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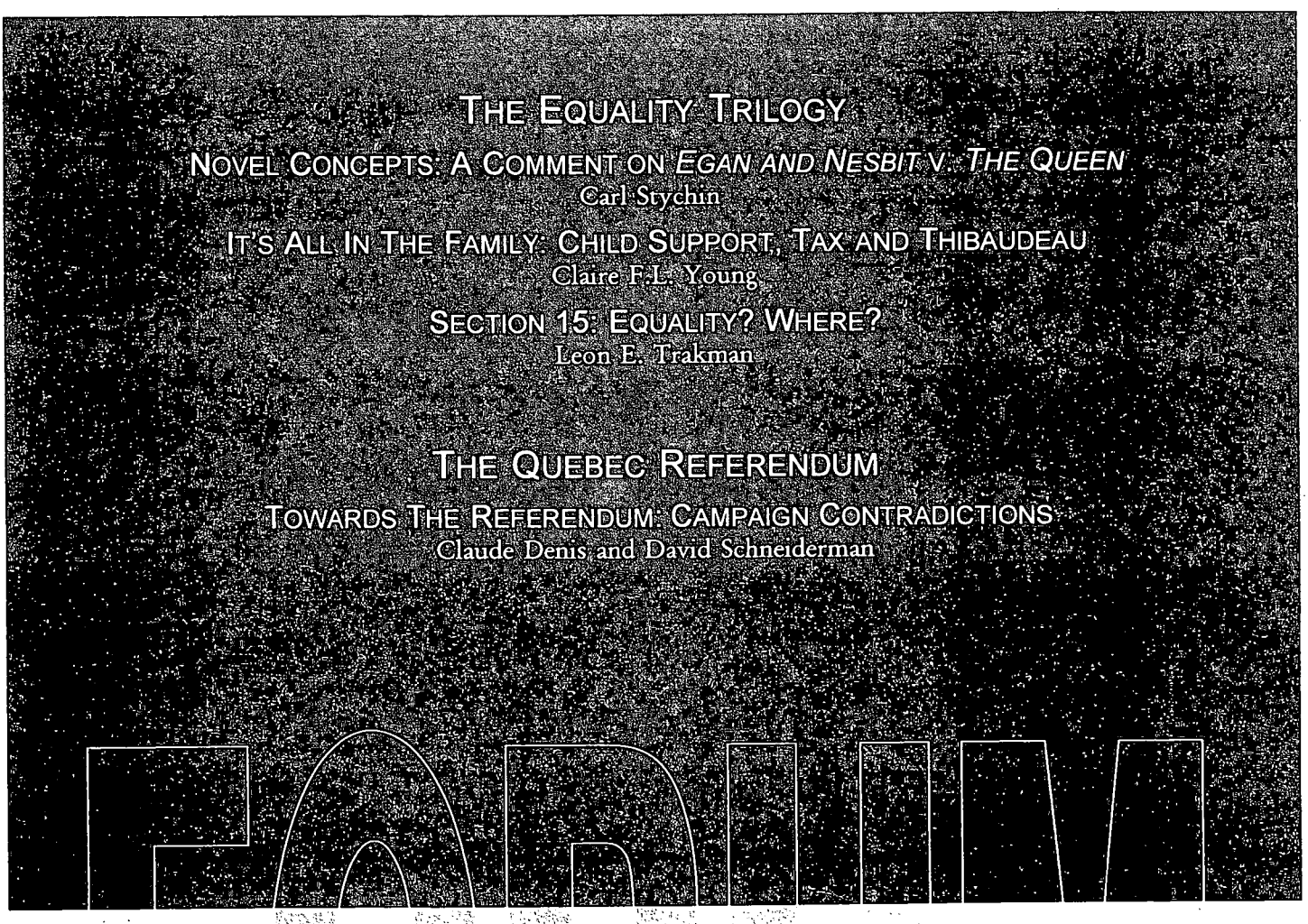

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Novel Concepts: A Comment on *Egan and Nesbit* v. *The Queen*

Carl F. Stychin

For lesbian and gay activists, debates about the potential of constitutional rights struggles are well established. While many have been attracted to the legal arena as a focus for social movement activism, others have been sceptical about the likelihood of progressive social change emanating from *Charter* politics. The Supreme Court of Canada's recent decision in *Egan and Nesbit* v. *The Queen*[1] will provide considerable new ammunition with which to highlight the limitations of constitutional rights struggles for lesbians and gay men. At the same time, however, the case underscores how the articulation of lesbian and gay narratives within legal discourse can prove troubling for the judiciary. The appellants' history as gay men forces some members of the Court onto the defensive which leads to a justification of the role of marriage in society. Putting marriage and, indeed, heterosexuality on the defensive might well be an important step in destabilizing its centrality. Consequently, the political implications of *Egan*, and lesbian and gay *Charter* politics more generally, remain rather indeterminate.

Background

The issue in the case was whether the definition of "spouse" in section 2 of the *Old Age Security Act*[2] violates section 15(1) of the Charter. The *Act* provides for a "spousal allowance" to be paid to the spouse of a pensioner when that spouse is between the ages of sixty and sixty-five and the combined income of the couple falls below a specified level. Spouse is defined to include "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife." Egan and Nesbit lived together since 1948 in a sexual relationship which exhibited many of the "traditional" characteristics associated with marriage. In October, 1986, Egan became eligible to receive old age security and the guaranteed income supplement. Because their combined income fell below the fixed level, Nesbit, upon reaching the age of sixty, applied for the spousal allowance. The application was rejected because he failed to meet the opposite sex requirement in the definition of spouse in section 2. Egan and Nesbit brought an action in the Federal Court, arguing that the definition of spouse contravenes section 15(1) of the *Charter* on the grounds that it discriminates on the basis of "sexual orientation." They sought a remedy in the form of a declaration that the definition be extended to include "partners in same sex relationships otherwise akin to conjugal relationships."

At the Federal Court Trial Division, the action was dismissed.[3] While Martin J. concluded that had Nesbit been a woman he would have been eligible for the spousal allowance, the distinction in law was made not on the basis of "sexual orientation," but between spousal and non-spousal couples. The objective of the law was "to alleviate the financial plight of elderly married couples, primarily women who were younger than their spouses and who generally did not enter the work force."[4] The Federal Court of Appeal, upheld that decision.[5] Robertson J.A. (Mahoney J.A. concurring) agreed that "the criterion of entitlement is expressed in terms of spousal status" and "homosexual" couples were not adversely affected in relation to other non-spousal couples.[6] In dissent, Linden J.A. held that the legislative distinction was based upon a characteristic related closely to sexual orientation, which was an

analogous ground under section 15(1) of the Charter. The *Charter* violation, moreover, could not be saved under section 1 because the law did not minimally impair the right.

At the Supreme Court of Canada, a majority accepted that the definition of spouse offended section 15(1).[7] The minority, on the other hand, followed the judgments below, characterizing the distinction as one between spouses and non-spouses, and not one based upon "sexual orientation."[8] Of the majority, however, only four ruled that the violation could not be saved under section 1. Sopinka J. found, instead, that the *Charter* infringement could be justified. Consequently, the definition of spouse remains unaffected in the law.

THE PURPOSE OF THE LEGISLATION

The divergence of opinion within the Court in large measure stems from the different ways in which the purpose of the spousal allowance is characterized. La Forest J. described at length the "functional values" that underlie the legislation. For him, the spousal allowance is a product of Parliament's desire to take "special account" of married couples in need; a singling out that excludes numerous other sorts of people who live together. The subsequent extension of the definition of "spouse" to include unmarried heterosexual conjugal couples is simply a reflection of "changing social realities." In fact, La Forest J. characterized the purpose far more broadly than simply as a desire to benefit elderly poor married people. Rather, the law is designed to support the institution of marriage itself and the concomitant "unique ability" of heterosexual couples to procreate and raise children. Thus, it appears that the law provides a benefit to recognize the expenses involved in child rearing.[9] Given this purpose, according to La Forest J., the distinction between spouses and non-spouses is perfectly logical: "[i]t would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage."[10] Moreover, support for the institution of marriage is not constitutionally suspect, nor is the promotion of stable heterosexual relationships which, for La Forest J., is a further purpose (or at least a benefit) of the spousal allowance. Thus, in neither purpose nor effect does the distinction violate section 15(1). Excluded couples are "incapable" of meeting the objectives that Parliament sought to promote.[11] The distinction is neither irrelevant nor arbitrary.

The weakness with that characterization is that the spousal allowance is a clumsy piece of legislation with which to achieve those ends. The Act makes no reference to children. In fact, it includes any common law couple that has lived together for a year. No benefits accrue to a couple that has raised children if that couple happen to be the same age. Nor is there any benefit for poor women who have raised children on their own.[12]

A more obvious purpose of the law, one for which there is some evidence in the Parliamentary record, is that the spousal allowance was designed to recognize that the "traditional" pattern of married life involved female spouses, younger than their husbands, leaving the workforce to raise children, often without returning to full time or at all. Upon retirement of the male partner, the family income would drop sharply in many cases, imposing hardship. While this may have motivated the introduction of the benefit, Cory J. points out that the *Act* makes no reference to dependent female spouses. The most that can be claimed regarding purpose is that, minimally, "the Act is designed to benefit either the male or female member of a heterosexual common law [or married] couple who have lived together for a period of one year and have a net income which is below the fixed level."[13] As a consequence, the benefit provides "state recognition of the legitimacy of a particular status" and "a recognition by the state of the societal benefits which flow from supporting a couple who, for at least a year, have established a stable relationship which involves cohabitation, commitment, intimacy, and economic interdependence."[14]

It is through the competing characterizations of the law's purpose that the different outcomes are reached. For Cory J., the law provides an economic benefit which recognizes the social contribution of cohabiting couples who find themselves poor (with an age spread between them). The character of that contribution remains unspecified as do the social benefits of a relationship of economic dependence. L'Heureux-Dubé J., in separate reasons, more clearly articulates the purpose as providing "an entitlement to a basic *shared* standard of living" from which same-sex couples have been completely excluded.[15] By divorcing the purpose from the promotion of an exclusively heterosexual institution (marriage) and the raising of children, the discriminatory effect of the law becomes apparent. It is only by linking the

benefit to the status of being married, and then immunizing marriage from constitutional review (a contentious move in itself), that a finding of discrimination is avoided by La Forest J.

DISCRIMINATION: OF GROUNDS AND GROUPS

La Forest J. avoids a finding of discrimination on the face of section 2 by characterizing the legal distinction as between spousal and non-spousal couples, with a benefit to the former which attempts to "ameliorate an historical disadvantage" suffered by child-raising married people. In contrast, both Cory J. and L'Heureux-Dubé J. are forced to grapple with the analytical framework through which a finding of discrimination for the purposes of section 15(1) of the *Charter* will be reached. While Cory J. offers a straightforward *Charter* equality analysis, L'Heureux-Dubé J. attempts an interesting reformulation of section 15(1) in which she shifts the emphasis onto the discrimination itself.

Cory J. begins by asking whether the difference in treatment is closely related to a personal characteristic of a group to which the claimant belongs. Having found in the affirmative, he then proceeds to consider whether the personal characteristic — "sexual orientation" — is analogous to the enumerated grounds in section 15(1). Cory J. quickly concludes that this basis for distinction does "serve to deny the essential human dignity of the *Charter* claimant," as demonstrated by the social, political, and economic disadvantage suffered by "homosexuals."[16] Moreover, discrimination against a "homosexual couple" cannot be separated analytically from "sexual orientation" discrimination. For Cory J., the constitutional protection extends both to aspects of "status" and "conduct."[17] A finding of discrimination thus results from the denial of an economic benefit and the right to make a choice to receive that benefit (as opposed to other benefits available to single people), and from the resulting stigmatization and loss of self worth. The explicit recognition that equality rights extend both to status and conduct is a potentially important judicial pronouncement which might result in a broader interpretation of the scope of constitutional protection than otherwise would be the case.[18]

Although she reaches the same result as Cory J., L'Heureux-Dubé J. embarks on an impressive attempt to centre section 15 analysis, not on the grounds of discrimination, but on the core meaning of the guarantee: "that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens."[19] It is because some individuals and groups have been subject to historic disadvantage and marginalization that they are more likely to be demeaned by a legislative distinction. However, L'Heureux-Dubé J. makes explicit that membership in a socially marginalized group is not a precondition to a successful equality claim. Rather, discrimination is determined by measuring the impact on the individual from the perspective of "the reasonably held view of one who is possessed of similar characteristics, under similar circumstances, and who is dispassionate and fully apprised of the circumstances."[20] A focus on analogous grounds thus would be replaced by L'Heureux-Dubé J. with an examination of whether a distinction is discriminatory in terms of the nature of the group adversely affected and the nature of the interest at stake: "the more socially vulnerable the affected group and the more fundamental to our popular conception of 'personhood' the characteristic which forms the basis for the distinction, the more likely that this distinction will be discriminatory."[21] The appeal of this approach lies in the possibility of examining a broad social context and the particular location of the claimant within a matrix of social relations, which L'Heureux-Dubé J. recognizes may be lost in what she sees as the increasing formalism of the categorical approach to discrimination. In this respect, her views are consistent with those who have expressed concern about the limitations of a categorical approach to equality.[22] On the facts of this case, L'Heureux-Dubé J. easily finds a section 15(1) violation, especially since she explicitly analyzes the distinction from the point of view of those affected, rather than assuming a vantage point of "illusory neutrality." In terms of the nature of the group, the claimants are "homosexual men," as well as "elderly and poor." The group of "homosexuals" is based upon a characteristic "that is quite possibly biologically based and that is at the very least a fundamental choice."[23] As for the interest affected, the exclusion of the appellants from an entitlement sends the "metamessage" that "society considers such relationships to be less worthy of respect, concern and consideration."[24] That result is clearly discriminatory within L'Heureux-Dubé J.'s framework.

