Interpreting the Charter of Rights: Generosity and Justification

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Interpreting the Charter of Rights: Generosity and Justification

Abstract
The author argues that there is a close relationship between the scope of the rights guaranteed by the Charter and the standard of justification required under section 1. The broader the scope of a right, the more relaxed the standard of justification must be. A generous interpretation of a right is incompatible with the stringent Oakes standard of justification. However, a purposive interpretation of a right, confining the right to conduct that is worthy of constitutional protection, is compatible with a stringent standard of justification.

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I. GENEROSITY AND JUSTIFICATION

At a recent Justice Department Conference, I was asked to address the topic, "A Review of Supreme Court of Canada Charter Decisions: Trends in the Future." As I reviewed the cases, it seemed to me that the key to the future development of the Charter lay in the resolution of a conflict between two contradictory doctrines, both of which have been warmly, even fervently, embraced by the Supreme Court of Canada. The first doctrine, articulated in Hunter v. Southam Inc. and R. v. Big M Drug Mart Ltd, as well as many subsequent cases, is that the guaranteed rights should be given a generous interpretation. The second doctrine, articulated in R. v.

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3 [1985] 1 S.C.R. 295 at 344 [hereinafter Big M].
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legislative bodies, and to introduce meaningful rules to the process of Charter review. These purposes can be accomplished only by restricting the scope of the Charter rights.

II. PURPOSIVE INTERPRETATION

How can the scope of the Charter rights be restricted without abandoning or undermining the civil libertarian values that the Charter protects? The Supreme Court of Canada has answered this question in its insistence on a purposive interpretation of the Charter rights. The purposive approach to the interpretation of the Charter was spelled out most fully in R. v. Big M Drug Mart Ltd.\(^5\) It involves an attempt to ascertain the purpose of each Charter right and, then, to interpret the right so as to include activity that comes within the purpose and to exclude activity that does not. Of course this leaves the judges with the task of "finding" the purpose, but some guidance can be obtained from the language in which the right is expressed, from the implications to be drawn from the context in which the right is to be found, including other parts of the Charter, from the pre-Charter history of the right, and from the legislative history of the Charter. Moreover, as a body of case-law develops on the meaning of a particular right, the core of the definition tends to become settled.

In Hunter v. Southam Inc., the Court assumed that a purposive approach and a generous approach were one and the same thing – or, at least, were not inconsistent. Dickson C.J. quoted the well-known statement of Lord Wilberforce that a bill of rights should receive a "generous interpretation," and he equated that statement with "a broad, purposive analysis," which was the approach he said he intended to take.\(^6\) In Big M, Dickson C.J. said that the definition of a right should be "a generous rather than a

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5 Supra, note 3 at 344.
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legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.\(^7\)

In *Big M*, Dickson C.J. did go on to warn that judges should not "overshoot" the purpose of the right.\(^8\) The truth of the matter is that the widest possible reading of a Charter right, which is the most generous interpretation, will nearly always "overshoot" the purpose of the right, by including behaviour that is outside the purpose and unworthy of constitutional protection. The effect of a purposive approach is normally going to be to narrow the scope of the right. Generosity is a helpful idea only if it is subordinate to purpose; otherwise, it is bound to lead to results that are inconsistent with a purposive approach.

The purposive approach works in perfect harmony with the stringent standard of justification under section 1. Once a right has been confined to its purpose, it seems obvious that a government ought to have to satisfy a stringent standard of justification to uphold legislation limiting the right.

III. CRIMINAL JUSTICE

A. Legal rights

The Supreme Court of Canada has not only said that it would give a generous interpretation to the Charter rights, it has certainly done so. Without doubt it is the legal rights, which, generally speaking, are the rights of those accused of crime, that have received the most generous interpretation. These rights have usually been given the widest possible scope, leading the Court to often take positions that have been rejected by the Supreme Court of the United States, even in its expansive (Warren Court) phase.

The Supreme Court of Canada has held that a person must be advised of the right to counsel before taking a mandatory

\(^{7}\) *Supra*, note 3 at 344.

