# AN ANALYSIS OF SECTION 15 OF THE CHARTER AFTER THE FIRST TWO YEARS OR HOW SECTION 15 HAS SURVIVED THE TERRIBLE TWOS

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*The authors review the interpretation of s. 15 to date and discuss alternate analytical methods, favouring one. They consider a number of potential problem areas for the courts under s. 15.*

## I. INTRODUCTION

Section 15[1] of the Canadian Charter of Rights and Freedoms[2] has now celebrated its second birthday[3] and it is appropriate to ask how it has survived the terrible twos. Has it received the judicial direction needed to develop in an independent and mature direction? Or has it been so dominated by a mentor fearful of what it would do if left to grow unchecked by constant discipline that it is a timid and useless thing? Or has its guardian irresponsibly left it to function without sensible restraints oblivious to the consequences of so doing?

An observer can safely opine that there is no danger whatsoever that the interpretation section 15 has received will lead to its unprincipled application whenever a law of less than universal application is scrutinized.[4] Whether it has been allowed the freedom it needs to develop an independent existence to ensure that the purpose for which it was designed is accomplished is the more difficult judgment to make. To date most courts have been reluctant to let section 15 grow up. They will not let it walk on its own.[5]

Why they have adopted this attidude is difficult to say. It is not as if section 15 is the first child. By April 17, 1985, courts had already accumulated three years experience as constitutional guardians. Nonetheless, section 15 equality interests must constantly struggle with restaints,

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1. Section 15(1): "Every individual is equal before and under the law and has the right to the equal protection and 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. Constitution Act, 1982, as enacted by Canada Act, 1982 (U.K.), 1982, c. 11.
3. Section 32(2) of the Charter: "[S]ection 15 shall not have effect until three years after this section comes into force." Section 32 came into force April 17, 1982.
4. Courts with very few exceptions when interpreting section 15 have acknowledged that discrimination does not exist unless a law treats likes unlike or those not alike alike. Justice Hugessen's observation in *Smith Kline & French Laboratories Ltd.* v. *Canada* unreported, 9 December 1986, No. A-909-85 (Fed. C.A.) at 6 is not unusual: "As long ago as Aristotle's time, it was accepted that equality consisted of treating equals equally and unequals unequally."
5. In *Andrews* v. *Law Society of British Columbia* [1986] 4 W.W.R. 242 at 250 (B.C.C.A.), Justice McLachlin opposed the "elevation" of section 15 to an important position in the Charter. Why, is not clear. Equality values account for some of the fundamental rights and freedoms set out in the Charter, including, for example, those described in sections 2, 6, 27 and 28, and the best known pre-Charter case, an acknowledged milestone in the protection of these Canadian values, *Roncarelli* v. *Duplessis* [1959] S.C.R. 121. *See also Piercey* v. *General Bakeries Ltd.* [1986] 31 D.L.R. (4th) 373 at 387 (Nfld. S.C.T.D.).

such as the notion that "discrimination" means purposive or prejudicial state action or that section 1 values such as fairness and reasonableness are relevant considerations in assessing a law's compliance with section 15.

It may be that courts mistakenly believe that a vibrant section 15 will lead to numerous senseless actions challenging decisions legislators make every time they use classification schemes to accomplish legislative objectives.[6] Indeed, some courts have raised the spectre of governments being compelled to licence blind and infant drivers because of section 15.[7]

Even though courts have expressed alarm about the potential disruptive force inherent in a vigorous section 15, their members have not shied away from charting independent approaches to section 15 cases. The Federal Court of Appeal illustrates the confusion created by this proliferation of views. In *Smith Kline & French Laboratories Ltd.* v. *Canada* [8] Justice Hugessen plotted a course substantially different from that favored by the trial judge, Justice Strayer. In doing so he cited at least eight other cases which were decided on grounds different in principle from those which appealed to Justice Strayer.[9] Less than two months later another panel of the Federal Court of Appeal decided *Headley* v. *Public Service Commission Appeal Board.* [10] This time Justice MacGuigan distanced himself from the views of Justice Hugessen, preferring those of Justice Strayer, the trial judge in *Smith, Kline & French.* Justice Pratte, on the other hand, "confess[ed] that I would have to express my agreement with the interpretation adopted by . . . McLachlin, J.A., in *Andrews* v. *Law Society of British Columbia* . . ?"[11] Justice Urie diplomatically declined to side with either view on this point.[12]

Anyone who has read the reported section 15 cases and a sampling of the unreported cases for which written reasons have been given would agree that our judges are an independent lot. The reader would be hard pressed to find enough judges that have interpreted section 15 the same way to form a foursome. And while judicial ingenuity is generally an attribute to be saluted, in this case the lack of consensus is of concern, the judges having been unable to agree on even the basic features of section 15.

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6. There are not many laws which apply to everyone. Perhaps the criminal law is as good an example as there is of a universal law. There are not likely to be many frivolous suits. *See Kask* v. *Shimizu* [1986] 4 W.W.R. 154 at 167 (Alta. Q.B.). An action would be ill-advised where there is no chance of success. Courts will dismiss such actions and in some cases without any evidence led in support of the legislation. *See, e.g., Harrison* v. *University of British Columbia* 14 C.C.E.L. 90 at 95-96 (B.C.S.C.): "There is no need for evidence to prove, as a general proposition, that aging eventually affects mental and physical capacity and that everyone who is employed in a capacity calling for mental or physical ability will probably . . . one day cease to be able to do their job adequately."
7. *Smith, Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986 No. A-909-85 (Fed. C.A.) at 8; *Andrews* v. *Law Society of British Columbia* [1986] 4 W.W.R. 242 at 250 (B.C.C.A.); *Singh* v. *Dura* unreported, 6 May 1987 No. 8603-10125 (Alta. Q.B.) at 14.
8. Unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 4.
9. *Smith, Kline & French Laboratories Ltd.* v. *Canada* [1986] 1 F.C. 274 (Fed. Ct. T. D.).
10. 72 N.R. 185 at 192 (Fed. C.A.).
11. *Id.* at 192.
12. *Id.* at 192.

One might fairly attribute this divergence of judicial opinion to the fact that section 15 is still in its infancy, not having come into effect until April 17, 1985. However, the delayed introduction of section 15 should have had its balancing benefits. By April 24, 1985, the date the Supreme Court of Canada announced its decision in *The Queen* v. *Big M Drug Mart*,[13] the Canadian judiciary had in its possession the interpretive approach best suited to Charter problems. Justice MacGuigan acknowledged this in *Headley* v. *Public Service Commission Appeal Board*.[14] Regrettably, with some notable exceptions, section 15 cases have not benefitted from this Charter experience. Section 15 might as well have been the first born.

## II. BASIC PRINCIPLES

Fortunately, section 15 lends itself to the same analysis as other Charter sections and it is relatively easy to identify the differences which distinguish the approach the Supreme Court of Canada has taken in nonsection 15 Charter cases and that taken by other courts in section 15 cases. Once these discrepancies are known, it is relatively easy to suggest alterations which will bring the section 15 analysis into line with that mandated by the Supreme Court of Canada in nonsection 15 Charter cases.

The Supreme Court of Canada has repeatedly stated that there are two questions of paramount importance in Charter cases.[15] First, one asks whether the challenged law violates a right or freedom guaranteed by the Charter. This query can only be answered after the scope of a right or freedom set out in the Charter is established and the challenged law is held up against this standard. Second, in the event that the law does violate a right or freedom set out in the Charter, is the violation one that can be saved by the limitation feature of section 1 of the Charter?[16]

Adherence to these straightforward directives reveals the consitutional contours of the rights and freedoms set out in the Charter and fidelity to this order of inquiry makes it difficult for decision makers to infuse limitation values associated with section 1 into the initial inquiry.[17] Deviation from this dichotomy is unfair because the onus bearer is not the

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13. [1985] 1 S.C.R. 295.
14. (1987) 72 N.R. 185 at 188 (Fed C.A.).
15. *E.g.*, *The Queen* v. *Oakes* [1986] 1 S.C.R. 103; *The Queen* v. *Big M Drug Mart* [1985] 1 S.C.R. 295.
16. This approach is dictated by section 1 of the Charter, which reads as follows: "*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In *The Queen* v. *Oakes* [1986] 1 S.C.R. 103 at 135 Chief Justice Dickson described section 1's function this way: "It is important to observe at the outset that s.1 has two functions: first it constitutionally guarantess the rights and freedoms set out in the provisions which follow; and second, it states explicitly the exclusive justificatory criteria (outside of s.333 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured." His Lordship went on to observe what section 1 makes abundantly clear, namely that, "The rights and freedoms guaranteed by the Charter are not, however, absolute." [1986] 1 S.C.R. at 136.
17. *The Queen* v. *Oakes* [1986] 1 S.C.R. 103 at 134; *Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 10-11; *The Queen* v. *LeGallant* [1986] 6 W.W.R. 372 at 379 (B.C.C.A.); *Wright* v. *Canada* (1986) 13 C.P.C. (2d) 63 at 76 (Ont. Dist. Ct.); *Iron* v. *The Queen* [1987] 3 W.W.R. 97 at 112 (Sask. C.A.).

same for each issue. The person alleging a Charter breach must satisfy the decision maker that a right or freedom set out in the Charter has been violated and the person invoking the challenged law to defend his position must establish the criteria required by the limitation provision in section 1.[18] In close cases who has the onus will determine the fate of the action.

## III. SECTION 15 QUESTIONS

Before reviewing the section 15 case law we will outline the approach we advocate.[19] This is not to suggest that there are not others. There are.[20] But we happen to believe that our analytical method is preferable to others which have attracted judicial approval. However, we have recorded our views here for reasons besides this conviction. It allows us to highlight the differences inherent in competing interpretations and serves as a springboard for our criticism of methods which are unlike the one we favor, which we advance below.

At the outset it is important to recognize the values promoted by section 15.[21] In the absence of a sound understanding of why section 15 exists, the likelihood it will be properly interpreted and applied is minimal. Justice Dickson, as he then was, in *The Queen* v. *Big M Drug Mart Ltd.* [22] wrote:

> [T]he proper approach to the definition of the rights and freedoms guaranteed by the *Charter* [is] a purposive one. The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.

There is no reason why this directive should not apply to section 15.

Section 15 recognizes the heartfelt and abiding desire of persons to be treated fairly by those whose decisions affect their lives.[23] This is particularly so when those judgments have the force of law. Fairness means nothing more and nothing less in the context of section 15 than the like treatment of those who are alike and dissimilar treatment of those who are not alike. It means that the law adopts rationality as a keystone concept and eschews *ad hominem* solutions. In essence, it celebrates the values of the rule of law and condemns arbitrariness.[24]

Justice McDonald's statement in *Kask* v. *Shimizu* [25] is the best explication of the benefits section 15 promotes:

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18. *The Queen* v. *Oakes* [1986] 1 S.C.R. 103 at 136-137.
19. *See* Wakeling, "An Introduction to Section 15(1) of the Charter" 24 *Alta. L. Rev.* 412 (1986).
20. *See* the text associated with nn. 52 to 78.
21. *Kask* v. *Shimizu* [1986] 4 W.W.R. 154 at 158 (Alta. Q.B.); *Blainey* v. *Ontario Hockey Assoc.* [1986] 54 O.R. (2d) 513 at 529 (C.A.).
22. [1985] 1 S.C.R. 295 at 344.
23. *See* generally Wakeling, "An Introduction to Section 15(1) of the Charter" 24 *Alta. L. Rev.* 412 at 412-13 & 440 (1986).
24. In *Roncarelli* v. *Duplessis* [1959] S.C.R. 121 at 140, Justice Rand wrote: "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is, that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute . . . Could an applicant be refused a permit because he had been born in another Province, or because of the colour of his hair?"
25. [1986] 4 W.W.R. 154 at 158-159 (Alta. Q.B.). The preamble of the Individual's Rights Protection Act, R.S.A., 1980, c. I-2 contains a statement worth remembering.

1. When an individual is and feels equal before and under the law to other individuals, and has the protection and benefit of the law equal to that enjoyed by other individuals, he feels that his inherent dignity is respected by the social order and he, therefore, feels a higher degree of self-worth and is more likely to be a useful and contributing member of social and political institutions which enhance the participation of individuals and groups in our society.

