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The Evolving Approach to Section 15(1): Diminished Rights or Bolder Communities?

Roslyn J. Levine, Q.C. and Jonathon W. Penney*

I. INTRODUCTION

Inevitably, cases of complex and far-reaching constitutional issues form a dynamic platform on which earlier conflicts within the case law are resolved and new ones develop.¹ One concern that refuses resolution, to this point, is the precise balance between the values and interests that define the right to equality under section 15 of the Charter² and those that characterize justification, under section 1.³ The issue has

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¹ See, e.g., the often cited disagreement among members of the Court as to the role “irrelevant personal characteristic” should play in determining whether a law is discriminatory in *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143; *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 [hereinafter “*Egan*”]; *Thibaudeau v. Canada (Minister of National Revenue)*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627, 124 D.L.R. (4th) 449, and *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418, was eventually resolved by the Court’s unanimous decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 [hereinafter “*Law*”]. In addition, the Court in *Law* continued its emphasis on enumerated and analogous grounds despite L’Heureux-Dubé J.’s advocacy in *Egan* for an approach that focused less on the grounds and more on the discrimination itself. Some, like Professor Pothier, agreed with the Court on its chosen direction. See Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 C.J.W.L. 37, at 49. In recent years, however, others have argued that L’Heureux-Dubé J.’s approach is appropriate in certain circumstances: see Daphne Gilbert, “Time to Regroup: Rethinking Section 15 of the Charter” (2003) 48 McGill L.J. 627; Jonathon Penney, “A Constitution for the Disabled or a Disabled Constitution? Toward a New Approach to Disability for the Purposes of s. 15(1)” (2002) 1 J.L. & Equality 83.

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

³ See e.g., the disagreements between the judgments of Gonthier, L’Heureux-Dubé and McLachlin JJ. in *Miron*, in particular the comments of McLachlin J., at 486. See also the disagreements among members of the Court in *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769 [hereinafter “*Lavoie*”], wherein Bastarache J., for the plurality, rejected the consideration of

foiled legal commentators and the Supreme Court of Canada alike. In 2004, the Supreme Court's calendar included a number of high profile section 15 challenges.⁴ In this article, we suggest that in the past year, the Court embarked on a changed approach to the values and interests embodied in section 15; it took a direction that demonstrates greater recognition of community interests and a corresponding movement away from past emphasis of individualistic and subjective concerns.

The year's cases addressed a broad variety of claims that attempted to engage the equality right in a wide variety of circumstances. Remarkably, none of the challenges was successful. More surprisingly, in three of four cases the Court determined that section 15 was not violated and dismissed the claims without resort to section 1.

In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*⁵ the children's advocacy organization asked the Court to find that the section 43 defence in the *Criminal Code* violated children's equality rights. The provision exempts parents from the assault sections of the *Code* if they use reasonable disciplinary force, such as "spanking," when correcting their children. *Auton v. British Columbia*⁶ tested the claim by autistic children that the *Health Act* (B.C.) breached their equality rights by failing to include coverage for special therapy that did not meet the definition of medical services. Section 15 was not violated in these circumstances.

"practical, moral, economic, or social underpinnings of the legislation in question" within the s. 15(1) analysis. In terms of academic debate on the ss. 15(1) and 1 balance, see e.g., Jim Hendry, "The Idea of Equality in Section 15 and Its Development" (2002) 21 Windsor Y.B. Access Just. 153; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299, at 319-32; June Ross, "A Flawed Synthesis of the Law" (2000) 11 Const. F. Const. 74; Christopher Bredt & Ira Nishisato, "The Supreme Court's New Equality Test: A Critique" (September-October 2000) 8 Can. Watch 16 [hereinafter "Nishisato"]; Peter W. Hogg, *Constitutional Law of Canada* (Stud. ed. 2001), at 1007-15; Leon E. Trakman, William Cole-Hamilton & Sean Gatten, "R. v. Oakes 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83; Bev Baines, "Law v. Canada: Formatting Equality" (2000) 11 Const. F. Const. 65.

⁴ See e.g., *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381, 244 D.L.R. (4th) 294 [hereinafter "NAPE"]; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 [hereinafter "Canadian Foundation"]; *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 [hereinafter "Same Sex Marriage Reference"]; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657, 245 D.L.R. (4th) 1 [hereinafter "Auton"]; *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357, 244 D.L.R. (4th) 257 [hereinafter "Hodge"].

⁵ *Supra*, note 4.

⁶ *Supra*, note 4, citing R.S.B.C. 1996, c. 179.

The case of *Hodge v. Canada*⁷ concerned a separated common law spouse's challenge to her differential treatment under the Canada Pension Plan, which denied her a survivor's pension, but provided it to married but separated spouses. Once again, no section 15 violation was found. In *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*⁸ the Court examined the claim of women workers whose previously hard fought "pay equity" payments were cancelled by legislation aimed at fiscal restraint. Here, the Court departed significantly from previous cases that had completely rejected economic justification. Although section 15 was violated, the legislation was upheld.

Lastly in the *Same Sex Marriage Reference*,⁹ the Court assessed the constitutionality of the proposed same-sex marriage legislation but refused to answer the pointed equality question referred to it by the federal government, that is, whether the traditional, opposite-sex definition of marriage violates the section 15 rights of gay and lesbian couples.

In each of these decisions, the Court exhibited ideas about equality that illustrate a shift away from its previous, more individualistic, approach to the values and interests in section 15. The "community" has always resided in section 1, where violations of the individual's rights were justified by communitarian standards. This year, however, the Court has taken a more communitarian approach to section 15.

In Part II of this paper, we discuss the major themes of "communitarian"¹⁰ social theory and the work of prominent legal commentators and jurists who have advocated this ethic and criticized the Supreme Court of Canada's section 15 approach as individualistic and subjective. In Parts III to VI, we suggest that the Court's most recent equality rights decisions give effect, in various ways, to communitarian themes. Finally, in Part VII we assess the Court's move toward a more communitarian approach, including its advantages and shortcomings.

⁷ *Supra*, note 4.

⁸ *Supra*, note 4.

⁹ *Supra*, note 4.

¹⁰ Phillip Selznick, "The Idea of a Communitarian Morality" (1987) 75 Calif. L. Rev. 445, at 445-47. See Part II for a more authoritative discussion of communitarian theory.

II. SECTION 15 AND COMMUNITARIAN THOUGHT

1. Modern Communitarian Thought and Canadian Constitutionalism

Heavily influenced by modern sociology, communitarian thought has emerged in the last 20 years to challenge traditional and contemporary theories of liberalism advocated by John Rawls, Robert Nozick and Ronald Dworkin — the school of thought that has dominated recent political theory.¹¹ Though differences exist among the various theorists most often associated with communitarian thought — Charles Taylor, Alasdair MacIntyre, Michael Sandel and Michael Walzer¹² — some common themes are identifiable throughout. First, communitarians criticize the overly subjective and individualistic understanding of the person in traditional liberal theory.¹³ According to communitarians, traditional liberal theory places importance primarily on personal liberty and equality and perceives the individual as existing prior to his or her social relationships and community.¹⁴ As MacIntyre writes, liberal theory requires us to “abstract ourselves from all those particularities of social relationships of which we have been accustomed to understand our responsibilities and our interests.”¹⁵ For communitarians, this heavily subjective account of the “self” fails to recognize that people do not exist in isolation, but live and grow in social relationships and communities:

What is denied to [liberal theory’s] unencumbered self is the possibility of membership in any community bound by moral ties

¹¹ *Id.*, at 445-7. Writers Charles Taylor, Alasdair MacIntyre, Michael Sandel and Michael Walzer are most often cited as “communitarian” theorists. See Michael Sandel, *Liberalism and the Limits of Justice* (2nd ed. 1998); Alasdair MacIntyre, *After Virtue* (2nd ed. 1984); Charles Taylor, “Cross-Purposes: The Liberalism-Communitarian Debate” in Rosenblum (ed.), *Liberalism and the Moral Life* (1989); Charles Taylor, *Philosophy and the Human Sciences: Phil. Papers*, Vol. 2 (1985); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983). The political theories challenged by the communitarians were the traditional liberal theories, and their many permutations, as articulated by John Stuart Mill, John Rawls and Robert Nozick. See John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, 1971); Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974); John Stuart Mill, *On Liberty*, Himmelfarb, (ed.) (Knopf, 1974).

