COMMENT

CHRONIQUE DE JURISPRUDENCE

Andrews v. *Law Society of British Columbia*

The equality provisions of the *Canadian Charter of Rights and Freedoms*, enacted in section 15(1), came into effect in 1985 and proclaim the right of every individual to equal protection and equal benefit of the law. *Andrews* v. *Law Society of British Columbia* is the Supreme Court of Canada's first interpretation of these provisions. The Supreme Court held that section 42 of the *Barristers and Solicitors Act*, R.S.B.C., c. 26, which made Canadian citizenship a prerequisite for admission to the B.C. Bar, violated s. 15(1) and was not justified under section 1 of the *Charter*.

Although *Andrews* does not involve sex discrimination, Colleen Sheppard, in "Recognition of the Disadvantaging of Women: The Promise of *Andrews* v. *Law Society of British Columbia*", contends that the decision signals the potential for law to facilitate gender equality. The author is encouraged by the Court's rejection of traditional notions of equality such as the similarly situated test and equality as sameness of treatment. She finds that the most promising aspect of *Andrews* is its adoption of a contextualized, purposive approach to s.15, which requires the redress of disadvantaging and prejudice. The author concludes that *Andrews* is but a starting point to the elaboration of a concept of constitutional equality, which must continually be informed by those who experience inequality. Only in this way can substantive equality be achieved.

David Elliott, in "Comment on *Andrews* v. *Law Society of British Columbia* and Section 15(1) of the *Charter*: the Emperor's New Clothes" questions whether we can litigate our way to a more equal society. The author contends that in moving from equality of oppurtunity to equality of condition, and emphasizing the effect rather than the intention of the law, the Court is taking an activist route to equality. He believes that this broad approach is not surprising in a society which is showing increasing interest in equality after having done little to advance it in the past. He contends, however, that a non-elected judiciary, with limited access to information and operating in an adversarial context, may not be the most appropriate body to define equality.

L'article 15(1) de la *Charte canadienne des droits et libertés* entra en vigueur en 1985 et garantit à tout individu le droit à l'égalité aux yeux de la loi, tant au niveau de la protection que des bénéfices. Dans *Andrews* c. *Law Society of British Columbia*, la Cour suprême du Canada se prononça pour la première fois sur la nature et la portée de ce droit. En cause était l'article 42 du *Barristers and Solicitors Act*, R.S.B.C., c.26 au terme duquel l'admission au barreau de la Colombie-Britannique était réservée aux citoyens canadiens. La cour jugea que ce prérequis était une violation du principe d'égalité de l'art. 15(1) qui ne pouvait se justifier sous l'article 1 de la *Charte*.

Dans "Recognition of the Disadvantaging of Women: The Promise of *Andrews* v. *Law Society of British Columbia*", Colleen Sheppard soutient que même si *Andrews* ne touche pas à la discrimination basée sur le sexe, cette décision peut promouvoir l'égalité entre les sexes. L'auteur se réjouit du rejet, par la Cour, des normes traditionnelles qui définissent l'égalité en tant que traitement identique et qui accorderaient le même traitement à tous les individus qui se trouvent dans une même situation. L'auteur soutient que l'aspect le plus prometteur de la décision est la reconnaissance de l'art. 15(1) comme instrument contextuel dont l'application doit servir à redresser les "désavantagements" et préjugés présents et passés. L'auteur souligne qu'*Andrews*, toutefois, n'est qu'un point de départ dans l'élaboration d'un nouveau concept d'égalité constitutionnelle et conclut que l'expérience des victimes d'inégalité doit constamment informer ce concept.

Dans "Comment on *Andrews* v. *Law Society of British Columbia* and Section 15(1) of the *Charter*: the Emperor's New Clothes", David Elliott soulève la question à savoir si les tribunaux ont la compétence pour paver le chemin sur lequel l'égalité s'engage. Dans *Andrews*, la Cour rejette l'égalité de chance au profit de l'égalité de condition et s'attarde à l'effet de la loi, plutôt qu'à l'intention du législateur. L'auteur qualifie cette approche de généreuse et d'activiste. Notre société a du retard à rattraper vis-à-vis la promotion de l'égalité et on ne devrait pas se surprendre de l'intérêt qu'elle y porte maintenant. Toutefois, il souligne que les tribunaux, composé de membres non-élus, opérant dans un contexte adversatif avec un minimum d'information ne sont pas les mieux placés pour définir et mettre en application les principes d'égalité.

Recognition of the Disadvantaging of Women: The Promise of *Andrews* v. *Law Society of British Columbia*

N. Colleen Sheppard*

Synopsis

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I. Introduction

Women experience inequality. Women are disproportionately poor, especially if we are elderly, single mothers, of colour, lesbians or divorced. Women are beaten and raped at home and in the streets. Women are harassed as sex objects in the workplace, in universities, at home and in the streets. The vast majority of women in the labour force work in low pay, low status jobs. In the home, women continue to do most of the housework and childcare. Our skills and our strengths are not recognized. Our work is not noticed unless it is left

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undone, our childrearing not acknowledged unless our children have troubles.[1] We have been told for centuries that we are not fully human, that we are not rational[2] or as intelligent. Women have been judged'"non-persons";[3] we are labelled "other".[4]

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[1]Numerous studies and reports have documented and analysed the inequalities women confront in society. See, for example, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: 1970); *Women in Canada: A Statistical Report* (Ottawa: Ministry of Supply & Services, 1985); *Poverty Profile 1988: A Report by the National Council of Welfare* by K. Battle (Ottawa: 1988); M. Boyd,'"The Social Demography of Divorce in Canada" in K. Ishwaran, ed., *Marriage and Divorce in Canada* (Toronto: Methuen, 1983); *Report of the Royal Commission on Equality in Employment* by Judge Rosalie Silberman Abella (Ottawa: Supply and Services Canada, 1984) [hereinafter *Equality in Employment*]; C. Guberman & M. Wolfe, eds, *No Safe Place: Violence Against Women & Children* (Toronto: Women's Press, 1985); L. MacLeod, *Battered But not Beaten ... Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987); C. Backhouse & L. Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto: Macmillan, 1978); K. Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Ministry of Supply & Services, 1978); G. Ferguson Matthews, *Voices from the Shadows: Women with Disabilities Speak Out* (Toronto: Women's Press, 1983) S. Worth Rowley, "Women, Pensions and Equality" in C. Boyle et al., eds, *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) 283; M. Fitzgerald, C. Guberman & M. Wolfe, eds, *Still Ain't Satisfied: Canadian Feminism Today* (Toronto: Women's Press, 1982); S. Burt, L. Code & L. Dorney, eds, *Changing Patterns: Women in Canada* (Toronto: McClelland & Stewart, 1988).

[2]As Ann Scales notes:

> Patriarchal psychology sees value as differently distributed between men and women: Men are rational, women are not. Feminist psychology suggests different conceptions of value: Women are entirely rational but society cannot accommodate them because the male standard has defined into oblivion any version of rationality but its own.

See A. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373 at 1383. Alison Jaggar discusses how the liberal conception of human nature places particular value on the capacity for rationality defined as an individual mental capacity, in contrast to a physical or bodily capacity, or a collective conception of rationality. See A. Jaggar, *Feminist Politics and Human Nature* (Totawa, N.J.: Rowman & Allanheld, 1983) c. 3. Thus, it is important to challenge not only the denial of the rationality of women, but as well to critique the meaning of rationality in dominant discourse and the mind/body dichotomy upon which the preeminence of male-defined rationality is based.

[3]In 1928, the Supreme Court of Canada decided unanimously that the word "persons" in the *British North America Act, 1867* did not include women: *Reference Re the Meaning of the Word'" Persons" in Section 24 of the British North America Act, 1867*, [1928] S.C.R. 276, 4 D.L.R. 98, reversed on appeal; see *Edwards et al.* v. *A.G. Canada* [1930] A.C. 124. See also, K. Busby, "The maleness of legal language" (1989) Manitoba L.J. 191 at 199-200 for a discussion of how apparently generic terminology often conceals an implicit male norm. Busby also suggests at 195 that to use "they" or "them" instead of "we" or "us" in referring to women conveys a false objectivity in women's scholarship by distancing the author from the women she is discussing.

[4]In discussing the idea of women as "Other", Simone de Beauvoir writes:

> ...humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being. ... She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute — she is the Other.

The Second Sex (New York: Vintage Books, 1974) at xviii-xix.

