Discrimination in the Provision of Government Services and S.15 of the Charter: Making the Best of the Judgements in Egan, Thibaudeau, and Miron

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DISCRIMINATION IN THE PROVISION OF GOVERNMENT SERVICES AND S.15 OF THE CHARTER: MAKING THE BEST OF THE JUDGEMENTS IN EGAN, THIBAudeau, AND MIRON

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RÉSUMÉ
L'article 15 de la Charte canadienne des droits et libertés devrait être un moyen utile de résoudre bon nombre des problèmes qui touchent les clients à faible revenu. Dans cet article, l'auteure étudie les problèmes et les questions soulevés lorsque l'on prépare une plaidoirie sur l'article 15. L'auteure traite des tâches nécessaires suivantes lors d'un litige se basant sur l'article 15 : résumer l'analyse de l'article 15; définir la notion de discrimination aux fins de l'article 15; établir les liens entre l'effet discriminatoire et le motif de distinction illicite; obtenir l'inclusion du groupe représenté par le client aux fins de l'article 15; et réfuter les arguments de l'article 1. Dans cet article, l'auteure étudie les récentes décisions de la Cour suprême du Canada dans les causes Egan and Nesbit versus Canada, Thibaudeau versus Canada (M.R.N.) et Miron versus Trudel de même que la décision de la Cour d'appel de la Colombie-Britannique dans la cause Eldridge versus British Columbia.

INTRODUCTION
Advocates who work with poor people are exposed daily to the fundamental issues of human rights law. A poverty law practice is a "crash course" in the power dynamics that are the bedrock of discrimination.

The problems associated with discrimination, which include inferior treatment, exclusion and deprivation, are created or exacerbated by people who are in a "majority" position. The people who are affected are in a "minority" position. The terms used in this context have no direct relation to numbers. In the context of discrimination, a "minority" position has to do with relative lack of power.

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and influence. The lack of power and influence on the part of the minority is coupled with a lack of recognition by the majority of the commonality of the minority individual or group with the majority, and a consequent failure of empathy. Important similarities between majority and minority are ignored by the majority, and important differences are not taken into account.

It is no coincidence that minority status and poverty frequently go together. Further, in North America, minority status has strong historical links to sex (female), race/ethnicity (particularly non-"white"), disability (particularly visible disability), age (the extremes of the age spectrum), sexual orientation (non-heterosexual), religion (non-"mainstream Christian"), citizenship (non-citizens) and other characteristics that have been recognised as grounds of discrimination in provincial human rights legislation, the Canadian Charter of Rights and Freedoms\(^1\) (hereinafter the Charter), or both.

Given all of the above, it would seem natural for poverty law practitioners and their clients to turn to s.15 of the Charter as a source of assistance in their ongoing battle for justice in matters involving government, at least insofar as that battle is waged in courts and administrative tribunals. This has not happened nearly as often as might be expected. For the purpose of this article, I will ignore the obvious and massive impediment to Charter litigation by poverty advocates; scarcity of time and resources. One of the other reasons for the scarcity of s.15 challenges may be that the poverty law advocate who reads s.15 decisions may give up in despair.

Section 15 jurisprudence is not well developed at the Supreme Court of Canada level, and the few Supreme Court decisions released to date are difficult to understand and difficult to reconcile. In the lower courts, the few decisions that have dealt with discrimination in the provision of government services are mostly characterized by judicial failure to recognise discrimination.

On 25 May, 1995, the Supreme Court of Canada released three s.15 decisions, all of which dealt with access to government services or benefits of some nature. The decisions come at a time in Ontario in which the provincial government has announced its intention to embark on a program of further deprivation of the province’s most vulnerable people. This may therefore be a good time to review the issues fundamental to the type of s.15 challenge most likely to be of concern to poverty law advocates.

Discrimination is an elastic term covering a myriad of behaviours, from the violent aggression of the stereotypic racist to the oversight, resulting from

ignorance, that makes life harder for the disabled. The business of s.15 is discrimination, but the jurisprudence to date has not come to grips with the wide range of issues that discrimination raises. Section 15 jurisprudence lags behind human rights law in this respect, which is not surprising, given that s.15 has been in effect only since 1987, whereas the provinces and the federal government have had human rights legislation for much longer; in Ontario for over thirty years.

There are two types of discrimination that may give rise to a s. 15 claim. The first is different treatment that results in disadvantage to those singled out for the different treatment. An example is the rule, under current Ontario social assistance legislation, that persons 18-21 years old living in their parents’ home are categorically ineligible for assistance. This situation is discriminatory because 18-21 year old people are treated differently, and the differentiation causes a disadvantage to them.

The second type of discrimination occurs when everyone is treated the same. This could occur, for example, if the government required everyone on social assistance to attend personally at the welfare office every month to pick up his or her benefits cheque. This rule, applied to everyone, would have a more onerous effect on people with disabilities that affect their mobility than on those who do not have such disabilities. This situation could be seen to be discriminatory because disabled people are affected by the rule in a worse way than others. Same treatment that results in disadvantage is referred to in this article as constructive discrimination.

The advocate who attempts to persuade a judge or other adjudicator that one of the above-noted types of situations infringes s.15 faces two major difficulties:

1. Supreme Court of Canada jurisprudence is confusing. In my view, this is caused in part by the Justices in a particular case, often with the best of intentions, essaying general remarks to address issues that are not before them. The members of the Court could also be criticised for not choosing their language more carefully, and using it more consistently, in a complex area of law that requires strict attention to clarity in expression.

2. The crux of a s.15 claim is that existing systems that benefit the majority be modified to provide fairness to a minority. Judicial reluctance to tamper with existing systems is unlikely to be overcome without a compelling explication of the law.
This article will give a brief outline of the decisions in *Egan and Nesbit v. Canada*, *Thibaudeau v. Canada (M.N.R.)*, and *Miron v. Trudel*. In the light of these three cases and previous jurisprudence, and in the context of discrimination in government services, it will go on to address how the judgements affect the necessary tasks in a s.15 argument:

- summarizing the s.15 analysis
- defining discrimination for the purpose of s.15
- establishing the nexus between the discriminatory effect and the prohibited ground
- obtaining the inclusion of the group represented by the client for the purpose of s.15
- rebutting s.1 arguments.

I. THE DECISIONS IN EGAN, THIBAudeau, AND MIRON

In *Egan*, the appellants sought a declaration that the definition of "spouse" contained in the *Old Age Security Act* offends section 15 of the *Charter* because it excludes same-sex spouses from spousal benefits. At the Supreme Court of Canada, Justices L'Heureux-Dubé and Cory (for Iacobucci, McLachlin, and Sopinka) held that s.15 was infringed. Justice LaForest (for Lamer, Gonthier, and Major) held that s.15 was not infringed. Because Justice Sopinka agreed with Justices LaForest, Lamer, Gonthier, and Major that any infringement was saved by s.1, the appellants were unsuccessful.

In *Thibaudeau*, a divorced mother with custody of her two children challenged the tax treatment of maintenance payments. Under the current tax laws, maintenance payments are added to the recipient spouse's income and are deducted from the payor spouse's income. The majority of the Federal Court of Appeal struck down s.56(1)(b), the inclusion provision, as discriminatory, contrary to s.15(1) of the *Charter*, on the basis of "family status". At the Supreme Court of Canada, Justices Cory, Iacobucci, Gonthier, Sopinka and La Forest held that s.15 was not infringed. Justices L'Heureux-Dubé and McLachlin

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dissented on this point, and also held that the infringement was not saved by s.1. In *Miron*, the appellant was a member of an unmarried couple with children. He was injured while a passenger in an uninsured motor vehicle driven by an uninsured driver. After the accident, the appellant made a claim for accident benefits against his partner's insurance policy, which extended accident benefits to the "spouse" of the policy holder. The respondent insurer denied his claim on the ground that the appellant was not legally married to his partner, and hence not her "spouse". When appellant sued the insurer, the insurer brought a preliminary motion to determine whether the word "spouse", as used in the applicable portions of the policy, included unmarried common law spouses. The motions court judge found that "spouse" meant a person who is legally married. The appellant appealed the decision to the Court of Appeal, arguing that the policy terms, which were those of the standard automobile policy prescribed by the *Insurance Act*, R.S.O. 1980, c. 218, discriminated against him in violation of s. 15(1) of the *Charter*. The Court of Appeal dismissed the appeal. The appeal was allowed by a majority of the Supreme Court of Canada comprised of Justices L'Heureux-Dubé, McLachlin, Sopinka, Cory and Iacobucci, who held that the restriction breached s.15 and was not saved by s.1. Chief Justice Lamer and Justices La Forest, Gonthier and Major dissented on the application of s.15.

II. **SUMMARIZING A DESCRIPTION OF THE S.15 ANALYSIS**

It is customary to begin a factum with a brief summary of the "test" for establishing a breach of s.15. The "test" should summarize what the equity-seeker must establish before the enquiry shifts to s.1. This would be easier if the Supreme Court were more consistent in its language.

The first version of a s. 15 test was enunciated by the Supreme Court in *Andrews v. Law Society of British Columbia*, a case of discriminatory differentiation:

A complainant ... must show not only that he or she is not receiving equal treatment before or under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

Four years later, the Chief Justice of Canada addressed constructive discrimination in a dissenting judgement in *Rodriguez v. British Columbia (A.G.)*. The judgement is useful to this analysis because it is one of the only two Supreme

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Court of Canada judgements to address constructive discrimination,9 and it was not a dissent in respect of the issue of whether discrimination existed, the rest of the Court having assumed without deciding that s.15 was infringed. The Chief Justice summarized a three-part test based on Andrews:

The first step is to determine whether there is an infringement of one of the rights to equality mentioned in that provision. The question essentially is whether the statute makes distinctions between groups or classes of persons based on personal characteristics. If such inequality is found, the second step is to determine whether the inequality is discriminatory. Where there is discrimination, finally, justifications are to be considered in light of s. 1 of the Charter.10

Since the third part of the test invokes s.1, it can be seen that, in respect of s.15(1), the test used in Rodriguez is essentially the same as that used in Andrews.

A. **Differences in approach to s.15 among Supreme Court Justices**
The judgements in Egan, Thibaudeau, and Miron display a variety of ways of stating the s.15 analysis, even among judges who agree that the section is breached. The variations in terminology make it difficult to discern a pattern, but it appears that the Andrews test remains in use by the majority. Justices Lamer, LaForest, Gonthier, and Major appear to have added a new element to the test that essentially imports section 1 into the section 15 analysis.

1. **Differences in general approach**
At this point, four Justices of the Supreme Court are using one three-step analysis, one is using a different three-step analysis, and four are using a two-step analysis.

The minority approach places a significantly greater onus on the equity-seeker than does the majority, and represents a departure from the Andrews test. According to Justices Lamer, LaForest, Gonthier, and Major (in Egan, Thibaudeau and Miron):

The analysis to be undertaken under s.15(1) of the Charter involves three steps. The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes a burden, obligation or disadvantage on a group of persons to

9. *Symes v. M.N.R.* (1993) 161 N.R. 243 (S.C.C.), [hereinafter Symes], the other Supreme Court case which dealt with constructive discrimination, does not yield much direction concerning "tests" for infringement of s.15

which the claimant belongs which is not imposed on others, or does not provide them with a benefit which it grants others. ... The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated in s. 15(1) or one analogous thereto.11

In Miron, Justice Gonthier did note that “the functional values underlying the law may themselves be discriminatory.”12 However, he went on to confine “discriminatory” situations to

... case(s) where the underlying values are irrelevant to any legitimate legislative purpose. Relevancy is assessed by reference to a ground enumerated in s. 15 or one analogous thereto.13

Despite the added reference to s.15 grounds, Justice Gonthier seems to accept that the existence of “any legitimate legislative purpose” nullifies discrimination. As applied by Justices LaForest, Lamer, Gonthier, and Major, “relevancy to the functional values underlying the law” means that the purpose behind the law is accepted without question as valid and beyond challenge under s.15 as long as it is “legitimate”. All of this analysis is to take place before s.1 comes into play.

The source of this departure from Andrews can be seen in Justice LaForest’s judgement in Egan. In that judgement, he cites Justice McIntyre’s test in Andrews as quoted above, but gives Justice McIntyre’s words a novel interpretation that adds to the burden on the equity-seeker:

The nature of discrimination within the meaning of s. 15(1) of the Charter was first discussed by this Court in the seminal case of Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143. In the principal reasons in that case, McIntyre J., at p. 175, underlined the importance in a constitutional document, which is not easily modified, of achieving a workable balance that permits government to perform effectively its function of making ongoing choices in the interests of society and the work of the courts in ensuring protection for the equality rights described in s.15. As he stated, what we must do is “to provide a continuing framework for the legitimate exercise of governmental power and, at the same time, for the unremitting protection” of equality rights. And he warned (see p. 168), as I did in my separate reasons, that not all distinctions resulting in disadvantage to a particular group will constitute discrimination. It would bring the legitimate work of our legislative bodies to a standstill if the courts were to question every distinction that had a disadvantageous effect on an enumerated or

12. Ibid. at para 15.
13. Ibid. at para 15.
analogous group. This would open up a s. 1 enquiry in every case involving a protected group. As I put it in Andrews, at p. 194, "it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society".14

He then goes on to introduce the irrelevancy requirement discussed above.