2. When an individual is not discriminated against, particularly by government and those exercising the powers of government, on the ground of his cultural background or his being a member of a group, he feels that society respects him despite his being of a different culture or a member of a different group in comparison with others, particularly with those who exercise majoritarian or significant power. This, in turn will tend to increase the likelihood of his having faith in social and political institutions which enhance the participation of individuals and groups in society.

In each case, as well, the sense of fair play, equality of treatment and opportunity which the individual will entertain will be likely to enhance his sense that Canada is a country in which, because it is free, he can plan his and his family's vocational and personal development, knowing with confidence that the state and those who exercise the powers of the state will obstruct his hopes and expectations only on grounds that are unrelated to inequality of treatment by the law or discrimination on the ground of some characteristic he possesses.

In each case, it is not only the individual who is directly involved, whose participation in society will be enhanced: if the individual is a member of that group who become aware of the equality of treatment or the respect which he is accorded by society will share his sense that Canadian society will treat other members of the group similarly, and this will tend to increase their faith in social and political institutions which enhance the participation of individuals and groups in society. Moreover, other members of the group will share the individual's confidence that the freedom of our society will, as said in the preceding paragraph, ensure that family and vocational development will not be obstructed by the state on the grounds mentioned.

Assuming that this understanding of the purpose of section 15 is correct, and we have no reason to believe that we are wrong,[26] there are a series of

26. The following are authority for the proposition that section 15 directs lawmakers to treat likes alike and those not alike differently: *Headley* v. *Public Service Commission Appeal Board* (1987) 72 N.R. 185 at 192 (Fed. C.A.); *Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 6; *Ambrose* v. *Canada* unreported 20 October 1986, No. A-249-86 (Fed. C.A.) at 2; *Nissho Corp.* v. *Bank of British Columbia* unreported 14 May 1987, No. 8603-12287 (Alta. Q. B.) at 10; *Singh* v. *Dura* unreported 6 May 1987, No. 8603-10125 (Alta. Q. B.) at 7; *Kask* v. *Shimizu* [1986] 4 W.W.R. 154 at 158-159 (Alta. Q. B.);*Cabre Exploration Ltd.* v. *Arndt* [1986] 4 W.W.R. 261 at 268 (Alta. Q. B.);*Re H.P.H.* (1987) 76 A.R. 235 at 238 (Prov. Ct.); *Andrews* v. *Law Society of British Columbia* [1986] 4 W.W.R. 242 at 248 (B.C.C.A.); *Rebic* v. *Collver,* [1986] 4 W.W.R. 401 at 410-411 (B.C.C.A.); *Shewchuk* v. *Ricard* [1986] 4 W.W.R. 289 at 306 (B.C.C.A.) (by implication); *N.M.* v. *Superintendent of Family and Child Services* [1987] 3 W.W.R. 176 at 182 (B.C.S.C.); *British Columbia & Yukon Territory Building & Construction Trades Council* v. *British Columbia* (1985) 66 B.C.L.R. 270 at 290 (S.C.); *Baker* v. *Association of Professional Engineers* unreported 23 September 1985, No. A852089, Vancouver Registry (B.C.S.C.) at 4; *Weinstein* v. *Minister of Education* [1985] 5 W.W.R. 725 at 738-39 (B.C.S.C. 1985); *Tit* v. *Director of Vital Statistics* [1986] 4 W.W.R. 238 at 240 (Man. Q.B.); *Piercey* v. *General Bakeries Ltd.* (1986) 31 D.L.R. (4th) 373 at 384 (Nfld. S.C.T.D.); *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems International, Canada Ltd.* unreported 27 July 1987, S.C.A. No. 01635 (N.S.S.C.A.D.) at 21-22 (by implication); *The Queen* v. *Hamilton* (1986) 17 O.A.C. 241 at 252 & 261 (C.A.); *The Queen* v. *R.L.* (1986) 14 O.A.C. 318 at 324 (C.A.); *Blainey* v. *Ontario Hockey Assoc.* (1986) 54 O.R. (2d) 513 at 524 & 529 (C.A.); *McDonald* v. *The Queen (1985)* 51 O.R. (2d) 745 at 768 (C.A.); *McKinney* v. *University of Guelph* (1986) 14 C.C.E.L. 1 at 33 (Ont. S.C.); *Streng* v. *Township of Winchester* 31 D.L.R. (4th) 734 at 741 (Ont. S.C.); *L'Assoc. des Detaillants en Alimentation* v. *La Ferme Carnival Inc.* unreported 6 August 1986, No. 500-05-009768-852 (Que. S.C.) at 50; *The Queen* v. *Monk* 43 Sask. R. 318 at 320 (Q.B. 1985); *Westfair Foods Ltd.* v. *The Queen* unreported 14 January 1987 (Sask. Prov. Ct.) at 18 (by implication); *The Queen* v. *Scrutton* unreported 30 September 1986 (Sask. Prov. Ct.) at 22 (by implication); *F.S. Royster Guano Co.* v. *Virginia* 253 U.S. 413 at 415 (1920).

questions the answers to which will accurately determine whether a law complies with the constitutional standard section 15 sets. They are as follows:

1. What is the purpose of the law?; 2. What are the characteristics of persons similarly situated with respect to the purpose of the law?; 3. Does the law accord similar treatment to persons similarly situated?; 4. What are the characteristics of the subgroup accorded dissimilar treatement?[27] If it is determined that the law is inconsistent with section 15(1), one must then ask whether the law constitutes affirmative action and is covered by section 15(2)[28] or is justifiable in terms of section 1. Section 1 will be examined later.

Just as it was important to determine why section 15 was included in the Charter, it is important to ascertain why the challenged law was enacted.[29] Not until the legislative goal is known is it possible to determine the characteristics of those who are similarly situated with respect to the purpose of the law. For example, in *N.M.* v. *Superintendent of Family and Child Services* [30] at issue was a provision which allowed a child to be adopted without the natural father's consent where the father was not married to the child's natural mother. Speaking in general terms, the court wrote:[31]

> The requirement for the consent of a child's parents to her adoption reflects the concern for the best interest of the child by ensuring that the legal and moral relationship she has with her parents is not severed easily. It reflects a community belief that a child's parents will know more about her best interest than will the Court or a social worker. A Court will dispense with a required consent only when the best interest of a child so requires.

Formulation of the legislative goal allows an analyst to determine the group of potential complainants because it reveals those who are similarly situated in each case. Obviously, a person who is not a member of the group who is similary situated with respect to the law's purpose has no reason to object if the law does not bestow the same benefits or impose the same burdens on him as are enjoyed or endured by those who are alike. In *N.M.* v. *Superintendent of Family and Child Services* a person not related by blood or any other meaningful way to a child someone wished to adopt could not complain with any justification that the adoption law violated section 15 because it did not require his or her consent as a prerequisite to an adoption order.

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27. *See* Wakeling, "An Introduction to Section 15 of the Charter" 24 *Alta. L. Rev.* 412 at 418-22 (1986).

28. Section 15(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."

29. In order to determine legislative intent recourse is had to the same tools which prove useful in the construction of statutes for purposes other than the assessment of their constitutional validity — social context, legal context (statutes in pari materia, other statutes, legislative evolution) and the language context. *See* generally E. Driedger, *Construction of Statutes* (2d ed. 1983) 149-63. Courts seldom document the process utilized to detect legislative purpose but they invariably record the purpose as they understand it. *E.g., Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 5-6 (purpose of patent laws).

30. [1986] 3 W.W.R. 176 (B.C.S.C.). For other examples *see* Wakeling, "An Introduction to Section 15(1) of the Charter" 24 *Alta. L. Rev.* 412 at 419-21 (1986).

31. [1987] 3 W.W.R. at 184.

Once the characteristics of those who are similarly situated are known, it is relatively easy to determine if the law under review treats them all the same. In *N.M.* v. *Superintendent of Family and Child Services* it was readily apparent that the Adoption Act did not. In general, an adoption order could not be made without the consent of the child's natural mother, whether married or not and the natural father, if married to the natural mother. But the consent of the natural father was dispensed with by the Adoption Act as a precondition to an adoption order if he was not married to the child's natural mother. With respect to this exception, the Court stated:[32]

> The impugned portion . . . creates two distinctions: (i) a natural mother is treated differently from a natural father; (ii) a natural father married to the natural mother is treated differently from a natural father who never married the natural mother.
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> The first distinction, based on sex, corresponds to a biological difference between parents. However, as it relates to the functions relevant to this case, those inherent in the status of "parent", namely the care and nurturing of children, the biological difference is of significance primarily by reason of tradition or social custom, and only for that reason after the period of breast-feeding. It is that tradition which the law reflects rather than a real and important relevant natural fact . . . I am persuaded that the natural father and the natural mother are similarly situated, having regard to the purpose of the Act.
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> . . . Under the Act, if the natural father marries the mother and disappears the next day, his consent is required. His consent cannot be of any greater value to the Court in determining whether an adoption is in the best interest of a child, than that of a natural father who never married the mother. Marital status, in itself, bears no relationship to ability to nurture a child and consider its best interest.

By identifying the natural father not married to the child's natural mother as nonetheless like her for the purposes of the Adoption Act, the court answered two questions. The first is, does the law accord similar treatment to those who are alike, and the second is, what are the characteristics of the subgroup accorded dissimilar treatment? The answers to these questions allows one to determine that the Adoption Act distinguishes or discriminates and does so on the basis of sex and marital status. Further, a review of section 15 confirms that sex is an enumerated ground of discrimination in section 15 and that marital status is not.

Nothing more need be done in order to state that the Adoption Act is a law inconsistent with the right to equal protection of the law proclaimed in section 15 of the Charter and that it may be inconsistent with the Charter.[33] The first proposition is correct because the Adoption Act does not treat likes alike and the second is accurate because the ultimate evaluation of the Adoption Act takes place after the limitation feature of section 1 has been applied.

Thus, once a decision maker has concluded that likes have not been treated alike or that unlikes have been treated alike, all that remains to be determined is whether there is justification for this under section 1.[34] Precisely how this will be done is not now known as the Supreme Court of Canada has not yet decided a section 15 case. Consequently, one can only

32. [1987] 3 W.W.R. at 184-85.

33. Section 52(1) of the Charter: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency of no force or effect."

34. If the effect of the inequality is unimportant or trivial the courts will not interfere. *The Queen* v. *Jones* [1986] 2 S.C.R. 284 at 314; *The Queen* v. *Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713 at 759; *The Queen* v. *C.(R.)* unreported, 20 February 1987, (Ont. C.A.).

speculate as to the test or tests which the Supreme Court of Canada will consider appropriate. However, the Supreme Court in *The Queen* v. *Oakes*[35] examined section 1 in great detail and fashioned an analytical approach which in all likelihood will apply in section 15 cases. Current jurisprudence suggests that *Oakes*[36] applies in section 15 cases.[37]

Chief Justice Dickson's exegesis of section 1 proceeded on the understanding that those who defend the limitation of fundamental freedoms should be held "to a stringent standard of justification."[38] This orientation is attributable to three factors. First, Canada is committed to the creation and continued existence of a free and democratic society.[39] Second, the rights and freedoms guaranteed by section 1 of the Charter are deemed essential to such a society.[40] In *The Queen* v. *Big M Drug Mart*[41] his lordship, speaking of rights associated with a free and democratic political system, wrote, "They are the *sine qua non* of the political tradition underlying the Charter." Third, the protection of fundamental rights and freedoms is the raison d'etre of the Charter.[42]

The same principles apply, whether the section under scrutiny is 11(d), as was the case in *Oakes*, or section 15. None of the cases decided to date have suggested the contrary.[43]

In order to determine whether legislation which violates section 15 qualifies as a reasonable limit under section 1, four questions must be answered. First, is the legislative objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom"[44] so that it can be characterized as responsive "to concerns which are pressing and substantial in a free and democratic society?"[45] Second, are the legislative means "carefully designed to achieve the objective in question" and "rationally connected to the objective?"[46] If they are adjudged "arbitrary,

