was rejected on the basis that his relationship with Mr. Egan did not fall within the definition of "spouse" in the *Act*, which includes a person of the opposite sex who is living with the pensioner, if the two persons have publicly represented themselves as husband and wife. Messrs. Nesbit and Egan brought an action in the Federal Court seeking a declaration that the definition should be extended to include "partners in same-sex relationships otherwise akin to a conjugal relationship." The Trial Division dismissed the action. The Federal Court of Appeal upheld the judgment. In the Supreme Court of Canada a majority of five judges held that the *Act* was discriminatory. However, Sopinka J. held that the equality rights violation was justified pursuant to s. 1 of the *Charter*. The four remaining judges held that the *Act* was not discriminatory, and in the

alternative that s. 1 of the *Charter* provided a justification.

Masse v. *Ontario (Ministry of Community and Social Services)*

In the *Masse* case, multiple plaintiffs joined together to challenge the welfare cuts of Ontario's Harris government. Their claim was that the cuts were discriminatory in that they imposed a disproportionate responsibility for fiscal austerity measures on welfare recipients, contrary to s. 15 of the *Charter*, and that the cuts pushed welfare recipients below an irreducible minimum standard without fundamental justice, contrary to s. 7 of the *Charter*. The applicants filed extensive evidence attesting to the fact that the government had targeted welfare recipients for prejudicial treatment, and that reduced rates were creating extreme hardship including hunger and loss of shelter. A Court of three judges, Corbett, O'Driscoll, and O'Brien JJ., dismissed the claim.[7]

Eldridge v. *British Columbia*

In *Eldridge (B.C.C.A.)*,[8] the appellants, Robin Eldridge and Linda and John Warren, challenged the *Medical and Health Care Services Act* and the *Hospital Insurance Act* because of a failure to provide medical interpreting services for the deaf as a benefit, effectively denying to the deaf medical services that are available to the hearing.

A medical interpreting service was previously provided to deaf people in the Lower Mainland of British Columbia by an organization known as the Western Institute for the Deaf and Hard of Hearing. The Institute had stopped the service because it no longer had sufficient monies to pay for it.

Robin Eldridge and the Warrens brought suit in the British Columbia Supreme Court against the provincial government. They sought relief under s. 15 of the *Charter*, which guarantees equal benefit of the law without discrimination based on disability.[9] The British Columbia Supreme Court dismissed the application. The British Columbia Court of Appeal also rejected the claim. Hollinrake and Cumming JJ.A. found that there was no discrimination. Lambert J.A. found that there was discrimination but that it was justified under s. 1 of the *Charter*.

Thibaudeau v. *Canada*

Suzanne Thibaudeau challenged s. 56(1)(b) of the *Income Tax Act (ITA)* pursuant to which she was required to pay income tax on child support received from her ex-husband. Section 56(1)(b) of the *ITA* required a separated or divorced parent to include in income any amounts received as child support, while s. 60(b) allowed the non-custodial parent who has paid child support to deduct those payments from his income. For Ms. Thibaudeau the inclusion of the children's support payments in her taxable income increased her tax burden by $3,705 in 1989, whereas the divorce decree provided only $1,200 for this additional burden. The Federal Court of Appeal in a 2 to 1 decision held that the deduction/inclusion scheme penalizes the custodial parent by imposing a proportionately higher tax burden on her than on the non-custodial parent who benefits from a 100 percent deduction for the amounts he pays towards the support of his children. On appeal to the Supreme Court of Canada, a majority found that there was no discrimination.

Symes* v. *Canada

Beth Symes, a self-employed lawyer, sought the right to deduct child care expenses from her income pursuant to the principle that expenses related to the cost of earning business income are deductible expenses. She argued that child care is vital to women's ability to earn an income, and that to exclude child care expenses from the concept of "business expense" is contrary to the basic principles of s. 15 of the *Charter*. Revenue Canada initially allowed the deductions claimed by Ms. Symes, but subsequently disallowed them on the basis that child care expenses were not incurred for the purpose of producing income, but rather were personal or living expenses. Ms. Symes appealed.

The Federal Court Trial Division agreed with Ms. Symes; however, the Federal Court of Appeal affirmed Revenue Canada's refusal to recognize the claimed expenses. In the Supreme Court of Canada, a majority of the Court ruled against Ms. Symes. McLachlin and L'Heureux-Dubé JJ. dissented.

Pushing the Social and Economic Dimensions of Inequality Outside the Equality Frame

The standard oppositional moves that are made to counter claims of discrimination in government economic policy involve pushing the subject matter of the claim outside the boundary of law and into the realm of the social and economic, and conducting the discrimination analysis in such a way as to break the cause and effect linkage between the inequality complained of and the *Charter*'s equality guarantees.

The first move and the second move are closely related. In some decisions, such as *Masse*, several things happen at once: a judge says both that the case is about social and economic policy that the court should not interfere with, and that there is no discrimination. The moves are unified by underlying premises. One underlying premise is that social and economic inequality are within the control of the affected individual. A related premise is that because individuals can achieve equality as a matter of personal choice and merit, there is no obligation on government to reduce *de facto* disparities between groups and provide a social safety net. Governments may choose to do these things, but the choice and the criteria for establishing program parameters and entitlements are within the sole discretion of the government. However, for the sake of analytical clarity, we focus separately, first, on the characterization of socio-economic policy as a special species of legislation, and second, on the question of how discrimination analysis is conducted.

The Separation of Equality Rights from Social and Economic Policy

There is a line of government and judicial commentary contending that legislation concerning social or economic policy questions should either be immune from judicial review, or subject to a lower standard of scrutiny. The usual candidates for the socio-economic legislation category are income tax legislation and social program legislation providing such benefits as health care, pensions, and social assistance.

It would appear that this line of commentary finds its roots in two ideas. One idea is that economic legislation is value neutral. The other idea is that it is not institutionally legitimate for courts to intrude on government decision making that involves the allocation of resources between groups. Judges

can and should do law. Law is concerned with a contest between the individual and the state, and not with group interests, which are really policy issues. Policy issues should be left to legislatures.

Economics as Value Neutral

Governments have argued that some legislation is only based on economic realities and not on political choices about how resources are to be distributed among groups. The idea is to elevate economic considerations to a plane that transcends both law and politics, and excludes discriminatory motives. In *Thibaudeau (F.C.A.)* such a characterization of the *ITA* found a supporter in Létourneau J.A. He said: "The *Income Tax Act* is essentially economic legislation, which may even be described as amoral … its purpose being to trace income and tax it on the basis of the social and economic needs of the community, taking into account the reality of the taxpayer's situation … numerous provisions of the *Act* … impose different burdens based on different economic realities."[10]

Létourneau J.A.'s portrayal of the *ITA* as "essentially economic legislation, which may even be described as amoral" serves, though perhaps unconsciously, to establish authority for the *ITA* that places it outside the norm of equality, and in turn to shelter the judge's decision from scrutiny. The inference to be drawn is that ordinary people are in no position to judge the *ITA* because it is driven by unchallengeable, unknowable, value free, economic factors that should not be second guessed.

The income tax system is commonly portrayed by lawyers, economists, and others as amoral, that is, neutral or value free. Lisa Philipps and Margot Young describe the problem this way:

> There has been tremendous resistance to seeing the *Income Tax Act* for what it is: a social policy document, influenced by notions of just distribution and ideologically-specific understandings of ideal forms of social ordering. Instead, the ITA is often viewed as a politically and morally neutral document, structured by the dictates of financial accounting, economic theory and tax principles that permit no political shades or shaping.[11]

An additional problem with an approach to equality rights that concedes that certain legislation has neutral goals is that it draws attention away from the more important question, which is the effects of the legislation. Even if income tax legislation were value neutral in its goals or intentions, which it is not, equality rights analysis should be concerned with disparate effects.

The decision of the Federal Court of Appeal in *Thibaudeau (F.C.A.)* was appealed to the Supreme Court of Canada.[12] A majority of the Court rejected the view that the socio-economic label can operate so as to completely immunize a certain category of legislation from review. On behalf of the majority, Iacobucci J. said: "As must any other legislation, the *Income Tax Act* is subject to *Charter* scrutiny. The *scope* of the s. 15 right is not dependent upon the legislation which is being challenged."[13]

However, Gonthier J. contended in *Thibaudeau* that the "special nature" of the *ITA* is "a significant factor that must be taken into account" in defining the scope of the right to equal benefit of the law. Gonthier J. said:

> It is the very essence of the ITA to make distinctions, so as to generate revenue for government while equitably reconciling a range of divergent interests. In view of this, the right to equal benefit of the law cannot mean that each taxpayer has an equal right to receive the same amounts, deductions or benefits, but merely the right to be *equally governed* by the law.[14]

The decisions in *Thibaudeau* indicate a continuing reluctance on the part of some members of the judiciary to subject tax law to the same equality standards as other legislation.[15]

Discrimination and the Democratic Legitimacy of the Courts

The first s. 15 case in which the issue of institutional legitimacy arises is *Andrews*, wherein La Forest J. of the Supreme Court of Canada said: "Much economic and social policy-making is simply beyond the institutional competence of courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions."[16] He also cautioned against judicial intervention in areas "beyond the traditionally established and analogous policies against discrimination."[17] Initially, in *Andrews*, these statements were made in *obiter*, as cautionary notes.

