

**CHARTER EQUALITY RIGHTS: INTERPRETATION OF
SECTION 15 IN SUPREME COURT OF CANADA DECISIONS**

Mary C. Hurley
Law and Government Division

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CHARTER EQUALITY RIGHTS: INTERPRETATION OF SECTION 15 IN SUPREME COURT OF CANADA DECISIONS

INTRODUCTION

This paper contains a summary review of a number of principles relevant to analysis of section 15 and section 1 of the *Canadian Charter of Rights and Freedoms* (the Charter), as determined by the Supreme Court of Canada (the Court), followed by a chart setting out basic elements of the Court's decisions in which the equality rights provision has been raised.

SUBSECTION 15(1)

Subsection 15(1) of the Charter, in effect since April 1985, provides that:

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

A. The *Andrews* Decision

The Court issued its first section 15 ruling in 1989. *Andrews v. Law Society of British Columbia*⁽¹⁾ articulated an initial interpretive framework for the application of subsection 15(1) in future equality rights cases. Accordingly, subsequent determinations as to whether legislative distinctions or other government action violated section 15 of the Charter required lower courts to apply the *Andrews* framework.

(1) [1989] 1 S.C.R. 143.

Andrews involved a successful challenge to the statutory citizenship requirement for entry into the legal profession in British Columbia. The British Columbia Court of Appeal had applied a formal equality test in its consideration of section 15, according to which persons similarly situated were entitled to similar treatment, and different treatment of persons differently situated was justified.⁽²⁾ Although confirming the appellate court's decision, the Court rejected its *formal* equality analysis in favour of a *substantive* equality approach.

Relevant principles set out in *Andrews* include the following:

- The section 15 equality guarantee is mainly concerned with the *impact* of the law on the individual or group concerned. It has a “large remedial component.”
- Equality is a comparative concept, discernible through comparison with the condition of others within the relevant social or political context. Section 15 is not, however, a general guarantee of equality: differential treatment does not necessarily result in inequality, while identical treatment may frequently produce serious inequality. Subsection 15(2) recognizes this fact by providing that laws, programs and activities having as their object the amelioration of conditions of disadvantaged groups are not precluded by subsection 15(1).⁽³⁾
- A law will thus not necessarily be “bad” because it makes distinctions. Legislative classifications are necessary for the governance of modern society. Section 15 was not intended to eliminate all distinctions in laws, but only those that are discriminatory.
- For section 15 purposes, discrimination is defined as a distinction, intentional or not, that is based on grounds relating to the personal characteristics of the individual or group concerned, and that has the effect of imposing disadvantages or burdens not imposed on others, or of withholding access to advantages or benefits available to others. This definition emphasizes the importance of the impact of the impugned distinction.
- The personal characteristics that will or may ground a section 15 claim are those enumerated within the section itself, as well as certain non-enumerated characteristics such as, for example, citizenship in the circumstances of the *Andrews* case. The enumerated grounds “reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must ... receive particular attention.”
- The determination of whether a non-enumerated ground falls within the scope of section 15 requires assessment as to whether it is “analogous” to the enumerated grounds.⁽⁴⁾

(2) Most of the appellate and other lower courts across the country had used this test since the coming into effect of the provision in April 1985.

(3) See text under “Subsection 15(2)” heading for a brief review of the Court's interpretation of that provision.

(4) The “enumerated or analogous grounds” approach endorsed by the Court in *Andrews* was taken by the Federal Court of Appeal in *Smith, Kline & French Laboratories v. Canada (Attorney General)*, [1987] 2 F.C. 359.

The enumerated and analogous grounds approach concentrates on the personal characteristics of those claiming to have been treated unequally, and asks, among other things, whether those in that group have been subjected to historical disadvantage, stereotyping and prejudice.

- It is not, however, sufficient to focus on whether the claim is based on an enumerated or a non-enumerated, analogous ground. The effect of the challenged distinction must also be weighed. A complainant must establish “not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.”

Andrews thus determined that a finding of section 15 infringement requires:

- inequality, or a distinction based on personal characteristics with respect to treatment and/or impact in the formulation or application of the law; and
- discrimination, evidenced by an effect of prejudice to a disadvantaged individual or group, as determined by the enumerated grounds and/or those non-enumerated grounds analogous to them.

B. The *Turpin* and *Swain* Decisions

Through 1995, the Court’s subsequent section 15 decisions expanded upon the basic *Andrews* framework. Certain concepts retained particular significance. In *R. v. Turpin*,⁽⁵⁾ in particular, the Court reinforced the *Andrews* criterion of disadvantage for purposes of establishing a section 15 violation based on analogous grounds:⁽⁶⁾

- The Court reiterated the importance of looking “not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context.” In this light, a finding of discrimination under section 15 of the Charter will, in most cases, entail a search for “disadvantage that exists apart from and independent of the particular legal distinction being challenged.” The criterion of general disadvantage in addition to the particular prejudicial distinction under challenge did not go uncriticized, but generally remained a key consideration for section 15 claims.
- The Court also confirmed that deciding whether a group is “analogous” and therefore one that should benefit from section 15 protection requires an examination of the group’s place in

(5) [1989] 1 S.C.R. 1296.

(6) See text accompanying notes 11 to 14.

society. One analytical tool identified for this purpose involved an evaluation of whether the group constitutes a “discrete and insular minority.”⁽⁷⁾

- In the same vein, *Turpin* defined the overall purpose of section 15 as being the remedying or preventing of discrimination against groups suffering social, political and legal disadvantage in Canadian society. Thus, deciding whether a group is protected by section 15 involves “a search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political or social prejudice.” This definition was stated and applied in many subsequent Supreme Court of Canada and lower court cases.

The Court’s decision in *R. v. Swain*⁽⁸⁾ contained a useful review of the approach developed in *Andrews-Turpin*:

[These] cases convey a basic framework within which particular s. 15(1) claims can be analyzed. The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied ... This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in “discrimination.” This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant’s s. 15(1) rights have been infringed, the Court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure the claim fits within the overall purpose of s. 15; namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

C. The 1995 Trilogy

Although the *Andrews-Turpin* analytical scheme was applied, essentially unchanged, in subsequent Court rulings,⁽⁹⁾ three 1995 decisions revealed a marked three-way division among members of the Court as to the appropriate approach to section 15

(7) This criterion was also the subject of criticism but it, too, remained an important factor routinely referred to in subsequent lower court cases. Some have favoured a de-emphasis of notions of discreteness and insularity which, if considered determinative, might unduly restrict the scope of section 15. See text accompanying notes 11 to 14.

(8) [1991] 1 S.C.R. 933.

(9) See for example, *Symes v. Canada*, [1993] 4 S.C.R. 695, at 753-58.

interpretation.⁽¹⁰⁾ These rulings also articulated variations from the original *Andrews-Turpin* approach advanced in the trilogy that are worth noting. In *Miron*, for example,⁽¹¹⁾ a majority of the court commented that the factors set out in *Turpin*⁽¹²⁾ for determining whether a group was “analogous” to those enumerated in section 15, while they were valid indicators, need not necessarily be present to make such a finding. In the majority view, analogous grounds could not be restricted to historically disadvantaged groups if the Charter was to retain future relevance.⁽¹³⁾ Nor is it essential for a discrete and insular minority to be targeted by the distinction at issue, as illustrated by the inclusion of sex among section 15’s enumerated grounds for defining analogous grounds. The “overarching” purpose of section 15 was also restated as being “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.”⁽¹⁴⁾

D. The *Law* Decision: A Second Leading Case

Following the trilogy, it was difficult to gauge how the Court’s division would affect the future evolution of section 15 interpretation, among other reasons because the *Andrews* framework had served as the authoritative guide in this area. The issue remained unresolved through 1998 in the Court’s post-trilogy rulings in which section 15 issues were addressed.⁽¹⁵⁾

(10) *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

(11) Note 10.