¹² Jeffrey Friedman has identified at least four different versions of communitarian thought. See Jeffrey Friedman, “The Politics of Communitarianism” (1994) 8 *Critical Rev.* 297.

¹³ Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (1990), at 207.

¹⁴ *Id.*

¹⁵ Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), at 3.

antecedent to choice; he cannot belong to any community where the self itself could be at stake. Such a community – call it constitutive as against merely cooperative – would engage the identity as well as the interests of the participants, and so implicate its members in a citizenship more thoroughgoing than the unencumbered self can know.¹⁶

In other words, for communitarians, the individual must be understood as existing *within* the community and its network of social and moral arrangements and not prior, or in opposition, to the community. This relational and community-based theory of the person led communitarians to place less emphasis on the subjective and atomistic aspects of individualism associated with liberal theory.¹⁷

A second, related theme among communitarians is to emphasize the importance of community interests. This follows logically from the first theme. If the individual is understood as embedded in the community, then in order to accommodate the interests of the individual one has to identify and accommodate the interests of the community.¹⁸ Thus, what emerges is a “shared understanding both of the good for man and of the good of that community.”¹⁹

These themes are inherent in the communitarians’ moral compass. In their view, understanding the importance of the community to the identity and social and personal development of the individual is to show greater respect for the dignity of that individual:

Our sense of self, including our sense of worthiness, is strongly influenced by our social settings, including the prevailing moral frameworks. As social beings, most of us need to feel that we are valued members of the community. A social and political system that systematically devalues and demeans a key element in our identity

¹⁶ Michael J. Sandel, “The Procedural Republic and the Unencumbered Self” (1984) 12 *Political Theory* 81, at 87.

¹⁷ Kymlicka, *supra*, note 13, at 216.

¹⁸ Kymlicka calls this the “social thesis.” See Kymlicka, *supra*, note 13, at 216-17.

¹⁹ MacIntyre, *supra*, note 11, at 250. For example, this paper will not focus on more expansive or “harder” communitarian themes wherein the state abandons neutrality to advocate and preserve the “morals” or “conception of the good” of the broader community. See Kymlicka, *supra*, note 13, at 217-24.

cannot but affect how we live our lives, including how much actual liberty we have (even if our formal liberty-rights are protected).²⁰

The evident and key rationale for the communitarian movement is its promotion of a more accurate representation of the relationship between individual and community — one that is a good deal more nuanced and integrated and one that provides greater respect for the individual.

These communitarian themes have had deep influence on recent political theory.²¹ Indeed, as noted by Hilliard Aronovitch, prominent liberal theorists like John Rawls and Ronald Dworkin have “reformulated” their respective liberal theories to take into account the important role of community.²² Given this influence, it is not surprising that these themes have emerged in Canadian legal commentary and scholarship.

In fact, many concerns regarding the initial enactment of the Charter could be characterized as communitarian. As a traditional liberal constitution enumerating mainly individual rights, the Charter brought about a sea change in Canadian constitutional “ethos” toward more individualistic values.²³ One central concern was that the Charter prioritized individualism and personal rights over the broader social concerns of the community. Thus, Andrew Petter notably wrote that the Charter is “a nineteenth-century liberal document set loose on a twentieth-century welfare state” that was “more likely to undermine than to advance the interests of the socially and economically disadvantaged Canadians.”²⁴ In this regard, as James B. Kelly noted, section 15 of the Charter — as the provision that protects the individual’s right to equality — was seen as a particular looming threat to the “diversity” of the Canadian community:

²⁰ Richard Nordahl, “Ronald Dworkin and the Defense of Homosexual Rights” (1995) 8 Can. J.L. & Juris. 19, at 40-41.

²¹ See, e.g., the discussion between prominent commentators Charles Taylor, Michael Walzer, Susan Wolf, Steven C. Rockefeller and Jurgen Habermas in Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1998).

²² See Hilliard Aronovitch, “A Liberal Reading of the American Constitution: A Critical Notice of Ronald Dworkin” (1997) 10 Can. J.L. & Juris. 521, at 523-24.

²³ Roger Gibbins, “The American Constitution and Canadian Constitutional Politics”, in Marian C. McKenna (ed.), *The Canadian and American Constitutions in Comparative Perspective* (1993) 131, at 139.

²⁴ Andrew Petter, “Immaculate Deception: The Charter’s Hidden Agenda” (1987) 45 Advocate 857, at 857.

The equality rights in section 15 of the *Charter* came into force in 1985, and it was feared that this section would pose the most serious threat to federal diversity in Canada. Russell suggested that section 15(1) would have a centralizing effect because “many of the social, economic and cultural policies to which the Supreme Court will apply egalitarian norms have been subject to determination at the provincial level.”²⁵

Similar to the concerns of the communitarians, legal scholars predicted that the Charter’s individualistic values would prove detrimental to the broader interests of the Canadian polity.

These concerns and criticisms did not go unanswered. The common and simple response was that the Charter, notwithstanding its individualistic values, provided ample opportunity to address the interests of the community within the section 1 justification analysis.²⁶ Equally, this was the Supreme Court’s answer.²⁷ Early in its jurisprudence, the Court expressed its view that individual equality rights under section 15 should be defined broadly, while any competing interests — such as the social interests of the community — should be addressed under section 1. In *Miron v. Trudel*, McLachlin J., as she then was, wrote:

This division of the analysis between s. 15(1) and s. 1 accords with the injunction to which this Court has adhered from the earliest Charter cases: courts should interpret the enumerated rights in a broad and generous fashion, leaving the task of narrowing the *prima facie*

²⁵ James B. Kelly, “The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997” (1999) 37 Osgoode Hall L.J. 625, at 639.

²⁶ In the words of Professor Wayne MacKay, section 1 provides an “escape hatch” for the legislature to address important competing interests and social concerns: MacKay, “The Legislature, The Executive and the Courts: The Delicate Balance of Power or Who is Running this Country Anyway?” (2001) 24 Dalhousie L.J. 37, at 55. Professors Kent Roach and Peter Hogg, among others, have argued that section 1 provides not only an opportunity for the Court to balance competing interests, but also allows the legislature to participate in a “Charter dialogue” with the Courts. See e.g., Kent Roach, “Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures” (2001) 80 Can. Bar Rev. 481, at 483; Peter Hogg and Allison Thornton, “Reply to ‘Six Degrees of Dialogue’ ” (1999) 37 Osgoode Hall L.J. 529; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001).