However, the argument about institutional legitimacy has been repeatedly articulated by La Forest J. Recently, in *RJR MacDonald Inc.* v. *Canada (A.G.)* he stated:

> In drawing a distinction between legislation aimed at "mediating between groups" where a higher standard of s. 1 justification may be appropriate, and legislation where the state acts as the "singular antagonist of the individual", where a higher standard of justification is necessary, the Court in *Irwin Toy* was drawing upon the more fundamental institutional distinction between the legislative and judicial functions that lies at the very heart of our political and constitutional system. Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well-placed to subject criminal legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.[18]

A similar point was made by Décary J.A. in *Symes (F.C.A.)*, although somewhat more succinctly and less elegantly. Regarding Beth Symes's s. 15 challenge to the *ITA*, he expressed the view that courts ought not to "fish" in "troubled economic waters" but rather defer to Parliament in the social and economic domain.[19]

The idea that courts should defer to governments because of the superior capacity of governments to deal with complex problems and protect vulnerable groups might be appealing but for the fact that in

numerous s. 15 cases, the language of judicial deference has been used not to uphold legislation that protects vulnerable groups, but rather to justify discrimination against them. In other words, judges' anxieties about second guessing policy decisions translate into defeat for equality rights claimants.

The opinion of Lambert J.A. in *Eldridge (B.C.C.A.)* is illustrative. Lambert J.A. found that refusing to provide interpreter services for people who are deaf is discriminatory. But then he observed that there are competing demands on medical services and concluded that the discrimination should be rectified, "if at all" by legislative or administrative action, but not by judicial action. He ruled that discrimination against deaf people in the allocation of medical services is justified pursuant to s. 1 of the *Charter*.[20]

Lambert J.A.'s deferential approach in *Eldridge (B.C.C.A.)* is particularly disturbing, given that he clearly understood and agreed that the denial complained of was discriminatory, that the harm to the disadvantaged group was great, and that the cost to government of rectifying the problem was small. Lambert J.A. completely abandoned established frameworks for s. 1 analysis, including the requirement that the respondent bear the burden of proving that the rights violation is justified in a free and democratic society, substituting a policy of judicial non-responsibility. In essence, Lambert J.A.'s hands-off approach to s. 1 is just a variation on the idea that there are certain kinds of legislation to which s. 15 simply does not apply, a proposition that the Supreme Court of Canada has rejected.

The British Columbia Court of Appeal decision in *Eldridge (B.C.C.A.)* was overturned by the Supreme Court of Canada on 9 October 1997.[21] In a unanimous decision the Supreme Court of Canada held that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a violation of s. 15 of the *Charter*, and is not a reasonable limit on equality under s. 1. This outcome is a clear reversal of the Court of Appeal's holding. However, it would be premature to say that the issue of judicial deference in relation to social benefit schemes has gone away. In *Eldridge* the Supreme Court of Canada was at pains to acknowledge that there is a lack of consensus in the Court about whether or not a deferential approach should be adopted in such cases. The Court found its way around the issue by holding that the challenged lack of interpreter services could not be upheld under s. 1, *even on a deferential approach*.[22]

The dissenting opinion of Sopinka J. in *Egan*[23] is also illustrative of the correlation between expressed concern about the role of the courts and defeat for disadvantaged groups. Sopinka J. formed part of the majority that held that the *Old Age Security Act* discriminates against gays, contrary to s. 15 of the *Charter*. However, relying on the notion that government should not second guess Parliament on social policy questions involving competing interests between groups, he finds the discrimination to be justified under s. 1 of the *Charter*.[24]

The following passage from the opinion of Sopinka J. in *Egan* confirms that the core image of rights that animates his approach is that of the individual against the state. He states:

> [T]he legislation in question represents the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being

> the protagonist [sic] of an individual. In these circumstances the Court will be more reluctant to second-guess the choice which Parliament has made.[25]

The opinion of Sopinka J. in *Egan* has been subject to much criticism[26] and was roundly rejected by four of his colleagues on the Bench.[27] It was not even entirely endorsed by any of the other judges. Nonetheless, it determined the outcome of the case. Had Sopinka J. not ruled against the plaintiffs under s. 1, they would have won their case by 5 to 4.

Similarly, in *Egan*, La Forest J. uses the language of judicial deference, not to support the equality aspirations of gays, but rather to defeat them. Unlike Sopinka J., La Forest J. does not even find it necessary to resort to s. 1. He finds that preferential treatment of heterosexual couples is simply not discriminatory. Drawing on his earlier opinion in *Andrews*, La Forest J. says:

> It would bring the legitimate work of our legislative bodies to a standstill if courts were to question every distinction that had a disadvantageous effect on an enumerated or analogous group. This would open up a s. 1 inquiry in every case involving a protected group. [I]t was never intended in enacting s. 15 that it become a tool for the whole-sale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society.[28]

The striking thing about La Forest J.'s opinion in *Egan* is that it shows very clearly that talk of judicial deference, while purportedly about refraining from making a value judgement, can actually be a cover or reinforcement for the judge's values. In *Egan*, La Forest J. does not decide to defer to Parliament based on the notions of institutional role articulated in *RJR MacDonald*.[29] He decides to defer to Parliament because he agrees with the values that are promoted by the legislation. He does not attempt to hide this. He says, with approval, "[The singling out of legally married and common law couples for benefits] is deeply rooted in our fundamental values and traditions that could not have been lost on the framers of the *Charter*."[30] He says further that "Parliament may quite properly give special support to the institution of marriage" and to common law couples.[31] Thus, at the same time as clearly supporting the substantive content of the government's policy of favouritism towards the "traditional" couple, the opinion of La Forest J. derives support from the language of judicial restraint.

The approach of La Forest J. in *Egan*, although supported by three other judges on the Supreme Court, is not the majority opinion; it is in fact a dissenting opinion. Similarly, the opinion of Sopinka J. in *Egan* regarding the interpretation and application of s. 1 of the *Charter* is not the opinion of the majority.[32] However, in thinking about what is going wrong in the equality jurisprudence, these opinions cannot be entirely discounted because the themes are repeated in lower court decisions such as *Masse*.[33]

What is most striking about the *Masse* decision is how closely connected the legal category of socio-economic policy is to the exclusion of poor people from rights. Poor people's issues, by definition, are seen as issues for socio-economic policy and not as rights issues. Indeed, rights for people living in poverty are seen as an oxymoron. The lawyers representing the Government of Ontario in *Masse* argued

that "while poverty is a deeply troubling *social* problem it is not unconstitutional,"[34] and predictably, that the challenge to deep cuts in the welfare system "involves matters of *economic and social policy* beyond the competence and jurisdiction of the courts."[35] [Emphasis added.] Clearly, this theme had resonance for at least two members of the Ontario Divisional Court. O'Brien J., who dismissed the claim in its entirety, begins his opinion by saying:

> I approach the arguments on these issues bearing in mind the statements made by Sopinka J. in *Egan*: "It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit scheme because their limits would depend on an accurate prediction of the outcome of court proceedings under 15(1) of the *Charter*."[36]

O'Brien J.'s approach, he indicates, is also informed by the following statement made by La Forest J. in *McKinney* and approved by Sopinka J. in *Egan*:

> But generally, courts should not lightly second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality.[37]

And he closes his opinion by saying, "I believe that the comments of La Forest J. in *Andrews* are particularly appropriate to the applicants argument on the s. 15 issue."[38] He quotes La Forest J. stating:

> [I]t was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that *all* [emphasis in the original] legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts. Their role is to protect against incursions on fundamental values, not to second-guess policy decisions.[39]

In a separate opinion, O'Driscoll J., like O'Brien J., also dismisses all aspects of the *Masse* claim. O'Driscoll J. also quotes extensively from the opinions of both Sopinka and La Forest JJ. in *Egan*, calling for judicial deference. He invokes the same passages as O'Brien J., and adds the following statement of Sopinka J. made in *Egan*:

> This Court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so.[40]

However, at the conclusion of his opinion, O'Driscoll J. says:

> The applicants will appreciate that the court has no jurisdiction or desire to second-guess policy/political decisions. … The matter cannot be summed up any better than was done by the United States Supreme Court in *Dandridge* v. *Williams* at p. 1162-163: "The intractable economic, social and even philosophical problems presented by welfare

assistance programs are not the business of this Court."[41]

This statement indicates that O'Driscoll J.'s position goes far beyond the proposition that governments should have some leeway to make choices between disadvantaged groups. His comments strongly suggest that O'Driscoll J. wholeheartedly supports the government's argument that given the socio-economic character of poverty, the courts simply have no responsibility to hear the equality rights claims of people on income assistance.