The notion that the equity-seeker would have to prove

a) that a distinction is created or effected by legislation or government action,

b) that a burden, obligation or disadvantage is thereby created for a group that is protected by the anti-discrimination provision, and

c) that the above situation "is discriminatory"

is foreign to the body of human rights law that has developed under federal and provincial human rights legislation. In all cases, proof of points a and b constitutes proof of point c. The Supreme Court has repeatedly pointed to human rights law as an aid in the analysis of s.15, but no member of the Court other than Justice LaForest has ever suggested such a radical departure from the jurisprudence.15 Certainly, Justice McIntyre did not do so. Justice McIntyre addressed the differences between considering discrimination in human rights law and in the constitutional context in Andrews.16 Had he felt that such a difference in approach was warranted, presumably he would have said so at that point.

A reading in context of the parts of Justice McIntyre’s decision in Andrews cited by Justice LaForest indicates that Justice McIntyre went no farther than to suggest that not all legislative distinctions attract Charter protection. In fact, his only clear conclusion as to the limitations built into s.15 is that “The words ‘without discrimination’ ... limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.”17 Justice McIntyre did state that discrimination must be shown “in addition to” unequal treatment.


15. The introduction of this approach, and its associated requirement that the claimant prove “irrelevancy” is also a change from Justice LaForest’s own position in McKinney v. University of Guelph [1990] 3 S.C.R 229, 76 D.L.R. (4th) 545 [hereinafter McKinney].

16. Supra, note 6 at 18-19.

17. Ibid. at 23.
However, his remarks came at the conclusion of a review of three "approaches to s.15", which were:

1. that any legislative distinction constituted a prima facie breach of s.15,
2. that only "unreasonable" or "unjustifiable" distinctions breached s.15, and
3. that breach of s.15 should be interpreted purposively, in relation to the "enumerated and analogous grounds".

Justice McIntyre firmly rejected approaches 1 and 2 above. The remarks that surround his rejection of approach number 2, above, included a concern that s.1 should not be imported into s.15. These remarks quite clearly indicate disagreement with Justice LaForest's approach, and incidentally with the addition of the "irrelevancy" requirement posited by Justices Lamer, LaForest, Gonthier and Major.

Justice L'Heureux-Dubé's test for breach of s.15, outlined below, also separates the requirement to establish "that this distinction is 'discriminatory' within the meaning of s. 15" 19 from the requirements to establish "that there is a legislative distinction" and "that this distinction results in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group". However, in application, she makes it clear that her third requirement is not a discrete one. It is met if the claimant can establish that the "distinction" is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration".20 The claimant may do this by adducing evidence as to the nature of the group affected, and the nature of the interest affected. This line of reasoning clearly means that the existence of discrimination is established by way of evidence concerning the nature of the "legislative distinction" and the nature of the affected group. Nothing more is required to establish a breach of s.15.

The initially misleading way of stating and applying the s.15 test that is used by Justice McIntyre and Justice L’Heureux-Dubé is a typical majority approach of the Supreme Court in s.15 cases, used by the majority of the Court in discussing the proposition that not all distinctions are discriminatory, and therefore not all distinctions breach s.15.21

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18. Ibid. at 21-24.
20. Ibid. at para 56.
21. See the review of cases set out by the Chief Justice in Rodriguez, supra, note 8 at para
Justices Cory, Iacobucci, McLachlin, and Sopinka can be seen to outline the steps in their analysis in two slightly different ways, when their decision in Egan, written by Justices Cory and Iacobucci, is compared with the adoption by the others of Justice McLachlin's decision in Miron.

In Egan, Justices Cory and Iacobucci outlined the analysis as follows:

The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics ... the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.22

... the resolution of the question as to whether there is discrimination under s. 15(1) must be kept distinct from the determination as to whether or not there is justification for that discrimination under s. 1 of the Charter.23

In Miron, Justice McLachlin, with Justices Sopinka, Cory and Iacobucci concurring, summarized the s.15 analysis as follows:

I take the view that an analysis under s. 15(1) of the Charter involves two stages. First, the claimant must show that the impugned legislation treats him or her differently by imposing a burden not imposed on others or denying a benefit granted to others. Second, the claimant must show that this unequal treatment is discriminatory. This requires one to consider whether the impugned legislative distinction is based on one of the grounds of discrimination enumerated in s. 15(1) or on an analogous ground. In the great majority of cases the existence of prejudicial treatment based on an enumerated or analogous ground leads to a conclusion that s. 15(1) has been infringed. Distinctions made on these grounds are typically based on stereotypical attitudes about the presumed characteristics or situations of individuals rather than their true situation or actual ability. Once a breach has


23. Ibid. at para 136.
been established, it is for the government to justify the inequality under s. 1 of the Charter ...\textsuperscript{24}

Justice \textit{L'Heureux-Dubé} was consistent, in \textit{Egan, Thibaudeau} and \textit{Miron}, in stating a new approach to s.15: she urged more focus on the definition of discrimination, and less on whether the claimant fits into enumerated or analogous grounds.

In my view, for an individual to make out a violation of their rights under s. 15(1) of the Charter, he or she must demonstrate the following three things:

(1) that there is a legislative distinction;

(2) that this distinction results in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group;

(3) that this distinction is "discriminatory" within the meaning of s. 15.\textsuperscript{25}

Remarks by Justices L'Heureux-Dubé, McLachlin, Cory and Iacobucci which further define the term "discriminatory" are set out in Part II below.

\section*{2. Differences in regard to adding an "irrelevancy" requirement}

Obviously, problems arise for the equity-seeker from the new approach to s. 15 suggested by Justices LaForest, Lamer, Gonthier, and Major. The main problem is caused by the novel stress laid by these Justices on the term "irrelevant":

... in assessing relevancy for this purpose one must look at 'the nature of the personal characteristic and its relevancy to the functional values underlying the law' ... one must necessarily undertake a form of comparative analysis to determine whether particular facts give rise to inequality ... this comparative analysis must be linked to an examination of the larger context, and in particular with an understanding that the Charter was ... 'not enacted in a vacuum' ... but must 'be placed in its proper linguistic, philosphic and historical contexts'.\textsuperscript{26}

Justices Cory, Iacobucci, McLachlin, Sopinka and L'Heureux-Dubé specifically disagreed\textsuperscript{27} with the adding on of a requirement that "irrelevancy", as elucidated

\begin{itemize}
\item[24.] \textit{Supra}, note 4 at para 177.
\item[25.] \textit{Egan, supra}, note 2 at para 55.
\item[27.] \textit{Ibid.} per L'Heureux-Dubé J. at para 42-45 and per Cory, Iacobucci JJ. at para 136; see also: \textit{Thibaudeau, supra}, note 3 per Cory, Iacobucci JJ. at para 154-157 and \textit{Miron, supra}, note 4 per McLachlin J. at para 133-139.
\end{itemize}
by Justices LaForest, Lamer, Gonthier, and Major, be demonstrated by the equity-seeker. All five of the remaining Justices held that the irrelevancy requirement imports an analysis better left under s.1. Justices L'Heureux-Dubé, Cory, Iacobucci and McLachlin pointed out that the irrelevancy requirement permits circular reasoning and an inadequate response to the obvious substantive purpose of s.15.

B. Stating a summary of s.15 analysis for a particular case
It is essential that the advocate be able to set out a coherent theory of discrimination in any individual case; something along the lines of the following:

Regulation A excludes people under the age of 18 from (benefit). This differentiation is discriminatory on the ground of age.

Regulation B imposes the requirement that, in order to obtain (X service), every applicant must attend in person at the office of the relevant government agency. This requirement imposes a particular hardship on persons with disabilities that affect their mobility, and as such is constructively discriminatory against persons with physical disabilities.

The next step is to set out the test that organizes the s.15 argument, for the purpose of the factum.

The following elements are common to all of the tests set out in Egan, Thibaudeau and Miron.

- **distinction**: The equity-seeker must establish that the impugned legislative provision or government action puts him or her in a different position from others. In Egan, Thibaudeau and Miron, the phrase most commonly used was that the law “draws” or “creates” distinctions. This is understandable in the light of the fact that these were cases of discriminatory differentiation. In constructive discrimination cases, the essence of the problem is that the law in itself creates no distinctions; the discrimination is created by everybody being treated the same. The Chief Justice in Rodriguez also addressed distinction by adverting to whether the statute makes distinctions, despite the fact that Rodriguez was a case of constructive discrimination. A phrase that is somewhat more suitable to constructive discrimination cases is used by Justice McLachlin in Miron, above. She says that “the claimant must show that the impugned legislation treats him or her differently by imposing a burden not imposed on others or denying a benefit granted to others”. She goes on to call this a “legislative distinction”.

- **personal characteristics/grounds of discrimination**: The equity-seeker must establish that the impugned legislative provision or government action is “based on” a personal characteristic or on membership in a group enumerated in s.15, or in an unenumerated group. (Justice L'Heureux-Dubé speaks of “an identifiable group”.) The term “a distinction … based on” is a natural one to use in cases of discriminatory differentiation. As noted above, in cases of constructive discrimination, the legislation in itself creates no distinction,
much less one "based on" membership in an enumerated, unenumerated or identifiable group. The Chief Justice in Rodriguez contributed to the potential for confusion in using essentially the same phrase in a case of constructive discrimination, although he provided some clarification later on in the decision, which will be discussed below. Justice L'Heureux-Dubé provides a more widely-applicable phrase when she speaks of "a denial of ... equality rights on the basis of the rights claimant's membership in an identifiable group".

• **burden, obligation or disadvantage:** The equity-seeker must establish that the impugned legislative provision or government action creates a burden, obligation or disadvantage: Justice L'Heureux-Dubé speaks of "a denial of one of the four equality rights".

It is virtually impossible to construct an all-purpose test to guide an analysis of the facts of a case in the light of s.15. Clearly, the Supreme Court is finding it heavy going. Rather than trying to devise an all-purpose test, it might make sense to set out two slightly differing tests; one for cases of discriminatory differentiation, and one for cases of constructive discrimination. Examples follow:

**discriminatory differentiation:**

1. Does the law or government action create a distinction that affects a group identified by a personal characteristic?

2. Does the distinction create a burden, obligation or disadvantage for this group, compared to others?

**constructive discrimination:**

1. Does the application of the law or government action affect a group identified by a personal characteristic?

2. Does the application create a burden, obligation or disadvantage for this group, compared to others?

### III. DEFINING DISCRIMINATION

As noted above, government benefits are often denied or restricted on the basis of differentiation between classes of people. Differentiation by sex, age, marital status or family status, for example, is common. In other cases, a condition or restriction associated with a benefit and applied universally acts as a barrier to a particular class of person, or results in more hardship to that class than to others. For convenience, the former type of situation will be referred to as discriminatory differentiation, and the latter as constructive discrimination.

The two types of discrimination will be discussed in detail below.
A. Discriminatory Differentiation

To date, most Supreme Court of Canada s. 15 judgements have been given in cases of discriminatory differentiation rather than constructive discrimination. The Court has provided some general statements that apply to both types of discrimination, and these are set out below. However, it should be noted that some issues that are unique to constructive discrimination have not been addressed.

In Andrews, McIntyre J. wrote the majority opinion on the interpretation of section 15(1). He addressed primary principles before attempting a preliminary definition of discrimination. He stressed the importance of the effect of impugned legislation or government action:

> To approach the ideal of full equality before and under the law—and in human affairs an approach is all that can be expected—the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.  
>  
> He stated that the promotion of equality involves the promotion of a society:

> ... in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.

Justice McIntyre addressed the definition of discrimination under s. 15 of the Charter with reference to the law developed under the Human Rights Acts of various Canadian jurisdictions. He stated that discrimination under s. 15 would "be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts". The principles which had been applied under those Acts were "equally applicable in considering questions of discrimination under s. 15(1)". In the context of Andrews, a case of discriminatory differentiation rather than constructive discrimination, he stated:

29. Ibid. at 11.
30. Ibid. at 15.
31. Ibid. at 19.
32. Ibid. at 18.
... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.33

Although it was not necessary to do so in the context of Andrews, Justice McIntyre also indicated that constructive discrimination was also encompassed by s.15.