(12) Note 5.

(13) This principle was restated in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

(14) *Miron*, note 10, par. 131. This statement was taken up in the Court’s subsequent unanimous ruling in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358. The determining role of the human dignity concept for purposes of section 15 analysis was confirmed in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

(15) In *Adler v. Ontario*, [1996] 3 S.C.R. 609, only two members of the Court, in dissent, and representing two of the three analyses outlined in the “trilogy,” undertook a full section 15 analysis. In the Court’s unanimous decision in *Eaton v. Brant Co. Board of Education*, [1997] 1 S.C.R. 241, at par. 62, Sopinka J. acknowledged that “there has not been unanimity” with respect to section 15 principles, but found the disability issue before the Court could be resolved “on the basis of principles in respect of which there is no disagreement.” Similarly, Iacobucci J. in *Benner*, note 14, having noted the three trilogy approaches to section 15, applied a largely traditional approach to the circumstances of the case for a unanimous Court, adding at par. 67 that “the result in this appeal is in my opinion the same no matter which [of the three tests] is applied.” See also *Eldridge*, note 13, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

The full Court's unanimous 1999 ruling in *Law v. Canada (Minister of Employment and Immigration)*⁽¹⁶⁾ marked an apparent attempt to reconcile the Court's earlier split and to set benchmarks for the following years of section 15 analysis. The decision therefore represented a significant development.

The case involved an appeal of a ruling against a claim of age-based discrimination arising because *Canada Pension Plan* survivor benefits are denied to able-bodied surviving spouses under the age of 35 who are without dependent children.⁽¹⁷⁾ In dismissing the appeal, the Court consolidated and refined previously stated principles concerning the purpose of and approach to section 15, with a view to providing guidelines for lower courts' future evaluation of discrimination claims under the Charter. These guidelines, it was stressed, are to serve as points of reference rather than a fixed formula, so as not to detract from the strong remedial purpose of the equality rights provision.

Under *Law*, central issues raised by and broad inquiries into claims of discrimination reflected issues and inquiries essentially as stated in *Andrews*. Thus, a court evaluating a discrimination claim should continue to determine whether:

- the law in question either actually distinguishes between the claimant and others on the grounds of one or more personal characteristics, or results in substantively different treatment on the basis of such characteristics by failing to take account of the claimant's already disadvantaged position;⁽¹⁸⁾
- the differential treatment is based on one or more enumerated or analogous grounds protected by section 15; and
- the treatment discriminates substantively by imposing a burden or withholding a benefit in a way that reflects stereotyped application of presumed characteristics, or that otherwise has demeaning or devaluing effects on the individual.

In other words, courts must find (i) distinction(s) in treatment (ii) on the basis of an enumerated or analogous ground (iii) that amounts to substantive discrimination.

The primary innovation of the *Law* ruling, which many contend rendered section 15 analysis significantly more complex, lay in its reformulation of the evaluative framework to assist courts in assessing the merits of section 15 claims. Its basic elements, underscoring a heightened focus on human dignity, may be summarized as follows:

(16) Note 14.

(17) (1996), 135 D.L.R. (4th) 293 (F.C.A.).

(18) In other words, whether the law results in adverse effect discrimination. See note 29.

- The purpose of section 15 is to prevent the violation of human dignity and freedom by the imposition of disadvantage, stereotyping or prejudice, and to promote equal recognition at law of all persons as equally deserving.
- A claim of discrimination is unfounded in the absence of conflict between the purpose or effect of the law under challenge and the purpose of section 15, as determined by analyzing the context of the claim and claimant.
- A distinction in treatment is unlikely to constitute discrimination for section 15 purposes if it does not violate human dignity, and particularly if it also helps improve the position of disadvantaged individuals or groups.
- Because equality is a comparative concept, relevant “comparators” must be established; within the scope of the ground(s) of alleged discrimination claimed, a court may refine a claimant’s comparison, should it be insufficient or inaccurate.⁽¹⁹⁾
- Contextual factors that determine whether the law demeans a claimant’s dignity are to be evaluated, first and foremost from the perspective of the claimant and, to ensure that her or his assertion is supported objectively, from the perspective of a reasonable person in circumstances similar to the claimant’s, who takes into account those contextual factors.
- The list of contextual factors raised by a section 15 claimant to show that a law is demeaning to dignity is not closed.
- Noteworthy contextual considerations influencing whether section 15 has been infringed include:
 - (1) pre-existing disadvantage or vulnerability experienced by the claimant, with the effect of the challenged law always of central significance;
 - (2) the extent of the link, if any, between the ground(s) raised and the claimant’s actual circumstances, with discrimination more difficult to establish to the degree the law takes those circumstances into account in a way that values the claimant;
 - (3) the ameliorative purpose or effect of the law under challenge for a relatively more disadvantaged group which, if present, is unlikely to violate the dignity of more advantaged claimants;⁽²⁰⁾ and

(19) See also text accompanying notes 22 to 25.

(20) In *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, the Court recognized that both the Aboriginal appellants and the First Nations respondents were disadvantaged. It extended this factor to situations in which the excluded group is also disadvantaged, so as to ensure the analysis remains focused on whether the exclusion infringes subsection 15(1) and to prevent reducing that analysis to a balancing of relative disadvantage.

- (4) the nature and scope of the interest affected by the law, with more severe localized results of the law for those affected more likely to show that the distinctions in treatment responsible are discriminatory under section 15.
- The claimant’s burden of establishing section 15 infringement does not oblige her or him to adduce evidence of violation of human dignity or freedom; the fact that a distinction in treatment is based on one or more section 15 grounds will often be sufficient to establish such an infringement in that it will be apparent, through judicial notice and logic, that the distinction is discriminatory.

Applying these principles to the case at hand, the Court concluded that, while the challenged provisions of the *Canada Pension Plan* do create differential treatment based on the enumerated ground of age, they do not impose a substantive long-term disadvantage on younger adults and do not violate the essential human dignity of surviving spouses under the age of 35; thus, they are not discriminatory.

E. Some Post-Law Observations

As anticipated, the Court’s assessment of the human dignity factor in subsequent decisions to date has continued to play a pivotal role in determining whether a section 15 claim of discrimination will be allowed or dismissed.

The Court has continued to develop guidelines as to how contextual factors are to be weighed and analyzed in individual cases. Additional explanation can be found, for example, in *Trociuk v. British Columbia (Attorney General)*, in which the Court ruled that legislation excluding some fathers from the birth registration and naming process was discriminatory on the basis of sex. It noted that absence of historical disadvantage need not necessarily preclude a finding of discrimination, underscoring the point that “neither the presence nor absence of any of the [*Law*] contextual factors is dispositive of a s. 15(1) claim” or “determines the outcome of the dignity analysis.”⁽²¹⁾

The Court has also maintained its focus in post-*Law* decisions on the significance of the “comparator group” in section 15 analysis.⁽²²⁾ It returned to the matter most fully in

(21) [2003] 1 S.C.R. 835, 2003 SCC 34, par. 20, 28.