As the cases show, the explicit separation of law from social and economic policy operates as a kind of trump. It makes individual freedom from government interference the dominant constitutional right, and it blocks equality analysis. The socio-economic policy trump may shape the court's entire approach to the claim, to legitimate a refusal to make a finding of discrimination, as in *Masse*. Or, as in *Eldridge (B.C.C.A.)*, it may in itself relieve the respondent of the burden of making out a s. 1 defence.

Breaking the Linkage between Inequality and Equality Rights

To fully understand the mechanics of how equality rights can be drained of their capacity to address real equality problems, consideration must also be given to some of the ways in which the linkage between *de facto* inequality and a legal finding of discrimination gets broken.

The Supreme Court of Canada has held that the analysis under s. 15 involves two steps. First, the claimant must show that there has been a denial of equal protection or benefit of the law. Second, the claimant must show that the denial constitutes discrimination. In order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15, such as race or sex, or on analagous grounds such as marital status or sexual orientation, and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics.[42] In short, discrimination is understood to be detrimental treatment based on personal characteristics.

Courts have also recognized repeatedly that discrimination is primarily a question of adverse effects, rather than treatment or intention. However, the usefulness of this theoretical development will be uncertain if judges are too easily swayed by defences calculated to attribute the causes of discrimination to factors other than a challenged law, and to discount adverse effects.

Shifting Blame

When courts do not want to hold governments responsible for addressing certain forms of inequality, the tendency is to revert to a blame and punishment model of responsibility, ignoring that the key goal of human rights protections is not to find fault, but rather to remedy discriminatory effects. Among the eligible targets for blame are nature, the equality rights claimant, or some other legislation. Blaming nature is a very familiar defensive move. This is what the Supreme Court of Canada did in *Bliss* v. *Canada (A.G.)*[43] when it attributed the harm of pregnancy discrimination to nature, and not to the legislation.

The pattern of blaming nature is repeated in the decision of the majority of the British Columbia Court of Appeal in *Eldridge*.[44] Hollinrake and Cumming JJ.A. reasoned that the lack of access to medical services complained of by the plaintiffs was not caused by the *Medical Services Act* — which treats everyone the same, without regard to deafness — but rather by the fact of deafness itself. They said: "This inequality exists independently of the legislation and cannot be said to be in any way an effect of the legislation."[45]

The theme of attributing the cause of the alleged discrimination to nature is also repeated in La Forest J.'s opinion in *Egan,* when he finds that marriage is by nature heterosexual.

The *Thibaudeau* decision provides an illustration of responsibility being shifted away from a challenged legislative scheme and on to another scheme or to an extraneous social cause. In *Thibaudeau*, the evidence was clear that the deduction/inclusion system under the *ITA* had adverse effects on Suzanne Thibaudeau as well as many other women because women are the vast majority of separated custodial parents. However, the majority was prepared to dismiss those effects as the fault of another system of legislation, the family law system. In a concurring opinion, Gonthier J. adds that the inequality in the income tax system complained of by Ms. Thibaudeau is not caused by the *ITA* but rather is attributable to social causes such as the failure of non-custodial parents to fulfil their obligations to their children adequately. Along with his male colleagues, he also finds that the real cause of the problems complained of by Ms. Thibaudeau is the provincial family law system.

Alternatively, the rights claimant can be blamed for having been complicit in a "family decision." This occurred in the case of *Symes*, at the level of the Supreme Court of Canada.[46] A majority of the Court rejected Beth Symes's claim, because she was seen to have chosen to assume child care expenses that her husband could have assumed or shared. Her choice was seen as atypical, and therefore her own fault. On behalf of the majority, Iacobucci J. said:

> [T]he appellant and her husband made a "family decision" to the effect that the appellant alone was to bear the financial burden of having children. … [T]he "family decision" is not mandated by law and public policy.[47]

Iacobucci J. points out that at law, parents are viewed as having "joint" legal responsibilities. He concludes with a warning that adverse effects analysis requires that the effects complained of be caused by the impugned legislation, not by independent factors. He writes:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish 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.[48]

In *Symes*, as in *Thibaudeau*, L'Heureux-Dubé and McLachlin JJ. dissented and would have ruled in favour of the rights claimant.

The *Thibaudeau* and *Symes* decisions illustrate a point that goes to the heart of the discussion about

how courts are thinking about what discrimination is, and what the responsibility of governments is for dealing with it. An implication of these decisions seems to be that there is no discrimination unless the harm complained of can be shown to be caused exclusively by the challenged law, as evidenced by a comparison that is conducted within the four corners of the legislation. This interpretation is disturbing because the character of discrimination often precludes rights claimants from being able to prove that a given law is the sole cause of the inequality complained of.[49] It will almost always be possible to point to the claimant's group membership as a factor in a claim of discrimination. Discrimination is often a matter of a dynamic between a given practice and a wider context of inequality experienced by the group. The more disadvantaged the group, the easier it becomes to attribute a given instance of discrimination to pre-existing disadvantage.

A different example may help to clarify the point. If one thinks about cuts in funding for rape crisis centres, a crucial factor that makes such cuts an issue of sex discrimination is that overwhelmingly women are the victims of sexual violence and the users of rape crisis centre services. But to see this, it is necessary to take the situation of the group into account. A logical though ludicrous implication of a mono-causal approach to discrimination is that governments could be absolved of responsibility for the consequences of women's decreased access to rape crisis centres, on the basis that the harm does not flow only from the government cuts but also from the fact that women are raped. The conclusion to be drawn from some of the cases is that judges are asking the wrong question.

In keeping with the remedial goal of human rights protections, the question that should be asked is not, “Is there someone or something else that could be blamed?” but rather, “Who has the capacity to make a difference to the conditions of inequality experienced by this group?” If a government policy contributes to or worsens women's disadvantaged position, this should be sufficient to establish a causal connection between the policy and the disadvantage for the purposes of equality analysis.

Discounting Adverse Effects

The principle that discrimination is a question of adverse effects is well established in case law. However, adverse effects can be discounted if the court can be persuaded to focus on legislative purpose or treatment rather than adverse effects. Also, adverse effects may be discounted if not everyone in the group is adversely affected, or if people not in the group are also having problems.

The first two moves are illustrated by the Supreme Court of Canada decision in *Thibaudeau*. The majority finds that the most important effect of the legislation is to benefit post-divorce couples. The Court focuses on the legislative goal of assisting divorced couples, and then deals with the “post-divorce family unit” as though it can be taken for granted that a tax benefit to the husband trickles down to the wife.[50] The fact that Suzanne Thibaudeau and many other women were penalized by the legislation, while their husbands benefited, is ignored.

On this point, Madam Justice McLachlin and Madam Justice L'Heureux-Dubé explicitly dissent from their male colleagues. McLachlin J. recognizes that the legislation had the “laudable aim of ameliorating the position of all members of the broken family,”[51] but finds that Parliament failed to consider the impact of the scheme on custodial parents, the great majority of whom are women. McLachlin J. finds

that on its face, the *ITA* demonstrates adverse unequal treatment of custodial parents in that it artificially inflates the custodial parent's taxable income.[52]

Similarly, L'Heureux-Dubé J. concedes that the purpose of the impugned distinction may be to confer tax savings upon "couples," but she finds that it does not follow that its effect is experienced equally by both members of the couple. L'Heureux Dubé J. finds also that the fact that some isolated individuals within the group may not be adversely affected does not alter the general validity of this conclusion.