\(^{8}\) *Ibid.*
breathalyser test. A suspect who is intoxicated cannot waive the right to counsel. An identification line-up cannot be held until the accused has successfully contacted counsel, even if that process may take many hours. A search, even one made under a valid warrant or other authority, becomes unreasonable (that is, unconstitutional) if there has been a violation of the right to counsel. A blood sample taken by a doctor from the free-flowing wound of an accident victim and handed over to the police is an unreasonable (that is, unconstitutional) seizure. An accused who chooses to testify at trial can prevent the prosecution from using the evidence against him at a new trial, although any other kind of voluntary statement would obviously be admissible at the second trial. In all of these situations, the Supreme Court of the United States either has reached or probably would reach an opposite conclusion.

B. Fundamental Justice

The breadth of the procedural rights of the criminal accused is striking enough. But it does not compare with the Supreme Court of Canada's interpretation of fundamental justice in section 7 as encompassing substantive as well as procedural due process. In Reference Re Section 94(2) of the Motor Vehicle Act R.S.B.C., the Court brushed aside the evidence from the history of section 7 that the phrase fundamental justice had been chosen in order to avoid

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the unfortunate American experience with the concept of substantive due process. The Court held that the requirement of fundamental justice was a substantive as well as a procedural one, and that it had the effect of constitutionalizing the element of \textit{mens rea} for any offence for which the accused could be liable to the punishment of imprisonment (loss of liberty). It followed that an offence of absolute liability (driving without a valid driver's licence) was unconstitutional. The Court extended this dramatic decision in \textit{R. v. Vaillancourt},\textsuperscript{17} in which the Court held that the felony-murder rule in the \textit{Criminal Code} was unconstitutional. The fact that the accused did not intend to cause death (although he did intend to commit a serious crime) meant that, as a matter of constitutional law, he could not be found guilty of murder.\textsuperscript{18}

\textbf{C. Comment}

The cases dealing with the rights of the criminal accused do not fit my thesis; the broad interpretation of the right has not been accompanied by a relaxation of the section 1 standard of justification. Indeed, in \textit{R. v. Oakes} itself,\textsuperscript{19} the Court gave the widest possible interpretation of the presumption of innocence in section 11(d) and, at the same time, laid down the stringent standards of justification that are now supposed to regulate the application of section 1.

While the criminal justice cases do not fit my thesis, the Court in later cases has been at pains to argue that they form a special category in which the issue of justification is less complicated than it is in other branches of the law. In the criminal justice cases, "[T]he government is best characterized as the singular antagonist of the individual whose right has been infringed."\textsuperscript{20} The contrast is with legislation enacted to protect not just the community at large,

\textsuperscript{17} [1987] 2 S.C.R. 636.


\textsuperscript{19} \textit{Supra}, note 4.

but a particular group, sometimes a vulnerable group, such as unorganized retail workers or children. In such a case, the Court takes the view that the primacy of the *Charter* right is much less obvious. Indeed, the *Charter* right may "become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons." In such a case, if the *Charter* right that is relied upon to attack the legislation is a tenuous one, it is obvious that the Court is going to uphold the legislation without agonizing too long about whether the *Oakes* standards have really been met.

IV. FREEDOM OF RELIGION

A. Sunday Closing

In *R. v. Big M Drug Mart Ltd* and *R. v. Edwards Books and Art Ltd*, the Supreme Court of Canada held that Sunday closing laws were violations of freedom of religion, which is guaranteed by section 2(a) of the *Charter*. In these holdings, the Court reversed an earlier decision of its own, which had held the contrary under the *Canadian Bill of Rights*, and departed from the Supreme Court of the United States, which had also upheld Sunday closing laws. As the precedents indicated, the argument that Sunday closing laws violate freedom of religion is not very strong, since the financial penalty of closing on a sabbath would be borne by anyone observing a sabbath, even if there was no Sunday closing legislation. About all that can be said about the legislation is that it is arguably a preference for the Christian religion; this may raise

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22 Supra, note 3.

23 Supra, note 21.


an equality argument, but it is not an obvious denial of freedom of
religion.

