What’s Law Good For?: An Empirical Overview of Charter Equality Rights Decisions

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Bruce Ryder, Cidalia C. Faria and Emily Lawrence∗

“...the [similarly situated] test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter.”

-McIntyre J. in Andrews v. Law Society of British Columbia

It has now been 15 years since the Supreme Court first outlined, in Andrews v. Law Society of British Columbia, an approach to the interpretation of the equality rights in section 15 of the Charter of Rights and Freedoms, and five years since the Court revised the test for determining violations of section 15 in Law v. Canada (Minister of Employment and Immigration). It has become a cliché to note that the definition of equality rights is the most challenging and elusive task imposed on the judiciary by the Charter. Equality has long been the subject of ideologically charged debates featuring widely divergent theories. Since philosophers have debated the meaning of equality for millennia, it should hardly be surprising that the Canadian courts have had difficulty settling on a single approach to equality rights since they came into force in 1985 — or if the generality of the approaches on which they have agreed can serve to obscure fundamental differences.

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The potential breadth of equality rights raises the interpretive stakes compared to the more focused application of most other Charter rights and freedoms. In a society characterized by persistent inequalities, the judiciary could enlist section 15 in the redistribution of a wide range of legal and material entitlements. Section 15 thus implicates, in a particularly profound manner, the appropriate division of responsibility between courts and legislatures in a constitutional democracy. Perhaps this helps explain both the courts’ cautious approach to the adjudication of equality claims and the intemperate nature of much of the academic commentary on their equality decisions — high expectations or political anxieties meet judicial realpolitik. We should approach the task of seeking section 15’s meanings with a humility that befits the size of the challenge. As the Supreme Court has noted, there are no fixed or easy formulas to the definition of equality.

This paper begins, in Part I, by outlining the tension between formal and substantive understandings of equality that characterizes section 15 jurisprudence. While both visions have informed the interpretation of section 15, and often work harmoniously in resolving equality issues, we are concerned that the Court has not consistently adhered to its stated commitment to favouring substantive equality over formal equality when the two visions clash. In Part II, we review academic assessments of the Supreme Court’s approach to section 15 and its record in equality rights litigation. While some of the commentators share our concern that the Court’s recent jurisprudence is compromising its commitment to substantive equality, others express the view that the Court has consistently favoured the claims and perspectives of equality-seeking groups. In Part III, we attempt to shed some light on these varying assessments by examining the record of Supreme Court and lower court decisions in adjudicating section 15 claims over the past 15 years. We found that the success rate of equality claimants has been consistently and significantly lower than the success rate of Charter claimants generally, although the success rate has increased in the past five years. In Part IV, we examine how the Supreme Court has applied the four contextual factors set out in Law to guide the determination of whether differences in treatment on prohibited grounds violate human dignity and thus amount to discrimination in a substantive sense. Of these four factors, we found that the “correspondence” factor, which restates the similarly situated test rejected as a guide to section 15 in Andrews, has functioned as the determinative factor in the Court’s equality decisions since Law. Finally, in
Part V, we discuss the need to reconsider the application of the four contextual factors in Law so that the promotion of substantive equality is consistently treated as the primary goal of equality jurisprudence. We argue that violations of section 15 should be found whenever governments impose differential treatment on the basis of a prohibited ground that has the effect of further subordinating an already disadvantaged group, unless the law or policy at issue is a targeted program that ameliorates the condition of a more or equally disadvantaged group.

I. THE TENSION BETWEEN FORMAL AND SUBSTANTIVE UNDERSTANDINGS OF EQUALITY

In resolving the challenges posed by section 15 of the Charter, the courts have drawn significant guidance from anti-discrimination jurisprudence developed under Canadian human rights statutes, from the experience of other nations and from international law. Relying on these sources and the text of section 15, the courts have concluded that section 15 does not posit a general guarantee of legal equality that can be used to challenge any legal differences in treatment. Section 15 is concerned, rather, only with those legal inequalities imposed on the basis of the most pernicious and persistent disadvantages associated with the personal characteristics listed as prohibited grounds of discrimination (or analogous thereto). In addition, the courts have had no difficulty concluding that section 15 is concerned with discrimination that can be either intentional or inadvertent, direct (resulting from a classification on a prohibited ground that is evident on the face of a law or policy) or indirect (resulting from the effects of the application of a facially-neutral law or policy). Nevertheless, fundamental differences about the meaning of equality rights permeate the Canadian constitutional jurisprudence, sometimes emerging in the open articulation of different legal rules, more often emerging in divergent applications of the same legal rules.

At the risk of over-simplifying the complexity of the issues, we suggest that one tension in particular has always dominated, and continues to dominate, the jurisprudence: the tension between formal and substantive understandings of equality. While these terms are often used in very different ways by different commentators, we believe they continue to have analytical salience.

We understand formal equality to be concerned with ensuring that laws or policies do not impose disadvantages on individuals by treating
them according to false stereotypes associated with irrelevant personal characteristics. The focus of formal equality is on the individual’s situation, and on the relevance of the personal characteristics at issue to the objectives of the challenged law or policy. The “similarly situated” test, which measures means-ends rationality (or the fit between a challenged difference in treatment and the objectives of a law), is the most familiar expression of this understanding of formal equality. In contrast, we understand substantive equality to be concerned with ensuring that laws or policies do not impose subordinating treatment on groups already suffering social, political or economic disadvantage in Canadian society. The focus of substantive equality is on the group, and on the impact of the law on its social, economic or political conditions. Thus, for example, in the debate about whether the opposite-sex requirement in the legal definition of marriage violates section 15, formal equality focuses on whether sexual orientation is relevant to the objectives of the legal definition of marriage; substantive equality focuses on whether the exclusion from marriage has the effect of further subordinating gays and lesbians in Canadian society.

It is sometimes remarked that Charter equality jurisprudence has rejected formal equality in favour of a substantive understanding of equality. As we understand them, however, both understandings of equality permeate the jurisprudence. The tests developed by the Supreme Court in *Andrews* and *Law* to guide the interpretation of section 15 can be seen as attempts to mediate the tension between them. The Court in *Andrews* stated that the similarly situated test should be rejected “as a fixed rule or formula for the resolution of equality questions arising under the Charter”. Nevertheless, a focus on means-ends rationality, or on determining whether a law is treating individuals according to relevant personal characteristics, remained central to the definition of discrimination put forward by McIntyre J. in *Andrews*. In other decisions, the Court

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4 *Supra*, note 1.

5 For example, McIntyre J. wrote that “[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed”. *Andrews, supra*, note 1, at 174-75. A key issue arising from this deceptively simple formulation is how to determine when distinctions based on personal characteristics reflect relevant merits and capacities as opposed to the stereotypical application of group characteristics.
has emphasized that overcoming group-based disadvantage is the dominant purpose of section 15.\footnote{E.g., \textit{R. v. Turpin}, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1333 (Justice Wilson described the purpose of s. 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society").} It is fair to say, then, that section 15 has two purposes: ensuring that laws avoid treating individuals according to irrelevant personal characteristics, and ensuring that laws avoid further subordination of already disadvantaged groups.\footnote{\textit{Eldridge v. British Columbia (Attorney General)}, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 54.} Section 15(1), with its focus on the equality rights of individuals, and section 15(2), with its focus on overcoming group-based disadvantage, reflect these twin purposes.