In the most recent trilogy, Justices LaForest, Lamer, Gonthier, and Major, as well as Cory, Iacobucci, McLachlin, and Sopinka quoted the above-noted Andrews definition at various times. The following further definitions were proposed:

Justice Cory (on behalf of Iacobucci, McLachlin and Sopinka) in Egan:

... the existence of discrimination is determined by assessing the prejudicial effect of the distinction against s. 15(1)'s fundamental purpose of preventing the infringement of essential human dignity.34

Justice L'Heureux-Dubé in Miron, Egan and Thibaudeau:

A distinction is discriminatory within the meaning of s. 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.35

Arguably, Justice L'Heureux-Dubé's definition comes the closest to a succinct distillation of the jurisprudence to date.

Another point which is clear from an examination of Miron, Egan and Thibaudeau is that the majority of the Supreme Court holds that discrimination must be assessed from a subjective as well as an objective point of view:

Justice Cory (for Iacobucci, McLachlin, and Sopinka) in Egan:

33. Ibid. at 18.
34. Supra, note 2 at para 179.
35. Ibid. at para 56.
Ultimately, it must be remembered that the question as to whether or not there is discrimination should be addressed from the perspective of the person claiming a Charter violation.\textsuperscript{36} 

Justice L’Heureux-Dubé in Egan:

This examination should be undertaken from a subjective-objective perspective: i.e. from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.\textsuperscript{37}

Justice L’Heureux-Dubé went on to suggest that, in assessing subjectively and objectively whether the impact of legislation or government action is discriminatory:

... it is instructive to consider two categories of factors: (1) the nature of the group adversely affected by the distinction and (2) the nature of the interest adversely affected by the distinction.\textsuperscript{38}

In respect of the nature of the group, she pointed out that:

... groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable.\textsuperscript{39}

In respect of the nature of the interest, she pointed out that:

... the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter.\textsuperscript{40}

She illustrated the above points as follows:

If a projectile were thrown against a soft surface, then it would leave a larger scar than if it were thrown against a resilient surface. In fact, the depth of the scar inflicted will generally be a function of both the nature of the affected surface and the nature of the projectile used....No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects

\textsuperscript{36} Ibid. at para 179.

\textsuperscript{37} Ibid. at para 56. L’Heureux-Dubé J. makes similar references in Thibaudeau, supra, note 3 and Miron, supra, note 4.

\textsuperscript{38} Ibid. at para 57.

\textsuperscript{39} Ibid. at para 60.

\textsuperscript{40} Ibid. at para 63.
of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable. As such, a distinction may be discriminatory in its impact upon one group yet not discriminatory in its impact upon another group.

... In the same way that a very dense projectile will impact upon a surface more sharply than a less dense projectile, an examination of the nature of the interest affected by the impugned distinction is helpful in determining whether that distinction is discriminatory. This examination requires an evaluation of both economic and non-economic elements ...

Referring back to our analogy once again, if the projectile is dense enough and thrown hard enough, then it will leave a mark on even the most resilient of surfaces. Similarly, the more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact even with respect to groups that occupy a position of advantage in society.\footnote{41}

1. Judicial reluctance to recognise discriminatory differentiation in benefit cases

When decisions from the lower courts and administrative tribunals are compared to the judgements of the Supreme Court of Canada, it is clear that even the Supreme Court's earlier pronouncements, such as those made in Andrew\textsuperscript{s}, have failed to make much impact on the judiciary's grasp of concepts of discrimination at the lower court level. An example can be seen in the impatient reaction of some judges to the proposition that government can discriminate by denying a resource, as opposed to discriminating by inflicting something on the affected group. In some lower courts the reluctance of judges to recognise the denial of a government benefit as discrimination has led to some truly acrobatic judicial reasoning. The root of this reluctance is probably personal political views; it can also be seen as a reluctance to apply the Charter as a "sword" to obtain rights, as well as a shield against government interference.

Three examples of judicial balking in different-treatment benefits cases are set out below. Note that, in two of these cases, the initial finding that there was no discrimination was reversed on appeal; a clear encouragement to persistence on the part of the advocate.

In McLeod v. Canada,\footnote{42} the wife of a deceased person was refused a CPP survivor's pension because the couple had not been cohabiting for eleven years prior to his death. She challenged the refusal under s.15, alleging that the CPP definition of "spouse" effects discrimination on the ground of marital status.

\footnote{41} \textit{Ibid.} at para 57-65.

The Alberta Court of Queen’s Bench denied the claim for two reasons. The first was that it was the action of her spouse and another person “which led to the denial to her of survivor’s benefits” rather than her marital status. The second was that marital status was not a “personal characteristic”, because “the actions of two other people (were) necessary to place one within a particular group”. No authority was cited for this reasoning. It is clearly at odds with the views of the majority of the Supreme Court in *Thibaudeau* and *Miron*, and with the *obiter* of Justice Iacobucci in *Symes v. M.N.R.*

In *Egan and Nesbit v. Canada*, at the Federal Court of Appeal level, the majority allowed that sexual orientation could be an analogous ground of discrimination for the purpose of section 15, but dismissed the appeal, concluding that the definition of “spouse” for CPP purposes was not discriminatory. While the majority Federal Court of Appeal judgement in *Egan* is incoherent, it would appear that there were four reasons for the result reached.

First, the majority took the view that, because the Supreme Court in *Andrews* had rejected the notion that the “similarly situated” test was the relevant test in establishing discrimination, no comparative analysis could be made. This unnecessarily restrictive approach enabled the court to ignore the relevance of the trial judge’s finding that, had this been a heterosexual couple, the spousal allowance would have been granted.

Secondly, the majority focused on the statement in *Andrews* that a person should not be deprived of a benefit because of a distinction based on irrelevant personal differences. Astonishingly, the court inferred from that statement that there is a “legal requirement that a distinction be based on an irrelevant personal difference” in order for discrimination to be established. The court concluded that this “requirement” precluded a finding of discrimination in this case because sexual orientation was highly relevant to the appellant’s claim.

Thirdly, the majority took the view that because other groups were excluded, such as unrelated housemates and brothers and sisters who lived together, the exclusion was not discriminatory. (This reasoning seems to ignore the Court’s own earlier finding that the “similarly situated” test was not to be used.)

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Finally, the court made findings concerning the purpose of the legislation. Since there was no need to refer to section 1, it is not clear why it did so. Possibly it was an attempt to respond to an argument that the legislation deliberately discriminated on the basis of sexual orientation. The majority accepted\(^4\) that the objective of the legislation was to ameliorate the severe cut in income experienced by one-"breadwinner" couples, where the breadwinner becomes eligible for a pension before the other spouse. The evidence as to legislative intention that was placed before the court clearly contemplated "traditional" heterosexual marriages in which the wife was younger than the husband.

On appeal, five out of nine Supreme Court of Canada Justices held that s.15 was infringed, using the differing analyses noted above. (Five out of nine also held that the infringement was justified under s.1, which was why the *Egan* appeal was ultimately unsuccessful.)

The third case of failure by a lower court to recognise discrimination was rectified by the judgement of Arbour, J.A. in *Re Eaton and Brant County Board of Education*.\(^5\)

In the *Re Eaton* case, the legislative provision at issue was s. 8(3) of the *Education Act*:\(^5\)

> The Minister shall ensure that all exceptional children in Ontario have available to them ... appropriate special education programs ... and shall provide for ... parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,

(a) require school boards to implement procedures for ... identification of the learning abilities and needs of pupils ...

(b) in respect of special education programs ... define exceptionalities of pupils, and prescribe classes ... of exceptional pupils ...

The matter at issue was the decision of a school board’s Identification, Placement and Review Committee (the IPRC) to place a disabled child in a segregated class rather than let her remain in the general primary school population. The test used by the IPRC in making the decision was whether the child’s "special needs can be met best in a regular class or in a special class".\(^5\) On judicial review, the appellants argued that the test was discriminatory and that s.15 of

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the *Charter* required that there be a presumption that disabled students would attend regular classrooms, unless those proposing a segregated classroom could establish that a segregated placement would provide a better educational experience than an integrated classroom. Divisional Court dismissed the application, stating that it had “great difficulty in appreciating how the *Canadian Charter of Rights and Freedoms* ... [could] create a presumption in favour of one pedagogical theory over another”.

The Court of Appeal unanimously held that the Divisional Court had mischaracterized the issue. Arbour J.A. stated that, “in legal terms, the two pedagogical theories are not on the same footing if one produces discrimination and the other does not.”

In considering whether segregated schooling could be discriminatory in these circumstances, the test used by the Court was whether it could be considered a “disadvantage, or the deprivation of a benefit”. The Court considered the subjective views of the appellant, but indicated that “subjective perception is not in itself determinative of the issue”. The judgement went on briefly to consider evidence as to the social, historical and political context pertaining to exclusion of disabled persons from everyday life, before concluding that unwanted segregation was a disadvantage. Having concluded that the treatment resulted in disadvantage, the Court concluded that it was discriminatory.

The Court went on to find that the section of the *Education Act* which granted a discretion which could be applied in a discriminatory way was not protected by s.1 because it did not infringe *Charter* rights as little as possible:

> Although the Act does not mandate a *Charter* infringement, it grants a discretion which may be used, and was used in this case, in a way that infringes s.15: see Carol Rogerson, “The Judicial Search for Appropriate Remedies under the Charter: Examples of Overbreadth and Vagueness” in Sharpe, ed., *Charter Litigation* (1987), at p.291. Since it permits a *Charter* infringement, without further guidance, I cannot say that the Act infringes the equality rights of disabled students as little as possible.

The remedy granted in *Re Eaton* was to curtail the discretion conferred upon school boards under the *Education Act*.

Section 8 of the Act should be read to include a direction that, unless the parents of a child who has been identified as exceptional by reason of ... disability consent ... the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs.58

2. **Rebutting predictable arguments in discriminatory differentiation cases**

There is little or no support for the following arguments in the caselaw. Nevertheless, they have been made in a number of cases, and continue to be made.

a) **The Charter does not protect economic rights**

An economic interest, the "right" to be admitted to a provincial Bar in order to practice law, was protected in *Andrews*. However, the above-noted argument, stated or unstated, appears to underlie many cases of judicial reluctance to recognise discrimination. The only authority for such a sweeping statement is jurisprudence under s.7 of the *Charter*, and even there, there is room for argument, as noted in *A.G. Quebec v. Irwin Toy Ltd.*59 As Justice L'Heureux-Dubé points out in *Egan*, economic disadvantage can be among the indicia of discrimination:

> The Charter is a document of civil, political and legal rights. It is not a charter of economic rights. This is not to say, however, that economic prejudices or benefits are irrelevant to determinations under s. 15 of the Charter. Quite the contrary. Economic benefits or prejudices are relevant to s. 15, but are more accurately regarded as symptomatic of the types of distinctions that are at the heart of s. 15: those that offend inherent human dignity.60

... the Charter is not a document of economic rights and freedoms. Rather, it only protects "economic rights" when such protection is necessarily incidental to protection of the worth and dignity of the human person (i.e. necessary to the protection of a "human right"). Nonetheless, the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter.


60. *Supra*, note 2 at para 37.
Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g., voting, mobility).

In view of the reluctance of some judges to recognise discrimination in the provision of benefits, it may be useful to stress the fact that, in most cases put forward by poverty law advocates, there is no suggestion that a new system of benefits be created, but that the existing one be administered in a non-discriminatory fashion. As Justice Cory (for Iacobucci, McLachlin, and Sopinka) noted in Egan:

It is clear that Parliament does not have any constitutional obligation to provide benefits. However, once the decision has been made to confer a benefit, it cannot be applied in a discriminatory manner.

b) Legislation whose purpose is social, rather than punitive, should receive a lighter standard of review

There is no support for this argument in relation to the s. 15 analysis. Even Justice Sopinka's remarks, reviewed below, about how "government must be accorded some flexibility in extending social benefits" were made in the context of a section 1 analysis.

Justice L'Heureux-Dubé in Egan, dealt with this argument (also in the context of s.1):

... The mere fact ... that legislation is "social" in nature is not, by itself, a reason for increased deference. In fact, to defer to the legislative prerogative in circumstances where social science views do not substantially conflict, and where there is a reasonable, alternative means of fulfilling the legislative objective in a way that would materially lessen the magnitude of the rights violation, would frustrate the purpose of the Charter.

... The Attorney General of Canada argues that the impugned legislation is social, not punitive, and should thereby enjoy a somewhat more deferential standard of review by this Court. As I have already noted, I do not believe that such defer-

61. Ibid. at para 63-64.
62. Ibid. at para 166.
63. Ibid. at para 75.
ence is appropriate when there is a reasonable alternative, readily available, that is not the subject of conflicting social science views, that would materially lessen the effect of the rights violation to the affected group, and that would not result in a concomitant prejudice to another group. To accord deference merely because the issue is a "social" one would be to issue a licence to discriminate in favour of the status quo.  

c) The restrictions at issue are not "because of" enumerated or analogous grounds, but "because of" whatever rationale the government puts forward for the legislation or government action.
A first rebuttal to this argument is often the fact that the legislation or government action does specifically differentiate according to an enumerated or unenumerated ground of discrimination.