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35. [1986] 1 S.C.R. 103 at 135-40.
36. [1986] 1 S.C.R. 103.
37. *The Queen* v. *MacPherson* [1986] 6 W.W.R. 366 at 371 (Alta. Q. B.); *Kask* v. *Shimizu* [1986] 4 W.W.R. 154 at 168 (Alta. Q. B.); *Andrews* v. *Law Society of British Columbia* [1986] 4 W.W.R. 242 at 259 (B.C.C.A.); *Shewchuk* v. *Ricard* [1986] 4 W.W.R. 289 at 307 (B.C.C.A.); *Stoffman* v. *Vancouver General Hospital* [1986] 14 C.C.E.L. 146 (B.C.S.C.); *Piercey* v. *General Bakeries Ltd.* (1986) 31 D.L.R. (4th) 373 at 387-88 (Nfld. S.C.T.D.); *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems International Canada Ltd.* unreported 27 January 1987, S.C.A. No. 01635 (N.S.S.C.A.D.) at 22; *Reference re Family Benefits Act (N.S.), Section 5* (1987) 186 A.P.R. 338 at 356 (N.S.S.C.A.D.); *Fraser* v. *Nova Scotia* (1986) 180 A.P.R. 91 at 103-04 (N.S.S.C.T.D.); *The Queen* v. *Hamilton* (1987) 17 O.A.C. 241 (C.A.); *Blainey* v. *Ontario Hockey Association* (1986) 54 O.R. (2d) 513 at 527 (C.A.); *McKinney* v. *University of Guelph* (1986) 14 C.C.E.L. 1 at 34 (Ont. S.C.); *Wright* v. *Canada* (1986) 13 C.P.C. (2d) 63 at 76 (Ont. Dist. Ct.); *The Queen* v. *Monk* (1985) 43 Sask. R. 318 at 320 (Q.B.).
38. *The Queen* v. *Oakes* [1986] 1 S.C.R. 103 at 136.
39. *Id.* at 136.
40. *Id.* at 136.
41. *The Queen* v. *Big M Drug Mart* [1985] 1 S.C.R. 295 at 346.
42. *The Queen* v. *Oakes* [1986] 1 S.C.R. 103 at 136.
43. *See* n. 38 *supra.*
44. *The Queen* v. *Big M Drug Mart* [1985] 1 S.C.R. 295 at 352 quoted in *The Queen* v. *Oakes* [1986] 1 S.C.R. at 138.
45. *The Queen* v. *Oakes* [1986] 1 S.C.R. at 138.
46. *Id.* at 139.

unfair or based on irrational considerations" they will not pass constitutional muster.[47] Third, do the legislative means "impair 'as little as possible' the right or freedom in question?"[48] Fourth, is the effect of the legislation on members of society too severe, considering the relative importance of the objective, to warrant justification under section 1.

Elsewhere,[49] it has been argued that the standard of review under section 1 will be a function of a number of factors, including the following:

1. Whether the legislation offends a right or freedom set out in a section of the Charter other than section 15;
2. Whether the legislation utilizes a classification scheme enumerated in section 15;
3. Whether the legislation utilizes a classification scheme not enumerated in section 15.

The expectation is that the degree of scrutiny will not be the same in all instances.[50] Section 1 invites the use of flexible standards dependent on the importance of the right or freedom in question to a free and democratic society and the circumstances surrounding the infringement.[51] As a rule scrutiny will be the most demanding in categories 1 and 2 above. However, laws which adversely affect the enjoyment of important interests, such as access to the courts, may be subject to careful review, whether or not they utilize a classification system listed in section 15.

## IV. SECTION 15 CASE LAW REVIEW

We will now focus on what the courts have said about section 15. So far we have concentrated on what the law should be. As noted above, the Supreme Court of Canada has not addressed section 15 issues. However, the Federal Court of Appeal and several other appellate courts, including those of British Columbia, Ontario and Nova Scotia, as well as numerous superior and provincial courts across Canada, have interpreted section 15.

Unfortunately, the courts are deeply divided as to the correct approach to section 15 and no consensus has emerged. There are as many views as there are contributors to the subject, most judges finding something deficient in what others have said about section 15. In spite of this diversity, two schools of thought dominate the debate and jockey for position in the ultimate race which will be run in the Supreme Court of Canada.

One school argues that the equality rights set out in section 15 should be interpreted restrictively. Its proponents maintain that the word "discrimination" imports limits of reasonableness, rationality and fairness into section 15, independent of section 1. *Andrews* v. *Law Society of British*

47. *Id.* at 139.

48. *Id.* at 139.

49. Wakeling, "An Introduction to Section 15(1) of the Charter" 24 *Alta. L. Rev.* 412 at 438-40 (1986).

50. Chief Justice Dickson has stated that "some limits on rights and freedoms protected by the Charter will be more serious than others . . . ." *The Queen* v. *Oakes* [1986] 1 S.C.R. 103 at 139.

51. *The Queen* v. *Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713 at 768.

*Columbia* [52] is the leading case expounding this view and has attracted a considerable following.[53]

In *Andrews* [54] Justice McLachlin addressed the constitutionality of a provision in the Barristers and Solicitors Act which denied bar membership to noncitizens. Although ultimately finding the provisions to be in violation of section 15, she devoted considerable effort to the task of justifying the importation of considerations of reasonableness, rationality and fairness into the section 15(1) analysis prior to reference to section 1.

While Justice McLachlin agreed that the constitutional principle of equal protection required that "persons who are 'similary situated be similarly treated' and, conversely, that persons who are 'differently situated be differently treated'", she immediately qualified this statement in the following terms:[55]

> [s.]15 does not merely refer to laws that deny individuals the equal protection and equal benefit of the law, it stipulates that for there to be a violation, the denial of equal protection and benefit must be by legislation (or and executive act or an order) that discriminates. It is therefore necessary to consider what the phrase "without discrimination" means in s.15.

Justice McLachlin did not accept the proposition that the term "discrimination" is synonomous with "distinction", afraid that section 15 might subsume the other rights set out in the Charter and open the floodgates

52. [1986] 4 W.W.R. 242 (B.C.C.A.).

53. *Headley* v. *Public Service Commission Appeal Board* (1987) 72 N.R. 185 at 192 (Fed. C.A.) per Pratte, J.A.; *Nissho Corporation* v. *Bank of British Columbia* unreported 14 May 1987, No. 8603-12287 (Alta. Q. B.) at 10; *Singh* v. *Dura* unreported 6 May 1987, No. 8603-10125 (Alta. Q. B.) at 4; *The Queen* v. *McPherson* [1986] 6 W.W.R. 366 (Alta. Q. B.); *Re H.P.H.* (1987) 76 A.R. 235 (Alta. Prov. Ct.); *Rebic* v. *Collver* [1986] 4 W.W.R. 401 at 420-21 (B.C.C.A.); *British Columbia* v. *Husband* [1986] 5 W.W.R. 520 at 526 (B.C.S.C.); *Cromer* v. *British Columbia Teacher's Federation* [1986] 5 W.W.R. 638 at 651 (B.C.C.A.); *The Queen* v. *LeGallant* [1986] 6 W.W.R. 372 at 379 (B.C.C.A.); *Stoffman* v. *Vancouver General Hospital* (1986) 14 C.C.E.L. 146 (B.C.S.C.); *Harrison* v. *University of British Columbia* (1986) 14 C.C.E.L. 90 (B.C.S.C.); *N.M.* v. *Superintendent of Family and Child Services* [1987] 3 W.W.R. 176 (B.C.S.C.); *Newfoundland and Labrador Housing Corp.* v. *Williams* (1986) 178 A.P.R. 275 at 280 (Nfld. D.C.); *The Queen* v. *Century 21 Ramos Realty Inc.* unreported 27 February 1987, No. 592/85 (Ont. C.A.); *Jamorski* v. *Ontario* unreported 14 May 1987, No. RE 1777/86 (Ont. S.C.); *Aluminum Co. of Canada* v. *The Queen* (1986) 29 D.L.R. (4th) 583 at 593 (Ont. S.C.); *K Mart Canada Ltd.* v. *Millmink Developments* (1986) 31 D.L.R. (4th) 135 (Ont. S.C.); *L'Assoc. des Detaillants en Alimentation* v. *Le Ferme Carnival Inc.* unreported 6 August 1986, No. 500-05-009768-852 (Que. S.C.) at 52; *Westfair Foods Ltd.* v. *The Queen* unreported 14 January 1987 (Sask. Prov. Ct.).

54. [1986] 4 W.W.R. 242 (B.C.C.A.).

55. *Id.* at 248.

requiring all legislation "to run the gauntlet of section 1."[56] Nor did the *prima facie* approach of Justice Strayer in *Smith, Kline & French Laboratories Ltd.* v. *Canada*[57] appeal to her.

The alternative preferred by Justice McLachlin involved determining whether the impugned distinction was "reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected."[58] She concluded that the ultimate question under the section 15 analysis was:[59]

> [W]hether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected and giving due weight to the right of the legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable and unfair.

This approach severely curtailed the function of section 1. It would only be relevant during times of extraordinary emergency such as war. She gave as an example the internment of enemy aliens in times of war.[60]

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56. *Id.* at 250. Section 6 of the Charter provides useful direction in determining the meaning of the word "discrimination" in section 15. In paragraph 6(3)(a) the word "discriminate" is used in its neutral sense. That paragraph reads, in part: "any laws or practices . . . other than those that discriminate among persons on the basis of province of present or previous residence." "Discriminate" in this context is clearly interchangeable with "distinguish", a word having a neutral, as opposed to pejorative, meaning. If the word "discriminate" is used in section 6 in a neutral sense then the word "discrimination" in section 15 should logically be given a similar meaning, unless there is justification for a different interpretation. There is none.

    It is only recently that the word "discrimination" has taken on a pejorative connotation in Canadian society. C.B.A., *A Blue Print for Implementation of Constitutional Equality Rights* (June 17, 1985) 41. *The Oxford Universal Dictionary on Historical Principles* (3d ed. 1955) states that "discrimination" means "[t]o make or constitute a difference in or between, to differentiate." *Websters Third New International Dictionary* (1981) states that "discriminate" means to "make a distinction". This definition of the word "discrimination" was favored by Justice Wright in *Canada Safeway* v. *Steel and Manitoba Human Rights Commission* (1984) 27 Man. R. (2d) 79 at 85-86 (Man. Q.B.): "I will indicate for the record that the definition associated with the U.S. Human Rights legislation, where the wording is very similar to the Manitoba law, seems more consistent with the terminology used in our law. That definition is simply: 'To discriminate is to make a distinction, to make a difference in treatment or favour. (*See* reference to this in *Aros* v. *Mcdonnel Douglas Corporation* 5 F.E.T. 397 at 399).

    In *Aros*, the U.S. District Court, Central District of California, held that a different grooming code for men and women amounts to "discrimination". The court quoted the following statement in support of its position: "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor . . .' 5 E.P.D. para. 8418 at p. 7055 (U.S. Dist. Ct. 1972). The court then went on to say: "That interpretation reflects the common understanding of the word that has been adopted by courts construing Title VII . . . It is clear, therefore, that the term discrimination in this context contains no qualifications. Every difference in treatment is discrimination. 5 E.P.D. para. 8418 at pp. 7055-7056."

    Justice Wimmer, of the Saskatchewan Court of Queen's Bench agreed with Justice Wright. In *The Queen* v. *Monk* Justice Wimmer said: "In *Constitutional Law of Canada*, second edition Professor Hogg suggests at pages 799-800 that the word 'discrimination' as it appears in s.15 should be understood in its neutral as oppossed to pejorative — sense. That is, 'discrimination' should be read as a synonym for distinction or classification rather than as a synonym for bias or prejudice. Such an interpretation is consistent with the notion that the *Charter* should be given a broad and palliative application." (1985) 43 Sask. R. 318 at 319-320.

57. [1986] 1 F.C. 274 (T.D.).

58. [1986] 4 W.W.R. at 252.

59. *Id.* at 253.

60. *Id.* at 253.

After setting out her view of the proper approach, Justice McLachlin concluded that discrimination on the basis of citizenship was not reasonable or fair. For the very reasons set out in her analysis under section 15, she also concluded that such discrimination was not justified under section 1.