(22) In *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, par. 45-50, it emphasized that “identification of the group in relation to which [an] appellant can properly claim ‘unequal treatment’ is crucial,” and substituted a different “comparator group” for the group identified by the appellant. See also *Lovelace v. Ontario*, note 20, par. 62-64.

Hodge v. Canada (Minister of Human Resources Development).⁽²³⁾ Here the Court observed that because section 15 analysis proceeds throughout on a comparative basis, the choice of comparator group is an ongoing issue in every case and initial misidentification “can doom the outcome” of the section 15 examination. *Hodge* reaffirmed the judiciary’s role in scrutinizing the claimant’s choice of comparator, and its duty “to step in and measure the claim to equality rights in the proper context and against the proper standard” when a claimant’s choice is mistaken.⁽²⁴⁾ The Court’s rather complex discussion of the comparator group issue asserts that “[t]he appropriate comparator group is the one which mirrors the characteristics of the claimant ... relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter.”⁽²⁵⁾

F. Additional Guiding Principles

The Court’s section 15 jurisprudence has stated a number of additional interpretive principles. Noteworthy examples include the following:

- In *R. v. Nguyen; R. v. Hess*,⁽²⁶⁾ the Court found that a legislative provision addressing a group by reference to an enumerated characteristic does not necessarily result in an automatic section 15 violation, absent a discriminatory result as defined in *Andrews*.⁽²⁷⁾
- In *McKinney v. University of Guelph*,⁽²⁸⁾ the Court held that the term “law” in section 15 is not confined to statutory instruments such as laws and regulations, but may also extend to government policies or contracts. *McKinney* also affirmed that section 15 protects against both direct discrimination and adverse effect discrimination.⁽²⁹⁾

(23) [2004] 3 S.C.R. 357, 2004 SCC 65.

(24) In *Canada (Attorney General) v. Hislop*, 2007 SCC 10, 1 March 2007, par. 37-38 and 59-60, the Court found that it was the government party whose section 15 arguments relied on inappropriate comparator groups.

(25) *Hodge*, note 23, par. 22-23. See also *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78.

(26) [1990] 2 S.C.R. 906.

(27) See also *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, both of which involved unsuccessful claims of discrimination on the basis of age. In other cases in which the enumerated ground was age, however, the Court found section 15 infringements on the basis of little analysis: see *McKinney v. University of Guelph*, note 28, *Tétreault-Gadoury v. Canada (Canada Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

(28) [1990] 3 S.C.R. 229.

(29) Direct discrimination may arise when the challenged law or other government activity contains an explicit distinction based on an enumerated or analogous ground. Adverse effect discrimination may occur when an apparently neutral rule nevertheless has a prejudicial impact on a group entitled to the benefit of section 15 protection.

- *R. v. Swain*⁽³⁰⁾ confirmed that section 15 protection is also available with respect to common law rules that form the basis for governmental action.
- *Symes v. Canada*⁽³¹⁾ confirmed that a finding of discrimination does not require that all members of a group be negatively affected by a legislative distinction.
- *Adler v. Ontario*⁽³²⁾ confirmed that Charter guarantees, including section 15 equality rights, cannot be invoked either to enlarge or to invalidate other provisions of the Constitution.
- In *Benner v. Canada (Secretary of State)*,⁽³³⁾ the Court affirmed that, although section 15 does not apply retroactively, determinations of retroactivity depend on characterization of circumstances of individual cases, including whether their most relevant feature is a past event or a current condition resulting from it.
- *Eaton v. Brant Co. Board of Education*⁽³⁴⁾ distinguished between disability and other enumerated grounds that are not characterized by individual differences, ruling that one of the purposes of section 15 in disability cases involves the recognition and accommodation of the *actual* characteristics of persons with disabilities.⁽³⁵⁾
- In *Eldridge v. British Columbia (Attorney General)*,⁽³⁶⁾ the Court ruled that in some circumstances, section 15 requires governments to take special measures to ensure that disadvantaged groups are able to benefit equally from government services, for example by extending the scope of a benefit to a previously excluded group.
- In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*,⁽³⁷⁾ the Court confirmed that, whether or not immediate benefits would ensue, depriving individuals of access to an institution represents differential treatment for section 15 purposes.⁽³⁸⁾
- The same workers' compensation decision clarified that, in section 15 cases involving economic interests, economic disadvantage/deprivation is not necessarily unrelated to a loss of human dignity.

(30) Note 8.

(31) Note 9.

(32) Note 15. See also *Reference re Bill 30, An Act to amend the Education Act*, [1987] 1 S.C.R. 1148.

(33) Note 14.

(34) Note 15.

(35) See also *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54.

(36) Note 13. See also *Vriend*, note 15.

(37) Note 35.

(38) See also *Vriend*, note 15; *M. v. H.*, [1999] 2 S.C.R. 3.

- In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,⁽³⁹⁾ the Court reiterated its view that legislatures are under no obligation to create benefits, but may target the programs to be funded on the basis of policy, provided the resulting benefit is not delivered in a discriminatory way.
- *Canada (Attorney General) v. Hislop*⁽⁴⁰⁾ confirmed that a declaration of invalidity under section 15 may not warrant a retroactive constitutional remedy where the right at issue has arisen from a substantial change in the law at a given point in time, government's reliance on the prior law was in good faith, and considerations of fairness to litigants are outweighed by respect for the legislative role.

SUBSECTION 15(2)

Subsection 15(2) reads:

Subsection [15(1)] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The 2000 decision in *Lovelace v. Ontario*⁽⁴¹⁾ contains the Court's first relatively extensive discussion of the proper interpretation of subsection 15(2), and of that provision's relationship with subsection 15(1). The case concerned the exclusion of certain "non-band" Aboriginal groups in Ontario from the fund that provides Ontario First Nations registered under the *Indian Act* with shares in the proceeds of the reserve-based Casino Rama, in order to strengthen their economic and social development. The Ontario appellate court found that the casino project was authorized by subsection 15(2), and could not constitute discrimination under subsection 15(1). In upholding this conclusion, the Court relied on subsection 15(1) interpretation under its 1999 *Law* decision rather than on subsection 15(2).

The Court observed that, although its previous section 15 rulings had not given independent scope to subsection 15(2), they had considered the provision to support the interpretation of the equality rights section as substantive in nature. Having noted competing approaches to subsection 15(2) – under which some judges and academics have regarded it either as an interpretive aid to subsection 15(1), or as an exemption from that provision's application – the Court found that, at this stage of the evolution of section 15 jurisprudence, the provision should be understood as confirmation of the substantive equality approach to subsection 15(1).

(39) Note 25.

(40) Note 24.

(41) Note 20.

In the Court's view, its conclusion that subsection 15(2) is "confirmatory and supplementary" to subsection 15(1) is supported by the terms of the two provisions: the former is referenced to the latter, with no language of exemption, while "on its face" subsection 15(2) describes the content of subsection 15(1). Further, the Charter's internal coherence is ensured by treating subsection 15(2) as an interpretive aid to subsection 15(1). Interpreting subsection 15(2) as an independent right or as an exemption to subsection 15(1) would have a contrary effect, for example by rendering section 1 redundant. Thus it is preferable to "recognize the interpretive interdependence" of the two provisions.