In many cases, formal and substantive understandings of equality will work together to lead to the same conclusion — because neither understanding of equality is violated, or both are. The latter kind of alignment is apparent, for example, in the challenges to the opposite-sex requirement of the legal definition of marriage. The exclusion treats individuals irrationally since sexual orientation does not relate to the objectives of contemporary marriage law. The exclusion also has the effect of further subordinating an already disadvantaged group.

On some occasions, a law or policy may violate formal equality, but not implicate substantive equality because it does not further subordinate, or ameliorate the conditions of an already disadvantaged group. In these circumstances, the courts have held that a violation of formal equality is sufficient to breach section 15(1). An equality claimant need not be a member of a disadvantaged group. This strikes us as a sensible conclusion, one that accords with the listing in section 15(1) of grounds of discrimination (e.g., sex) rather than disadvantaged groups (e.g., women). There is no problem with giving effect to formal equality \textit{per se}; the problem is that formal equality, as the Court has recognized, and as section 15(2) underlines, is an incomplete understanding of equality.

The tensions in the jurisprudence between formal and substantive understandings of equality come to the fore when they are not aligned in a particular case. This can happen in a number of ways.

First, conflict can arise when a law violates formal equality and simultaneously promotes substantive equality by improving the conditions of a disadvantaged group, as is often the case with affirmative
action programs. In these instances, section 15(2) indicates that substantive equality trumps formal inequality. The Court’s decisions in Law and Lovelace give expression to just such a priority of substantive over formal equality. They indicate that targeted ameliorative programs aimed at improving the conditions of disadvantaged groups will rarely violate section 15.

A second kind of conflict, and the least openly addressed in the jurisprudence to date, arises when a law is consistent with formal equality yet violates substantive equality. This occurs when a law meets the similarly situated test — because the personal characteristic at issue is rationally related to the objectives of the challenged law — but has the effect of further subordinating an already disadvantaged group. How should courts resolve section 15 issues when consistence with formal equality clashes with the promotion of substantive inequality? The tension here is the reverse of the one arising with affirmative action programs. Yet the preference for substantive equality expressed in the text of section 15(2) should also point to the result here: just as the promotion of substantive equality should not be inhibited by formal equality, the exacerbation of substantive inequality should not be excused by formal equality. Targeted affirmative action programs do not normally violate section 15 because the promotion of substantive equality justifies the violation of formal equality. Similarly, a law that exacerbates substantive inequality should violate section 15 even if it is consistent with formal equality. As we will see in our review of recent Supreme Court decisions in Part IV below, the opposite appears to be occurring: outside the affirmative action context, formal equality appears to be prevailing over substantive equality. As we will see in the next section, this is a concern shared by other commentators.

II. CRITICAL ASSESSMENTS OF THE SUPREME COURT’S SECTION 15 DECISIONS

While the approach to section 15 set out in Andrews received, and continues to receive, a welcome reception in the academic literature, the Law ruling has generated a largely negative response. For example,

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Christopher Bredt and Adam Dodek have expressed the concern that the human dignity standard introduced in Law is “hopelessly abstract”, and places too great a burden on equality claimants by shifting to section 15 a balancing of individual rights and social objectives that ought to take place pursuant to section 1, where the government rather than the claimant has the burden of proof.9 Similarly, Peter Hogg has argued that the “human dignity” test articulated in Law is “vague, confusing and burdensome to equality claimants”.10 He, like Bredt and Dodek, has urged a return to the simpler and more predictable test set out by the Court in Andrews.11

Others have recognized that once we accept, as the Court did in Andrews, that not all burdensome differences in treatment on the basis of prohibited grounds are discriminatory, a third step to the section 15 inquiry is necessary to sort out discriminatory from non-discriminatory differences in treatment.12 However, a number of scholars have raised the alarm that the “relevancy” test favoured by a minority of the Court in the 1995 trilogy13 was not explicitly put to rest in the Law ruling. Sheilah Martin has argued that the question of whether differential treatment is relevant to a law’s objectives needs to be banished more clearly from section 15:

While discrimination may sometimes involve an irrelevant personal characteristic it should not be elevated into a mandatory requirement…. [Relevancy] made discrimination into a fit between means and ends,

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without subjecting the ends to sufficient scrutiny or gauging the law’s
social underpinnings or impacts and without calling on the government to
justify its actions.\footnote{Supra, note 11, at 327.}

While in her view an assessment of the fit between means and ends
is a necessary element of the Charter analysis, Martin argues that it is
preferable to have the government bear the burden of addressing the
issue pursuant to section 1.\footnote{Id., at 362.}

Dianne Pothier’s review of the Court’s first decisions applying the
Law test echoed Martin’s concern that the scope of section 15 is being
unjustly restricted by the centrality placed on relevance in the human
dignity analysis.\footnote{D. Pothier, supra, note 11, at 56.} Similarly, Donna Greschner has urged the Court to
reject the “discredited ‘relevancy’ test” on the grounds that it “is formalis-
tic and undermines a substantive approach to equality”.\footnote{D. Greschner, “Does Law Advance the Cause of Equality?”, supra, note 12, at 301.} Diana Majury
likewise expresses the concern that some of the Supreme Court’s recent
decisions “raise the spectre that the Court is slipping backward in its un-
derstanding and commitment to substantive equality”.\footnote{D. Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebra-
tion” (2002) 40 Osgoode Hall L.J. 297, at 306.}

Another group of more intemperate critics paint a very different pic-
ture of the Court’s Charter jurisprudence. Rather than finding signs of a
compromised commitment to substantive equality, they accuse the
Court of being captured by the claims of equality-seeking groups and
their powerful allies in government, academia and the legal profession.
Thus, for example, F.L. Morton and Rainer Knopff have suggested that
“the Court Party”, a coalition of social interests that includes equality-
seeking groups like LEAF and EGALE, has hijacked the Court by per-
suading it to adopt a “revolutionary human rights understanding of the
Charter’s equality provisions”.\footnote{F.L. Morton and Rainer Knopff, The Charter Revolution and the Court Party (Peter-
borough: Broadview Press, 2000), at 68.} Similarly, Robert Martin argues that
the Court has embraced a “dominant orthodoxy” shaped in large part by
interest group and identity politics around issues of sex, ethnicity and

\footnote{Supra, note 11, at 327.}
\footnote{Id., at 362.}
\footnote{D. Pothier, supra, note 11, at 56.}
\footnote{D. Greschner, “Does Law Advance the Cause of Equality?”, supra, note 12, at 301.}
\footnote{D. Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebra-
tion” (2002) 40 Osgoode Hall L.J. 297, at 306.}
\footnote{F.L. Morton and Rainer Knopff, The Charter Revolution and the Court Party (Peter-
borough: Broadview Press, 2000), at 68.}
sexual orientation. Martin is particularly troubled, and at his most polemical, regarding what he sees as “feminist domination of the legal and political processes in Canada”. He notes that feminist and other groups seeking social justice have focused on section 15 of the Charter, and “their preference for section 15 has resonated with the judges of the Supreme Court and, as a result, the section gives every sign of eclipsing the rest of the Charter”. He suggests that “[t]he dominant orthodoxy has become the primary factor that determines the outcome of litigation before the [Supreme] Court”.