In contrast with the view of Justice McLachlin, the other school believes that section 15 should be interpreted in the same manner as every other section of the Charter and favors considering limits of reasonableness, rationality and fairness in the context of section 1. Only after it has been determined that equals have been treated unequally does the inquiry proceed to section 1 where the onus is on the government to show that the unequal treatment is reasonable, rational and fair, considering the purpose of the impugned legislation. The Federal Court of Appeal decision in *Smith Kline & French Laboratories Ltd.* v. *Canada* [61] contains one of the more recent statements of this theme, but there are many other converts to this view.[62]

The plaintiff in *Smith Kline & French Laboratories* [63] unsuccessfully alleged that the Patent Act discriminated against patent holders of medicines. The trial court held that the plaintiffs failed to establish that the Patent Act was oppressive and disproportionately discriminatory.[64]

At the appellate level Justice Hugessen rejected the analytical framework constructed by Justices Strayer and McLachlin, satisfied that they were inconsistent with *Oakes*:[65]

> If a category must be shown to be unreasonable or unfair before it can be said to give rise to a breach of equality rights, it is difficult to see how there can ever be room for application of section 1.

Elsewhere his lordship said "The tests of section 1 are not to be used as a gauge to determine the extent of Charter-guaranteed rights."[66]

There are, in addition, numerous variations of the two positions outlined above. However, most section 15 decisions may be categorized one way or the other depending on where they place the onus of proof with regard to reasonableness, rationality and fairness. Some decisions, such as those of Justice Strayer in *Smith, Kline & French Laboratories Ltd.* v. *Canada* [67] and Justice MacGuigan in *Headley* v. *Public Service Commission Appeal Board* [68] are hybrids of the two approaches to the interpretation of section 15.

Justice Strayer concluded that legislative use of a classification system listed in section 15 constitutes a breach of section 15 and obliges the user or

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61. Unreported 9 December 1986, No. A-909-85 (Fed. C.A.).
62. *Kask* v. *Shimizu* [1986] 4 W.W.R. 154 (Alta. Q. B.); *Shewchuk* v. *Ricard* [1986] 4 W.W.R. 289 (B.C.C.A.); *Piercey* v. *General Bakeries Ltd.* (1986) 31 D.L.R. (4th) 373 (Nfld. S.C.T.D.); *The Queen* v. *Hamilton* (1986) 17 O.A.C. 241 (C.A.); *McKinney* v. *University of Guelph* (1986) 14 C.C.E.L. 1 at 33 (Ont. S.C.); *Wright* v. *Canada* (1986) 13 C.P.C. (2d) 63 at 76 (Ont. D.C.); *The Queen* v. *Neely* (1985) 22 C.C.C. (3d) 73 (Ont. D.C.; *The Queen* v. *Monk* (1985) 43 Sask. R. 318 (Sask. Q.B.).
63. [1986] 1 F.C. 274 (T.D.).
64. *Smith Kline & French Laboratories Ltd.* v. *Canada* [1986] 1 F.C. at 325.
65. Unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 11.
66. *Id.* at 7.
67. [1986] 1 F.C. 274 (T.D.).
68. (1987) 72 N.R. 185 (Fed. C.A.).

a person relying on the legislation to defend its position under section 1.[69] If the legislation discriminates on grounds not enumerated in section 15, the complainant must show that the legislative ends are not "broadly legitimate for a government" and that the means are not "rationally related to the achievement of those ends"[70] before the government, or a litigant relying on the legislation, is called upon to justify the discrimination. Thus, Justice Strayer, with respect to the classification schemes set out in section 15, can be pigeonholed as a supporter of the view that section 1 and the concepts of reasonableness and fairness are linked. In other cases, he was prepared to abandon that relationship. Justice MacGuigan's views are consistent with Justice Strayer's:[71]

> To put it more exactly, I find the internal limit 'discrimination' to be required in all cases, but in some cases, viz. those based on the enumerated grounds, the drafters have already made the fundamental determination that pejorative distinctions based on those grounds constitute discrimination, whereas in other cases the complainant has to prove that discrimination results. In all cases the discrimination has to be more than trivial.

Given that the approach we set out above[72] completely isolates section 1 and section 15 issues, it is apparent that the analysis of which *Andrews* v. *Law Society of British Columbia*[73] is the leading example does not appeal to us. In our opinion that system does not comply with basic Charter jurisprudence.[74]

We believe that the court in *Andrews*[75] failed to appreciate the true nature of the relationship between section 1 and section 15. Justice McLachlin's assertion that the Supreme Court of Canada's decision in *Oakes*[76] "draws a clear distinction between the rights and freedoms guaranteed by the specific subsections following s.1, and s.1 which confirms them and limits them"[77] is not accurate enough. It is section 1 which both guarantees and limits the rights set out in the other sections of the Charter. Because of her apparent belief that section 15 guaranteed equality rights, she thought it logically necessary to find reasonable limits within that section as well. In *Oakes* the Supreme Court of Canada commented on this issue as follows:[78]

> It is important to observe at the outset that s.1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, secondly it states explicitly the exclusive justificatory criteria (outside of s.33 of the Charter) against which limitations on those rights and freedoms must be measured. Accordingly, any s.1

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69. [1986] 1 F.C. 274 at 318.
70. *Id.* at 274.
71. 72 N.R. 185 at 189-90.
72. *See* the text associated with nn. 21 to 51.
73. [1986] 4 W.W.R. 242 (B.C.C.A.).
74. *The Queen* v. *Oakes* [1986] 1 S.C.R. 103 and the cases which preceded it, such as *The Queen* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295. In *Southam* v. *The Queen (No. 1)* (1983) 3 C.C.C. (3d) 515 at 526 the Ontario Court of Appeal held that once an individual has established a *prima facie* breach of the Charter he is not required to "take a further step and establish . . . the negative, namely, that such infringement or limit is unreasonable!" *See also* K. Fogarty, *Equality Rights and Their Limitations in the Charter* (1987) 290.
75. [1986] 4 W.W.R. 242 (B.C.C.A.).
76. [1986] 1 S.C.R. 103.
77. [1986] 4 W.W.R. 242 at 247.
78. [1986] 1 S.C.R. at 135.

> inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada.

This statement demonstrates the fundamental duality of section 1 and that "s.1 . . . states . . . the exclusive justificatory criteria against which limits on . . . rights and freedoms must be measured." Thus, Justice McLachlin's view that section 15 guarantees a right is, with respect, clearly incorrect. Section 1 guarantees the right to equality and contains the exclusive criteria for limiting the right to equality. There is no suggestion of, or place for, the idea of considering reasonable limits on the right to equality before proceeding to section 1. Section 1 provides both the guarantee and the limit. Therefore, to say section 15 is infringed has no constitutional significance in the absence of section 1. If reference must be made to section 1 to find the "guarantee", it is not illogical to refer to section 1 for any reasonable "limit" on such guarantee.

The practical effect of addressing issues of reasonableness and rationality under section 1 instead of section 15 is to place the onus on the government to justify laws which do not treat similarly situated persons equally. Contrary to the opinion of Justice McLachlin, this does not trivialize the Charter. The section 1 requirement that the government justify situations where individuals are treated unequally enhances rather than trivializes the rights of the individual to equality.

We will now explain in detail the bases of our conviction that the opposing method of interpreting section 15 is preferable and then discuss a number of recent section 15 cases which are supportive of the position we take.

The school of thought of which the Federal Court of Appeal decision in *Smith Kline & French Laboratories* [79] is an example, advances a position which, unlike that in *Andrews*, is consistent with the wording of section 15. Those courts favoring the first approach invariably create numerous tests having no relation to the actual wording of the section. This is done to reduce the extent of and limit the rights protected by section 15. However, it disregards the plain wording of the Charter and section 15 in particular.

The Charter is not ambiguous on this issue. Section 15 sets out the right, equality, and section 1 describes how the right to equality is to be limited. The Charter guarantees the right to equality subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. As noted earlier, if a court adheres to this simple two part test every section 15 question can be answered in a consistent, logical and principled manner.[80]

Unlike other sections of the Charter there are no express limitations on the rights set out in section 15. There are no terms such as "arbitrary", "unreasonably", "reasonable" or "cruel and unusual" as appear in sections 8, 9, 11(a), 11(b), 11(e) and 12. The absence of limiting words such as "fair" or "reasonable" suggest that such limitations should not be found within section 15, but rather in section 1. This conclusion is

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79. Unreported 9 December 1986, No. A-909-85.

80. *See* the text associated with nn. 15 to 18.

supported by the decision of the European Court of Human Rights in the *Golder* case:[81]

> In the submission of the government the right to respect for correspondence is subject, apart from interference covered by paragraph 2 of article 8, to implied limitations . . . that submission conflicts with the explicit text of article 8. The restrictive formulation used at paragraph 2 ("there shall be no interference . . . except such as . . .") leaves no room for the concept of implied limitations.

Similarly, the United States concept of implied limitations has no application in Canada because of the express limitation provision in section 1 which is absent in the Constitution of the United States.[82]

A review of some of the initial drafts of what is now section 15 provides further evidence that limitations should not be built into section 15.[83] The "Federal Draft Proposals, February 5 to 6, 1979" contained the following clause:

> D. *Non-Discrimination Rights*
>
> 1. Right to equality before the law and equal protection of the law without distinction or limitation other than one which is provided by law and fair and reasonable having regard to the object of the law.

The "Discussion Draft, Rights and Freedoms within the Canadian Federation, July 4, 1980" contained a redrafted non-discrimination clause:

> *Non-discrimination Rights*
>
> 7.(1) Everyone has the right to equality before the law and to equal protection of the law without distinction or restriction other than any distinction or restriction provided by law that is fair and reasonable having regard to the object of the law.

In the "Federal Draft, The Canadian Charter of Rights and Freedoms, August 22, 1980" all of the limitation clauses were removed from the various categories of rights and a separate limitation clause, similar to the present section 1, was inserted in their place.

It is also significant that in the final draft of section 15 the heading was changed to "Equality Rights" from "Non-discrimination Rights," thus de-emphasizing the concept of "discrimination" and highlighting the concept of "equality".[84] The emphasis in section 15 is on the four statements of equality and not on the words "without discrimination." Justice McDonald's statement in *Kask* v. *Shimizu* [85] confirms this: "[T]he debate on [what is meant by the word discrimination does not] shed light upon the scope of s. 15(1)."

There is nothing in section 15 to suggest that the phrase "without discrimination" should be viewed as a limitation or restriction on the concept of equality. This must be true with respect to two of the four equality concepts which appear in section 15. The phrase "without discrimination" does not refer to the phrase "equal before and under the

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81. (1975) 18 Eur. Ct. H.R. 4 at 21.

82. *Black* v. *Law Society of Alberta* [1986] 3 W.W.R. 590 at 615-16 (Alta. C.A.).

83. It should be emphasized that the interpretation of a Charter provision should not be decided on the basis of the legislative history of the Charter. *Reference re Section 94(2) of the Motor Vehicle Act* (1985) 23 C.C.C. (3d) 289 (S.C.C.).

84. *See Law Society of Upper Canada* v. *Skapinker* (1984) 9 D.L.R. (4th) 161 at 176-77 (S.C.C.), for a discussion of headings in the Charter.

85. [1986] 4 W.W.R. at 159.

law."[86] With respect to the phrase "equal protection and equal benefit of the law", Professor Bayefsky's explanation is convincing. She maintains that the words "without discrimination" in section 15 serve the sole purpose of permitting a grammatical "because of."[87]

Rather than importing notions of reasonableness and rationality, the words "without discrimination" assist in determining the nature of the rights set out in section 15. "Equality — or at least equality of treatment — and discrimination are positive and negative statements of the same principle."[88] The concept of discrimination implies the imposition of unequal conditions in comparable cases, in other words the unequal treatment of equals.[89] Thus, the words "without discrimination" highlight the principle that only those similarly situated for the purposes of the impugned legislation are entitled to similar treatment thereunder.