Other points that can be made in response to this argument include the following:

i) The Supreme Court has reiterated that the discrimination analysis focusses on effect, and that intent is relatively unimportant;

ii) Recent Supreme Court jurisprudence has rejected the proposition that causal connection is to be a matter of narrow interpretation; and

iii) Human rights jurisprudence, which is applicable in the interpretation of s.15, supports the proposition that, if one of the reasons for differential treatment is prohibited, the action is discriminatory.

The above-noted points are further elaborated below.

i) focus on effect
In Andrews, McIntyre J. defined discrimination as:

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. (emphasis added)  

It is important to note that Andrews was a case of differential treatment, as were the numerous cases since Andrews, including Miron and Egan, in which all members of the Supreme Court reiterated the principle that effect, not intention, is the important factor in assessing discrimination. Concentration on effect is not limited to cases of constructive discrimination.

64. Ibid. at para 97.
65. Supra, note 6 at 18.
ii) \textit{causal connection is not to be a matter of narrow interpretation}

Justice Cory in \textit{Egan} (for Iacobucci, McLachlin and Sopinka), responded to an argument that the legislative distinction in question was between "spousal" and "non-spousal" relationships rather than between homosexual and heterosexual relationships:

To treat persons of the same sex who represent themselves as a common law couple differently from persons of the opposite sex representing themselves as a common law couple is a differentiation which must be based upon sexual orientation. I would add that, although the statute appears to do so, it is not necessary for the challenged legislation to directly identify sexual orientation as a criterion for eligibility. For example, it has been held that a distinction made on the basis of pregnancy constitutes discrimination on the basis of sex. Similarly, differential treatment in the form of sexual harassment constitutes discrimination on the basis of sex ... What is relevant in resolving the issue is whether the difference in treatment affects the individual or group in a manner which is related to their personal characteristics. To put it another way, the question is whether the difference in treatment is closely related to a personal characteristic of a group to which the claimant belongs ... It may be correct to say that being in a same-sex relationship is not necessarily the defining characteristic of being homosexual. Yet, only homosexual individuals will form a part of a same-sex common law couple. It is the sexual orientation of the individuals involved which leads to the formation of the homosexual couple. The sexual orientation of the individual members cannot be divorced from the homosexual couple. To find otherwise would be as wrong as saying that being pregnant had nothing to do with being female.(emphasis added)\textsuperscript{6}

iii) \textit{if one of the reasons for differential treatment is prohibited, the action is discriminatory}

On many occasions, most recently in \textit{Symes},\textsuperscript{67} the Supreme Court has advised that s.15 be interpreted in the light of existing human rights jurisprudence. In cases of direct discrimination, it is settled law that if one of the reasons for an action is prohibited, the action contravenes equity legislation. The source of that law is the \textit{R. v. Bushnell Communications Ltd}\textsuperscript{68} line of cases. That case involved a breach of the reprisal section of the \textit{Canada Labour Code}. In affirming the decision, the Ontario Court of Appeal stated that it was sufficient that union membership was a "proximate cause" for the dismissal at issue, and it was immaterial if there were other proximate causes, such as inability to get along

\footnotesize{\textsuperscript{66} Supra, note 2 at para 167-8.  
\textsuperscript{67} Supra, note 9 at 310.  
with fellow workers. Bushnell has been relied on in a long line of human rights tribunal cases.69

d) The applicants are in their situation by choice, and the existence of this “choice” negates a finding of discrimination.

The tendency to focus on choice, real or imaginary, is incongruent with equity jurisprudence, because lack of choice is not a built-in requirement of the s. 15 categories. For example, religion, which is not immutable, is an enumerated ground. Further, citizenship, which is not immutable, has been accepted as a non-enumerated ground in Andrews.

Justice L’Heureux-Dubé in Miron held that the absence or presence of an element of “choice” should not be determinative of s. 15 analysis. She went on to assess “choice” on the subjective reality of the equity-seeker:

... this argument is premised upon an important and, in my mind, unchallenged assumption: that the majority of unmarried persons living in a relationship of some interdependence and duration are, indeed, exercising a “free choice”. In my respectful view, this assumption may mischaracterize the reality of a significant number of persons in non-traditional relationships. This silent and oft-forgotten group constitutes couples in which one person wishes to be in a relationship of publicly acknowledged permanence and interdependence and the other does not.70

Justice McLachlin in Miron (for Sopinka, Cory, and Iacobucci) took the same approach:

In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one’s partner to marry; financial, religious or social constraints — these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual’s effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in Andrews: the individual exercises limited but not exclusive control over the designation.71


70. Supra, note 4 at para 94 and 96.

71. Ibid. at para 153.
B. Constructive Discrimination

The caselaw on discrimination that does not arise from differentiation on a prohibited ground, in both human rights and Charter jurisprudence, is characterized by wide variation in the terminology used by adjudicators. Discrimination that results from same treatment has been called "indirect discrimination" and is most often referred to as "adverse effect" discrimination. There is often some mention or discussion at the outset as to whether the impugned provision or action is "seemingly neutral" or "facially neutral" (that is, whether the actor could have foreseen the discriminatory consequences), despite the fact that motivation has been confirmed to be irrelevant to the question of whether discrimination exists. For the purpose of this article, discrimination that does not arise from differentiation will be referred to as constructive discrimination because the frequent use of the term "adverse effect" in cases involving differentiation (such as McKinney v. University of Guelph) makes it confusing to do otherwise.

As noted above, constructive discrimination is the type of discrimination in which an adverse effect on a protected group is caused by an action or policy that does not expressly distinguish on impermissible grounds. This type of discrimination manifests itself by its effect, rather than by differentiation on prohibited grounds. An example is a requirement by an employer that all employees work on Saturdays. Such a requirement, applied to everyone, disadvantages persons whose religious obligations fall on Saturdays, and thus can constitute religious discrimination. Constructive discrimination has been accepted as part of the definition of discrimination for the purpose of the Charter, as well as under human rights legislation.

Constructive discrimination was first dealt with by the Supreme Court of Canada in the context of human rights legislation, in O'Malley v. Simpson-Sears. In that case, the Supreme Court of Canada affirmed that, despite the absence of specific legislative wording, discrimination cannot be confined to situations in which a protected group is singled out for different treatment. O'Malley involved a challenge to an employer's "seemingly neutral" rule that obliged workers to accept Saturday employment. The Court found the rule discriminatory because of its adverse effect on Sabbatarians, despite the fact that the effect had not been contemplated by the employer. The "adverse effect" doctrine was thus developed as an extension of the debate about whether a person who

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72. See generally, J. Keene, Human Rights in Ontario (Toronto: Carswell, 1992), Chapter 4.

73. McKinney, supra, note 15, in which a mandatory retirement provision was challenged was a case of differentiation based on age rather than constructive discrimination.

unwittingly effects a discriminatory result should be considered liable for discrimination. However, since the O'Malley decision the Supreme Court of Canada has confirmed that, even in cases of discriminatory differentiation, proof of discriminatory intent is not required because the purpose of human rights legislation is remedial.\(^7^5\)

The idea that identical treatment applied to everyone can have discriminatory effects was first accepted for the purpose of discrimination analysis under the Charter in Andrews, although Andrews did not involve identical treatment. The only constructive discrimination judgements of the Supreme Court in the context of the Charter have been Symes and Rodriguez.

The matter at issue in Symes\(^7^6\) was a provision of the Income Tax Act that effectively disallowed wages paid to a nanny as a business expense. Ms. Symes, a self-employed lawyer, argued that the provision was constructively discriminatory against business women. Ultimately, the majority of Supreme Court of Canada ruled that s.15 had not been breached, although they accepted that "adverse effects" discrimination was covered by s.15.\(^7^7\) Justice Iacobucci, for the majority, noted that:

... it is clear that a law may be discriminatory even if it is not directly or expressly discriminatory. In other words, adverse effects discrimination is comprehended by s.15(1).\(^7^8\)

The matter at issue in Rodriguez v. British Columbia (A.G.)\(^7^9\) was a provision of the Criminal Code that effectively made assisting in suicide a crime. Ms. Rodriguez argued that disabled persons who are unable to commit suicide without assistance are discriminated against contrary to s. 15 in that, unlike persons capable of causing their own deaths, they are deprived of the option of choosing suicide by virtue of s. 241(b) of the Criminal Code.

The majority of the Court refused to deal with the s.15 issue, assuming without deciding that s.15 was infringed, and holding that the impugned provision of the

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75. The Supreme Court made this finding in, for example, Robichaud v. Canada (Treasury Board) [1987] 2 S.C.R. 84 (sub nom. Brennan v. Canada and Robichaud) (1987), 75 N.R. 303, 8 C.H.R.R. D/4326.

76. Supra, note 9.

77. Symes is a complex case that will not be outlined in full in this article. Readers are referred to McAllister, "The Supreme Court in Symes: Two Solitudes" (1994) 4 N.J.C.L. 248.

78. Supra, note 9 at para 115.

79. Supra, note 8.
Criminal Code was protected by s.1 in any event. The Chief Justice agreed that s.15 was breached, and held that the provision was not saved by s.1.

The Chief Justice, in his judgement in Rodriguez, addressed the determination of "whether (an) inequality is discriminatory":

... it must first be determined whether the effect of that provision is to impose on certain persons or groups of persons a disadvantage or burden or to deprive them of an advantage, benefit and so on. It must then be determined whether that deprivation is imposed by or by the effect of a personal characteristic listed in s. 15(1) of the Charter, or a similar characteristic.80

The Chief Justice went on to summarize the positive duty on government as follows:

Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.81

There have been a number of constructive discrimination judgements by the Supreme Court under human rights legislation. They include Brossard v. Comm. des droits de la personne,82 Central Alberta Dairy Pool v. Human Rights Commission (Alta.),83 Renaud v. Board of Education of Central Okanagan No. 23 and C.U.P.E. Local 523.84 In all of these, the equity-seeker was successful, and the judgements are presumably reliable indicators about how the Supreme Court would view similar issues arising under s.15.

A major difficulty that arises from the underdeveloped state of the law in this area is that judges often fail to recognise the indirect nature of the causal link in constructive discrimination. This problem is illustrated in Fernandes v. Director

80. Ibid. at para 163.
81. Ibid. at para 155.
of Social Services (Winnipeg Central), 85 and in Eldridge v. British Columbia. 86 Both cases are discussed below.

1. Judicial reluctance to recognise constructive discrimination in benefits cases

In Fernandes, the appellant had a progressive disease requiring full-time care. He had to move from an apartment into a hospital after his spousal relationship broke up. It was accepted on the evidence that he did not need to remain in hospital, since he was able to reside in ordinary accommodation if he could obtain 16 hours per day of attendant care. He applied under Manitoba’s Social Allowances Act 87 (hereinafter the SAA) for the funds that would allow him to live independently. A provision of the SAA allowed for an allowance for “essential surgical, medical … and other remedial treatment, care and attention”. However, the SAA also allowed the Director, in making a decision to grant an allowance, to take into account any “resources” that might be available to the applicant. The Director took into account the availability of the hospital to the applicant, and refused to grant Fernandes an allowance.

The Director’s decision was confirmed by the administrative tribunal set up to deal with appeals under the SAA. Fernandes appealed the decision, citing, inter alia, ss.7 and 15 of the Charter. He was unsuccessful.

The Manitoba Court of Appeal accepted that the SAA allowed the interpretation taken by the Director, but found that s.15 was not infringed. The Court found that the appellant was not being disadvantaged because of any personal characteristic. The Court observed:

Under the Act, Fernandes is being treated in the same manner as all applicants for an allowance. He is receiving all basic necessities as required by the Act … The fact that he is not being housed in a facility of his choice does not give rise to a determination that he is deprived of equal protection and benefit before and under the law.

… He is unable to remain community-based because he has no caregiver, because he must rely upon public assistance and because the facilities available to meet his needs are limited.88

Unfortunately, the Supreme Court of Canada refused leave to appeal.

85. (1992), 7 Admin. L.R. (2d) 153 (Man C.A); leave to appeal to S.C.C. refused (1993), 10 Admin. L.R. (2d) 56n (S.C.C.) [hereinafter Fernandes].
86. (26 May 1995) B.C.J. No. 1168 (B.C.C.A.) [unreported].
88. Fernandes, supra, note 85 at 167.
The day after the Supreme Court handed down its decisions in *Egan, Miron,* and *Thibaudeau,* the British Columbia Court of Appeal decided *Eldridge v. British Columbia.* The judgement of the majority in *Eldridge* is depressingly similar to that in *Fernandes.*

The three plaintiffs in *Eldridge* were born deaf. They are fluent users of American Sign Language, but have limited skills in written English and none in spoken English. The problem at issue in *Eldridge* was the failure of the British Columbia health insurance scheme to pay for sign language interpretation for deaf beneficiaries. The plaintiffs, who included a diabetic whose diabetes was not easily controlled and a woman who had experienced the premature birth of twins without being able to communicate with the medical personnel involved, provided compelling evidence as to the need for clear communication between health workers and patients. However, two out of three members of the B.C. Court of Appeal concluded that there had been no breach of s.15.