The impact of L'Heureux-Dubé J.'s reformulation of equality analysis remains to be seen. Given that she wrote only for herself, it may prove to be of academic interest only. However, it potentially presents a more flexible and generous approach to

section 15(1) which avoids the pitfalls of a rigid categorical approach. It will be interesting to observe in future judgments whether L'Heureux-Dubé J. can persuade some of her colleagues of the merits of "putting discrimination first" in equality jurisprudence.

Section One Analysis

Neither Iacobucci J. nor L'Heureux-Dubé J. exhibited any hesitation in determining that the infringement of section 15(1) cannot be upheld pursuant to section 1 of the Charter. For Iacobucci J., once the purpose of the legislation is characterized as the alleviation of poverty amongst elderly households, then the definition of spouse in section 2 is not rationally connected to that purpose, because "same sex relationships involve similar levels of economic dependence, mutual responsibilities and emotional commitment" as heterosexual relationships.[25] Iacobucci J. also highlighted a problem of federal-provincial coordination: increasingly, provincial social welfare legislation recognizes same-sex couples. This divergence may lead to inconsistent treatment and a substantial impairment of the right to equality. Finally, Iacobucci J. was sceptical of the financial burden that an expanded definition of spouse would impose upon government. Likewise, L'Heureux-Dubé J. held that while the objective of the spousal allowance program is not, in itself, discriminatory in purpose, it is based upon a discriminatory presumption which is not rationally connected to that purpose. Such a presumption has a "significant discriminatory impact" which could not withstand a proportionality analysis.

By contrast, Sopinka J. accorded a high level of deference to the government because of the socio-economic nature of the issue: "in these circumstances, the court will be more reluctant to second-guess the choice which Parliament has made."[26] Financial constraints necessarily demand choices between disadvantaged groups and the failure of the government to further expand the definition of spouse to same sex couples — which remains a "novel concept" — therefore survived section 1 scrutiny. This degree of deference is quite unprecedented and starkly contrasts with early ringing pronouncements from the Court on the strictness of judicial scrutiny under section 1.[27] Moreover, the novelty of the case is hardly in itself a basis upon which to uphold a *Charter* violation; and financial burden has been held by the Court to carry only limited weight as a justification.[28]

To some extent, however, Sopinka J.'s concern with the financial impact on the government of an extended definition of spouse is bolstered by the attempts of Cory, Iacobucci, and L'Heureux-Dubé JJ. to characterize same-sex couples as no different from heterosexuals in terms of the ways in which relationships of financial dependence develop. This emphasis on sexual sameness obviates the fact that, historically, the raising of children, the related difficulty for women of entering and exiting the paid labour force, the income gap between men and women generally, and stereotyping of women's roles probably were the main factors which created the relationships of dependence. While some of those factors may be present in some same-sex relationships — such as the need to interrupt careers to care for children and, in the case of lesbians, the discrimination suffered by women in the labour force more generally — it could be a mistake to assume that same-sex couples will impose a proportionate level of burden on the treasury. Moreover, Sopinka J. might well have considered the likelihood of same-sex couples claiming a spousal benefit, given that such a move demands a degree of "outness" rendered less likely by the historical and continuing prejudice and discrimination outlined by Cory J. Finally, as Iacobucci J. noted, federal-provincial harmonization would be a useful means to avoid a patchwork whereby relationships are recognized in some jurisdictions but not others. Given that "two can live more cheaply than one," it would be a strange situation if elderly poor individuals are left further worse off by the social welfare system as a whole than are couples of any orientation. This problem further underscores the difficulty of analyzing a piece of social assistance legislation in isolation.

Conclusion

The decision of the Supreme Court in *Egan and Nesbit* is of interest for various reasons. First, the case contains the first explicit Supreme Court endorsement that "sexual orientation" is an analogous ground of discrimination pursuant to section 15(1) of the Charter. Perhaps of more general interest is L'Heureux-Dubé J.'s attempt to reformulate the analytical approach to equality so as to lessen the dependence upon the identification of grounds. Whether her approach attracts support in subsequent cases will be worth watching. Second, the fact that

four members of the Court embarked upon an extended defense of the institution of marriage (and, by extension, heterosexuality) is significant. Given that the definition of spouse includes any cohabiting heterosexual couple together for *one year*, the rhetoric of La Forest J. seems at odds with the statutory language itself. However, the unremitting defense of marriage does partially defuse the argument raised by some commentators that the *Charter* has become a tool for liberal social engineering.[29] At the same time, the fact that four members of the Court are prepared to articulate this position may give rise to scepticism about the likelihood of successfully employing *Charter* litigation as a means of achieving progressive social change in terms of the lesbian and gay rights agendas.

On the other hand, the fact that La Forest J. found it necessary to articulate his wide-ranging defense of heterosexual marriage (and "traditional" families) suggests that the norm may be somewhat "troubled" by the public articulation of gay/lesbian narratives such as those of Egan and Nesbit.[30] Despite the outcome of the case, the publicity and, indeed, the positively glowing descriptions of the relationship of the appellants might have some positive educational value and some destabilizing effect on heterosexual hegemony.[31]

Third, the case may provoke governments to rethink how they seek to alleviate poverty. The spousal allowance is clearly a cumbersome and somewhat arbitrary mechanism based upon a model of relationships that is increasingly inapplicable to most couples. Amongst the working poor, relationships in which both parties are in low paid jobs, rather than in a relationship of economic dependence, are more realistic.[32] So too, the spousal allowance hardly compensates adequately those couples who bear the financial burden of raising children, which is not designed for that purpose (contrary to the dicta of La Forest J.), and which will not even benefit all of those who have raised children and then find themselves poor.

Finally, *Egan* has forced the Court to attempt an articulation of the social value of conjugal relationships to society. At one point, Cory J. does note that "the relationship of many heterosexual couples is sometimes far from ideal." But this is the only suggestion that 'marriage' and 'family' may not always be socially and individually beneficial. The case thus exemplifies a conundrum for lesbian and gay rights strategists. In attempting to appropriate a state benefit for same sex couples, the resulting judicial discourse leaves virtually no space for the articulation of a critique of the institutions upon which a system of compulsory heterosexuality is founded. Such a result is certainly not surprising, but it should remind us once again of the limits of legal discourse generally and *Charter* litigation in particular.❑

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ENDNOTES

1. [1995] S.C.J. No. 43 (QL) [hereinafter *Egan*].
2. R.S.C. 1985, c.O-9.
3. [1992] 1 F.C. 687.
4. *Ibid.* at 693.
5. [1993] 3 F.C. 401.
6. *Ibid.* at 478.
7. The majority consisted of L'Heureux-Dubé, Sopinka, Cory, McLachlin, and Iacobucci JJ. Cory and Iacobucci JJ. delivered joint reasons (Cory J. writing on the section 15(1) issue and Iacobucci J. on section 1). McLachlin J. concurred with those reasons and Sopinka J. concurred with the section 15(1) analysis only. L'Heureux-Dubé J. delivered separate reasons, but reached the same conclusions as Cory and Iacobucci JJ.
8. The minority judgment was delivered by La Forest J. and concurred in by Lamer C.J., Gonthier and Major JJ.
9. *Egan*, paras. 20-25.
10. *Egan*, para. 21.
11. *Egan*, para. 26.
12. On this point, however, La Forest J. suggested in passing that one benefit of the spousal allowance may be to encourage the raising of children by married couples rather than single parents.
13. *Egan*, para. 148.
14. *Egan*, para. 161.
15. *Egan*, para. 90.
16. *Egan*, para. 171. La Forest J. agreed with Cory J. that "sexual orientation" is an analogous ground of discrimination. In fact, the issue was conceded by the respondent.

17. *Egan*, para. 175.

18. See Mary Eaton, "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994) 17 Dal. L.J. 130.

19. *Egan*, para. 36.

20. *Egan*, para 41.

21. *Egan*, para 61.

22. See e.g., Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179; Mary Eaton, "Patently Confused: Complex Inequality and *Canada* v. *Mossop*" (1994) 1 Rev. Constitutional Stud. 203; Carl Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 Cdn. J. Law & Juris. 49.

23. *Egan*, para. 89. At this point, L'Heureux-Dubé J. seems to suggest that a genetic basis for "homosexuality" would strengthen the claim of "homosexuals" under the Charter. She also held that to the degree that membership in a group involves "unfettered choice" a finding of discrimination will be less likely. In the context of "sexual orientation," however, the use of immutability arguments is problematic. See Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability" (1994) 46 Stan. L. Rev. 503; Stychin, *supra* note 12.

24. *Egan*, para. 90.

25. *Egan*, para. 195.

26. *Egan*, para. 109.

27. See e.g., *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136, per Dickson C.J.

28. See *Schachter* v. *The Queen*, [1992] 2 S.C.R. 679 at 710-12, per Lamer C.J.

29. See e.g., Rainer Knopff and F.L. Morton, *Charter* Politics (Scarborough: Nelson Canada, 1992). For a discussion of conservative academic reaction to the Charter, see Herman, "The Good, the Bad, and the Smugly: Perspectives on the *Canadian Charter of Rights and Freedoms*" (1994) 14 Oxford J. Leg. Stud. 589.

30. On the possibility of "troubling" the heterosexual norm through rights struggles, see D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) 147.

31. On the value of lesbian and gay narratives, see generally Fajer, "Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men" (1992) 46 U. Miami L. Rev. 511.

32. Cory J. discusses at some length how the 'at home' dependent spouse model is no longer applicable to the great majority of Canadians.

It's All In The Family: Child Support, Tax, and *Thibaudeau*

Claire F.L. Young

The issue of whether the tax system discriminates against women in contravention of section 15(1) of the *Charter* has been the focus of much public attention recently. This question has arisen in the context of two recent *Charter* challenges heard by the Supreme Court of Canada, both of which have been to the *Income Tax Act*.[1] In *Symes* v. *Canada*[2] the Court held that it was not discriminatory on the basis of sex to deny the deduction of child care expenses as a business expense. In *Thibaudeau* v. *Canada*,[3] which is the focus of this comment, the issue was whether the requirement that Suzanne Thibaudeau include child support payments received from her ex-spouse in income discriminated against her as a divorced custodial parent in contravention of section 15(1) of the *Charter*. The Federal Court of Appeal[4] held that the requirement did discriminate on that basis, but the Supreme Court of Canada overturned this decision, holding that there was no discrimination. In so doing the Supreme Court split along gender lines. As was the case in *Symes*, the male judges made up the majority, which held that there had been no discrimination, and the only two women on the Court were in dissent. This point did not escape Suzanne Thibaudeau who commented after the decision that "laws are made by men for men."[5]

As background to my analysis of the decision of the Supreme Court in *Thibaudeau*, I review both the tax rules that prompted the litigation and the decision of the Federal Court of Appeal. My analysis will focus on four issues: the Court's attachment to the "post-divorce spousal unit" as the relevant group for the purposes of the application of section 15 of the *Charter*; the Court's view that if the tax rules create a problem for divorced or separated custodial parents that problem relates to family law, not tax law; the unfortunate absence from the decision of any discussion of the argument raised by the intervenors in the case that the tax rules discriminate against custodial parents on the basis of sex; and, finally, whether there is a future for successful *Charter* challenges to the *Act*.

Paragraphs 60(b) and (c) of the *Act* provide a deduction in the computation of income to those who pay child support. The deduction is available if the payment is made on a periodic basis, is for the maintenance of the child, and is made pursuant to court order or written agreement. If an amount is deductible by the payor, paragraphs 56(1)(b) and (c) of the *Act* require that the amount be included in the income of the recipient (whether or not the payor actually takes the deduction). This is known as the "inclusion/deduction" system. The gender dimensions of these rules are straightforward; 98 per cent of those paying child support, and thereby entitled to the deduction, are men and 98 per cent of those receiving child support payments which they must include in their income are women.[6] The primary justification for these rules put forward by the Department of Finance is that the inclusion/deduction system provides a subsidy which results in higher support payments, thereby benefiting children whose parents have separated or divorced.[7] The subsidy arises where the payor is in a higher tax bracket than the recipient because the monetary value of the deduction to the payor exceeds the amount of the tax payable by the recipient. In theory, this overall tax saving permits higher support awards. It has been estimated that the amount of the tax subsidy is approximately $300 million a year.[8]

In May 1995 the Federal Court of Appeal held in *Thibaudeau* (F.C.A.) that the requirement to include child support payments in income contravened section 15 of the *Charter* on the basis of family status. The court found that it discriminated against separated custodial parents because neither separated non-custodial parents nor separated custodial non-parents are required to include in income any amounts that they receive for the support of children.[9] This decision was heralded by many women's groups as a victory for women who receive child support from their ex-spouses.[10] The response of the federal government was threefold; it appealed the decision to the Supreme Court of Canada, it applied for and received a stay of the order of the Federal Court of Appeal, and it established the Task Force on Child Care headed by Sheila Finestone, Secretary of State (Status of Women) to "seek the views of Canadians ... on the tax treatment of child support."[11] As of the present time, the report of the Task Force has not been released to the public.

Thus the scene was set for the Supreme Court to rule on the matter, and this they did with remarkable speed, releasing their decision just one year after the ruling of the Federal Court of Appeal.[12] By a majority of 5-2, the Court held that the requirement to include child support payments in income did not contravene the *Charter*.[13] The decision is, however, a complex one. Two majority judges (Cory and Iacobucci JJ.) disassociated themselves from the decision of Gonthier J. with respect to his section 15 analysis, preferring to adopt the reasoning of McLachlin J. enunciated in *Miron* v. *Trudel*[14] and incorporated into her dissent in *Thibaudeau*. Despite using the same *Charter* analysis as McLachlin J., Cory and Iacobucci JJ. reach a different result with respect to its application to the facts of this case. The other judges in the majority (LaForest and Sopinka JJ.) agree with Cory J., Iacobucci J. and Gonthier J. that section 15 is not infringed, although they do not state which *Charter* analysis they apply to reach that conclusion. L'Heureux-Dubé J., in dissent, formulates her own *Charter* analysis and reaches the same conclusion as McLachlin J. on the facts of the case.