Does the Court’s record in section 15 cases support the claims of the critics that the Court is backing away from its commitment to substantive equality, or, conversely, that it is captured by the aspirations and theories of equality-seeking groups? Back in 1989, just prior to the release of the Supreme Court’s ruling in Andrews, Gwen Brodsky and Shelagh Day published an empirical analysis of section 15 cases that demonstrated that a disproportionate number of equality rights claims were being brought by members of non-disadvantaged groups and that an alarmingly small number of claims had been raised by individuals or groups identified by certain prohibited grounds of discrimination. No doubt the Andrews decision altered that trend by confining equality claims to challenges to differential treatment on the basis of enumerated or analogous grounds. However, since Brodsky and Day’s study, there has been little in the way of empirical examinations attempting to measure in quantitative terms the relative success rate of section 15 claims. We have attempted to rectify that situation, at least in part, by undertaking a quantitative examination of the courts’ disposition of section 15 claims since the 1989 ruling in Andrews to determine whether the record supports the kinds of concerns raised by the critics described above.

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21 *Id.*, at 24. See also *id.*, at 124 “Feminist thought and ideology are central elements of the ruling orthodoxy”.
22 *Id.*, at 21.
23 *Id.*, at 35.
III. SUCCESS RATES OF SECTION 15 CLAIMS

Tabulated in Appendix A are the 43 decisions of the Supreme Court of Canada in which a majority of the Court ruled on a section 15 claim, beginning with *Andrews* and ending with its most recent equality rights ruling in *Canadian Foundation for Children, Youth and the Law v. Canada*. We have also compiled a sample of lower court section 15 rulings during the decade that *Andrews* was the leading case (February 2, 1989 to March 25, 1999) and during the five years since *Law* was decided (March 25, 1999). The sample includes all lower court decisions disposing of section 15 claims that were reported in the *Dominion Law Reports*, the *Federal Court Reports*, or that are available in QuickLaw’s federal court judgments database or provincial judgments databases for the prairie and Atlantic provinces. This yielded a database of 323 lower court rulings. We then classified the Supreme Court and lower court rulings on the basis of whether or not the court found a violation of the Charter in its disposition of the section 15 claim. This analysis yielded the following data on success rates:

<table>
<thead>
<tr>
<th></th>
<th>Under <em>Andrews</em></th>
<th>Under <em>Law</em></th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>SCC</td>
<td>25.9% 7/27</td>
<td>31.2% 5/16</td>
<td>27.9% 12/43</td>
</tr>
<tr>
<td>Lower courts</td>
<td>18.9% 43/228</td>
<td>26.3% 25/95</td>
<td>21.1% 68/323</td>
</tr>
</tbody>
</table>

The success rate of section 15 claims at the Supreme Court, 27.9 per cent, is significantly lower than the average success rate of all Charter claims before the Court, which, according to Patrick Monahan and Nadine Blum, hovered around 35 per cent from 1991-2002, or a slightly lower rate (33 or 34 per cent) according to studies by F.L. Morton *et al.* and James Kelly covering the periods from 1982-1992 and 1993-1997.
The success rate of section 15 claims at the lower courts is substantially lower (21.1 per cent) than at the Supreme Court (27.9 per cent) over the 15-year period since 1989. This is not surprising since the Supreme Court’s position as the final court of appeal, together with its ability to control its docket, means that the equality claims it adjudicates will be drawn largely from the pool of more credible claims presented in the lower courts. Another notable feature of the data is that the success rate of section 15 claims at both the Supreme Court and lower courts has increased since the Law ruling compared to the Andrews decade.

Of course, there are a number of reasons to be cautious before drawing conclusions from this data. The “success” or “failure” of a section 15 claim is not necessarily a reliable indicator of a court’s commitment to upholding equality rights. Not all section 15 claims rely on a desirable or even plausible interpretation of equality rights. Thus, for example, when Imre Finta’s equality rights challenge to the war criminal provisions of the Criminal Code failed, few would consider its dismissal as anything but a victory for our understandings of equality. Yet it is counted here as a “failed” section 15 claim. Other unsuccessful claims are counted as “failed” even though they may articulate a vision of substantive equality that will assist disadvantaged groups in political and legal struggles. Conversely, some “successful” claims may articulate narrow or regressive conceptions of equality. Clearly, then, the quantitative summary we are presenting here is a crude measure of “success” in equality litigation. It needs to be supplemented by a variety of other kinds of studies to get a full picture of the results and the impact of equality litigation. Quantitative analysis needs to be supplemented by the traditional kinds of qualitative analysis that critically evaluate the

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substance of equality decisions.\textsuperscript{32} We also need more investigation of the impact of legal decisions on political actors and policy development,\textsuperscript{33} and, perhaps most importantly, we need more inquiries into how and in what ways policy changes generated by equality litigation are actually having an impact on the lives of equality litigants and the groups they represent. Quantitative analysis of cases only offers a glimpse of overall trends in courts’ decision-making — it cannot in itself provide explanations for those trends or reveal anything useful about the impact of equality litigation on government policy or people’s lives.

Bearing in mind these caveats, what can our data tell us about the courts’ handling of Charter equality claims? The increased success rate of section 15 claims since Law casts some doubt on the thesis that the Law test places greater burdens on equality claimants than the Andrews ruling did. The Andrews opinion posited an apparently straightforward definition of discrimination: differences in treatment on prohibited grounds based on prescribed group characteristics would normally be discriminatory, while differences in treatment on prohibited grounds that reflected actual merits and capacities would rarely be discriminatory. The Law test is an attempt to work out the complexities buried in this deceptively simple formulation. As Denise Réaume has noted, the human dignity approach to discrimination “may be less a new threshold requirement of section 15 than a matter of making explicit a condition already present”.\textsuperscript{34}

The increased success rate in the past five years is likely attributable, at least in part, to factors other than the doctrinal differences between Andrews and Law. It seems likely, for example, that potential litigants and their legal advisors have become more sophisticated in predicting which cases are likely to succeed and more wary of launching equality challenges as the evidentiary and doctrinal hurdles they face

\textsuperscript{32} We attempt to join these two types of analysis in Part IV, below.


\textsuperscript{34} D. Réaume, “Discrimination and Dignity”, supra, note 12, at 654.
have become better understood. It may also be that the resources available to equality-seeking groups to fund litigation have declined and that this has led to a concentration of effort on equality litigation with relatively high chances of success. We found some support for these hypotheses by tracking the annual success rate at the lower courts to see how it varied over the fifteen-year period. We found a success rate of 15.6 per cent at the lower courts in the first five years after Andrews (1989-1993: 21/128), followed by an increase to 24.5 per cent in the second half of the Andrews decade (1994-1998: 23/94), a rate that has increased slightly to 26.3 per cent since the Law ruling (25/95). While the number of Supreme Court decisions is much smaller, the data also indicates an increased success rate since the mid-1990s (see Appendices A and B, below).