The only point that I seek to make in the foregoing
paragraph is that Big M and Edwards Books gave a generous (broad)
interpretation to freedom of religion. How then was section 1
applied? In Big M, the Sunday closing law was a federal law, and
the section 1 argument was rejected on the basis that the federal
Parliament lacked the constitutional power to impose a common day
of rest for secular purposes. In Edwards Books, the Sunday closing
law was a provincial law, applicable only to retail stores, and the
section 1 argument was addressed on the merits. The Court held
that the provision of a common pause day was a sufficiently
important objective to warrant overriding a guaranteed right. It
then moved to the tricky question of whether the law infringed the
Charter right as little as possible. The answer to that, of course, was
no, as Wilson J. (in partial dissent) held: the legislation contained
a narrow exemption for some Saturday-observing retailers, but it
could have contained a much broader exemption, which would have
infringed the right less. But the majority of the Court still held that
the law could be justified under section 1 and was valid. Dickson
C.J. said that the Court should not substitute its opinion for the
Legislature's "as to the place at which to draw a precise line;" he
was satisfied that the Legislature had made a "satisfactory effort" to
accommodate Saturday-observing retailers.26 La Forest J. said that
"a legislature must be given reasonable room to manoeuvre," and the
Court should not interfere with the legislative choice.27

The opinions of Dickson C.J. (with whom Chouinard and Le
Dain JJ. agreed) and La Forest J. in Edwards Books constituted a
substantial relaxation of the Oakes standard of section 1 justification.
The reason, I would suggest, was that the Charter right had been
stretched so far that it no longer presented a sufficiently weighty
reason to defeat legislation which was a well intentioned effort to
pursue a benign policy.

26 Supra, note 21 at 782.
27 Ibid. at 795-96.
B. Private Schooling

In R. v. Jones, the pastor of a fundamentalist church argued that his freedom of religion had been abridged because he was not permitted to operate a religious school for his children in his church basement. Alberta’s School Act did in fact permit this kind of private instruction, provided the Department of Education issued a certificate of efficient instruction. There was no reason to suppose that Jones would be unable to obtain such a certificate, but he refused to apply for one on the ground that an application to the state would be contrary to God’s will. Wilson J., for the majority of the Supreme Court of Canada, held that the requirement to apply for a certificate of efficient instruction was not a violation of freedom of religion. But La Forest J., for a minority of three, held that the requirement was a violation of freedom of religion. However, he hastened to hold that the law was justified under section 1, despite the absence of any evidence as to the necessity of the requirement.

The minority in Jones was willing to relax the burden-of-proof requirement for section 1 justification because the Charter guarantee of freedom of religion had been expanded to the point of the trivial. Such an insubstantial right should not be permitted to disrupt the administration of a system of compulsory education that actually made generous provision for alternative, private, religious forms of instruction.

V. FREEDOM OF EXPRESSION

A. Scope of Right

Freedom of expression, which is guaranteed by section 2(b) of the Charter, will probably become the main arena where the relationship between the Charter right and section 1 justification will be played out. Laws regarding hate propaganda, defamation, obscenity, soliciting a prostitute, and nude dancing, for example,

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raise the question of whether every communicative act, no matter how trivial, false, or harmful, enjoys constitutional protection. If the answer is yes, look for a major relaxation in the section 1 standard of justification. However, it is more likely that the answer will be no, that restrictions will be placed on the scope of freedom of expression, so that women, racial minorities, and other groups need not re-fight in the courtroom their political battles for protection from vilification. But it must be acknowledged that the decision in *Irwin Toy* points in the opposite direction.

B. *Commercial Speech*

In *Irwin Toy Ltd v. A.G. Quebec*,

the Supreme Court of Canada held that commercial advertising was covered by the guarantee of freedom of expression. In fact, the Court went so far as to say that "[a]ctivity is expressive if it attempts to convey meaning." This is certainly a generous interpretation. At issue in *Irwin Toy* was the validity of a Quebec law prohibiting advertising directed to children under the age of thirteen. Faithful to the generous interpretation of the right, the Court held that such advertising was protected by section 2(b), and that the law infringed section 2(b).

The Court then turned to the question of whether the law was saved by section 1. The Court split on this issue, but the majority said yes. The purpose of the law was sufficiently important: it was to protect children, who were a vulnerable group. But did the law impair the guaranteed right as little as possible? Quebec's law was quite the most drastic solution to the problem of children's advertising that had been adopted by any known jurisdiction. Nevertheless, the majority of the Court held that the Quebec Legislature could properly conclude "that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of

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29 Supra, note 20.