The test applied by Gonthier J. in determining whether section 56(1) of the *Act* contravenes section 15 of the *Charter* is "whether the impugned provision creates a prejudicial distinction affecting the complainant as a member of a group, based on an irrelevant personal characteristic shared by the group."[15] But Gonthier J. makes it clear that in applying this test he takes a "comparative" approach and this is the point of departure in the reasoning of Cory and Iacobucci JJ. In his section 15 analysis, Gonthier J. takes into account the objectives of the inclusion/deduction scheme. For him, they form part of the legal context for determining the section 15 issue. In so doing he acknowledges but dismisses the argument of the intervenor SCOPE that such an approach is more properly applied to a section 1 analysis. The issue of where this analysis of "functional values and relevance" (as it is described by Cory and Iacobucci JJ.)[16] belongs is critical because it relates directly to the issue of who bears the burden of proof. Section 1 makes *Charter* rights subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The onus to justify the discrimination is on the government and that is when, in the opinion of Cory and Iacobucci JJ., an analysis of functional values and relevance is to be undertaken, not when the onus is on the complainant to demonstrate discrimination under section 15. Furthermore, as Cory and Iacobucci JJ. point out, the approach of Gonthier J. focuses on the ground of distinction rather than the discriminatory impact of the distinction. As they state, this "permits proof of relevance, standing alone, to negate a finding of discrimination."[17]

A key to understanding the basis of the decision of the majority in *Thibaudeau* is that the relevant group for the purposes of their *Charter* analysis is separated or divorced couples or, as Cory and Iacobucci JJ. put it, the "post-divorce 'family unit'."[18] With this "unit" as the starting point for the section 15 analysis, it is easy for the majority to conclude that there is no discrimination because the inclusion/deduction system benefits the group of separated or divorced parents by generating "substantial savings."[19] Overall the tax burden of the *couple* is reduced. But what about the fact that the tax benefit is not shared equally by the individuals in the couple or that the support payments may not be increased to accurately reflect the impact of the inclusion/deduction system? For Gonthier J. this is a family law issue, not a tax issue.[20] I return to this point later.

In contrast to the majority, McLachlin and L'Heureux-Dubé JJ. focus on the inequality as between custodial and non-custodial parents. They do not view separated or divorced individuals as part of a couple with their ex-spouses. Rather they consider the impact of the requirement to include child support payments in income on separated or divorced custodial parents alone. With respect to this difference of

opinion about the unit of comparison for the purposes of a section 15 analysis, McLachlin J. states: "Where unequal treatment of one individual as compared with another is established, it is no answer to the inequality to say that a social unit of which the individual is a member has, viewed globally, been fairly treated."[21] Once the women on the court frame the issue as being whether custodial parents are discriminated against in comparison to non-custodial parents, it is as easy for them to conclude that the inclusion/deduction scheme is discriminatory as it was for the men on the Court to conclude that it was not discriminatory. Simply put, in comparison to non-custodial parents who receive a tax deduction, custodial parents incur a tax burden.

The majority's view that the divorced or separated couple should be viewed as a single unit is problematic for several reasons. First, it is at odds with one of the objectives of family law, which is to promote a "clean break" or self-sufficiency of spouses after separation or divorce. While the *Moge* v. *Moge*[22] decision of the Supreme Court of Canada clarified that this objective was only one among others, including compensation for the economic consequence of family breakdown, the promotion of self-sufficiency remains a key component of support law. Treating the divorced couple as a single unit flies in the face of this development. Second, if one takes the view of the majority to its logical conclusion, it appears that once a couple has a child, they remain a couple forever. Neither separation, divorce, or even remarriage by one or both of the parties, can dissolve the "family," at least insofar as the inclusion/deduction rules apply to them.

The role of family law in setting the amount of child support awards is central to the decision of the majority. For Gonthier J., if a support award does not take the tax consequences into account sufficiently, then the recipient may apply for a variation of the order in accordance with family law. Consequently, any unfairness can be redressed. As L'Heureux-Dubé J. points out, life is not so simple. She demonstrates that "important systemic factors preclude the family law system from properly filling the lacuna left by the deduction/inclusion provisions of the [*Act*]."[23] One of these factors is that family law discourages frequent applications for variation of support orders. This is a problem because, even if a court takes the inclusion/deduction rules into account when setting the amount of child support[24], the accuracy of that amount may be very short lived. If there is any change to the income of either party, the amount may be too low (or too high). Indeed it is quite possible that annual applications for variation of the amount would be necessary to redress any unfairness. Further, as L'Heureux-Dubé J. illustrates, the costs of such court actions and fears about antagonising the non-custodial parent also serve as effective deterrents to seeking variations of the amount of child support awards. Cory and Iacobucci JJ. also place importance on the role of family law. They conclude that the tax rules and family law operate in tandem and "if there is any disproportionate displacement of the tax liability between the former spouses (as appears to be the situation befalling Ms. Thibaudeau), the responsibility for this lies not in the *Income Tax Act*, but in the family law system and the procedures from which the support orders originally flow."[25] I find the approach of the majority somewhat perplexing. It reminds one of the "chicken and egg" analogy. Surely without the tax rules that require the inclusion of child support payments in income, there would be no need for family law to compensate with respect to the amount of these orders. The problem appears, therefore, to be rooted in the tax rules and not, as Gonthier J. would suggest, merely a family law problem exacerbated by the tax rules.

In their decision, the Supreme Court chose not to discuss one extremely important issue; that is whether section 56(1)(b) and (c) of the *Act* has an adverse impact on women, thereby discriminating against them on the basis of sex. Hugessen J. at the Federal Court of Appeal held that there was no sex discrimination. His reasoning was that a rule does not discriminate on the basis of sex simply because it affects more members of one sex than the other. If a rule which adversely affects women has the same adverse effect on men, then even though the number of women adversely affected (98 per cent in this case) is considerably greater than the number of men adversely affected (2 per cent), there is no sex discrimination. In other words, he invoked a qualitative aspect to the test of adverse impact discrimination. In order to succeed, women in the affected group (separated or divorced custodial parents) had to be affected differently than men.[26]As Ellen Zweibel has said, this interpretation "comes dangerously close to requiring a distinction based on a sex-linked physical characteristic to establish adverse effects discrimination based on sex. It virtually precludes linking gender-based discrimination to social or economic status."[27] At the Supreme Court, the Coalition of Intervenors argued that there was also discrimination on the basis of sex and in so doing challenged this narrow interpretation of adverse-

effects discrimination. It is regrettable that the Supreme Court did not take the opportunity to address the issue.

Thibaudeau is an important decision for many reasons, not the least of which is that it throws some light on the possible fate of future *Charter* challenges to the *Act*. While acknowledging that "the [*Act*] is subject to the application of the Charter just as any other legislation is" Gonthier J. also refers to the "special nature" of the *Act*. [28] The question then becomes, is there something so special or different about tax legislation that requires that it be treated differently than other legislation when the subject of a section 15 challenge? [29] It appears that for Gonthier J. the answer is yes. For him the special nature is connected to the fact that it is the "essence of the ITA to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests."[30] This special nature is a "significant factor that must be taken into account in defining the scope of the right relied on, which here as we know is the right to the 'equal benefit' of the law."[31] Gonthier J.'s analysis is not convincing and contradicts other Supreme Court pronouncements on the issue.[32] Attributing a special nature for section 15 purposes to legislation merely because it makes distinctions is highly problematic. Most legislation makes distinctions and indeed a distinction is the first step to establishing an infringement of section 15. I find Gonthier J.'s concern about revenue raising legislation somewhat of a red herring, as the purpose of the inclusion/deduction system is to generate a tax subsidy not revenue. L'Heureux-Dubé J., in dissent, is clearly not persuaded that such an approach is appropriate in a section 15 analysis. In a veiled criticism of Gonthier J.'s approach she states:[33]

> Inequality is inequality and discrimination is discrimination, whatever the legislative source. To water down one's analysis of a legislative distinction or burden merely because it arises in a statute which makes many other distinctions is antithetical to the broad and purposive approach to s. 15 of the Charter which this Court has repeatedly endorsed.

In conclusion, while Suzanne Thibaudeau lost in court, her litigation has clearly prompted the federal government to reconsider the current policy with respect to child support.[34] Immediately after the decision of the Federal Court of Appeal, the federal government announced the establishment of the Finestone Task Force, although, as mentioned, its report has not yet been released publicly. In January 1995 the Federal/Provincial/Territorial Family Law Committee issued its report and recommendations on child support.[35] It recommended child support guidelines which establish a formula by which the amount of child support would be set and made suggestions with respect to any further examination of the tax issues. Allan Rock, Minister of Justice also has acknowledged the role that Suzanne Thibaudeau has played in this process. In announcing that he hopes to introduce legislation to deal with this issue soon, he said "Suzanne Thibaudeau succeeded very well in bringing these issues to the attention of not only the courts, but to the Canadian public and the Parliament of Canada. Because of this judgment [*Thibaudeau*], the process has accelerated."[36] What remains to be seen is what this process will produce in terms of improvements to the system. ❑

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Endnotes

1. *Income Tax Act*, R.S.C. 1985, c. I-5 [hereinafter the *Act*].

2. (1993), 4 S.C.R. 695, 110 D.L.R. (4th.) 470 [hereinafter *Symes*].

3. [1995] S.C.J. No. 42 (QL) [hereinafter *Thibaudeau*]. Suzanne Thibaudeau argued that it was discriminatory on the basis of family status to require her to include child support payments in her income. The intervenors, SCOPE (Support and Custody Orders for Priority Enforcement) and the Coalition of Intervenors (consisting of the Charter Committee on Poverty Issues, the Federated Anti-Poverty Groups of British Columbia, the National Action Committee on the Status of Women and the Women's Legal Education and Action Fund) argued that it was also discriminatory on the basis of sex because the requirement had an adverse impact on women, compared to men.

4. (1994), D.L.R. (4th) 261; [1994] 2 C.T.C. 4 [hereinafter *Thibaudeau* (F.C.A.) cited to C.T.C.].

5. "A Deduction that is not Elementary" *The [Toronto] Globe and Mail* (31 May, 1995) A13.

6. See the evidence of Nathalie Martel, a federal government economist, on cross examination in *Thibaudeau* (F.C.A.) Supplementary Case on Appeal, Volume 2 at 185.

7. See Ellen Zweibel and Richard Shillington, *Child Support Policy: Income Tax Treatment and Child Support Guidelines* (Toronto: The Policy Research Centre on Children, Youth and Families, 1993) at 8.

8. *Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support* (Canada: Minister of Public Works and Government Services, 1995) at 49.

9. As I shall discuss later, the Federal Court of Appeal rejected the argument of the intervenor SCOPE that the requirement to include child support payments also discriminated on the basis of sex.

10. See e.g. "Mothers Stand to Gain Through Tax Ruling" *The [Toronto] Globe and Mail* (4 May, 1995) A2, where Ardyth Cooper, of the Canadian Advisory Council on the Status of Women said that, "[i]t sends out a clear message that the rights of these parents — most of them women and many of them among Canada's poorest — cannot be trampled by outdated tax law."

11. Introduction to Status of Women Canada, *Task Group on the Tax Treatment of Child Support: Discussion Points* (Ottawa: Status of Women Canada, 1994).

12. The Federal Court of Appeal released its decision on May 3, 1994, the Supreme Court of Canada heard the appeal on October 4, 1994 and released its decision on May 25, 1995.

13. The majority consisted of Justices LaForest, Sopinka, Gonthier, Cory and Iacobucci with L'Heureux-Dubé and McLachlin JJ. dissenting.

14. [1995] S.C.J. No. 44 (QL).

15. *Thibaudeau*, para. 103.

16. *Thibaudeau*, para. 154.

17. *Thibaudeau*, para. 156.

18. *Thibaudeau*, para. 158. This characterisation of separated or divorced parents can be contrasted to that of McLachlin J. who describes them as "the fractured family" (at para. 187).

19. *Thibaudeau*, para. 134.

20. *Thibaudeau*, para. 141.

21. *Thibaudeau*, para. 190.

22. (1992) 43 R.F.L. 3d. 345.

23. *Thibaudeau*, para. 23.

24. Evidence was presented in *Thibaudeau* that, in fact, judges do not always take the tax consequences into account when setting the amount of child support awards. See *Thibaudeau* F.C.A. at 14.

25. *Thibaudeau*, para. 160.

26. For an excellent discussion of this issue, see Lisa Philipps and Margot Young, "Sex, Tax and the Charter: A Review of *Thibaudeau v. Canada*, (1995) 2 Rev. Con. Studies 221 at 240-247.

27. Ellen Zweibel, "*Thibaudeau v. R.*: Constitutional Challenge to the Taxation of Child Support Payments" (1993/94) N.J.C.L. 305 at 317.

28. *Thibaudeau*, para. 90.

29. The Supreme Court has made it clear that the *Act* is subject to *Charter* scrutiny. In *Symes* Iacobucci said "[t]he Income Tax Act is certainly not insulated against all forms of Charter review" (at 67) and in *Thibaudeau* Cory and Iacobucci JJ. state that: "As must any other legislation, the Income Tax Act is subject to Charter scrutiny. The scope of the s. 15 right is not dependent upon the nature of the legislation which is being challenged" (at para. 159).

30. *Thibaudeau*, para. 91.

31. *Thibaudeau*, para. 90.

32. *Supra* note 29.

33. *Thibaudeau*, para. 6.

34. It should be noted that in May 1995 Allan Rock, Minister of Justice announced that Suzanne Thibaudeau's legal expenses with respect to the Supreme Court hearing would be paid by the federal government. See "Ottawa to Appeal Child Support Ruling" *The [Toronto] Globe and Mail* (19 May, 1995) A2.

