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LAW V. *CANADA*: FORMATTING EQUALITY

Beverley Baines

ISSUE

In *Law* v. *Canada*[1] the Supreme Court of Canada held that *Canada Pension Plan* survivor benefits[2] do not infringe *Charter* equality rights.[3] Appearances to the contrary notwithstanding, *Law's* reasoning was not based on deference. Deference has acquired a technical meaning in *Charter* jurisprudence, one that Madame Justice Bertha Wilson was the first to identify. In *Chaulk* she used "deference" to refer to Chief Justice Lamer's "view that Parliament is not" required to seek and adopt "the absolutely least intrusive means of attaining its objective."[4] Her usage signalled a significant change in one of the original tenets of the *Oakes*' test.[5] More specifically, it signified that the Chief Justice had imported a reasonableness test into minimal impairment analysis.[6] In effect, deference condones rational rather than minimal impairment, although the Court has not changed its terminology to reflect this transformation.[7] Therefore, since it is found in *Charter* jurisprudence only at the minimal impairment stage of section 1 proportionality analysis, deference could play no role in *Law*. Absent a violation of *Charter* rights, the Court found it unnecessary to turn to section 1 analysis.

This outcome was somewhat curious in light of facts contained in a report on the *Canada Pension Plan* authored by Terry De March.[8] Not only was his report accepted into evidence by the three judges who composed the Pension Appeals Board,[9] but portions of it were repeated in the Board's decision "because they can assist the reader to obtain a broad perspective on and understanding of the *Canada Pension Plan*'s development and objectives."[10] Although the Federal Court of Appeal made no reference to it,[11] and the Supreme Court of Canada made only one oblique reference,[12] there are two reasons why the De March

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

2 *Canada Pension Plan*, R.S.C. 1985, c. C–8, ss. 44(1)(d) and 58(1)(a) [hereinafter CPP].

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

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

4 *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303 at 1388.

5 *R* v. *Oakes*, [1986] 1 S.C.R. 103 created two tests, one of which contained three branches, that had to be met before legislation found in violation of a *Charter* right could nevertheless be "saved" under section 1.

6 *Supra* note 4 at 1343, per Lamer C.J.: "In enacting s. 16(4), Parliament may not have chosen the absolutely least intrusive means of meeting its objective, but it has chosen from a range of means which impair s. 11(d) as little as is reasonably possible."

7 As recently as *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 21 [hereinafter *Corbière*], McLachlin and Bastarache JJ. wrote that "it has not been demonstrated that s. 77(1) of the Indian Act impairs the s. 15 rights *minimally*;" and L'Heureux-Dubé J., concurring, wrote at para. 103 "[T]hose seeking to uphold this law have not demonstrated that a complete exclusion of non-residents from the right to vote, which violates their equality rights, constitutes a *minimal* impairment of these rights" (emphasis added).

8 *Nancy Law* v. *The Minister of Employment and Immigration* (1995), C.E.B. & P.G.R. 8574 [hereinafter *Law*, PAB], wherein Rutherford J. described De March at 6076 as "Chief of Legislative Development in the Policy and Legislation Division, Income Security Programs Branch of the Department of Human Resources Development. Mr. De March has some 17 years [sic] experience in a variety of increasingly senior posts in the Government of Canada, all related to various aspects of the administration, implementation and amendment of the *Canada Pension Plan*. The Board accepts his unique and substantive background and experience as enabling him to assist the Board in understanding the Plan's background and development as well as the policies and objectives it has been designed to address."

9 *Ibid.* at 6074, Rutherford J. noting the Board "is made up of judges and former judges of the superior and appellate courts of the provinces."

10 *Ibid.* at 6076.

11 *Law* v. *Canada (Minister of Employment and Immigration)*, [1996] 1 F.C.J. No. 511 [hereinafter *Law*, FCA].

12 *Law*, SCC, *supra* note 1 at para. 15: "Following an extensive extract from the respondent's expert report, adduced at the trial de novo before the Pension Appeals Board, Rutherford J. stated that although many laws create legal distinctions, not all amount to discrimination within the meaning of s. 15(1) of the *Charter*." In addition, in paras. 8 and 97, the Court quoted from two quotations contained in the De March report, albeit without

report was indeed relevant to deciding *Law*. First, it referred to five recent federal reports that had resulted at least in part from questions about the constitutionality of age limits on *Canada Pension Plan* survivor benefits,[13] which was the central issue in *Law*. Nevertheless, in *Law*'s opinion, these reports merited a single generic reference — one that left the misleading impression that the appellant alone had raised them.[14] Second, the De March report made it clear that all but the first of these five federal reports had recommended changes to the age limits on *Canada Pension Plan* survivor benefits, whether for reasons of constitutionality or changing social conditions.[15] In addition, De March pointed out that after the first of these reports had appeared, the federal government "acknowledged that the current criteria may no longer be appropriate."[16] Yet again, *Law*'s opinion was silent, containing no hint either of this acknowledgment or of the recommendations of these five federal reports.[17]