There appear to be two reasons for the majority decision. The first is that:

... the evidence before us falls well short of establishing that because of their hearing impairment, for all practical purposes, the deaf are denied the medical services available to the hearing.

This finding was apparently occasioned by the fact that one set of plaintiffs had access to a doctor who could communicate in American Sign Language, and by the testimony of a doctor who was communicated with his patients by written notes that:

"I think I give adequate care. I would like to give better care."

The majority's analysis of s.15 is even more disturbing than its analysis of the evidence. The Court begins by noting that:

In establishing the impact of the legislation there must be a distinction drawn between those effects which can be attributed to the legislation and those which exist independently of it.

It goes on to say:

... The legislation removes the responsibility of both the hearing and the deaf to make payment to their doctors. This is the impact of the legislation

89. *Supra,* note 86.
on both the deaf and the hearing. Therefore, the effect of the legislation is that the deaf remain responsible for the payment of translators in order to receive equivalent medical services as those with hearing, as they would be in the absence of the legislation. This inequality exists independently of the legislation and cannot be said in any way to be an effect of the legislation. Both purposively and effectively the legislation provides its benefit of making payment for medical services equally to the hearing and the deaf.93

Lambert J., who dissented from the majority view of s.15 in Eldridge, accepted that the exclusion of interpreter services breached s.15, but held that the discrimination was justified under s.1.

The approach taken by the Manitoba Court of Appeal in Fernandes is essentially to ignore the part played by social assistance in the plaintiff’s enforced confinement to hospital, and instead to cast about for a “cause” of the plaintiff’s predicament that does not require Charter scrutiny. The Court failed to appreciate that the Director’s interpretation of “resources” to include a hospital meant that people with severe disabilities were denied the opportunity to choose a residence outside a hospital.94 A comparable decision in respect of able-bodied people would be a decision that, if shelters for the homeless were available, people should be denied a housing allowance.

The majority of the B.C. Court of Appeal in Eldridge placed a further refinement on the Fernandes approach by choosing the narrowest possible definition of the purpose of the health insurance legislation at issue, contrary to the usual principles of statutory interpretation.95 The purpose of the legislation, according to the Court, was not to make the included health services available, it was to “remove the responsibility to make payment”. By using this device, the court was able to locate the plaintiff’s burden outside the ambit of the legislation. Dianne Pothier, in an article soon to be published in the Canadian Journal of Constitutional Law96 sums this up neatly:

93. Ibid. at para 35.

94. It is incidental, but interesting, that the evidence showed that the province would pay as much or more to keep Fernandes in hospital than it would had he been granted his allowance.

95. It is a standard principle of statutory interpretation that legislation is to be interpreted purposively. See for example, P.A. Côté, The Interpretation of Legislation in Canada, 2d ed. (Cowansville, Quebec: Les Éditions Yvon Blais Inc., 1992). In addition, most provinces’ legislatures and our federal Parliament have passed legislation dealing with statutory interpretation which provide for broad, liberal interpretation. Ontario’s Interpretation Act R.S.O 1990, C. I-11, s.10, is a typical provision.

In other words, the Court is saying that since the state did not cause the disability, it has no responsibility in relation thereto. It makes one wonder what was the point of including disability within the protection of s. 15.

When the situations in Fernandes and Eldridge are compared with the situation in Rodriguez, it is clear that the Courts of Appeal of Manitoba and British Columbia did not approach the facts as the Supreme Court would do. If the Chief Justice had used the Fernandes and Eldridge approach, he would have decided that the “real” reasons for Ms. Rodriguez’s problem were the fact that she was disabled and the fact that she could not persuade someone else to risk a criminal prosecution, and that therefore there was no discrimination. Instead, he was willing to give consideration to how the application of the impugned law made a bad situation worse.

Fernandes was decided before the Supreme Court decided Rodriguez. Eldridge was decided after Rodriguez, and in the light of the Chief Justice’s judgement in Rodriguez, Eldridge was clearly wrongly decided.

The Fernandes decision is very short on legal analysis, so it is difficult to discern why the Court took the approach it did. As with the lower court Egan and Mcleod judgements reviewed above, the approach of the Court may reflect no more than a reluctance to acknowledge that giving substantive effect to the equality rights granted in the Charter means that change to existing systems must be contemplated. The same reluctance was much more evident in the Eldridge decision, which is considerably longer. That reluctance cannot be fully addressed by mere legal argument. However, the advocate can address the point at which these decisions diverge from the direction taken by the Supreme Court in Rodriguez. That argument is discussed below.

2. Rebutting predictable arguments in constructive discrimination cases

All of the “predictable arguments” noted above in the section on discriminatory differentiation might be made in constructive discrimination cases, and can be rebutted as outlined above. The other argument that most often greets constructive discrimination cases is the one that appears to underlie the reasoning of the Manitoba and British Columbia Courts of Appeal in Fernandes and Eldridge, above. The argument is not stated in the decisions, but it can be inferred to be something like the following:

a) S. 15 protection is limited to situations in which the government’s act or omission can be seen as the only cause of the applicant’s hardship.

The Fernandes and Eldridge Courts’ narrow focus with causation might be caused by overreliance on some of the wording of the Andrews decision. An argument can be made, supported by the judgement of Lamer C.J.C. in Rodriguez, and by the judgements in Egan, Miron, and Thibaudeau, that the
court cannot avoid examining the impact of impugned legislation or government action simply because they are not the only reasons for the applicant's hardship.

Rodriguez is the only decision of the Supreme Court of Canada which has dealt with constructive discrimination on the ground of disability under s.15. In Rodriguez, the majority of the Court declined to deal with the s.15 issue, assuming without deciding that s.15 was infringed, and holding that the impugned provision of the Criminal Code was protected by s.1 in any event.

The majority of the Court having avoided the issue, the decision of the Chief Justice (dissenting only in respect of the application of s.1) stands as the only indication available as to how the Supreme Court would analyse an argument like the one above.

The Chief Justice concluded that disabled persons who are unable to commit suicide without assistance are discriminated against contrary to s. 15 in that, unlike persons capable of causing their own deaths, they are deprived of the option of choosing suicide by virtue of s. 241(b) of the Criminal Code. They are deprived of a benefit or subjected to a burden. He further found that s. 1 of the Charter does not save s. 241(b) of the Criminal Code:

... I find that an absolute prohibition that is indifferent to the individual or the circumstances in question cannot satisfy the constitutional duty on the government to impair the rights of persons with physical disabilities as little as reasonably possible. Section 241(b) cannot survive the minimal impairment component of the proportionality test ... 97

The Chief Justice addressed the causation issue in constructive discrimination cases as follows:

In Andrews, supra, McIntyre, J., stated that the first characteristic of discrimination is that it is "a distinction ... based on grounds relating to personal characteristics of the individual or group" (p. 174). Can it be said that the distinction here is "based" on grounds relating to a personal characteristic covered by s. 15(1)? In my view, if s. 15(1) is to be applied to adverse effect discrimination, as McIntyre, J., implies, the definition given in Andrews should not be taken too literally. I adopt in this regard the observations of Linden, J.A., who said in dissent in Egan and Nesbit v. Canada (1993), 153 N.R. 161, at p. 196:

"While a distinction must be based on grounds relating to personal characteristics of the individual or group in order to be discriminatory, the words "based on" do not mean that the distinction must be designed with reference to those grounds. Rather, the relevant consideration is whether

97. Rodriguez, supra, note 8 at para 204.
the distinction affects the individual or group in a manner related to their personal characteristics."

In other words, the difference in treatment must be closely related to the personal characteristic of the person or group of persons. In the case at bar, there can be no doubt as to the existence of such a connection. It is only on account of their physical disability that persons unable to commit suicide unassisted are unequally affected by s. 241(b) of the Criminal Code. The distinction is therefore unquestionably "based" on this personal characteristic. Is it a characteristic covered by s. 15(1)?

A physical disability is among the personal characteristics listed in s. 15(1) of the Charter. There is therefore no need to consider at length the connection between the ground of distinction at issue here and the general purpose of s. 15, namely elimination of discrimination against groups who are victims of stereotypes, disadvantages or prejudices. No one would seriously question the fact that persons with disabilities are the subject of unfavourable treatment in Canadian society, a fact confirmed by the presence of this personal characteristic on the list of unlawful grounds of this discrimination given in s. 15(1) of the Charter.

I accept that s. 241(b) was never intended to create such an inequality, and that provision, which contains no distinction based on personal characteristics, does at first sight treat all individuals in the same way. For the reasons given above, however, saying this does not dispose of the argument that the provision creates inequality. Even if this was not the legislature's intent, and although s. 241(b) does not contain any provision specifically applicable to persons with disabilities, the fact remains that such persons, those who are or will become incapable of committing suicide unassisted, are on account of their disability affected by s. 241(b) of the Criminal Code differently from others.98

The Chief Justice restated the Andrews definition of discrimination as follows:

To determine whether the inequality created by s. 241(b) of the Criminal Code is discriminatory, it must first be determined whether the effect of that provision is to impose on certain persons or groups of persons a disadvantage or burden or to deprive them of an advantage, benefit and so on. It must then be determined whether that deprivation is imposed by or by the effect of a personal characteristic listed in s. 15(1) of the Charter, or a similar characteristic. (emphasis added)99

Not surprisingly, since there have been only two constructive discrimination decisions based on s.15 by the Supreme Court of Canada to date, (Symes and Rodriguez), the Court has not had much occasion to comment on the differences

98. Ibid. at para 171-4.
99. Ibid. at para 163.
Government Services and Section 15 of the Charter

between discriminatory differentiation and constructive discrimination, other than in Rodriguez as noted above. However, the contributions to the definition of discrimination made by the majority of the Supreme Court in Egan, Miron, and Thibaudeau (reviewed above in the section on discriminatory differentiation) show a willingness to recognise discrimination from the perspective of the equity-seeker, without undue restriction in regard to causation.

IV. THE GROUNDS OF DISCRIMINATION

The grounds enumerated in s.15 are “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”. Being able to classify the client as part of an enumerated group obviously relieves the advocate of one of the headaches of Charter litigation. However, people have a messy habit of being multi-faceted and hard to classify. Frequently, the most accurate description of the group affected is not included among the enumerated grounds. Counsel must then argue for inclusion of the named group as an unenumerated group.

Particular problems can be created by the legislation or government action. In many situations, not all persons who could be affected by the legislation or government action are members of the groups on whose behalf the litigation is commenced. In other situations, not all members of groups cited are affected by the legislation or government action.

Judicial comment on all of these issues is presented below.

A. Obtaining inclusion as an “unenumerated ground”

1. The pre-Egan, Thibaudeau, and Miron approach

In Andrews, Justice McIntyre found that an “enumerated and analogous grounds” approach to section 15 was most closely in accord with the purposes of the section and the definition of discrimination. This approach asserts that the purpose of the section is to prevent discrimination based on the grounds enumerated and on grounds analogous to them. While McIntyre J stated that the grounds enumerated in section 15(1) must receive particular attention because they “... reflect the most common and probably the most socially destructive and historically practised bases of discrimination”, he emphasized that the grounds listed in section 15 are not exclusive and that other possible grounds may be established.

100. Supra, note 6.

101. Ibid. at 18.
Justice McIntyre's judgement in *Andrews* briefly mentioned, with approval, US caselaw which established constitutional protection of a group on the basis of that group being "a discrete and insular minority".\(^{102}\)

In *R. v. Turpin, Siddiqui and Clauzel*,\(^ {103}\) the Supreme Court of Canada again had occasion to consider non-enumerated grounds, this time in the context of a claim that s. 15 should forbid different treatment of accused persons based on the province in which they were tried. Justice Wilson noted that the indicia of discrimination include stereotyping, historical disadvantage or vulnerability to political and social prejudice. The decision in *Turpin* also contains a reminder that the decision to include of a group under the protection of s. 15 should be with a view to the purpose of s.15, which is to remedy or prevent discrimination "against groups suffering social, political and legal disadvantage in our society".\(^ {104}\)

The reason for the Court's unanimous decision that s. 15 was not breached finally appeared to be that persons accused of crimes in all provinces except Alberta could not be said to be members of a "discrete and insular minority".