35. *Supra* note 8.

36. "Feds Ponder Tax Changes for Child Support" *Law Times* (5-11 June, 1995) 4.

The Centre for Constitutional Studies mourns the passing of THE RIGHT HONOURABLE JEAN-LUC-PÉPIN, a founding member of the Centre's Advisory Board.
1924 - 1995

SECTION 15: EQUALITY? WHERE?

Leon E. Trakman

INTRODUCTION

The Supreme Court of Canada recently has faced a storm of public hostility at decisions that many view as morally indefensible. In *R.* v. *Prosper*,[1] the Court confirmed the right of a drunk driver to seek counsel before taking the breathalyser. Even more controversially, in *R.* v. *Daviault*[2] the Court seemed to transform the state of drunkenness into a defence of automatism.

In the recent trilogy of equality decisions, *Egan* v. *Canada*,[3] *Miron* v. *Trudel*,[4] and *Thibaudeau* v. *Canada*,[5] the Supreme Court has reaffirmed mainstream morality, but at the expense of discrete minority interests. In particular, by rejecting a claim for gay rights in *Egan* and treating marriage and the family as the repository of public morality in *Miron*, it has dealt a severe blow to equality rights under section 15 of the *Charter*.

The intent of this paper is to critically evaluate the directions which the Supreme Court has taken in this most recent trilogy of cases. It will be argued that a more coherent approach to section 15 is *in part* developed in the trilogy; substantively by McLachlin J., procedurally by Cory and Iacobucci JJ., and ideologically by L'Heureux-Dubé J.

The approach to section 15 adopted by Gonthier J.[6] runs afoul of Justice Wilson's warnings in *Andrews*, which she repeated in *Turpin*:[7]

> Similarly, I suggested in my reasons in *Andrews* that the determination of whether a group falls into an analogous category to those specifically enumerated in section 15 is "not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society." If the larger context is not examined, the section 15 analysis may become a mechanical and sterile categori-zation process conducted entirely within the four corners of the impugned legislation.

Justice Gonthier's approach also imposes an undue burden on claimants, as is aptly illustrated by Cory and Iacobucci JJ.[8] An alternative approach returns to the ideological underpinnings of section 15 — "the unremitting protection of equality rights" — embodied in *Andrews* v. *Law Society of British Columbia*.[9]

My thesis is that while the approach to section 15 adopted by Gonthier *et al.* is a step in the wrong direction, the *Andrews* analysis of section 15 is in need of further development. The enumerated and analogous ground approach has not been overly successful as an instrument of substantive justice.[10] The conservative approach taken by courts has led to very few analogous grounds being developed.[11] Although Gonthier's test is flawed, a different form of relevance test for discrimination might better serve the purposes of the equality guarantee than the analogous grounds approach. The recent trilogy, by signalling a suggestive change in equality jurisprudence, may inadvertently lead to an improved test of discrimination.

WHATEVER HAPPENED TO EQUALITY?

On May 25, 1995 the Supreme Court of Canada released a trilogy of decisions concerning section 15 of the *Charter*. In general, the Court demonstrated that it is significantly divided as to the nature and significance of section 15 of the *Charter*. Sopinka, Cory, McLachlin and Iacobucci JJ. support the section 15 test laid out in *Andrews*, Lamer C.J. and LaForest, Gonthier and Major JJ. advocate a three-part test that increases the burden on the person alleging the section 15 violation. L'Heureux-Dubé J., in contrast, extends the reach of section 15 to embrace a wider expanse of discrimination. These legal developments are only truly comprehensible in light of the once widely endorsed decision of the Supreme Court in *Andrews*, where the Court set out a complex test for the analysis of equality claims under the *Charter*.

That analysis was to be undertaken with the purpose of correcting historical, social and political inequality, and to remedy disadvantage. The aim was not simply to achieve formal equality or identical treatment. The elements of the *Andrews* test are as follows. The claimant must identify the "law," for the purpose of section 15, which infringes one of the four "rights" set out in section 15. The person alleging a section 15 violation must establish a distinction between the manner in which the law treats her and the manner in which it treats others. The claimant must also establish that this treatment leads to disadvantage. McIntyre J., writing for the majority on this point, maintained that this disadvantage arises if there is a violation of any of the following four rights: "The right to equality before and under the law, and the right to equal protection and benefit of the law."[12] The final element of the analysis of equality under the *Charter* requires that the person alleging a violation of section 15 establish that this distinction in treatment, giving rise to disadvantage, is a result of discrimination. As McIntyre J. explained in *Andrews*, "[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."[13] He added:[14]

> [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 or capacities will rarely be so classed.

To establish discrimination, the person alleging it must bring it within one of the grounds enumerated in section 15(1), or frame it as an analogous ground. The type of persons entitled to protection on analogous grounds, McIntyre J. illustrated, are those who belong to a "discrete and insular minority."[15] This phrase, while not constituting a test unto itself, is a touchstone for the definition of analogous grounds.

The elements of the *Andrews* test which are pertinent here are two: (1) a distinction imposing a burden on the claimant not imposed upon others, and (2) that distinction being based on a personal characteristic falling under an enumerated or analogous ground. The *Andrews* test will be referred to, therefore, as a two-part test.

The *Andrews* decision struck a middle ground between two more radical interpretations of the section 15 guarantee, namely those of Peter Hogg and McLachlin J., then of the British Columbia Court of Appeal. Hogg's pre-*Andrews* position was that a law drawing any distinction would violate the section 15 guarantee and that the analysis would then be taken up under section 1 where the distinction would be justified or found constituionally invalid.[16] McLachlin's view was that only those distinctions that were "unreasonable or unfair" would constitute discrimination. Whether a legislative distinction was justified would then be determined under section 15, not section 1.[17] Hogg's position denied any real function to the section 15 guarantee. McLachlin's minimalized the role of section 1. McIntyre J.'s middle ground was to have the section 15 guarantee "catch" only those distinctions based on enumerated or analogous grounds, and to leave issues surrounding justification of the distinction to section 1.[18] That this approach to section 15(1) would ensure that claims fit within the purpose of the guarantee was later reiterated by Lamer J. in *R.* v. *Swain*, where he wrote:[19]

> Furthermore, in determining whether the claimant's section 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the sections or within an analogous ground, so as to ensure that the claim fits within the overall purpose of section 15; namely, to remedy

> or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

The two-part test enunciated in *Andrews* prevailed until the trilogy that is the subject of this review. The Supreme Court of Canada applied it, for example, in 1993 in *Symes* v. *Canada*.[20] While L'Heureux-Dubé and McLachlin JJ. dissented in the result, they endorsed the section 15 test enunciated in *Andrews*. *Egan*, *Miron*, and *Thibaudeau* likely has changed all this: the Supreme Court has shifted from unanimity to significant division on the nature of the section 15 test. In this new trilogy, despite assertions to the contrary,[21] Lamer C.J., LaForest, Gonthier and Major JJ. have varied from *Andrews*. As will be illustrated below, it is the approach adopted by these justices, and the uncertain position of Sopinka J., that gives rise to the most concern about the capacity of section 15 to continue to provide substantive justice.

MARGINALIZING *ANDREWS* v. *LAW SOCIETY OF BRITISH COLUMBIA*: LAMER C.J. AND LAFOREST, GONTHIER AND MAJOR JJ.

The "new" three-part section 15 test is developed by Gonthier J. in *Miron* and expanded further in *Thibaudeau*. In addition, LaForest J. adopts the test in *Egan*. The first two steps in the three-step analysis are familiar. Both significantly reflect the approach adopted in *Andrews*. As Gonthier J. explains in *Miron*:[22]

> The analysis to be undertaken under section 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 which the claimant belongs which is not imposed on others, or does not provide them with a benefit which it grants others (*Andrews*, supra). It is at this second step that the direct or indirect effect of the legislation is examined.

However, Gonthier J.'s third step has a significant and novel impact upon the application of section 15:[23]

> The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated in section 15(1) or one analogous thereto.

Gonthier J. elaborates:[24]

> This third step thus comprises two aspects: determining the personal characteristic shared by a group and then assessing its relevancy having regard to the functional values underlying the legislation.

Gonthier J. maintains, under the first aspect of the third step, that "the individual's membership in a group is an essential condition, while idiosyncrasies unrelated to membership in a group do not give rise to discrimination."[25] However, it is the second aspect of Gonthier's third step that is most telling:[26]

> The second aspect of the third step, that of assessing relevancy, looks to the nature of the personal characteristic and its relevancy to the functional values underlying the law. Of course, the functional values underlying the law may themselves be discriminatory. Such will be the case where the underlying values are irrelevant to any legitimate legislative purpose. Relevancy is assessed by reference to a ground enumerated in section 15 or one analogous thereto.

Gonthier J.'s "addition" to the two-part *Andrews* test, then, is to assess the relevance of the personal characteristic to the functional values underlying the legislation. If the functional values underlying the legislation are themselves discriminatory, then relevance is determined by reference to an analogous or enumerated ground in section 15.

Gonthier J. asserts that the three-step approach "in no way departs from this Court's approach in *Andrews*."[27] In support of this assertion, he cites McIntyre J. in *Andrews* 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."[28] Thus, Gonthier J. holds that the relevancy of the particular law to the particular ground enumerated in section 15 or one analogous thereto has long been the subject of examination under section 15.

Gonthier J. also suggests that "[r]elevancy is at the heart of the identification of an analogous ground."[29] In support of this contention, he claims that, in both *Turpin*[30] and *R.* v. *Genereux,*[31] the Court found that the persons alleging a violation of section 15 were not in an analogous position, while not ruling out the possibility that the province of residence in *Turpin* or membership in the military in *Genereux* could be the basis of an analogous ground. In advancing these arguments, Gonthier J. claims that he is simply "clarify[ing] a qualification which must be made"[32] when applying section 15, and by implication, that he is not reconstituting that test.

It is worth noting the different ways in which relevance could function in the section 15 analysis. The *Andrews* test holds that distinctions violate section 15 when they are based on personal characteristics falling under either enumerated or analogous grounds. Those grounds informed the *Andrews* analysis as to which distinctions were relevant or irrelevant with reference to the underlying values of section 15. Gonthier J. frames his view on the assumption that grounds are enumerated or analogous because they are commonly used to make distinctions having little or no rational connection to the subject matter.[33] Distinctions on such grounds are not discriminatory if they are relevant to a "physical or biological reality or fundamental value."[34] It follows that the scope of the equality guarantee, according to Gonthier J., is not circumscribed by enumerated and analogous grounds.[35] In his view, then, the scope of section 15 is as wide or as narrow as the concept of relevance, or rational connection, that is utilized.

Gonthier J. appears, at times, to advocate a broad and context-sensitive approach towards section 15, comparable to Wilson J. in *Turpin*. However, Gonthier J.'s broad and contextual approach searches for biological realities or values that render distinctions relevant, thereby rendering them *not* discriminatory. It is reasonable to infer from this that Gonthier J.'s approach is even more conservative than the equality jurisprudence that preceded him. In focusing on the values and realities of mainstream society, ordinarily considered under section 1, he ensures that relevant distinctions will be found not to infringe the equality guarantee. His analysis prevents the shift to a section 1 consideration as to whether mainstream values ought to take precedence over minority values. The likely result of his approach is that section 15 will be unduly narrowed in its scope of application: majority values will trump minority realities and values and section 15 will fail to produce substantive equality in fact.

Accordingly, Gonthier J.'s test fails, not because it focuses on relevance, but because it measures relevance wholly in terms of the functional values underlying legislation and according to fundamental realities or values. His approach assumes, quite falsely, that the concept of relevance is exhausted within section 15 and that there is no place for a relevance test under section 1.[36] He also fails to recognise that relevance under section 15 is limited to the values underlying the guarantee, *not* relevance to functional values underlying the legislation, *nor* to fundamental realities and values, however much these overlap with section 15 values.

THREE DIFFERENT CRITIQUES OF THE "NEWER" SECTION 15 ANALYSIS: MCLACHLIN J., CORY AND IACOBUCCI JJ., AND L'HEUREUX-DUBÉ J.[37]

Others members of the Court challenge Gonthier J.'s assertion that he is merely clarifying a prevailing section 15 test. In *Miron*, McLachlin J.[38] and L'Heureux-Dubé J., concurring in the result, firmly reject Gonthier J.'s third step. McLachlin J. contends, first, that Gonthier J. overstates the significance of the relevance of personal characteristics shared by a group to the functional values underlying the legislation. In her view, a "finding that the distinction is relevant to the legislative purpose will not in and of itself support the conclusion that there is no discrimination."[39]

Cory and Iacobucci JJ. argue in *Egan* and *Thibaudeau* that Gonthier J.'s third step interferes with the function of section 1 by: (a) imposing a higher burden on the section 15 claimant, and (b) bypassing the section 1 inquiry into whether legislative distinctions accord with the values of a free and democratic society.

L'Heureux-Dubé J. goes further than McLachlin J. in rejecting Gonthier J.'s conception of relevance. In her dissenting opinion in *Egan* she states that relevance is more appropriately evaluated under section 1, not section 15:[40]

> In sum, I believe that it is more accurate and more desirable to treat relevance as, in fact, a *justification* for distinctions that have a discriminatory impact on persons or groups,

to be considered under section 1 of the *Charter*.

McLachlin J.

The "newer" section 15 analysis articulated by Gonthier J. is most cogently evaluated by the majority opinion of McLachlin J. in *Miron*. She critiques Gonthier J.'s test in two ways. First, she attributes a limited function to relevance under a section 15 analysis. Second, she criticizes the manner in which the three-part test is applied in *Egan* and *Miron*.