Overall, the data suggests that the success rate of section 15 claims has been relatively low, compared to Charter claims generally, throughout the Andrews decade and the first five years under Law. The data does not support the view that the Andrews test operated in a manner more supportive of equality claimants. Nor does it support the view that the courts have been particularly receptive to the claims of equality-seeking groups. For example, examining the record of Supreme Court decisions, it is striking that six of the nine grounds of discrimination listed in section 15 have not given rise to a single successful claim (race, national origin, ethnic origin, colour, religion, mental disability). Since there have been either no claims considered by the Court, or very few, on each of these grounds, this is a reminder that the costs of litigation remain the most formidable barrier to the affirmation and protection of equality rights.

Moreover, the success rate at the Supreme Court of claims based on a number of the enumerated grounds is low. For example, the success rate of claims based on age discrimination is 20 per cent (1/5). The success rate of claims based on sex discrimination is 25 per cent (2/8), and in the two successful cases, the claimants were men. This is not the record of a Court captured by the interests and ideologies of equality-seeking groups.

Criticisms that the Law test has made it harder to assert a successful section 15 claim have focused on its approach to the third stage of the section 15 analysis, namely, its definition of discrimination as a violation of human dignity, to be assessed by reference to four contextual factors from the point of view of a reasonable person in the claimant’s position. The critics have raised concerns that this third stage of the
equality analysis, following on the establishment of differential treatment (1st stage) on the basis of a prohibited ground (2nd stage), places onerous burdens on equality claimants. To attempt to measure whether the record of decision-making lends credence to this concern, we have categorized the cases where section 15 claims failed according to the stage of the analysis at which they foundered. The results are as follows:

**Stage of analysis at which unsuccessful section 15 claims failed**

1 = differential treatment  
2 = prohibited ground  
3 = discrimination  
s. 1 = s. 15 violation upheld pursuant to s. 1

<table>
<thead>
<tr>
<th></th>
<th>Under Andrews — failure at which stage</th>
<th>Under Law — failure at which stage</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>SCC</td>
<td>18.75%</td>
<td>37.5%</td>
</tr>
<tr>
<td></td>
<td>3/16</td>
<td>6/16</td>
</tr>
<tr>
<td>Lower courts</td>
<td>26.6%</td>
<td>53.1%</td>
</tr>
<tr>
<td></td>
<td>47/177</td>
<td>94/177</td>
</tr>
</tbody>
</table>

As one would expect, the data reveals that a larger proportion of equality claims were dismissed at the prohibited grounds stage of analysis during the *Andrews* decade than has been the case in the last five years. As different personal characteristics are rejected or accepted as analogous grounds, it is predictable that the number of claims dismissed at this stage would diminish.

The Supreme Court data supports the view that the human dignity stage of the *Law* analysis has posed a formidable barrier to equality claimants, accounting for the dismissal of the claim in almost two-thirds (7/11) of the unsuccessful section 15 cases in the past five years. This is a significant increase from the Court’s record during the *Andrews* decade, when more claims were dismissed at the first two stages of the equality analysis or by upholding violations of section 15 pursuant to section 1. This change in the pattern of Supreme Court decision-making

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35 The cases tabulated here do not include all failed s. 15 claims in our sample. Omitted from the tabulation are claims that failed on the grounds that the claimant could not invoke s. 15 (e.g., on the grounds that corporations cannot claim s. 15 rights).
supports the concern expressed by a number of commentators that the Law test has shifted the burden of analysis from section 1 to the human dignity stage of the section 15 test. On the other hand, the pattern of lower court decisions is very different. After Law, more than two-thirds of the section 15 claims rejected by the lower courts fail at the first two stages of the equality analysis, as they did in the Andrews decade. The number of claims failing at the third stage of the analysis has decreased since Law. Compared to the record during the Andrews decade, the number of equality violations that lower courts have found to be justified pursuant to section 1 has increased.

Members of the Supreme Court have suggested on a number of occasions that it will be rare that discrimination will not also be established if the claimant has succeeded in demonstrating differential treatment on the basis of a prohibited ground. At the Supreme Court level, this prognostication has proven to be dramatically inaccurate. The Court has regularly found differential treatment on a prohibited ground to be non-discriminatory. It has done so in seven of the 16 cases where the Court applied the Law test to resolve a section 15 claim. The strikingly different pattern at the lower courts reminds us that the Supreme Court data reflects a skewed selection of section 15 cases as a whole, one that likely overemphasizes the dispositive role, in practice, of the human dignity stage of the Law test.

The section 15 cases to which the Supreme Court gives leave are more likely to be well-presented and well-funded claims that involve the most challenging aspects of equality litigation, and thus are more likely to turn on the Court’s conclusion at the human dignity stage. At the lower courts, the vast majority (71 per cent) of unsuccessful equality claims since Law have failed at either the differential treatment or prohibited ground stages of analysis, while 14.5 per cent have failed at the human dignity stage of the Law test. Interestingly, a comparable proportion (15.8 per cent) of section 15 claims failed at the discrimination stage in the lower courts during the Andrews decade. Establishing differences in treatment on the basis of a prohibited ground did not assure success for

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36 Bredt and Dodek, supra, note 9; Martin, supra, note 11; Hogg, supra, note 10.
equality claimants during the *Andrews* decade or the first five years under *Law*.

IV. THE SUPREME COURT’S APPLICATION OF THE FOUR CONTEXTUAL FACTORS IN *Law*

In the *Law* case, Iacobucci J. articulated four “contextual factors” to serve as guides to the determination of whether or not differential treatment on a prohibited ground of discrimination would constitute discrimination in a substantive sense by implicating the claimant’s human dignity. The four factors, expressed in terms that lean towards a finding of discrimination, are: (1) the presence of historic disadvantage; (2) the lack of correspondence between the ground of discrimination at issue and the actual needs, capacities and circumstances of the claimant; (3) the absence of a purpose or effect that ameliorates the condition of another more disadvantaged group; and (4) the importance of the interest interfered with by the state. The Court stated that these factors are not an exhaustive description of the relevant considerations, but it has not since articulated any others.

One of the difficulties of applying the *Law* test is that, apart from indicating that the first factor, historical disadvantage, is the “most compelling” indicator of discrimination, the Court did not discuss the relative weight to be given to each factor. This is not a problem when all factors point towards the same conclusion, which is one of the reasons why all 15 judges who have heard the recent Charter challenges to the opposite-sex requirement of the legal definition of marriage have found that it discriminates against same-sex couples. The *Law* factors work

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38 The Court’s description of the four contextual factors is set out in *Law*, supra, note 3, at paras. 62-75.
39 Id., at para. 63.
well when a government law or policy clearly violates both formal and substantive conceptions of equality. The legal bar to same-sex marriage has the effect of further subordinating a disadvantaged group by denying them entry into one of society’s fundamental legal institutions. Moreover, the legal bar to same-sex marriage is not designed to improve the conditions of some other disadvantaged group. For these reasons, the legal definition of marriage contributes to substantive inequality. But the legal bar also violates formal equality, because the grounds of sex and sexual orientation do not correspond to any of the objectives of the contemporary legal regulation of marriage. Now that marital rights and obligations are framed in gender-neutral terms, and the law no longer inhibits people’s freedom to choose whether or not to procreate, within or outside of marriage, the argument that the sex or sexual orientation of persons seeking to legally marry is somehow relevant to state objectives founders on irrationality.