The British Columbia Court of Appeal decision in *Eldridge* is another example of purpose or treatment being permitted to eclipse discriminatory effects. A majority of the Court found that there is no discrimination because the *Medical Services Act* treats deaf and non-hearing people alike. There is coverage for everyone for medical services. The Court makes this finding notwithstanding that the effect of the no-interpreter policy is to deny to deaf people the equal benefit of paid medical services. As previously mentioned, the Court attributes the fact that deaf people are required to pay for translators in order to receive medical services, to nature rather than to the legislation. As for the legislation, the Court says: "Both purposively and effectively the legislation provides its benefit of making payment for medical services equally to the hearing and the deaf."[53]

As previously mentioned, the decision of the British Columbia Court of Appeal in *Eldridge* was overturned by the Supreme Court of Canada.[54] The Supreme Court of Canada rejected argument to the effect that s. 15 requires only that people be treated the same and does not oblige the state to ensure that disadvantaged members of the society can take advantage of public benefit programs. The Court affirmed its commitment to the idea that discrimination can arise from the adverse effects of facially neutral rules, and held that the failure to provide sign language interpreters necessary for effective communication in the delivery of medical services is a violation of the *Charter*. Although the Supreme Court of Canada decision in *Eldridge* is an advance over the impoverished analysis of the Court of Appeal, it does not disprove the thesis that judges are vulnerable to arguments designed to shut down adverse effects analysis.

The s. 15 dissent in *Egan*[55] provides a further illustration of the problem. In the decision of La Forest J. in *Egan*, the effects complained of by the two gay men are ignored. It is recognized that the *ITA* favours heterosexual couples, a goal which La Forest J. regards as constitutionally permissible. However, the *ITA* is understood to treat homosexual couples the same as other non-spousal "couples."[56]

A variation on the theme of discounting adverse effects involves diffusing the effects so either the effects or the group are forced outside the bounds of a protected ground. The jurisprudence requires s. 15 rights claimants to show that the alleged discrimination is *based on* personal characteristics. The decision of Hugessen J. in *Thibaudeau (F.C.A.)* illustrates the judicial view that harmful effects are not based on personal characteristics, unless those harmful effects are proven to be confined to one, and only one, group.[57]

Hugessen J. recognized that within the group negatively affected by the challenged provision of the *ITA*, women were overwhelmingly represented. However, because 2 percent of the negatively affected

group were custodial fathers, the claim of sex discrimination was not borne out, he found. In particular, the distinction could not be said to be based on the shared characteristic of femaleness, held Hugessen J. It is clear that Hugessen J.'s conception of what constitutes femaleness excludes a range of social, legal, and economic factors that define women as an unequal group in the society. He also overlooks the fact that, in a social context of inequality and stigmatization in which single mothers raise their children, the imposition of an income tax penalty on custodial parents does have a qualitatively disproportionate impact on women, as well as a numerically disproportionate one.

Hugessen J.'s approach to the ground of sex discrimination is a narrow, socially decontextualized, biological, and defeating one. Philipps and Young have described the problem this way:

> Hugessen J.A.'s notion of sex difference works … for … only a few characteristics we associate with sex. Pregnancy is the most obvious and — apart from other aspects of women's reproductive physiology, perhaps breast feeding — may be the only gender dimension along which discrimination occurs that fits with Hugessen J.A.'s analysis. … All other characteristics that one associates with one sex or the other point, potentially, to at least some members of the "opposite" sex. What Hugessen J.A. fails to realize … is that categorization (how we demarcate the female and the male) is only a theoretical device; its relationship with the real world is necessarily a complicated one.[58]

Significant consolation can be taken from the fact that on appeal, the Supreme Court of Canada did not fasten on the Hugessen J. approach. Nonetheless, Hugessen J.'s opinion stands as a demonstration of an archetypal problem that confronts women when equality is constructed as a question of sameness and difference. Women are required to show that they are the same as men for the purpose of establishing the entitlement to equality, and simultaneously that they are different from men for the purpose of establishing the rights violation. This is the impossibility of the sameness-difference model of sex equality.

Resisting the Disconnection of Equality Rights from *De Facto* Social and Economic Inequality

The cases referred to here show that there are many ways to couch a refusal to deal with adverse effects. Whereas the invocation of the socio-economic policy category functions to divorce social conditions of inequality from the ambit of equality rights, breaking the linkage between *de facto* inequality and a legal finding of discrimination depends on conducting the discrimination analysis in such a way as to either shift responsibility away from the government or to discount the harm complained of by the rights claimant.

To review, these are the basic moves:

- create a special hands-off category for socio-economic issues;
- shift responsibility away from the government by blaming nature or the claimant

herself or some other legislative system;

- discount adverse effects by focusing instead on legislative appearances or intentions;
- discount adverse effects by redrawing the boundaries of the group and observing that not everyone in the group is adversely affected, thus diluting the adverse effects;
- discount adverse effects by observing that people outside the group are also negatively affected, thereby diffusing the adverse effects.

Categorizing an equality rights claim as a question of social or economic policy is a means of invalidating the claim. Although the idea of allowing governments sufficient room to implement equality-promoting measures is appealing, the reality is that in the s. 15 cases where judges have decided to "defer" to governments to give them "room to manoeuvre" in the "socio-economic sphere," that room has functioned to allow discriminatory legislation to stand.

The purported distinction between social and economic policy on the one hand, and real law, on the other, is not sustainable. At the heart of this categorical distinction is a problematic view of what rights are supposed to do and not supposed to do. The view is that rights are supposed to protect the individual's liberty from incursions by the state. Rights are not supposed to address disparities between groups. Rights are supposed to be individualistic and negative. They are not supposed to be group-based and positive.

However, founding equality rights interpretation on a core idea of rights as individualistic and negative cannot serve women's interests. Although the inequality problems of women are experienced by individual women and in this sense are individual, they also have a larger context of social, economic, political, and legal inequality. Deprived of their group context, women's equality problems can be rendered invisible, but not eliminated.

The assumption that rights are injunctions *not* to do something rather than to do something is detrimental to women because women need governments to act positively, to provide benefit schemes, to provide protection from domestic violence, and to reverse historical patterns of discrimination.

For women, a division between rights to economic security and rights to personal liberty is purely artificial. In the circumstances of women who have violent or psychologically abusive male partners, for example, the indivisibility of economic issues from violence issues is clear. As a result of the Conservative government's cuts to social assistance and social programs, the Ontario Association of Interval and Transition Houses reports that "a significant number of women in Ontario are now making decisions to remain in or return to abusive situations."[59] A woman who has inadequate economic supports is more vulnerable to threats to her physical security and less able to escape. Thus, a woman's right to physical security is intimately linked to her economic conditions.

For women, even the assumption that liberty is a negative right that can be adequately respected by restraining government action is fictitious. Liberty from domestic violence, for example, is contingent on the willingness of governments to actively fulfil their policing responsibilities.

Economic inequality also has profound effects on women's enjoyment of all other rights. It not only increases women's vulnerability to violence, sexual exploitation, coercion, and imprisonment, it also deprives women of equal status and decision-making authority in their domestic relationships with men, and it affects their ability to care for their children. It limits women's access to justice, to expression of their ideas, and to participation in political life. It affects not only women's individual opportunities, but also the ability of women as a group to improve their status and conditions.

It is simply not the case, then, that liberty rights can be understood as separate from other rights when women are concerned. Women's inequality manifests itself in multiple ways — spanning the range of civil and political, economic, social, and cultural rights.

The situation of meritorious equality claims being rejected based on their perceived socio-economic character is all the more troubling in light of the unevenness with which the concept is applied. Some cases trigger judges' concerns about overstepping the judicial role. Others do not. It is notable that challenges by doctors[60] and lawyers to government regulatory schemes are not met with anything like the kind of resistance engendered by welfare rights challenges.

Andrews, the first equality rights case to be decided by the Supreme Court of Canada, stands in stark contrast to cases in which courts have adopted a policy of deference towards government policies affecting disadvantaged groups. Mark Andrews, a white, male lawyer was allowed to succeed in his challenge to legislation designed to regulate the legal profession. And, as previously mentioned, although La Forest J. warned of the dangers of questioning legislative decisions in areas that go beyond traditional human rights coverage, he did not argue that government should be given room to mediate between different groups of lawyers. Rather, La Forest J.'s opinion reveals his sympathy towards Mr. Andrews's goal of pursuing his economic goals. He says:

> By and large, the use in legislation of citizenship as a basis for distinguishing between persons, here for the purpose of conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society that are embodied in s. 15.[61]

Even from a very narrow legal perspective, according a higher level of constitutional protection to traditional criminal law liberty rights is problematic because it rests on an inadequate conception of what criminal law is. McLachlin J. put it this way:

> [It] has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with competing rights between different sectors of society than if it is a contest between the individual and the state. … However, such distinctions may not always be easy to apply. For example, criminal law is seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential.[62]

The superficial attractiveness of the idea that courts should allow governments to make legislation

that addresses social problems does not dictate that equality rights should have nothing to say about the relationship between the effects of given legislative action or inaction, and social and economic inequality. Nor does the fact that the solutions to some equality problems are difficult mean that they are not real equality rights problems.