Once this important principle is understood, fears that every distinction will amount to an infringement of section 15 will disappear. Distinctions which do not create inequality or unequal treatment are not proscribed. This is the message conveyed in each of the following quotations:

> The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.[90]
>
> At the most basic level, the equality rights guaranteed by section 15 can only be the right to those similarly situated to receive similar treatment. The issue will be to know, in each case, which categories are permissible in determining similarity of situation and which are not.[91]
>
> It is first necessary to determine what meaning should be ascribed to "equal protection and equal benefit." Legislation which classifies or differentiates between groups or individuals does not, per se, violate the requirement of equal protection or benefit. Almost all legislation classifies or differentiates. Indeed, in order to ensure equal protection and equal benefit, it may be necessary for the legislature to treat groups and individuals differently . . . In my view, the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are "similary situated be similarly treated" and, conversely, that persons who are "differently situated by differently treated" . . .[92]

By way of summary, unequal treatment of the kind addressed in section 15 does not exist unless those similarly situated are treated differently or those not similarly situated are treated alike. No other criteria determines inequality and it is not only unnecessary but unwarranted to introduce concepts such as fairness or reasonableness into section 15. To do so not only confuses section 1 and section 15 issues, but ignores the directive of the Supreme Court of Canada to give the Charter a broad and liberal

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86. *Id.* at 160.

87. Bayefsky, *Defining Equality Rights* in *Equality Rights and The Canadian Charter of Rights and Freedoms* (1985) 27.

88. *Id.*

89. *Smith Kline & French Laboratories Ltd.* v. *Canada*, unreported 9 December 1986, A-909-85 (Fed. C.A.) at 8.

90. *The Queen* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 347.

91. *Smith Kline & French Laboratories Ltd.* v. *Canada*, unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 6.

92. *Andrews* v. *Law Society of British Columbia* [1986] 4 W.W.R. 242 at 248 (B.C.C.A.).

interpretation. Justice Dickson, as he then was, wrote in *The Queen* v. *Big M Drug Mart Ltd.*,[93]

> The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

Many judges have resisted the temptation to parachute tests of relevance and rationality into the definition of equality. Instead they have interpreted section 15 as mandated by the express wording of the Charter, reserving questions of reasonableness, rationality and fairness for consideration under section 1. Because their contribution is noteworthy we will mention some of them.

In *Piercey* v. *General Bakeries Ltd.* [94] Chief Justice Hickman saw no need to establish special rules for the interpretation of section 15. His lordship said:[95]

> I shall approach the question raised under the Charter in the two steps suggested by the Ontario Court of Appeal in *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638 at p. 654, 4 C.C.C. (3d) 385, 41 O.R. (2d) 225:
>
> First, it has to be determined whether the guaranteed fundamental right or freedom has been infringed, breached or denied. If the answer to the question is in the affirmative, then it must be determined whether the denial or limit is a reasonable one demonstrably justified in a free and democratic society.

Chief Justice Hickman struck down provisions of the Newfoundland Worker's Compensation Act which restricted the rights of certain employees to maintain an action in court for injuries arising in the course of employment. When considering the application of the Charter to this issue, Chief Justice Hickman was impressed by the importance of the concept of equality to the whole of the Charter:[96]

> If one uses an holistic approach when interpreting the Charter, he or she will conclude that the cornerstone of that noble document is that the law shall be equally applied to all Canadians and that the somewhat restricted escape-hatch ostensibly provided in section 1 shall be used sparingly indeed and only for the most compelling reasons. In my view, the courts when called upon to interpret or implement the Charter, should not be timid but rather, should apply the words of Lord Denning M.R. who, when referring to the Great Charter of 1214, in his book, *What Next in the Law* (1982), wrote: "It flows into the estuaries and up the rivers. It cannot be held back."

In *Wright* v. *Canada* [97] Judge Killeen declined to follow *Andrews* v. *Law Society of British Columbia*:[98]

> With respect, I have some grave reservations about importing a judge-made "rule of unreasonableness" into the language of s. 15(1). The specific inclusion of such a standard of construction into s.. 15(1) would lead, I fear, to a watering down of the rights guaranteed by the section. If it should be imported into s. 15(1), I would ask, why should it not be equally imported into all of the other sections of the Charter purporting to protect and guaranty fundamental rights and freedoms of Canadians? And if it is so imported, whether selectively or across-the-board, where does that leave s. 1 under which the persuasive burden is clearly placed on the government to justify incursions on the rights and freedoms of the subject under the "reasonable limits" standard?

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93. [1985] 1 S.C.R. 295 at 344. In *Dixon* v. *British Columbia* [1987] 1 W.W.R. 313 at 324 (B.C.S.C.) Chief Justice McEachern held that "narrow technical arguments should not be employed to avoid Charter scrutiny."

94. (1986) 31 D.L.R. (4th) 373 (Nfld. S.C.T.D.).

95. *Id.* at 383.

96. *Id.* at 387.

97. (1986) 13 C.P.C. (2d) 63 at 76 (Ont. Dist. Ct.).

98. [1986] 4 W.W.R. 242 (B.C.C.A.).

In setting out the main structural difference between the American Constitution and the Canadian Charter of Rights and Freedoms, Judge Killeen highlighted the major practical consequence of a decision on this issue — the determination of where the burden of proof should rest:[99]

> Numerous American commentators have noted that the U.S. Supreme Court has allowed itself to fall into a quagmire of dubious verbal doctrines in an effort to deal with equal protection issues. One central reason for this is that the U.S. Bill of Rights lacks an equivalent of our s. 1 under which a "reasonable limits" burden is cast upon governments. I think we should be wary of building a rule of unreasonableness into the s. 15(1) inquiry — especially where it casts an evidentiary burden on the subject — when the Charter itself expressly commands in s. 1 that the government must bear the burden of justification under the reasonable limits criterion.

Judge Killeen placed the burden of proof on the government, requiring it to justify under section 1 any limitation on equality rights set out in section 15(1). When addressing section 1, he said:[100]

> Section 1 justification is now controlled by the criteria set out in the judgment of Chief Justice Dickson in *R.* v. *Oakes*, supra. There, the Chief Justice constructs a preliminary evidentiary presumption to the effect that the rights and freedoms of the Charter are guaranteed unless the party invoking s.1 — invariably the government — can bring itself within what he calls the "exceptional criteria" which can justify their limitation . . .

Justice Gray in *McKinney* v. *University of Guelph* [101] followed this pattern, obliging the government to answer questions of rationality, reasonableness and proportionality under the section 1 analysis. He quoted Chief Justice Dickson in *Oakes* [102] as authority for "separating the analysis into two components."[103] Having found mandatory retirement to be inconsistent with the concept of equality he then proceeded to analyze the rationality and reasonableness of the policy under section 1. Based on the evidence before him he was satisfied that a policy of mandatory retirement was reasonable in a free and democratic society.

Panels of the British Columbia, Ontario, Nova Scotia and Federal Courts of Appeal have supported the view that considerations of reasonableness, rationality and fairness should be restricted to the inquiry under section 1. We will now refer to their work.

Writing for the majority, Justice Macfarlane of the British Columbia Court of Appeal in *Shewchuk* v. *Ricard*,[104] stated that the "relevance, rationality and absence of arbitrary or capricious conduct are all matters to consider when asking whether a breach can be justified under the criteria provided by s. 1." *Shewchuk* v. *Ricard* [105] dealt with a challenge to a provision of the Child Paternity and Support Act. Justice Macfarlane found that the legislation did not treat parents, who were equals, equally. However, he held that the limits contained within the Child Paternity and Support Act were, pursuant to section 1, reasonable in a free and democratic society.

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99. 13 C.P.C. (2d) 63 at 76.
100. *Id.* at 76.
101. (1986) 14 C.C.E.L. 1 (Ont. S.C.).
102. [1986] 1 S.C.R. 103.
103. 14 C.C.E.L. 1 at 33.
104. [1986] 4 W.W.R. 289 at 305.
105. *Id.* at 305.

In *The Queen* v. *Hamilton* [106] Justice Dubin of the Ontario Court of Appeal tracked this course. In analyzing section 15 he first noted "that as a general rule it is fundamental that the . . . law treat all individuals in like circumstances equally."[107] Justice Dubin then applied this principle to the uneven proclamation of section 234(2) and 236(2) of the Criminal Code and held that:[108]

> Individuals in this province who are within the class of persons contemplated by ss. 234(2) and 236(2) (now s. 239(5)) are denied the equal protection and equal benefit of the law by reason of the failure of these sections of the *Criminal Code* to have been proclaimed to be in force in this province and they are entitled to a remedy unless the Crown can support the uneven application of the law pursuant to s. 1 of the Charter . . .

His lordship then found that the Crown had failed to satisfy the burden cast upon it to justify the denial of equality by showing some desireable social objective which would justify the failure to proclaim the sections of the *Criminal Code* under consideration in force in the province of Ontario.

A five member panel of the Nova Scotia Supreme Court Appeal Division in *Reference re Family Benefits Act (N.S.), Section 5* [109] unanimously and decisively rejected the notion that "a test of reasonableness is necessary under s.15(1)." The court stated as follows:[110]

> [s.]1 of the *Charter* does not come into play until a prima facie violation of a right under s.15(1) has been established. As there is a general test under s.1 for justifying limitations on Charter rights, we do not think it is appropriate to create standards for justifying departures under s.15(1). We see nothing in the wording of s.15(1) which would warrant such an interpretation and, indeed, to attempt the formulation of a test under s.15(1) would conflict with or duplicate the "reasonable classification" test in s.1.

On the facts before the court certain provisions of section 5 of the Family Benefits Act were found to be discriminatory and in conflict with section 15(1). After concluding that section 15(2) had no application, the court proceeded to section 1, concluding that the impugned provisions were unreasonable limits, the Attorney General not having shown that the distinction between males and females bore any true relationship to the relief of poverty.

The panel of the Federal Court of Appeal for which Justice Hugessen wrote in *Smith Kline & French Laboratories Ltd.* [111] endorsed this view of section 15. Justice Hugessen explicitly rejected the two-tiered approach to the definition of section 15 rights favored by a number of panels of the British Columbia Court of Appeal:[112]

> The difficulty I have with those decisions, as I understand them, is that they conclude that the ultimate test as to whether any given legislative category is in breach of section 15 is whether it meets the twin standards of reasonableness and fairness. With respect, I find this test impossible to reconcile with the teaching of *Oakes*. If a category must be shown to be unreasonable or unfair before it can be said to give rise to a breach of equality rights, it is difficult to see how there can ever be room for application of section 1.

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106. (1986) 17 O.A.C. 241 at 261-62.
107. *Id.* at 261.
108. *Id.* at 262.
109. (1986) 186 A.P.R. 338 at 351.
110. *Id.* at 351.
111. Unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 6.
112. Unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 10-11.

Justice Hugessen opined that the key to the interpretation of section 15 lay not in determining the reasonableness or fairness of the discrimination but, rather, in the determination of the categories of individuals who are similarly situated for the purposes of any given law. He did not believe it was necessary to import limits reserved for section 1 into section 15 because in his view "the text of the section itself contains its own limitations. It only proscribes discrimination amongst members of categories which are themselves similar."[113]

## V. MISCELLANEOUS MATTERS

Now that we have detailed the questions constitutional adjudicators must answer in section 15 cases and reviewed the leading section 15 decisions, we will concentrate on a number of problem areas disclosed in the general section 15 case law, not already discussed. Some of the topics will have been covered indirectly, but not in sufficient detail. In this part we will examine the consequences of a restrictive definition of those classes of persons similarly situated, the significance of the enumeration in section 15, whether section 15 extends to corporations and novel propositions raised by some courts in the context of section 15.

### A. IDENTIFICATION OF THOSE SIMILARLY SITUATED

The identification of those who are similarly situated with respect to the purpose of the law is a crucial function. As noted above,[114] this decision defines those whose interests may be adversely affected by legislation inconsistent with section 15(1). Justice Hugessen emphasized the significance of this stage of the inquiry in this passage:[115]

> At the most basic level, the equality rights guaranteed by section 15 can only be the right of those similarly situated to receive similar treatment. The issue will be to know, in each case, which categories are permissible in determining similarity of situation and which are not.

The case for a level of abstraction sufficiently general to allow the proper assessment of all relevant interests has been made elsewhere:[116]

> Care has to be taken to utilize a level of abstraction which accurately reflects the nature of the problem under legislative consideration. By narrowing the focus unduly the analyst may omit a crucial part of the problem and cause the inquiry to be brought to an abrupt and premature end. This would be the result if it was determined that a complainant is not a member of the group who is similarly situated with respect to the purpose of the law . . . For this reason, courts must utilize a level of abstraction comparable to that incorporated in s.15(1). In other words, because s.15(1) employs a broad focus, so should the courts.