Prior to the release of the Supreme Court's decisions in *Egan, Miron* and *Thibaudeau*, it appeared that the courts were developing a situation-specific approach to determining whether an unenumerated ground of discrimination was to be included for the purposes of s.15. In *Schachtschneider v. M.N.R.*,\(^ {105}\) the majority of the Federal Court of Appeal found that a tax provision which was disadvantageous to the applicant because she was married and living with her spouse did not discriminate because of marital status. Mahoney J.A., for the majority, stated:

> [T]he group now in issue is composed of married persons with a child of the marriage, living together and not supporting each other. In my opinion, that is not a group that can be described as being disadvantaged in the context of its place in the entire social, political and legal fabric of our society. It follows that it is not a distinct and insular minority within the contemplation of s. 15.\(^ {106}\)

In the Federal Court of Appeal decision in *Thibaudeau*, the context produced a different result. As noted above, the appellant was a divorced mother with custody of her two children, who challenged the tax treatment of maintenance payments. Under the current tax laws, maintenance payments are added to the

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recipient spouse's income and are deducted from the payor spouse's income. The majority of the Federal Court of Appeal struck down s. 56(1)(b), the inclusion provision, as discriminatory, contrary to s. 15(1) of the Charter, on the basis of "family status". The court observed that separated custodial parents could readily be seen as "a discrete and insular minority which has historically suffered prejudice and has need of protection".107

2. Justice L’Heureux-Dubé’s critique of grounds-based approach
The prominent place granted in the jurisprudence to the "ground of discrimination" question, coupled with the judicial tendency toward having inclusion as an unenumerated ground depend on the circumstances of the case, creates the potential for massive uncertainty in Charter litigation. This fact was not lost on Justice L’Heureux-Dubé, and it was a major reason for her proposal of a new approach to s.15 analysis in Egan. Clearly, Justice L’Heureux-Dubé has expressed a willingness to focus on the situation of the actual equity-seeking group, without much inquiry into the characteristics of the ground. Although hers is the view of only one member of the Court (albeit its most advanced and sophisticated equity analyst) it has obviously influenced other members. While Justices McLachlin, Sopinka, Cory and Iacobucci have for now continued with the "grounds" analysis, it is clear that they are prepared to be liberal in their approach to unenumerated grounds. It seems likely that over time the distinctions in approach among the majority of the Court could blur significantly.

Because it appears to be influencing a majority position, and because of its strong relevance to the facts in many government-benefit Charter cases, Justice L’Heureux-Dubé’s approach is set out here in some detail. It is followed by the more broadly-based views of the majority:

... the current vehicle of choice for fulfilling the purposes of s. 15, the "grounds" approach, is incapable of giving full effect to this purpose ...

... This approach inquires into whether the characteristics of the ground are sufficient to constitute a basis for discrimination, rather than into the absence or presence of discriminatory effects themselves ... We must remember that the grounds in s. 15, enumerated and analogous, are instruments for finding discrimination. They are a means to an end. By focusing almost entirely on the nature, content and context of the disputed ground, however, we have begun to approach it as an end, in and of itself. Such an approach, in effect, approaches s. 15 not by giving primacy to the word "discrimination", but rather by giving primacy to the nine enumerated grounds. In essence, it defines the preconditions to when discrimination will be present exclusively by reference to qualities seen generally to reside in those grounds.

Additional problems arise when certain grounds, particularly grounds based upon legal status (marital status, family status, citizenship, province of residence, etc.) may be said to give rise to discriminatory concerns in certain contexts but not in others. Are these grounds therefore sometimes analogous and sometimes not analogous? In these types of circumstances, the finding of "analogousness" will be driven by the result we want to reach. If we want to conclude that the impugned distinction is discriminatory, then we find the grounds to be analogous. If we want to conclude that a distinction is non-discriminatory, then we simply say that although the ground "may be analogous in some contexts", it is not in this case: see, e.g., Turpin, supra, per Wilson J.; R. v. Généreux, [1992] 1 S.C.R. 259, per Lamer C.J.

... If a finding of discrimination does not flow automatically from a finding that a distinction has been drawn on the basis of an enumerated or analogous ground (see Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872; R. v. Hess, [1990] 2 S.C.R. 906), then it follows that reliance on "grounds" may not contemplate the entire picture. An additional dimension of analysis is needed.

At this juncture, an important question must be asked. If the purpose of s. 15 is really to provide a broad guarantee of protection against discrimination in all of its forms, then why does it matter if the basis for distinction is abstractly "analogous" to the enumerated categories? The answer, I think, is that it does not matter. As this Court has frequently acknowledged, the essence of discrimination is its impact, not its intention. The enumerated or analogous nature of a given ground should not be a necessary precondition to a finding of discrimination. If anything, a finding of discrimination is a precondition to the recognition of an analogous ground. The effect of the "enumerated or analogous grounds" approach may be to narrow the ambit of s. 15, and to encourage too much analysis at the wrong level.

We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences. To make matters worse, in defining the appropriate categories upon which findings of discrimination may be based, we risk relying on conventions and stereotypes about individuals within these categories that, themselves, further entrench a discriminatory status quo. More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.

For all of these reasons, I am led inevitably to the conclusion that a truly purposive approach to s. 15 must place "discrimination" first and foremost in the Court's analysis. This is not to say that the essential characteristics of the nine enumerated grounds are irrelevant to our inquiry. They are, in fact, highly relevant. I turn now to a discussion of their important role in an approach that looks
She noted that "an effects-based approach to s. 15 that looks to groups rather than grounds recognizes the importance of adverse effects discrimination in s. 15 without requiring us to resolve some of the intractable issues that have sprung up around that doctrine" such as the question of what percentage of the affected population must be identified by an enumerated or unenumerated ground of discrimination, in order for s.15 to come into play:

To expand briefly upon the example of domestic workers, under traditional adverse effects doctrine, what percentage of the group would have to have been women in order to succeed in a sex-based discrimination claim? Fifty percent? Ninety percent? As this Court found in Symes v. Canada, [1993] 4 S.C.R. 695, it is difficult to draw a principled distinction along such lines. I believe that it is both easier and more intellectually honest to examine the effect of the distinction on the group affected. In this case, that group would be domestic workers, and the only decision is: does the distinction discriminate against domestic workers?

As I noted in Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554 at p. 645, categories of discrimination cannot be reduced to watertight compartments, but rather will often overlap in significant measure. When assessing the social context of the impugned distinction, it is therefore of relevance that a significant majority of domestic workers are immigrant women, a subgroup that has historically been both exploited and marginalized in our society. Awareness of, and sensitivity to, the realities of those experiencing the distinction is an important task that judges must undertake when evaluating the impact of the distinction on members of the affected group. Discrimination cannot be fully appreciated or addressed unless courts' analysis focuses directly on the issue of whether these workers are victims of discrimination, rather than becoming distracted by ancillary issues such as "grounds", be they enumerated or analogous.109

Justice L'Heureux-Dubé's discussion of the need for both subjectivity and objectivity in defining discrimination (outlined above in Part II) yields some useful direction as to how she would approach the decision as to whether a particular group is entitled to Charter protection. She would look at both the nature of the group, and the seriousness of the disadvantage at issue:

... groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable. As such, a distinction may be discriminatory in its impact upon one group yet not discriminatory in its impact upon another group. While it may be discriminatory against women to prohibit female guards from searching male prisoners, it may not be discriminatory against men to prohibit male guards


109. Ibid. at para 79-80.
from searching female prisoners: Weatherall v. Canada (Attorney General), supra. While it may be discriminatory to define a particular criminal offence as only applying to women, it may not be discriminatory to restrict the applicability of the offence of sexual assault of a minor to men: R. v. Hess, supra. In the same way that it does not really matter why the affected surface is soft, it is not necessary that there be a formal nexus between the social vulnerability of the affected group and the prejudice flowing from the impugned distinction in order for that vulnerability to be relevant to determining whether the distinction is discriminatory. Put another way, it is merely admitting reality to acknowledge that members of advantaged groups are generally less sensitive to, and less likely to experience, discrimination than members of disadvantaged, socially vulnerable or marginalized groups. See, by analogy, Schachtschneider v. Canada, [1994] 1 F.C. 40 (C.A.), per Linden J.A..

Most of the factors identified in Andrews under the "analogous grounds" approach as characteristic of the enumerated grounds in s. 15 are, not surprisingly, integral to evaluating the nature of the group affected by the impugned distinction. It is highly relevant, for instance, to inquire into whether the impugned distinction is based upon fundamental attributes, such as those enumerated in s. 15, that are generally considered to be essential to our popular conception of 'personhood' or 'humanness'. Furthermore, it is important to ask ourselves questions such as "Is the adversely affected group already a victim of historical disadvantage?"; "Is this distinction reasonably capable of aggravating or perpetuating that disadvantage?"; "Are group members currently socially vulnerable to stereotyping, social prejudice and/or marginalization?"; and "Does this distinction expose them to the reasonable possibility of future social vulnerability to stereotyping, social prejudice and/or marginalization?". Membership in a "discrete and insular minority", lacking in political power and thus susceptible to having its interests overlooked, is yet another consideration that may be taken into account.

Consideration of these factors involves the recognition that differently situated groups are starting on different levels of the s. 15 playing field. In my view, our approach to s. 15 must reflect that reality. Indeed, I reiterate McIntyre J.'s words in Andrews, supra, at p. 169 that "for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions". Treating historically vulnerable, disadvantaged or marginalized groups in the same manner as groups which do not generally suffer from such vulnerability may not accommodate, or even contemplate, those differences. In fact, ignoring such differences may compound them, by making access to s. 15 relief most difficult for those groups that are the most disempowered of all in Canadian society.

To summarize, the more socially vulnerable the affected group and the more fundamental to our popular conception of "personhood" the character-
istic which forms the basis for the distinction, the more likely that this distinction will be discriminatory.

... In the same way that a very dense projectile will impact upon a surface more sharply than a less dense projectile, an examination of the nature of the interest affected by the impugned distinction is helpful in determining whether that distinction is discriminatory. This examination requires an evaluation of both economic and non-economic elements.

As I noted earlier, the Charter is not a document of economic rights and freedoms. Rather, it only protects “economic rights” when such protection is necessarily incidental to protection of the worth and dignity of the human person (i.e. necessary to the protection of a “human right”). Nonetheless, the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter.

... Referring back to our analogy once again, if the projectile is dense enough and thrown hard enough, then it will leave a mark on even the most resilient of surfaces. Similarly, the more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact even with respect to groups that occupy a position of advantage in society.

To summarize, tangible economic consequences are but one manifestation of the more intangible and invidious harms flowing from discrimination, which the Charter seeks to root out. In other cases, the prejudice will be to an important individual interest rather than to one that is economic in nature. The nature of the interest affected is therefore highly relevant to whether the distinction that adversely affects that interest is discriminatory in nature. In all but the most extreme cases, this factor cannot be considered in isolation. It only assumes meaningful proportions when assessed in light of the nature of the group affected.110

3. **The probability of a more inclusive approach to unenumerated grounds**
Justice L'Heureux-Dubé has expressed most clearly the willingness to focus on the situation of the actual equity-seeking group, without much inquiry into the characteristics of the ground. However, as noted above, the rest of the majority of the Court have maintained a liberal approach which has produced the same results as the approach of Justice L'Heureux-Dubé.

Justice McLachlin (for Sopinka, Cory, and Iacobucci) in *Miron*:

Our approach must be generous, reflecting the "continuing framework" of the constitution and the need for "the unremitting protection' of equality rights": Andrews, per McIntyre J., at p. 175. Andrews instructs us that our approach must also reflect the human rights background against which the Charter was adopted. In evoking human rights law as the defining characteristic of discrimination under s. 15(1) of the Charter, this Court in Andrews engaged the principle of equality which underlies the constitutions of free and democratic countries throughout the world. This principle 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. Logic suggests that in determining whether a particular group characteristic is an analogous ground, the fundamental consideration is whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual? An affirmative answer to this question indicates that the characteristic may be used in a manner which is violative of human dignity and freedom.

The theme of violation of human dignity and freedom by imposing limitations and disadvantages on the basis of a stereotypical attribution of group characteristics rather than on the basis of individual capacity, worth or circumstance is reflected in qualities which judges have found to be associated with analogous grounds. One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction: Andrews, supra, at p. 152 per Wilson J.; Turpin, supra, at pp. 1331-32. Another may be the fact that the group constitutes a "discrete and insular minority": Andrews, supra, at p. 152 per Wilson J. and at p. 183 per McIntyre J.; Turpin, supra, at p. 1333. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in Andrews, "[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" (at pp.174-75). By extension, it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1): Andrews, supra, at 195 per La Forest J. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory: see Egan v. Canada, supra, per Cory J.