In 1985, the equality provisions of the *Canadian Charter of Rights and Freedoms* came into effect, proclaiming the right of every individual to equal protection and equal benefit of the law without discrimination.[5] Can the legal concept of equality help to change the pervasive inequalities facing women in Canadian society?[6] *Andrews* v. *Law Society of British Columbia*[7] constitutes the first major decision on the interpretation of the s. 15 equality provisions by the Supreme Court of Canada. Though not involving sex discrimination, the general principles and themes articulated in *Andrews* are promising for women and reveal a potential role for law in promoting gender equality.

In this case comment I explore the implications of *Andrews* for women's equality rights. In so doing, I canvass both the strengths and weaknesses of the Supreme Court's initial articulation of an "approach"[8] to constitutional equality. Perhaps the clearest conclusion to be drawn from *Andrews* is that it is but a starting point to the elaboration of a legal concept that must continually be informed by concrete life experiences of inequality.

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[5]*Canadian 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. The equality guarantees are contained in s. 15, which provides:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 28 of the *Charter* is also particularly relevant. It provides:

> 28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[6]To date, the equality provisions of the *Charter* have not been effective in promoting equality for women. Instead, they have been used primarily by men. Moreover, in a number of cases, men have challenged protective legislation that benefits women. For a review of the case law and this disconcerting trend in Charter litigation, see S. Day & G. Brodsky, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

[7][1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719 [hereinafter *Andrews* cited to S.C.R.].

[8]As McIntyre J. states:

> To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned.

Ibid. at 165.

II. The *Andrews* Case

The case arose as a result of the British Columbia Law Society's refusal to admit Mark Andrews to the practice of law because he was not a Canadian citizen. At the time, he was a British subject residing permanently in Canada. He had law degrees from Oxford University and, except for the citizenship requirement, had completed the requirements for admission to the British Columbia Bar. Ironically, Andrews, the individual plaintiff in the first major constitutional equality case, is a well-educated, white male — not the kind of person one immediately associates with the protections afforded under the equality provisions of the *Charter*. Yet, as a non-citizen, he was denied certain entitlements granted citizens. Moreover, as pockets of jurisprudence reveal, non-citizens in Canada have historically been the targets of invidious discrimination on the basis of race, colour and national origin.[9] The Supreme Court of Canada struck down the citizenship requirement as a violation of s. 15(1) of the Charter, although two justices would have upheld the provision on the basis of s. 1.[10] This comment focuses on the Court's discussion of the interpretation of the equality provision of the *Charter*, s. 15.

III. An Approach to Constitutional Equality

McIntyre J. dissented in the outcome of the case. His discussion of equality and discrimination, however, was adopted by the Court.[11] In reviewing his judgment, five important themes emerge, each of which has important implications for the protection of equality for women under the Constitution. The themes include the following: (A) acceptance of a purposive approach to the interpretation of s. 15; (B) rejection of the equation of equality with sameness of treatment and acceptance of an effects-based approach; (C) rejection of the "similarly situated" test; (D) articulation of a definition of discrimination that requires harm, prejudice or disadvantaging, not just distinction; and (E) adoption of an "enumerated or analogous grounds" limitation. Although each of these developments is positive for advancing equality for women, the judgment leaves ambi-

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[9]*E.g.*, for example, *Union Colliery of British Columbia* v. *Bryden*, [1899] A.C. 580 (P.C.), *Quong-Wing* v. *R.*, [1914] 49 S.C.R. 440. See also T.R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clark Irwin, 1981) c. 4. La Forest J. discusses the relationship between non-citizenship and racism, prejudice and exclusion, at 195, writing: "Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin...".

[10]Wilson J. (Dickson C.J. and L'Heureux-Dubé J. concurring) struck down the citizenship requirement; La Forest J. concurred in separate reasons. McIntyre J. (Lamer J. concurring) dissented and would have upheld the citizenship requirement under s. 1.

[11]Both Wilson and La Forest JJ. begin their judgments by affirming their substantial agreement with McIntyre J.'s interpretation of s. 15. Although I flag points of divergence or elaboration in their judgments, the focus of this comment is McIntyre J.'s opinion.

guities and unanswered questions. The full implications of the above themes, therefore, remain to be resolved in future cases.

A. A Purposive Approach to Equality

The most significant and promising aspect of the *Andrews* decision is the Supreme Court's embrace of a purposive approach to s. 15. McIntyre J. rejects formulaic approaches to the equality guarantees in which constitutional violations are determined with reference to abstract or formal rules. Instead, he insists that the interpretation of s. 15 must be informed by an appreciation and understanding of its social and historical purpose. He recalls the words of Dickson C.J. that "[t]he meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in light of the interests it was meant to protect."[12]

In articulating the purpose of s. 15, however, McIntyre J.'s words are general and abstract. His answer to the question of s. 15's purpose seems to restate the question:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.[13]

McIntyre J. elaborates the point by referring to an earlier Ontario Court of Appeal decision which considered the equality protections to be based on the "moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and respect".[14] Again, this statement of purpose does not appear to go far beyond what the words of s. 15 already tell us.

Despite his adoption of a purposive approach, therefore, McIntyre J. does not articulate his understanding of the actual content and concrete implications of s. 15's purpose. This failure to address fully the question of purpose helps to explain some of the ambiguities in his judgment. We are left having to piece together a more complete picture of the purpose of s. 15 ourselves, by considering the logical implications of McIntyre J.'s discussion of effects-based discrimination, disadvantage and prejudice, and the enumerated or analogous grounds. Since a clear articulation of the purpose of s. 15 is central to the coher-

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[12]*Supra*, note 7 at 169, citing from *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321 [hereinafter *Big M Drug Mart* cited to S.C.R.].

[13]*Ibid.* at 171.

[14]*Reference re an Act to Amend the Education Act* (1986) 53 O.R. (2d) 513 at 554, 25 D.L.R. (4th) 1 at 42 (C.A.).

ent development and just application of the principle of constitutional equality in future cases, I return to it after exploring the remaining themes.

B. Rejection of "Equality as Sameness of Treatment" and Acceptance of an "Effects-Based Approach"

At the outset of his discussion of equality, McIntyre J. rejects the notion that equality means "sameness of treatment":

> It must be recognized at once... that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well that identical treatment may frequently produce serious inequality.[15]

The rejection of the equation of equality with sameness of treatment and inequality with differential treatment marks a major departure from traditional notions of equality. Two fundamental problems with a sameness vision of equality make its demise important.

First, it is premised on a false and unfair assumption about social reality. To maintain that equality will be secured by treating all individuals the same requires that everyone be the same. Underlying this conception is an assumption that society is a conglomeration of undifferentiated, autonomous individuals. But no such illusory world exists. Moreover, the undifferentiated, autonomous individuals contemplated by the theory, upon closer scrutiny, have the characteristics of individuals in the dominant groups in society. Thus, the sameness of treatment accorded women is informed by the standards set by men in response to male interests and needs. To be equal, therefore, women must adopt the ways of being and acting of the men who dominate. Group diversity is anathema to such an approach. To challenge structures, institutions and male-defined ways of being and acting, instead of changing oneself to fit in, is also excluded by the sameness model. In short, in a diverse society, a sameness of treatment approach demands and rewards conformity to a norm defined in accordance with the characteristics of the members of dominant groups in society.[16]

This raises the second fundamental problem with a definition of equality that is limited to sameness of treatment. In a diverse society and in a world of pervasive and severe inequalities, sameness of treatment, by not acknowledging disparate disadvantaging effects, can accentuate inequality. Discrimination must embrace what has been termed "adverse effect" discrimination. In referring to the first Canadian human rights case in which the Supreme Court recognized "adverse effect" discrimination, McIntyre J. explains:

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[15]*Supra*, note 7 at 164.

[16]E.g., C. Dalton, "Remarks on Personhood", American Association of Law Schools Panel, January 5, 1985; M. Minow, "Foreward: Justice Engendered, The Supreme Court 1986 Term" (1987) 10 Harv. L.R. 10 at 13-16.

