Comment on *Andrews* v. *Law Society of British Columbia* and Section 15(1) of the *Charter*: the Emperor's New Clothes?

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Synopsis

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Introduction

Shortly after the Supreme Court's decision in *Andrews* v. *Law Society of British Columbia*,[1] the Ontario Court of Appeal remarked that section 15(1) of the *Charter*[2] "has just put on a new set of clothes."[3] This comment considers

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[1] *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.], aff'g (1986), 27 D.L.R. (4th) 600, [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305 (C.A.), McLachlin J.A., rev'g (1985), 22 D.L.R. (4th) 9, [1986] 1 W.W.R. 252, 66 B.C.L.R. 363 (S.C.), Taylor J.

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

[3] *Energy Probe* v. *A.G. Canada* (1989), 58 D.L.R. (4th) 513 (Ont. C.A.).

these clothes. How has the highest court fashioned them? What do they look like? Are we getting a better fit? Since *Andrews* is one of the Supreme Court's first major decisions on section 15(1),[4] these are important questions.

Some may object to the reasoning in *Andrews*, saying that the Court has misunderstood the "similarly situated" test.[5] Others may criticise the lack of a coherent view of equality and discrimination. Some may think *Andrews* goes too far; others, that it does not go far enough. Still others may be concerned about the differing views of the justification for inequality. It may be, however, that all these concerns fall short of the mark. The issue may be less the adequacy of the Court's response to the *Charter* equality challenge, and more the nature of the challenge itself.

Mark Andrews, a British subject permanently resident in Canada, was refused admission to the B.C. Bar because he was not a Canadian citizen. The *Barristers and Solicitors Act*[6] required Canadian citizenship as a prerequisite to admission to the bar. Andrews argued that this requirement violated section 15(1) of the *Charter*. Although his challenge failed before the B.C. Supreme Court, it was upheld by the B.C. Court of Appeal, and by a majority of the Supreme Court of Canada.

Five issues which were raised in *Andrews* merit special attention: (1) What is the test for the "equality" requirements in section 15(1) of the *Charter*?;[7] (2) What is the relationship between section 15(1).equality and section 15(1) discrimination?; (3) What is the relationship between section 15(1) and section 1?; (4) What is the test for section 1 in equality cases? and (5) What does this decision tell us about the role of the judiciary in *Charter* equality cases?

Three Supreme Court judges gave individual reasons: McIntyre J., for himself and Lamer J.; Wilson J., for herself, Dickson C.J., and l'Heureux-Dubé J.; and La Forest J. McIntyre J.'s response to the first question had general but qualified support from the other members of the Court; the Court was evenly split in its response to the third question; and Wilson J.'s response to the fourth question gained the support of four of the six judges. Let us try to unravel the five general issues.

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[4]*Reference Re an Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148, 1140 D.L.R. (4th) 18, 77 N.R. 241. However, this decision addressed the relation between *Charter* provisions, such as section 15, and the *Constitution Act, 1867* but not the specific content of section 15(1).

[5]5.The Ontario Court of Appeal came close to suggesting this in *Catholic Children's Aid Society of Metropolitan Toronto* v. *T.S.* (1989), 60 D.L.R. (4th) 397 [hereinafter *Children's Aid Society*].

[6]R.S.B.C. 1979, c. 26, s. 42.

[7]*Andrews*, *supra*, note 1 did not address the other major *Charter* equality guarantee, section 28, and contained only a passing reference to section 15(2), the affirmative action provision.

Test for Equality

McLachlin J.A. of the B. C. Court of Appeal had used the comparative similarly situated test[8] for equal protection and benefit of the law guaranteed in section 15(1).[9] According to this test, those who are similarly situated should be similarly treated.

Before the Supreme Court's decision, this test had gained considerable acceptance. The Ontario Court of Appeal, for example, had included it as the first two steps of a general three-part approach to analyzing section 15(1), requiring that a complainant (i) identify the class of persons alleged to be treated differently from another class of persons; (ii) show that the first class is similarly situated to the second class in relation to the purpose of the law, and (iii) show that the purpose or effect of the law challenged is discriminatory in the sense of being pejorative or invidious in purpose or effect.[10]

With the support of the whole Court, McIntyre J. launched a verbal broadside against this test, castigating it as "seriously deficient."[11] He considered it

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[8]The test was expounded in J. Tussman and J. tenBroek, "The Equal Protection of the Laws" (1949) 37 Calif. L. Rev. 341.

[9]McLachlin J.A. had gone on to find that Andrews was similarly situated with all other applicants who had Andrews' qualifications for the bar and were Canadian citizens, to find that the citizenship requirement was an unreasonable or unfair means for the legislature to seek to achieve its objective, and to conclude that this legislative measure could not be saved under section 1 of the *Charter*.