²⁷ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 [hereinafter “*Oakes*”]. For a discussion, see J. Daniels, “Valid Despite Vagueness: The Relationship Between Vagueness and Shifting Objective” (1994) 58 Sask. L. Rev. 101.

protection thus granted to conform to conflicting social and legislative interests to s. 1.²⁸

Accordingly, that early approach led the Court to adopt a traditional liberal and individualistic analysis of equality; individuals and their interests, such as “freedom” and autonomy, were understood in conflict with or in opposition to the interests of the community:

This principle [of equality under section 15] recognizes the dignity of each human being and each person’s freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. It recognizes that society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences.²⁹

Here, McLachlin J., in contrast to communitarians, posed the interests of individuals as prior to and separate from any interests of the “community as a whole.”

However, this has often been an imperfect balance. In several cases, the Court has taken a narrow approach to interests considered under section 1. For example, in its decision in *Sauvé*³⁰ the majority rejected Parliament’s rationale for limiting the voting rights of prisoners, which drew heavily upon “social and political philosophy,” as an improper attempt to insulate the right violation from the Court’s review.³¹ Further, under section 1 the Court has repeatedly rejected economic considerations of the government as a sufficient rationale to limit Charter rights.³² In *Singh*, Wilson J., writing for the majority, expressed serious doubt that the government could use “utilitarian considerations” as legitimate reasons to limit Charter rights.³³ If utilitarian concerns cannot provide a basis to limit rights, then what sorts of community interests does section 1 involve?

²⁸ *Miron*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418, at 486.

²⁹ *Miron*, *id.*, at 494.

³⁰ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519.

³¹ *Id.*, at paras. 10-13.

³² See, e.g., *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 [hereinafter “*Schachter*”]; *Egan*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3; *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, 1 S.C.R. 177 [hereinafter “*Singh*”].

³³ *Singh*, *id.*, at 218-19.

The more serious problem with the earlier cases relates to the communitarian criticisms, noted above, directed at more individualistic accounts of identity that pose individual interests in opposition to community interests. If, as communitarians contend, such an account of the rights and interests of a person does not properly respect the dignity of that person, then a different equality analysis would appear warranted.

Of course, the Court's approach under section 15 *has* evolved since *Miron*. As the Supreme Court developed the meaning of the right in section 15, it focused on the notion of "human dignity" to delineate the true equality violations from the false, since not every distinction drawn between individuals or groups could be discriminatory.³⁴ In *Law* the Court first articulated "human dignity" as the core interest protected by section 15, and required claimants to establish a violation of "essential human dignity."³⁵ This apparently "new" prerequisite, involving objective and subjective components, led many commentators to argue that the Court had narrowed its approach to section 15.³⁶ Yet other commentators, such as James Hendry, held a contrary opinion, noting that the changes in *Law* were necessary given the Court's new focus on "human dignity," a largely subjective and individualistic concept:

Dignity is inherently a subjective concept. As Nagel suggested, political legitimacy depends on accommodating the subjective or partial concerns of the individual who is subject to the laws. The Court has recognized since *Andrews* the subjective devastation wrought by discrimination imbedded in the laws, in stereotypes, prejudice, and wrongful assumptions, to be unacceptable, repugnant, and the worse kind of oppression.³⁷

³⁴ The notion of "human dignity" moved towards the centre of the s. 15(1) framework over a number of decisions, with discussions in earlier decisions, such as *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 at 391 *per* Wilson J., *Egan*, *supra*, note 32, at 543-51 *per* L'Heureux-Dubé J., and *Miron*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418, at 486-99, *per*: McLachlin J., culminating in its crystallization as the "core interest" in s. 15(1) in *Law*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 47.

³⁵ *Law*, *supra*, note 34, at para. 47. Many have criticized the Court for this development, arguing that this change has narrowed the rights protected under s. 15(1). For a discussion of these criticisms and a thoughtful response, see Donna Greschner, "Does Law Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299.

³⁶ See, e.g., Martin, *supra*, note 3, at 319-32; Ross, *supra*, note 3; Nishisato, *supra*, note 3; Hogg, *supra*, note 3, at 1007-1015; Baines, *supra*, note 3. For a discussion of these criticisms and a thoughtful response, see Greschner, *supra*, note 35.

³⁷ Hendry, *supra*, note 3, at 170. Greschner makes a similar point when she writes:

Indeed, Iacobucci J., when discussing the notion of human dignity in *Law*, emphasized subjective elements of the concept, writing that “human dignity” is concerned with “whether an individual or group feels self-respect and self-worth.”³⁸ Similarly, Sheilah Martin has noted, “dignity belongs more to the realm of individual rights than to group-based historical disadvantage.”³⁹ This emphasis on an inherently individualistic concept like human dignity is not illogical. After all, the rights under section 15 are posed as *individual rights* — why should competing interests be employed to narrow those rights?

2. More Recent Communitarian Criticisms in Legal Commentary

With the continued individualistic framework of the section 15 analysis under *Law*, further criticisms with communitarian themes have emerged. For example, Allan Hutchinson, though not proclaiming himself a communitarian, has criticized rights adjudication, such as equality rights challenges under section 15, as based on an individualistic liberal paradigm that “provides an essentially false account of human community.”⁴⁰ He has also advocated a “democratic dialogue” that emphasizes relationships between individuals in communities with their “shared commitments and mutual understandings.”⁴¹ Similarly, Donna Greschner has argued that a proper “purposive” approach to section 15 would focus on promoting the “belonging of individuals” in distinct communities.⁴² These approaches involve communitarian ideas. Other

Draping an allegation of discrimination in dignity language deeply personalizes it and brings it to the very heart of an individual’s sense of self-worth. This makes the allegation more emotion-laden, and thus more rhetorically powerful... The problem with feelings is that no one can argue against them.

See Greschner, *supra*, note 35, at 313.

³⁸ *Law*, *supra*, note 34, at para. 53. For a discussion of the varying subjective and objective approaches to equality see: Sophia Moreau, “The Wrongs of Unequal Treatment” (2004) 54 Univ. of Toronto L.J. 291.

³⁹ Martin, *supra*, note 3, at 329.

⁴⁰ See Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (University of Toronto Press, 1995), at 125 [hereinafter “Coraf”]. See also Allan C. Hutchinson, “Michael and Me: A Postmodern Friendship” (1996) 33 Osgoode Hall L.J. 239.

⁴¹ Coraf, *id.*, at 197.

⁴² Greschner, *supra*, note 35, at 314-15.

recent commentators have articulated criticisms with similar communitarian themes.⁴³

But such concerns are not limited to the academy. Perhaps the most obviously communitarian concerns have been articulated by a few members of the Court itself. Often in dissent, Charles Gonthier J. strove for a communitarian approach to Charter analysis in his judgments. Further, in published commentary he also focused on communitarian aspects of constitutionalism,⁴⁴ asking what happened to the third branch of the ideal of “liberty, equality and fraternity” — fraternity being the proxy for “community.”⁴⁵ In *Figueroa*,⁴⁶ Gonthier J., for the minority, wrote:

A right’s purpose may be connected not only to purely individual interests but also to communitarian or group concerns... the right to equality protected by s. 15 of the *Charter* is expressly an individual right, but the concept of freedom from discrimination is related (as the grounds of discrimination listed in s. 15(1) demonstrate) to the individual’s membership in certain social groups and to the relationships between minority groups and Canadian society.⁴⁷

There, Gonthier J. explicitly linked the right under section 15 not to individualistic but to communitarian concerns. Likewise, LeBel J., perhaps Gonthier J.’s heir as the communitarian on the Court, situated section 15 as a “communitarian component” of the constitution when he wrote, in *R. v. Advance Cutting & Coring Ltd.*:

One approach to the constitutional protection of civil liberties views the Charter as essentially designed to protect individual rights...