> ... discrimination (in that case adverse effect discrimination) was described in these terms: "It arises where an employer... adopts a rule or standard... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force". It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint.[17]

Thus the Court recognizes in *Andrews* that a law or policy, that is neutral on its face and treats everyone in the same way, can still be discriminatory and violate the equality guarantees, if it has a disparate disadvantaging impact on certain individuals or groups. Such discrimination is institutionalized in the policies, procedures, organizations and structures of society, contributing to what is often referred to as "systemic discrimination".[18]

The Court's willingness to acknowledge discriminatory effects and to draw on the jurisprudence of human rights legislation stands in stark contrast to the constitutional interpretation of equality in the United States. The U.S. Supreme Court has rejected an effects-based approach, and has therefore limited violations of the equal protection clause to intentional or purposive discrimination:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and

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[17]*Supra*, note 7 at 173, citing from *Ontario Human Rights Commission and O'Malley* v. *Simpson's Sears Ltd* [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 in which the Court held that a facially neutral policy requiring store employees to work on Saturdays had a discriminatory impact on the complainant who was a Seventh Day Adventist. Accordingly, despite the absence of any intent to discriminate on religious grounds against individuals whose Sabbath is Saturday, the policy was nevertheless found to constitute adverse effect discrimination.

[18]While "systemic discrimination" can be both intentional or unintentional, increasingly those concerned with human rights are uncovering its unintentional manifestations. As Judge Rosalie Silberman Abella explained in *Equality in Employment*, *supra*, note 1 at 9:

> The impact of behavior is the essence of "systemic discrimination". It suggests that the inexorable, cumulative effect on individuals or groups of behavior that has an arbitrarily negative impact on them is more significant than whether the behavior flows from insensitivity or intentional discrimination....
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> Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified.

The Abella Report was relied on and cited with approval in the Supreme Court's unanimous decision in *Action travail des femmes* v. *C.N.R. Co.*, [1987] 1 S.C.R. 1114 at 1138-39, 40 D.L.R. (4th) 193 at 209-210 [hereinafter *Action travail des femmes* cited to S.C.R.].

> licensing statutes that may be more burdensome to the poor and to the average black than to the affluent white...[19]

Such a view severely limits equal protection doctrine. It is heartening that the Canadian Supreme Court has rejected this narrow and limited approach.

Several important implications flow from the rejection of a sameness standard and adoption of an effects-based approach. To begin, the problems identified above are avoided. Instead of adhering to an individualistic vision of society, the Court reveals a heightened sensitivity to group diversity and human differences. As McIntyre J. puts it "the accomodation of differences...is the essence of true equality...".[20] For women, this means that our differences from men must be accomodated to secure equality of outcomes.[21] Nor are concerns that touch women's lives exclusively or predominantly excluded from the reach of equality because of the absence of a male reference point.[22] By recognizing effects-based discrimination, the Court also acknowledges the inequities inherent in the sameness standard of formal equality. Four additional implications are not as apparent, but deserve mention.

First, once we acknowledge that an apparently neutral law or policy can have a disparate and damaging impact on certain groups, it becomes clear that

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[19]*Washington* v. *Davis*, 426 U.S. 229 (1976). This perspective has been re-affirmed in subsequent cases; *E.g., Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979); *McCleskey* v. *Kemp*, 481 U.S. 279 (1987). In contrast, under the federal human rights legislation, Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. s. 2000e *et seq.*, the concept of effects-based or disparate impact discrimination has been acknowledged: see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). It is ironic in the constitutional context that the possibility of identifying pervasive and systemic inequalities is overtly presented as a justification for a narrow interpretation of the equal protection clause in the United States.

In *Andrews*, the Court held that "the principles which have been applied under Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1)", *supra*, note 7 at 174.

[20]*Supra*, note 7 at 169.

[21]Christine Littleton elaborates this idea by developing a theory of equality as acceptance:

> The theory of equality as acceptance requires social institutions to adjust to the fact that people come in two sexes, not one, or one and a half. Even if — perhaps especially if — male and female are wholly social constructions, a society embracing equality as an ideal cannot fulfill that ideal by elevating one social category (male) to the level of public norm, and subordinating the other (female) to it.

"Equality and Feminist Legal Theory" (1987) 48 U. Pitt. L. Rev. 1043 at 1056.

[22]Catharine MacKinnon has clarified that it is precisely when there is no male equivalent to women's experience of disadvantage that some of the most severe problems of inequality arise (*e.g.* pregnancy discrimination). See *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979) c. 5; "Difference and Dominance: On Sex Discrimination" in C.A. MacKinnon, ed., *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) 32. One can, of course, still understand such forms of discrimination in comparative terms. But, the picture of discrimination requires the use of a wider lens to understand how certain laws or practices socially disadvantage women *vis-a-vis* men.

affirmative or positive action is needed to redress systemic and institutionalized discriminatory policies and practices. By "affirmative action", or "equity programmes",[23] I mean proactive measures aimed at identifying and remedying systemic discrimination. An essential first step in affirmative action is the identification of past, existing, and potential problems of adverse effect discrimination and systemic discrimination.[24] Once identified, a variety of affirmative action strategies exist for remedying systemic discrimination. One strategy is the abolition of laws or policies that cause adverse effect discrimination.[25] Alternatively, a discriminatory law or policy could be reformed to alleviate its disparate impact on particular socially disadvantaged groups and secure equality of outcomes. This may entail differential treatment on a long term basis to accommodate group differences.[26] Finally, the discriminatory impact of a law or policy could be eradicated by providing a socially disadvantaged group with facilitated access to resources, skills learning or educational and employment opportunities denied to them in the past.[27] This would entail the development and implementation of special temporary measures designed "to break a continuing cycle of systemic discrimination"[28]. Underlying this aspect of affirmative

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[23]Judge Abella chose to replace the term "affirmative action" with "employment equity programs" in *Equality in Employment, supra*, note 1, given the widespread confusion and/or negative reaction to the concept of affirmative action. I use the terms "affirmative action" and "equity programme" interchangeably.

[24]No longer is it fair or sufficient to rely only on retroactive individual human rights complaints or legal suits as the means of identifying discrimination. See S. Day, "Impediments to Achieving Equality" in S.L. Martin and K.E. Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 402 for a discussion of the inadequacies of the individual complaint as a mechanism for redressing systemic discrimination. I do not mean to suggest that individual cases are not important. They are critical and often very effective in providing a concrete example of the impact of law on individual lives. Nevertheless, they must be supplemented by proactive efforts to remedy inequality. Recent legislative developments, including the federal *Employment Equity Act*, S.C. 1986, c. 31 and pay equity legislation in Ontario and Manitoba (See *Pay Equity Act, 1987*, S.O. 1987, c. 34 and *Pay Equity Act*, S.M. 1985, c. 21), reflect a shift away from reliance on individual complaints of discrimination.

[25]It is essential that the necessity of the law or policy itself be the first target of scrutiny since this allows excluded groups to challenge the standards, rules, laws and policies of the *status quo*, rather than changing themselves to comply with them. See also, discussion in my earlier article, "Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*" in Boyle et al., eds, *supra*, note 1, 195 at 218-20.

[26]An example might be a policy of paid maternity leave for childbearing purposes.

[27]This third strategy is often considered to constitute the sole affirmative action strategy. In some contexts, it is legitimate and important provided the legitimacy of the standards and required skills have been scrutinized.

[28]*per* Dickson C.J. in *Action travail des femmes, supra*, note 18 at 1143. The Court approved special temporary measures requiring the company to hire one woman for every four non-traditional positions filled until women constituted 13 percent of those in non-traditional occupations in the company. Dickson C.J. outlined the rationale of such an employment equity programme as follows at 1143-43:

action is a belief that special temporary measures are essential to the effective redress of years of institutionalized discrimination.

Secondly, recognition of effects-based discrimination may lead us towards a more "positive" rights approach to s. 15.[29] For central to the acknowledgement of effects-based discrimination is the requirement of positive remedial action. When one is considering legislation or government policy, the remedy may entail ordering the government to do something to redress the disparate impact of its current legislation or policy. Indeed, McIntyre J. emphasizes the "large remedial component" of s. 15.[30] Courts appear to be having difficulties determining the appropriate scope of *Charter* remedies. Should courts extend legislative benefits to excluded groups in the face of a finding of inequality, or invalidate the impugned statute altogether, thereby denying everyone the benefit equally?[31] Though reluctant to engage in legislative redrafting, when the exclusion is due to a specific exemption in a statute, courts can effectively extend the reach of the legislation simply by striking down the exemption.[32] Even if courts do not order the extension or creation of government benefits, legislatures will feel considerable pressure to reform legislation in the face of judicial findings of inequality. The remedial dimension of equality rights, therefore, may contain the seeds of a more positive rights orientation.

> An employment equity programme thus is designed to work in three ways. Firstly, by countering the cumulative effects of systemic discrimination, such a programme renders future discrimination pointless...Secondly, by placing members of that group that had previously been excluded into the heart of the work-place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping...Thirdly, an employment equity programme helps to create what has been termed a "critical mass" of the previously excluded group in the work place.... The presence of a significant number of individuals from the targeted group eliminates the problems of "tokenism"; ...