[10]See *R.* v. *Ertel* (1987), 35 C.C.C. (3d) 398 at 418-22, 20 O.A.C. 257, and *R.* v. *Turpin* (1987), 22 O.A.C. 261 at 266, 36 C.C.C. (3d) 289, 60 C.R. (3d) 63, aff'd but with criticism of the similarly situated test in [1989] 1 S.C.R. 1296 [hereinafter *Turpin* cited to S.C.R.]. For other variations of the test, see *Re McDonald and R.* (1985), 51 O.R. (2d) 745 at 765 (C.A.); *R.* v. *R.L.* (1986), 26 C.C.C. (3d) 417 at 424-25 (Ont. C.A.); *Reference Re the Act to Amend Education Act* (1986), 25 D.L.R. (4th) 1 at 42-43, 53 O.R. (2d) 513, 13 O.A.C. 241; *Re Blainey and Ont. Hockey Assn* (1986), 26 D.L.R. (4th) 728 at 739-40, 54 O.R. (2d) 513, 14 O.A.C. 194; *Bregman* v. *A.G. Canada* (1986), 57 O.R. (2d) 409, 18 O.A.C. 82, 33 D.L.R. (4th) 477; *R.* v. *Century 21 Ramos Realty Inc.* (1987), 58 O.R. (2d) 737 at 756, 19 O.A.C. 25, 32 C.C.C. (3d) 353, 37 D.L.R. (4th) 649; and *Re McKinney and Bd of Governors of the University of Guelph* (1987), 46 D.L.R. (4th) 193 (Ont. C.A.), leave to appeal to S.C.C. granted April 21, 1988. In the latter decision, the court focussed on the third step of the test, rejecting the reasonableness / fairness approach of the B.C.C.A. in *Andrews*, *supra*, note 1.

[11]*Andrews*, *supra*, note 1 at 166. The similarly situated test, as formulated in *R.* v. *Ertel*, *supra*, note 10 was vigorously criticised in M.D. Lepofsky and H. Schwartz, "Section 15 — An Erroneous Approach to the *Charter*'s Equality Guarantee: *R.* v. *Ertel*" (1988) 67 Can. Bar Rev. at 115. McIntyre J. made some, although not all, of the criticisms put forth in the Lepofsky and Schwartz article. As well as criticising the rigidity of the test, as does McIntyre J., Lepofsky and Schwartz criticised what they regard as its subjective, open-ended nature. They said that whether individuals or classes are similarly situated in regard to a particular legislative purpose depends in large part on how broadly an individual judge wishes to characterise the purpose. The Supreme Court

too mechanical and rigid to handle the true complexity of equality. He criticised its"similarly situated" branch as requiring merely similar treatment for all to whom a particular law applies, and for all members of the same group.[12] Equality, he suggested, must look beyond those subject to an individual law or within a single group. He said the "similarly treated" branch focuses on the treatment given by government rather than its effect on the complainant, and is both too narrow and too wide.[13] He claimed it ignores the fact that identical treatment "may frequently produce serious inequality",[14] and cannot account for the fact that some distinctions do not violate equality.

Where does this leave the similarly treated test? McIntyre J. described equality as "a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises".[15] He called it an ideal that "a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial effect on one than another."[16]

These general comments on equality were supported by the entire Court.[17] They might translate into an inequality test resembling the following:[18] (i) determine the legislative purpose, (ii) look for those who are similarly situated to the complainant in the broad sense of being in the same social and political setting (and not simply subject to the same law or within the same group) which is relevant to the legislative purpose, (iii) determine if the claimant is affected differently as a result of an irrelevant personal difference, and (iv) determine if this different effect amounts to a relative disadvantage for the complainant.

If this is so, the Court is in the confusing position of rejecting the similarly situated test[19] but retaining much of its comparative framework.[20] The real movement here may be one of attitude, not linguistics. The Court is stressing that comparisons must be broadly applied, with an emphasis on inter-law, intergroup similarities and differences, and on effect rather than intention. The Court

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recently agreed with two other criticisms in the Lepofsky and Schwartz article: see *infra*, notes 67 and 76.

[12]*Andrews, ibid.* at 166-67, McIntyre J., and Lepofsky and Schwartz, *ibid.* at 119.

[13]*Andrews, ibid.* at 167-68, McIntyre J., and, generally, Lepofsky & Schwartz, *ibid.*

[14]*Andrews, ibid.* at 164, McIntyre J.

[15]*Ibid.*, McIntyre J.

[16]*Ibid.* at 165, McIntyre J.

[17]*Ibid.* at 151, Wilson J., and at 193, La Forest J.

[18]McIntyre J. does not do this, as his focus is on section 15(1) discrimination which will be discussed in part III.

[19]The Supreme Court has since said that the similarly situated test was "clearly rejected" in *Andrews, supra*, note 1; *Turpin, supra*, note 10 at 1332.

[20]Ontario courts seem to consider that much of the framework has survived: see *Doe* v. *Municipality of Metropolitan Toronto Commissioners of Police* (1989), 58 D.L.R. (4th) 396 and *Children's Aid Society, supra*, note 4.

seems to be signalling that *Charter* equality must go beyond traditional, formalistic concepts, and include a more "post-liberal"[21] emphasis on equality of condition.

On the basis of the Court's approach to the similarly situated test, it appears that, as I will suggest later, it is taking an activist route to equality. Unfortunately, *Andrews* provides no clear answers as to the implications of this approach or as to how far the Court proposes to go.[22]

II. Relationship between Section 15(1) Equality and Discrimination

McIntyre J. said that the equality guarantees in section 15(1) are limited or qualified by the requirement in that section that equality be "without discrimination".[23] Wilson J. expressed "complete agreement" with McIntyre J.'s finding on section 15(1).[24] Hence, a majority of the Court held that the equality guarantees cannot give rise to protection on their own and must always be accompanied by discrimination pursuant to section 15(1).[25]

This finding could have a significant impact on section 15(1) interpretation if the discrimination branch of section 15(1) is ,on its own, more restrictive than the equality guarantees. McIntyre J. seemed to view discrimination as the general converse of equality, but he appeared to qualify this equation by suggesting that discrimination is *especially* concerned with the adverse effect of the law in question.[26] He said that the ideal of equality is not merely equal treatment but

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[21]See M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry", (1982) 4 Sup. Ct L. Rev. 130 at 154-59, still one of the best short discussions of *Charter* equality. At 156, Gold says that "[i]n terms of equality, the post-liberal conception represents an uneasy compromise between two irreconcilable conceptions of equality (and hence justice). At one extreme is the ideal of classical liberalism, that of formal equality. In its modern form, it looks askance at any deviation from the norm of universal application of the law. At the other extreme is the ideal of radical egalitarianism, the idea that all material inequalities must be eliminated totally".