The four contextual factors operated effectively and harmoniously to expose the weakness of the government’s position on the marriage issue. But what happens when the factors point in different directions? The combination of the first, third and fourth factors should serve to maintain a focus on substantive equality: they examine whether the state has imposed further burdens on already disadvantaged groups, and, if so, whether those burdens are a result of a targeted program that ameliorates the condition of an equally or more disadvantaged group.41

The second factor, on the other hand, while it is framed in terms of “correspondence” between the grounds at issue and the claimant’s actual situation, replicates the “relevance” or “similarly situated” tests that earlier judgments of the Court rejected as an insufficient guide to the interpretation of section 15.42 The correspondence factor inevitably

41 In Lovelace v. Canada, supra, note 8, the Court relied on the ameliorative purpose factor to affirm the principle that the state does not discriminate by adopting targeted ameliorative programs for disadvantaged groups, even if those groups are identified by prohibited grounds of discrimination. The Court also struggled to explain how the correspondence factor — or the formal equality, similarly situated test — was not violated by the program. This was unconvincing. In our view, it would have been more convincing to acknowledge that the program violated formal equality (because the distinction between band and non-band Aboriginal groups was a poor marker of economic need), and rest the decision upholding the program on the grounds that the promotion of substantive equality through targeted ameliorative programs can justify violations of formal equality.

42 See Andrews, supra, note 1, at 168; Miron, supra, note 13, at 488, per McLachlin J.; Egan, supra, note 13, at 546-48, per L’Heureux-Dubé J.
involves a consideration of the objective of the challenged law or policy, and a consideration of whether the differential treatment on a prohibited ground is relevant to the achievement of that objective. In other words, the correspondence test asks whether the claimant is similarly situated to those receiving different treatment, measured by reference to differences that are relevant to the state’s objectives. Whether we label this approach “correspondence”, “relevance” or “means/ends fit”, they are all variations on the familiar Aristotelian ideal of formal equality: it is not discriminatory to treat likes alike, and unalikes unalike. Since we are all alike in some ways, and unalike in others, the question boils down to: which differences are relevant in this context? Does the differential treatment at issue correspond to relevant differences in people’s actual situations? The correspondence factor is the similarly situated test. Both are inquiries into whether the differential treatment is imposed on the basis of a characteristic that is relevant to the objectives of the law or policy at issue.

The four Law factors can thus be seen as an attempt to mediate between formal equality (or rational treatment of individuals) and a substantive conception of equality aimed at ameliorating the conditions of disadvantaged groups. Much of the time we do not need to choose between them because formal and substantive conceptions of equality do not always conflict. When a substantive equality analysis and a formal equality analysis point in the same direction, the result of a court’s consideration of the four contextual factors in Law is straightforward. This will be true, for example, when the challenged state action is rational and does not subordinate disadvantaged groups. It will also be true when the state imposes subordinating and irrational differential treatment on a disadvantaged group. But when formal and substantive equality point in different directions, how is a court to weigh the competing factors in deciding whether the claimant has established discrimination in a substantive sense? As we discussed in Part I above, the Court has not yet fully resolved this issue. When the state violates formal equality and promotes substantive equality by adopting targeted ameliorative programs, section 15 is not violated: substantive equality trumps formal inequality. But when subordinating effects on disadvantaged groups result from the rational pursuit of a state objective, the Court’s recent decisions suggest that formal equality trumps substantive inequality. The following chart lists the Court’s determinations on each of the four
contextual factors in the fifteen rulings that involved some discussion of this stage of the Law analysis.43

1. The Four Contextual Factors at Work in SCC Equality Rights Rulings

<table>
<thead>
<tr>
<th>Case</th>
<th>Historical Disadvantage</th>
<th>Lack of Correspondence</th>
<th>Lack of Ameliorative Purpose</th>
<th>Important Interest Violated</th>
<th>Disc’n?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Law(^{44})</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>-</td>
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</tr>
<tr>
<td>2. M. v. H(^{45})</td>
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<td>➪</td>
<td>➪</td>
<td>➪</td>
<td>Yes</td>
</tr>
<tr>
<td>3. Corbiere(^{46})</td>
<td>➪</td>
<td>➪</td>
<td>-</td>
<td>➪</td>
<td>Yes</td>
</tr>
<tr>
<td>4. Winko(^{47})</td>
<td>➪</td>
<td>x</td>
<td>-</td>
<td>-</td>
<td>No</td>
</tr>
<tr>
<td>5. Delisle(^{48})</td>
<td>-</td>
<td>x</td>
<td>-</td>
<td>-</td>
<td>No</td>
</tr>
<tr>
<td>6. Lovelace(^{49})</td>
<td>➪</td>
<td>x</td>
<td>x</td>
<td>neutral</td>
<td>No</td>
</tr>
<tr>
<td>7. Granovsk(^{50})</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>neutral</td>
<td>No</td>
</tr>
<tr>
<td>8. Little Sisters(^{51})</td>
<td>➪</td>
<td>➪</td>
<td>➪</td>
<td>➪</td>
<td>Yes</td>
</tr>
<tr>
<td>9. Lavose plurality(^{52})</td>
<td>➪</td>
<td>➪</td>
<td>➪</td>
<td>➪</td>
<td>Yes</td>
</tr>
<tr>
<td>10. Gosselin(^{53})</td>
<td>x</td>
<td>x</td>
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</tr>
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<td>11. Walsh(^{54})</td>
<td>-</td>
<td>x</td>
<td>-</td>
<td>-</td>
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<tr>
<td>12. Siemens(^{55})</td>
<td>-</td>
<td>x</td>
<td>-</td>
<td>-</td>
<td>No</td>
</tr>
<tr>
<td>13. Trociuk(^{56})</td>
<td>x</td>
<td>➪</td>
<td>x</td>
<td>➪</td>
<td>Yes</td>
</tr>
<tr>
<td>14. Martin(^{57})</td>
<td>neutral</td>
<td>➪</td>
<td>➪</td>
<td>➪</td>
<td>Yes</td>
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</tbody>
</table>

The pattern of results in these Supreme Court cases applying the *Law* test makes clear that the correspondence factor has thus far proven to be the most important factor in determining whether or not the Court finds a difference in treatment on a prohibited ground to be discriminatory. Historical disadvantage, far from being the “most compelling” factor as Iacobucci J. suggested it should be in *Law*, has played a secondary role. The Court’s finding on historical disadvantage has supported the outcome of the discrimination inquiry in only seven of the 15 cases. The record of the third and fourth factors is similar: the findings on ameliorative purpose and the importance of the interest at stake have supported the outcome of the discrimination inquiry in six of 15 and eight of 15 cases respectively. The finding on the correspondence factor, on the other hand, has aligned with the outcome of the discrimination inquiry in all 15 cases. In short, it seems that the finding on the correspondence factor and the conclusion on discrimination invariably correspond.