See also *Equality in Employment*, *supra*, note 1 at 9-10.

[29]Positive rights impose a duty on the government to act to ensure the effective enjoyment of rights. Negative rights are concerned with non-interference by government. See discussion, C. Boyle, *Sexual Assault* (Toronto: Carswell, 1984) at 33-42.

[30]*Supra*, note 7 at 171.

[31]The explicit protection of the right to "equal benefit of the law" in s. 15 appears to support the equal extension rather than equal denial approach. See *Schacter* v. *Canada* [1988] 3 F.C. 515 at 531, 9 C.H.R.R. D/5320 (F.C.T.D.).

[32]*E.g.*, *Re Blainey and Ontario Hockey Ass'n.* (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.) (leave to appeal denied). A similar situation would arise if a provincial government excluded funding for abortions from its health insurance scheme. Arguably, such a policy would constitute an overt form of discrimination against women. (See discussion of *Brooks* v. *Canada Safeway*, *infra*, note 93, and accompanying text.) A discriminatory financial burden would be imposed on women wishing to terminate an unwanted pregnancy. The remedy would be to strike down the exclusion of abortions from the general health insurance provisions. In effect, this secures positive rights.

Intimately related to the positive versus negative rights debate is the question of the delineation of the public and private spheres. In *Andrews*, the Court formally adheres to the notion of a delineation between the public and private sphere, maintaining that s. 15:

> ...is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of law.[33]

On one level, this appears straightforward. Individuals cannot make *Charter* claims about discriminatory treatment accorded them by "private" individuals or institutions. On another level, however, as so-called "private" activity becomes increasingly regulated by government, we may witness an increasing number of instances where the government is implicated in what initially appears to be "private" discrimination. Moreover, recognizing the disparate effects of laws and government policies would appear to extend the reach of what is considered "public" to areas formerly defined as "private". A positive remedy to redress such effects-based discrimination makes clear that the socially constructed line between the public and the private sphere has shifted. For women, the public/private dichotomy has been used to deny redress for abuses of "private" power.[34] Legal developments which promote recognition of the ways in which government affects, through action and inaction, the scope and nature of "private" power, are helpful for women.

A final implication of the rejection of the equality as sameness approach is the necessary abandonment of a straightforward rule-based approach (*i.e.* equality as sameness of treatment) to constitutional equality. One cannot simply conclude that inequality exists where individuals from disadvantaged groups are being treated differently. It depends on the circumstances. It thus becomes clear that interpreting the constitutional mandate of equality is complicated. Differential treatment does not necessarily produce inequality. Sameness of treatment does not necessarily generate equality. When, then, is it permissible to treat people differently and when is it not? To resolve this dilemma, Justice

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[33]*Supra*, note 7 at 163-64. McIntyre J. may be concerned with retaining a sense of consistency between his judgment in *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 and the scope of s. 15. For a compelling critique of the Court's attempt to draw a line between the public and the private in that case, see A. Petter & A. Hutchinson, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278.

[34]For a discussion of the public/private split and women's inequality, see H. Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology" in C. Boyle et al., eds, *Charterwatch—Reflections on Equality*, *supra*, note 1 at 107 and J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

McIntyre adopts the purposive approach, forcefully rejecting the "similarly situated" test.

C. *Rejection of the "Similarly Situated" Test*

In the United States, reliance on the similarly situated test emerged as a mechanism to allow some degree of differential treatment to pass constitutional scrutiny, as an exception to a general understanding of equality as sameness of treatment. Pursuant to the test, equality requires that all those who are similarly situated be similarly treated.[35] Justice McIntyre rejects this test as seriously flawed:

> ...the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those to whom it excludes from its application.[36]

According to Justice McIntyre, the similarly situated test is a mechanism for defining away rather than addressing problems of inequality. One need simply define two groups as not similarly situated to justify treating them differently and unequally. To illustrate this problem, he points to the refusal to understand pregnancy discrimination as sex discrimination by finding pregnant persons to be differently situated from non-pregnant persons.[37] Thus, equal application of the law within the targeted group satisfies the similarly situated test.

Although I agree with the rejection of the similarly situated test, my reasons for doing so go beyond those articulated by the Court. Justice McIntyre

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[35]See J.S. Tussman & J. tenBroek, "The Equal Protection of the Laws" (1949) 37 Calif. L. Rev. 341 for a clear articulation of the American similarly situated test. McIntyre J. discusses the adoption and application of this test in Canadian constitutional adjudication and also refers to its parallel with the Aristotelian principle of equality that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion with their unalikeness", *Andrews*, *supra*, note 7 at 166.

[36]*Ibid.* at 168.

[37]*Bliss* v. *A.G. Canada*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417 [hereinafter *Bliss* cited to S.C.R.]. Another example is the Ontario Court of Appeal decision in *R.* v. *Morgentaler, Smoling and Scott* (1985) 52 O.R. (2d) 353, 14 D.L.R. (4th) 184 (C.A.). (reversed on other grounds on appeal) The Court was incapable of understanding the abortion issue in terms of equality. According to the Court, because men do not have abortions, gender discrimination is not involved.

> It is true that abortion, as a matter of biological fact, relates only to women. However, that fact does not make the section discriminatory on the basis of sex. It would not apply to men and the argument would be without any substance to say that the legislation is discriminatory or causes inequality because it does not require men seeking an abortion to comply with s. 251. (p. 395).

Since women and men were not similarly situated *vis-à-vis* the abortion dilemma, there was no interference with equality rights. Such an approach is no longer tenable after *Andrews*. McIntyre J. approved of the above reasoning in his dissenting judgment in *R.* v. *Morgentaler* [1988] 1 S.C.R. 30 at 156, 44 D.L.R. (4th) 385. He appears to have changed his position in *Andrews*, critiquing

appears to limit the similarly situated test to Dicey's formal notion of equality that demands equality merely in the application as opposed to the substance of the law.[38] While he is right to critique this narrow and tautological notion of consitutional equality reminiscent of the *Canadian Bill of Rights* jurisprudence on sex discrimination,[39] the conceptual shortcomings of the similarly situated test go even deeper.

The similarly situated test, at least as developed by some of its most influential proponents, has included an analysis of the content and purpose of the law. In their classic and oft-cited article, "The Equal Protection of the Laws", Tussman and tenBroek elaborate the similarly situated test that has been the lynchpin of equal protection jurisprudence in the United States.[40] They suggest that laws will satisfy the constitutional requirement of equal protection if the classifications inherent in legislation are reasonable. For Tussman and tenBroek:

> A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.
> The purpose of a law may be either the elimination of a public'"mischief" or the achievement of some positive public good.[41]

To constitute a reasonable classification pursuant to the similarly situated test, therefore, the legislative classification must include all those similarly situated with respect to the purpose of the law.[42] Contrary to McIntyre J.'s concern that

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the *Bliss* line of reasoning as seriously deficient. The Court may well acknowledge in future cases that the abortion issue deeply implicates questions of women's equality. It is my position that the equality of women is undermined when they do not have control of their reproductive lives. See *supra*, note 32, and discussion of *Brooks*, *infra*, note 93.

[38]A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1959), at 183-205.

[39]For particularly vivid examples, see *Bliss*, *supra*, note 32; *A.G. Canada* v. *Lavell (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; Isaac* v. *Bedard* (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 417.

[40]Tussman & tenBroek, *supra*, note 35.

[41]*Supra*, note 35 at 346.

[42]Tussman and tenBroek also clarify two errors that courts sometimes make in applying the similarly situated test. The first error is to define similarly situated as all those possessing the classifying trait. As Tussman and tenBroek point out, *supra*, note 35 at 345, "[a]ll members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test". The result of such an approach is "the easy dismissal of the equal protection issue on the grounds that the law applies equally to all to whom it applies". This potential danger in the application of the similarly situated test corresponds to McIntyre J.'s critique. However, according to Tussman and tenBroek, it constitutes a misapplication of the test. The second error is a tendency to equate reasonableness with societal definitions of "natural" differences. Tussman and tenBroek write at 346:

> The issue is not whether, in defining a class, the legislature has carved the universe at a natural joint. If we want to know if such classifications are reasonable, it is fruitless

the similarly situated test does not include analysis of a law's purpose or content, it appears that it sometimes does. And yet, this does not render the similarly situated test unproblematic.