[22]Wilson J., for three judges, expressed "complete agreement" with McIntyre J.'s views on section 15(1) and La Forest J. expressed "substantial agreement". This agreement was qualified, but in regard to issues other than the test for equality.Some might argue that clear directions on equality are unnecessary in light of the Court's emphasis on the second branch of section 15(1), the prohibition against discrimination. However, as formulated by McIntyre J., section 15(1) discrimination requires some of the same comparisons between people equally and unequally affected as does the more general notion of equality. This will be discussed further in part III.

[23]*Andrews*, *supra*, note 1 at 172.

[24]*Ibid.* at 151.

[25]This finding was reaffirmed in *Turpin*, *supra*, note 10 at 1331. The decision was rendered by Wilson J., for Dickson C.J. and Beetz, Lamer, La Forest and L'Heureux-Dubé JJ.

[26]McIntyre J. said at 172 that the rights to equality and equal protection "are granted with the direction contained in section 15 itself that they be without discrimination. Discrimination ... epitomizes the worst effects of the denial of equality...". At 181 he said that the words "without discrimination" "are a form of qualifier built into s.15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage." Since relative

that "a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial effect on one than another."[27] He defined discrimination as follows:

> ...discrimination is a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[28]

Although the concepts of inequality and discrimination may differ mainly in their focus, some effect must be given to the section 15(1) phrase "and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" which follows the word discrimination. If section 15(1) equality is tied to the discrimination provision, equality must also be limited by this phrase. Since the majority of the Court seemed to agree that equality guaranteed in section 15(1) *is* restricted by the discrimination provisions,[29] the crucial question is how tightly this restriction should be drawn. As we will see,[30] a majority of the Court may have drawn it much less strictly than did McIntyre J.

III. Discrimination

McIntyre J. suggested that the form of discrimination which is prohibited by section 15(1) is an intentional or unintentional government distinction or classification which:

(a) has the force of law; (b) denies equal treatment to the complainant or has a differential effect on him or her, and imposes on the claimant a relative disadvantage; and (c) is based on a ground of discrimination enumerated in section 15(1) or on an analogous ground.

Let us consider these requirements in more detail.

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disadvantage was also relevant to McIntyre J.'s definition of equality at 164-65, the distinction here is apparently one of degree, not kind.

[27]*Andrews, supra*, note 1 at 165.

[28]*Ibid.* at 174-75.

[29]Only La Forest J. expressed doubt on this issue.

[30]*Infra*, Part III-C.

A. Force of Law

McIntyre J. said little to amplify this requirement, beyond noting that "[w]hether other governmental or *quasi*-governmental regulations, rules, or requirements may be termed laws under s.15(1) should be left for cases in which the issue arises".[31] Wilson J. added nothing, while La Forest J. seemed to envisage section 15(1) as extending to "legislative or governmental differentiation".[32]

The Court's approach in *Dolphin Delivery*[33] had suggested that section 15(1) *does* apply to non-statutory governmental action. In *Andrews*, although the law society itself had non-governmental aspects, the *Charter* challenge was directed at a statute. Under the *Dolphin Delivery* test, this was a sufficient governmental element for the *Charter* to apply. Where the link to government action is indirect,[34] courts will then have to determine more precisely how much "governmental element" is necessary before the *Charter* can be invoked.

B. Equal Treatment, Differential Impact, and Relative Disadvantage

McIntyre J.'s treatment of discrimination as roughly synonymous with inequality[35] implies that the "equal treatment", "differential impact", and "relative disadvantage" elements of discrimination must meet the requirements of the inequality test discussed in part I, above. However, because section 15(1) discrimination is qualified by specific enumerated grounds, McIntyre J. focused on these grounds, or on analogous grounds, and not directly on the more general "irrelevant personal characteristic" of the inequality test.

McIntyre J. stressed that unequal treatment or differential impact must result in a relative disadvantage to the complainant, but he cast this requirement broadly. For McIntyre J. and the others, relative disadvantage can be either positive, requiring harm, or negative, involving the denial of a benefit accorded to others. Andrews had been deprived of the capacity to practice law immediately, a benefit available to Canadian citizens with comparable qualifications.[36]

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[31]*Andrews, supra* note 1 at 164, McIntyre J.

[32]*Ibid.* at 194, La Forest J.

[33]*Retail, Wholesale & Department Store Union, Local 580* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 at 194-99, 25 C.R. 573.

[34]As in *McKinney* v. *University of Guelph* (1987), 46 D.L.R. (4th) 193, 24 O.A.C. 241, 63 O.R. (2d) 1, leave to appeal to S.C.C. granted April 21, 1988.

[35]Except for its greater emphasis on adverse effect. See Part II.