The dominance of correspondence, or formal equality, in the Court’s recent rulings occurs in a number of different ways. A violation of formal equality may be *sufficient* to establish that differential treatment on a prohibited ground is discriminatory. An example is the Court’s decision last year in *Trocic v. British Columbia (Attorney General)*. In that case, a father challenged a provision of the *Vital Statistics Act* that permitted a mother to exclude a father from having

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<table>
<thead>
<tr>
<th>15. CFCYL*</th>
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<th>➢</th>
<th>➢</th>
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<td>=</td>
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<tr>
<td>➢</td>
<td>=</td>
<td>the Court found this factor leaned toward a finding of discrimination</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>neutral</td>
<td>=</td>
<td>the Court found this factor did not lean in either direction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>=</td>
<td>this factor was not addressed</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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60 *Supra*, note 56.
his particulars included in their child’s birth registration and from participating in choosing the child’s surname. While Deschamps J.’s opinion on behalf of the Court did not address the correspondence factor by name, the gist of her reasoning was that the prohibited ground at issue, sex, did not always correspond to good reasons for excluding fathers from the birth registration and naming process. The arbitrariness of the exclusion drove Deschamps J. to the conclusion that the difference in treatment was discriminatory, notwithstanding that the claimant, or fathers generally, could not be said to be members of a historically disadvantaged group.

The overriding importance accorded to the correspondence factor was also apparent in the other successful section 15 claim in last year’s Supreme Court decisions, *Nova Scotia (Workers’ Compensation Board) v. Martin*.62 In finding that the exclusion of chronic pain claimants from workers’ compensation benefits and services amounted to discrimination on the basis of physical disability, Gonthier J. commented that the lack of correspondence between the differential treatment and the true needs and circumstances of the claimants was “at the heart of the section 15(1) claim”.63 Since the lack of correspondence was the “gravamen of the appellants’ section 15 claim”,64 a consideration of relative historic disadvantage was “largely inappropriate”.65

Finding irrational differences in treatment on the basis of prohibited grounds — that is, violations of formal equality — to be sufficient to lead to a finding of discrimination, as occurred in *Trociuk* and *Martin*, is not always troubling. Formal equality is not necessarily inconsistent with substantive equality, and of course formal inequality may be the means (as in *Martin*) through which substantive inequality is perpetuated. The main concern with the Court’s analysis in cases like *Trociuk* and *Martin* is that by foregrounding formal inequality, the Court may put aside its stated commitment to treating the achievement of substantive equality as section 15’s ultimate purpose.66

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62 *Supra*, note 57.
63 *Id.*, at para. 89.
64 *Id.*, at para. 91.
65 *Id.*, at para. 89.
Another, and more troubling, way in which formal equality is dominating the Court’s equality jurisprudence is that in some cases a lack of correspondence is being found to be a necessary ingredient of a finding of discrimination. Thus, in a handful of cases, the Court’s finding that the ground of discrimination corresponded to actual circumstances that were relevant to the law was the sole basis for concluding that discrimination had not been demonstrated.\footnote{Winko, supra, note 37; Delisle, supra, note 48; Walsh, supra, note 54; Siemens, supra, note 55.} Perhaps the starkest example of this trend is the recent decision in \textit{Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)}\footnote{Supra, note 58.} in which a majority of the Court rejected the argument that section 43 of the \textit{Criminal Code} discriminated on the basis of age by exempting parents, guardians and teachers from prosecution for assault when they use reasonable force to correct children in their care. Chief Justice McLachlin, writing on behalf of the 6-3 majority that upheld the legislation, concluded in one short paragraph that three of the contextual factors leaned toward a finding of discrimination:

The first \textit{Law} factor, vulnerability and pre-existing disadvantage, is clearly met in this case. Children are a highly vulnerable group. Similarly, the fourth factor is met. The nature of the interest affected — physical integrity — is profound. No one contends that s. 43 is designed to ameliorate the condition of another more disadvantaged group: the third factor.\footnote{Id., at para. 56.}

Nevertheless, the Chief Justice went on to conclude that the subordinating differential treatment was not discriminatory in a substantive sense. Her conclusion in this regard turned entirely on the correspondence factor: age, she held, corresponds to the need to use corrective and reasonable force in some circumstances.

The result of permitting the correspondence factor to trump the other three factors is that even differential treatment on a prohibited ground that further subordinates a disadvantaged group will not be found to violate section 15 if the claimant fails to demonstrate that the law or policy at issue lacks a rational basis. The state is not called upon to justify its imposition of subordinating differential treatment on disad-
vantaged groups. Rather, the claimant has the burden of proving the lack of a rational connection between the personal characteristic at issue and the objective of the challenged law. The problem with this approach is that it too readily forgives the exacerbation of substantive inequality.

V. REVISITING THE LAW TEST

Our review of Supreme Court of Canada and lower court rulings on section 15 claims since the 1989 decision in Andrews reveals that, far from being captured by equality-seeking groups, the courts have approached section 15 cautiously from the outset. Many section 15 rulings reflect a persistent anxiety about the breadth and depth of its potential impact on state policies involving the distribution of material resources. Section 15 claims have consistently received a less receptive audience in the courts than is the norm for Charter claims generally. This was true in the decade during which Andrews was the leading section 15 case, and has remained true in the five years since the Law test displaced Andrews as the template for the adjudication of equality rights claims. Perhaps surprisingly, in light of the apparent additional burdens placed on section 15 claimants by the human dignity analysis in Law, the success rate of section 15 claims in the past five years has been higher, at both the Supreme Court and in the lower courts, than it was in the Andrews decade. This may be explained in large part by a deepening appreciation on the part of potential claimants and their lawyers of the nature of the hurdles section 15 claims must surmount and thus a declining propensity to launch relatively high-risk challenges. But it may also suggest that the critics of the Law ruling should be wary of exaggerating the positive aspects of the Andrews test and the manner of its application up until 1999. Equality claimants have faced long odds and significant jurisprudential obstacles to successful Charter challenges throughout the past 15 years. This is so even though equality-seeking groups have succeeded in establishing many of the key elements of a substantive conception of equality.70 Putting substantive equality to work to achieve favourable litigation outcomes appears to be another matter entirely.