⁴³ In the context of s. 15, see *e.g.*, David Brown, “Reconciling Equality and Other Rights: Paradigm Lost?” (2003) 15 Nat’l J. Const. L. 1. In the context of other provisions of the Charter (s. 24), see Julianne Parfett, “A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence” (2002) 40 Alta. L. Rev. 299; Kent Roach, “The Attorney General and the Charter Revisited” (2000) 50 Univ. of Toronto L.J. 1; Mark Carter, “Reconsidering the Charter and Electoral Boundaries” (1999) 22 Dal. L.J. 53.

⁴⁴ See Justice Gonthier, “Law and Morality” (2003) 29 Queen’s L.J. 408; Justice Gonthier, “Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or the Unspoken Third Pillar of Democracy” (2000) 45 McGill L.J. 567 [hereinafter “Fraternity”].

⁴⁵ Fraternity, *id.*, at 569.

⁴⁶ *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912.

⁴⁷ *Id.*, at para. 130.

Nevertheless, the communitarian components of the Canadian Constitution are often overlooked. Section 15 equality rights are concerned not only with the position of individuals, but also with the situation of groups in society.⁴⁸

As this brief survey illustrates, a few members of the Court and numerous legal commentators have propounded a more communitarian approach to equality under section 15, although those concerns have largely remained unanswered. The fact that the referenced judgments of LeBel and Gonthier JJ. failed to garner support from the majority of judges on the Court indicates the relative marginal role these concerns have played in the case law.

Change is apparently afoot. In our view, the Supreme Court of Canada has moved toward a more communitarian approach to equality rights under section 15. As we argue, the Court's decisions in 2004 demonstrate aspects of the articulated communitarian themes: (1) greater emphasis on importance of the community to the individual and (2) a corresponding movement away from the traditional liberal understanding of the person based on a subjective and individualistic perspective.

III. TOWARDS AN EMPHASIS ON SOCIAL COMMUNITY

1. The Canadian Foundation Case

The Supreme Court's decision in *Canadian Foundation for Children Youth and the Law v. Canada*,⁴⁹ often referred to as the "spanking case," illustrates a thoroughly communitarian understanding of the person existing in a community of fundamental social relationships. The context of the family unit — perhaps the essential human group or community — and the school environment⁵⁰ put the liberal individualistic approach to section 15 to its true test. In its challenge, the Foundation argued, *inter alia*, that the decriminalization inherent in section 43 of the Criminal Code violated the equality rights of children and sent a mes-

⁴⁸ [2001] S.C.J. No. 68, [2001] 3 S.C.R. 209, at paras. 167-68.

⁴⁹ [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 1.

⁵⁰ Section 43 also protects persons standing in the place of parents and teachers who use reasonable force in respect of their different circumstances. In the school context protected actions are unlikely to include true disciplinary action, like spanking, but only the application of force to ensure childrens' safety. See *Canadian Foundation*, *supra*, note 49, at paras. 1, 40.

sage that they were “less worthy” as human beings.⁵¹ This argument rested on the untenable idea that children develop in an abstract environment or bubble, removed from the relationships essential to the child’s development as a socialized being. The communitarian approach to the limits of section 15 provided the necessary “reality check” to achieve the correct outcome.

Writing for the majority, the Chief Justice found no violation of section 15(1). She made this finding in spite of her recognition that section 43 involved differential treatment based on an enumerated ground (age).⁵² Further, she acknowledged that a majority of the contextual factors listed in *Law* — pre-existing disadvantage, nature of the interest affected, absence of ameliorative purpose — supported the Foundation’s case.⁵³ In the result, however, these factors held no consequence. The majority’s decision was determined solely by the remaining contextual factor — “needs correspondence.”

Some background to the “needs correspondence” concept is appropriate. In determining whether a claim is established under section 15, a Court must consider whether impugned legislation corresponds with or takes into account the “actual need, capacity or circumstances” of the claimant or claimants.⁵⁴ This is the “needs correspondence” factor. The factor first gained clear definition in *Law* where it was grouped with other “contextual factors” in applying section 15(1).⁵⁵ However, as late as 2002, the Court was still internally conflicted about the importance of the needs correspondence factor in the section 15(1) framework.⁵⁶ The Court’s decision in *Canadian Foundation* may have finally decided some of these questions. In that decision, the needs correspondence factor provided the hook for the Court to apply a communitarian approach to the section 15 analysis.

⁵¹ *Canadian Foundation*, *id.*, at para. 50.

⁵² *Canadian Foundation*, *id.*, at para. 52.

⁵³ *Canadian Foundation*, *id.*, at para. 56.

⁵⁴ *Law*, *supra*, note 34, at para. 88.

⁵⁵ *Law*, *id.*, at paras. 69-71.

⁵⁶ *E.g.*, in *Lavoie*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769, a clear disagreement existed among members of the Court as to the centrality and application of the “needs correspondence” branch of *Law*. Justice Bastarache, writing the majority opinion for three other members of the Court, placed little emphasis on the needs correspondence factor. In contrast, Arbour J., in a minority opinion concurring in the result (LeBel J. concurring), explicitly disagreed with Bastarache J.’s narrow characterization of the needs correspondence analysis.

After asking whether there was a “lack of correspondence” (between the claimants’ needs and the section 43 defence), the Chief Justice went on to explore the various “needs” of children:

Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. *Children also depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.*⁵⁷

After noting the “dual” needs of children in the circumstances, the Chief Justice found that section 43 was a reasonable attempt by Parliament to “accommodate both of these needs.”⁵⁸ By allowing parents and teachers to carry out the reasonable education and guidance essential to children’s development without “threat of sanction by the criminal law” — although ensuring that harmful force is punished — section 43 corresponds to these circumstances.⁵⁹ This needs correspondence supported the finding that section 43 was not an affront to children’s dignity within the meaning of section 15(1).⁶⁰

2. A Communitarian Approach to the Child’s Needs

The majority’s approach to the needs of children in *Canadian Foundation* is clearly communitarian. In discussing the various needs of children, the Chief Justice looked at the broader notion of children as individuals existing within a community with broader needs for growth and stability within a social environment. In other words, the majority implicitly deployed what communitarian Charles Taylor might call a “dialogical” theory of identity, that conceptualizes social relationships as fundamental to personal development.⁶¹ According to Taylor, our identities are inherently tied to our relationships with those people

⁵⁷ *Canadian Foundation*, *supra*, note 49, at para. 58 (emphasis added).

⁵⁸ *Canadian Foundation*, *id.*, at para. 59.

⁵⁹ *Canadian Foundation*, *id.*, at para. 59.

⁶⁰ *Canadian Foundation*, *id.*, at para. 68.

⁶¹ Charles Taylor, *The Malaise of Modernity* (Concord: Anansi Press, 1991), at 33-34.

