Equality Rights since 1985

Section 15 of the *Canadian Charter of Rights and Freedoms* states:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[1]

As with all *Charter* rights, this right is not guaranteed absolutely. Rather, the protection it affords is limited by section 1 of the *Charter*, which states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[2]

The *Charter* came into effect on April 17, 1982, but section 15 came into effect three years later – on April 17, 1985. This delay gave legislatures time to bring their laws into compliance with the equality rights guarantee, and also gave the courts the opportunity to become familiar with interpreting and applying the other *Charter*rights before having to confront the potentially more challenging rights guaranteed by this section.

The wording of section 15 raises three key questions of interpretation. First, what kind of legal distinctions amount to *discrimination*? Second, how should the listed (or "enumerated") grounds of discrimination guide the analysis of whether equality rights have been breached? And third, how should section 15(2) and the concept of ameliorating *disadvantage* influence the concept of discrimination?

These three questions have arisen repeatedly in cases on section 15. A look back at the landmark Supreme Court of Canada cases dealing with equality rights in the twenty-five years since this section came into effect reveals that the Court has continued to struggle with how to interpret and apply these rights. At one point the members of the Court were dramatically divided, advancing three different approaches. And more recently, the Court was forced to clarify a previous leading case – a clarification that virtually amounted to overruling that decision.

To show the evolution of the Court's approach to equality rights, this article reviews the landmark Supreme Court equality cases during these twenty-five years.

The Supreme Court's First Equality Case: *Andrews v. Law Society of British Columbia*

The first equality case that the Supreme Court considered was *Andrews v. Law Society of British Columbia* in 1989.[3] This case concerned whether it was discriminatory to require that lawyers be Canadian citizens. To decide that issue, the Court had to interpret what section 15 protects against. The Court considered several alternative interpretations.

One option was to consider *any* distinction made by law a violation of the right to equality that the government would have to justify under section 1. Justice McIntyre, however, pointed out that this interpretation would deprive the term "discrimination" of its meaning.[4] Accordingly, this interpretation was unanimously rejected by the Court.[5]

Another option was to consider only unfair or unreasonable distinctions to be discriminatory. This option was rejected because it left no role for section 1 in requiring the government to justify distinctions as "reasonable limits" on equality.[6] As Justice McIntyre pointed out, unlike equality guarantees in other jurisdictions – such as the Fourteenth Amendment in the United States, or article 14 of the European Convention on Human Rights – the *Charter* right to equality is subject to justification under section 1. This section must therefore be given some independent role.[7]

Instead, the Court adopted what it termed the "enumerated and analogous grounds" approach.[8] This approach "adopts the concept that discrimination is generally expressed by the enumerated grounds."[9] The person claiming his or her rights have been violated must "show not only that he or she is not receiving equal treatment before and 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."[10]

Not all distinctions will be discriminatory. And sometimes a failure to make a distinction that takes into account the situation of a person or group will amount to discrimination.[11] In attempting to define the term, Justice McIntyre stated:

[D]iscrimination 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.[12]

Five of the six judges who decided this case adopted this definition entirely. Justice La Forest, on the other hand, took the view that discrimination is essentially about distinctions based on *irrelevant*personal characteristics such as those listed in section 15(1).[13]

The Court unanimously concluded that the citizenship requirements amounted to discrimination.[14] A majority of the Court concluded that the discrimination could not be justified.[15]

A Divided Court: *Egan*, *Thibideau* and *Miron*

Despite the substantial agreement that was achieved in *Andrews*, six years later the Court was seriously divided in its approaches to equality claims. In 1995, the Court released decisions on three equality cases, each related to alleged discrimination in the benefits associated with marriage.*Miron v. Trundel* dealt with the exclusion of common law spouses from automobile accident benefits.[16] *Egan v. Canada* dealt with the exclusion of same-sex couples from Old Age Pension spousal benefits.[17] And *Thibaudeau v. Canada* dealt with the tax laws requiring that child support payments be included in the receiving parent's income.[18] In each of these decisions, the nine judges divided into three camps, each taking a different approach to determining when equality rights have been infringed.