Given the durability and consistency of the pressures for changing *Canada Pension Plan* survivor benefits, it is surprising that the Minister failed to concede, and the Court failed to find, that the age limits violated *Charter* equality rights. After all, that would not have ended the matter. Rather, it would merely have shifted the burden onto the government to show why the infringement should be saved under section 1. Even absent any intrinsic reason, the federal government would have had a strong federalism argument. Pensions were originally a provincial responsibility under the *Constitution Act, 1867* and this did not change until 1951 when section 94A was added (and revised in 1964) to enable Parliament to legislate with respect to old age pensions and supplementary benefits, including survivors' and disability benefits.[18] Since section 94A also provides that federal pension laws cannot affect the operation of provincial pension laws, at best the situation is one of concurrent powers.[19] Concurrency alone would have given the Court pause in its section 1 analysis; and when taken in combination with the existence of on-going federal-provincial negotiations aimed at reaching a consensus, as well as of "analytical work on several options" being "currently underway," as evidenced in De March's report,[20] it is not difficult to imagine the Court sustaining a section 1 argument even if only temporarily.[21]

Deference and even hyperdeference[22] aside, why did the Canadian Supreme Court decide to hear *Law*? After all, it had gone through four levels of appeal involving at least ten appellate decision-makers.[23] Why add the nine more Court voices to the nine that had already denied

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indicating whether it was their source. Interestingly enough, there was a slight variation between the citation in para. 8 and the corresponding citation in the De March report, leaving it open to speculation whether the former was a correction or typo.

13 *Law*, PAB, *supra* note 8 at 6081, referring to: (i) the *Report of the Parliamentary Task Force on Pension Reform* (The "Frith" Report) 1983; (ii) *Equality for All*, Report of the Parliamentary Committee on Equality Rights, 1985; (iii) *Toward Equality*, The Response to the Report of the Parliamentary Committee on Equality Rights, 1985; (iv) *Survivor Benefits under the Canada Pension Plan*, a Consultation Paper released in 1987; and (v) the Report on the Consultation Paper by the Standing Committee on National Health and Welfare in 1988.

14 *Law*, SCC, *supra* note 1 at para. 100: "Before answering these questions, it is useful to note that, although the appellant has referred this Court to government reports and other sources which favour extending survivor's pensions to younger spouses ..."

15 *Law*, PAB, *supra* note 8 at 6081, quoting from the De March report that: (i) the Frith Report "stated that ... further study of the CPP survivor's benefits was required in order to identify why changes were needed and who would gain or lose from such changes;" (ii) *Equality for All* "recommended that benefits under the CPP be awarded without reference to age, family status or disability;" (iii) in *Toward Equality* "the Government recognized that social programs must evolve to reflect changing social conditions and that the Government intended to work with the provinces in an effort to reach a consensus on reform;" (iv) the Consultation Paper was the culmination of "extensive discussions between federal and provincial officials" which had occurred after the federal government "acknowledged that the current criteria may no longer be appropriate and stated its intention to work with the provinces to arrive at a consensus on this issue;" and (v) the Report on the Consultation Paper by the Standing Committee on National Health and Welfare "supported the major thrust of the paper but suggested some fundamental changes in benefit structure."

16 *Ibid.*

17 *Supra* note 1. See comment reproduced at note 14.

18 *British North America Act, 1951* (U.K.), 14–15 Geo. VI, c. 32, as amended by the *Constitution Act, 1964* (U.K.), 12–13 Eliz. II, c. 73.

19 P.W. Hogg, *Constitutional Law of Canada*, stud. ed. (Scarborough: Carswell, 1999) at 385.

20 *Law*, PAB, *supra* note 8 at 6081.

21 *Ibid.* at 6085 wherein Rutherford J. held: "In the context of the *Canada Pension Plan* with its complexities, cross-subsidizations, inter-relationships with other support-benefit programs and initiatives and its federal-provincial support base and amendment formula, the courts and administrative tribunals which must consider legal challenges of the kind raised in this case should exercise the greatest deference and restraint before invalidating any part of such legislation on *Charter* grounds."