The notion that judicial activism threatens democracy rests on a conception of democracy that is too thin and too process oriented. The ideal of democracy must be understood to be big enough to include the goal of equality. There is judicial support for this perspective. In *R.* v. *Oakes*, Dickson C.J. of the Supreme Court of Canada said:

> [C]ourt[s] must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[63]

The legitimacy of judicial intervention to uphold *Charter* rights does not reside in the kind of line drawing that seeks to differentiate this kind of legislation from that, or to separate legal issues from socio-economic issues, but rather in the values that the *Charter* embodies. When democracy and equality are understood to be consistent rather than oppositional concepts, it may be recognized that judicial interventions to promote the social and economic equality of women are not a threat to democracy, but rather a potential enhancement of it.

The notion that courts lack the democratic legitimacy to address certain issues rings hollow for groups that are not adequately represented within legislatures.[64] Women are not equally represented in either the legislatures or the judiciary. However, courts sometimes provide an alternative venue when elected officials are not listening.[65]

It is all very well to have debates about whether courts should leave some tasks to governments. However, establishing categories that sort cases according to the type of legislation or type of issue will never lead to satisfactory results. As particular cases come along, judges will continually be forced to redefine the categories so that an appearance of consistency is maintained. Yesterday's legal issue will be tomorrow's social policy issue because a judge either feels moved by the facts of a particular case or does not feel so moved.

Great care must be taken to ensure that judges do not recoil from issues simply on the basis that they are the issues of disadvantaged groups in the society. Social and economic equality are, by definition, the issues of disadvantaged groups. There cannot be one standard of rights protection for dominant groups in the society, with a lower standard of protection being accorded to the rights of disadvantaged groups. To have a legal right to equality means that there is an institution of enforcement whose job it is to judge laws, policies, and practices for their conformity with the protected value. It is not legitimate for judges to abdicate this responsibility, especially for groups that are not adequately represented within government.

When judges say that courts should not "second guess" governments in the realm of social and economic policy making, the damaging public message is that there is no obligation on anyone to take positive steps to address inequality of conditions, and governments can make laws that perpetuate inequality, with impunity. The message might come across differently if there were some other institution, apart from the courts, that was charged with the responsibility for enforcing equality rights, but there is no other such institution. In this circumstance, judicial deference translates into permission for government complacency about the persistent social and economic inequality of women and other disadvantaged groups.

Just as it is unacceptable for judges to decide that they do not deal with cases involving challenges to structures that create social and economic inequality, so, too, it is highly problematic for discrimination analysis to revert to a blame and punishment model of liability. The point of discrimination analysis should not be to look for ways of allowing government to minimize its responsibility to promote the equality of disadvantaged groups, but rather to ensure that the *Charter* goal of assisting disadvantaged groups to overcome their inequality is advanced.

Associated with the various linkage-breaking moves identified in this chapter is an unhelpful framework for s. 15 analysis which has been developed by the Supreme Court of Canada. Although it is not impossible to use the "different treatment based on personal characteristics" framework to illuminate the adverse effects that government decisions have on women, the framework is not particularly helpful because it has a tilt in favour of equality as same treatment of individuals. Its starting place for understanding whether discrimination has occurred is treatment rather than effects. The capacity of the decision maker to perceive adverse effects on the group is undermined when the starting place for the analysis is the treatment of the individual claimant.

The prioritization of treatment over effects must be rejected. Quite simply, the goal of achieving equality for disadvantaged groups cannot be served by understandings of inequality that are indifferent to the effects of government choices on disadvantaged groups.

Fundamentally, the different treatment/same treatment formulation version of equality is concerned with abstract difference rather than with subordination. Its normative goal is neutral treatment. It does not comprehend that a seemingly neutral rule may not be neutral for women because it rests on sexist social structures. Many seemingly neutral rules retain their appearance of neutrality only as long as they are viewed in isolation from social patterns of inequality. The very idea of neutral rules should be suspect, especially given that many rules are made without the participation and influence of women.

Finally, the "different treatment based on personal characteristics" formulation is apt to reinforce an understanding of sex as a matter of biological characteristics rather than as the socially constructed consequences of being female. Being a woman is not simply a biological fact. It is a social, economic, and legal construction. Moreover, a dominant social and economic expectation is that caretaking will be poorly paid, if at all, and performed by women who will be economically dependent on men.[66]

However, the Supreme Court's framework for s. 15 analysis is not the core problem in the jurisprudence. The core problem is resistance to the insight that discrimination is a question of adverse effects on disadvantaged groups. Equality jurisprudence has recognized that equality may sometimes require different treatment, but this insight is too superficial. It does not necessarily translate into an awareness that same treatment is a mischaracterization of the normative goal of equality. It does not represent a clear understanding that inequality is not a question of different treatment but rather of subordination, marginalization, exclusion, and group disadvantage. As long as equality rights law continues to revolve around a conception of equality as sameness and difference, more problems can be anticipated.

Conclusion

This chapter has examined techniques of legal argument that have been used to push the social and economic dimensions of group-based inequality outside the equality framework: creating a hands-off category for socio-economic issues; shifting responsibility away from government by blaming nature, the rights claimant, or another legislative scheme; discounting adverse effects by focusing on legislative appearances or intentions; and diluting or dispersing adverse effects.

It is readily apparent that our claim that the *BIA* violates women's *Charter* equality rights can be summarily dismissed if equality rights are understood to have nothing to say about economic inequality or if s. 15 analysis is reduced to a small and highly predictable repertoire of mechanical and legalistic comparisons. However, we argue these approaches to equality rights cannot be sustained.

The judicial opinions discussed — in the cases of *Egan*, *Masse*, *Eldridge (B.C.C.A.)*,[67] *Thibaudeau*, and *Symes* — fall back on the very kind of discredited reasoning that resulted in the defeat of Stella Bliss's claim more than a decade ago.[68] As such, they go against the main current of the major jurisprudential developments in human rights and *Charter* equality rights law of the past decade, a central feature of which is the recognition that discrimination is a question of effects on disadvantaged groups. It has been explicitly recognized that s. 15 confers more than formal equality. And regarding *Bill of Rights* decisions such as *Bliss*, the Supreme Court of Canada acknowledged in *Andrews* that "[i]t is readily apparent that the language of s. 15 was deliberately chosen in order to remedy some of the perceived defects under the *Canadian Bill of Rights*.[69]

Having come this far in equality rights case law, for the judges to revert to formal equality reasoning of the very kind that resulted in the systematic defeat of equality claims under the *Canadian Bill of Rights* risks creating a real crisis in the legitimacy of the courts.

Viewed against the backdrop of Canadian political history, many of the judicial opinions discussed in this chapter are also historically anomalous. They are a throwback to a nineteenth century version of equality as same treatment. They are consistent with a classical liberal image of the autonomous, self-defining individual in need only of protection from state interference. This imagery leads to an impoverished conception of what the norm of equality requires. However, the extreme individualism and sexism of nineteenth century rights is inconsistent with more than 50 years of Canadian government commitments to social and economic equality for women, and concerted government efforts within the

same time period to construct a social safety net that ameliorates conditions of people in need (many of whom are women) and simultaneously reduces disparities between groups.

The cases discussed here point to the necessity of continually recalling courts and governments to the contemporary values, analytical insights, and group aspirations that underlie equality rights. They also provide some indication of the challenges that women face in their ongoing efforts to replace outdated conceptions of rights with contemporary understandings that can serve women's interests in achieving true social and economic equality.

Endnotes for Chapter 3

[1] *Egan* v. *Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609, 95 C.L.L.C. 210-025, [1995] W.D.F.L. 981, C.E.B. & P.G.R. 8216, 12 R.F.L. (4th) 201, 182 N.R. 161, 29 C.R.R. (2d) 79, 96 F.T.R 80 (note) [hereinafter *Egan* cited to S.C.R.].

[2] *Masse* v. *Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, 35 C.R.R. (2d) 44, 89 O.A.C. 81, 40 Admin L.R. (2d) 87 (Ont. Ct. (Gen. Div.)) [hereinafter *Masse* cited to D.L.R.]. Application for leave to appeal to the Ontario Court of Appeal refused on 30 April 1996; leave to appeal to the Supreme Court of Canada refused 5 December 1996.

[3] *Eldridge* v. *British Columbia (A.G.)* (1995), 125 D.L.R. (4th) 323 (1995) 59 B.C.A.C. 254, 7 B.C.L.R. (3d) 156, [1995] 1 W.W.R. 50, 96 B.C.A.C. 254, reversed [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577, 218 N.R. 161, 624, [1998] 1 W.W.R. 50 96 B.C.A.C. 81, 38 B.C.L.R. (3d) 1.