30 Ibid. at 968.

31 Ibid. at 998.
Here, as in Edwards Books, we see an attitude of deference to the legislative judgment. The reason for that deference, I would argue, was the fact that the Charter right had been expanded to cover activity that was, if not unworthy of protection, at least in need of some degree of regulation.

The Supreme Court of Canada has decided one other commercial speech case, namely, Ford v. A.G. Quebec, in which it struck down a Quebec law that required commercial signs to be in French only. In that case, the section 1 justification was rejected. The Court held that the banning of English was too drastic a means of protecting the French language. The case is not unlike Irwin Toy in that in both cases, the Legislature enacted a drastic measure, without precedent in other jurisdictions, to protect what it perceived as a vulnerable group — children in Irwin Toy and French-speakers in Ford. Perhaps the difference is that the law in Ford was perceived by the Court as unduly oppressive to the English-speaking minority, whereas the law in Irwin Toy had its major impact on the large corporations that manufacture toys, breakfast cereals, soft drinks, and the like. It is worth noting as well that childrens’ products could still be advertised in Quebec, so long as the advertising did not use images aimed at children. No similar outlet was available to the English-speaking business person who wished to include the English language in a commercial sign.

Although there are some differences between Ford and Irwin Toy that arguably make the different outcomes intelligible, the fact remains that Ford does not fit my thesis. The wide ambit of the right (to include commercial speech) was not accompanied by a relaxation in the standard of section 1 justification, or, at least, not enough of a relaxation to save the law.

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32 Ibid. at 999.
VI. MOBILITY

In *United States of America v. Cotroni*, the Supreme Court of Canada held that the extradition of a Canadian citizen offended section 6(1) of the *Charter*, which guarantees to every citizen of Canada "the right to ... remain in ... Canada." In reaching this conclusion, La Forest J., for the majority of the Court, emphasized that the *Charter* should receive a generous interpretation. Indeed, he went on to acknowledge that "the infringement of s. 6(1) that results from extradition lies at the outer edges of the core values sought to be protected by that provision." The idea that Canadian citizens accused of crime in another country could resist extradition on constitutional grounds is a startling conclusion that would put Canada in breach of its many extradition treaties and seriously hamper the efforts of international law enforcement. Canada would become a refuge for those of its citizens who were international criminals. Not surprisingly, therefore, La Forest J. went on to hold that the *Extradition Act* was saved by section 1 of the *Charter*. The beneficent purpose of the Act was not in doubt: the suppression of crime clearly qualified as a sufficiently important purpose. But did the Act impair the right as little as possible? On this issue, the Court divided. The two dissenters, Wilson and Sopinka JJ., held that the objective of suppressing crime could be achieved by prosecuting the accused in Canada instead of extraditing them. This was possible because the crimes with which they were charged (conspiracies to import drugs into the United States) had been committed in Canada. When the accused could be prosecuted in Canada, the dissenters held, extradition could not be justified under section 1.

La Forest J., for the majority, replied that, in his view, it was not appropriate to impose a constitutional requirement of prosecution in Canada; there could be a variety of evidentiary or procedural reasons why the other country was the preferable forum

35 Ibid. at 1480.
36 Ibid. at 1481.
of trial. Therefore, La Forest J. said, the right "is infringed as little as possible, or at the very least as little as reasonably possible." He more or less acknowledged, however, that this was a "flexible" application of the Oakes test — an approach, he pointed out, that was sanctioned by Edwards Books. As in Edwards Books, the broad interpretation of the right led to a relaxation in the standard of section 1 justification.

VII. FREEDOM OF ASSOCIATION

If we turn from the rights that have been interpreted broadly — criminal justice rights, freedom of religion, freedom of expression, and mobility — to the rights that have been interpreted narrowly, we do find some recognition by individual judges of the close relationship between the scope of the right and the standard of justification under section 1.