The most problematic aspect of this "reasonable classification" elaboration of the similarly situated test is its conceptual transformation of problems of inequality, domination and subordination into problems of irrational classification. When applied to cases involving historically disadvantaged groups, such a doctrine solidifies a legal ideology that masks the inequalities of power between dominant and subordinate groups. Equal protection law thereby concerns itself with irrational differential treatment, not with subordinating treatment.[43]

A further problem with the similarly situated test developed by Tussman and tenBroek is its inherent malleability. In particular, the definition of a law's purpose can always be formulated so as to correspond rationally to the legislative classification.[44] While appearing to infuse equal protection doctrine with objective rationality, certainty and fairness, the similarly situated test provides a doctrinal mask for what ultimately depends on the values and biases of judges.

Finally, the similarly situated test, even as elaborated by Tussman and tenBroek, still conceptualizes equality in terms of a sameness standard. Its objective is to develop guidelines for deviating from sameness of treatment. Differential treatment is still understood as a violation of equality; it is simply justified as reasonable in certain circumstances.

In the Canadian context, the language of reasonable classification has arisen in discussions by appellate level courts regarding the interpretation of s. 15. Most notable in this regard is the decision of the British Columbia Court of Appeal in the *Andrews* case itself. Justice McLachlin held:

> ...the question to be answered under s. 15 should be whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected.[45]

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to consider whether or not they correspond to some "natural" grouping or separate those who naturally belong together.

Such an approach would allow the social inequalities of women to be rationalized as "natural" and consistent with the equal protection clause. To avoid these conceptual errors, Tussman and tenBroek incorporate an analysis of the purpose of the law into the similarly situated test.

[43]Catharine MacKinnon has made this critique most forcefully: *supra*, note 22.

[44]See "Note - Legislative Purpose, Rationality and Equal Protection" (1972) 82 Yale L.J. 123. See also M.D. Lepofsky & H. Schwartz, "Constitutional Law — Charter Rights and Freedoms, Section 15 — An Erroneous Approach to the Charter's Equality Guarantee: *R.* v. *Ertel*" (1988) 67 Can. Bar Rev. 115.

[45]*Re Andrews and Law Society, B.C.* (1986), 27 D.L.R. (4th) 600 at 609,.[1986] 4 W.W.R. 242 at 252, 2 B.C.L.R. 305 at 315 (C.A.).

This inquiry into the reasonableness of a law under s. 15 was rejected by the Supreme Court. Instead, according to McIntyre J., such an analysis properly belongs under s. 1.

The test developed by the Court to address s. 1 issues, however, appears to parallel in some ways the similarly situated test as elaborated by Tussman and tenBroek. By definition, s. 1 is a "reasonable limits" provision, an idea that may embody a concept such as "reasonable classification". In fact, the similarities between the test outlined by Tussman and tenBroek and the test articulated for interpreting s. 1 in *R.* v *Oakes*[46] are striking. According to Dickson C.J.:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective... must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom", ...
>
> Secondly, ... the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" ... There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, ... should impair "as little as possible" the right or freedom in question. ... Thirdly, there must be a proportionality between the *effects* of the measures ... and the objective ...[47]

In *Andrews*, Justice McIntyre articulates a test which appears somewhat less stringent, although it retains the same basic structure of identifying the purpose and assessing the rationality of the means in achieving the purpose.[48] It will be important to ensure that s. 1 is not reduced to a mere reasonable classification test with similar problems to those outlined above *vis-à-vis* the similarly situated test.[49] In light of the inclusion of the third prong in the *Oakes* proportionality test, the Court can insist on an approach to s. 1 that goes beyond the ratio-

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[46][1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter cited to S.C.R.].

[47]*Ibid.* at 138-39.

[48]McIntyre J. outlines a revised test for s. 1 in his *Andrews* judgment, *supra*, note 7 at 84. His s. 1 views were in the dissent.

> In my opinion, in approaching a case such as the one before us, the first question the Court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warant overriding constitutionally protected rights. The second step in a s. 1 inquiry involves a proportionality test whereby the Court must attempt to balance a number of factors.

[49]The problem of indeterminacy and the malleability of the test pursuant to the *Oakes* criteria is discussed in J.C. Bakan,"'Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123.

nality[50] of the provision to require the weighing of the harm caused by a violation of s. 15 with the benefit to society of allowing the inequality.[51]

D. Discrimination and Disadvantaging

There is a tendency to overlook the human agency of the dominant members of society in creating disadvantage and a potential to view "disadvantaged" groups as naturally disadvantaged or responsible for their socially disadvantaged position.[52] Accordingly, I use the term "disadvantaging" to emphasize that more powerful groups in society actively disadvantage less powerful groups. This causes their disadvantaged status. The terminology of disadvantage may actually reinforce the values and standards of dominant groups in society, if the group differences from which disadvantage flows are labelled undesirable rather than recognizing the social construction that renders these differences problematic.[53]

With these caveats in mind, the requirement in *Andrews* that disadvantage be a necessary component of a s. 15 violation is important and positive.[54] McIntyre J. derives this requirement from his interpretation of the concept of discrimination and from his understanding of the enumerated grounds.[55] Consistent with his acknowledgement that not all distinctions in treatment generate inequality, he adopts the view that:

> [t]he words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words 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.[56]

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[50]The meaning of what is reasonable or rational could also be revised to take into account concerns with disadvantage, prejudice, group harms.

[51]See O. Fiss, "Groups and the Equal Protection Clause" (1976) 5 Phil. & Pub. Affairs 107 at 167-68.

[52]J. McCalla Vickers, "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research" in A. Miles & G. Finn, eds, *Feminism: From Pressure to Politics*, 2d ed. (Montreal: Black Rose Books, 1989) 37 at 47-49.

[53]As Audre Lorde has pointed out, we tend to filter differences through a hierarchical lens of "dominant/subordinate, good/bad, up/down, superior/inferior". "Age, Race, Class, and Sex: Women Redefining Difference" in A. Lorde, *Sister Outsider* (Trumansburg, N.Y.: The Crossing Press, 1984) 114. See also, M. Minow,"Learning to Live with the Dilemma of Difference: Bilingual and Special Education" (1985) 48 Law and Contemp. Probs. 157.

[54]McIntyre J. labels his requirement of disadvantage the'"enumerated or analogous grounds" approach, *supra*, note 7 at 179-80. I think a term such as the "anti-subordination" approach or the "social disadvantaging" approach would be preferable. (See, for example, R. Colker, "Anti-Subordination Above All: Sex, Race, and Equal Protection" (1986), 61 N.Y. Univ. L.R. 1003).

[55]See discussion of the enumerated or analogous grounds limitation, *infra*, note 71 and accompanying text.

[56]*Supra*, note 7 at 180-81.

Thus, as McIntyre J. makes clear:

> A complainant under s. 15(1) must show 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.[57]

Discrimination does not just mean differentiation; it involves a law or policy "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."[58]

McIntyre J. links the requirement for disadvantage to s. 15's explicit protection against discrimination, rather than its general affirmation of the principle of equality. In so doing, he unduly, and perhaps inadvertently, narrows the concept of equality. To my mind, the concept of equality itself requires consideration of disadvantage and prejudice for its cogency. The realities of domination, subordination and social disadvantage should be the focal point of the constitutional principle of equality itself and not be considered solely at the stage of identifying the existence or non-existence of discrimination. Otherwise, we fall back into the trap of looking simply to *differential* treatment or impact as the measure of inequality. Though the practical implications of deriving the requirement of disadvantage from "discrimination" rather than "equality" may be insignificant in the context of the *Charter*, it would be preferable in terms of conceptual clarity to derive the need for disadvantage from both.[59]

To make sense of an approach based on disadvantage, it is also necessary to conceptualize problems of discrimination and inequality in group as opposed

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[57]*Ibid.* at 182.

[58]*Ibid.* at 174.

[59]McIntyre J.'s emphasis on discrimination may lessen the scope of the first clause of s. 15 ("Every individual is equal before and under the law"), which would be inconsistent with the requirement of giving *Charter* rights a large and generous interpretation (*Big M Drug Mart*, *supra*, note 12 at 344). Deriving the requirement of group disadvantage from the concepts of equality *and* discrimination would ensure the continued relevance of this first clause. Wilson J., in a subsequent judgment (see *Turpin*, *infra*, note 73), gives meaning to the first clause by suggesting that s. 15 provides four kinds of protection against discrimination (*i.e.* before the law, under the law, in the protection of the law and in the benefit of the law). In his judgment in *Andrews*, La Forest J. avoids a narrowing of the meaning of the first clause by leaving open the possibility that'"there is room under s. 15 for judicial intervention beyond the traditionally established and analogous policies against discrimination", *ibid.* at 194. Emphasizing that the role of the courts is "to protect against incursions on fundamental values", he writes:

> ...there may well be legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group and so devoid of any rational relationship to a legitimate state purpose as to offend against the principle of equality before and under the law as to merit intervention pursuant to s. 15.