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70 See Manfredi, supra, note 33, chapter 2, for an account of LEAF’s successes in this regard.
Section 15 of the Charter has had considerable influence in the courts and in governments “as an authoritative normative statement about fundamental values of equality”.\textsuperscript{71} The Court is comfortable giving weight to equality values when interpreting legal rights,\textsuperscript{72} or the right to vote (as in the \textit{Figueroa}\textsuperscript{73} ruling last year), or when considering whether limits on rights or freedoms can be upheld under section 1.\textsuperscript{74} While equality values have exerted an important influence on Charter interpretation and the design and administration of government policies,\textsuperscript{75} the results of Supreme Court section 15 cases have had, with a few exceptions, a modest impact on government policies and, for the most part, have been disappointing from the point of view of equality-seeking groups. Why is the court so apparently comfortable with equality values but so cautious about equality rights? A large part of the answer probably lies in the potential breadth of section 15’s impact on complex areas of redistributive social policy. The Court is manifestly uncomfortable with equality rights claims that directly target the ways in which governments raise and distribute material resources in areas such as income tax, pension or social assistance policy. These kinds of challenges often face a steeper than usual uphill battle, and the quality of the Court’s reasoning often suffers. The \textit{Symes}\textsuperscript{76}, \textit{Thibaudeau}\textsuperscript{77} and \textit{Gosselin}\textsuperscript{78} rulings are cases in point.

The successful section 15 claims establishing a right to marry for same-sex couples in British Columbia, Ontario and Quebec demonstrate the power of the \textit{Law} analysis when formal and substantive equality analyses coincide and what is at stake, primarily, is the state’s distribu-


\textsuperscript{72} An example is the weight given to sex equality in upholding sexual assault legislation alleged to violate the rights of accused persons. See the discussion in Manfredi, \textit{supra}, note 33, chapter 5.


\textsuperscript{74} P.W. Hogg, “Equality as a Charter Value in Constitutional Interpretation”, Claire L’Heureux-Dubé International Conference, Québec City, (21 March 2003).

\textsuperscript{75} See Hiebert, \textit{supra}, note 33.


\textsuperscript{78} \textit{Supra}, note 53.
tion of symbolic as opposed to material resources.\textsuperscript{79} Despite this compelling example of the power of the \textit{Law} analysis to displace state policies resting on deeply rooted, irrational and subordinating prejudices, our examination of the Court’s recent section 15 decisions reveals a danger that the \textit{Law} test can readily serve to forgive state policies that impose subordinating differential treatment on disadvantaged groups so long as those policies have a rational basis.

To reduce this danger, the Court needs to adopt a test for the justification of subordinating treatment of disadvantaged groups that demands more from government. Rather than forgive such treatment whenever there is a relevant connection between the differential subordinating treatment on a prohibited ground and a state objective, the government should be held to a higher standard. Governments should have to demonstrate not only that they have chosen rational means for the pursuit of compelling objectives, but also that they had no other options that would have had a less burdensome impact on disadvantaged groups. This higher standard could be adopted by treating the demonstration of subordinating differential treatment on the basis of a prohibited ground as sufficient to establish a violation of section 15. A consideration of the relevance of the prohibited ground to state objectives, or the test of means/ends fit, could be left in such cases to the section 1 stage of analysis as several commentators have recommended.\textsuperscript{80} South African equality jurisprudence treats the lack of a rational basis as sufficient but not necessary to establish a violation of equality. In other words, the presence of a rational basis, or a correspondence between the prohibited grounds and state objectives, is not sufficient to establish a lack of discrimination.\textsuperscript{81} South African judges have fashioned an equality jurisprudence that borrows heavily from the ideas of Supreme Court of Canada

\textsuperscript{79} Judy Fudge has argued, drawing on Nancy Fraser’s distinction between recognition claims and redistributive claims, that Charter equality rights foster recognition claims and recognition remedies but are “not very amenable to claims that either challenge pervasive social and legal norms or involve redistribution”. J. Fudge, “The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts”, in T. Campbell, K.D. Ewing and A. Tomkins eds., \textit{Sceptical Essays on Human Rights} (Oxford: Oxford University Press, 2001) 336, at 343.


\textsuperscript{81} See the test set out in \textit{Harksen v. Lane NO and Others} (1997) 11 B.C.L.R. 1489 (CC).
judges, particularly those of L’Heureux-Dubé J.\textsuperscript{82} Perhaps it is time to borrow back. The Court needs to reconsider the incisive critiques presented by L’Heureux-Dubé J. in \textit{Egan}\textsuperscript{83} and by McLachlin J. (as she then was) in \textit{Miron}\textsuperscript{84} of treating proof of irrelevance as a necessary component of a section 15 violation.

Another way of accomplishing the same result would be to build a more demanding test for means/ends fit into the section 15 analysis, in a manner that would ease the current evidentiary burdens on claimants and demand more of the state than the presence of a rational basis. This might involve modifying the \textit{Law} test in some respects, and in other respects it might involve a renewed emphasis on passages in Iacobucci J.’s opinion in \textit{Law} that have been overshadowed by subsequent developments. The Court’s recent jurisprudence treats the correspondence factor, which has proven to be a similarly situated or relevance test dressed up in new linguistic garb, as the decisive factor in equality claims. The Court could reiterate that the presence of historical disadvantage is “the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory”.\textsuperscript{85} The Court could also explore Iacobucci J.’s suggestion in \textit{Law} that “a more precise correspondence will likely be important where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society”.\textsuperscript{86} A more demanding test of means/ends fit would be one that asked the state to demonstrate that it chose the least subordinating means of pursuing a compelling objective that is itself consistent with equality norms.

If the \textit{Law} test were revised along these lines, a more sensible division of the burden of proof in section 15 cases would result. In cases where the claimant has established subordinating differential treatment of a disadvantaged individual or group, the government could avoid a

\textsuperscript{83} \textit{Supra}, note 13.
\textsuperscript{84} \textit{Id}.
\textsuperscript{85} \textit{Law, supra}, note 3, at para. 63.
\textsuperscript{86} \textit{Id.}, at para. 106.
finding that section 15 is violated in one of two ways. First, it could show that the differential treatment was a result of a carefully targeted program aimed at ameliorating the conditions of a more or equally disadvantaged group. Second, it could displace a presumption of discrimination where subordinating treatment of disadvantaged individuals or groups has been established by showing that it was pursuing a compelling objective pursuant to the least subordinating means. In other words, the government, not the claimant, would have to demonstrate the nature and importance of its objective, and the government, not the claimant, would have to show that it considered alternative means but none promised a less burdensome impact on the claimant or the disadvantaged group s/he represents.

It may be true, as Iacobucci J. stated in Law, that there should be “no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory”. However, such a presumption is appropriate if the differential treatment at issue further subordinates a disadvantaged individual or group by imposing a burden or denying a benefit, and the policy at issue is not a targeted program that ameliorates the condition of a more or equally disadvantaged group. Without taking some steps along these lines, the Court’s stated commitment to substantive equality is at risk of receding even further from its jurisprudential grasp.

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87 Id., at para. 67.
VI. APPENDIX A

Summary of Supreme Court of Canada Dispositions of Section 15 Claims

Listed below are all Supreme Court of Canada cases where a section 15 claim was addressed by a majority of the Court. Companion cases that involved challenges to the same or similar legal provisions and raised the same section 15 issues have been grouped together and counted as one case.