In short, as a decision to exclude a claimant from membership in the group similarly situated with respect to the purpose of a law effectively concludes the constitutional investigation before it has commenced, it should not be made if there is a plausible argument in favor of including the claimant in

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113. Unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 8. *See also* K. Fogarty, *Equality Rights and Their Limitations in the Charter* (1987) 335.

114. *See* the text associated with nn. 27 to 35.

115. *Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 6.

116. Wakeling, "An Introduction to Section 15(1) of the Charter" 24 *Alta. L. Rev.* 412 at 419-21 (1986).

the group. This will exist if the candidate shares any important common features with those who are undoubtedly members of the class similarly situated. A restrictive treatment of those who are alike is not in keeping with the general rule that the Charter receive a generous interpretation.

This caution has been accepted by many as salutary,[117] but not all. Some have been quick to conclude that the plaintiff is not a constituent of the similary situated group.[118] On occasion this is the correct decision.[118A] In many instances a good case for the opposite conclusion existed. *Mirhadizadeh* v. *Ontario* [119] illustrates this situation. The defendant successfully claimed the plaintiff's negligence action was barred by section 11 of the Public Authorities Protection Act, as an action against any person for an act done in pursuance of statutory authority must be commenced within six months after the cause of action arose. One would have expected those similarly situated to be described as follows: plaintiffs in negligence actions commenced in Ontario. Justice Steele's focus was not that general:[120]

> In the present case all persons wishing to commence actions are subject to the same provision. There is not discrimination between one class of plaintiff and another.

As a result, the court did not assess the reasons which led to the passage of the Public Authorities Protection Act.

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117. *The Queen* v. *MacPherson* [1986] 6 W.W.R. 366 at 368-369 (Alta. Q. B.) (all Canadians accused of Criminal Code offences are alike); *Kask* v. *Shimizu* [1986] 4 W.W.R. 154 (Alta. Q. B.) (resident and nonresident plaintiffs are alike); *Re H.P.H.* 76 A.R. 235 at 239 (Prov. Ct. 1987) (all young offenders are alike); *Shewchuk* v. *Ricard* [1986] 4 W.W.R. 289 at 306 (B.C.C.A.) per Macfarlene J.A. (male and female parents are alike); *Newfoundland & Labrador Housing Corp.* v. *William* (1986) 178 A.P.R. 275 at 278 (Nfld. Dist. Ct.) (all tenants are alike); *Zutphen Bros. Constr. Ltd.* v. *Dywidag Systems Int'l Canada Ltd.* unreported 27 January 1987, S.C.A. No. 01635 (N.S.S.C.A.D.) at 21-22 (Crown and other litigants alike); *Nova Scotia* v. *Phillips* unreported 27 November 1986, S.C.A. No. 01587 (N.S.S.C.A.D.) (needy males and female with dependents alike); *McDonald* v. *The Queen* (1985) 51 O.R. (2d) 745 at 766 (C.A.); (all Canadian young persons charged with criminal offences are alike); *McKinney* v. *University of Guelph* (1986) 14 C.C.E.L. 1 at 33 (Ont. S.C.) (employees over and under sixty-five are alike); *The Queen* v. *Monk* (1985) 43 Sask. R. 318 at 320 (Q.B.) (all persons who have sex with young persons are alike); *The Queen* v. *Scrutton* unreported 30 September 1986 (Sask. Prov. Ct.) (all retailers regardless of size are alike).

118. *Nissho Corp.* v. *Bank of British Columbia* unreported 14 May 1987, No. 8603-12287 (Alta. Q. B. Chambers) at 10 (resident and nonresident plaintiffs not alike); *Singh* v. *Dura* unreported 6 May 1987, No. 8603-10125 (Alta. Q. B.) at 15 (resident and nonresident plaintiffs not alike); *Re H.P.H.* (1987) 76 A.R. 235 at 238-39 (Prov. Ct.) (young and adult offenders not alike); *Shewchuk* v. *Ricard* [1986] 4 W.W.R. 289 at 292 (B.C.C.A.) per Nemetz C.J. (male and female parents not alike); *British Columbia & Yukon Territory Bldg. & Constr. Trades Council* v. *British Columbia* (1985) 66 B.C.L.R. 279 at 294 (S.C.) (unionized workers on Expo 86 site not like unionized workers on other sites); *Continental Distributors Ltd.* v. *Township of Richmond* unreported 13 June 1985, No. A850915, Vancouver Registry (B.C.S.C.) at 9 (building permit holders in excess of $25,000.00 not like those with smaller sums); *The Queen* v. *R.L.* (1986) 14 O.A.C. 318 at 328-29 (C.A.) (young and adult offenders not alike); *Gerald Shapiro Holdings Inc.* v. *Natham Tessis & Assoc. Inc.* unreported 18 November 1986, No. 21985/84 (Ont. S.C. Chambers) at 8 (resident and nonresident plaintiffs not alike); *Meldrum* v. *City of Saskatoon* (1985) 46 Sask. R. 239 (Q.B.) (all plaintiffs in actions defended by municipalities not alike);

118A. *Wyebee Dev. Ltd.* v. *First Investors Corp.* (1986) 32 D.L.R. (4th) 595 at 600 (Alta. Q. B.) (owner and operator under the Surface Rights Act not alike); *The Queen* v. *Swain* (1986) 13 O.A.C. 161 at 187-88 (C.A.) (insane acquittee and person acquitted simpliciter are not the same).

119. (1986) 13 C.P.C. (2d) 1 (Ont. S.C.).

120. *Id.* at 5.

*Streng* v. *Corporation of Winchester*,[121] a case involving the limitation period in the Municipal Act, illustrates the alternative orientation available to the court. Justice Smith's focus was much broader:[122]

> The class created here is that of persons suffering personal injuries as a result of the negligence of others. The class may be further narrowed by including only those suffering injuries in car accidents. All members of such a class are entitled to expect, in the normal course, to be treated alike.

This decision obliged his lordship to consider the role limitation periods played in the administration of justice. In the absence of a cogent case for special rules dependent on the identity of the defendant, the plaintiff was allowed to continue his action.

Two other decisions demonstrate why courts should be inclined to adopt an abstract description of those who are similarly situated. In *The Queen* v. *R.L.* [122A] and *Re H.P.H.* [122B] the Ontario Court of Appeal and the Alberta Provincial Court respectively held that young offenders were not in the same class as persons accused of offences but who were older than young offenders. These courts obviously did not consider a sufficient identity existed just because these persons were the subject of criminal or quasi-criminal charges. We would have concluded that this common feature was enough to warrant their inclusion in the same group. In any event, we would have been reluctant to state that legislation which distinguishes on the basis of age does not even violate section 15, when age is a prohibited ground of discrimination. Is it not incongruous to hold that legislation which discriminates on the basis of age does not offend section 15 because persons affected by the discriminatory legislation are not alike, their age being a sufficient ground to distinguish them?

## B. SIGNIFICANCE OF THE GROUNDS ENUMERATED IN SECTION 15

There are two points we wish to make here. First, principles of interpretation strongly suggest that the words "in particular" do not introduce the only grounds of classifiction which may be constitutionally

121. (1986) 31 D.L.R. (4th) 734 (Ont. S.C.).

122. *Id.* at 741.

122A. (1986) 14 O.A.C. at 325-29 (C.A.).

122B. (1987) 76 A.R. 235 at 237-38 (Prov. Ct.).

suspect. Many courts have so held.[123] On the other hand, several have expressed the view that the only grounds beyond those listed in section 15 are "similar types of discrimination."[124] Why this is so is difficult to understand. Reasons were not given and we cannot think of any. The *ejusdem generis* rule certainly does not apply. As has been noted elsewhere,[125] "The House of Lords, in *Ambatielos* v. *Anton Jurgens Margarine Works*, and the Judicial Committee of the Privy Council, in *Canadian National Rys.* v. *Canadian Steamship Lines, Ltd.*, have held that where general words precede particular instances the *ejusdem generis* rule does not apply."

Until the Supreme Court of Canada finally settles this issue, Canadian courts should take their lead from the Permanent Court of International Justice.[126] In 1935 the League of Nations asked the court whether the abolition of private schools in Albania conformed with the letter and spirit of article 5 of the Albanian Declaration of October 2, 1921. The first paragraph in article 5 reads:[127]

> Albania nationals who belong to racial, linguistic or religious minorities, will enjoy the same treatment and security in law and in fact as other Albanian nationals. *In particular* they shall have an equal right to maintain, manage and control at their own expense or to establish future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and exercise their own religion freely therein. (emphasis added)

In commenting on the second sentence in Article 5, the court said:[128]

> This sentence of the paragraph being linked to the first by the words "in particular", it is natural to conclude that it envisages a particularly important illustration of the application of the principle of identical treatment in law and in fact that is stipulated in the first sentence of the paragraph.

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123. *Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 6 (by implication); *Smith Kline & French Laboratories Ltd.* v. *Canada* [1986] 1 F.C. 274 at 317 (T.D.); *Andrews* v. *Law Society of British Columbia* [1986] 4 W.W.R. 154 at 160 (Alta. Q. B.); *British Columbia & Yukon Territory Bldg. & Const. Trades Council* v. *British Columbia* [1985] 66 B.C.L.R. 277 at 287-22 (S.C. Chambers); *Baker* v. *Association of Professional Engineers* unreported 23 September 1985, No. 852 089 Vancouver Registry (B.C.S.C.); *Piercey* v. *General Bakeries Ltd.* (1986) 31 D.L.R. (4th) 373 at 384 (Nfld. S.C.T.D.); *Newfoundland & Labrador Housing Corp.* v. *Williams* (1986) 178 A.P.R. 275 at 278 (Nfld. Dist. Ct.); *Zutphen Bros. Constr. Ltd.* v. *Dywiday Systems Int'l Canada Ltd.* unreported 27 January 1987, S.C.A. No. 01635 (N.S.S.C.A.D.); *The Queen* v. *Doucette* unreported 29 November 1985, County of Halifax (Prov. Ct.) at 21; *The Queen* v. *Hamilton* (1986) 17 O.A.C. 241 at 257 (C.A.); *Streng* v. *Township of Winchester* (1986) 31 D.L.R. (4th) 734 at 740-41 (Ont. S.C.); *Wright* v. *Canada* (1986) 13 C.P.C. (2d) 63 at 72-73, (Ont. D.C.); Some consider the question unresolved: *B.C.T.F.* v. *British Columbia* [1987] 1 W.W.R. 527 (B.C.C.A); *N.M.* v. *Superintendent of Family and Child Services* [1987] 3 W.W.R. 176 at 186 (B.C.S.C.); *Weinstein* v. *Minister of Education* [1985] 5 W.W.R. 724 at 738 (B.C.S.C.); *McDonald* v. *The Queen* (1985) 51 O.R. (2d) 745 at 766 (C.A.); *K Mart Canada Ltd.* v. *Millmink Developments Ltd.* (1986) 31 D.L.R. (4th) 135 at 146-47 (Ont. S.C.); *The Queen* v. *Scrutton* unreported 30 September 1986 (Sask. Prov. Ct.) at 22.

124. *Beltz* v. *Law Society of British Columbia* (1986) 31 D.L.R. (4th) 685 at 694 (B.C.S.C.); *Mirhadizadeh* v. *Ontario* (1986) 13 C.P.C. (2d) 1 at 5 (Ont. S.C.); *Westfair Foods Ltd.* v. *The Queen* unreported 14 January 1987 (Sask. Prov. Ct.) at 18.

125. Chipeur, "Section 15 of the Charter Protects People and Corporations — Equally" 11 *Can. Bus. L.J.* 304 at 310 (1986).

126. *Minority Schools in Albania*, P.C.I.J. Series A/B, No. 64 (1935).

127. *Id.* at 5.

128. *Id.* at 19.