[4] *Symes* v. *Canada*, [1989] 3 F.C. 59, 25 T.T.R. 306, 40 C.R.R. 278, 1 C.T.C 476 (F.C.T.D.; reversed [1991] 3 F.C 507, 127 N.R. 348, 7 C.R.R. (2D) 333, 2 C.T.C. 1, 91 D.T.C. 5386 (F.C.A.) [hereinafter *Symes (F.C.A.)* cited to F.C.]; affirmed [1993] 4 S.C.R. 695, [1994] 1 C.T.C. 40, 19 C.R.R. (2d) 1, 110 D.L.R. (4th) 470, [1994] W.D.F.L. 171 [hereinafter *Symes* cited to S.C.R.].

[5] *Thibaudeau* v. *Canada*, [1994] 2 F.C. 189, [1994] 2 C.T.C. 4, 3 R.F.L. (4th) 153, 167 N.R. 161, 114 D.L.R. (4th) 261, 21 C.R.R. (2d) 35, [1994] W.D.F.L. 812 [hereinafter *Thibaudeau (F.C.A.)* cited to D.L.R.], affirmed, [1995] 2 S.C.R. 627 at 675–76, [1995] W.D.F.L. 957, [1995] 1 C.T.C. 382, 95 D.T.C. 5273, 12 R.F.L. (4th) 1, 124 D.L.R. (4th) 449, 182 N.R. 1, 29 C.R.R. (2d) 1 [hereinafter *Thibaudeau* cited to S.C.R.].

[6] There are two clarifying points to be made about the cases. First, the cases should not be taken to represent the definitive statement on the law in particular fields. Second, it may be objected that not all the cases were "good cases." Some people have questioned whether the *Symes* case was a good case, in light of the fact that the situation of many women is much worse than that of professional women such as Beth Symes. Exception could also be taken to the *Egan* case on the basis that it can be understood to perpetuate coupleism in pension benefit allocation while ignoring the serious problem of poverty among single elderly women. Legitimate as such concerns may be, they do not amount to legal principles for deciding these cases. It must be granted that a tendency of *Charter* litigation is to present a rather narrow picture of any given problem. The plaintiff may come forward with one concern. However, the problem may be bigger than this. For example, if the situation of Ms. Symes is placed in a bigger frame, it may be understood as symptomatic of the concerns that most women have about socially constructed conflicts between the world of paid work and the world in which children are cared for. Similarly, the *Egan* situation may be understood to present a narrow slice of the larger problem of preferential treatment for heterosexual couples. This is one of the reasons that interventions by community organizations can be useful. They can help to fill out the picture. However, the important point for our discussion is that a court can both grant relief *and* comment on the broader implications of a case.The fact that a particular claim is not representative or not "the best" (or "the worst") case should not lead a court to reject it.

[7] Corbett J. would have allowed one aspect of the claim, but he is in dissent from the other two judges on this point.

[8] See *Eldridge (B.C.C.A.)*, *supra* note 3.

[9] Robin Eldridge and the Warrens testified about difficulties they had in communicating effectively with doctors who do not use sign language. Those difficulties included, in the case of Linda Warren who had a difficult childbirth, an inability to obtain information from hospital staff about the condition of her newly born twin girls. Eldridge's physician testified that he was unsure about the accuracy of information he was receiving by means of handwritten notes passed back and forth between himself and Robin Eldridge.

[10] *Thibaudeau (F.C.A.)*, *supra* note 5 at 289, Létourneau J.A. in dissent.

[11] Lisa Philipps and Margot Young, "Sex, Tax and the *Charter*: A Review of *Thibaudeau* v. *Canada*" (1995) 2 *Review of Constitutional Studies* 221 at 222. See also Claire Young, "It's All in the Family: Child Support, Tax, and *Thibaudeau*" (1995) 6 *Constitutional Forum* 107 at 110 where she similarly states that at least some of the justices at the Supreme Court of Canada seemed reluctant to apply the *Charter* as rigorously to the *Income Tax Act* as to other types of legislation.

[12] *Supra* note 5.

[13] *Thibaudeau* (S.C.C.), *supra* note 5. The position of the majority of the Supreme Court in *Thibaudeau* is consistent with its earlier decision in *Symes* (S.C.C.), *supra* note 4, wherein Iacobucci J. said on behalf of the majority at 753:

> A preliminary "debate" took place before this Court which questioned the propriety of using the *Charter* to challenge the scheme of deductibility created by the Act. With respect to this debate, I have two brief comments.
>
> First, it has been suggested that to subject the Act to the *Charter* would risk "overshooting" the purposes of the *Charter*. However, the danger of "overshooting" relates not to the kinds of legislation which are subject to the *Charter*, but to the proper interpretive approach which courts should adopt as they imbue *Charter* rights and freedoms with meaning: see *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, at p. 344. Second, it has been said that courts should defer to legislatures with respect to difficult economic questions. However, support for this proposition is said to come from cases in which a degree of deference has been exhibited as part of a s. 1 *Charter* analysis: see, e.g., *PSAC* v. *Canada*, [1987] 1 S.C.R. 424, at p. 442. Such cases do not advocate a deferential approach at any earlier stage of *Charter* analysis.
>
> Since neither of the two propositions upon which this preliminary "debate" was founded can withstand even brief critical analysis, I consider it unnecessary to comment further in this regard. The Act is certainly not insulated against all forms of *Charter* review.

[14] *Thibaudeau* (S.C.C.), *supra* note 5 at 676.

[15] Lisa Philipps assesses the judgments in *Thibaudeau* (S.C.C.) this way:

> "Despite their explicit rejection of Gonthier J.'s methodology, Iacobucci and Cory JJ. sent very mixed signals on this issue. On the one hand they asserted in direct contrast to Gonthier J. that "[t]he scope of the section 15 right is *not* dependent upon the nature of the legislation which is being challenged." On the other, they agreed with him that "courts should be sensitive to the fact that intrinsic to taxation policy is the creation of distinctions which operate … to generate fiscal revenue while equitably reconciling what are often divergent, if not competing, interests." Though more ambivalent than Gonthier J.'s, these remarks will be perceived to support some form of diminished *Charter* protection in the tax area. Sopinka and La Forest JJ. added no comments of their own on this question.

See "Tax Law: Equality Rights" (1995) 74 *Canadian Bar Review* 668 at 676.

[16] *Andrews* v. *Law Society (British Columbia)*, [1989] 1 S.C.R. 143 at 194, [1989] 2 W.W.R. 289, 25 C.C.E.L. 255, 91 N.R. 255, 34 B.C.L.R. (2d) 273, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

[17] *Ibid.*

[18] *RJR MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 at 277, 127 D.L.R. (4th) 1, 100 C.C.C. (3d) 449, 62 C.P.R. (3d) 417 [hereinafter *RJR MacDonald* cited to S.C.R.].

[19] Décary J. for a unanimous court, *supr*a note 4 at 532. As indicated in note 13, *supra*, on further appeal a majority of the Supreme Court of Canada rejected this approach.

[20] In *Eldridge (B.C.C.A.)*, *supra* note 3 at 70–71, Lambert J.A. said:

> Some of the limits imposed under the *Medical and Health Care Services Act* and some of the financial allocation choices that I have mentioned have resulted and will result in adverse effects discrimination against people suffering from disabilities, including serious illness itself. But we do not have those cases before us. How can

> we say, in those circumstances, that expenditure of scarce resources on services that remedy infringed constitutional rights under s. 15, on the one hand, are more desirable than expenditures of scarce resources on things that cure people without affecting constitutional rights, on the other. And, indeed, how can we prefer the allocation of scarce resources to services that remedy the infringed constitutional rights of one disadvantaged group over the allocation of scarce resources to services that remedy the infringed constitutional rights of a different disadvantaged group.
>
> In my opinion the kind of adverse effects discrimination which I consider has occurred in this case should be rectified, if at all, by legislative or administrative action and not by judicial action.

[21] *Eldridge* (S.C.C.), *supra* note 3.

[22] More particularly, the Court is referring to what is known as the minimal impairment branch of the *Oakes* test for s. 1 analysis. In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Court established a framework for s. 1 analysis which includes a requirement that the impugned provision must "minimally impair" the *Charter* guarantee. However, subsequently, in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, a majority of the Court held that a more deferential approach to the minimal impairment branch of the *Oakes* test may be adopted in cases that involve complex social problems, requiring a delicate balancing of competing rights and social interests, or attempts to distribute scarce resources. According to *McKinney*, in cases where such legislative balancing has occurred, the minimal impairment criterion may be satisfied by showing that the government had a "reasonable basis" for concluding that the legislation impaired the right as little as possible. The reasonable basis test also appeared in *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. However, *Egan, supra* note 1, revealed divisions within the Court on the question of whether deference should be accorded to a legislature merely because an issue is identified as a social one or because a need for governmental incrementalism is shown. In *Eldridge*, the Court acknowledges this difference of opinion about the implications of the concept of judicial deference.