[36]Arguably, the distinction was of no consequence in this case because Andrews could plausibly argue that he had been denied both immediate membership in the bar, a result, and also the immediate possibility of earning a livelihood as a lawyer, an opportunity. Moreover, the Act here *purported* to differentiate on the ground of citizenship. La Forest J., at 196, said that'"[h]ere there was no allegation that the purpose of the legislation was based on discriminatory considerations; the argument centred rather around the adverse effects of the legislation." Nevertheless, the expressed

McIntyre J. differentiated between opportunities and benefits or advantages, and suggested that withholding any one of these could lead to a finding of discrimination.

McIntyre J. and the others also felt that section 15(1) covers both intentional and unintentional discrimination.[37] He suggested that inequality could result where government failed to draw any legal distinction between different groups[38] and where it applied undifferentiated rules without taking into consideration people's special characteristics.

McIntyre J. seemed to measure relative disadvantage resulting from discrimination in the same way he would determine inequality of treatment or differential impact in the first place. He compared the disadvantage suffered by Andrews with the effect of the law on Canadian citizens in similar circumstances. The rather nebulous contours of McIntyre J.'s approach to ascertaining similar circumstances were noted above.[39]

C. Enumerated or Analogous Grounds

McIntyre J. said that "[t]he enumerated grounds in section 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition".[40] However, it is virtually impossible to read his reasons as *not* setting down some suggested limits for non-enumerated grounds. He found unsatisfactory both the "neutral" approach of treating section 15(1) as applicable to all distinctions and the "unreasonable or unfair distinctions" approach of the Court of Appeal. He said that "[t]he enumerated and analogous grounds approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s.1."[41] Certainly McIntyre J.'s reasons would be inconsistent with any approach to section 15(1) more concerned with justification than this one.

McIntyre J. supplied no precise test to determine which unenumerated grounds are "analogous" but he stressed the importance of the nature of the discriminatory action. He said that discrimination involves the type of personal characteristics which are often arbitrarily attributed to individuals, without any

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purpose here *was* based on a discriminatory criterion. Had Andrews been a Canadian citizen and a registered Indian complaining that "facially neutral" requirements discriminated against him on grounds of race, the Court would have faced the opportunity versus actual conditions issue more squarely.

[37]See, for example, *Andrews, supra* note 1 at 174, McIntyre J., and at 193, La Forest J.

[38]*Ibid.* at 167-69, 171, McIntyre J.

[39]*Supra*, Part I.

[40]*Andrews, supra*, note 1 at 175.

[41]*Ibid.* at 182 and see *infra*, note 72.

necessary relevance to the individuals' merit.[42] A number of his other comments seemed to relate more to the nature of the claimant's group. He said that discrimination sometimes involves stereotyping and historical disadvantage,[43] and noted that permanent resident non-citizens constitute a "discrete and insular minority"[44]. Generally, though, in describing analogous grounds, McIntyre J. seemed to emphasise relative disadvantage resulting from irrelevant personal characteristics, features central to his general concept of inequality.[45]

Despite their expressed "substantial agreement"[46] and "complete agreement"[47] with McIntyre J.'s views on section 15(1), it is not clear that La Forest and Wilson JJ. fully supported the view that the section is limited to enumerated or analogous criteria of discrimination. La Forest J. seemed to envisage a possible residual role for judicial intervention under section 15(1) *outside* the enumerated or analogous categories, in cases of "legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group as to merit intervention pursuant to s.15".[48] Wilson J. said simply: "I agree with my colleague [McIntyre J.] that it is not necessary in this case to determine what limit, if any there is on the grounds covered by s. 15 and I do

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[42]*Andrews, ibid.* at 174-75 and see discussion in part II of this text. Consider the basis for McIntyre's comment at 174-75 that'"[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed". Presumably this is so because the former kinds of distinctions are much less likely to be relevant to the purpose of the government law or other action in question. Similarly, the enumerated categories in section 15(1) are criteria which are unlikely to relate directly to an individual's merits or capacities.

[43]McIntyre J. at 175 said that "[t]he enumerated grounds...reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must...receive particular attention". If these features distinguish the enumerated grounds, then presumably they can be used to identify analogous grounds.

[44]McIntyre J. at 183, citing the U.S. Supreme Court in *U.S.* v. *Carolene Products Co.*, 304 U.S. 144 at 152-53, note 4 (1938) [hereinafter *Carolene Products*]. Unlike Wilson J., McIntyre J. did not amplify what he meant by this phrase. Either he intended its original meaning in *Carolene Products*, a meaning difficult to reconcile with his "irrelevant personal characteristics" approach, or he was attempting to incorporate the phrase into this approach. In the latter case, he would presumably argue that because non-citizens constitute a distinct group, they are more likely than others to be attributed group characteristics rather than characteristics more relevant to their individual merits or capacities, and because they are insular, in the sense of lacking general support outside their group, they are especially vulnerable to being disadvantaged in this way.

[45]Discussed in Part I of this text. La Forest J. characterised McIntyre J.'s approach as asking if the discrimination was based on irrelevant personal differences, either as illustrated in the enumerated categories of section 15(1) or as traditionally found in human rights legislation.

[46]*Andrews, supra* note 1 at 193, La Forest J.

[47]*Ibid.* at 151, Wilson J.