Regarding the first part of her criticism, McLachlin J. emphasizes that relevance is only one factor in determining whether a distinction is discriminatory under section 15(1):[41]

> Proof that the enumerated or analogous ground founding a denial of equality is relevant to a legislative goal may assist in showing that the case falls into the class of rare cases where such distinctions do not violate the equality guarantees of section 15(1), serving as an indicator that the legislator has not made the distinction on stereotypical assumptions about group characteristics. *However, relevance is only one factor in determining whether a distinction on an enumerated or analogous ground is discriminatory in the social and political context of each case.*

McLachlin J. elaborates by stressing that, however relevant might be a legislative distinction, courts are bound to advance a more fundamental *Charter* purpose to prevent violations of human dignity and freedom:[42]

> A finding that the distinction is relevant to the legislative purpose will not in and of itself support the conclusion that there is no discrimination. The inquiry cannot stop there; *it is always necessary to bear in mind that the purpose of section 15(1) is to prevent the violation of human dignity and freedom through the stereotypical application of presumed group characteristics.*

McLachlin J. then makes her most significant observation. Merely finding that a group characteristic is relevant to a legislative purpose does not mean that the legislature has not employed that characteristic to produce a discriminatory effect, contrary to section 15:[43]

> If the basis of the distinction on an enumerated or analogous ground is clearly irrelevant to the functional values of the legislation, then the distinction will be discriminatory. However, it does not follow from a finding that a group characteristic is relevant to the legislative aim, that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of section 15(1).

The solution, McLachlin J. proposes, is to examine the discriminatory effect of the legislation:[44]

> This [limitation, burden or disadvantage] can be ascertained only by examining the effect or impact of the distinction in the social and economic context of the legislation and the lives of the individuals it touches.

McLachlin J. directs three specific criticisms at Gonthier J.'s method of interpreting section 15. First, she disputes the logical means by which he attaches pivotal significance to relevance under section 15. Second, she argues that discrimination should be evaluated from the perspective of its social and economic effect upon members of targeted groups. Third, she contends that Gonthier J.'s third step varies from pre-existing *Charter* jurisprudence, notably, from *Andrews*.

Regarding her first criticism, McLachlin J. contends in *Miron* that the reasoning that underlies Gonthier's relevance test is circular:[45]

> Gonthier J. concedes that the distinction here at issue — denial on the basis of marital status — might, for some purposes, be viewed as an analogous ground. He asserts, however, that it is not used in a discriminatory manner in this case because "the functional value of the benefits is not to provide support for *all* family units living in a state of financial interdependence, but rather, the Legislature's intention was to assist those couples who are married" (para. 72). He concludes that distinguishing on the basis of marital status is relevant to this purpose and hence that the law is not discriminatory. *On examination, the reasoning may be seen as*

> *circular. Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under section 15(1).*

McLachlin J. infers that, by relating a discriminatory ground to the functional value of legislation, the court is able to employ a false logic to render that distinction relevant to the legislation. The result, as she envisages it, is the triumph of arid form over substance.

McLachlin J.'s second criticism of Gonthier J.'s three-step approach is that, in placing emphasis upon relevance, he overlooks the social and economic effect of discrimination. Her alternative is to employ a social-effects analysis. In particular, she suggests that, to break out of Gonthier J.'s "logical circle," it is necessary to evaluate the extent to which disadvantage arising from stereotypical group characteristics violates human dignity and freedom. In McLachlin J.'s words:[46]

> The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under section 15(1). *The focus of the section 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.*

McLachlin J.'s third criticism is implicit in her contention that "the early decision of this Court under section 15" varied from Gonthier's method of reasoning.[47]

McLachlin J.'s criticism of Gonthier J.'s three-step method of reasoning applies equally to the reasoning adopted by La Forest J. in *Egan*. La Forest J. characterizes the functional value of the legislation being challenged in *Egan* as aiming to provide support to elderly married couples. Given that marriage is "firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate,"[48] he concludes that Parliament may use the relevant ground of sexual orientation as a basis for distinguishing those who should receive benefits under the Act from those who should not. In defining the purpose of the legislation in terms of the alleged discriminatory ground, namely in favour of the traditionally married couple, LaForest J. *himself* establishes the relevance of the ground. In determining that relevance, he is able to negate the presence of discrimination against other couples under section 15(1). In employing this method of reasoning, La Forest J. runs afoul of each of McLachlin J.'s criticisms. He employs circular reasoning, as McLachlin J. defines it, to establish relevance. He finds it unnecessary to examine the impact of the legislation in question upon members or groups who might be disadvantaged because they are not bound by traditional ties of marriage. He also varies from the *Charter* jurisprudence of *Andrews* and its pre-trilogy sequelae of cases.

Cory and Iacobucci JJ.

The third step in the section 15 test is criticized on different grounds by Cory and Iacobucci JJ., in a joint decision in *Thibaudeau*.[49] They contend that Gonthier J.'s third step disregards the function ordinarily performed by section 1 of the *Charter* on two grounds. It imposes a significantly higher burden upon the person alleging a section 15 violation. It also bypasses the section 1 inquiry as to whether legislation that restricts fundamental rights accords with the interests of a free and democratic society.

Regarding the function of section 1 of the *Charter*, Cory and Iacobucci JJ. state:[50]

> The analysis of functional values and relevance employed by Gonthier J. imports into a section 15 analysis the justificatory analysis which properly belongs under section 1 of the Charter. As a result, it deprives the section 1 analysis of much of its substantive role.

On the unjustifiably higher burden the three step analysis foists upon the person alleging a section 15 violation, Cory and Iacobucci JJ. contend:[51]

> ... Gonthier J.'s analysis of section 15] places an additional and erroneous onus upon the claimant. From the outset, decisions dealing with the equality section have made it clear that, under section 15, the

> claimant bears only the burden of proving that the impugned legislation is discriminatory. On the other hand, under section 1, it is the government which bears the onus of justifying that discrimination.

Cory and Iacobucci JJ. conclude that, to satisfy the requirements of section 1 of the *Charter*, the state must be able to justify impinging upon fundamental rights. In not imposing this burden upon the state, the three-step approach followed by Gonthier J. violates the "entire structure of the Charter."[52] As Cory and Iacobucci JJ. would have it:[53]

> ... [i]n enunciating the principles which govern the relationship between the state and the individual, the Charter recognizes that the state may impinge upon fundamental rights but only in situations in which it can justify that infringement as being necessary in a free and democratic society. This division of the burden is integral to the entire structure of the Charter. An approach to Charter rights which changes the assignment of this onus should be avoided.

This critique of the three-step approach is significant in demonstrating the link between the procedure underlying the approach and its substantive effect. In stressing that the Court ought not to permit the state to avoid the burden ordinarily resting upon it under section 1, Cory and Iacobucci JJ. critique Gonthier J.'s method of construing section 15 to the exclusion of section 1. In emphasizing that the structure of the *Charter* is oriented around substantive ends, Cory and Iacobucci JJ. highlight the need to evaluate section 15 in light of the interests of a free and democratic society under section 1. This approach reinforces an essential message of *Andrews*, underscored by L'Heureux-Dubé J., that it is necessary to recognize that every member of Canadian society is "equally deserving of concern, respect, and consideration within a democratic society."[54]

L'Heureux-Dubé J.

Unlike her colleagues, Lamer C.J. and LaForest, Gonthier and Major JJ., L'Heureux-Dubé J. seeks to expand the scope of section 15. She outlines her objective in the opening passages of her dissent in *Egan*:[55]

> For section 15 jurisprudence to continue to develop along principled lines, I believe that two things are necessary: (1) we must revisit the fundamental purpose of section 15; and (2) we must seek out a means by which to give full effect to this fundamental purpose.

She revisits the fundamental purpose of section 15 by examining the concept of discrimination:[56]

> If the fundamental purpose of section 15 is to guarantee equality "without discrimination," then it follows that the pivotal question is, "How do we define 'discrimination'?" Under the approach set out in *Andrews*, this Court has sought to define "discrimination" by reference to the nine grounds enumerated in section 15(1) as well as by reference to "analogous grounds," which embody characteristics seen to be held in common by the enumerated grounds.

However, L'Heureux-Dubé J. insists that, to conceive of "discrimination" wholly in terms of enumerated and analogous grounds is to employ an "indirect means" of defining a violation of section 15(1).[57] "A preferable approach," she insists, "would be to give independent content to the term 'discrimination', and to develop section 15 along the lines of that definition."[58] As a direct definition of a violation of section 15(1), she proposes that the claimant "must demonstrate the following three things:"[59]

> (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 section 15.

She contends, further, that a distinction is discriminatory in terms of section 15:[60]

> ... 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.

Finally, she articulates a "subjective-objective" method of measuring the reasonableness of the claim of the person affected:[61]

> 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.

L'Heureux-Dubé J.'s approach to section 15 is distinct in several respects. More than any other member of the Court, she underscores the idealized goal of section 15, to ensure "the unremitting protection of equality rights."[62] She also attributes to section 15 an expansive scope of application. For her, the intent of section 15 is to ensure that every person is rendered equally worthy of value, or, in her words, "equally deserving of concern, respect, and consideration."[63] It is her conviction that this pervasive purpose guides section 15, beyond enumerated and analogous grounds.

Given her goal of expanding the boundaries of section 15 beyond *Andrews* and the restrictions imposed upon section 15 by Gonthier and LaForest JJ., L'Heureux-Dubé J.'s argument, viewed as a whole, is unlikely to be adopted by the Court. However vexed McLauchlin, Cory, Iaccobuci and possibly, Sopinka JJ.[64] might be by the third step in the section 15(1) analysis proposed by Gonthier J., they are unlikely to agree that the enumerated and analogous grounds in section 15 are indirect rather than direct means of protecting equality rights. L'Heureux-Dubé J.'s rendition of section 15 nevertheless is important in highlighting that section 15 is concerned, above all else, with social equality. So long as social justice is accomplished by enumerated or analogous means, there is no reason for complaint and L'Heureux-Dubé J.'s creative approach is expendable. Absent that accomplishment, however, L'Heureux-Dubé J.'s judgement rings a loud warning bell, that equality without substance is the surest pathway to inequality.

ON REFLECTION

None of the critiques of Justice Gonthier's "three-part test" squarely address its central flaw: that, while relevance *is* important in a section 15 analysis, Gonthier J.'s conception of relevance is misconstrued. It is contended that irrelevance is a defining feature of discrimination, and that a certain form of "relevance" disproves discrimination. However, relevance is a comparative concept insofar as it relates or compares at least two factors. To take account of relevance is to refer to the factors which are compared, hereafter called the referents. The problem with Gonthier J.'s three-part test is that he employs the wrong referents in his analysis of relevance.

The key aspect of Gonthier J.'s test is worth repeating:[65]

> The second aspect of the third step, that of assessing relevancy, looks to the nature of the personal characteristic and its relevancy to the functional values underlying the law. Of course, the functional values underlying the law may themselves be discriminatory. Such will be the case where the underlying values are irrelevant to any legitimate legislative purpose. Relevancy is assessed by reference to a ground enumerated in section 15 or one analogous thereto.

This is a confusing passage. Assuming that the functional values underlying the law are not themselves discriminatory, Gonthier J. would have the relevance of the personal characteristic determined by reference to the functional values underlying the law. Clearly, according to this view, the criteria of relevance would have to be broader than enumerated or analogous grounds. A distinction between males and females might be relevant to a legislative purpose (and thus would not infringe section 15), while being an "irrelevant distinction" because it is based on an enumerated ground, namely, sex.[66] When the functional values, embodying what Gonthier J. calls "biological differences,"[67] are not discriminatory, the criteria of relevance are those functional values. Only when the values underlying the legislation are discriminatory, then, are the enumerated and analogous grounds the final determinants of relevance. This follows from Gonthier J.'s assertion that grounds are enumerated or analogous because they tend to be the basis for distinctions that have no rational connection to fundamental realities and values.[68]

McLachlin J. points out that the personal characteristic that is relevant to values underlying the legislation is no basis for saying that there is necessarily no discrimination. If the personal characteristic

is irrelevant to the legislative purpose then the distinction is necessarily discriminatory. Justice McLachlin's essential point is that the underlying values of the legislation are not the proper referents for a relevance test. The proper referent is the set of values that underlie the section 15 guarantee. Enumerated grounds reflect, but do not exhaust, those values. Analogous grounds are analogous precisely because they are generated by section 15 values. These values include redressing the harm that arises from offensive stereotyping, as from historical, political, and social disadvantage.

The critique which Cory and Iacobucci JJ. direct at Gonthier J.'s three-part test is not as satisfying as that advocated by McLachlin J. They argue that the test establishes a burden on the section 15 claimant that is higher than the *Andrews* two-part test which requires only that the claimant establish "discrimination." Cory and Iacobucci JJ. nevertheless fail to demonstrate that discrimination is not based on a concept of irrelevance. Discrimination easily lends itself to definition in terms of distinctions based on irrelevant considerations. Discrimination involves, however, not simply irrelevant considerations, but also considerations that result in burdens or disadvantages. This means recognizing that relevance *is* a key concept in the conceptualization of discrimination. However, to determine the nature of that relevance is to take account of the nature of the referent, namely, that to which the personal characteristic is relevant. The values underlying the legislation, as McLachlin J. has shown, is not an accurate referent. But, another referent well might be appropriate. One referent resides in the values that underlie section 15.

Cory and Iacobucci JJ. are justified in objecting to Gonthier J.'s three-part test on the ground that it erodes the substantive function of section 1. Certainly, Gonthier J.'s test assumes a role more properly reserved to section 1 of the *Charter* when it examines more than the values underlying the section 15 guarantee. Nor does the fact that the values of a free and democratic society overlap with the particular values embodied in section 15 negate the virtue of a section 1 inquiry. To permit a section 15 inquiry to delineate all applicable values is to ignore that the ranking of *Charter* values arises, more properly, under section 1. To do otherwise is to allow the *Charter* to serve the values underlying specific sections, like section 15, at the expense of the values underlying other sections of the *Charter*. Such a practice clearly would be contrary to existing Charter jurisprudence.[69]

While Gonthier J.'s test is susceptible to these criticisms, a relevance test need not fall victim to either of Cory and Iacobucci JJ.'s arguments. If irrelevance is a component in defining a discriminatory distinction, then, as the claimant must prove discrimination under section 15, the burden is no higher with a relevance test. The only change is that the definition of discrimination has been clarified. (Gonthier J. makes this claim, but it is not convincing on his test of relevance.) Likewise, an inquiry into whether the values underlying section 15 have been engaged so as to make a distinction irrelevant and, hence, discriminatory, clearly does not deprive section 1 of its substantive function.