All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition — that any or all of them must be present to find an analogous ground — is invalid. As Wilson J. recognized in Turpin (at p. 1333), they are but "analytical tools" which may be "of assistance". For example, analogous grounds cannot be con-
fined to historically disadvantaged groups; if the Charter is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination. Nor is it essential that the analogous ground target a discrete and insular minority; this is belied by the inclusion of sex as a ground enumerated in s. 15(1). And while discriminatory group markers often involve immutable characteristics, they do not necessarily do so. Religion, an enumerated ground, is not immutable. Nor is citizenship, recognized in Andrews; nor province of residence, considered in Turpin. All these and more may be indicators of analogous grounds, but the unifying principle is larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual. (emphasis added)\textsuperscript{1}

Justice Cory (for Iacobucci, McLachlin, and Sopinka) in \textit{Egan}:  

The fundamental consideration underlying the analogous grounds analysis is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant.\textsuperscript{12}

The decisions of Justice McLachlin (for Sopinka, Cory, and Iacobucci) in \textit{Miron}, and Justice Cory (for Iacobucci, McLachlin, and Sopinka) in \textit{Egan} list the following reasons for including, respectively, marital status and sexual orientation as unenumerated grounds:

- **personal characteristic**
  "it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice ... a matter of defining importance to individuals ... not a matter which should be excluded from Charter consideration on the ground that its recognition would trivialize the equality guarantee.\textsuperscript{13}

  ... the question is whether the difference in treatment is closely related to a personal characteristic of a group to which the claimant belongs.\textsuperscript{14}

- **historical disadvantage:**
  marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the Charter ... Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice.\textsuperscript{15}

\textsuperscript{111.} \textit{Miron, supra}, note 4 at para 145-149.

\textsuperscript{112.} \textit{Supra}, note 2 at para 171.

\textsuperscript{113.} \textit{Miron, supra}, note 4 at para 151.

\textsuperscript{114.} \textit{Egan, supra}, note 2 at para 167.

\textsuperscript{115.} \textit{Miron, supra}, note 4 at para 152.
While historical disadvantage or a group's position as a discrete and insular minority may serve as indicators of an analogous ground, they are not prerequisites for finding an analogous ground. They may simply be of assistance in determining whether the interest advanced by a claimant is the sort of interest that s. 15(1) was designed to protect. The fundamental consideration underlying the analogous grounds analysis is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant. Since one of the aims of s. 15(1) is to prevent discrimination against groups which suffer from a social or political disadvantage it follows that it may be helpful to see if there is any indication that the group in question has suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political and social prejudice.\(^{116}\)

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation.\(^{117}\)

- **individual's lack of full control over characteristic**
  marital status often lies beyond the individual's effective control ... the individual exercises limited but not exclusive control over the designation.\(^{118}\)

- **legislative/judicial recognition:**
  legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities.\(^{119}\)

  ... it is apparent that a legislative consensus is emerging which recognizes that sexual orientation is an analogous and prohibited ground of discrimination. The human rights legislation in New Brunswick, Nova Scotia, Quebec, Ontario, Manitoba and the Yukon all prohibit discrimination on the basis of sexual orientation. As a result of Charter challenges, protection against discrimination on the basis of sexual orientation is also available in Alberta and in the federal jurisdiction. The Ontario Court of Appeal in Haig v. Canada, supra, found that sexual orientation was an analogous ground ... \(^{120}\)

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4. **Use of International Law**

The Supreme Court of Canada has recognized that international human rights treaty obligations entered into by Canada and decisions of international human rights tribunals may be of value in interpreting the *Charter*. In *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*, Chief Justice Dickson (in dissent but not on this point) stated that, although the norms of international law were not binding, they provided "a relevant and persuasive source for interpretation" of *Charter* provisions, especially when arising out of Canada's international human rights obligations. Dickson C.J.C. held that:

... the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In *Slaight Communications Inc. v. Davidson*, Dickson C.J.C. (now in the majority) indicated that Canada's international human rights obligations should inform:

... not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective.

**B. Rebutting predictable arguments concerning grounds**

Once one has determined the big issue of whether an unenumerated group "qualifies" for *Charter* protection, the reach of the impugned legislation or government action is the main issue that gives rise to arguments about grounds of discrimination. One common argument is that, if the legislation or government action affects persons other than the groups on whose behalf the litigation is undertaken, there is no breach of s.15. The opposite proposition is also argued: if not all members of groups cited are affected by the impugned legislation or government action, there is no breach of s.15.

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Obviously, if the approach suggested by Justice L’Heureux-Dubé were universally accepted, none of the arguments noted below would arise. The first question would not be about whether the persons affected by the legislation or government action could be classified in such a way as to qualify for Charter protection, but about whether the disadvantage created by the legislation or government action was discriminatory. We would not run the risk of “denying s. 15 relief to persons who are victims of legislatively sanctioned discrimination, but who are unable to fit themselves into an established or analogous ‘ground’”. While the entire Supreme Court has yet to specifically embrace Justice L’Heureux-Dubé’s approach, the analyses retained by Justices Lamer, Cory, Iacobucci, McLachlin, and Sopinka provide considerable support in rebutting the arguments noted above.

1) not all persons who could be affected by the Regulation are members of the groups we cite as affected

As a matter of logic, there would seem to be no justification to refuse a claim of discrimination by one group because others could also be subject to discrimination. In Egan, Justice Cory (for Iacobucci, McLachlin, and Sopinka) seems to address this point:

The appellants are not alleging that the discrimination is unique or particular to their personal situation but, rather, that the Act discrimimates against all homosexual common law couples who are living in a state which is comparable to heterosexual common law couples. It follows that the appellants must demonstrate that homosexual couples in general are denied equal benefit of the law, not that they themselves are suffering a particular or unique denial of a benefit. (emphasis added)

The only circumstance in which the effect of legislation or government action on others would nullify a discrimination argument would be if the impugned provision or action disadvantaged everybody with the same degree of adverse effect. In that case, there would be no better-off comparator group.

2) not all members of groups cited are affected by the Regulation

In Rodriguez, Chief Justice Lamer held that s. 241(b) of the Criminal Code has a discriminatory effect on the ground of disability, despite the fact that not all disabled people were adversely affected by it:

It is moreover clear that the class of persons with physical disabilities is broader than that of persons unable to end their lives unassisted. In other words, some persons with physical disabilities are treated unequally by the

125. Egan, supra, note 2 at para 81.
126. Ibid. at para 153.
effect of s. 241(b) of the Criminal Code, but not all persons, nor undoubtedly the majority of persons with disabilities, are so treated. The fact that this is not a bar to a remedy under s. 15(1) seems to me to have been clearly decided by Brooks, Allen and Dixon et al. v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219; 94 N.R. 373; 58 Man.R.(2d) 161; 59 D.L.R.(4th) 321, and Janzen and Govereau v. Pharos Restaurant and Grammas et al., [1989] 1 S.C.R. 1252; 95 N.R. 81; 58 Man.R.(2d) 1.

In Brooks, the question was whether unfavourable treatment on account of pregnancy could be regarded as sex discrimination. Responding to the argument that this was not so because all women were not affected by this discriminatory provision, Dickson, C.J., said (at p. 1247):

"I am not persuaded by the argument that discrimination on the basis of pregnancy cannot amount to sex discrimination because not all women are pregnant at any one time. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Many, if not most, claims of partial discrimination fit this pattern. As numerous decisions and authors have made clear, this fact does not make the impugned distinction any less discriminating."

In Janzen this court had to determine whether sexual harassment was a form of sex discrimination. The Court of Appeal had accepted the argument that since all women were not affected by this type of behaviour, no discrimination had resulted. Dickson, C.J., rejected this argument as follows (at pp. 1288-1289):

"If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically."

V. THE S.1 ARGUMENT

The application of s.1 of the Charter is the area where the real battle in most discriminatory-benefits cases, the one concerning the allocation of resources, should be fought. This will not occur until the courts make better and more consistent judgements concerning what issues are properly included under s.15. This article will not provide a general review of leading cases on s.1 to date, but will be confined to a review of the treatment of s.1 in the Egan, Thibaudeau, Miron and Rodriguez cases. A review of these cases shows that the Supreme Court still lacks a clear consensus as to the nature of relevant criteria, and continues to exhibit lack of uniformity in regard to what evidence is considered

127. Supra, note 8 at para 175-177.
under what parts of enunciated tests. The following is an attempt to apply some order to some rather inconsistent judgements.

A. The Oakes standard and further developments

R. v. Oakes\textsuperscript{128} has maintained its status as the major referral point for s.1 analysis, being followed without further comment by Chief Justice Lamer in Rodriguez and by Justice Iacobucci for Justices Cory and McLachlin in Egan.

The Oakes test is summarized most succinctly by Justice Iacobucci in Egan:

\begin{quote}
\ldots three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.\textsuperscript{129}
\end{quote}

Justice L’Heureux-Dubé’s summary is even briefer:

\begin{quote}
In my view, there is no possible justification for a discriminatory distinction other than that it is relevant to an important objective. As such, a distinction found to violate s. 15(1) may only be saved under s. 1 if it is found to be relevant to a proportionate extent to a pressing and substantial objective. This is accomplished by reference to the framework to s. 1 analysis set down in R. v. Oakes, [1986] 1 S.C.R. 103 and modified by the majority of this Court in Dagenais v. Canadian Broadcasting Corp.,[1994] 3 S.C.R. 835.\textsuperscript{130}
\end{quote}

Justice L’Heureux-Dubé and Justice Iacobucci, for Cory and McLachlin, noted that:

\begin{quote}
\ldots in Big M, this Court held that a purpose may never, itself, be unconstitutional. By that same token, where the purpose of impugned legislation is, itself, discriminatory, it cannot be saved under s. 1. I would add, however, that where the court has available to it several possible, and equally likely, interpretations of the purpose of the legislation, then it should prefer one that is consistent with Charter values over one that is not.\textsuperscript{131}
\end{quote}


\textsuperscript{129.} Supra, note 2 at para 189.

\textsuperscript{130.} Ibid. at para 70.

\textsuperscript{131.} Ibid. at para 71 and 210.
Justices L'Heureux-Dubé (as noted above) and McLachlin consider "the majority of this Court in Dagenais"\(^{132}\) to have modified the proportionality part of the test:

there must be a proportionality between the discriminatory effects of the impugned distinction and the salutary effects of the distinction: Dagenais v. Canadian Broadcasting Corp.\(^{133}\)

In Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, at p. 889, Lamer C.J., writing for the majority, restated the proportionality of effects test as follows: "there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the right or freedom in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures" (emphasis in original).\(^{134}\)

Justice Sopinka, speaking only for himself in Egan, added a further consideration to s.1:

... government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit schemes because their limits would depend on an accurate prediction of the outcome of court proceedings under s. 15(1) of the Charter.

This Court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so ... McKinney v. University of Guelph, [1990] 3 S.C.R. 229\(^{135}\)

There seem to be two elements to Justice Sopinka's reasoning. The first is his disturbing tendency\(^{136}\) to accept the continuation of discriminatory situations because legislatures or other institutions plead that they are too "new" to accept. The second and major element is the implied assertion that a government's "choices between disadvantaged groups" can be considered "legitimate" with-


\(^{133}\) Egan, supra, note 2 per L'Heureux-Dube J. at para 76.

\(^{134}\) Thibaudet, supra, note 3 per McLachlin, J. at para 233.

\(^{135}\) Egan, supra, note 2 at para 104-105.

out critical examination of the circumstances of any particular situation of underinclusivity.

It is not clear whether Justice LaForest (writing in *Egan* for Lamer, Gonthier, and Major) understood Justice Sopinka to be suggesting that critical examination was not necessary. He simply agrees that s.1 would save the impugned provisions:

> for the considerations set forth in my reasons in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, especially at pp. 316-18, some of which are referred to in the reasons of my colleague Justice Sopinka, as well as for those mentioned in my discussion of discrimination in the present case.¹³⁷

However, Justices L’Heureux-Dubé and Iacobucci (for Cory and McLachlin) clearly see the implications of Justice Sopinka’s decision, and vehemently disagreed:

**Justice L’Heureux-Dubé:**

> It goes without saying that I cannot agree with the novel approach to s. 1 taken by Sopinka J. in this case, particularly in light of the following remarks by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 136:

> A second contextual element of interpretation of s. 1 is provided by the words “free and democratic society”. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

> There is a first time to every discrimination claim. To permit the novelty of the appellants’ claim to be a basis for justifying discrimination in a free and democratic society undermines the very values which our Charter, including s. 1, seeks to preserve.¹³⁸


Justice Iacobucci (for Cory and McLachlin):

Since preparing these reasons, I have read the reasons of my colleague, Justice Sopinka. I note that, although he finds the impugned statute to violate the appellants' equality rights, he finds this violation to be justifiable in a free and democratic society under s. 1. In reaching this conclusion, he relies heavily on select passages from this Court's judgment in McKinney v. University of Guelph, [1990] 3 S.C.R. 229, at pp. 317-19, per La Forest J. McKinney involved a s. 15 challenge launched by several professors to a university's mandatory retirement policy and a provision in the Ontario Human Rights Code which limited the protection of the Code in the area of employment to those under 65. These passages from McKinney may seem to support the extremely deferential approach to s. 1 adopted by Sopinka J. However, a close examination of the McKinney decision reveals that La Forest J.'s comments therein can be said to be limited to Charter review of provincial human rights legislation governing private relations only. At page 318 of McKinney, immediately before one of the passages cited by Sopinka J., the following appears:

The Charter, we saw earlier, was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice. As counsel for the Attorney General for Saskatchewan colourfully put it, this "should lead us to ensure that the Charter doesn't do through the back door what it clearly can't do through the front door".