The Court did not foreclose the possibility that subsection 15(2) might have independent application in some future case, and suggested that it might wish to reconsider the matter of subsection 15(2) interpretation in another context.

SECTION 1

A. The *Oakes* Test

Section 1 reads:

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

As the terms of the section make clear, no Charter protection is absolute. In the presence of a section 15 violation, the courts therefore undertake a separate section 1 evaluation to determine whether the infringement nevertheless constitutes a reasonable limit to the equality rights guarantee.

The government bears the burden of establishing that any Charter breach is justified. The governing approach to section 1 analysis detailed by the Supreme Court of Canada in *R. v. Oakes*⁽⁴²⁾ involves a two-step process. First, the objective of the legislation or government action must be shown to be sufficiently "pressing and substantial" to warrant overriding a Charter right. Second, the means adopted to attain that objective must be reasonable and demonstrably justified. This step entails a proportionality test in which the courts are required "to balance the interests of society with those of individuals or groups." Three elements must be satisfied:

(42) [1986] 1 S.C.R. 103.

- the measures adopted must be rationally connected to the objective;
- the measures adopted should cause minimal impairment to the right or freedom in question; and
- there must be a proportionality between the *effects* of the measures limiting the right or freedom and the objective identified as being sufficiently important, and between the deleterious and salutary effects of the measures at issue.⁽⁴³⁾

B. The Flexible Approach

In the years since *Oakes*, the application of its “strict” section 1 test has undergone adjustments. In particular, the Supreme Court of Canada has developed a flexible approach to the *Oakes* test’s “minimal impairment” requirement resulting in a less stringent section 1 analysis in certain cases. The approach evolved to a significant extent, and has been applied, in cases in which the interests of vulnerable groups have been central to the Court’s section 1 analysis. For example, in a number of major cases involving the Charter’s subsection 2(b) freedom of expression provision, legislation violating that guarantee has nevertheless been upheld on the basis that it offered vulnerable groups needed protection from harm of one form or another.⁽⁴⁴⁾

However, the flexible approach to section 1 analysis also allows for greater judicial deference to legislative choice in “socio-economic” cases involving circumstances that require the government to strike a balance between the legitimate claims of competing groups for limited resources. The reasoning has been that, because neither the government nor the courts can be absolutely certain as to the “best” balance in such cases, the appropriate question is not whether the right in question *has been* minimally impaired, but rather whether the government

(43) The “deleterious” vs. “salutary” effects element was articulated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at 889.

(44) See *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927 (provincial regulation limiting advertising directed to children); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (adjudicator’s order requiring employer to provide positive letter of reference to wrongfully dismissed employee); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (*Criminal Code* provision prohibiting the dissemination of hate propaganda); *R. v. Butler*, [1992] 1 S.C.R. 452 (*Criminal Code* provision prohibiting the dissemination of obscenity); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (application of *Butler* “obscenity” test to gay and lesbian material). For other contexts in which a similar reasoning has been applied, see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (freedom of religion: retail employees); *Public Service Alliance of Canada et al. v. The Queen in right of Canada et al.*, [1987] 1 S.C.R. 424 (freedom of association: workers not party to a P.S.A.C. challenge); *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (security of the person: disabled persons).

had a *reasonable basis* for so concluding. Where, on the other hand, the government acts as the claimant's "singular antagonist," for example in cases involving legal rights, the courts are in a better position to assess with greater certainty whether the least drastic means have been used.⁽⁴⁵⁾

In some relatively early decisions, a majority of the Court suggested that discriminatory legislation might be justified on the basis of a government's entitlement to take "incremental measures" in legislating human rights protection⁽⁴⁶⁾ or an "incremental approach" in allocating state benefits,⁽⁴⁷⁾ or because the ground of discrimination at issue is relatively "novel."⁽⁴⁸⁾ In these and other cases, the matter of when and how the less stringent *Oakes* test may appropriately be invoked was a source of disagreement among Court members.⁽⁴⁹⁾ In *Egan*, for instance, dissenting members of the Court expressed strong criticism of both incremental and novelty approaches to section 1 justification.⁽⁵⁰⁾ In *Vriend*, Iacobucci J.'s reasons for the majority reiterated the view that "the need for governmental incrementalism [is] an inappropriate justification for Charter violations. ... [G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time."⁽⁵¹⁾

C. Separation of Powers

In *Newfoundland (Treasury Board) v. N.A.P.E.*,⁽⁵²⁾ the Court had occasion to consider section 1 interpretation under the *Oakes* test in relation to the constitutional separation

(45) The "competing groups"—"singular antagonist" distinction is set out in *Irwin Toy* and has been relevant to the section 1 findings in a number of subsequent cases, including section 15 decisions such as *McKinney*. In the *Egan* decision, for example, Sopinka J., in his section 1 analysis, commented that the *Old Age Security Act* issue in that case "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 of an individual. In these circumstances, the Court will be more reluctant to second-guess the choice which Parliament has made." It is worth noting, however, that flexible application of the minimal impairment branch of the *Oakes* test has not necessarily been limited to cases in which the protection of vulnerable groups or complex socio-economic policies have been at issue. Nor has the distinction between "competing groups" cases and "singular antagonist" cases necessarily been determinative for purposes of deciding when to apply the flexible approach.

(46) *McKinney*, note 28.

(47) *Egan*, note 10.

(48) *Ibid.*

(49) See, for example, *McKinney*, note 28, *Egan*, note 10, *Rodriguez*, note 44.

(50) Note 10.

(51) Note 15, par. 122. See also *M. v. H.*, note 38, par. 128-130.

(52) [2004] 3 S.C.R. 381, 2004 SCC 26.

of powers, and the extent to which judicial deference is mandated within that constitutional framework.

On the question of whether inadequate deference is paid to legislative and executive choices overall, the Court observed that generalized deference “would largely circumscribe and render superfluous the independent second look imposed on the courts” by section 1 and “would leave little protection to minorities.”⁽⁵³⁾ Furthermore, it noted,

Judicial review of governmental action long predates the adoption of the *Charter*. Since Confederation, courts have been required *by* the Constitution to ensure that state action complies with the Constitution. The *Charter* has placed new limits on government power in the area of human rights, but judicial review of those limits involves the courts in the same *role* in relation to the separation of powers as they have occupied from the beginning, that of the constitutionally mandated referee. As the Court affirmed in *Vriend ...*, “... it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies.”⁽⁵⁴⁾

In the Court’s view, if the legislature and the executive, the political branches of government, were allowed to be the final arbiters of Charter compliance of their policies, “it would seem the enactment of the *Charter* affords no real protection at all to the rights holders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy.”⁽⁵⁵⁾

The Court concluded that the *Oakes* test incorporates “a healthy respect for legislative choice in areas of economic and social policy,”⁽⁵⁶⁾ and need not be modified, adding that “[w]hile ... the separation of powers is an important constitutional principle, ... the s. 1 test set out in *Oakes* and the rest of our voluminous s. 1 jurisprudence already provides the proper framework in which to consider what the doctrine of separation of powers requires in particular situations.”⁽⁵⁷⁾

(53) *Ibid.*, par. 103.

(54) *Ibid.*, par. 105.

(55) *Ibid.*, par. 111.

(56) *Ibid.*, par. 114.

(57) *Ibid.*, par. 116.