George Herbert Mead famously called our “significant others.”⁶² Thus, Prof. K. Anthony Appiah, who also advocates a dialogical theory of identity, writes:

After all, we have it in our power to some extent to make our children into the kind of people who will want to maintain our culture. Precisely because the monological view of identity is incorrect, there is no individual nugget waiting in each child to express itself, if only family and society permit its unfettered development. We have to help children make themselves, and we have to do so according to our values because children do not begin with values of their own.⁶³

Given the majority’s broader approach to “needs”, it is not surprising that this was an important point of departure for Binnie J. who dissented. For Binnie J., the majority improperly strayed from the subjective individual perspective of the claimant children. Thus, he wrote:

While the child needs the family, the protection of s. 43 is given not to the child but to the parent or teacher who is using “reasonable” force for “correction.” Section 43 protects parents and teachers, not children. A child “needs” no less protection under the *Criminal Code* than an adult does.⁶⁴

In other words, Binnie J. disagreed with the Chief Justice’s more expansive communitarian approach to the limits of section 15. For him, the needs of the family were *not* the needs of the children. The only needs to be protected under section 15, were the specific needs of children to the exclusion of the interests or role of parents or guardians around them. Justification of the violation for good policy reasons should be left to section 1.⁶⁵

At its core, the disagreement between the Chief Justice and Binnie J. was about their different perspectives on how to characterize the “need” in question. Justice Binnie remained focused on the individualistic needs

⁶² George Herbert Mead, *Mind, Self and Society* (Chicago: University of Chicago Press, 1934).

⁶³ Anthony Appiah, “Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction” in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition*, (1994) at 158-59.

⁶⁴ *Canadian Foundation*, *supra*, note 49, at para. 100.

⁶⁵ *Canadian Foundation*, *id.*, at para. 100.

of the claimant children *vis-à-vis* their parents and guardians, while the Chief Justice looked at the broader notion of the children as individuals within a community and social environment.

Justice Binnie's approach to "needs" in *Canadian Foundation* is more consistent with an individualistic approach to section 15 evident in past jurisprudence, which makes the departure from that approach by the majority all the more noteworthy. As recently as 2002, a majority of the Court had emphasized the need to approach equality from the individualized and subjective perspective of the claimant.⁶⁶

It is evident in *Canadian Foundation* that the Supreme Court moved toward a more communitarian approach to section 15, in emphasizing the importance of the social community of the individual and the interaction of the two in defining equality rights. From a traditional liberal perspective, which pits individual interests against those of the larger community, one could easily suggest that the effect of this changed approach to section 15 is a limitation or diminishment of equality rights in favour of stronger community interests. It is important to note, however, that this characterization — individual versus community — is exactly what communitarians attempt to challenge. In the next section, we analyze another context in which the Court has recently underscored the importance of community.

IV. TOWARD ECONOMIC COMMUNITY INTERESTS

1. Community Interests in *Newfoundland (Treasury Board) v. N.A.P.E.*

As already noted, a key theme of communitarian theory is recognition of the importance of community interests. To speak of "community interest" may seem abstract, but for many communitarian theorists it is a very concrete term that represents the broad variety of collective interests of the community, including social, political, and, in some cases, economic interests. In Sandel's view, the "community" constitutes not just "shared self-understandings" of people but also how those interests are "embodied" in "institutional arrangements."⁶⁷ Such institutional

⁶⁶ See the comments of Bastarache J. (at para. 47) and endorsed by McLachlin C.J.C. and L'Heureux-Dubé J. (at para. 1) in *Lavoie v. Canada*, *supra*, note 56, at para. 47.

⁶⁷ Sandel, *supra*, note 11, at 173.

arrangements include, as Philip Selznick points out, the inherent ties among social, political and economic interests of the community:

Another theme that bears on the communitarian perspective is what we might call the *principle of continuity*. Sociological interpretation is not comfortable with clear lines drawn between one human activity and another, one social sphere and another. In sociological jurisprudence we are uneasy with the separation of law and politics, law and economics, law and morality. The same may be said of any other social sphere, whether it be education, technology, science, business, or national security.⁶⁸

The Supreme Court's decision in *Newfoundland v. NAPE*⁶⁹ draws heavily upon this notion that social interests are invariably tied to other community interests, including economic interests. In so doing, the decision in *NAPE* represents a remarkable shift in the Court's position on the importance of community economic interests.

In *NAPE*, the claimant union challenged section 9 of the *Public Sector Restraint Act* introduced by the Newfoundland and Labrador government to limit budget spending. Among other measures, the law deferred pay equity payments by three years and effectively released the government from obligations to pay \$24-million under a 1988 agreement to redress sex-based wage discrimination in the government workforce. The claimants argued, among other things, that the government's attempt to legislate itself out of its obligation to alleviate discriminatory government practices ran afoul of section 15(1). In response, the government argued mainly that its financial crisis was unprecedented and so serious that it had no choice but to restrain government spending. In short, deficit reduction, not pay equity, was a paramount public concern.

Given the highly political and contentious issues involved, the Supreme Court's decision was greatly anticipated. Indeed, the Newfoundland Court of Appeal's decision touched off various debates, including an informative, and at times heated, exchange among academic commentators.⁷⁰

⁶⁸ Selznick, *supra*, note 10, at 449.

⁶⁹ [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381.

⁷⁰ See Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. NAPE" (2003) 48 McGill L.J. 525; Christopher Manfredi & James B. Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Choudhry and Hunter, 'Measuring Judicial Activism on the Supreme Court of Cana-

The Court upheld the legislation. It was bound to find that the provision violated the workers' section 15(1) rights, since the aim of the legislation was to remove redress for previous discriminatory actions. The legislation was justified in limiting those equality rights in the circumstances because of the financial emergency. The Court fully accepted budgetary restraints as a concern that was "pressing and substantial"⁷¹ enough to limit the claimant's *equality* rights. Writing for the Court, Binnie J. stated:

In my view, the union's argument that budgetary issues should effectively be given no weight in these circumstances goes too far. With respect, the need to address a fiscal crisis such as that described by the President of the Treasury Board was a pressing and substantial legislative objective.⁷²

On its face, this holding represents an important development. Historically, the Court has been entirely adverse to finding "financial considerations" as a sufficient justification for limiting any Charter right, let alone equality rights. First, in *Schachter*, the leading authority on section 52(1) remedies and, in addition, a decision involving a section 15(1) violation, the Supreme Court emphasized that budgetary concerns were not a legitimate reason to limit rights as defined by the Charter. The Court could not have been more categorical in its position:

This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.⁷³

In that case, the cost of remedying the violation was estimated at \$50-million to \$500-million. In spite of the serious worry that the government may have had over the economic health of the community, "budgetary concerns" could not support justification for limiting rights.

da"" (2004) 49 McGill L.J. 741; Sujit Choudhry & Claire E. Hunter, "Continuing the Conversation: A Reply to Manfredi and Kelly" (2004) 49 McGill L.J. 765.

⁷¹ The first branch of the *Oakes* test. See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 [hereinafter "*Oakes*"].

⁷² *NAPE*, *supra*, note 69, at para. 74.

⁷³ *Schachter*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at 709 (emphasis added).

Rather, such considerations *only* became relevant to shaping a proper remedy.

This resistance may be largely explained with optics. As Abella J., as she then was, wrote in *Rosenberg v. Canada (Attorney General)* when dealing with equality and discrimination, monetary concerns appear less important:

Cost/benefit analyses are not readily applicable to equality violations because of the inherent incomparability of the monetary impacts involved. Remedying discrimination will always appear to be more fiscally burdensome than beneficial on a balance sheet. On one side of the budgetary ledger will be the calculable cost required to rectify the discriminatory measure; on the other side, it will likely be found that the cost to the public of discriminating is not as concretely measurable. The considerable but incalculable benefits of eliminating discrimination are therefore not visible in the equation, making the analysis an unreliable source of policy decision making.⁷⁴

In *Egan*, after referring to both the Court's general reluctance to accord much weight to financial consideration and the *Schachter* admonition, Iacobucci J., in dissent, stated:

This is certainly the case when the financial motivations are not, as in the case at bar, supported by more persuasive arguments as to why the infringement amounts to a reasonable limit.⁷⁵

At that point “more persuasive arguments” could potentially justify limiting a Charter right, but what those arguments could be was unknown.