[23] *Egan*, *supra* note 1.

[24] Sopinka J. added three concepts to the obstacles confronting the equality rights claimant: scarce resources, the "new" social relationship, and incrementalism. In what has since become a frequently quoted passage, Sopinka J. said in *Egan*, *ibid.* at 572-73:

> I agree with the respondent the Attorney General of Canada that *government must be accorded some flexibility in extending social benefits and does not have to be proactive in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all*. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit scheme because their limits would depend on an accurate prediction of the outcome of court proceedings under s. 15(1) of the *Charter*. [Emphasis added.]

Regarding incrementalism, Sopinka J. also cites La Forest J. in *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, 91 C.L.L.C. 17,004, 76 D.L.R. (4th) 545, 118 N.R. 1, 13 C.H.R.R. D/171, 45 O.A.C. 1, 2 O.R. (3d) 319 (note), 2 C.R.R. (2d) 1 [hereinafter *McKinney* cited to S.C.R.], a mandatory retirement case, for the proposition that,

> … generally, courts should not lightly second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards the full and ungrudging recognition of the dignity of the human person. (*Egan*, *ibid.* at 574.)

[25] *Egan*, *ibid.* at 575–76.

[26] For academic criticism of *Egan*, *ibid.*, see Diane Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 *National Journal of Constitutional Law* 295; Bruce Ryder, "*Egan* v. *Canada*: Equality Deferred, Again" (1996) 4 *Canadian Labour and Employment*

Journal 101; and John Fisher, "The Impact of the Supreme Court Decision in *Egan* v. *Canada* Upon Claims for the Equal Recognition of Same-Sex Relationships" (1997) [unpublished article].

[27] Regarding the "new" social relationship, the comment of Iacobucci J. is particularly apt. He says on behalf of four members of the Court in *Egan*, *supra* note 1 at 618–19:

> A concern is my colleague's position that, because the prohibition of discrimination against gays and lesbians is "of recent origin" and "generally regarded as a novel concept," the government can be justified in discriminatorily denying same-sex couples a benefit enuring to opposite-sex couples. Another argument he raises is that government can take an incremental approach in providing state benefits.
>
> With respect, I find both of these approaches to be undesirable. Permitting discrimination to be justified on account of the "novelty" of its prohibition or on account of the need for government "incrementalism" introduces two unprecedented and potentially undefinable criteria into s. 1. It also permits s. 1 to be used in an unduly deferential manner well beyond anything found in the prior jurisprudence of this Court. The very real possibility emerges that the government will always be able to uphold legislation selectively and discriminatorily allocate resources. This would undercut the values of the *Charter* and belittle its purpose.

[28] *Egan*, *supra* note 1 at 529–30; Andrews, *supra* note 16 at 194.

[29] *Supra* note 18.

[30] *Egan, supra* note 1 at 535.

[31] *Ibid.* at 536 and 537.

[32] Regarding section 1, La Forest J. says: "Had I concluded that the impugned legislation infringed s. 15 of the *Charter*, I would still uphold it under s. 1 of the *Charter* for the reasons set forth … which are referred to in the reasons of my colleague Justice Sopinka, as well as for those mentioned in my discussion of discrimination in the present case." See *Egan*, *supra* note 1 at 539–40.

[33] *Masse*, *supra* note 2.

[34] *Ibid.* at 49.

[35] *Ibid.*

[36] *Egan*, *supra* note 1 at 272–73.

[37] *Ibid.* at 574; *McKinney, supra* note 24 at 318–19.

[38] *Masse*, *supra* note 2 at 60; *Andrews*, *supra* note 16 at 194.

[39] *Ibid.* at 45–46.

[40] *Ibid.* at 46; *Egan*, *supra* note 1 at 573.

[41] *Masse*, *supra* note 2 at 46–47; and *Dandridge* v. *Williams*, 90 S. Ct. 1153 (1970) at 1162–63.

[42] The cases reveal a degree of variation in the way that the s. 15 test is articulated. The version we have provided is drawn from the majority opinion of McLachlin J. in *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at 485, 10 M.V.R. (3d) 151, 23 O.R. (3d) 160 (note), [1995] 1 L.R. 1-3185, 13 R.F.L. (4th) 1, 181 N.R. 253, 124 D.L.R. (4th) 693, 81 O.A.C. 253.

[43] [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, [1978] 6 W.W.R. 711, 23 N.R. 527, 78 C.L.L.C. 14,175 [hereinafter *Bliss* cited to S.C.R.].

[44] For Hollinrake and Cumming JJ.A., the issue of the *Charter*'s application to legislative inaction, and the issue of how discrimination is defined, are connected to a deeper question, which is just how much equality disadvantaged groups are supposed to get. In a very revealing statement, Hollinrake J.A. says in *Eldridge (B.C.C.A.)*, *supra* note 3 at 341:

> [The Appellants] submit that s. 15 be interpreted in such a manner as to effectively impose on the government a positive duty to address all inequalities when legislating benefits in the area of medical services. That, in my opinion, is equivalent to imposing an obligation on the government of ensuring absolute equality … I do not think that s. 15 imposes such an obligation.

[45] *Ibid.*

[46] *Symes* (S.C.C.), *supra* note 4.

[47] *Ibid.* at 763–64.

[48] *Ibid.* at 764–65.

[49] Further, in *Symes*, *ibid.*, the effects of the law are assessed without regard to the inequality of women. There is an unwillingness to allow the analysis of the effects of the law to be informed by the fact of the unequal cost of child care that women have traditionally born, the implications of such costs for the ability of women to participate in the paid labour force, or the impact of child care responsibilities on women's economic inequality.

Thus, even though Iacobucci J. acknowledges that s. 15 is supposed to be concerned with adverse effects, he is only focused on the challenged law. The possibility that the law may rest on sexist stereotype is not considered. Nor is the analysis focused on the tendency of the law to perpetuate and reinforce women's inequality, in the context of a web of child care and employment-related inequalities experienced by women.

Another way of putting this is to say that the law looks different when viewed from the perspective of the group experiencing discrimination. From the standpoint of Beth Symes and many other women, the question is not whether women disproportionately pay child care expenses, but rather: Is this a law which perpetuates or reinforces women's inequality by refusing to recognize a kind of responsibility that women are culturally expected to assume?
L'Heureux-Dubé and McLachlin JJ. understand this. In *Symes*, *ibid.* at 786, L'Heureux-Dubé J. says:

> … though ostensibly about the proper statutory interpretation of the Act, this case reflects a far more complex struggle over fundamental issues, the meaning of equality and the extent to which these values require that women's experience be considered when the interpretation of legal concepts is at issue.

[50] Central to the reasoning in the opinions upholding s. 56(1)(b) of the *ITA* is a refusal to recognize Suzanne Thibaudeau as a person in her own right separate from her husband. The Court decides that Ms. Thibaudeau should not be seen as either an individual woman or as a member of the group "women" but rather as a member of a "post-divorce family unit." The Court rejects the comparison that the rights claimant seeks to make between custodial parents and non-custodial parents. As the Court sees it, the entity that matters is the divorced or separated couple, and comparisons cannot be made between the custodial parent and the non-custodial parent. This makes the sex discrimination complained of by Ms. Thibaudeau invisible, and renders her invisible too. The majority does not explain why Ms. Thibaudeau cannot be recognized as a person, separate from her ex-husband. Neither McLachlin J. nor L'Heureux-Dubé J. has any difficulty in seeing the absurdity of treating Ms. Thibaudeau and Mr. Thibaudeau as though they were a unit. McLachlin J. acknowledges that the *ITA* treats the non-custodial parent as part of a single taxation unit, namely "the family." McLachlin J. refers to this as legislative fiction. She says in *Thibaudeau*, *supra* note 5 at 707–8:

> The deduction/inclusion scheme does not treat each taxpayer as a separate taxation unit, but treats the non-custodial parent as forming part of a single taxation unit, the family. By a legislative fiction, the

> deduction/inclusion scheme removes the amount of the support payments paid between former spouses from the non-custodial parent's taxable income, and transfers it to the custodial parent's taxable income.