Four of the judges – Chief Justice Lamer and Justices La Forest, Gonthier, and Major – built upon Justice La Forest's view in *Andrews* that discrimination is a distinction based on an *irrelevant*personal characteristic. For these judges, the test for determining whether a person's section 15 rights have been violated was to ask three questions. First, does the law draw a distinction? Second, does that distinction impose a burden or withhold a benefit? And finally, is that distinction based on an *irrelevant* personal characteristic which is listed in section 15(1) or is analogous to those that are listed?[19]

Four other judges – Justices Cory, Sopinka, Iacobucci and McLachlin – followed the approach of the majority in *Andrews*. They argued that a person claiming a section 15 rights violation must establish that the law draws a distinction between the claimant and others based on a personal characteristic, that the distinction is based on one of the grounds listed in section 15(1) or a ground that is analogous to those that are listed, and the distinction must have the effect of creating a disadvantage or denying a benefit.[20] These judges thought that the addition of the "relevance" requirement was the wrong way to determine whether a distinction is discriminatory. They argued that a distinction that is relevant to a legislative objective can still be discriminatory. Instead, they put the focus on whether the distinction violates the human dignity of the claimant through the "stereotypical application of presumed group characteristics," or by the *effect* of perpetuating the limitation, burdens or disadvantages that a group already experiences in society.[21] They also pointed out that considering "relevance" at the first stage, where the claimant must establish that their right to equality has been infringed, leaves little to be done at the second stage, where the government must justify the infringement of rights under section 1.[22]

A third distinct approach was taken by Justice L'Heureux-Dubé. She too was critical of the "relevance" approach. She pointed out that the relevance approach "fails to take into account the possibility that a distinction that is relevant to the purpose of the legislation may nonetheless still have a discriminatory effect."[23] For example, she pointed out that where the legislative purpose is itself discriminatory, a distinction that is relevant to that purpose will also be discriminatory.[24]

Justice L'Heureux-Dubé was also critical of the reliance that all of the other judges placed upon the personal characteristics listed in section 15(1). She argued that the focus should be on the word "discrimination" in section 15, not on finding analogies to the nine grounds

that are listed; these, she stated, are simply instruments for finding discrimination.[25] In other words, they help to focus attention upon certain types of distinctions that result in discrimination, but the list is not exhaustive and so they must not be the only distinctions that amount to discrimination.

Justice L'Heureux-Dubé pointed out other shortcomings of the focus upon "enumerated or analogous grounds." For example, "religion" is the only listed ground that is not immutable (because an individual may change his or her religion). If religion were not included, it would be logical for the Court to require that analogous grounds also be immutable, yet this would lead to the absurd result that religious discrimination would be tolerated.[26] She also observed that the Court's decision on whether or not to recognize a new analogous ground of discrimination appears to be driven by whether the Court wants to find discrimination in that case.[27] And finally, she pointed out that not all distinctions on the basis of a listed ground will amount to discrimination.[28] She therefore concluded that the ground upon which the distinction is made should play no role in the finding of discrimination. Instead, the focus should be on the effect of the distinction.[29]

As a result, Justice L'Heureux-Dubé took the position that a person claiming their section 15 rights had been violated must establish that there is a legislative distinction, that the distinction results in a denial of one of the four equality rights – the right to equality before the law, the right to equality under the law, the right to equal protection of the law, or the right to equal benefit of the law. As well, the claimant must establish that the distinction is on the basis of membership in an identifiable group, and that the distinction amounts to discrimination.[30] For her purposes, a distinction is discriminatory where it promotes or perpetuates the view that the claimant is "less capable, or less worthy of recognition or value as a human being or as a member of Canadian society."[31] This assessment is from the point of view of a reasonable person in the circumstances of the complainant, and the impact is assessed based on two factors: the nature of the group affected by the distinction, and the nature of the interest affected by the distinction.[32]