NAPE might be understood as the case where the meaning of “more persuasive arguments” is illuminated. But a close examination of the decision provides some doubt for the proposition. The Newfoundland and Labrador government's sole motivation for the offending legislation was “financial.” In coming to his conclusion, Binnie J. acknowledged that the legislation suffered from the untenable “sole purpose” reflected in *Egan* — that financial considerations alone could not justify limits on rights.⁷⁶ The magnitude of the financial concerns — terming the circumstances a

⁷⁴ [1998] O.J. No. 1627, at para. 42, 38 O.R. (3d) 577 (C.A.).

⁷⁵ *Egan*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513, at para. 194.

⁷⁶ *NAPE*, *supra*, note 69, at para. 72.

“crisis” — was the only distinguishing feature. No other “persuasive arguments” were evident, to ground the following statement:

Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis. It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise “whose sole purpose is financial.” The weighing exercise has as much to do with social values as it has to do with dollars.⁷⁷

How could the significance of the financial crisis in *NAPE* be so exceptional that the concerns of the government, though articulated only in budgetary language, could be justified in overriding equality rights? After all, it is the government’s job to juggle priorities against crises and their expenditures.⁷⁸

2. The Link — Social Goods, Values and Community Interests

The subtle key in *NAPE* was equating the legislation with the provision of essential social goods. With this device, the Court’s decision in *NAPE* disclosed another communitarian theme — the economic interests of the community, once disregarded as a justificatory factor, emerge as a consideration in government limits on equality. The decision in *NAPE* is important because it represents the Court’s linking, for the first time, of government economic measures with essential values of the community. Thus, Binnie J. wrote:

The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, *was* undertaken to promote other values of a free and democratic society.⁷⁹

⁷⁷ *NAPE*, *supra*, note 69, at para. 72.

⁷⁸ The SARS epidemic, “mad cow” disease, natural disaster relief at home and abroad are, in a sense, the “ordinary” events of government business. They are inevitable, as is their gargantuan cost; only their exact timing is unpredictable.

⁷⁹ *NAPE*, *supra*, note 69, at para. 75 (emphasis in original).

As implied earlier, “dollars” in Charter cases have always meant government choices between providing the service or benefit in issue and delivering other services and benefits. In *NAPE*, for Binnie J., the economic interests of the community, properly understood, were linked to numerous other communitarian values and interests, including healthcare, welfare and education. Thus, he suggested that steps taken by the government to reduce expenditures were essential to *promote* other democratic values. Put another way, the Court appears to have appreciated that the interests of the claimants themselves — in terms of access to proper health, welfare and education — were tied to the economic interests of the broader community.

The exceptional emphasis on economic community in *NAPE* appears to diminish the individual’s right to equality. Strictly speaking, the scope of the equality right under section 15 is not reduced, at least not in the same way as in *Canadian Foundation*. However, the expanded scope for justification — the inclusion of a previously unacceptable factor — establishes the same net effect. Yet, communitarians likely would characterize this assessment as exemplifying the traditional liberal approach to rights — one that does not take into account the complex ties between individual and community. In linking individual social interests to the economic interests of the community, the Court has recognized that the ultimate interests and equality rights of the individual are equally served within the larger domain.

V. THE SHIFT AWAY FROM THE “SUBJECTIVE” IN SECTION 15

So far, we have argued that the Supreme Court, in 2004, has taken a more communitarian approach to the meaning of equality by a heightened appreciation and protection of the social and economic interests of the community. Another central theme of the modern communitarian movement is the shift away from more individualistic, and thus more subjective, accounts of personal identity and belonging. This theme is also evident in the Court’s equality jurisprudence in the past year.

In keeping with its traditional framework for adjudicating equality rights under section 15, Bastarache J., writing for the majority in *Lavoie*, stressed the importance of the subjective analysis of human dignity:

The concepts of dignity and freedom are not amorphous and, in my view, do not invite the kind of balancing of individual against state interest that is required under s. 1 of the Charter. On the contrary, the

subjective inquiry into human dignity requires the claimant to provide a rational foundation for her experience of discrimination in the sense that a reasonable person similarly situated would share that experience.⁸⁰

However, as we discuss below, the Court's recent approach has moved away from this subjective perspective of the equality rights claimant.

1. The Move Away From a Subjective Perspective in Comparator Selection

In *Hodge v. Canada*, the claimant challenged the constitutionality of the definition of "spouse" in the Canada Pension Plan (CPP) legislation. Ms. Hodge had been a common law spouse who separated from her common law husband before he died. Cohabiting common law spouses could receive a survivor's pension under the Canada Pension Plan. Spouses who had been married, but subsequently divorced, could receive CPP survivor's pension. Ms. Hodge was denied the survivor's benefit because she was not co-habiting with her common law spouse at the time of his death. She argued that the legislation violated her equality right, based on marital status. The CPP Tribunal and Federal Court of Appeal agreed. The Supreme Court did not.

The section 15 analysis requires a court to find "discrimination" in the impugned provision, since not every distinction is discriminatory in the constitutionally protected sense. The Supreme Court has expended great effort in developing the model to discern discrimination from the innumerable distinctions created by all legislation. One tool in the analysis is the selection of a "comparator" (usually a group) that provides a measure for the claim and removes it from unworkable abstraction. The choice and description of the comparator group is crucial to the outcome of many equality cases. Employing one comparator group will result in a successful claim, while choosing another will lead to failure.⁸¹

From the outset, it was clear in *Hodge* that the selection of the proper comparator group would determine the Court's decision. Writing for

⁸⁰ *Lavoie*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769, at para. 47.

⁸¹ See e.g., *Hodge*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357, at para. 1; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703, at para. 46 [hereinafter "*Granovsky*"]; *Auton*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657, at para. 55.

the Court, Binnie J. stated in his first paragraph that a section 15 challenge “will likely fail” unless the comparator selection is right.⁸² Not surprisingly, the Court’s decision turned on the point. In the lower courts the claimant had identified “married spouses living apart at the time of the contributor’s death” as her chosen comparator. The Court of Appeal accepted the claimant’s selection, which led to the finding that the CPP legislation was, indeed, in violation of the claimant’s section 15 right.

The Supreme Court rejected Ms. Hodge’s choice of comparator group. Instead, Binnie J. held that the claimant’s proper comparator was “divorced spouses.” After this finding, the challenge could not succeed, simply because divorced spouses are also not entitled to the survivor’s pension under the CPP; the distinction between Ms. Hodge’s group and the comparator disappeared. Once the comparator group changed, the entire section 15(1) analysis of the Court of Appeal was changed fundamentally and the claim was destined to fail.

Justice Binnie disagreed with the approach taken by the Court of Appeal with respect to comparator selection. The Court of Appeal showed deference to the claimant’s selection, adopting the presumption that the claimant’s choice of comparator should be respected short of contrary evidence.⁸³ On this point Binnie J. wrote:

In my view, with respect, the Federal Court of Appeal erred in concluding that a court is required to “adopt the comparator group chosen by the applicant unless it can be shown that there is a paucity of evidence or a failure to plead that comparator” (para. 23). While it is up to the claimant to make an initial choice of “the person, group, or groups with whom he or she *wishes* to be compared” (emphasis added), the correctness of that choice is a matter of law for the court to determine: *Granovsky*, *supra*, at paras. 47, 52 and 64.⁸⁴

In other words, the Court of Appeal erred in law when it deferred to the claimant’s choice of the correct comparator. Justice Binnie went even further. He determined that it is mandatory for a court to intervene on this point:

⁸² *Hodge*, *supra*, note 81, at para. 1.