L'Heureux-Dubé J. agrees with McLachlin J. that the appropriate unit of analysis is not the couple. Whereas McLachlin J. finds that the appropriate unit of comparison is the individual custodial parent who is divorced or separated, L'Heureux-Dubé J. focuses on custodial parents as a group, while acknowledging that the scheme makes many layers of distinctions, between those who receive or make payments pursuant to a court order or written agreement and those who do not; between parents who are separated or divorced and those who are not; and between those who pay and those who receive maintenance. The more important question for L'Heureux-Dubé J. is whether the combination of distinctions has the effect of imposing a benefit or burden unequally on the basis of one's membership in an identifiable group, in this case, women. She finds that it does.

[51] *Ibid.* at 709.

[52] *Ibid.* at 711.

[53] *Eldridge (B.C.C.A.)*, *supra* note 3 at 339.

[54] *Supra* note 20 and accompanying text.

[55] *Supra* note 1.

[56] *Egan*, *supra* note 1 at 539.

[57] The decision of the Ontario Divisional Court in *Masse* also exemplifies the requirement that the effects must be confined to one group. In this case an overflow of effects is taken as evidence that the group is not a protected s. 15 group. Corbett J. rejects the s. 15 claim that targeting social assistance recipients for spending cuts constitutes discrimination. Corbett J. notes that welfare recipients are not the only people who are subject to budgetary restraint or who suffer from inadequate incomes, and then, without weighing evidence presented by the applicants to the effect that welfare recipients are subject to an additional burden, concluded that the applicants had failed to establish "that any differentiation had been made based on the personal characteristics of social assistance recipients." *Masse*, *supra* note 2 at 71. And on this basis, Corbett J. finds that social assistance recipients are not a protected s. 15 group, or at least not in the context of this case.

Corbett J.'s approach is consistent with that of O'Driscoll and O'Brien JJ. Both judges advert to the fact that poverty is not confined to people on social assistance, and O'Driscoll J. says that the status of being on social assistance is not a personal characteristic within the meaning of s. 15. *Masse*, *ibid.* The question of whether poverty or the status of being on social assistance constitutes a protected ground has not yet been taken up by the Supreme Court of Canada. However, a number of lower courts, not including the Ontario Divisional Court, have viewed this issue differently. See, for example, *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks* (1993), 101 D.L.R. (4th) 224, 30 R.P.R. (2d) 146, 119 N.S.R. (2d) 91, 330 A.P.R. 91, 1 D.R.P.L. 462 (N.S.C.A.) [the Nova Scotia Court of Appeal found discrimination on the basis of race, sex and income]; *Federated Anti-Poverty Groups of B.C.* v. *British Columbia (A.G.)* (1991), 70 B.C.L.R. (2d) 325, B.C.W.L.D. 1571, W.D.F.L. 710 (B.C.S.C.) [the British Columbia Supreme Court held that persons receiving income assistance constitute a discrete and insular minority within the meaning of section 15]; *R.* v. *Rehberg* (1994), 111 D.L.R. (4th) 336, 127 N.S.R. (2d) 331, 355 A.P.R. 331, 19 C.R.R. (2d) 242, W.D.F.L. 3787 (N.S.S.C.) [the Nova Scotia Supreme Court found that single mothers along with their children constitute a group likely to experience poverty, and that poverty is likely to be a personal characteristic of the group]; and *Schaff* v. *R.* (1993), 18 C.R.R. (2d) 143, 2 C.T.C. 2695 (T.C.C.) [the Tax Court of Canada held that poor, female, single custodial parents have historically suffered social, political, and legal disadvantage, and should be protected under s. 15].

[58] Philipps and Young, "Sex, Tax and the *Charter*: A Review of *Thibaudeau* v. *Canada*," *supra* note 11 at 254.

[59] Ontario Association of Interval and Transition Houses (OAITH), Submission to the UN Special Rapporteur on Violence Against Women, *Home Truth: Exposing the False Face of Equality and Security Rights For Abused Women in Canada*, November 1996, at 21.

[60] See, for example, *Mia* v. *British Columbia (Medical Services Commission)* (1985), 17 D.L.R. (4th) 385, 61 B.C.L.R. 273, 15 Admin. L.R. 265, 16 C.R.R. 233 (S.C.), in which the Court embraces the claim of a doctor to be free of geographic restrictions on her right to pursue her medical practice.

[61] *Andrews*, *supra* note 16 at 196–97.

[62] *RJR MacDonald*, *supra* note 18 at 332.

[63] *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308.

[64] The Charter Committee on Poverty Issues put it this way in their submission to the Supreme Court of Canada in the *Symes* case: "Disadvantaged groups may rely on the *Charter* to provide them with a "voice" in the democratic process which they are otherwise denied. Judicial processes under the *Charter* may often be more respectful of disadvantaged groups than political processes, ensuring that they receive a full hearing." See *Symes* v. *Canada* (S.C.C.), *supra* note 4. Factum of the Intervenor, the Charter Committee on Poverty Issues, paragraph 32.

[65] As John Hart Ely wrote in *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 151 regarding the term "discrete and insular minorities" adopted by the Supreme Court of Canada in *Andrews*, *supra* note 16 at 152, "The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending."

[66] This rigid hierarchy of gender roles has implications not only for women who live with men, but also for lesbians and gay men who choose to bond with one another. In particular, from a morally conservative perspective, "family" and "spousal" benefit schemes are seen as the exclusive preserve of women and men whose relationships conform to traditional heterosexual norms. This view of sex roles also dictates that women who aspire to professional advancement should eschew childbearing.

Granted, the same treatment formula can be usefully deployed in some situations. Essentially, it is a call for gender blindness and individual assessment. This sometimes works well for individual women in job-hiring situations, for example, because it requires that each applicant be judged individually rather than being sorted according to group membership. However, when it comes to legislative schemes that reinforce the pre-existing social inequality of women, an equality analysis is required that looks not only to a relationship between a challenged law and an individual woman, but to the relationship between the challenged law, the inequality of the group in the society, and other layers of subordinating stereotypes, laws, and practices that, together, create the inequality of the group.

[67] As indicated, here, the reference is to the decision of the British Columbia Court of Appeal in *Eldridge.* On further appeal, that decision was reversed by the Supreme Court of Canada. See *supra* notes 3 and 20, as well as accompanying text.

[68] In summary, in *Bliss*, *supra* note 43 at 191, the Court made these moves:

1. The *Bliss* Court distinguished penalties from benefits, insisting that there is a difference in the way that equality analysis should think about penalizing legislation, such as a criminal law provision, that treats one section of the population more harshly than others, and legislation providing "additional benefits" to a group of women. Contrasting the case of *Drybones*, which concerned the criminalization of drinking by Aboriginals, making it an offence for an Indian to be intoxicated, the Court said:

   > There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *Regina* v. *Drybones*, and legislation providing additional benefits to one class of women, specifying conditions which entitle a claimant to such benefits and defining a period during which no benefits are available.

2. The *Bliss* Court shifted responsibility for the inequality complained of by Stella Bliss away from the legislative scheme,

finding the cause of the inequality did not reside in the legislation, but rather was created by nature. The Court said: "[these provisions] are concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation but by nature." *Ibid.* at 190.

3. The *Bliss* Court broke the link between the ground of sex and the equality violation by insisting that all women be negatively affected, a criterion that the claim of Stella Bliss could not satisfy because the challenged provision did not affect all women negatively, only those who were pregnant. The Court failed to take into account the fact that the adverse effects complained of were experienced exclusively by women. Because the challenged provision did not affect all women, and noting that the *Unemployment Insurance Act* treated all non-pregnant employees alike, the Court concluded that if the *Unemployment Insurance Act* treats pregnant women differently from other employed persons, it is because they are pregnant, not because they are women. The Court expressed agreement with Justice Pratte of the Federal Court of Appeal (1977), 16 N.R. 254) who said:

> Assuming the respondent to have been "discriminated against," it would not have been by reason of her sex. Section 46 applies to women, and has no application to women who are not pregnant, and it has no application, of course to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant not because they are women. *Bliss*, (S.C.C.) *ibid.* at 190–1917.

In other words, by treating all non-pregnant persons the same (whether male or female), the *Unemployment Insurance Act* satisfied the requirement of neutrality, that is, of treating likes alike.

4. The *Bliss* Court stated repeatedly that the challenged scheme was enacted for valid federal objectives, as though the validity of the government's objectives could in itself be dispositive, regardless of the discriminatory effects on women.

5. The *Bliss* Court invoked a relevancy test for determining the legality of eligibility criteria based on pregnancy, holding that an extended eligibility period for pregnant women is a relevant distinction for determining entitlement to unemployment insurance benefits. The Court failed to recognize that a law may be relevant to a government objective, but nevertheless discriminatory in purpose or effect.

6. The Court did not draw any analytical distinction between the plaintiff's claim and the government's defence.

[69] *Andrews*, *supra* note 16 at 170.