Key

Ground = ground of discrimination asserted
Section 15 violated? = whether a majority or plurality found a violation of section 15, and, if not, at which stage of the section 15 analysis the claim failed (1st = because no difference in treatment found; 2nd = because the difference in treatment was found not to be on the basis of a prohibited ground; 3rd = because the difference in treatment on a prohibited ground was found not to be discrimination in a substantive sense; other = section 15 held to be inapplicable).
Section 1 limit? = whether violation of section 15 upheld pursuant to section 1.
Result = whether an unjustifiable violation of section 15 found.

<table>
<thead>
<tr>
<th>Case</th>
<th>Ground</th>
<th>Section 15 violated?</th>
<th>Section 1 limit?</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
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<td>Yes</td>
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<td>3. Turpin (1989)</td>
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</table>

88 Supra, note 1.
90 Supra, note 6.
<table>
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<tr>
<th></th>
<th>Case</th>
<th>Province of residence</th>
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<th>Age</th>
<th>Group seeking relief from the federal crown</th>
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<th>Employment status</th>
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<tr>
<td>5</td>
<td>R. v. Hess (1990)96</td>
<td>Sex</td>
<td>No (3rd)</td>
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<td></td>
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<td>6</td>
<td>McKinney (1990)97 Harrison (1990)98 Stoffman (1990)99</td>
<td>Age</td>
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<td>Yes</td>
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<td>8</td>
<td>Tétreault-Gadoury (1991)102</td>
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<td>R v. Généreux (1992)103</td>
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<td><strong>11. Chiarelli (1992)</strong></td>
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<td><strong>16. NWAC (1994)</strong></td>
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<td><strong>17. Finta (1994)</strong></td>
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<td><strong>19. Égan (1995)</strong></td>
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107 Supra, note 76.
108 Supra, note 31.
112 Supra, note 13.
113 Supra, note 13.
<table>
<thead>
<tr>
<th>Case</th>
<th>Category</th>
<th>protected characteristics</th>
<th>Affirmative action</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>21. Ont. Home Bldr’s Assoc. (1996)(^{115})</td>
<td>Religion</td>
<td>No (other)</td>
<td>N/A</td>
<td>No</td>
</tr>
<tr>
<td>22. Adler (1996)(^{116})</td>
<td>Religion</td>
<td>No (other)</td>
<td>N/A</td>
<td>No</td>
</tr>
<tr>
<td>23. Eaton (1997)(^{117})</td>
<td>Physical disability</td>
<td>No (3rd)</td>
<td>N/A</td>
<td>No</td>
</tr>
<tr>
<td>24. Benner (1997)(^{118})</td>
<td>Sex</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>25. Eldridge (1997)(^{119})</td>
<td>Physical disability</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>26. Vriend (1998)(^{120})</td>
<td>Sexual orientation</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>27. Van. Society of Imm. &amp; V.M. Women (1999)(^{121})</td>
<td>Immigrant status, race, sex, national or ethnic origin</td>
<td>No (1st)</td>
<td>N/A</td>
<td>No</td>
</tr>
<tr>
<td>28. Law (1999)(^{122})</td>
<td>Age</td>
<td>No (3rd)</td>
<td>N/A</td>
<td>No</td>
</tr>
<tr>
<td>29. M. v. H. (1999)(^{123})</td>
<td>Sexual orientation</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>30. Corbière (1999)(^{124})</td>
<td>Aboriginality-residence</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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</tbody>
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\(^{114}\) Supra, note 77.
\(^{118}\) Supra, note 37.
\(^{119}\) Supra, note 7.
\(^{122}\) Supra, note 3.
\(^{123}\) Supra, note 45.
\(^{124}\) Supra, note 46.
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<thead>
<tr>
<th>No.</th>
<th>Case Reference</th>
<th>Issue</th>
<th>Outcome</th>
<th>N/A</th>
<th>Status</th>
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<tbody>
<tr>
<td></td>
<td><em>Orlowski</em> (1999)</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td><em>Bese</em> (1999)</td>
<td></td>
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<td></td>
<td><em>Lepage</em> (1999)</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>32.</td>
<td><em>Delisle</em> (1999)</td>
<td>Employment status</td>
<td>No (2nd &amp; 3rd)</td>
<td>N/A</td>
<td>No</td>
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<tr>
<td>33.</td>
<td><em>Lovelace</em> (2000)</td>
<td>Non-band aboriginality (not decided)</td>
<td>No (3rd)</td>
<td>N/A</td>
<td>No</td>
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<tr>
<td>34.</td>
<td><em>Granovsky</em> (2000)</td>
<td>Physical disability</td>
<td>No (3rd)</td>
<td>N/A</td>
<td>No</td>
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<td>35.</td>
<td><em>Little Sisters</em> (2000)</td>
<td>Sexual orientation</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<td>37.</td>
<td><em>Gosselin</em> (2002)</td>
<td>Age</td>
<td>No (3rd)</td>
<td>N/A</td>
<td>No</td>
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125 *Supra*, note 37.
129 *Supra*, note 48.
130 *Supra*, note 8.
131 *Supra*, note 50.
132 *Supra*, note 51.
133 *Supra*, note 52.
134 *Supra*, note 53.
135 *Supra*, note 54.
136 *Supra*, note 55.
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<tr>
<td>40. <em>Trocik v. B.C.</em> (2003)¹³⁷</td>
<td>Sex</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>41. <em>Nova Scotia (WCB) v. Martin</em> (2003)¹³⁸</td>
<td>Physical Disability</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>42. <em>R. v. Malmo-Levine</em> (2003)¹³⁹</td>
<td>Marijuana use</td>
<td>No (2nd)</td>
<td>N/A</td>
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</tbody>
</table>

¹³⁷ *Supra*, note 56.
¹³⁸ *Supra*, note 57.
¹³⁹ *Supra*, note 43.
¹⁴⁰ *Supra*, note 58.
VII. APPENDIX B

Annual Success Rate in SCC Section 15 Cases

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Cases</th>
<th>Number of Wins</th>
<th>Success Rate</th>
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<tbody>
<tr>
<td>1989</td>
<td>3</td>
<td>1</td>
<td>33.3%</td>
</tr>
<tr>
<td>1990</td>
<td>4</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1991</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>1992</td>
<td>3</td>
<td>1</td>
<td>33.3%</td>
</tr>
<tr>
<td>1993</td>
<td>4</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1994</td>
<td>2</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1995</td>
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<td>1996</td>
<td>2</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1997</td>
<td>3</td>
<td>2</td>
<td>66.6%</td>
</tr>
<tr>
<td>1998</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>1999</td>
<td>6</td>
<td>2</td>
<td>33.3%</td>
</tr>
<tr>
<td>2000</td>
<td>3</td>
<td>1</td>
<td>33.3%</td>
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<tr>
<td>2001</td>
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<tr>
<td>2002</td>
<td>3</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2003</td>
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<td>2</td>
<td>50%</td>
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<td>2004</td>
<td>1</td>
<td>0</td>
<td>0%</td>
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<tr>
<td>Total</td>
<td>43</td>
<td>12</td>
<td>27.9%</td>
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