[48]*Ibid.* at 194, La Forest J. Apparently La Forest J. would base this emergency protection on a free-standing application of the equality guarantees rather than on any addition to the enumerated and analogous categories of discrimination.

not do so."[49] The uncertainty surrounding the support for McIntyre J.'s enumerated or analogous grounds test could have effects beyond section 15(1).[50] As we will see, the test was central to McIntyre J.'s approach to the relationship between sections 15(1) and 1.[51]

It is also less than clear that McIntyre J.'s colleagues wholly shared his views on what to emphasise when looking for analogous criteria. Instead of stressing the nature of the distinction drawn by the government, Wilson J. focused on the condition of those subject to it. For her, the important question was whether or not non-citizens were a "discrete and insular minority",[52] disadvantaged in the sense that they lacked political power.[53] Indeed, for Wilson J., disadvantage because of lack of political power, or for other reasons, may be sufficient to constitute an analogous category for the purposes of section 15(1).[54] Political powerlessness was also a criterion for La Forest J., but he added to it the immutable or arbitrary nature of the distinction[55] and its relative irrelevance. Wilson J.'s emphasis in ascertaining analogous categories is thus quite different from that of McIntyre J. In comparison with his, it could substantially widen section 15(1), and could put even more strain on the assumption that this section is "justification-free".[56]

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[49]*Ibid.* at 153 Wilson J.

[50]In two subsequent decisions, though, the Court seems to have treated the requirement of either enumerated or analogous grounds as essential: see *Reference Re Constitutionality of Ss. 32 and 34 of the Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 1 S.C.R. 922 at 924 and *Turpin, supra*, note 18 at 1332.

[51]Discussed in part IV of this text.

[52]The phrase is from Stone J.'s well-known fourth footnote in *Carolene Products, supra*, note 44. In the footnote, Stone J. tentatively suggested that courts might be justified in subjecting "prejudice against discrete and insular minorities" (such as religious, national, or racial minorities), on the ground that prejudice against these minorities deprived them of the ordinary political process as the normal means of repealing undesirable legislation. The footnote has since evolved into one of several conflicting judicial tests in the United States for determining which classifications are "suspect" and merit the court's most rigorous level of control, "strict scrutiny": see also J.A. Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment* (Ithaca: Cornell Univ. Press, 1983).

[53]*Andrews, supra* note 1 at 152-53, Wilson J. This, it is suggested, is consistent with the meaning of Stone J.'s fourth footnote in *Carolene Products, supra*, note 44.

[54]*Ibid.* at 152 Wilson J. See also *Turpin, supra*, note 10 at 1331-1333. In *Turpin*, Wilson J., speaking for the Court, held that a finding of discrimination will "in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged". In *Turpin*, the Court held that the group in question could not complain of discrimination because it was *not* a disadvantaged group apart from the legal distinction being challenged.

[55]This criterion is similar to the "immutable characteristics" test of Brennan J. of the United States Supreme Court in *Frontiero* v. *Richardson*, 411 U.S. 677 at 686 (1973), one of the main American rivals to the "discrete and insular minorities" test for ascertaining suspect classifications subject to full judicial scrutiny. See also *supra*, note 53.

[56]This will be further discussed in Part IV-A.

IV. Justificatiou

A. *Section 15(1)*

In *Andrews*, the trial judge used a rationality test to determine whether the means (the distinction) justified the ends (the government's purpose).[57] McLachlin J.A. broadened this test to one of reasonableness and fairness.[58] If the distinction was unreasonable or unfair, it was up to government to justify it under section 1 of the *Charter* by reference to the strict test formulated in *R.* v. *Oakes*.[59]

McIntyre J. tried to postpone questions of justification until the section 1 stage of the analysis,[60] while at the same time preserving a "screening" role for section 15(1).[61] The key to this approach was his restriction of discrimination, and through it, section 15(1) as a whole, to either the enumerated grounds or analogous grounds of discrimination. He was not entirely successful in doing this. His main criterion for determining whether or not unenumerated criteria are analogous to the enumerated criteria appears to be whether or not they are relevant to the government's purpose. At best, his approach could *reduce* the scope of the justificatory features considered at the section 15(1) stage of analysis.[62]

Wilson and La Forest JJ. seemed to take a broader approach to the "analogous" grounds test, and emphasised lack of political power as a criterion.[63] As well, La Forest J. saw a limited role for section 15(1) beyond analogous grounds, and Wilson J. may have too.[64] Even if Wilson J.'s reasons are seen as falling within the "analogous" confines, her broad approach to what is analogous would seem to invite consideration of justificatory factors.[65]

One can sympathize with the attempt to keep justification out of section 15(1), as the *Charter* addresses justification separately, in section 1. Moreover, in section 1, unlike section 15(1), the onus of proof is on government.[66] To the

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[57]*Supra*, note 1, (1985), 22 D.L.R. (4th) 9 at 16 (B.C.S.C.).

[58]*Supra*, note 1, (1986), 27 D.L.R. (4th) 600 at 609-10 (B.C.C.A.).

[59][1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87. This test will be considered in section B.

[60]*Infra*, Part III-C.

[61]*Andrews, supra* note 1 at 182, McIntyre J.

[62]As seen, though, it was unclear in *Andrews, supra*, note 1 if McIntyre J.'s attempt to limit section 15(1) discrimination to enumerated or analogous grounds had the full support of his colleagues: *infra*, Part III-C.