On the other hand, several of the other judges argued that the requirement that the distinction be based on a ground that is listed in section 15(1), or a ground that is recognized as analogous to those that are listed, plays an important role. As Justice McIntyre had argued in *Andrews*, several of the judges thought it would trivialize equality rights to call all distinctions discrimination. Therefore, the reliance on "grounds" serves to filter out trivial inequalities from those worthy of constitutional protection.[33] While these judges admitted that not every distinction based on one of the listed grounds would amount to discrimination, they maintained that the grounds serve as "ready indicators of discrimination because distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics."[34]

A Unified Court: *Law v. Canada*

Four years after the trilogy of 1995 cases discussed above, the Supreme Court released a case that presented a unanimous approach to equality cases: *Law v. Canada*.[35]

In this case, the Court established a three-step framework for assessing equality claims. First, a court must assess whether the claimant has experienced differential treatment, either by a law making a formal distinction on the basis of a personal characteristic or by a law failing to take into account the claimant's already disadvantaged position. Second, a court must assess whether that differential treatment is based on one of the grounds listed in section 15(1), or on a ground that is analogous to those that are listed. Then, third, a court must assess whether the differential treatment amounts to discrimination, which involves considering the underlying purpose of the equality provision in remedying prejudice, stereotypes, and historic disadvantage.[36]

According to the Court in *Law v. Canada*, establishing that differential treatment amounts to discrimination requires considering the impact that the treatment has on the claimant's human dignity.[37] The Court stated that this assessment must be from the subjective-objective point of view that Justice L'Heureux-Dubé had previously described: "the relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant."[38] As well, the Court stated that the assessment must take into account four "contextual factors": pre-existing disadvantage, the relationship between the grounds and the claimant's characteristics or circumstances; whether the law has an ameliorative purpose or effect; and the nature of the interest affected.[39]

The first of these factors reflected the concern about stereotyping and prejudice that Justices McLachlin, Cory, Iacobucci, and Sopinka had previously expressed. It also incorporated Justice L'Heureux-Dubé's concern that a distinction that affects an already disadvantaged group is more likely to be discriminatory. This, according to the Court, would be the most compelling factor leading to a conclusion that the treatment amounts to discrimination. [40]

The second factor incorporated the concern of Chief Justice Lamer, and Justices La Forest, Gonthier, and Major, that a distinction based on one of the listed grounds may actually correspond with the needs, capacities or circumstances of individuals or groups, and thus not be discriminatory.[41]

The fourth factor incorporated Justice L'Heureux-Dubé's concern that a distinction that affects a constitutionally or socially significant interest is more likely to be discriminatory.[42]

And finally, the third factor – whether the law has an ameliorative purpose or effect – gave meaning to section 15(2) of the *Charter*, which states that section 15(1) does not preclude the government from ameliorative the disadvantages experienced by those grounds listed in section 15(1).

According to the Court, none of these factors alone would be conclusive of discrimination, and none of them need to be present in a given case for differential treatment to amount to discrimination. Rather, each must be considered to give context to the ultimate question of whether the treatment offends the claimant's human dignity and therefore amounts to

discrimination.

A Return to *Andrews*: *R. v. Kapp*

In 2008, nine years after the decision in *Law v. Canada*, the Supreme Court once again addressed the issue of how equality claims should be assessed. In *R. v. Kapp*, the Court clarified how the approach in *Law* was to be applied by the courts. This clarification, however, essentially amounted to a return to the test enunciated in 1989 in *Andrews*.[43]

Kapp forced the Court to reconsider the relationship between sections 15(1) and 15(2). The case arose because a communal fishing licence had been granted to three aboriginal bands. The licence gave them the exclusive right to fish for salmon at the mouth of the Fraser River for a 24-hour period.[44] A group of mostly non-aboriginal commercial fishers claimed that exclusion of non-aboriginals from the licence amounted to racial discrimination.[45] The government defended the licensing program on the basis that it was intended, in part, to ameliorate the conditions of a disadvantaged group.[46]