22 *Hyperdeference* is a term I derived by combining "hyper," meaning "excessive," with the ordinary, not legal, meaning of "deference," which refers to courts refusing to second-guess legislative policy choices. I use it to describe a decision such as *Law* wherein the Court upholds the impugned legislation without ever finding a rights violation.

23 Subsequent to the original refusal of benefits, the first appeal was directed to the Minister of National Health and Welfare; the second, to the Pension Plan Review Tribunal (unreported, but referred to in *Law*, SCC, *supra* note 1 at para. 12) which consisted of at least three members; the third, to the Pension Appeals Board (*supra* note 8) which consisted of Dureault, J., Chairman; Rutherford, J., Vice-Chairman; and Angers, J.A., and the fourth, to the Federal Court of Appeal (*supra* note 11) which consisted of Isaac C.J., Stone and McDonald JJ.

Nancy Law's claim?[24] Interestingly enough, the judges also felt some obligation to respond to that question. According to Justice Iacobucci, the Court decided *Law* "in order to provide a set of guidelines for courts that are called upon to analyse a discrimination claim under the *Charter*."[25] Seemingly, the case provided "a useful juncture at which to summarize and comment upon [the basic principles relating to the purpose of s. 15(1) and the proper approach to equality analysis]."[26] However, it is unclear why it was timely. Although Justice Iacobucci preferred to "believe it is fair to say that there has been and continues to be general consensus regarding [these basic principles]," he also acknowledged that "there have been differences of opinion among the members of this Court as to the appropriate interpretation of s. 15(1)."[27] Astoundingly, he then wrote a further 108 paragraphs without setting out any of these differences. This smacks of damage control.

There are other indications that *Law*'s ambition might be vintage damage control. Not least was its eschewal of the recent and robust factionalism that permeated virtually every paragraph of the equality trilogy[28] in favour of a bland, pedantic portrayal of judicial unanimity. The decision was itself authored, perhaps strategically, by the Justice whom Canada's national newspaper has characterized as "neutral, or at least unpredictable."[29] Further, it lacked at least two of the features that have frequently served as indicia of serious late-twentieth-century constitutional jurisprudence — namely, there were no equality writings included among the three items set out on the unusually short list of "Authors Cited"[30] and, more significantly, no interveners. Of course, *Law* involved the deferral of survivor benefits to retirement age (assuming the equality seeker lived that long) rather than their outright denial, and it was grounded in age and not sex discrimination, which combined to make it an unlikely candidate for social activism. Finally, and most significantly, *Law*'s opinion contained not a whiff of the section 15(1) relevancy test propounded by Justice Gonthier in *Miron*[31] and relied upon by Justice La Forest in *Egan*.[32] Yet this test was so controversial as to be conspicuous by its omission. Does *Law*'s reticence mean it has been laid to rest? Or does it soldier on in another guise? Might some reference to it have put the Court's consensus in jeopardy?

The articulation of the relevancy test threatened, and was intended to threaten, equality seekers. Thus it is important to understand whether it is really gone or whether the Court has reconstituted it. Before considering this issue, however, I want to briefly set out *Law*'s context and outline Justice Iacobucci's opinion. Thereafter, I intend to argue that aside from formatting section 15(1) equality analysis, *Law*'s approach drastically curtails it. Clearly, this happened to Nancy Law's claim. Moreover, not only does this approach evidence a re-articulation of the relevancy test in the guise of what are called "contextual factors," it is at odds with the purpose of section 15(1) as Justice Iacobucci crafted it. In sum, I conclude that consistency requires the Court either to redefine the meaning of equality rights or to change its approach to equality analysis. Otherwise, it will be perceived not as adjudicating but as controlling *Charter* equality rights.

Context

The facts are simple. In 1991, at the age of thirty, Nancy Law was widowed when Jason Law, her husband of ten years, died at the age of fifty. Since he had contributed to the *Canada Pension Plan* for twenty-two years, she applied for survivor's benefits. Her application was refused because the Plan is structured to defer benefits until retirement age if surviving spouses have neither dependent children nor disability and are under the age of thirty-five. Irrespective of dependent children or disability, surviving spouses over the age of forty-five receive full benefits while those between the ages of thirty-five and forty-five receive gradually reduced benefits.[33] Not surprisingly, Nancy Law believed the Plan discriminated on the grounds of age.