D. Additional Considerations

Not surprisingly, the specific matter of whether and when financial or budgetary measures may justify Charter violations (the dollars vs. rights question) is among the recurring issues in the Court's section 1 deliberations, including in section 15 cases. Its conclusions in *Nova Scotia v. Martin and Laseur* and *N.A.P.E.* indicate that "[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective" for section 1 purposes,⁽⁵⁸⁾ but *could* qualify as sufficiently important in exceptional cases where they are "wrapped up with other public policy considerations."⁽⁵⁹⁾ The Court has stated its intention to continue to view budgetary justifications for Charter breaches with scepticism, "because there are *always* budgetary constraints and there are *always* other pressing government priorities."⁽⁶⁰⁾ Nevertheless, on the minimal impairment aspect, the Court has noted that in some cases involving difficult choices on resource distribution where there is no obvious solution, "[g]overnments act as they think proper within a range of reasonable alternatives" and have a large margin in doing so. In the Court's view, the "scope of that 'margin' will be influenced ... by the scale of the financial challenge confronting a government and the size of the expenditure required to avoid a *Charter* infringement in relation to that financial challenge."⁽⁶¹⁾

The *Vriend* decision clarified that, in cases of Charter infringement owing to legislative under-inclusion, the first stage of the *Oakes* test should be concerned with the legislation as a whole, the impugned provisions, *and* the omission that infringes the equality right. The focus of the inquiry should be primarily on the objective of the legislated limitation or omission in question, with consideration given to the purposes of the entire Act and of the challenged provisions in order to provide the necessary broader context.⁽⁶²⁾

It is also worth stressing that in some instances, a Charter violation need not be subjected to any section 1 "test." For example, in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,⁽⁶³⁾ the Court found that the section 15 violation was a consequence of Customs officials' *implementation* of their governing legislation rather than the legislation itself. That is, the infringement occurred at the administrative level and was not a "limitation prescribed by law" within the meaning of section 1. Therefore, it could not be justified.

(58) Note 35, par. 97.

(59) Note 52, par. 69.

(60) *Ibid.*, par. 72.

(61) *Ibid.*, par. 83-84. See also *Eldridge*, note 13, par. 85-87.

(62) *Vriend*, note 15, par. 109-111. This refinement of the "pressing and substantial objective" component of the *Oakes* test was reiterated in *M. v. H.*, note 38, par. 82.

(63) Note 44.

**SECTION 15 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS
SUPREME COURT OF CANADA DECISIONS**

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<i>Andrews v. Law Society of British Columbia</i> [1989] 1 S.C.R. 143 (unanimous <i>re</i> section 15 violation; 4-2 majority finding violation not justified under section 1)	<i>Barristers and Solicitors Act</i> of B.C.: eligibility to practise law restricted on basis of citizenship requirement	citizenship (analogous)	Citizenship recognized as analogous ground; section 15 violation not justified under section 1
<i>Reference Re Workers' Compensation Act, 1983 (Nfld.)</i> [1989] 1 S.C.R. 922 (unanimous)	<i>Workers' Compensation Act, 1983</i> of Newfoundland: restriction of right to seek compensation other than under Act	employment status (non-enumerated)	Situation of workers and dependants not analogous to that of enumerated groups; no section 15 violation
<i>R. v. Turpin</i> [1989] 1 S.C.R. 1296 (unanimous)	<i>Criminal Code</i> : restricted eligibility to choose method of trial for certain offences, based on province of prosecution/residence	province of prosecution/ residence – place/mode of trial (non-enumerated) (infringement of subsection 11(f) right to waive jury trial also claimed unsuccessfully)	Despite acknowledged inequality of treatment, accused in all provinces but Alberta not disadvantaged group; no section 15 violation
<i>Rudolph Wolff & Co. v. Canada</i> [1990] 1 S.C.R. 695 (unanimous)	<i>Federal Court Act, Crown Liability Act</i> : suits of individuals against Crown restricted to Federal Court jurisdiction	litigants against Crown (non-enumerated)	Crown not an individual for purposes of comparison under section 15; no distinction based on analogous ground, no section 15 violation

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>R. v. S. (S.)</i> [1990] 2 S.C.R. 254 (unanimous)</p>	<p><i>Young Offenders Act</i>: alternative measures program unavailable in Ontario on basis of discretionary government decision</p>	<p>province of residence (non-enumerated)</p>	<p>Discretionary decision not “the law” for section 15 purposes; if law conferring discretion were challenged, province of residence distinction not based on “personal characteristic”; no section 15 violation</p>
<p><i>R. v. Nguyen; R. v. Hess</i> [1990] 2 S.C.R. 906 (4-3 on section 15 issue)</p>	<p><i>Criminal Code</i>: definition of offence of having intercourse with person under 14 years of age restricted to male offenders and female victims</p>	<p>sex (enumerated) (infringement of section 7 right not to be deprived of liberty except in accordance with fundamental justice also claimed successfully (5-2))</p>	<p>Distinction based on enumerated ground not automatic section 15 violation, section 15 not precluding offence capable of commission by one sex as matter of biological fact; no section 15 violation</p>
<p><i>McKinney v. University of Guelph</i> [1990] 3 S.C.R. 229 (unanimous <i>re</i> section 15 violation among judges considering issue; 5-2 as to result)</p>	<p>(1) University policies: mandatory retirement; (2) Ontario <i>Human Rights Code</i>: restriction of prohibition against age discrimination to persons under 65</p>	<p>age (enumerated) (Note: Majority reasons noting case one of adverse effect discrimination)</p>	<p>(1) Charter not applicable to universities: assuming it were, mandatory retirement policies violating section 15 but justified under less stringent section 1 test; (2) Code provision also in violation of section 15 but entitled to deference under section 1</p>
<p><i>Stoffman v. Vancouver General Hospital</i> [1990] 3 S.C.R. 483 (unanimous <i>re</i> section 15 violation among judges considering issue; 4-3 as to result)</p>	<p>Medical Staff regulation: mandatory retirement</p>	<p>age (enumerated)</p>	<p>Charter not applicable to hospitals: assuming it were, regulation violating section 15 justified under less stringent section 1 analysis</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Connell v. University of British Columbia</i> [1990] 3 S.C.R. 451 (unanimous <i>re</i> section 15 violation among judges considering issue; 6-1 and 5-2 as to result)</p>	<p>(1) University policies: mandatory retirement; (2) <i>Human Rights Act</i> of B.C.: prohibition against discrimination in employment restricted to persons under age 65</p>	<p>age (enumerated)</p>	<p>(1) Charter not applicable to university policies: assuming it were, policies violating section 15 justified under section 1; (2) Act also violating section 15 but meeting section 1 test</p>
<p><i>Douglas/Kwantlen Faculty Assn. v. Douglas College</i> [1990] 3 S.C.R. 570 (unanimous as to result)</p>	<p>Collective agreement: mandatory retirement provision</p>	<p>age (enumerated)</p>	<p>Charter applicable to college, collective agreement constituting “law” for section 15 purposes, arbitrator having jurisdiction to consider whether provision in collective agreement in compliance with section 15; N.B.: no decision on merits of section 15 case</p>
<p><i>R. v. Swain</i> [1991] 1 S.C.R. 933 (6-1 as to result)</p>	<p>(1) <i>Criminal Code</i>: provision for automatic detention of person found not guilty by reason of insanity; (2) Common law criterion enabling Crown to adduce evidence of an accused’s insanity against the accused’s wishes</p>	<p>disability (enumerated) ((1) and (2) infringement of section 7 right not to be deprived of liberty except in accordance with fundamental justice also claimed successfully; (2) infringement of section 9 right not to be arbitrarily detained also claimed successfully)</p>	<p>Owing to section 7 finding with respect to (2), no section 15 discussion or conclusion: section 15 discussion limited to determination that new common law rule formulated by Court not in violation of that section</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<i>Tétreault-Gadoury v. Canada (Canada Employment and Immigration Commission)</i> [1991] 2 S.C.R. 22 (unanimous)	<i>Unemployment Insurance Act</i> : disenfranchisement of persons aged 65 to regular unemployment insurance benefits	age (enumerated) (Note: Court noting case one of adverse effect discrimination)	Board of referees without jurisdiction to consider Charter issue; provision in violation of section 15 and not justified under section 1
<i>R. v. Généreux</i> [1992] 1 S.C.R. 259 (unanimous on section 15 issue)	General Court Martial proceedings	membership in military (non-enumerated) (infringement of subsection 11(d) right to hearing before independent and impartial tribunal also claimed successfully (8-1))	Military personnel not falling within analogous ground; no section 15 violation
<i>Canada (Minister of Employment and Immigration) v. Chiarelli</i> [1992] 1 S.C.R. 711 (unanimous)	<i>Immigration Act</i> : provisions requiring deportation of permanent residents convicted of offences subject to certain sentences	permanent residents convicted of relevant offences (non-enumerated) (infringement of section 7 right not to be deprived of fundamental justice and of section 12 right not to be subjected to cruel and unusual treatment or punishment also claimed unsuccessfully)	Charter section 6 providing for differential treatment of permanent residents and citizens; permanent residents convicted of serious offences not falling within analogous ground, deportation scheme not violating section 15
<i>Weatherall v. Canada (Attorney General)</i> [1993] 2 S.C.R. 872 (unanimous)	Frisk searches and cell patrols by female guards in male prisons	sex (enumerated) (infringement of section 7 right not to be deprived of liberty except in accordance with fundamental justice and of section 8 right to be secure against unreasonable search and seizure also claimed unsuccessfully)	Doubtful that differential treatment in question in violation of section 15: even if section 15 infringed, such infringement justified under section 1