[63]*Ibid.*

[64]*Ibid.*

[65]*Ibid.*

[66]*Andrews, supra*, note 1 at 183-84.

extent that justification is addressed in section 15(1), section 1 is deprived of meaning and the claimant faces an onus of proof which would otherwise rest with government.[67]

It is possible to keep justification out of section 15(1) by giving equality and discrimination a neutral meaning, letting them refer essentially to an absence or presence of distinctions.[68] But surely it cannot have been intended to prohibit justified distinctions in section 15(1).[69] This suggests that section 15(1) must prohibit at least *some* kinds of *un*justified distinctions.[70]

McIntyre J., and probably his colleagues, attempted to interpose an intermediate stage of analysis involving distinctions which have adverse aspects but are not necessarily unjustified. But the adverse aspects of a distinction are inevitably central to the question of whether it is justifiable.[71] Thus adverse aspects cannot be totally severed from justification. Once it is accepted that equality and discrimination are more than neutral concepts, the question is not whether justification can be kept out of section 15(1) but how broadly or narrowly courts should, at that point, consider justificatory factors.

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[67]See Wilson J. in *Turpin*, *supra*, note 10 at 1332, agreeing with Lepofsky and Schwartz's criticism that the "similarly situated" test places an unfair burden on a *Charter* claimant to prove that a law is unreasonable: (see Lepofsky and Schwartz, *supra*, note 11 at 125-28).

[68]For example, The *Shorter Oxford English Dictionary* defines "to discriminate" as "to make or constitute a difference in or between; to differentiate", giving it a neutral meaning, while it defines "to discriminate against" as "to make an adverse distinction with regard to", giving it a pejorative meaning. Virtually all courts have rejected the option of giving equality or discrimination a neutral meaning. See the discussion in *Re McKinney and Bd of Governors of the University of Guelph*, *supra*, note 10; and reasons of McIntyre J. in *Andrews*, *supra*, note 1 at 178-82.

[69]See *Re McKinney*, *ibid.* at 225-33; and reasons of McIntyre J. in *Andrews*, *supra*, note 1 at 181-82. McIntyre J. said that section 15(1) cannot have been intended to prohibit all distinctions because such an interpretation would (i) trivialise the rights guaranteed by the *Charter* by requiring courts to question many universally recognised distinctions, (ii) deprive the notion of discrimination of all content, and (iii) virtually deny any role for section 1. McIntyre J.'s reasoning is sound as far as it goes but problems arise when one attempts to determine which distinctions, *short* of all distinctions, are prohibited under section 15(1).

[70]Thus, unless section 15(1) prohibits favourable differences, the pejorative meanings referred to in note 68, *supra*, are more appropriate to section 15(1) discrimination than those which are merely neutral.

[71]This is true whether the adverse aspects result from the government distinction itself, as with McIntyre J.'s "relative disadvantage resulting from irrelevant personal distinction" test or whether they pertain to the complainant independently of the distinction, as with Wilson J.'s characterisation of a "discrete and insular minority". The broader scope of the latter approach would make considerations of general reasonableness and justifiability especially difficult to avoid.

B. Section 1

When it came to the test for justification under section 1 itself,[72] the Court gave two different, and conflicting, answers. Wilson J. for herself, Dickson C.J. and l'Heureux-Dubé J., applied the "*Oakes*" test. This test requires first that the government objective relate to societal concerns which are pressing and substantial. It then requires that the means adopted by government meet three proportionality requirements. First, they must be rationally connected to the government objective. Second, they must impair the relevant *Charter* right as little as possible. Third, there must be proportionality between the effects of the limiting measure and the government objective.[73] In apparent contrast, McIntyre J., for himself and Lamer J., with La Forest J. expressing general agreement[74] in separate reasons, said that section 1 required that the government objective be "desirable" and its means "reasonable".[75]

This is a potentially significant difference on one of the most basic of all *Charter* provisions.[76] If the lower standard supported by half the Court in *Andrews* relates to all *Charter* guarantees, the entire course of future *Charter* litigation could be affected. If it is specific to section 15(1), one might still ask what other specific sections might involve a similar difference.[77]

Wilson J., representing three judges, said that the government's breach of section 15(1) was *not* justified under section 1 of the *Charter*. La Forest J. agreed, making this the majority view. While Wilson J. found that the citizenship provision failed the *Oakes* test, La Forest J. held that it failed the apparently less stringent "desirable objective / reasonable means" requirements. McIntyre

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[72]For the caselaw on section 1 prior to the Court's decision in *Andrews*, see L.A. Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988), 10 Sup. Ct L. Rev. 469 at 483-513.

[73]*R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 135-142, 26 D.L.R. (4th) 200 at 224-29, 65 N.R. 87, referred to in *Andrews*, *supra*, note 1, (1986), 27 D.L.R. (4th) 600 at 606-07 (B.C.C.A.). See also Weinrib, *ibid.* at 483-513.

[74]La Forest J. at 197.

[75]McIntyre J. at 184-85.

[76]See Weinrib, *supra*, note 72 at 509-12, for earlier signs of a difference in approach to section 1. See, however, *Turpin*, *supra*, note 8, where the Court gave some indirect support to the *Oakes* test. Speaking for six judges in *Turpin*, Wilson J. agreed with Lepofsky and Schwartz, *supra*, note 11 who had criticised the similarly situated test because it required less state justification than was permitted under section 1 of the *Charter*. For Lepofsky and Schwartz, the test for section 1 was that of *R.* v. *Oakes*, *supra*, note 72.

[77]One thing which seems clear, at least at present, is that neither group in the Court was contemplating variable levels of judicial scrutiny, based on the nature of the discriminatory criterion, as in American law. Ironically, though, two of the American criteria for determining "suspect classifications" subject to strict scrutiny ("discrete and insular minorities" and "immutable characteristics") are being adopted by our Court to determine analogous categories of discrimination in section 15(1): See Baer, *supra*, note 52 *infra*, part III-C.