In the Labour Trilogy, the Court had to interpret freedom of association which is guaranteed by section 2(d) of the Charter. The three cases involved three statutes (two provincial and one federal) each of which denied the right to strike to a group of workers. On a narrow interpretation of freedom of association, there was no breach of the Charter. The workers' power to associate together in a union, or any other form of association, was not touched by any of the three statutes. What was affected was the ability of the association, once formed, to carry out its objective of improving the wages and working conditions of its members. On a broad interpretation of freedom of association, the right would extend beyond the right of individuals to form an association and would protect at least some of the activities of the association itself, including, in the case of a union, the right to strike. The argument in favour of this broad interpretation was that the right to form a

37 Ibid. at 1490.
38 Ibid. at 1489.
union was of little value if the legislative bodies were free to deprive
the union of the power to carry out its principal purpose.

The Court split on this difficult choice, with the majority
electing the narrower interpretation of freedom of association. The
narrower definition left the right to strike without constitutional
protection. The three statutes were therefore upheld. McIntyre J.,
who formed part of the majority, pointed out that a wide definition,
constitutionalizing the right to strike, would lead to the frequent
invocation of section 1, requiring the Court to make repeated policy
choices about the adequacy and justification of numerous legislated
alternatives to the right to strike. The implication was that many
of these alternatives would have to be upheld under section 1. The
force of this point was illustrated by the position of Dickson C.J.,
one of the two dissenters, who would have given constitutional
protection to the right to strike, but who was willing to use section
1 to sustain the back-to-work law in the Dairyworkers case on the
basis of rather slight evidence. The other dissenter, Wilson J., on
the other hand, voted for both a wide interpretation and a stringent
requirement of section 1 justification.

VIII. EQUALITY

A. Andrews Case

In Andrews v. Law Society of B.C., the Court gave a narrow
interpretation to the equality rights that are guaranteed by section
15 of the Charter. The principal judgment on the meaning of
section 15 was that of McIntyre J., with whom all of the other

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40 Alberta Reference, ibid. at 419.
41 Supra, note 39.
42 In Alberta Reference, supra, note 39, Dickson C.J. did not find the section 1 justification sufficient, and in the Six and Five case, supra, note 39, he found the section 1 justification to be only partially sufficient.
43 Wilson J. found the section 1 justification insufficient in all three cases.
judges agreed on this issue. The effect of the judgment was to restrict section 15 so that it applied only to the enumerated and analogous grounds, and so that it protected only disadvantaged groups.

Despite this restriction of the right, McIntyre J. held that the Oakes test was still too stringent a standard of section 1 justification, and that a more relaxed standard should be applied.45 On the basis of a lower standard, he held that the citizenship requirement in the British Columbia statute regulating admission to the bar was justified under section 1. Only Lamer J. agreed with this conclusion, which meant that McIntyre J. ended up in dissent. La Forest J. agreed that a standard of justification lower than Oakes was appropriate in equality cases,46 but he still held that the citizenship requirement could not be justified under section 1. However, La Forest J.'s reasoning meant that three of the six judges agreed that the Oakes standard should be relaxed in equality cases.

The opinion of the other three judges in Andrews was written by Wilson J., with whom Dickson C.J. and L'Heureux-Dubé J. agreed. Wilson J. invoked the relationship between the scope of the right and the standard of justification to support her adherence to the Oakes test. She said that the Oakes test "remains an appropriate standard when it is recognized that not every distinction between individuals and groups will violate s. 15."47 She added: "Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."48 Here was a very clear recognition of the relationship between the scope of the right and the standard of justification.

As Wilson J. recognized in Andrews, the equality guarantee of section 15 is perhaps the easiest example of the relationship between the scope of the right and the standard of justification.

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45 Ibid. at 184.
46 Ibid. at 197-98.
47 Ibid. at 154.
48 Ibid.
under section 1. If section 15 were interpreted as condemning every legislative classification, from the graduated rates of income tax (which discriminate on the basis of income) to the regime of securities regulation (which discriminates on the basis of the kind of property bought or sold), the Oakes test would be an impossible burden to impose upon government. Virtually every law could be challenged under section 15, and each challenge would have to be resolved under section 1. Given the range of policy choices inherent in any regime of social or economic regulation, it would usually be impossible to establish that the distinctions actually made were minimum impairments of equality. But once section 15 was narrowed to encompass only discrimination against the named and analogous groups, and even then only against disadvantaged groups, the great majority of potential equality challenges would fail at the section 15 stage of judicial review. For those few challenges that could meet the Andrews requirements, so that they had to be resolved under section 1, surely Wilson J. was right to insist that a strict standard of section 1 justification be applied.