Nevertheless, Cory and Iacobucci JJ. are justified in pointing out that section 15 ought not to be employed to determine the weight to be accorded to legislative purposes. Section 15 analysis ought to be concerned, instead, with whether a distinction is irrelevant with regard to section 15 values.

L'Heureux-Dubé' J.'s position is important in providing a necessary means of arriving at a meaningful relevance test. She concentrates on the values underlying section 15 to which distinctions will be found to be relevant or irrelevant. She notes that human beings are equally worthy of recognition concern, respect and consideration, while distinctions that promote contrary views are discriminatory. It is precisely by elucidating section 15 values in this way that a relevance test can satisfy the larger purposes of the *Charter*, namely the furtherance of substantive justice.

In summary, relevance *is* a key component of discrimination and incorporating it into section 15 analysis is appropriate. Relevance to the functional values underlying the particular law in question, however, is not the right form of relevance. What is determinative under section 15 is relevance or irrelevance to section 15 values. These values may or may not overlap with the values underlying the legislation in question. A more expansive conception of relevance applies under section 1, namely, relevance to the values of a free and democratic society. As a result, the functional values of legislation are clearly germane under section 1. In contrast, relevance to section 15 values underlies the enumerated and analogous grounds.[70]

In sum, McLachlin, Cory, Iacobucci and L'Heureux-Dubé JJ., *all* are justified in focusing on section 15 values. They do not consider *en masse*

under section 15 the values of a free and democratic society. Nor do they invoke the functional values of legislation. Nor do they identify any fundamental reality or distinction according to which distinctions are relevant or irrelevant. They appropriately consider the values underlying the section 15 guarantee of equality in relation to which a distinction is either discriminatory or not. Of note, L'Heureux-Dubé J. insists that the Court revisit the fundamental purpose of section 15 itself.

Nevertheless, their respective approaches are in need of development. In adopting a relevance test in regard to the values underlying section 15, as distinct from the functional values that are attributed to legislation, they could clarify the appropriate weight that ought to be attributed to relevance under section 15, a function that was not adequately performed in either the *Andrews* case or in the cases that followed.

CONCLUSION

If section 15 has meaning, that meaning resides in the condition of communal life to which equality is directed. That condition presupposes that all persons within society are entitled to participate in that communal life with comparative equality. This condition of equality does not require that everyone share exactly equally in the social "good." Equality entitles different segments of society to enjoy different qualities of lives with comparative, not symmetrical, equality.

Comparative equality also means that no one segment of society is entitled to define the quality of the "good" life for all in the image of itself. Whatever its object, the legislature in a democratic society is disentitled to identify itself with the interests of select communities so as to produce comparative inequality for other communities.

I do not suggest by this that government should suddenly cease to consider mainstream interests. Indeed, it would be quite unrealistic to expect a government that is responsive to popular interests *not* to define the status of marriage in the traditional image of the heterosexual couple. My objection is to the assumption that this image ought to prevail at the expense of others. Such exclusivity produces substantive inequality: it offends those who conceive of marriage outside of the mainstream; it is an affront to single mothers who are taxed on their family benefits.

Certainly, it is difficult to expect the legislature not to show preferences for established social values. Government, after all, is elected by *the people*; and the people ordinarily represent mainstream values, as is exemplified by traditional family life. However, it is on account of the tendency of government to overrepresent popular interests that the section 15(1) guarantee of equality is a necessary counterbalance. It is in recognizing that courts are bound to offset the government's underinclusion of unpopular values that section 15(1) is so vital to a free and democratic society.

For these reasons, the "new" equality jurisprudence enunciated by Gonthier and LaForest JJ. is troubling. It is troubling because the ultimate criterion of discrimination is relevance to the new and malleable concept of fundamental realities and values. The risk is that this approach will both legitimate and encourage the underinclusivity of difference in equality jurisprudence by legitimating distinctions on grounds of their "relevance," even though section 15 values might dictate otherwise. The harm is that such an approach will provide government with the means of accomplishing this unequal end with impunity.

A different sort of relevance test, based on an articulated understanding of the values that motivate the guarantee of equality, might better achieve the aims of section 15. Rather than have to convince a court that a particular ground should be found to be analogous, attention could be focused on whether the particular legislative distinction offends, either in purpose or effect, section 15 values.

Most importantly, if the values underlying section 15 are concerned with "the unremitting protection of equality rights,[71] as L'Heureux-Dubé J. asserts, than it is necessary for courts to protect the interests of every person and group whose interests are "equally deserving of concern, respect, and consideration."[72] Insofar as McLachlin, Cory, Iacobucci and possibly, Sopinka JJ. appreciate the importance of these values, there remains hope for the future.❑

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APPENDIX I: DISTINCTIONS WITHIN AND BEYOND THE SCOPE OF SECTION 15

ALLEGED DISTINCTION	WITHIN SCOPE OF SECTION 15 (as analogous ground)	AUTHORITY
citizens vs. residents	yes	*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
employment status	no	*Workers' Compensation Reference*, [1989] 1 S.C.R. 922. Niemann v. Public Service Commission (Canada) (1989), 29 F.T.R. 156 (F.C.T.D.) (QL).
those with an interest in suing Crown	no	*Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695.
place (province) of residence	no	*R. v. Turpin*, [1989] 1 S.C.R. 1296.
common law spouses vs. married	yes (*new section 15 test)	*Miron v. Trudel*, [1995] S.C.J. No.44 (QL).
same sex spouses	no (*new section 15 test)	*Egan v. Canada*, [1995] S.C.J. No.43 (QL).
divorced custodial parent receiving support	no (*new section 15 test)	*Thibaudeau v. Canada(M.N.R.)*, [1995] S.C.J. No.42 (QL).
rural residents losing post offices	no	*Rural Dignity of Canada v. Canada Post Corp.* (1991), 78 D.L.R. (4th) 211 (F.C.T.D.).
those with crown privilege vs. those without	no	*Canada (A.G.) v. Central Cartage Co.* (1990), 71 D.L.R.(4th) 253 (F.C.A.).
married vs. unmarried persons	no yes (overruled)	*Schachtschneider v. Canada* (1993), 105 D.L.R. (4th) 162 (F.C.A.). *Leroux v. Co-operators General Insurance Co.* (1991), 83 D.L.R. (4th) 694 (Ont.C.A.). *Leroux v. Co-operators General Insurance Co.* (1990), 65 D.L.R. (4th) 702 (Ont.H.C.J.).
taxpayers earning employment income vs. those earning business income	no	*O.P.S.E.U. v. National Citizens' Coalition Inc.* (1990), 69 D.L.R. (4th) 550 (Ont.C.A.).
municipal employees	no	*Jones v. Ontario (A.G.)* (1992), 7 O.R. (3d) 22 (Ont.C.A.).
individuals injured because snow & ice on sidewalks (re notification to municipality)	no	*Filip et al. v. City of Waterloo et al.* (1992), 98 D.L.R. (4th) 534 (Ont.C.A.).

ALLEGED DISTINCTION	WITHIN SCOPE OF SECTION 15 (as analogous ground)	AUTHORITY
real property owners resident in province vs. non-resident owners	no	*McCarten v. Prince Edward Island* (1994) 112 D.L.R. (4th) 711 (PEISCAD).
small, emerging political party vs. established political parties	no	*Reform Party of Canada v. Canada (A.G.)* (1995), 123 D.L.R. (4th) 366 (Alta.C.A.).
those subject to vs. those exempt from Limitations of Actions Act	no	*Alberta Home Mortgage Corp. v. Keats*, [1994] A.J. No. 381 (Alta.C.A.) (QL).
single mothers	yes no (cast as public housing tenants) (overruled)	*Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No.97 (N.S.C.A.) (QL). *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1992), 112 N.S. R. (2d) 389 (N.S.Co.Ct.) (QL). *Dartmouth/Halifax County Regional Housing Authority v. Carvery*, [1992] N.S.J. No.180 (N.S.Co.Ct.) (QL).
landlords of residential property vs. other landlords	no	*Haddock v. Ontario (A.G.)* (1990), 70 D.L.R. (4th) 644 (Ont.S.C.).
place of residence	no	*Ontario Nursing Home Assn. v. Ontario* (1990), 72 D.L.R. (4th) 166 (Ont.H.C.J.).
farmers who could repay loans vs. farmers who could not repay loans	no	*Agricultural Credit Corp. of Saskatchewan v. Simonot*, [1991] S.J.No.585, (1991), 99 Sask. R. 133 (Q.B.) (QL).
occupation/tobacco industry	no	*Cosyns v. Canada (A.G.)*(1992), 7 O.R. (3d) 641, [1992] O.J. No.91 (Gen.Div.) (QL).
sexual orientation	yes	*Layland v. Ontario (M.C.C.R.)*, [1993] O.J. No.575 (Gen.Div.) (QL).
work status	no	*Nova Scotia Teacher's Union v. Nova Scotia (A.G.)*, [1993] N.S.J.No.153 (S.C.) (QL).
replacement workers vs. permanent workers	no	*McLaughlin v. UFCW, Local 1288P*, [1993] N.B.J. No.412 (Q.B.) (QL).
single mothers with dependent children /poverty	yes	*Regina v. Rehberg* (1994), 111 D.L.R. (4th) 336 (N.S.S.C.).

Endnotes

1. [1994] 3 S.C.R. 236.

2. [1992] 1 S.C.R. 259.

3. [1995] S.C.J. No. 43 [hereinafter *Egan*].

4. [1995] S.C.J. No. 44 [hereinafter *Miron*].

5. [1995] S.C.J. No. 42 [hereinafter *Thibaudeau*].

6. Concurred in by Lamer C.J., LaForest and Major JJ.

7. *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1332, quoting from *Andrews* v. *The Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 152. On McLachlin J.'s comments to this effect, see text associated with note 45, *infra*.

8. *Thibaudeau*, para.154.

9. *Supra* note 7 at 175.

10. See *infra* note 35.

11. See "Appendix I: Distinctions Within and Beyond the Scope of s.15."

12. *Supra* note 7 at 172.

13. *Ibid.* at 175.

14. *Ibid.* at 175-176.

15. In support of his use of this phrase, McIntyre J. finds support in the case of *United States* v. *Carolene Products Co.* 304 U.S. 144 (1938).

16. Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 799-801.

17. *Andrews* v. *Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600 at 610 (B.C.C.A.).

18. *Supra* note 7 at 182.

19. (1991), 63 C.C.C. (3d) 481 at 520-521; [1991] 1 S.C.R. 933; 5 C.R. (4th) 253.

20. [1993] 4 S.C.R. 695.

21. See for example, *Miron*, para. 28, per Gonthier J.

22. *Miron*, para. 13.

23. *Miron*, para. 14.

24. *Miron*, para. 15.

25. *Miron*, para. 15.

26. *Miron*, para. 15.

27. *Miron*, para. 28.

28. *Miron*, para. 14; *Andrews*, *supra* note 7.

29. *Miron*, para. 25.

30. [1989] 1 S.C.R. 1296.

31. [1992] 1. S.C.R. 259.

32. *Miron*, para. 28.

33. Gonthier J. is not entirely clear about what the subject matter is. It would appear to be the subject matter of the impugned legislation. What happens if the values underlying the legislation are discriminatory? Gonthier J.'s answer seems to be to determine the relevance of the distinction to "fundamental realities and values." See *infra* note 36. So while Gonthier J. says enumerated and analogous grounds are the determinants of discrimination when the functional values underlying the legislation are discriminatory, these grounds are only indicia — the real determinants are "fundamental realities and values."

34. *Miron*, para. 19 where Gonthier J. writes:

> More specifically, an indispensable element of the contextual approach to s. 15(1) involves an inquiry into whether a distinction rests upon or is the expression of some objective physical or biological reality, or fundamental value. This inquiry crucially informs the assessment of whether the prejudicial distinction has been drawn on a relevant basis, and therefore, whether or not that distinction is discriminatory.

35. Even keeping in mind the context-sensitive approach used in s. 15 analysis, a survey of s. 15 jurisprudence uncovers a very conservative approach taken to expanding the scope of the equality guarantee beyond enumerated grounds. See Appendix I. An exception to this rule is, notably, two decisions by Nova Scotia Courts: *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*, [1993] N.S.J. No.97 (N.S.C.A.) (QL) and *Regina* v. *Rehberg* (1994), 111 D.L.R. (4th) 336 (N.S.S.C.). The distinctions considered related to tenants of public housing, single mothers (with dependent children) and poverty. The last two grounds were found to be analogous.

36. *Miron*, paras. 31-32. Gonthier J. really appears oblivious to the different functions of the concept of relevance and assumes that all these functions are properly performed under a s. 15 analysis. He illustrates this when he writes at para. 32: "Fundamentally, s. 15(1) is concerned with the relevancy of distinctions. Relevancy goes to the determination of the existence of discrimination, whereas the s.1 justification only arises after discrimination has been established."

37. For reasons addressed below, Sopinka J., who is not mentioned either in this section or in the section above is nevertheless pivotal to the future status of s.15. On Sopinka's attempt to shift the equality debate from s.15 to s.1, see *infra*, note 64.

38. Sopinka, Cory and Iacobucci JJ. concurring.

39. *Miron*, para. 133.

40. *Egan*, para. 45.

41. *Miron*, para. 133 (emphasis added).

42. *Ibid.* (emphasis added).

43. *Ibid.*

44. *Ibid.*

45. *Miron*, para. 134 (emphasis added).