Ibid. at 194.

to individual terms. We are concerned with remedying the historical and ongoing harm that has been and is being done to particular groups in society. Individual members of those groups may be the ones who actually bring cases into the courtroom, but the cogency of the analysis depends on an understanding of discrimination against and the social disadvantaging of groups, not individuals.[60]

Although McIntyre J. appears to acknowledge such a group-based perspective, his discussion of the definition of discrimination is ambiguous and still wedded to an individualist focus. He repeatedly refers to "individuals and groups" rather than just'"groups". Such a reluctance to abandon individuals perhaps reflects conventional societal regard for human rights as individual rights. This perspective is reflected in the wording of s. 15 itself.[61] Section 15(2), for example, speaks of disadvantaged individuals and groups, when it would be more analytically accurate to speak of individuals from disadvantaged groups. I do not think we would sanction affirmative action for purely individual disadvantages.

To develop a coherent and effective approach to constitutional equality, we must focus on group disadvantage and locate the individual within her or his social group. In doing so, we can identify two major types of disadvantage experienced by an individual by virtue of membership in a particular social group. First, an individual may be discriminated against because she is judged according to stereotypes about the capabilities and abilities of the group to which she belongs. McIntyre J. recognizes this form of discrimination, writing, "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...".[62] The individual is being treated differently on the basis of perceptions of and discriminatory attitudes towards her group.

Secondly, an individual may be discriminated against because she exhibits certain characteristics specific to her group. She experiences disadvantages that

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[60]As Dickson C.J. emphasized in his discussion of employment equity in *Action travail des femmes*, *supra*, note 18 at 1142-43:

> The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity programme will render itself otiose....The goal is not to compensate past victims or even provide new opportunities for specific individuals who have been unfairly refused jobs or promotions in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity programme is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.

See also, Fiss, *supra*, note 51 for a discussion of what he terms the "group disadvantaging principle" and *infra*, note 104 and accompanying text.

[61]See *supra*, note 5.

[62]*Supra*, note 7 at 174 [emphasis added]. While this aspect of discrimination deserves to be remedied, it is somewhat limited. Such an approach does not secure equality even in the face of stereo-

flow from her differences from individuals in the dominant groups in society.[63] This type of discrimination has too often been overlooked in legal approaches to equality.[64] McIntyre J. recognizes this as discrimination by including, in his definition of discrimination, intentional and unintentional distinctions "based on grounds relating to personal characteristics of the individual or group...".[65] By retaining the phraseology of "individual or group" instead of "individuals from disadvantaged groups", he has created the potential for some confusion on this point. Nevertheless, it is critical that the constitutional protection of equality address this second dimension of discrimination since it contains the potential to affect the vast majority of individuals from socially disadvantaged groups. Whereas the first component of discrimination provides relief primarily to those members of disadvantaged groups who can emulate the standards of the dominant groups in society, the second component provides relief despite difference.

One further aspect of McIntyre J.'s discussion of disadvantage concerns its interplay with his s. 1 analysis. Curiously, his discussion of the *Oakes*[66] test under s. 1 reflects an unnecessary concern about the potential invalidation of important social and economic regulatory legislation under s. 15.

> In *Oakes*, it was held that to override a *Charter* guaranteed right the objective must relate to concerns which are "pressing and substantial" in a free and democratic society. However, given the broad ambit of legislation which must be enacted to cover various aspects of the civil law dealing largely with administrative and regulatory matters and the necessity for the legislature to make many distinctions between individuals and groups for such purposes, the standard of "pressing and substantial" may be too stringent for application in all cases. To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation.[67]

McIntyre J. appears to have forgotten that his limitation of the applicability of s. 15 to situations relating to prejudice and disadvantaging precludes the problem of widespread challenges to regulatory legislative classifications.[68] Though perhaps motivated by a desire to cast doubt on the *Oakes* test generally,

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types. In other words, it does not ensure equality when the individual does display the characteristics associated with the disadvantaged group. Nor does this approach question why stereotypes exist, how or whether to eradicate stereotypes, or whether stereotypes labelled negative are in fact positive human attributes. Often it has implicitly required that the individual from the disadvantaged social group emulate the characteristics of individuals in the dominant groups in society.

[63]She is being treated differently and unequally and she is in fact different or she is being treated the same when she is in fact different.

[64]The similarly situated test was a major mechanism for avoiding this second aspect of discrimination.

[65]*Supra*, note 7 at 174.

[66]*Supra*, note 46, and *supra*, note 47 and accompanying text.

[67]*Supra*, note 7 at 184.

[68]His limitation of the scope of s. 15 to enumerated or analogous grounds further decreases this problem; see discussion, *infra*, note 72 and accompanying text.

McIntyre J.'s words contain unfortunate echoes of the U.S. Supreme Court's rejection of effects-based discrimination.[69] As Wilson J. clarifies, in discussing the *Oakes* test:

> If every distinction between individuals and groups gave rise to a violation of s. 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation. This is not a concern, however, once the position that every distinction drawn by law constitutes discrimination is rejected as indeed it is in the judgment of my colleague, McIntyre J.[70]

E. Adoption of an "Enumerated or Analogous Grounds" Limitation

The Court's final step in *Andrews* is to limit the scope of s. 15 to protection against discrimination on the basis of "enumerated or analogous grounds".[71] According to McIntyre J., the enumerated grounds correspond to the "most common and probably the most socially destructive and historically practised bases of discrimination...".[72] Integral to the Court's insistence on the presence of disadvantaging and not just differential treatment, therefore, is the limitation of the scope of s. 15's protection to enumerated or analogous grounds. Moreover, the enumerated grounds provide guidance as to which additional grounds of discrimination should be accorded protection under s. 15.[73] Non-

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[69]See *supra*, note 19 and accompanying text.

[70]*Supra*, note 7 at 154.

[71] The majority of the Court both in *Andrews* and in a subsequent unanimous judgment, *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, 96 N.R. 115 [hereinafter *Turpin* cited to S.C.R.], concludes that there must be discrimination on an enumerated or analogous ground to obtain protection under s. 15. (La Forest J. in *Andrews* is the only judge to have left open a larger role for s. 15 beyond protection against discrimination on enumerated or analogous grounds. See *supra*, note 59.

One could envision non-enumerated or non-analogous classifications that create inequalities in the effective enjoyment of fundamental rights and freedoms. Section 15 could protect equality in the exercise of fundamental rights and freedoms even if the inequality did not correspond to an enumerated or analogous ground. The *Turpin* case is a good example. The Court held that a classification between individuals accused of criminal offences in one province versus another was not analogous to the enumerated grounds in s. 15; the claimant was denied relief under s. 15. The Court did suggest that the case raised equality concerns; however, it held that the question of equality in the administration of the criminal justice system should have been argued in terms of "fundamental justice" and s. 7 of the *Charter*.

[72]*Supra*, note 7 at 175. Arguably, discrimination against the poor and against homosexual men and lesbians has been just as pervasive and damaging as some of the enumerated grounds. While these grounds of discrimination may well be recognized as analogous in future cases, one wonders whether their exclusion reflects the extent to which they were perceived to pose threats to two central societal institutions — the heterosexual family and the capitalist market.