The equality guarantee also illustrates the difference between a generous interpretation and a purposive interpretation. The most generous interpretation of a Charter right is the widest interpretation the language will bear. But it will rarely be the case that a purposive interpretation will support the widest interpretation that the language will bear. A purposive interpretation relies upon the purpose of the right to narrow the scope of the right. In the case of section 15, the contrast between a generous interpretation and a purposive interpretation could not be more marked. As noticed earlier, a generous interpretation of section 15 exposes nearly all laws to challenge under section 15 and requires that their validity be determined under section 1. In fact, until the Andrews case was decided in the Supreme Court of Canada, the number of section 15 challenges was enormous. A study prepared in 1988,49 only three years after the coming into force of section 15 (which occurred on

17 April 1985\textsuperscript{50}, found 591 cases (most, but not all, of which were reported) in which a law had been challenged under section 15. Of course, the courts found ways (sometimes within section 15 itself and sometimes within section 1) to reject the majority of these challenges, but the absence of any clear restrictions on the scope of section 15 encouraged lawyers to keep trying to use it whenever some statutory distinction worked to the disadvantage of a client.

The American courts have limited the open-ended character of the equality guarantee in the fourteenth amendment by the doctrine of levels of scrutiny. By deciding that most classifications attract only minimal scrutiny, the courts have ensured that equal protection challenges that were not based on race, sex, or the abridgement of fundamental rights would nearly always fail.\textsuperscript{51} Indeed, it was something like a doctrine of minimal scrutiny that made the equality clause in the Canadian Bill of Rights so ineffective. With the single exception of the Drybones case,\textsuperscript{52} the Supreme Court of Canada readily accepted whatever rationale was supplied by government for any challenged distinction, and the challenge was rejected.

Neither the Canadian Bill of Rights jurisprudence nor the American jurisprudence offered a particularly attractive way for Canadian courts to control the floodgates opened by section 15 of the Charter. But section 15 itself offered some clues to its purpose that were missing from its counterparts in the Canadian Bill of Rights and the fourteenth amendment. The named grounds of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" pointed to personal characteristics of individuals that have often been the targets of prejudice and stereotyping. The reference in subsection (2) (the affirmative action clause) to "disadvantaged individuals or groups" suggested that the role of section 15 was to correct discrimination against disadvantaged

\textsuperscript{50} The Charter of Rights came into force on 17 April 1982, but section 32(2) postponed the coming into force of section 15 for three years. The purpose was to allow time for compliance measures.


individuals or groups. These references suggested that the purpose of section 15 was not to eliminate all unfairness from our laws, let alone all classifications that could not be rationally defended, but rather to eliminate discrimination based on the personal characteristics of persons or groups who are disadvantaged in our society. In *Andrews*, these references were invoked to restrict the scope of section 15 to the named or analogous grounds, and to add a requirement of systemic disadvantage or powerlessness as well.

It is important to acknowledge frankly that the interpretation of section 15 in *Andrews* is not a generous one. On the contrary, it is the narrowest interpretation that the language will reasonably bear. It will cause a dramatic reduction in section 15 challenges. That dramatic reduction can easily be inferred from the outcomes of the two section 15 cases that, at the time of writing, have been decided by the Court since *Andrews*.

B. Workers' Compensation Reference

In *Reference Re Workers' Compensation Act, 1983 (Nfld.)*,\(^5\) a section 15 challenge was mounted against the provision in *The Workers' Compensation Act, 1983* of Newfoundland that denies to an injured worker the right to sue his or her employer in tort. (A similar provision exists in all ten provinces.) It was argued that the denial of the tort action was a violation of section 15, because other accident victims, for example, those injured on the roads, could bring a tort action for damages against the person whose fault caused the accident. The Court disposed of the case in a single paragraph. Since the singling out of work-related accident victims did not depend upon any of the grounds of discrimination named in section 15, and was not analogous to the named grounds, there could be no breach of section 15. This defeated the challenge and avoided the need for the Court to proceed to section 1, which would have entailed an evaluation of the policy reasons for the standard Canadian workers' compensation system.