46. *Ibid.* (emphasis added).

47. *Ibid.*

48. *Egan*, para. 21.

49. Cory and Iacobucci JJ. concur with Gonthier J. in result, but not method. LaForest and Sopinka JJ. concur with Cory and Iacobucci JJ. in method and Gonthier J. in result.

50. *Thibaudeau*, para. 154.

51. *Ibid.*

52. *Ibid.*

53. *Ibid.*

54. *Supra* note 7; *Egan*, paras. 55-56.

55. *Egan*, para. 32. L'Heureux-Dubé J. concurred with Cory and Iacobucci J. (with whom Sopinka J. concurred on s. 15 but not s. 1) and McLachlin J. in the result. Thus, she formed part of a group of five justices who found the existence of discrimination under s. 15.

56. *Egan*, para. 35.

57. She states specifically: "As several commentators have suggested, and as I shall argue shortly, this is [the enumerated and analogous grounds approach] an *indirect* means by which to define discrimination" (*Egan*, para. 35).

58. *Ibid.*

59. *Egan*, para. 55.

60. *Egan*, para. 56.

61. *Ibid.*

62. See *Andrews*, supra note 7 at 175.

63. *Egan*, para. 56.

64. I refer to Sopinka J.'s "possible" rejection of the three-step approach towards s.15 largely because he adopts a rather conservative s. 1 analysis in *Egan*. In *Egan*, Sopinka J. found that the violation of s.15 was saved by s.1. No other justice concurred with him. Given that Lamer C.J. and La Forest, Gonthier and Major JJ. found there was no violation of s.15, Sopinka J.'s judgment was decisive in the Supreme Court deciding against Egan and Nesbitt. Sopinka J.'s reasoning is familiar. He argues, as in *Native Women's Association of Canada* v. *R.* [1994] 3 S.C.R. 627, that "the Attorney General of Canada must be accorded some flexibility in extending social benefits" (para. 104) and finds that such flexibility was justified in the case at hand (para. 104). See for a critical analysis of Sopinka J.'s approach, see Leon Trakman, "The Demise of Positive Liberty? Native Women's Association of Canada v. R." (1995) 6 Constitutional Forum 71

    It is quite possible, given this predisposition, that Sopinka might tip the balance of the Court in favour of the approach proposed by Gonthier and LaForest JJ. Were that the case, McLachlin, Cory, Iacobucci and L'Heureux-Dube JJ. are likely to become, at best, a divided minority as to the nature and application of s.15.

65. *Miron*, para. 15.

66. *Miron*, para. 20. Gonthier J. cites as an example *Weatherall* v. *Canada (Attorney General)*, [1993] 2 S.C.R. 872 concerning the searching of male prison inmates by female guards where female prison inmates were not searched by male guards.

67. *Ibid.*

68. Gonthier J.'s claim that enumerated and analogous grounds determine relevancy is disingenuous.

69. *Ford* v. *Quebec*, [1988] 2 S.C.R. 712 at 765-766. Engaging the values of a Charter guarantee is a separate process from determining the weight of those values under the overall structure of the Charter. For a discussion of the identity of values underlying the Charter guarantees see Lorraine E. Weinrib, "The Supreme Court of Canada and Section 1" (1988) 10 Supreme Court L.R. 469 at 494.

70. That concept of relevance encompasses a direct definition of discrimination. L'Heureux-Dube J.'s casting of these grounds as "indirect means" of defining discrimination might better have been cast as "instances of irrelevant distinctions". The direct definition is what these are instances of, irrelevant distinctions imposing burdens on historically, socially and politically disadvantaged groups. See *Egan*, paras. 35 and 55-56.

71. *Andrews*, *supra* note 7 at 175.

72. *Egan*, para. 56.

Towards The Referendum: Campaign Contradictions

Claude Denis and
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"The evolving status quo": that Prime Minister Chrétien was reduced to such desperate word play shows the extent to which Québecers expect the Canadian federation to change, at the same time that other Canadians want nothing to do with constitutional negotiations.

The National Commission on the Future of Québec claimed that the "almost unanimous rejection of the status quo" was a "highlight" of their public consultation among Québecers.[1] The process of self-selection involved in making submissions to the Commission and the boycott by the Parti libéral du Québec (PLQ) and many federalists may have left some doubt as to the representativity of its findings, but recent public opinion polls confirm that a significant majority of Québecers, federalists and sovereignists alike, are seeking alternatives to the constitutional status quo.[2]

Just how much change Québecers want is another question — one not likely to be answerable by the "yes / no" available at referendum time. This is because Québec's population has refused over the years to be convinced by the politicians' claims that sovereignty will be a good thing and that the current situation is a good thing. Hence the stalemate, whereby 40 per cent of Québecers reliably support sovereignty, 40 per cent reliably support federalism, and 20 per cent need to be won over — a task, so far, at which the federalists have been the much more successful.

TABLE 1

Discursive Claims on The Referendum and Its Consequences

	The "yes" forces	The "no" forces
Isolation	In the federation, English Canada generally gangs up on Québec, refusing to recognize its distinctiveness. This will continue with a "no" vote.	If Québecers vote "yes" they should not expect a partnership of any kind with Canada: Québec would be on its own.
Solidarity	Canada's self-interest will demand a close political-economic partnership with a sovereign Québec, building on a solidarity that is undermined under federalism.	Accommodation of differences is ongoing in the current federation, through a variety of mechanisms. Thus, not only Québecers are looking for renewed federalism, and they are getting it.

There is an interesting symmetry in the ways both sides attempt to retain and gain support: their strategies formulate discursive claims whose focus is the dichotomy isolation/solidarity (See Table 1). We try, in this paper, to outline the main elements of these discursive strategies, highlighting the internal difficulties each side encounters as the referendum approaches.

THE SOVEREIGNIST ALLIANCE

Although the federalist forces have hardly ever lost the upper hand in their thirty-year struggle with Québec's independence movement,[3] it ought to be clear that so long as the options remain defined as independence vs. (roughly) *status quo*, a decisive victory will elude both sides: it is easy to imagine the conflict going on forever, with the Parti Québécois (PQ) and the Parti libéral du Québec (PLQ) as inevitable standard bearers well into the next century.

The emergence of the Bloc Québécois (BQ) and Action démocratique du Québec (ADQ), followed by their alliance with the PQ, opens the door to another possibility, probably not for this time, but perhaps for the post-referendum era: the redefinition of the options as neither federalism nor sovereignty but rather "a true confederation" — this, a phrase increasingly popular among prominent Québecers eager to find a nationalist, if moderate, compromise.[4] Although the BQ and the ADQ have risen from opposite ends of the sovereignist/federalist spectrum, they have quickly found common ground through a pragmatism that still eludes the PLQ and Jacques Parizeau's PQ. Thus, if the text of the agreement between the PQ, BQ and ADQ begins with an affirmation of the sovereignist project, it is quickly modified by a battery of associationist clauses obliging the Québec government to seek a thoroughgoing treaty with Canada.

Many observers have seen this agreement as calling for "sovereignty for sure, association maybe,"[5] amounting to a hard-line sovereignist sleight of hand. What is missing from this appreciation, though, is a realization that the sovereignist alliance is anything but united in its strategy for the referendum: while Jacques Parizeau is officially the leader of the "yes" forces, his two partners have consistently challenged his vision of what the referendum should involve. Thus, the somewhat unexpected tandem of Lucien Bouchard and Mario Dumont has been trying to steer the sovereignist ship away from Parizeau's hard line, guided by the notion that the referendum must be won — and that therefore the sovereignist forces must meet the population on its own ground. The alliance agreement's heavy emphasis on the hoped-for partnership with Canada is a direct outcome of the Bouchard-Dumont influence. Indeed, if meeting the population on its own ground means abandoning the sovereignty/federalism dualism, so be it: the Bouchard-Dumont "yes" forces will offer Québecers the confederal partnership that Robert Bourassa dreamed of but never dared to pursue.

The move away from the sovereignist/federalist dichotomy and toward a consensus on confederation is, however, actively resisted by Premier Parizeau and his backers. This can be seen in the September 6th ceremony at Québec City's Grand Théâtre, when the preamble to the sovereignty bill was unveiled. The three-page long text is almost entirely devoted to a call to sovereignty, with only one sentence at the end alluding to "new relations" with the Canadian people, that would "allow us to maintain our economic ties and to redefine our political exchanges."[6] Presented as a highly solemn event, the ceremony was attended by nearly one thousand sovereignists — but by neither Lucien Bouchard nor Mario Dumont. Both were in Montreal, participating in pre-campaign events, and claiming not to be needed in Québec City. Although both also denied any tensions or disagreements within the sovereignist alliance, a Dumont aide was paraphrased in Montreal's *The Gazette* as saying: "Dumont was not involved in writing the preamble because he didn't approve of Parizeau's original plan for unconditional separation."[7]

Despite the alliance's agreement on the centrality of the partnership with Canada, the preamble's final text still expresses Parizeau's initial strategy — and its unveiling can be seen as a bid by the hard-liners against their alliance partners to redefine the terms of the referendum debate toward a more straightforward sovereignty, and to reclaim for Parizeau the leadership of the "yes" forces. No wonder Bouchard and, especially, Dumont found something else to do.

In this sense, the phrase "sovereignist alliance" is something of a misnomer. What does unite the alliance, however, is a sense that Québec is isolated and threatened in the federation as it is currently structured. Two sets of key historical moments are generally invoked to document this claim: the *Constitution Act, 1982*, and the failed Meech Lake and Charlottetown constitutional accords. The patriation

of the constitution with an amending formula and a charter of rights and freedoms, absent the consent of the Government of Québec, amounted to the proverbial stab in the back. The 1982 deal "curtailed Québec's powers" and "derogated from its vital interests," wrote the Bélanger-Campeau Commission.[8] According to Allaire, "Québec was excluded from the most important constitutional amendment in the history of Canadian federalism. It was isolated within the federal pact."[9] The Report of the National Commission on the Future of Québec has, more recently, confirmed the 1982 constitutional deal as the definitive constitutional moment as concerns Québec-Canada relations.[10] The recently released *Déclaration de souveraineté* concurrs, and adds:

> We were hoodwinked in 1982 when the Governments of Canada and the English-speaking provinces made changes to the Constitution, in depth and to our detriment, in defiance of the categorical opposition of our National Assembly. Twice since then attempts were made to right that wrong. The failure of the Meech Lake Accord in 1990 confirmed a refusal to recognize even our distinct character. And in 1992 the rejection of the Charlottetown Accord by both Canadians and Quebecers confirmed the conclusion that no redress was possible.

On this much, the three alliance partners unproblematically agree. But, as Lise Bissonnette, editor of *Le Devoir*, has noted (echoing Daniel Johnson) about the whole of the preamble, "il n'y a pas de lien absolu, univoque, entre le texte et sa conclusion qui se lit: 'Le Québec est un pays souverain.'"[11]

The referendum question, announced the next day, confirmed the ascendency of the hard-liners: a "yes" would allow the Québec government to declare sovereignty after merely submitting a partnership proposal to Canada. Interviewed on Radio-Canada's *Le Point* (September 10) a few days after the question was announced, Premier Parizeau noted that a number of possibilities existed regarding the timing of the proclamation of sovereignty. But he insisted that, in any case, a "yes" outcome in the referendum would make sovereignty a certainty, no matter what happened to partnership negotiations with Canada. Québec, he said, will be "virtually sovereign" as soon as the "yes" result becomes official.

The interview had begun with Mr. Parizeau admitting that he liked this question a whole lot more than that of 1980, and explaining with a smile that he was more influential in writing this one. Indeed, this question, accompanied by the preamble, shows how unequal the alliance was, and how being the Premier made all the difference for Jacques Parizeau. Although the dynamic of the alliance and entrenched public opinion marginalized the hard line through 1994 and the first half of 1995, Premier Parizeau eventually has been able to push aside his partners and their moderate preferences — making it all the more likely that the population's answer to the referendum question would be "no."

THE FEDERALIST FORCES

If the strategy of the sovereignist alliance tends to aim at generating feelings of isolation while at the same time reducing to a minimum Québecers' fear of "yes," the PLQ strategy is to reduce isolative tendencies and to, instead, engender a sense of solidarity with the rest of Canada. At the same time, the strategy is to portray the sovereignty option as out of touch with Québec's historical demands and contemporary public opinion. The "no" forces have, however, problems of their own which parallel the jockeying for position among sovereignist leaders, their outlooks and backers.

Daniel Johnson, leader of the PLQ, the official opposition, and the official "no" camp, has continually reiterated, as has Jean Chretien, a strategy of discussing only the proposal for sovereignty and not his own or his party's vision of constitutional change. That is, no alternatives to the sovereignist proposal will be offered by the PLQ and the "no" camp. Johnson is vulnerable to the charge that he is "empty" of ideas which could serve as alternatives to sovereignty.[12] This absence of an alternative constitutional vision is compounded by Johnson's failure to have clearly articulated in the past any other constitutional option he feels comfortable supporting other than the *status quo*.

To the considerable extent that public opinion in Québec is against the present constitutional arrangements, the PLQ could be courting potential disaster if it were to run a campaign on that basis. Thus, under pressure from federalists within Québec, particularly from his party's youth wing, Johnson recently announced his support for the PLQ's traditional demands for Québec's distinctiveness; "prin-

ciples that have always inspired the thinking and action of our party, notably in ... the Meech Lake accord."[13] The objective is to place Johnson clearly within the mainstream of nationalist opinion, although his vague and minimalist option appears to deviate from past precedent.