Arguments that the guarantee of equality is limited to the grounds enumerated in section 15 and that the phrase "without discrimination" limits and restricts the application of section 15 are both reminiscent of the position advanced by the Albanian government in *Minority Schools in Albania.* [129]

Second, there is one aspect of the existing section 15 case law which deals with section 1 that is surprising. On those few occasions when the legislation under review featured a classification ground listed in section 15, reference is seldom made to its presence in section 15 and the consequences thereof.[130] It would appear that courts are content to apply the *Oakes* [131] criteria, satisfied it has the flexibility needed to cope with all situations.[132] One would have thought, however, that the presence of an enumerated ground of discrimination would have provoked some comment. Does it have any impact on the justification standard? If not, why not? If it does, what impact? Should the court utilize a more demanding standard of review? Are the enumerated grounds to receive equal consideration or are some more invidious than others?[132A]

Justice Gray's decision in *McKinney* v. *University of Guelph* [133] is one of the few instances, of which we are aware, where any of these issues were even raised. This case, it will be remembered, considered mandatory retirement. The employers submitted that "age discrimination [was] distinguishable from the other enumerated grounds such as race and religion because other forms of discrimination are often based on feelings

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129. *Id.*

130. In *Reference re Family Benefits Act (N.S.), Section 5* (1986) 186 A.P.R. 338 at 351-55 the Nova Scotia Supreme Court Appeal Division noted that the subject legislation discriminated on the basis of sex and reviewed the American treatment of sex discrimination. *McKinney* v. *University of Guelph* (1986) 14 C.C.E.L. 1 (Ont. S.C.) is the only other case in which the court had before it discrimination on one of the enumerated grounds and acknowledged the fact. The following cases made no reference to this fact: *N.M.* v. *Superintendent of Family and Child Services* [1987] 3 W.W.R. 176 (B.C.S.C.) (sex); *The Queen* v. *R.L.* (1986) 14 O.A.C. 318 (C.A.) (age); *Blainey* v. *Ontario Hockey Assoc.* (1986) 54 O.R. (3d) 513 (C.A.) (age); *Gerol* v. *Canada* (1985) 85 D.T.C. 5561 (Ont. S.C.) (age).

131. *The Queen* v. *Oakes* [1986] 1 S.C.R. 103. Courts have predictably heeded *Oakes* [1986] 1 S.C.R. 103 when considering section 1 and have interpreted "reasonable limits" in a manner consistent with that developed by Chief Justice Dickson. *See The Queen* v. *MacPherson* [1986] 6 W.W.R. 366 at 371 (Alta. Q. B.); *Kask* v. *Shimizu* [1986] 4 W.W.R. 154 at 169-71 (Alta. Q. B.); *Shewchuk* v. *Ricard* [1986] 4 W.W.R. 289 at 307 (B.C.C.A.); *Piercey* v. *General Bakeries Ltd.* (1986) 31 D.L.R. (4th) 373 at 387 (Nfld. S.C.T.D.); *Zutphen Bros. Constr. Ltd.* v. *Dywidas Systems Int'l, Canada Ltd.* unreported 27 July 1986, S.C.A. No. 01635 (N.S.S.C.A.D.) at 24; *The Queen* v. *R.L.* (1986) 14 O.A.C. 318 at 329 (C.A.); *Blainey* v. *Ontario Hockey Assoc.* (1986) 54 O.R. (2d) 513 at 527 (C.A.); *McKinney* v. *University of Guelph* (1986) 14 C.C.E.L. 1 at 34 (Ont. S.C.); *Wright* v. *Canada* (1986) 13 C.P.C. (2d) 63 at 78 (Ont. D.C.). In general, courts which have tackled section 1 issues have not deferred to legislative preferences and have exercised independent judgment.

132. *See The Queen* v. *Edwards Books* [1986] 2 S.C.R. 713 at 768 and *Jamorski* v. *Ontario* unreported 14 May 1987, No. RE 1777/86 (Ont. H.C.) at 51-52, and the text associated with nn. 36 to 51.

132A. *See* Ross, "Levels of Review in American Equal Protection and Under the Charter" 24 *Alta. L. Rev.* 441 (1986).

133. (1986) 14 C.C.E.L. 1 (Ont. S.C.). *See also Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, A-909-85 (Fed. C.A.) at 9. *Smith Kline & French Laboratories Ltd.* v. *Canada* [1986] 1 F.C. 274 at 318 (T.D.); *Reference re Family Benefits Act (N.S.), Section 5* (1986) 186 A.P.R. 338 at 351 (N.S.S.C.A.D.).

of hostility and intolerance."[134] These arguments appealed to the court: "There is much to be said for the view that limitations on age equality should be viewed less suspiciously and less strictly than limitations on other equality rights."[135] What impact this conclusion had on Justice Gray's evaluation of the merits of mandatory retirement is not stated in the judgment.

## C. CORPORATIONS AND THE TERM "INDIVIDUAL"[136]

Courts which have given a restrictive definition to the word "discrimination" in section 15 have committed a similar error when defining the word "individual." Ignoring the Supreme Court of Canada's direction to give the Charter a generous rather than legalistic interpretation, the majority of decisions addressing the issue have excluded corporations from the definition of "individual" in section 15.[137] Only the trial judge in *Milk Board* v. *Clearview Dairy Farms Inc.* [138] has gone so far as to expressly include corporations within the protection of section 15.[139]

With respect, courts excluding corporations from section 15 have made a number of fundamental errors in reasoning. These are attributable to a misunderstanding of the nature of the Charter as a constitutional document[140] and to the narrow and literal interpretation given to section 15.

134. 14 C.C.E.L. 1 at 49.

135. *Id.* at 49. Justice Strayer in *Smith Kline & French Laboratories Ltd.* v. *Canada* [1985] 1 F.C. 274 at 318 (T.D.) stated that "It may be that distinctions based on certain grounds such as age may be more readily justified under s.1 . . . ."

136. For further discussion of this issue see Chipeur, "Section 15 of the Charter Protects People and Corporations — Equally," 11 *Can. Bus. L.J.* 304 (1986), Wakeling, "An Introduction to Section 15(1) of the Charter," 24 *Alta. L. Rev.* 412, 424-425 (1986), and Gertner, "Are Corporations Entitled to Equality?: Some Preliminary Thoughts" 19 C.R.R. 288 (1986).

137. *Aerlinte Eireann Teoranta* v. *Canada* (1987) 9 F.T.R. (Fed. Ct. T. D.); *Smith Kline & French Laboratories Ltd.* v. *Canada* [1986] 1 F.C. 274 (T. D.); *Nissho Corporation* v. *Bank of British Columbia* unreported 14 May 1987, No. 8603-12287 (Alta. Q.B.); *Mund* v. *Medicine Hat* (1985) 67 A.R. 11 (Q.B.); *Milk Board* v. *Clearview Dairy Farm Inc.* unreported 4 March 1987, No. A851874 (B.C.C.A.); *Homemade Winecrafts (Canada) Ltd.* v. *British Columbia* (1986) 26 D.L.R. (4th) 468 (B.C.S.C.);*Surrey Credit Union* v. *Mendenca* (1985) 67 B.C.L.R. 310 (S.C.); *Gerald Shapiro Holdings Inc.* v. *Nathan Tessis Associates Inc. (No. 2)* unreported 18 November 1986, No. 21985/84 (Ont. S.C.); *K Mart Canada Ltd.* v. *Millmink Developments Ltd.* (1986) 31 D.L.R. (4th) 135 (Ont. S.C.); *Aluminum Co. of Canada Limited* v. *The Queen* (1986) 29 D.L.R. (4th) 583 (Ont. S.C.); *L'Association Des Detaillants en Alimentation* v. *La Ferme Carnavol Inc.* unreported 6 August 1986, No. 500-05-009768-852 (Que. Sup. Ct.); *Kurolak* v. *Minister of Highways and Transportation* (1986) 28 D.L.R. (4th) 273 (Sask. Q.B.). None of these courts have given full consideration to all of the arguments advanced herein in favour of the inclusion of corporations within the definition of "individual".

138. 69 B.C.L.R. 220 at 245-246 (S.C.). *See also Board of Trustees of Fort McMurray Roman Catholic School District No. 32* v. *Board of Trustees of Fort McMurray School District No. 2833* unreported 19 February 1986, No. 8303-26095 (Alta. Q.B. Master); *The Queen* v. *Scrutton* unreported 30 September 1986 (Sask. Prov. Ct.); *Zutphen Brothers Construction Limited* v. *Dywidag Systems International, Canada Limited* unreported 27 January 1987, S.C.A. No. 01635 (N.S. Sup. Ct. App. Div.). Other decisions which have, by implication, included corporations within the protection of section 15 include: *Westfair Foods Ltd.* v. *The Queen* unreported 14 January 1987 (Sask. Prov. Ct.) at 19; *Cabre Exploration Ltd.* v. *Arndt* [1986] 4 W.W.R. 261 at 266 (Alta. Q.B.); *Father Don's Natural Products Ltd.* v. *Canada* (1986) 65 N.R. 62 (Fed. C.A.).

139. On appeal, the Court of Appeal disagreed with the trial judge on this issue. Unreported 4 March 1987, No. CA005312, at 14.

140. *See Dixon* v. *British Columbia* [1987] 1 W.W.R. 313 (B.C.S.C.) for a good discussion of the nature of the Charter.

Courts commit another mistake in concluding that the definition of the word "individual" is particularly relevant when a corporation raises a section 15 issue.[141] It is not most of the time. If the corporation is properly before the court it matters not that corporations may be excluded from the definition of the word "individual" in section 15. The generally applied standing principles would allow a corporation to raise section 15 regardless of whether "individual" includes corporations.[142] By virtue of section 52, the Charter governs all laws applied by the courts regardless of the nature of the parties before them. As noted by Justice Dickson, as he then was: "It is the nature of the law, not the status of the accused, that is in issue."[143] The definition of the word "individual" will only be relevant where the impugned legislation discriminates solely against corporations.[144]

Some err by granting undue weight to pre-Charter case law examining the meaning of "individual" in the Canadian Bill of Rights.[145] For reasons set out more fully elsewhere, the Canadian Bill of Rights cases are not sound precedents.[146] The Canadian Bill of Rights and the Charter have major differences. For example, the French version of the word "individual" in the Canadian Bill of Rights is "individu", in the Charter it is "personne." The word "personne" in the context of section 24(1) of the Charter has been interpreted to include corporations.[147]

Very little assistance can be gained from reference to Parliamentary intention or to the legislative history of the drafting of section 15.[148] The Supreme Court of Canada has held that such evidence should be given "minimal weight."[149] A court would be hard pressed to identify any relevant intention in the actions of the British Parliament. As well, it would be impossible to distil a common intention from the actions or statements of

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141. *See Nissho Corporation* v. *Bank of British Columbia* unreported 14 May 1987, No. 8603-12287 (Alta. Q.B.) at 8-9; *Gerald Shapiro Holdings Inc.* v. *Nathan Tessis & Associates Inc. (No. 2)* unreported 18 November 1986, No. 21985/84 (Ont. S.C.).

142. *See Nissho Corporation* v. *Bank of British Columbia* unreported 14 May 1987, No. 8603-12287 (Alta. Q.B.)at 8-9. For the latest Supreme Court of Canada review of the requirements for standing see *Finlay* v. *Canada* (1986) 71 N.R. 338 (S.C.C.).

143. *The Queen* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 314.

144. *See* Gertner, "Are Corporations Entitled to Equality?: Some Preliminary Thoughts" 19 C.R.R. 288 at 296. *Zutphen Brothers Construction Limited* v. *Dywidag Systems International, Canada Limited* unreported 27 January 1987, S.C.A. No. 01635, (N.S.S.C.A.D.) at 12, recognizes this principle.

145. *Surrey Credit Union* v. *Mendonca* 67 B.C.L.R. 310 (S.C.); *Parkdale Hotel Ltd.* v. *Canada* (1986) 27 D.L.R. (4th) 19 at 35-37 (Fed. Ct. Tr. Div.); *Re Homemade Winecrafts (Canada) Ltd. and B.C.* (1986) 26 D.L.R. (4th) 468 at 471 (B.C.S.C.); K. Fogarty, *Equality Rights and Their Limitations in the Charter* (1987) 286.

146. Chipeur, "Section 15 of the Charter Protects People and Corporations — Equally" 11 *Can. Bus. L.J.* 304 at 306-308 (1986).