J., who had commanded general support on the equality and discrimination issues, dissented. With Lamer J. agreeing, he found that the "desirable objective /reasonable means" requirements had been met.

V. Judicial Activism

Underlying *Andrews*, like all *Charter* cases, was the question of judicial activism. How aggressively should the courts apply the *Charter*? In assessing the constitutionality of government action, what range of factors — economic, social, political, and others — should they consider?

Andrews does contain some signs of caution. There was an effort to restrict section 15(1) analysis to enumerated or analogous categories of discrimination, and to avoid wide-ranging consideration of reasonableness or fairness at this stage. "Like my colleague" [McIntyre J.], said La Forest J.,

> I am not prepared to accept that *all* 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.[78]

La Forest J. cautioned that courts should be "extremely wary about questioning legislative and governmental choices in such areas".[79] Another sign of restraint was the refusal to apply the full rigours of *Oakes* to section 1 analysis in equality cases.

Generally, though, *Andrews* is an activist decision. The Court has followed its general principle that effects alone can produce a breach of *Charter* guarantees, without further evidence of governmental intent. It has rejected any simple definition of equality based on the applicability of similar legislative provisions and has moved from equality of opportunity to equality of conditions. A majority of the Court seems to feel only loosely bound by the enumerated / analogous categories requirement. Other criteria, such as political powerlessness, permit judicial intervention on a highly discretionary basis.[80]

This broad approach is hardly surprising. Equality is taking on new importance in a country which has done relatively little about it for a long time. Women's groups and minorities are demanding more than token action. In the economic sphere, there is increasing concern about a system which permits

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[78]*Andrews, supra*, note 1 at 194.

[79]*Ibid.* at 194.

[80]Even the irrelevant personal characteristics test depends on what an individual judge feels is relevant and how broadly he or she chooses to construe the legislative purpose against which relevance is measured (a point emphasised – indeed, perhaps overemphasised – in Lepofsky and Schwartz, *supra*, note 11). Although determination of legislative purpose has subjective elements which are vulnerable to manipulation, it must at least find some mooring in the language of the statutory enactment. Concepts such as "political powerlessness" have no such roots.

wealth for some but consigns the less fortunate to dead-end jobs, unemployment, limited welfare help,[81] or food banks.[82] The *Canadian Bill of Rights* was criticised because it did too little to advance equality. The legislative history and elaborate equality wording of section 15(1) suggest a fresh start and, to some at least, a more expansive approach.[83]

An expansive approach to equality implies an active judicial approach, more consideration of policy, and more assessment and invalidation of government action. Not only the *Bill*, but its interpretation by the Court, has been criticised as narrow and ineffective.[84] Judicial activism toward section 15(1) would seem consistent with the Court's general approach to the *Charter*,[85] and with its emphasis on the effects of government action as well as its purposes.[86] Arguably, it is supported by the elaborate equality wording and the legislative history of section 15(1).[87]

On the other hand, equality is an empty-content concept,[88] heavily dependent on those who interpret it. The *Charter* does not really change this.[89] It indicates where equality is protected (before the law, under the law, etc.) but does not define the concept itself. Although it enshrines several different kinds of rights and ideals,[90] including the rule of law and the concept of a free and democratic society, it fails to relate them to equality. Since it is improbable that the

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[81]Canada's social welfare system was relatively late in coming, is arguably defective in many respects, and has been subject to erosion in recent years. See, generally, A. Moscovitch and J. Albert, eds, *The "Benevolent" State: The Growth of Welfare in Canada* (Toronto: Garamond Press, 1987).

[82]For illustrations of this economic inequality, see J.A. Porter, *The Vertical Mosaic: An Analysis of Social Class and Power in Canada* (Toronto: University of Toronto Press, 1965); *Report of the Royal Commission on Taxation* (Ottawa: Queen's Printer, 1966-1967) (Chair: K. Le M. Carter); D. Olsen, *The State Elite* (Toronto: McClelland and Stewart, 1980); and L. McQuaig, *Behind Closed Doors: How the Rich Won Control of Canada's Tax System* (Markham, Ont.: Viking, 1987).

[83]See the arguments in favour of a broad "equality of results" construction in A.F. Bayefsky, "The Orientation of the *Canadian Charter of Rights and Freedoms*" in J.M. Weiler & R.M. Elliot, eds, *Litigating the Values of A Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) at 105.

[84]McIntyre J. at 166-68 agreed with aspects of this criticism.

[85]See, for example, *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 344-45, 18 D.L.R. (4th) 321 at 359-60, 3 W.W.R. 481.

[86]*Ibid.*, D.L.R. at 350, S.C.R. at 331-32.

[87]*Supra*, note 22.

[88]Lepofsky and Schwartz, *supra*, note 11 contend that this is a major flaw with the similarly situated test. I suggest that it is a major feature of equality itself. See, further, the authorities referred to in note 34 of the Lepofsky and Schwartz article.

[89]See, however, Gold, *supra*, note 21, where it is argued that there are some general *Charter* principles which can be applied to the interpretation of section 15(1).

[90]Gold, *ibid.*, argues that the plurality of values protected in the *Charter* suggests a general approach of judicial restraint, except to prevent restrictions on participation in, or criticism of, the political process.