Even if Johnson was prepared to endorse a specific program for constitutional reform, the credibility of that program would be severely undermined by the disinclination of the Prime Minister and Premiers outside of Québec to engage in anything resembling constitutional talks in order to appease public opinion within Québec. Reform of the federation in the guise of administrative change, as in the Internal Trade Agreement signed in July 1994, is considered less risky and less controversial. This disinclination is understandable from a number of vantage points. According to the usual refrain, Canadians are weary of the incessant preoccupation with constitutional talk, commencing in 1986 with the signing of the Meech Lake Accord. Provincial and federal politicians also have an incentive to steer clear of the constitutional dossier. Many of the Premiers who actively participated in those rounds of constitutional talks, the Premiers of New Brunswick and Saskatchewan notwithstanding, have not fared well in seeking renewed mandates. Premier Mike Harcourt of British Columbia, who will go to the polls shortly, has been damaged perhaps irreparably by his apparent "weakness" in consenting to a 25 per cent floor in the percentage of Québec seats in the House of Commons. In other words, no Premier who wishes to seek a renewed mandate should want to talk seriously about constitutional reform.

Still, given the possibility of a "yes" victory, would active assistance from federalist forces outside of Québec be useful to Johnson and Chrétien? That assistance could likely take two forms, alternatively or concurrently: supporting renewed federalism and indicating that there will be no negotiations regarding the terms of sovereignty or association. The first of these would affirm an existing solidarity with Québec, while the second would threathen the isolation of a sovereign Québec.

Help From Outside Québec

In apparent response to Johnson's speech to the PLQ youth wing, Prime Minister Chretien appeared to lend a helping hand to the "no" forces when he suggested that constitutional talks would have to be renewed, in any event, by 1997.[14] This was because Part V of the *Constitution Act, 1982* requires that the First Ministers meet within fifteen years of its coming into force in order to revisit the amending formula. The 1997 talks provide the Prime Minister with the opening he needs to both court the Québec electorate looking for alternatives to sovereignty and the *status quo*, while remaining faithful to his electoral commitment not to (voluntarily) renew constitutional talks — after all, the constitution makes him do it. This hardly represents a profound commitment to change.

Also, as the referendum concerns the future of Canada — including future Canadian linkages with Aboriginal peoples from within Québec and the sense of proprietorship many outside of Québec feel in the continued maintenance of the federation — it seems only right that the Premiers and other public opinion leaders impart to Québecers their sentiments in advance of the referendum vote. Not only does it seem appropriate, many Premiers would consider it their duty to do so, referring to the constitutional amending formula and to the state of public opinion in their home province. After all, Québecers seemingly did the same by offering to the rest of Canada Québec's constitutional demands in the wake of Meech Lake. But no elaborate mechanisms for consultation are being instituted and none likely are forthcoming, if at all, without a "yes" outcome. Any provincial or Canada-wide consultation regarding a potential sovereignist victory would be perceived as dangerously divisive, potentially inflaming public opinion within Canada and fuelling sovereignty within Québec.

There are those political leaders from outside of Québec (including the Prime Minister) who take another approach which may be perceived as assisting the "no" forces in Québec. These first ministers chide the sovereignty project and outrightly refuse to ponder a post-Canada Québec, or any negotiations in association with it. They may be pandering to public opinion at home, or hoping to influence the referendum outcome, or both.

Are these suitable roles for the Premiers to play during the referendum campaign? A number of factors militate against it. As the desired federalist outcome in the referendum campaign is a "no" vote, any intervention in the debate runs the risk of backfiring. This is made plain by the dissonance in constitutional rhetoric which prevailed during both the Meech and Charlottetown debates. When B.C. Justice Minister Moe Sihota claimed that Québec Premier

Bourassa "lost" on the distinct society issue in the Charlottetown text, this was meant to score points for his home audience in B.C.; not surprisingly, it had the opposite effect in Québec.[15] Any attempt by Canadians outside of Québec at influencing the outcome of the referendum campaign by negatively portraying the sovereignty option surely runs the risk of literally speaking the wrong language. There is, then, little that the rest of Canada can talk about with Québecers other than to invoke pious platitudes about our common history and the strength in diversity. This is reminiscent of the solidarity felt between Canada and Québec the morning after the Charlottetown vote.

The far more significant lesson to be drawn is that the deep cleavages between the constitutional visions of Québec and those outside of it are perhaps too profound to be overcome, at least at any time in the foreseeable future. The dissonance between Canada and Québec over such issues as the equality of the provinces and Québec's distinctiveness, as represented in public opinion polls following the Charlottetown referendum, suggests that in terms of constitutional reform there is little that can realistically be talked about.[16] The symbolic purchase of each proposal has an opposing, negative effect in the other jurisdiction. This is more than a hermeneutic problem that can be overcome by more elite dialogue and precise legal drafting. Indeed, in this sense, no matter the amount of administrative decentralization prompted by the current drive to reduce the federal deficit, it is hard not to conclude that Québec is isolated in its conception of the country, which remains best summarized as a pact between two nations.

The most optimal strategy for federalists outside Québec may be to stay out of the game, assuming they only concern themselves with the short term — that is, obtaining a "no" at referendum time. Given the recent statements of the Premiers at their annual conference, this strategy seems unlikely — although the controversy between Premier Parizeau and the others over who said what behind closed doors, petered out surprisingly quickly. Federalist participation raises not only the referendum stakes, but the post-referendum stakes whatever its outcome. Suggestions of future change together with refusals to negotiate send ambivalent signals to the Québec electorate and box-in future governments. Moreover, these are subjects that, if broached with any degree of serious intent, more properly belong in the realm of our recently well-rehearsed and potentially incendiary processes for public consultation. This is also the case for those outside Québec who might concern themselves for the longer term, and who may want to borrow a leaf from that part of the sovereignist alliance which seeks to redefine the terms of debate away from sovereignty *and* federalism.

Tomorrow Is Another Day

Symmetry is again the key word when thinking about what happens after the referendum: the reactions to and consequences of a "yes" are easier to predict for Québec than for English Canada, and the reverse is true of a "no" vote.

"No" remains Québecers' likely answer to the referendum question, notwitstanding the slight surge in public opinion favouring the "yes" in the immediate aftermath of the announcement of the question.[17] Indeed, the only way the sovereignists can win is with the help of a massive blunder on the part of "no" forces and/or if the "yes" is redefined in a confederationist way. Both are highly unlikely at this point: the blunder, because political leaders outside Québec appear to have understood that keeping quiet is the most useful contribution they can make; the confederationist redefinition of "yes," because of the now released preamble, question and enabling legislation.[18]

In the event of a "no," there is little doubt that Canadians outside Québec would immediately seek to return to business as usual: no constitutional discussions beyond the obligatory 1997 First Ministers' Conference, which would be kept as unobtrusive and inconsequential as possible. As happened in the short period between the 1980-2 constitutional renewal and the 1986 Meech Lake Accord, the "Québec problem" will be expected to recede into the very back of the country's collective mind. Thus, English Canada will treat a "no" as entirely unproblematic, a non-event as it were — we can go on as if nothing happened. As in 1980, however, Québecers are not likely to think that a "no" is the end of the story. While they may not expect constitutional discussions on renewed federalism to start in the immediate future, they remain dissatisfied with their place in the country and will want to see some evidence that Canada is moving in directions that they find congenial.

As for the political forces involved in the referendum campaign, a "no" is likely to inaugurate another period of "morosity," as well as a reconfiguration of political power. Trying to map this kind of

outcome is rather risky, but it is not unreasonable to expect both the PQ and the PLQ to suffer: we will see the end of this generation's hard-line sovereignist project, to a degree much greater than the post-1980 referendum, when Jacques Parizeau, Camille Laurin and others held on to their dream. And the PLQ will be a rather pitiful winner, being too federalist for a good majority of Québecers, on legs made wobbly by its weak-hearted and unrealistic appeals to Meech-type renewed federalism, and with an unpopular leader. The field, then, will be open for pragmatists and moderates such as Bouchard and Dumont to capture a wide "confederationist" mainstream. What happens then is anybody's guess, but it won't be the end of Canada's "Québec problem."

In the unlikely event that Québecers would vote "yes," there is little question that a confederationist consensus will emerge. After people calm down from the big federalist blunder that will have pushed the sovereignists over the top, or following a moderate "yes" campaign, the agenda in Québec will be concerned with a search for the strongest possible association with Canada — unless and until, that is, Canadians react negatively and try to undermine the realization of sovereignty. Québecers are likely to be radicalized if, for instance, they get the impression that Canadians are being mean-spirited, not only about the terms of economic association but also about things like borders and relations with First Nations. A "hard" sovereignty could then become the option of choice for a good majority of Québecers.

Which raises the question of how the rest of Canada would react to a "yes" vote. Predictions range from acrimonious break-up to rational negotiations driven by a common economic self-interest — variations on the dichotomy isolation/solidarity. Patrick Monahan, for instance, predicts that a unilateral declaration of independence, outside of the amending formula, would provoke Canada into a resentful and hard-line bargaining position.[19] Gordon Gibson, on the other hand, considers the amending formula question irrelevant. Because of the rational self-interest each side has in its continued economic stability, the expediency of maintaining business confidence would drive each side quickly to reasonable bargaining positions. As Gibson writes: "Business will demand fast action.[20] Both views suggest, correctly, that reactions to a "yes" in English Canada will not be monolithic. Rather, an illegal UDI will provoke hostility, just as economic interests will seek to instill calm. To the extent that the latter interests prevail, the "yes" becomes less significant an outcome.

The very legitimacy of the Canadian Parliament in a post-referendum Canada, of course, also hangs in the balance. As Alan Cairns astutely observes, English Canada exists, if at all, as a sociological and not as an organized political entity.[21] To the delight of the economic right, as represented by Gordon Gibson, the provinces would emerge as the most powerful figures at any bargaining table. This scenario foresees negotiations leading to the radical decentralization of a post-Quebec Canada. Such an outcome would be harmonious with that segment of Quebec public opinion seeking a confederationist solution to the problem of Quebec in Canada.

Nor is there reason to be sanguine about the continued existence of a post-Quebec Canada. Centrifugal forces could make remaining political linkages redundant, particularly at a time when perceived fiscal pressures are unravelling the social welfare state and open borders for business firms are realigning trade flows. The post-"yes" state of affairs in what remains of Canada might resemble nothing like pre-referendum arrangements. In which case, not only would the confederationist solution emerge as a viable option but a particular economic agenda would have gained immeasurably by the outcome.❑

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Endnotes

1. Québec, Commission nationale sur l'avenir du Québec, *Report* (Québec: Secrétariat national des commission sur l'avenir du Québec, 1995) at 14.

2. Hugh Winsor, "Quebeckers Want Proposals From Ottawa" *The Globe & Mail* (26 August 1995) A1.

3. The immediate aftermath of the Meech Lake Accord's failure is one exception, when polls reported that as many as 70 per cent of Québecers favoured sovereignty. See Édouard Cloutier, Jean H. Guay, and Daniel Latouche, *Le Virage* (Montréal: Québec-/Amérique, 1992) at 66.

4. See for instance several contributions to the special issue of the business magazine Entreprendre (8:4,

August / September 1995) on the topic "Mon pays." For this special issue, 60 "sages" (wise men and women) were consulted on what they consider their country and how they approach the referendum. Among others who use the phrase "une véritable confédération": Georges-Henri Lévesque, Jean Allaire, Nycol Pageau-Goyette, Michel Bélanger, Bernard Lamarre, Jeannine-Guillevin-Wood, all but the first two of whom are business people.

5. David Cameron, "L'éternel virage" 3:3 *Opinion Canada* (The Council for Canadian Unity, June, 1995) at 2.

6. Déclaration de souveraineté, reproduced in *The Globe & Mail* (7 September 1995) A1, A4; *Le Devoir* (7 September, 1995) A7.

7. Philippe Authier, "The time is now: preamble" *The Gazette* (7 September, 1995) A1, A8 at 14.

8. Québec, Report of the Commission on the Political and Constitutional Future of Quebec (March 1991) at 30.

9. Liberal Party of Quebec, *A Québec Free to Choose: Report of the Constitutional Committee* (28 January, 1991, for submission to the 25th convention) at 12.

10. *Supra* note 1 at 46.

11. "Un exercice périlleux et attachant" *Le Devoir* (7 September, 1995) A6.

12. "No Promises to Quebeckers, Johnston Says" *The Globe & Mail* (3 August 1995) A1.

13. "Johnston Promotes Quebec Distinctiveness" *The Globe & Mail* (14 August 1995) A2.

14. "PM Open to Constitutional Talks" *The Gazette* (20 August 1995) A1. For the PQ response, evoking the strategy of isolation, see "PM Humiliating Quebec on Constitution: Parizeau" *The Gazette* (22 August 1995) A1.

15. "Referendum Heat Rises in the West" *The Globe & Mail* (8 October 1992) A1.

16. Richard Johnston, André Blais, Elisabeth Gidengil, and Neil Nevitte, "The People and the Charlottetown Accord" in Ronald L. Watts and Douglas M. Brown, eds., *Canada: The State of the federation 1993* (Kingston: Institute for Intergovernmental Relations, 1993) 19.

17. "PQ Barrage Rarely Registers in Poll" *The Globe & Mail* (9 September 1995) A1.

18. Bill 1, *An Act Respecting the Future of Québec*, 1st Sess., 34th Leg., Québec, 1995.

19. Patrick J. Monahan, "Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation" *C.D. Howe Institute Commentary* (No. 65, January 1995). Adding fuel to that fire, the Québec Superior Court has ruled that a declaration of sovereignty outside of the amending formula would constitute a "grave threat to the rights and liberties required to be gauaranteed by the Charter" (our translation). See *Bertrand* c. *Québec (Procureur general)*, [1995] A.Q. no. 644 (QL), para. 81.

20. Gordon Gibson, *Plan B: The Future of the Rest of Canada* (Vancouver: The Fraser Institute, 1994) and Gibson, "In Cold or Hot Blood?" *Fraser Forum* (February 1995) 5.

21. Alan C. Cairns, "Suppose the 'Yes' Side Wins: Are We Ready?" *Western Perspectives* (Canada West Foundation, February 1995) at 7.