⁸³ *Hodge v. Canada*, [2002] F.C.J. No. 900 [hereinafter “*Hodge II*”].

⁸⁴ *Hodge*, *supra*, note 81, at para. 21.

Where “the differential treatment is not between the groups identified by the claimant, but rather between other groups” (*Law*, *supra*, at para. 58), accordingly, *it is the duty of the court* to step in and measure the claim to equality rights in the proper context and against the proper standard.⁸⁵

The Court followed a similar approach in *Auton*. In that case, the claimants’ children were autistic and the British Columbia provincial government had refused to fund a somewhat controversial, but apparently effective, autism treatment. The parents challenged the provincial legislation that limited the services covered by the government’s health scheme. The autism treatment was excluded from coverage because it was administered by persons who were not “health care practitioners” under the legislation. The claimants alleged that the legislation violated their rights under sections 7 and 15 of the Charter. The challenge was unsuccessful.

The claimants argued that their section 15 rights were violated on the ground of disability. To succeed, the differential treatment would have to engage their disability. Therefore, they described their comparator group as “non-disabled children and their parents, as well as adult persons with mental illness.”⁸⁶ The Court acknowledged that the choice of comparator group was crucial. In its analysis, as in *Hodge*, the Court disagreed with *both* of the comparator groups selected by the claimants and, instead, opted for its own complex formulation:

I conclude that the appropriate comparator for the petitioners is a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.⁸⁷

Clearly, in both *Hodge* and *Auton*, the Court required that it have an intrusive role in comparator selection. A court has an obligation (or “duty,” as expressed by Binnie J. in *Hodge*) to intervene because the decision regarding the comparator is elevated to an issue of law subject to the standard of correctness.

⁸⁵ *Hodge*, *id.*, at para. 22 (emphasis added).

⁸⁶ *Auton*, *supra*, note 81, at para. 49.

⁸⁷ *Auton*, *id.*, at para. 55.

As with most aspects of the section 15(1) analysis, in *Law* the Court first laid out a comprehensive framework for the proper selection of comparator groups. There, Iacobucci J. found that the claimant's subjective perspective was essential to this branch of the section 15(1) test:

The determination of the appropriate comparator, and the evaluation of the contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be conducted from the perspective of the claimant.⁸⁸

This mandatory language supported the Court of Appeal's approach in *Hodge*, requiring it to respect the subjective perspective of the claimant in comparator selection. Accordingly, this respect for the subjective perspective of the claimant led the Court in *Law* to imply, accordingly, that judicial modification of selection would be rare:

It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see Symes, *supra*, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.⁸⁹

This passage suggests two points. First, while the Court does not rule out the possibility of judicial involvement in the comparator selection process, the language indicates the exception, rather than the rule. The idea the Court would not "close the door" is far from Binnie J.'s suggestion in *Hodge* that the Court has an *obligation* to intervene in every section 15(1) case. Second, the quote implies that intervention in the comparator selection process, if necessary, should be minimal. That is, the court should intervene only to "refine" the comparator group

⁸⁸ *Law*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 59.

⁸⁹ *Law*, *id.*, at para. 58.

selected by the applicant, rather than redefine it completely. This is more consistent with a deferential approach pronounced in *Law*, requiring an analysis from the claimant's subjective perspective.

Clearly, the Supreme Court's cautious approach to judicial comparator selection has shifted dramatically since *Law*, although some incremental steps towards this result were evident before. To present *Hodge* and *Auton* as a paradigmatic shift ignores some of the more gradual changes in the law on comparator selection that have occurred since *Law*. In 2000, in *Granovsky*⁹⁰ as in *Hodge*, the claimant challenged provisions of the Canada Pension Plan, but on the enumerated ground of disability. In finding that the claim failed, Binnie J. altered the cautious approach to judicial comparator selection in *Law*:

The appellant contends that he ought to be compared to an ordinary member of the work force who was able-bodied during the contribution period because the appellant was being required to satisfy the level of contribution expected of an ordinary member of the work force with insufficient regard for periods of temporary disability. However, while a s. 15 complainant is given considerable scope to identify the appropriate group for comparison, "the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups" (*Law*, *supra*, at para. 58).⁹¹

At the same time, *Granovsky* did not represent a radical shift from the approach in *Law*. As Binnie J. indicates in the passage above, claimants are given "considerable scope" or wide latitude in their comparator selection. The Court indicates that deference is still owed to the claimant's perspective in choosing comparators. The claimant's choice may not always be sufficient but it doesn't result in an error of law.

The earlier deferential approach was grounded in the core idea that the subjective experience and perspective of the claimant is central to understanding the effect of discrimination on dignity.⁹² In the cases just examined, as well as in *Canadian Foundation*, the Court shifted away from the subjective and deferential approach. This shift away from a

⁹⁰ *Granovsky*, *supra*, note 81, at para. 46.

⁹¹ *Granovsky*, *id.*, at para. 46 (emphasis added).

⁹² *Law*, *supra*, note 88, at para. 53.

model that emphasizes subjectivism is additional confirmation of a more communitarian approach.

2. The Move Away From the Subjective Perspective in the Dignity Test

The Supreme Court has changed its previous emphasis on the subjective perspective in a further respect. Under *Law*, in determining whether the claimant has established a violation of his or her human dignity, the proper point of view is that of the reasonable person, in circumstances similar to those of the claimant, who considers all contextual factors relevant to the claim.⁹³ In *Canadian Foundation*, the Court did not apply this test and removed the subjective perspective of the claimant children:

The test is whether a reasonable person possessing the claimant's attributes and in the claimant's circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics: *Law, supra*. Applied to a child claimant, this test may well confront us with the fiction of the reasonable, fully apprised preschool-aged child. The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs.⁹⁴

Though the Court stated that this approach in no way “minimizes the subjective component” of the dignity test, it is hard to see how this modification does not impair the subjective analysis in important ways. Is the Court itself not comprised of the “reasonable persons” who must “seriously consider and value” the views of the child, to adjudicate the matter properly? Perhaps this new approach to the dignity test is simply a more nuanced way of adjudicating from an objective perspective. Whatever the merits of these concerns, the modification of the dignity test in *Canadian Foundation* is illustrative of the same communitarian theme — a movement away from relying upon the subjective perspective of claimants in adjudicating equality claims.

⁹³ *Law, id.*, at para. 61.

⁹⁴ *Canadian Foundation*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 53.

VI. TOWARDS A COHESIVE COMMUNITY

The *Same-Sex Marriage Reference* was poised to test all facets of the Supreme Court's approach to section 15, including whether the traditional, opposite-sex definition of marriage — actually the institution of marriage itself — was discriminatory and violated section 15. However, the case-of-the-year resulted in the disappointment-of-the-year in respect of section 15 equality claims. The Court not only dismissed, quite abruptly, one section 15 argument by interveners on the constitutionality of the newly proposed definition of marriage,⁹⁵ but also declined to answer the fourth question as to whether the traditional definition of marriage was consistent with the Charter.⁹⁶ The missed opportunity is regrettable from the perspective of the legal and academic community, which would have benefited from the Court's direction on section 15 in a case involving layers of communities and social relationships within the broadest idea of community.