Furthermore, I find that the context of McKinney is wholly distinguishable from the present appeal. This appeal involves a closely held personal characteristic (potentially only shared by a minority) upon which a distinction is drawn without the array of competing interests that animated the s. 1 analysis in McKinney. The only competing interest in the case at bar is budgetary in nature. The abolition of a mandatory retirement age, on the other hand, affects many factors, including: the entire composition of the workforce; the ability of younger people to secure jobs; access to university resources; promotion of academic freedom, excellence and renewal; collective bargaining rights; and the structure of pension plans.

However, what causes me greater concern is my colleague's position that, because the prohibition of discrimination against gays and lesbians is "of recent origin" and "generally regarded as a novel concept" (p. 6), the government can be justified in discriminatorily denying same-sex couples a benefit enuring to opposite-sex couples. Another argument he raises is that the government can justify discriminatory legislation because of the possibility that it can take an incremental approach in providing state benefits.

With respect, I find both of these approaches to be undesirable. Permitting discrimination to be justified on account of the "novelty" of its prohibition or on account of the need for governmental "incrementalism" introduces two unprecedented and potentially undefinable criteria into s. 1 analysis. It also permits s. 1 to be used in an unduly deferential manner well beyond anything found in the prior jurisprudence of this Court. The very real possibility emerges that the
government will always be able to uphold legislation that selectively and discriminatorily allocates resources. This would undercut the values of the Charter and belittle its purpose. I also find that many of the concerns raised by Sopinka J. — such as according the legislature some time to amend discriminatory legislation — ought to inform the remedy, and should not serve to uphold or legitimize discriminatory conduct: Schachter, supra. 139

B. Section 1 and government services or benefits cases
The onus in s.1 is on the government, and the arguments presented will of course be specific to the legislation or government action at issue. The poverty law advocate’s rebuttal argument will also be issue-specific. However, some of the issues addressed in Rodriguez, Thibaudeau, Egan, and Miron are likely to crop up in litigation concerning discrimination in government services or benefits.

1. Rational connection to a pressing and substantial objective
The government’s stated objective in most cases is not discriminatory on its face, and is therefore likely to pass the Big M part of the test. The objectives stated in Rodriguez, Thibaudeau, Egan, and Miron, which passed the test, are typical:

the protection of vulnerable people, whether they are consenting or not, from the intervention of others in decisions respecting the planning and commission of the act of suicide, 140

alleviation of poverty of elderly spouses, 141

protection of stable family units by insuring against the economic consequences that may follow from the injury of one of the members of the family, 142 and

increase of the resources of the broken family as a unit in order to increase child support and ease the discharge of the non-custodial parent’s obligations. 143

In some situations, it might be possible to argue that a stated objective is merely an excuse for the real objective, the wish to save money. It has been reiterated by the Supreme Court, usually in discussion of proportionality, that budgetary considerations should not be determinative of a s. 1 analysis. However, the


140. Rodriguez, supra, note 8 at para 186.

141. Egan, supra, note 2 at para 106 and 184.


143. Thibaudeau, supra, note 3 at para 217.
government has usually been given the benefit of the doubt about what its actual objectives were.

Justice Iacobucci dismissed an argument by the government that it would be too expensive to include same-sex couples in CPP benefits, in *Egan*, under the rational connection aspect of the s.1 test. That was in the light of the lack of fit between a stated legislative objective of alleviation of poverty of elderly spouses, and the exclusion by that legislation of some poor elderly spouses. *Egan* was a case of underinclusion; where the problem at issue can be seen as overbreadth in a restriction rather than lack of inclusiveness, the lack of rational connection may not be so obvious as it was in *Egan*. Chief Justice Lamer in *Rodriguez*, considering a case of constructive discrimination that adversely affected only disabled people who wanted to commit suicide but were too disabled to do so independently, opined that "The question of overbreadth in such circumstances is properly dealt with under the second component of the proportionality test." However, in all cases it is important to consider whether it can be argued that the restriction is, in the words of the Chief Justice in *Rodriguez*, not "carefully designed to meet the objective".

Justice L’Heureux-Dubé in *Egan* found that a distinction on the basis of sexual orientation was not rationally connected to the stated government objective. She indicated that:

> ... Discrimination on the basis of the legal status of the group affected (e.g. citizenship, province of residence, marital status) may raise special problems in this respect, since legal status always comes attached with specific rights and obligations. Because of the various rights and obligations which differing status-based groups may enjoy, part of the rational connection determination in such instances may require some inquiry into whether the distinction drawn in the impugned legislation is relevant to one or more of those rights and/or obligations.

She went on, however:

> If the distinction does not relate rationally to either a right or an obligation which attaches to the affected status-based group, then I do not see how a distinction drawn on the basis of membership in that status-based group would not be irrelevant.

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144. *Supra*, note 8 at para 190.


In *Miron*, Justice McLachlin (for Sopinka, Cory and Iacobucci) found that marital status was not rationally connected to the government’s stated objective. She discussed the choice of “marker” for who should receive benefits, and found:

... that in fixing on marital status as the criterion of eligibility for family accident benefits, the Legislature chose a criterion that was at best only collaterally related to its legislative goal; a criterion, moreover, that had the effect of depriving a substantial number of deserving candidates of receipt of benefits. Better tests were available. In short, the Legislature did not choose a reasonably relevant marker.¹⁴⁷

2. proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right

a) minimal impairment

In *Rodriguez*, the impugned overbroad provision effectively excluded certain disabled persons from option of suicide. Exclusion is obviously maximum impairment of a right. The Chief Justice found that did not satisfy the minimal impairment test:

... I find that an absolute prohibition that is indifferent to the individual or the circumstances in question cannot satisfy the constitutional duty on the government to impair the rights of persons with physical disabilities as little as reasonably possible.¹⁴⁸

While the burden of proof of the applicability of s.1 is on the government, it is useful to be prepared with suggestions as to how the government could have achieved its stated objective in a less discriminatory way.

The Supreme Court has reiterated that:

Parliament does not have to have chosen the least intrusive means of all to meet its objective. The fact that Parliament selected one of a range of choices so as to impair the right or freedom protected by the Charter as little as possible will suffice to meet the minimal impairment test: *R. v. Chaulk*, [1990] 3 S.C.R. 1303, and *R. v. Swain*, [1991] 1 S.C.R. 933.¹⁴⁹

Justice L’Heureux-Dubé phrased this consideration somewhat less broadly in *Egan*:

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¹⁴⁸. *Supra*, at para 204.

... the difficulty or impossibility of finding a workable alternative basis of distinction may be a valid consideration under this branch of the proportionality test.150

However, the Chief Justice in *Rodriguez* cautioned that:

... concern for the intricate and delicate function of Parliament to choose between differing reasonable policy options, some of which may impair a particular individual or group's rights more than others, should not be misconstrued as providing Parliament with a license for indifference to whatever Charter rights it deems necessary. As La Forest, J., observed in Tétreault-Gadoury c. Canada Employment and Immigration Commission, [1991] 2 S.C.R. 22; 126 N.R. 1; 81 D.L.R.(4th) 358, at p. 44:

"It should go without saying, however, that the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's Charter rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down. For example, in Re Blainey and Ontario Hockey Association (1986), 54 O.R.(2d) 513, the Ontario Court of Appeal found that s. 19(2) of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53, which permitted discrimination in athletic organizations and activities on the basis of sex, could not be justified under s. 1. Writing for the majority, Dubin, J.A. (as he then was), emphasized (at p. 530) that the sweeping effects of s. 19(2) were disproportionate to the ends sought to be achieved, and that the government had made no effort to justify this broad scope as a reasonable limit on the right to equality."151

In the s.1 analyses in *Rodriguez*, *Thibaudeau*, *Miron* and *Egan*, the existence of alternatives to the impugned measures was considered significant. Further, there was no requirement that the alternative measures be "free from problems".152

The availability of a benefit from another source was not considered by Justice Iacobucci (for Cory and McLachlin) to ameliorate impairment.153

b) **proportionality of effect**
Justice L'Heureux-Dubé in *Egan* summarized the issue of proportionality:

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150. *Supra*, note 2 at para 75.
153. See *Egan*, *supra*, note 2 at para 208.
... there must be a proportionality between the discriminatory effects of the impugned distinction and the salutary effects of the distinction: Dagenais v. Canadian Broadcasting Corp., supra. Factors such as the importance of the state interest, the extent to which it is furthered by the impugned distinction, the constitutional and societal significance of the interests adversely affected, the severity of the rights deprivation suffered by the individual, and the potential for entrenching marginalization or stigmatization of particular groups will all be relevant considerations to this branch of the s. 1 examination. The government must shoulder a heavier justificatory burden when the Charter infringement is severe: Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at p. 1190.

In many cases of denial of government services and benefits, there is no obvious advantage to the government to be balanced against the impairment of the clients’ rights, other than cost saving. As noted above, cost-saving has not been accorded enormous weight. Further, evidence as to actual savings is open to challenge, particularly if it is speculative.

Justice L’Heureux-Dubé in Egan:

It can be argued that the primary salutary effect of the distinction, on the other hand, is the savings it ostensibly entails to the public purse. The government’s expert estimates this saving as ranging between $12 million and $37 million. The appellants’ cross-examination at trial of that expert suggests that this figure may be considerably less. I would nonetheless make three observations in relation to this argument. First, by the government’s own account, these sums account for only between two and four percent of the total cost of the old age supplement program. Second, I have referred to these savings as “ostensible” because if the affected persons had been in heterosexual relationships instead of homosexual relationships, the government would have to have paid out this money anyway. Finally, I note that the majority of this Court recognized in Schachter v. Canada, [1992] 2 S.C.R. 679, at p. 709, that budgetary considerations should not be determinative of a s. 1 analysis, and should more properly be considered when attempting to formulate an appropriate remedy. On this basis, I conclude that the deleterious effects of the impugned distinction outweigh its salutary effects.

Justice Iacobucci (for Cory and McLachlin), in Egan:

The respondent Crown submits the cost of such an extension of benefits constitutes grounds for upholding the s. 15 limitation. Mr. Hagglund has estimated the cost of including same-sex spousal cohabitants as ranging from $12 million to $37 million per annum (see Case on Appeal, at p. 123). This evidence is highly speculative and statistically weak and thus accordingly incorporates guesswork.

154. Ibid. at para 76.

155. Ibid. at para 99.
For example, it is based on his generous estimates of the number of eligible same-sex couples and fails to take into account the fact that many of these households will be ineligible because they surpass the maximum income criteria. However, assuming arguendo that Mr. Hagglund's figures are valid, I find, as a question of law, that they do not justify the denial of the appellants' right to equality.

The jurisprudence of this Court reveals, as a general matter, a reluctance to accord much weight to financial considerations under a s. 1 analysis. In Schachter, supra, at p. 709, the Chief Justice noted that "[t]his Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1". 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.156

CONCLUSION
There is no question that a s.15 challenge is also a challenge to the ingenuity and staying power of the poverty law advocate. In Miron, Justice L'Heureux-Dubé acknowledged that consistent direction cannot be obtained, as yet, from our highest court:

There is no more important task in approaching any Charter right than that of characterizing properly its purpose: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295. Defining with accuracy and sensitivity the purpose of a particular right is, in short, the starting point for rights analysis. By implication, a right is said to be violated when the purpose of that right is denied, undermined, or frustrated by legislative action. Disagreement, no matter how small, at the foundational level of establishing the right's purpose will only magnify over time in terms of how that right is applied. More difficult cases, quite naturally, will only make these differences more apparent. I believe that this phenomenon is beginning to manifest itself in the divergent approaches to s. 15 taken in recent cases before this Court, of which this case, Miron v. Trudel, No. 22794, and Thibaudeau v. Canada, No. 24154, released concurrently, are no exception. The emergence of these differences suggests to me that we may not necessarily be operating with the same underlying purpose in mind. (emphasis added)157

This article clearly reveals my viewpoint: despite the complexity of the issues and the judicial myopia exhibited in some of the cases, I urge poverty law advocates to consider undertaking s.15 arguments. Section 15 remains a potentially powerful weapon, and in my view, it is far too early to abandon attempts to use it to redress injustice for poverty law clients.

Once again, Justice L'Heureux-Dubé provides an appropriate thought:

156. Ibid. at para 193-4.

157. Supra, note 4 at para 32.
For s. 15 jurisprudence to continue to develop along principled lines, I believe that two things are necessary: (1) we must revisit the fundamental purpose of s. 15; and (2) we must seek out a means by which to give full effect to this fundamental purpose.¹⁵⁸

Unless the judiciary continue to be faced with the complex problems of discrimination that affect poor people, the jurisprudence will develop without some of the most fundamental questions of principle being addressed.

¹⁵⁸. Ibid.