[73]See, for example, application in *Turpin, ibid.* See also *Reference re Workers' Compensation Act, 1983 (Nfld.), ss. 32, 34*, [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765, 96 N.R. 227, where LaForest J. followed the majority approach to enumerated or analogous grounds; and *Mirhadizadeh v. Ontario* (1989) 60 D.L.R. (4th) 597 at 600-602 (Ont. C.A.), denying s. 15(1) claim

enumerated grounds of discrimination must be analogous to the enumerated grounds in the sense that they must be a source of disadvantaging and prejudice. This approach appears to constitute a further significant limitation on the number of potential claimants under s. 15, protecting the courts from a plethora of claims by privileged groups who are the targets of legislative classification.[74]

In *Andrews*, the Court held that non-citizenship constitutes an analogous ground. Although McIntyre J. does not provide much elaboration as to why non-citizens should be accorded protection under s. 15, he does note that they are "a good example of a 'discrete and insular minority'".[75] Justice Wilson further elaborates the significance of this description by explaining that non-citizens, because of their lack of political power, are "vulnerable to having their interests overlooked and their rights to equal concern and respect violated".[76] Of particular significance is Justice Wilson's further comment that a determination as to whether a group falls into an analogous category "is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society".[77] Justice La Forest agrees that non-citizenship should be considered an analogous ground. He points out that citizenship is an "immutable" characteristic in the sense that it is "one typically not within the control of the individual... Citizenship is, at least temporarily, a characteristic of personhood not alterable except on the basis of unacceptable costs."[78] La Forest J. then proceeds to document the historical legal discrimination against non-citizens in Canada.[79]

A further question that arises concerning both enumerated and non-enumerated analogous grounds is the interpretive impact of the requirement that the intentional or unintentional distinction result in disadvantage or prejudice. The Women's Legal Education and Action Fund (LEAF)[80] argued in its intervenor factum:

> Some of the terms in section 15 indicate clearly the type of disadvantge which is meant to be addressed by the equality guarantees: *e.g.*, mental and physical disability. Others are all encompassing on their face: *e.g.*, race, sex. These latter grounds appear to place on the same footing the equality claims of those who

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since appelant (individual attempting to sue public authorities) was not a member of an enumerated or analogous group.

[74]For an examination of equality cases and a review of the large number of cases initiated by members of privileged groups in society, see Day & G. Brodsky, *supra*, note 6.

[75]*Supra*, note 7 at 183.

[76]*Ibid.* at 152.

[77]*Ibid.*

[78]*Ibid.* at 195.

[79]La Forest J.'s emphasis on legal disadvantage contrasts with Wilson J.'s emphasis on the social, political and legal context.

[80]LEAF is an organization established to bring test cases on behalf of women and to intervene in cases affecting women's rights in an effort to improve the condition of women in Canada.

> have been historically disadvantaged (like women and people of colour) and those who, traditionally, have been members of the dominant group (men, whites). In assessing claims to substantive equality brought under section 15, it is submitted that a Court should bear in mind that the purpose of the section is to promote the equality of those who have been disadvantaged. While not categorically ruling out the equality claims of members of a dominant group, a purposive approach would lead a Court to interpret secion 15 in such a way that these claims would be viewed with caution.[81]

A fuller discussion of the purpose of s. 15 by the Court might have clarified the logic of LEAF's approach.

Despite the significant advances made in *Andrews* to counter an abstractly neutral approach to s. 15, the idea of symmetrical treatment of gender or racial groups in terms of constitutional equality appears deeply embedded in the legal psyche. I suspect we will not be immune from arguments about "reverse discrimination" in Canada despite the specific endorsement of affirmative action in s. 15(2).[82] And yet, the rationale McIntyre J. articulates for adopting an "enumerated or analogous grounds" approach makes the historical, current and systemic experience of group disadvantage the central criterion for protection under s. 15. This should render a concept like'"reverse discrimination" a contradiction in terms. An individual from a privileged group will be unable to show that he is part of a disadvantaged group in society.[83] This is the touchstone of discrimination. Further development of the group disadvantaging principle,[84] therefore, to refine our understanding of the enumerated and analogous grounds of discrimination, will be needed to ascertain the constitutionality of particular affirmative action programmes in future cases.

F. A Return to the Question of Purpose

Having explored the various components of the Court's discussion of equality and discrimination, it is important to re-consider the purpose of s. 15. When we pull the various threads of McIntyre J.'s analysis together, we begin to see a pattern in the weave. That pattern reveals a repeated concern with historical and current subordination of socially disadvantaged groups in society. The remedying of that disadvantage should constitute the central purpose of s. 15. Although McIntyre J. does not articulate the purpose of s. 15 so directly, it is implicit in his logic and judgment as a whole. It flows from his adoption of

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[81]*Factum of the Women's Legal Education and Action Fund (LEAF)*, submitted to the Supreme Court of Canada in *Law Society of British Columbia* v. *Andrews*, September 22, 1987 at 14, para. 33.

[82]The concept of "reverse discrimination" is discussed in B.R. Gross, ed., *Reverse Discrimination* (Buffalo, N.Y.: Prometheus Books, 1977).

[83]Provided standing is granted, an individual from a privileged group may also argue that the legislation affecting him actually undermines the equality of a socially disadvantaged group.

[84]See Fiss, *supra*, note 51.

an effects-based approach that focuses on the real social impact of law and policy, from his insistence on evidence of disadvantage and prejudice, and from his understanding of the enumerated and analogous grounds. McIntyre J.'s failure to weave together the strands of his analysis to provide a more complete delineation of s. 15's purpose accounts for some of the ambiguities and hesitations apparent in his judgment. But the threads are there, ready to be woven together into a constitutional approach to equality that focuses on identifying and remedying substantive inequalities and systemic discrimination in a meaningful way. For that, we must applaud McIntyre J.'s work.

In contrast, Justice Wilson is more forceful in articulating her view of the purpose of s. 15 which she envisages as a provision'"designed to protect those groups who suffer social, political and legal disadvantage in our society..."[85] To identify these groups, Wilson J. would look to "stereotyping, historical disadvantage or vulnerability to political and social prejudice..."[86] She thus appears to adopt or share the purposive analysis advocated by LEAF in the following passage from its factum:

> The history of the *Charter*'s guarantees of substantive equality clearly shows that they were intended to benefit individuals and groups which historically have had unequal access to social and economic resources, either because of overt discrimination or because of the adverse effects of apparently'"neutral" forms of social organization premised on the subordination of certain groups and the dominance of others.
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> ...
>
> It is submitted that this purpose of promoting the equality of the powerless, excluded and disadvantaged should animate interpretation of the guarantees of substantive equality in s. 15.[87]

IV. Implications for Women

Integral to improving the lives of women is the need to fight racism, heterosexism, ageism, poverty, the mistreatment of women with disabilities, the dominance of white culture. I do not think we can separate out a simple strand of hope for some women from the larger fabric of all women whose diverse needs and concerns require different responses and fundamental institutional and social change.[88] Where does the *Andrews* case take us?

At a minimum, *Andrews* signals the possibility that courts will listen to the various voices of women. The Court has not adopted an approach to equality

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[85]*Supra*, note 7 at 154; Wilson J.'s understanding of the purpose of s. 15 is also articulated in *Turpin, supra*, note 73 at 1333.

[86]*Turpin, ibid.*

[87]*LEAF Factum, supra*, note 81 at 10, paras 23 and 24.

[88]For example, Esmeralda Thornhill, *supra*, note 1, at 157 states, "real Sisterhood should mean a willingness, a political and a personal will — collectively and individually — to assume responsibility for the elimination of racism".

that confines women's future arguments to a fixed doctrinal box. Women do not have to fit their individual, cultural or group experiences of inequality into awkward, wooden categories. Women can try to speak their truths in the adjudicative forum, though such truths are neither singular nor cohesive. Women just might not have to speak another language or pretend not to know things they really know.[89] But going to court remains risky. It is risky because women still bear the legal and practical burden of educating the judiciary about the subordination of women. It may also prove risky to raise false hopes that the courts will solve the problem of gender oppression with the help of s. 15 and s. 28.[90] Finally, it is risky because the application of the constitutional principle of equality by the courts is a deeply indeterminant and value-laden exercise. What *Andrews* does require is that s. 15 redress disadvantaging and prejudice. This is the essence of s. 15's purpose. Moreover, a purposive approach grounded in the identification of historical and current disadvantaging constitutionalizes a contextual approach to the equality guarantees.[91] Rejection of formalistic, abstract legal reasoning has been an important dimension of feminist critiques of law.[92]

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[89]For example, a divergence between women's experiences and the legal representation of the abortion dilemma was identified by Carol Gilligan in her research:

> The way women were talking about the moral problem in abortion did not fit the public discussion of abortion in this country. In other words, it was *not* construed as an adversary fight between the mother and the fetus. In fact the dilemma arose from the very connection between them...Women realized that to say that they thought pregnancy meant a life, developing through time — if nothing intervened, accident or biology — into a child, meant that you could not bring the issue into the legal system. To enter the legal system, therefore, women had to act as though they did not know things that they felt they knew, and that they did not in a sense understand issues of connection which could not be represented within the adversarial-rights model which pitted one life against the other.