Despite the disappointments, the decision in the *Same Sex Marriage Reference* reveals at least one communitarian theme with respect to substantive equality. At first blush, the *Same-Sex Marriage Reference* and the various Court of Appeal rulings on the constitutionality of the traditional definition of marriage,⁹⁷ all appear to involve the classic clash between individual rights and traditional community values. To begin, as noted by Carl Stychin, opposition to same-sex marriage rights has traditionally invoked communitarian discourse:

[W]e consistently find opposition to cosmopolitan claims to human justice firmly grounded in a communitarian language that speaks to the preservation of a particular community's "way of life," tradition, and often, national or local culture.⁹⁸

In this vein, at the Supreme Court, interveners argued that the recognition of same-sex marriage would marginalize and discriminate

⁹⁵ *Same Sex Marriage Reference*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, at para. 45.

⁹⁶ *Same Sex Marriage Reference*, *id.*, at paras. 61-72.

⁹⁷ *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (C.A.) [hereinafter "*Halpern CA*"]; *Catholic Civil Rights League v. Hendricks et al.*, [2004] Q.J. No. 2593, 238 D.L.R. (4th) 577 (C.A.); *EGALE Canada Inc. v. Canada (Attorney General)*, (2003), 238 D.L.R. (4th) 577 (B.C.C.A.).

⁹⁸ Stychin, "Same-Sex Sexualities and the Globalization of Human Rights Discourse" (2004) 49 McGill L.J. 951, at 955.

against religious groups whose belief systems required them to adhere to the traditional definition of marriage.⁹⁹

On a more nuanced analysis, although the decision in the *Same Sex Marriage Reference* was exceptionally brief on the equality analysis, it could be interpreted as a recognition of a communitarian conception of societal interests. As noted, a key communitarian theme is to understand individuals, not in isolation or in opposition to other members of the community, but rather, as developing within a web of cohesive social and moral relationships. Thus, the proper understanding of community is not one in which isolated, categorized persons holding individual values and interests constantly clash with competing interests and values of other individuals. In addressing the argument that the equality rights of religious groups or opposite-sex couples were violated by Parliament's recognition of same-sex marriage, the Court essentially deployed a distinctly communitarian notion of societal interests:

The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.¹⁰⁰

In other words, the argument that promoting certain individual interests inevitably leads to clashes with other community interests is a notion of society composed of individualized and competing rights holders. This is not a communitarian conception of society. Rather, as the Court points out, the promotion of certain goals — in this case equal concern — ought to be understood as a community interest, one that promotes overall cohesion and community values “as a whole.” Indeed, as Kymlicka notes, it has long been the view of communitarians that shared goals are important to the overall cohesion of a community:

[Communitarians] Sandel and Taylor say that there are shared ends that can serve as the basis for a politics of the common good which will be legitimate for all groups in society.¹⁰¹

⁹⁹ *Same Sex Marriage Reference*, *supra*, note 95, at para. 45.

¹⁰⁰ *Same Sex Marriage Reference*, *id.*, at para. 46.

¹⁰¹ Kymlicka, *supra*, note 13, at 226.

Promoting equal concern for citizens as an overall community goal makes sense in these circumstances. After all, the Court in *Same Sex Marriage Reference* was hearing a reference by the government for the benefit of Parliament, the institution that represents the interests of the Canadian community, which proposed the change to the definition of marriage through its draft legislation.

VII. LINGERING CONCERNS AND THE ROAD AHEAD

We have suggested that in the past year, the Supreme Court has embarked on a new approach to section 15 that gives effect to important communitarian themes. To begin with, by approaching the “needs” of the child claimants in *Canadian Foundation* as inherently tied to their essential social relationships, the Court has followed the communitarian theme that a person should be understood not in individualistic terms, but as embedded within a broader social environment and community. This same communitarian theme is evident in *NAPE* where the Court, for the first time, linked the economic interests of the community with the interests and values of the individual. The Court’s decisions in *Hodge* and *Auton* also gave effect to another communitarian theme — a shift away from the emphasis on a subjective approach to individual interests and values — by diminished deference to the claimants’ selection of comparators. The same theme also appeared in *Canadian Foundation*, where the Court removed subjectivity from the “reasonableness” dignity test. Finally, the Court in *Same Sex Marriage Reference* appeared to recognize a communitarian concept of societal interests and goals.

The communitarian approach to equality has clear benefits. It provides a more contextual and concrete understanding of claimants. They are viewed less as isolated or subjective individuals, but rather as what they are: members of the real and broader community to which their interests and values are inherently tied. The Court’s recognition of the importance of economic interests of the broader community is also a welcome development, given the centrality of such concerns for modern democratic governments. In the past, the Court has dismissed such interests or concerns as irrelevant.

At the same time, however, some lingering concerns about these developments exist. While the communitarian approach has benefits, the Court ought to guard against departing too far from individualistic no-

tions of equality rights. As indicated at the outset, the Court has been concerned with finding the proper balance between the individual rights found in section 15 and the corresponding interests recognized in section 1. After all, the Charter purports to protect “individual rights” rather than community interests.

Also, logistical concerns stem from the Court’s change in approach to comparator selection and the dignity test. First, the complete removal of the “subjective component” from the dignity test in *Canadian Foundation* may be difficult to justify, given that “human dignity” itself relies on subjective notions of equality.¹⁰² The Court removed the “subjective component” of the dignity test in *Canadian Foundation* on the basis that it was too difficult to determine what “reasonable children” would feel in a given circumstance. This rationale could be applied similarly in future challenges by other vulnerable groups. For example, as Sanjeev Anand points out, it would be equally difficult for the Court to reason from the perspective of severely mentally or physically disabled claimants, justifying the use of the same modified dignity test.¹⁰³ This “paternalistic” approach could open the Court to accusations that it is ignoring “significant concerns” of claimants.¹⁰⁴

Second, comparator selection could prove a tricky hurdle for claimants to overcome in the future. After *Hodge* and *Auton*, it is quite apparent that a court can, as happened in those cases, completely disregard any comparator groups relied on by the claimant. With no deference remaining, it would be inadvisable for a claimant to assume that his or her comparator selection is correct. The unfortunate result of this circumstance is that claimants bear a difficult burden to establish the proper evidentiary record to establish their claim. If a trial or appeal court disregards a claimant’s comparator group selection in its section 15 analysis, the claimant’s evidentiary record could be insufficient, causing the equality claim to fail.

Third, with less deference shown by the Court to the subjective perspective of claimants, courts have a greater measure of judicial discretion in characterizing the claim at each stage of the *Law* analysis. With greater judicial discretion comes the risk of results-driven decisions, or

¹⁰² Hendry, *supra*, note 3, at 170.

¹⁰³ Sanjeev Anand, “Reasonable Chastisement: A Critique of the Supreme Court’s Decision in the ‘Spanking’ Case” (2004) 41 Alberta L. Rev. 871, at 877.

¹⁰⁴ *Id.*, at 877.

at least the appearance of judicial pre-determination of results. *Hodge* and *Auton* provide cases in point. Once the Court characterized the situations of the claimants as comparable to different comparator groups, which bore no distinction from the claimants, the claimants' results were determined and the cases collapsed on themselves. Yet, the full explanations of the changes in comparator groups were very brief.¹⁰⁵ In this regard, it is important for the Court to provide robust analyses and thorough justifications to assist other litigants in the proper formation of their claims and corresponding records if valid claims of equality breaches are to succeed.

¹⁰⁵ *Hodge*, *supra*, note 81, at paras. 42-47.