Charter protects unjustified equality, *Charter* equality can be narrowed, very slightly, to the concept of justified equality. Courts must therefore determine, subject to the precise *Charter* wording, which kinds of equality are justified and which are not.[91]

Judicial activism in interpreting *Charter* equality is bound to mean heavy judicial involvement in formulating subjective value judgments, determining broad policy issues, and reassessing the merits of legislation. These are functions ill-suited to non-elected bodies with limited resources and rigid institutional constraints.[92]

Conclusion

The results in *Andrews* should give some pause for thought to those who urge judicial activism in section 15(1) *Charter* issues. The individual judgments reveal a complex array of differing views on equality, discrimination, section 15(1), section 1, and the relationship between all of these. For every question answered, dozens remain unanswered.

There is a striking difference of opinion on the section 1 test. McIntyre J.'s version of the enumerated/analogous grounds test lacks clear majority support. As a result, there is no real consensus on the precise relationship between sections 15(1) and 1. There are different points of emphasis in the tests for what is analogous and differences of opinion as to whether the section 15(1) equality guarantees provide protection independent of the discrimination branch of that section.

As important as the contested questions are those which remain unclarified or unanswered. McIntyre J. tells us what equality is *not*, but tells us relatively little about what it *is*. Aspects of the old "similarly situated, similarly treated" test are severely condemned, but we are not told what test should take its place. It is unclear with whom and according to which criteria the complainant should be compared. The differences and similarities between equality and discrimination are not clearly stated. The effects of discrimination, especially that of relative disadvantage, are stressed, but we are not told how to gauge effects or to measure disadvantage.

Justification is disavowed in section 15(1), but with either the irrelevance approach or the political powerlessness test, it cannot be avoided. Although

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[91]Courts cannot simply side-step this lack of criteria with the full-throttle view that "more is necessarily better". Greater equality for one individual or group can impose corresponding burdens on others. Greater equality restrictions on government can limit the scope of otherwise desirable government activities. They generate an aggregate imbalance between government and the private sphere, while inequality claims outside the web of human rights legislation flourish unchecked.

[92]With the advent of the *Charter*, these functions are all, to some extent, carried out by the judiciary. However, the more this occurs, the greater the liabilities of these functions become.

McIntyre J.'s two colleagues express support for his views on section 15(1) and on the relationship between this section and section 1, what are we to make of their own additional comments, which appear to take a broader approach to determining analogous grounds, or may even, as with La Forest J.'s reasonableness / unfairness approach, by-pass it altogether?

This lack of consensus and clarity is not surprising. When the *Charter*'s framers entrusted courts with the interpretation of equality, they left them one of the vaguest concepts in our legal and political system. They compounded the challenge by drafting a complex equality guarantee which includes a non-exhaustive list of examples of discrimination, without outer parameters. Although *Charter* equality almost inevitably involves justification, justificatory factors are addressed in a separate provision with a different onus of proof.

The *Charter* framers encouraged expectations but gave the judiciary an unenviable choice. The more courts seek to escape the formalism and restraint of the past, the more they thrust themselves into a world of policy choices, political and economic considerations and subjective value judgments.

We need to ask who *should* have the lead role in defining and applying equality. Is it realistic to expect significant gains if we delegate most of this job to non-elected people with limited access to information, limited resources, and an adversarial procedural format? If we divert our energies and expectations to courts, do we undermine the prospects for wide-ranging legislative change? Can we litigate our way to a more equal society?[93] How many of the root causes of disadvantage — poverty, prejudice, illiteracy, ill health, unemployment, and similar ills — will be cured on our courtroom floors?[94] In the enthusiasm of the post-*Charter* decade, do we risk underestimating the potential of our traditional democratic processes?[95]

Perhaps the real issue is not the newest interpretation of section 15(1), or whether the individual judges were "right" or'"wrong" in *Andrews*; arguably, in light of what was asked of them, McIntyre J. and his colleagues did a credible job. Perhaps the important question is whether we are asking too much in expecting the judiciary to play any major role in resolving the question of equal-

[93]Consider whether our American neighbours have created a more equal society after over a century of constitutional litigation involving "equal protection of the laws" arguments.

[94]Consider the result in *Andrews*, *supra*, note 1 itself: a graduate of an elite British university succeeds in gaining earlier entry into one of the most prestigious and highest-paying Canadian professions.

[95]Even in the *Charter* era, Canadians might do well to consider some of the suggestions made twenty years ago in P.H. Russell,'"A Democratic Approach to Civil Liberties" (1969) 19 U.T.L.J. 109.

ity.[96] Perhaps the issue is not whether section 15(1)'s "new clothes" provide a better fit, but whether Canadians are taking equality to the right tailor?

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[96]If this is so, the Court's challenge is to develop an approach to equality which minimises the risks of activism. The outlines of such an approach are beyond the bounds of this comment and I will offer only two observations. First, automatic judicial validation of virtually all *Charter* provisions would deprive the *Charter* of even minimal meaning and is therefore not a viable option. Beyond this threshold, the *Charter* permits an almost unlimited range of judicial approaches, from restrained to highly activist. Second, I am not sure that one can avoid the drawbacks of judicial equality activism by limiting it to certain select causes, such as helping to ensure participation in the political process (see, for example, J.H. Ely, *Democracy and Distrust*, (Cambridge: Harv. Univ. Press, 1980); Gold, *supra*, note 21; P. Monahan, *Politics and the Constitution*, (Agincourt: Carswell, 1987) and compare these with the "discrete and insular minorities" approach in *Andrews*, *supra*, note 1). Any such limits would be subjective, and would be unlikely to remove the traditional institutional weaknesses of any courts involved in advancing the chosen cause.