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Haig v. Canada; Haig v. Canada (Chief Electoral Officer)</i> [1993] 2 S.C.R. 995 (unanimous on section 15 issue)</p>	<p><i>Referendum Act, Canada Elections Act</i>: failure to make provision for enumeration of all citizens in “national” referendum</p>	<p>new residents of province (non-enumerated) (infringement of subsection 2(b) freedom of expression guarantee and of section 3 right to vote also claimed unsuccessfully)</p>	<p>Persons moving to Quebec less than six months prior to referendum not falling within analogous ground; no section 15 violation</p>
<p><i>Rodriguez v. British Columbia (Attorney General)</i> [1993] 3 S.C.R. 519 (7-2 on section 15 issue, 5-4 as to result)</p>	<p><i>Criminal Code</i>: prohibition against assisting suicide</p>	<p>disability/disabled persons unable to commit suicide without assistance (enumerated) (infringement of section 7 right not to be deprived of security/liberty except in accordance with fundamental justice and of section 12 right not to be subjected to cruel and unusual treatment or punishment also claimed unsuccessfully)</p>	<p>Majority concluding that because any section 15 violation justified under section 1, preferable to make no section 15 findings: essentially a section 7 case</p>
<p><i>Young v. Young</i> [1993] 4 S.C.R. 3 (unanimous as to result on constitutional issues)</p>	<p><i>Divorce Act</i>: Court orders for custody and access based on best interests of child</p>	<p>unspecified, presumably religion (enumerated) (infringement of subsections 2(a) freedom of religion, 2(b) freedom of expression and 2(d) freedom of association guarantees also claimed unsuccessfully)</p>	<p>Assuming Charter applicable to access action under <i>Divorce Act</i>, section 15 guarantee, if applicable, tangential to case based principally on subsections 2(a) and 2(b); no section 15 discussion, no section 15 violation</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<i>Symes v. Canada</i> [1993] 4 S.C.R. 695 (7-2 on section 15 issue)	<i>Income Tax Act</i> : provision limiting child care expense deduction	sex (enumerated)	Evidence not establishing adverse effect discrimination; no section 15 violation
<i>R. v. Finta</i> [1994] 1 S.C.R. 701 (unanimous as to Charter issues raised on cross-appeal among judges considering them)	<i>Criminal Code</i> : provisions allowing conviction for crimes against humanity or war crimes committed outside Canada	persons committing relevant crimes outside Canada (non-enumerated) (infringement of section 7 right not to be deprived of liberty/ security except in accordance with fundamental justice, and of subsections 11(a) right to be informed of offence charged without unreasonable delay, 11(b) right to be tried within reasonable time, 11(d) right to be presumed innocent, 11(g) right not to be found guilty of any act not an offence at the time of its commission also claimed unsuccessfully)	Difference in treatment based on location of crime, not personal characteristic; group of persons committing war crime or crime against humanity outside Canada not falling within analogous ground, no section 15 violation
<i>Native Women's Assn. of Canada v. Canada</i> [1994] 3 S.C.R. 627 (unanimous as to result)	Exclusion of N.W.A.C. from direct funding and participation in relation to constitutional discussions	sex (enumerated) (infringement of subsection 2(b) freedom of expression guarantee, in collaboration with section 28 guarantee of equality between sexes, also claimed unsuccessfully)	Based on facts of case, government under no constitutional obligation to provide funding; all members of Court considering Charter issue finding lack of evidentiary basis to support Charter infringement under either subsection 2(b) in combination with section 28, or section 15; no section 15 violation: essentially argued as a subsection 2(b) and section 28 case