E. DuBois et al., "Feminist Discourse, Moral Values, and the Law — A Conversation" (1985) 34 Buffalo L. Rev. 11 at 38-39. Gilligan also uses the concept of bilingualism to convey the idea that women learn to speak in a second voice that they think will be listened to when they speak in male-dominated contexts. *Ibid.* at 40, 59, 63. See also K. O'Donovan,'"Engendering Justice: Women's Perspectives and the Rule of Law" (1989) 39 U.T.L.J. 127 at 140-46 for a discussion of women, language and law. For a feminist reconceptualization of reproductive rights that integrates issues of relationships and human connection, see H. Lessard, "Rethinking Liberty: Reproductive Rights and Section 7 of the Charter" (Address to the Canadian Association of Law and Society, Quebec, June 1989) [unpublished].

[90]Despite the historical struggle by women in Canada to include s. 28 in the Charter, to date it has not figured prominantly in sex discrimination cases. See P. Kome, *The Taking of Twenty-Eight — Women Challenge the Constitution* (Toronto: Women's Press, 1983).

[91]As Madame Justice Wilson commented in *Turpin*, *supra*, note 73 at 1331-32: "Accordingly it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage."

[92]*E.g.*, K.Lahey, "...Until Women Themselves Have Told All They Have to Tell..." (1985) 23 Osgoode Hall L.J. 519; Ann Scales, *supra*, note 2; R. West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) 3 Wis. Women's L.J. 81.

Coupled with a commitment to equality for women, a contextualized, purposive approach holds promise for women. Two recent cases involving the interpretation of provincial human rights legislation exemplify the possibilities of the approach to equality and discrimination initiated in *Andrews*.

The first case, *Brooks* v. *Canada Safeway*,[93] overturned the Court's decision eleven years earlier under the *Canadian Bill of Rights* that discrimination on the basis of pregnancy did not constitute sex discrimination.[94] The Supreme Court found that pregnancy discrimination is sex discrimination because only women get pregnant.[95] It was not necessary to find a male equivalent to the condition of pregnancy or to find that women were being treated as though they were pregnant when they were not in fact pregnant. The complainants were all pregnant women who received disfavoured treatment because of their condition — because of their difference. In recognizing such discrimination as sex discrimination, Dickson C.J. stated:

> Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.[96]

This reasoning is a far cry from the language of the earlier *Bliss* case, where Ritchie J. concluded, in an oft-cited passage, that "[a]ny inequality between the sexes in this area is not created by legislation but by nature."[97] Women have lived and continue to live the experience of the double day of labour. While we still need to rethink and revise the structuring of employment and domestic work, *Brooks* takes us a step in the right direction by acknowledging the impor-

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[93][1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6183 [hereinafter *Brooks* cited to S.C.R.]. Both cases involved the interpretation of s. 6(1) of the Manitoba *Human Rights Act*, S.M. 1974, c. 65, which provides protection against sex discrimination.

[94]*Bliss*, *supra*, note 37.

[95]As Dickson C.J. put it, "Discrimination on the basis of pregnancy is a form of sex discrimination because of the *basic biological fact* that only women have the capacity to become pregnant", *supra*, note 94 at 1242 [emphasis added]. Although I agree with the Court's conclusion on this point, I am concerned about the suggestion that there is such a thing as a "basic biological fact". It seems to me tbat we must be vigilant in insisting that our understanding of biology is always socially constructed. See M. Minow, "Feminist Reason: Getting It and Losing It" (1988), 38 J. of Leg. Ed. 47 at 54.

[96]*Supra*, note 93 at 1243-44.

[97]*Supra*, note 37 at 190.

tance of not being financially penalized if we need to take time off work for childbearing.

The second case, rendered concurrently with *Brooks*, is *Janzen and Govereau* v. *Platy Enterprises*,[98] in which the Court unanimously concluded that sexual harassment constitutes sex discrimination. As in *Brooks*, to understand the conduct in question as sex discrimination required the Court to shed formalistic, sameness reasoning and a narrow similarly situated approach. Instead, the Court defined sex discrimination in language similar to the *Andrews* formulation.

> ...[D]iscrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment, or the employment opportunities available to, employees on the basis of a characteristic related to gender.[99]

Sexual harassment was defined as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment".[100] To conclude that sexual harassment constitutes sex discrimination, the Court adopted the contextualized, effects-based approach adopted in *Andrews*.

The Court began by acknowledging the disparate impact of sexual harassment on women, given the gender hierarchy of the labour force and the "abuse of both economic and sexual power"[101] that sexual harassment entails.

> Perpetrators of sexual harassment and victims of the conduct may be either male or female. However, in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female.[102]

Relying on the concept of adverse effect discrimination alone, therefore, one could conclude that sexual harassment is a kind of sex discrimination in employment. The Court could also have limited its analysis in *Brooks* to disparate impact reasoning by concluding that a provision relating to pregnancy has a disproportionate impact on women. And yet, as in *Brooks*, where the Court went on to make a conceptual link between gender and pregnancy, the Court in *Janzen* developed a conceptual relation between the phenomenon of sexual harassment and gender.

In the case of *Janzen*, to develop this conceptual connection, a further complicating or obscuring notion needed to be addressed — the sexual attractive-

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[98][1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352, 10 C.H.R.R. D/6205 [hereinafter cited to S.C.R.].
[99]*Ibid.* at 1279.
[100]*Ibid.* at 1284.
[101]*Ibid.*
[102]*Ibid.* at 1284.

ness of the victim. The Manitoba Court of Appeal had concluded that sexual harassment involved discrimination on the basis of the sexual attractiveness of the victim, not discrimination based on sex. It was, therefore, treatment according to an individual not a group characteristic.[103]

The Supreme Court rejected this view as fallacious for three interrelated reasons. First, it made clear that discrimination does not require that everyone in a targeted group be subjected to discriminatory treatment.

> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual.[104]

Secondly, in the context of the sexual harassment complained of in the particular case, "it was only female employees who ran the risk of sexual harassment."[105] In elaborating this point, Dickson C.J. demonstrated an appreciation of a contextualized approach and sensitivity to a women's perspective.

> To argue that the sole factor underlying the discriminatory action was the sexual attractiveness of the appellants and to say that their gender was irrelevant strains credulity. Sexual attractiveness cannot be separated from gender. The similar gender of both appellants is not a mere coincidence, it is fundamental to understanding what they experienced. All female employees were potentially subject to sexual harassment by the respondent Grammas. ... Any female considering employment at the Pharos restaurant was a potential victim of Grammas and as such was disadvantaged because of her sex. A potential female employee would recognize that if she were a male employee she would not have to run the same risks of sexual harassment.[106]

Thirdly, therefore, just as pregnancy cannot be separated from gender even though not all women are pregnant, so too must the notion of sexual attractiveness be understood in the context of a deeply sexist society that objectifies women's bodies and perpetuates a male-defined image of sexual attractiveness.[107] The practice of sexual harassment, in turn, cannot be separated from the unequal relations of sexual interaction that disadvantage women.[108]

Both these decisions are positive and important legal victories for women. They further develop and apply the approach to discrimination articulated in

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[103]*Ibid.* at 1287. The parallel with the *Bliss* line of thinking is clear. Pregnancy involves discrimination against pregnant persons, not women; See discussion *per* Dickson C.J. at 1289.

[104]*Ibid.* at 1288.

[105]*Ibid.* at 1290.

[106]*Ibid.*

[107]S. Brownmiller, *Femininity* (New York: Ballantine Books, 1984).

[108]See MacKinnon, *The Sexual Harassment of Working Women, supra*, note 22; see also "Sexual Harassment: Its First Decade in Court (1986)", in MacKinnon, *Feminism Unmodified: Discourses on Life and Law, supra*, note 22 at 103-116.

Andrews, thereby creating an important legal trilogy on equality. Thus, *Andrews* appears to have laid the groundwork for innovative legal developments sensitive to the realities of the various inequalities women face. Although the values, attitudes and biases of judges will continue to determine the outcome of future cases, the requirement in *Andrews* that judges identify prejudice and disadvantage ensures a more open articulation of the values upon which judicial decisions are made.

Not only is *Andrews* innovative in its approach to identifying inequality and discrimination, it is also significant for its emphasis on remedies for redressing inequalities. We need to think carefully about how courts can and should structure remedies to discrimination. In particular, we need to advocate remedies that will empower women to take an active role in creating the institutional structures that will secure substantive equality instead of promoting or relying on substantive remedial solutions devised predominantly by courts. For I am convinced that the best solutions will come, not from the bench, but from the people who live and feel the experience of inequality in our society.

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

David W. Elliott*

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.).