147. *See* Chipeur, "Section 15 of the Charter Protects People and Corporations — Equally" 11 *Can. Bus. L.J.* 304 at 314-315 (1986).

148. Cases which have made reference to these factors include *Homemade Winecrafts (Canada) Ltd.* v. *British Columbia* (1986) 26 D.L.R. (4th) 468 at 471-72 (B.C.S.C.); and *K Mart Canada Ltd.* v. *Millmink Developments Ltd.* (1986) 31 D.L.R. (4th) 135 at 147 (Ont. S.C.).

149. *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)* [1985] 2 S.C.R. 486 at 507-509.

the Prime Minister, various premiers, cabinet ministers and other politicians who spoke out during the entrenchment process.[150]

One would be required to conduct an extensive search through a large body of material of questionable legal relevance to find any comments on why the word "individual" was used in section 15. One judge has noted that:[151]

> Upon reviewing the minutes of the meetings held by the Special Joint Committee of Parliament on the Constitution, there appears to be no reference to the reason for changing the clause from:
>
> 15(1) Everyone has the right to equality before the law and to the equal protection . . .
>
> as the section existed in the Proposed Constitutional Resolution of October, 1980, to its present form.

Some courts have relied on the *ejusdem generis* rule to limit the application of section 15 and the definition of the word individual.[152] However, as noted above, the rules of statutory construction do not justify such reliance. Where general words precede particular instances, as in section 15, the *ejusdem generis* rule has no application.[153]

As noted above, the Supreme Court of Canada in *The Queen* v. *Big M Drug Mart Ltd.* [154] has provided some fairly clear indications of the approach that should be taken to the debate over whether a corporation can raise Charter issues. This theme surfaced again in *Reference re Public Service Employee Relations Act (Alta.).*[155] Justice McIntyre noted that groups, which would include corporations, were entitled to the protection of the Charter.[156] His reasoning follows closely that of the United States Supreme Court in *Pembina Consol. Silver Min. & Milling Co.* v. *Pennsylvania.* [157] In *Pembina* the Supreme Court held that corporations were included

150. "Given that the final product — the Constitution Act, 1982 — was the result of negotiations between 10 provincial premiers and the Prime Minister of Canada, a last minute agreement between 9 premiers and the Prime Minister, lengthy committee hearings, debate in the House of Commons and the Senate, as well as the ultimate Act of the Parliament of the United Kingdom, the intention of the drafters (whoever they might be) will remain an elusive will o' the wisp!" Gertner, "Are Corporations Entitled to Equality?: Some Preliminary Thoughts" 19 C.R.R. 288 at 291-292 (1986).

151. *Parkdale Hotel Ltd.* v. *Canada* (1986) 27 D.L.R. (4th) 19 at 35 (Fed. Ct. T. D.).

152. *See, for example, Nissho Corporation* v. *Bank of British Columbia* unreported 14 May 1987, No. 8603-12287 (Alta. Q.B.) at 5, and *L'Associatien Des Detaillants en Alimentation* v. *La Ferme Carnaval Inc.* unreported 6 August 1986, No. 500-05-009768-852 at 48.

153. *Canadian National Rys.* v. *Canada Steamship Lines. Ltd.* [1945] 3 D.L.R. 417 at 420 (P.C. Can.), [1945] A.C. 204 at 211; *see also* Chipeur, "Section 15 of the Charter Protects People and Corporations — Equally" 11 *Can. Bus. L.J.* 304 at 310 (1986).

154. [1985] 1 S.C.R. 295 at 312-315 (nature of the law and not status of the parties is important).

155. Unreported 9 April 1987, No. 19234.

156. Justice McIntyre opined that: "[T]he group can exercise . . . constitutional rights of its individual members on behalf of those members!" at 8. Elsewhere in his cogent reasons for judgment he asserted that: "Individual rights protected by the Constitution do not lose that protection when exercised in common with others!" at 17. His lordship was of the view that freedom of association under section 2(d) of the Charter bound the legislature to "treat groups and individuals alike!" At 19. Of course this conclusion does not mean that corporations and individuals must be treated identically in every situation. Only when the corporation and the individual are similarly situated for the purposes of the impugned legislation will section 15 come into play.

157. 125 U.S. 181, S. Ct. 737 (1988). Some Canadian courts have found "individual" to be a synonym of "person" and have included corporations within the definition of "individual". *Gray* v. *Woodgrove Chevrolet Oldsmobile Ltd.* unreported 14 May 1985, No. CC5727, (B.C. Co. Ct.) at 15.

under the designation "person" in the equal protection clause of the United States Constitution. In coming to that conclusion the court said:[158]

> Under the designation of "person" there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall: "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men." *Bank* v. *Billings*, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state.

It may be that some courts are hesitant to accord equality rights to corporations in the belief that to do so unduly emphasizes the importance of economic rights in the Charter. Many have questioned whether the pursuit of economic ends should be accorded constitutional protection. However, that is not the issue when considering whether corporations are entitled to rely on section 15. Equal protection of the law is a concern which goes "far beyond those of a merely pecuniary nature."[159]

If a corporation were claiming that section 15 entrenched some right of a purely economic nature, closer scrutiny may be necessary.[160] However, where a corporation has been treated unequally in connection with an otherwise lawful activity, the government must justify such inequality under section 1 of the Charter. This is so whether the discrimination applies to corporations and human beings or solely to corporations. The following example will illustrate this point.

If the Canadian government were to enact legislation preventing both natural persons and corporations from leasing government lands where the natural person or corporation, as the case may be, has made a political donation to the Rhinoceros Party, such legislation would surely be struck down as, among other things, inconsistent with section 15. Would the legislation be any less suspect if corporations were the only entities suffering a disability for making a political donation to the Rhinoceros Party? There can be no justification for discrimination against a corporation on the basis of its political affiliation. The right to equality is an important value in our society whether or not it is connected with economic interest and regardless of the nature of those asserting it.

## D. NOVEL PROPOSITIONS

Some unexpected restrictions have been placed on the scope of section 15. While we have already discussed many of them, there are two more which merit attention. The first surfaced in *Smith Kline & French Laboratories Ltd.* v. *Canada.* [161] Justice Hugessen argued that judicial deference to decisions of Parliament and legislative assemblies should exceed that granted to statutory delegates. Unfortunately, if there is

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158. *Pembina Consol. Silver Min. & Milling Co.* v. *Pennsylvania* 125 U.S. 181 at 188-189, 8 S. Ct. 737 at 741 (1888).

159. *Reference re Public Service Employee Relations Act (Alta.)* unreported 9 April 1987, No. 19234 (S.C.C.) at 45 per Dickson C.J.

160. *See Reference re Public Service Employee Relations Act (Alta.)* unreported 9 April 1987, No. 19234 (S.C.C.) at 45.

161. Unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 10.

authority for that point, it is not cited. We would suspect that there is none. This is not to argue that judicial deference is inappropriate. In some circumstances it is.[162] Obviously, the Charter does not invite judges to act as a super legislature.[163] What it does ask them to do is assess Charter compliance based on principles inherent in the Charter and developed by the case law and prior constitutional experience.[164] Neither the Charter nor the case law suggests that the identity of the actor, whether it be Parliament, legislative assemblies or statutory delegates, has anything to do with the validity of the act in question. We acknowledge that judicial deference will be in order in many cases but resist the conclusion that it "will be greatest where the categories are found in the very text of the legislation and will diminish as they . . . become further removed from the expression of legislative will, either by delegation or indirection."[165] We note, however, that considerations of judicial deference do not belong within the section 15(1) inquiry.[166] With its reference to a "democratic society" section 1 is ideally suited for such questions. Interestingly, the Alberta Court of Appeal did not invoke this doctrine in *Black* v. *Law Society of Alberta*, [167] a challenge to rules enacted by The Law Society of Alberta. Nor did the British Columbia Supreme Court in *Stoffman* v. *Vancouver General Hospital*, [168] a challenge to a retirement age established by hospital trustees.

Justice Steele in *Mirhadizadeh* v. *Ontario* [169] and Judge Allan in *Westfair Foods Ltd.* v. *The Queen* [170] jointly contributed the second proposition that we had in mind. The former stated that "The Charter does not apply to property rights"[171] and the latter "concluded that s.15(1) shouldn't be extended to economic interests . . ."[172] in the course of dismissing a complaint by large retailers forced to close Sunday that the Sunday closing law discriminated against large retailers. With respect, this cannot be correct. Suppose that a law prohibited short people from owning fast food

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162. *Stoffman* v. *Vancouver General Hospital* (1986) 14 C.C.E.L. 146 at 155 (B.C.S.C.).

163. *Harrison* v. *University of British Columbia* 14 C.C.E.L. 90 at 94-95 (B.C.S.C.). Justice Wakeling in *Iron* v. *The Queen* [1987] 3 W.W.R. 97 at 105 (Sask. C.A.) wrote: "I would prefer an approach based on public expectations to one based on the perception that the Charter is marshalling in a whole new social and economic order which only some of the judges who interpret it are able to perceive and appreciate."

164. *See Dixon* v. *Birtish Columbia* [1987] 1 W.W.R. 313 (B.C.S.C.). Judge Fogarty wrote: "Legislators themselves will have to recognize that the Charter was designed by them to curb legislative action which would create inequalities unless it can be established that reasonable limits to the equality rights can be justified." *Equality Rights and Their Limitations in the Charter* (1987) 335.

165. *Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, No. A-909-85 (Fed. C.A.) at 10.

166. *Andrews* v. *Law Society of British Columbia* [1986] 4 W.W.R. 242 at 253 (B.C.C.A.), *N.M.* v. *Superintendent of Family and Child Services* [1987] 3 W.W.R. 176 at 182 (B.C.S.C.) and *Smith Kline & French Laboratories Ltd.* v. *Canada* unreported 9 December 1986, No. A-909-85 (Fed. C.A.), all consider this issue within the context of section 15(1).

167. [1986] 3 W.W.R. 590.

168. (1986) 14 C.C.E.L. 146 (B.C.S.C.).

169. (1986) 13 C.P.C. (2d) 9 (Ont. S.C.).

170. Unreported 14 July 1987 (Sask. Prov. Ct.) at 17.

171. (1986) 13 C.P.C. (2d) 1 at 5 (Ont. S.C.).

172. Unreported 14 July 1987 (Sask. Prov. Ct.) at 17.

outlets. Would a court decline to declare such a law inconsistent with section 15 because the discrimination resulted in harm to an economic interest? It is acknowledged that the interests protected by section 15 are not economic interests, but neither are they interests of life or liberty. Section 15 protects equality interests. It matters not whether the impugned discrimination affects economic interests or those of life or liberty. Equality among those similarly situated is a value in and of itself worth preserving in the Charter.

Other than these two statements there is no authority for the proposition that section 15 does not apply where economic or property rights are being defended. This is not surprising given that section 6(2) of the Charter explicitly acknowledges that Canadians and others, have the right "(a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province."[173] In *Reference re Public Service Employee Relations Act (Alta.)* [174] Chief Justice Dickson, in dissent, referred to the argument that economic interests are not protected by the Charter. His lordship was of the opinion that at least where the interests went "beyond those of a merely pecuniary nature" they were entitled to Charter protection.[175] Surely equality interests would qualify under the Chief Justice's approach.

## VI. CONCLUSION

In the introduction we stated that the courts have been reluctant to grant section 15 an independent status. They have, in many instances, introduced considerations appropriate only under section 1 and thereby impaired their ability to assess section 15 values free of extraneous concepts such as reasonableness and fairness. The parts which followed hopefully explained the basis for our opinion and clearly described what needs to be done to ensure that section 15 is allowed to mature and join the Charter family as a contributing and independent member.

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173. *See Black* v. *Law Society of Alberta* [1986] 3 W.W.R. 590 (Law Society rules impeding formation of national law firms unconstitutional); *Beltz* v. *Law Society of British Columbia* (1986) 31 D.L.R. (4th) 685 at 693 (B.C.S.C. Chambers).

174. *Reference re Public Service Employee Relations Act (Alta.)* unreported 9 April 1987, No. 19234 (S.C.C.) at 45 and 48.

175. *Reference re Public Service Employee Relations Act (Alta.)* unreported 9 April 1987, No. 19234 (S.C.C.) at 45.