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Thibaudeau v. Canada</i> [1995] 2 S.C.R. 627 (5-2 on section 15 issue)</p>	<p><i>Income Tax Act</i>: provision requiring custodial parent to include child support payments in income</p>	<p>sex (enumerated), family status – separated custodial parents (non-enumerated)</p>	<p>Inclusion/deduction scheme not creating a “burden” for custodial parents for section 15 purposes; no section 15 violation</p>
<p><i>Egan v. Canada</i> [1995] 2 S.C.R. 513 (5-4 on section 15 issue; 5-4 as to result)</p>	<p><i>Old Age Security Act</i>: denial of spousal allowance based on opposite-sex definition of “spouse”</p>	<p>sexual orientation (analogous)</p>	<p>Sexual orientation recognized as analogous ground for section 15 purposes; section 15 violation justified under section 1</p>
<p><i>Miron v. Trudel</i> [1995] 2 S.C.R. 418 (5-4 on section 15 issue)</p>	<p>Denial of accident benefits to common law spouses under provincial legislation-based automobile insurance policy</p>	<p>marital status (analogous)</p>	<p>Marital status recognized as analogous ground for section 15 purposes; section 15 violation not justified under section 1</p>
<p><i>Adler v. Ontario</i> [1996] 3 S.C.R. 609 (1) 7-2 on section 15 issue, 8-1 as to result; (2) 7-2 on section 15 issue)</p>	<p><i>Education Act</i> of Ontario: (1) absence of funding to minority religion-based independent schools; (2) absence of school health support services to children with disabilities attending such schools</p>	<p>religion (enumerated) (infringement of subsection 2(a) freedom of religion guarantee also claimed unsuccessfully)</p>	<p>Among justices concurring on section 15 issue for different reasons, five concluding effect of section 93 of <i>Constitution Act, 1867</i> to insulate both claims from Charter scrutiny, two finding against section 93-based immunity but concluding distinctions alleged not arising under legislation; no section 15 violation</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Cooper v. Canada</i> (<i>Human Rights Commission</i>) <i>Bell v. Canada</i> (<i>Human Rights Commission</i>) [1996] 3 S.C.R. 854 (5-2 as to result)</p>	<p><i>Canadian Human Rights Act</i>: provision under which termination of employment at normal age of retirement for industry not a discriminatory practice</p>	<p>age (enumerated)</p>	<p>Neither Canadian Human Rights Commission nor tribunal appointed by it mandated to consider questions of law; both therefore without jurisdiction to subject limiting provisions of CHRA to constitutional scrutiny or to determine their constitutional validity; N.B.: no discussion or decision on merits of section 15 case</p>
<p><i>Eaton v. Brant Co. Board of Education</i> [1997] 1 S.C.R. 241 (unanimous)</p>	<p>Decision of the Ontario Special Education Tribunal confirming special education placement of a disabled child, contrary to parents' wishes</p>	<p>disability (enumerated)</p>	<p>In this case, placement consistent with child's educational interests and needs, not imposing burden or withholding benefit; no section 15 violation</p>
<p><i>Benner v. Canada</i> (<i>Secretary of State</i>) [1997] 1 S.C.R. 358 (unanimous)</p>	<p><i>Citizenship Act</i>: provisions distinguishing between access to Canadian citizenship for children born abroad of Canadian mothers and those born of Canadian fathers prior to February 1977, with former subjected to more onerous process and requirements</p>	<p>sex (enumerated)</p>	<p>Ongoing status created by 1977 legislation subject to Charter scrutiny; provisions maintaining stereotype favouring paternal over maternal lineage in violation of section 15 and not justified under section 1</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Eldridge v. British Columbia (Attorney General)</i> [1997] 3 S.C.R. 624 (unanimous)</p>	<p><i>Hospital Insurance Act and Medical and Health Care Services Act</i> of British Columbia: failure of hospitals and Medical Services Commission to provide sign language interpretation to hearing-impaired patients as medically required service</p>	<p>disability (enumerated)</p>	<p>Here Charter applicable to hospitals acting as agents for government policy; although neither <i>statute</i> infringing section 15, discretionary refusal of hospitals and Commission acting pursuant to legislation to provide interpretation where necessary for effective communication in violation of section 15 and not saved by section 1</p>
<p><i>Vriend v. Alberta</i> [1998] 1 S.C.R. 493 (unanimous on constitutional issues; 7-1 on remedy issue)</p>	<p><i>Individual's Rights Protection Act</i> of Alberta: exclusion of sexual orientation as a prohibited ground of discrimination</p>	<p>sexual orientation (analogous)</p>	<p>Deliberate exclusion of sexual orientation resulting in serious discriminatory effects, including denial of access to remedial procedures and psychological harm from implicit message that homosexuals not worthy of protection: legislation in violation of section 15 and not saved by section 1</p>
<p><i>Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.</i> [1999] 1 S.C.R. 10 (unanimous <i>re</i> section 15 violation among judges considering issue)</p>	<p><i>Income Tax Act</i>: denial of registration as a charitable organization</p>	<p>race, sex, national/ethnic origin (enumerated), immigrant status (non-enumerated)</p>	<p>Rejection of Society's application a consequence of inability to bring itself within established guidelines owing to its purposes and activities, not of the characteristics of beneficiaries; no section 15 violation: constitutional argument raised by interveners secondary</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Law v. Canada (Minister of Employment and Immigration)</i> [1999] 1 S.C.R. 497 (unanimous)</p>	<p><i>Canada Pension Plan</i>: survivor benefit ineligibility of able-bodied surviving spouses under the age of 35 and without dependent children</p>	<p>age (enumerated)</p>	<p>Given CPP aim to provide long-term financial security, and greater ability of relatively advantaged able-bodied younger surviving spouses without dependent children to overcome long-term need, age provisions not imposing substantive disadvantage in long term; no offence to human dignity, no section 15 violation</p>
<p><i>M. v. H.</i> [1999] 2 S.C.R. 3 (8-1 on section 15 issue)</p>	<p><i>Family Law Act</i> of Ontario: same-sex partners unable to access Part III spousal support scheme owing to opposite-sex definition of “spouse”</p>	<p>sexual orientation (analogous)</p>	<p>Definition excluding same-sex partners from benefits of scheme implying their inability to form intimate, economically interdependent relationships, and offending their human dignity: legislation in violation of section 15 and not saved by section 1</p>
<p><i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i> [1999] 2 S.C.R. 203 (unanimous)</p>	<p><i>Indian Act</i>: denial to off-reserve members of right to vote in band elections</p>	<p>aboriginality-residence/ off-reserve band member status (analogous)</p>	<p>Denial of right to participate fully in band governance presuming off-reserve band members less deserving than those living on-reserve, thus engaging dignity aspect of section 15: legislation in violation of section 15 and not saved by section 1</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Winko v. British Columbia (Forensic Psychiatric Institute)</i> [1999] 2 S.C.R. 625 (unanimous)</p>	<p><i>Criminal Code</i>: differential treatment of persons not criminally responsible (NCR) for criminal act owing to mental illness under Part XX.1</p>	<p>mental disability (enumerated) (infringement of section 7 right not to be deprived of security/liberty except in accordance with fundamental justice also claimed unsuccessfully)</p>	<p>Under Part XX.1, every NCR accused treated with regard to particular situation, individualized scheme constituting the essence of equal treatment; no real burden imposed, no section 15 violation</p>
<p><i>Orlowski v. British Columbia (Forensic Psychiatric Institute)</i> [1999] 2 S.C.R. 733</p> <p><i>Bese v. British Columbia (Forensic Psychiatric Institute)</i> [1999] 2 S.C.R. 722</p> <p><i>R. v. LePage</i> [1999] 2 S.C.R. 744 (all unanimous)</p>	<p>see <i>Winko</i></p>	<p>see <i>Winko</i></p>	<p><i>Winko</i> applied</p>
<p><i>Delisle v. Canada (Deputy Attorney General)</i> [1999] 2 S.C.R. 989 (unanimous <i>re</i> section 15 among judges considering issue)</p>	<p><i>Public Service Staff Relations Act</i> and Part I of <i>Canada Labour Code</i>: exclusion of RCMP members from statutory regimes</p>	<p>employment status (non-enumerated) (infringement of subsections 2(b) freedom of expression and 2(d) freedom of association guarantees also claimed unsuccessfully)</p>	<p>In circumstances of case, distinction as to employment not established as analogous ground, exclusion from trade union regime not adversely affecting dignity of RCMP members; no section 15 violation: primarily a subsection 2(d) case</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Granovsky v. Canada</i> (<i>Minister of Employment and Immigration</i>) [2000] 1 S.C.R. 703 2000 SCC 28 (unanimous)</p>	<p><i>Canada Pension Plan</i>: exclusion from “drop-out” provision altering contribution requirement for persons with severe permanent disabilities</p>	<p>disability (enumerated)</p>	<p>Although different treatment under drop-out provision not assisting temporarily disabled, Parliament’s targeting of group to be subsidized an unavoidable feature of contributory benefits plans such as CPP; exclusion not demeaning to appellant’s dignity, no section 15 violation</p>
<p><i>Lovelace v. Ontario</i> [2000] 1 S.C.R. 950 2000 SCC 37 (unanimous)</p>	<p>Exclusion of “non-band” Aboriginal groups in Ontario from First Nations Fund providing shares in Casino Rama proceeds to Ontario First Nations under <i>Ontario Casino Corporation Act</i></p>	<p>grounds claimed: (1) race/ethnicity (enumerated); (2) non-registration under <i>Indian Act</i> (non-enumerated) N.B.: Court did not rule on issue of applicable ground</p>	<p>Exclusion from First Nations Fund not established as demeaning to dignity of excluded groups; casino project corresponding to needs of included First Nations and not designed to meet similar needs of excluded groups; recognition of important differences between groups legitimate, no section 15 violation</p>
<p><i>Little Sisters Book and Art Emporium v. Canada</i> (<i>Minister of Justice</i>) [2000] 2 S.C.R. 1120 2000 SCC 69 (unanimous on section 15 issue)</p>	<p><i>Customs Act</i> and <i>Customs Tariff</i>: adverse effects of incorporated <i>Criminal Code</i> definition of “obscenity” and of related administrative review process on importation of gay and lesbian material</p>	<p>sexual orientation (analogous) (with the exception of unconstitutional reverse onus provision, infringement of subsection 2(b) freedom of expression guarantee claimed unsuccessfully (6-3))</p>	<p>Although Act and Tariff themselves constitutional, Customs officials’ adverse treatment in application of legislation, targeting appellants at administrative level, prejudicial and demeaning to their dignity: section 15 violation not capable of section 1 justification as not “prescribed by law”</p>