Discussing the approach to be taken for equality claims, Chief Justice McLachlin and Justice Abella, writing for a unanimous Court, said that "*Andrews* set the template for this Court's commitment to substantive equality – a template which subsequent decisions have enriched but never abandoned."[47] The majority also affirmed that "substantive equality" does not necessarily mean treating everyone identically.[48]

Discussing the relationship between sections 15(1) and 15(2), the Court pointed out that one way of combating discrimination is to prevent discriminatory distinctions that impact adversely on members of certain groups. This is what section 15(1) is aimed at. However, the Court pointed out that governments may also wish to combat discrimination by developing programs to help disadvantaged groups to improve their situation. Thus, section 15(2) "preserves the right of governments to implement such programs, without fear of challenge under s. 15(1)."[49]

The Court affirmed the two-step test for showing discrimination under section 15(1): "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by prejudicing or stereotyping?"[50] While the Court acknowledged that these questions were addressed in three steps in *Law*, the Court said that the test is "in substance, the same."[51]

Discussing the decision in *Law*, the Court said that the achievement of that case was unifying a Court that had become divided after the decision in *Andrews*, and contributing "to our understanding of the conceptual underpinnings of substantive equality."[52] However, the Court also noted that difficulties had arisen in applying "human dignity" as a legal test: it is an abstract and subjective notion that had become confusing and difficult to apply.[53] The Court also noted that human dignity had "proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be."[54]

The Court therefore revisited that four contextual factors presented in *Law* and described the role that they should serve in applying the *Andrews* test, which focuses on stereotyping and the perpetuation of prejudice or disadvantage. The Court said that the first and fourth factors in *Law* – pre-existing disadvantage and the nature of the interest affected – are relevant for assessing the perpetuation of disadvantage and prejudice. The second *Law* factor – the relationship between the ground and the claimant's characteristics or circumstances – goes to whether the distinction is based on stereotyping. And the third *Law* factor – whether the law or program has an ameliorative purpose or effect – goes to whether the purpose of the law falls within protection of section 15(2).[55]

The Court therefore stated that *Law* did not establish a new test for discrimination, but rather affirmed the approach in *Andrews* and subsequent cases, which defined discrimination in terms of perpetuating disadvantage and stereotyping.[56]

The Court then went on to address the role of section 15(2). The Court noted that it had previously declined to give independent force to section 15(2), but had not foreclosed the possibility of doing so in a future case.[57] While previous cases had treated section 15(2) as an interpretive aid to section 15(1), which mandated that the definition of "discrimination" applied by the Court did not include ameliorative programs, the Court in *Kapp* instead chose to give independent meaning to section 15(2).[58] In other words, the Court devised a test for determining when a program is ameliorative and therefore shielded from scrutiny under section 15(1).

That test for section 15(2) protection was formulated as follows. "A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds."[59]The Court also stated that the ameliorative purpose need not be the *only* purpose of the program.[60]

Looking Forward

Since *Kapp*, the Court has been applying the test for discrimination that was spelled out by Justice McIntyre in*Andrews*, and has been virtually ignoring the discussion that look place in *Law*.[61] It therefore appears that despite the divisions and detours that have occurred since 1989, the Supreme Court has now returned to the approach is used in the first section 15 case the Court ever considered.

The one significant change that has occurred since then was made in *Kapp*. That is, section 15(2) has now been given independent meaning and can be used to shield ameliorative government programs from being considered discriminatory under section 15(1).

Further Reading

Adam Badari, "Egan v. Canada (1995) – Equality Rights and Same-Sex Spousal Benefits" *Centre for Constitutional Studies* (22 July 2010).

Adam Badari, "Eldridge v. British Columbia (Attorney General) (1997) – Equality Rights and

Services for the Deaf" *Centre for Constitutional Studies* (17 June 2010).

Adam Badari, "Law v. Canada (Minister of Employment and Immigration) (1999) – Equality Rights Framework" *Centre for Constitutional Studies* (8 June 2010).

Jim Young, "Corbiere v. Canada (1999)" *Centre for Constitutional Studies* (22 July 2009).