C. Turpin Case

In *R. v. Turpin*, a section 15 challenge was mounted to a provision of the *Criminal Code* that stipulated that certain of the most serious offences, including murder, were to be tried by judge and jury, with no right to elect a trial by judge alone. The section 15 argument was based on another provision of the *Criminal Code*, applicable only in Alberta, which gave to an accused person the right to elect a trial by judge alone for all indictable offenses, including murder. The Supreme Court of Canada rejected this argument, and it did so on the basis of the second element of discrimination stipulated by *Andrews*, namely, the presence of disadvantage. Wilson J., for an unanimous Court, said that it was not sufficient for the equality claimant to show that he or she was disadvantaged by the impugned law. That, obviously, was necessary, but it was not sufficient. The claimant had to go further and show that the distinction employed by the statute was one that defined a group that was disadvantaged in other respects. Province of residence (or trial) did not, at least in the context of this case, identify a disadvantaged group. The claim would not, Wilson J. said, "advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society." Since the claim was outside the purpose of section 15, it was also outside the scope of section 15, and the claim accordingly was rejected.

D. Comment

Has the Court done the right thing in so severely narrowing the scope of section 15? I think so. As an analytical matter, the actual language of section 15, with its references to named grounds of discrimination and to disadvantage, does provide a plausible textual basis for the Court's ruling. As a matter of policy, there is much to be said for confining the benefit of section 15 to those

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persons or groups who suffer from prejudice, stereotyping, or systemic disadvantage. They are the groups who, by definition, cannot easily use the political process to redress their grievances. For other groups, who do not lack access to the political process, claims of unfair treatment can arguably be left to the political process for correction.

What is lost in the Court’s approach is the case where a claimant can show an arbitrary and harmful distinction but is unable to bring the case within a named or analogous ground or is unable to show disadvantage of a more general kind. That case could be one of real injustice, even though it is an injustice of an isolated or idiosyncratic kind. Moreover, attempts to remedy the injustice in the political arena may have failed. But the price of catching that case is to leave the scope of review under section 15 so wide that some doctrine akin to minimal scrutiny would have to be developed to deal with the flood of unmeritorious cases. If the scope of review under section 15 is kept narrow, then the standard of review can be quite strict. In particular, the rules of justification under section 1 can be the same strict rules that *Oakes* laid down for other *Charter* limits.\footnote{But note the difference of opinion in the *Andrews* Court on this issue: text accompanying notes 40-43, *supra* at 831ff.}

Bearing in mind that the Constitution should not be seen as the solution to every unfairness, and that the courts ought not to replace elected officials as the principal forum of political change, the Supreme Court of Canada’s limitation of section 15 is a wise act of judicial restraint.

**IX. CONCLUSION**

What does all this teach us for the future? I believe the purposive approach to the definition of *Charter* rights will gradually supplant the generous approach. The rights will become narrower; they will protect less behaviour; but they will afford real, not illusory, protection to that behaviour. Once a right is narrowed to its purpose, it is appropriate to insist upon the stringent *Oakes* standard of justification. The ascendancy of the purposive approach
will therefore be accompanied by the revival of the *Oakes* standard of justification.

These developments should not provide an inferior protection for the civil liberties guaranteed by the *Charter*. On the contrary, once *Charter* guarantees are expanded beyond their purpose, the judicial impulse to uphold legislation in the face of trivial *Charter* claims inevitably leads to a weakening of the section 1 standard of justification. Trivial *Charter* claims will fail even under a generous interpretation of *Charter* rights. But the weakening of the section 1 standard of justification carries the risk that worthy *Charter* claims may also fail. It is far better, I would argue, to eliminate the trivial claims in the first stage of *Charter* interpretation by excluding them from the definition of the right. The worthy claims that are included in the definition of the right will then be more likely to repel a section 1 justification, because the burden of justification resting on the government can be much heavier.

The reason for, and the result of, these developments will be a reduction in the volume of *Charter* litigation, a diminution of the policy-making role of the courts, and an increase in the predictability of *Charter* litigation. All of these results are heartily to be desired – especially if they can be had, as I argue they can be, without cost to the protection of the civil libertarian values of the *Charter*. 