Style of Cause	Nature of Challenge	Ground(s) of Discrimination	Result
<p><i>Lavoie v. Canada</i> [2002] 1 S.C.R. 769 2002 SCC 23 (7-2 on section 15 issue)</p>	<p><i>Public Service Employment Act</i>: distinction in opportunity to access public service employment</p>	<p>citizenship (analogous)</p>	<p>Although legislation limiting employment options for non-citizens having marginalizing effect, implicating person's livelihood and dignity, objectives of distinction sufficiently important to justify limits on equality: section 15 violation justified under section 1</p>
<p><i>Nova Scotia (Attorney General) v. Walsh</i> [2002] 4 S.C.R. 325 2002 SCC 83 (8-1 on section 15 issue)</p>	<p><i>Matrimonial Property Act</i> of Nova Scotia: exclusion of unmarried cohabiting opposite sex couples from legislative scheme providing for equal division of matrimonial property</p>	<p>marital status (analogous)</p>	<p>Extension of the <i>MPA</i> only to married persons reflecting differences between married and unmarried relationships and respecting personal autonomy, no constitutional requirement that protections of the <i>MPA</i> be extended to unmarried cohabitants, no section 15 violation</p>
<p><i>Gosselin v. Québec (Attorney General)</i> [2002] 4 S.C.R. 429 2002 SCC 84 (5-4 on section 15 issue)</p>	<p><i>Regulation respecting social aid (1984 Social Aid Act)</i>: distinction in base amount of social assistance paid to recipients under 30 who did not participate in government training programs</p>	<p>age (enumerated) (infringement of section 7 right not to be deprived of security/liberty except in accordance with fundamental justice also claimed unsuccessfully)</p>	<p>Plaintiff failing to provide evidence of discrimination, legislation aimed at averting long-term dependency and providing training, no violation of essential human dignity of welfare recipients under 30, no section 15 violation</p>

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<p><i>Trociuk v. British Columbia (Attorney General)</i> [2003] 1 S.C.R. 835 2003 SCC 34 (unanimous)</p>	<p><i>Vital Statistics Act of B.C.:</i> exclusion of father's particulars from child's birth registration and resulting denial of participation in choice of surname</p>	<p>sex (enumerated)</p>	<p>Absolute exclusion from birth registration and process of naming affecting significant interests of concerned fathers in way harmful to dignity: section 15 violation not justified under section 1</p>
<p><i>Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur</i> [2003] 2 S.C.R. 504 2003 SCC 54 (unanimous)</p>	<p><i>Nova Scotia Workers' Compensation Act and (Multi-faceted Pain Services) Program Regulations:</i> exclusion of workers with chronic pain from regular workers' compensation system</p>	<p>disability (enumerated)</p>	<p>Denial of benefits or of access to system available to other disabled workers without regard to actual needs demeaning to dignity of chronic pain sufferers: section 15 violation not justified under section 1</p>
<p><i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i> [2004] 1 S.C.R. 76 2004 SCC 4 (6-3 on section 15 issue)</p>	<p><i>Criminal Code:</i> justification of parents' or teachers' use of reasonable corrective force against children</p>	<p>age (enumerated)</p>	<p>Although children vulnerable and their physical integrity an important interest, decriminalization of minimal corrective force only sensitive to children's need for safe environment, not arbitrarily demeaning, no section 15 violation</p>
<p><i>Hodge v. Canada (Minister of Human Resources Development)</i> [2004] 3 S.C.R. 357 2004 SCC 65 (unanimous)</p>	<p><i>Canada Pension Plan:</i> lack of entitlement of "separated" common law spouses to survivor pensions</p>	<p>marital status (analogous)</p>	<p>In absence of cohabitation, spousal relationship terminated, CPP providing for disentitlement of <i>former</i> spouses, whether married or common law, no distinction established, no section 15 violation</p>

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<p><i>Newfoundland (Treasury Board) v. N.A.P.E.</i> [2004] 3 S.C.R. 381 2004 SCC 66 (unanimous)</p>	<p><i>Newfoundland Public Service Restraint Act</i>: deferral of pay equity wage increases, extinguishment of arrears for female health care sector workers</p>	<p>sex (enumerated)</p>	<p>Despite section 15 violation, exceptional fiscal measures adopted by province in response to exceptional financial crisis justified under section 1</p>
<p><i>Auton (Guardian ad litem of) v. British Columbia (Attorney General)</i> [2004] 3 S.C.R. 657 2004 SCC 78 (unanimous)</p>	<p><i>British Columbia Medicare Protection Act</i>: lack of funding for medically required “non-core” ABA/IBI therapy for autistic children</p>	<p>disability (enumerated) (infringement of section 7 right not to be deprived of security/liberty except in accordance with fundamental justice, not fully argued, also claimed unsuccessfully)</p>	<p>Exclusion of non-core services anticipated feature of partial health plan provided by <i>CHA</i> and <i>MPA</i>, benefit claimed not provided by law, claimants not denied benefit made available to comparator group, no section 15 violation</p>
<p><i>Canada (Attorney General) v. Hislop</i> 2007 SCC 10 1 March 2007 (unanimous)</p>	<p><i>Canada Pension Plan</i>: differential treatment in availability of CPP survivor benefits to same-sex surviving spouses</p>	<p>sexual orientation (analogous)</p>	<p>Statutory distinctions restricting same-sex spouses’ eligibility for and access to arrears of CPP survivor benefits in violation of section 15 and not saved by section 1; notwithstanding declaration of nullity, retroactive Charter relief unwarranted in this case</p>