"Vriend v. Alberta" *Centre for Constitutional Studies* (undated).

"Supreme Court Approves Affirmative Action Program" *Centre for Constitutional Studies* (undated).

Beverley Baines, "*Law v. Canada: Formatting Equality*" (2000) 11:3 *Constitutional Forum* 65.

June Ross, "A Flawed Synthesis of the Law" (2000) 11:3 *Constitutional Forum* 74.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15.

[2] *Ibid*., s. 1.

[3][1989] 1 S.C.R. 143.

[4] *Ibid*. at 181.

[5] *Ibid*. at 151, 181, 193.

[6] *Ibid*. at 181-82.

[7] *Ibid*. at 177.

[8] *Ibid*. at 182.

[9] *Ibid*. at 180..

[10] *Ibid*. at 182.

[11] *Ibid*. at 164.

[12] *Ibid*. at 174-75.

[13] *Ibid*. at 193.

[14] *Ibid*. at 158, 192, 204.

[15] *Ibis*. at 158, 204.

[16] *Miron v. Trudel*, [1995] 2 S.C.R. 418 .

[17] *Egan v. Canada*, [1995] 2 S.C.R. 513 .

[18] *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 .

[19] *Miron*, *supra* note 15 at paras. 13-14; *Egan*, *supra* note 16 at para. 9; *Thibaudeau*, *supra* note 17.at paras. 104-106.

[20] *Miron*, *supra* note 15 at para. 128; *Egan*, *supra* note 16 at paras. 130-31; *Thibaudeau*, *supra* note 17 at paras. 164, 177.

[21] *Miron*, *supra* note 15 at para. 133; *Thibiaudeau*, *supra* note 17at para. 154.

[22] *Miron*, *supra* note 15 at para. 129; *Thibaudeau*, *supra* note 17 at para. 154.

[23] *Egan*, *supra* note 16 at para. 43 [emphasis in original].

[24] *Egan*, *supra* note 16 at para. 44.

[25] *Egan*, *supra* note 16 at para. 48.

[26] *Ibid.* at para. 49.

[27] *Ibid.* at para. 50.

[28] *Ibid.* at para. 51.

[29] *Ibid.* at para. 52.

[30] *Miron*, *supra* note 15 at para. 83; *Egan*, *supra* note 16 at para. 55; *Thibaudeau*, *supra* note 17 at para. 5.

[31] *Egan*, *supra* note 16 at para. 56.

[32] *Miron*, *supra* note 15 at para. 90; *Egan*, *supra* note 16 at paras. 56-57; *Thibaudeau*, *supra* note 17 at para. 2.

[33] *Miron*, *supra* note 15 at para. 131.

[34] *Miron*, *surpa* note 15 at para. 132.

[35] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 .

[36] *Ibid.* at para. 39.

[37] *Ibid.* at para. 51.

[38] *Ibid.* at para. 60.

[39] *Ibid.* at paras. 63-75.

[40] *Ibid.* at para. 63.

[41] *Ibid.* at para. 67-68.

[42] *Ibid.* at para. 78.

[43] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 .

[44] *Ibid.* at para. 1.

[45] *Ibid.* at para. 2.

[46] *Ibid.*

[47] *Ibid.* at paras. 14, 77.

[48] *Ibid.* at para. 15.

[49] *Ibid.* at para. 16.

[50] *Ibid.* at para. 17.

[51] *Ibid.*

[52] *Ibid.* at para. 20.

[53] *Ibid.* at para. 21.

[54] *Ibid.* at para. 22.

[55] *Ibid.* at para. 23.

[56] *Ibid.* at para. 25.

[57] *Ibid.* at para. 34, citing *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950.

[58] *Kapp, supra* note 39 at para. 35-37.

[59] *Ibid.* at para. 41.

[60] *Ibid.* at para. 51.

[61] See, for example: *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 at para. 201; *Manitoba (Director of Child & Family Services) v. C.(A.)*, 2009 SCC 30, [2009] 2 S.C.R. 181 at paras. 150-52; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at paras. 105-08.