The De March report traced the legislative evolution of survivor's benefits under the *Canada Pension Plan*.[34] There were four reasons for their inclusion: the fact that

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24 The lone dissenter was a member of the Pension Plan Review Tribunal who, according to Iacobucci J. (*Law*, SCC, *supra* note 1 at para. 12),"found that the age distinctions in the impugned provisions were arbitrary and that Parliament could have targeted needy dependents without discrimination by legislating a test to determine need."

25 *Ibid.*, para. 5.

26 *Ibid.*

27 *Ibid.*, writing for a unanimous Court.

28 *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 [hereinafter *Miron*]; *Egan* v. *Canada*, [1995] 2 S.C.R. 513 [hereinafter *Egan*]; and *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627.

29 S. Fine, "Lose Mr. Justice Iacobucci and you lose all: Sexual Assault/A review of 24 cases before the Supreme Court of Canada shows how one man tips the scales of justice" *The Globe and Mail* (11 November 1994) A1 at A6.

30 *Law*, SCC, *supra* note 1 at 506 citing two different excerpts from the Debates of the House of Commons in 1964, as well as Sopinka et. al.'s treatise on Evidence.

31 *Miron, supra* note 29.

32 *Egan, supra* note 29.

33 According to *Law*, PAB, *supra* note 8 at 6077, in 1995, the maximum amount payable to a survivor under age sixty-five was $392.24; for a survivor over age sixty-five, the maximum was $427.91.

34 *Ibid.*

Québec proposed to include them in its plan provided the initial impetus; the expectation that most husbands were the primary financial providers meant that the husband's death created a need on the part of the surviving wife; the belief that pension contributions were deferred wages which should return to the family in an annuity form; and the desire to entitle survivors to some financial assistance as a matter of right rather than imposing on them the stigma of having to rely on social assistance. Given these rationales, it is not surprising that the initial act that was passed in 1965 provided differentially for male and female survivors, although this was changed in 1975. In 1986, a legal definition of spouse was added; it included common-law, but not gay and lesbian, relationships. As well, the provision terminating survivor's benefits on remarriage was repealed. A provision entitling the surviving spouse to the greater of the survivor's benefits in the case of more than one death was also added.

In fact, the De March report also provided estimates of the costs of eliminating the under-forty-five age criteria.[35] Including reinstatement of those previously ineligible due to the age rules, the costs would approximate $60 million in the first year of implementation. These represent permanent additional costs to the Plan. By the year 2020 the costs would have risen to $213 million. Ultimately, contribution rates would have to be raised beyond the gradual increases in place since 1987. However, the report did not include any specific information on how steeply contribution rates would have to increase if the age limits were removed.

Opinion

Justice Iacobucci's opinion had three dimensions. First, he surveyed the Court's prior jurisprudence pertaining to the meaning of section 15(1) equality rights, thereby positioning himself to forge a consensus on the purpose of that section. Next, he reviewed the ways in which the Court had previously approached *Charter* equality rights, saving only the relevancy test, and proceeded to format them "as guidelines for analysis."[36] Finally, he applied his newly formatted approach to equality analysis to *Law*'s facts, concluding that they did not support a finding of discrimination. I propose to briefly elaborate each of these dimensions in turn.

(i) Purpose of section 15(1)

After noting that section 15(1) is "perhaps the *Charter*'s most conceptually difficult provision" because equality is "an elusive concept" that has an "exalted status,"[37] Justice Iacobucci nonetheless maintained that there was "great continuity in the jurisprudence of this Court on [the purpose of the s. 15(1) equality guarantee]."[38] Beginning with Justice McIntyre's statement in *Andrews* about the purpose of section 15(1) reflecting the recognition of human beings as "equally deserving of concern, respect and consideration,"[39] he moved through similar descriptions in various intervening opinions, including those of Madame Justice Bertha Wilson in *McKinney*, referring to the "promotion of human dignity;"[40] Madame Justice Beverley McLachlin in *Miron*, referring to "human dignity and freedom;"[41] and Madame Justice Claire L'Heureux-Dubé in *Egan*, referring to "value as human beings or as members of Canadian society."[42] Finally, he cited his own joint opinion with Justice Cory in *Vriend*, in which they referred to the purpose of section 15(1) in terms of taking "a further step in the recognition of the fundamental importance and the innate dignity of the individual."[43] Not surprisingly, Justice Iacobucci concluded that "these statements share several key elements," amongst which "human dignity" played a preeminent role.[44] Under these circumstances, and as an aside, it is hard to figure out why Peter W. Hogg contended Justice Iacobucci's reference to "human dignity" was a "new element" that was "added" to section 15(1) analysis, let alone how Professor Hogg could also justify characterizing it as "the new human dignity approach."[45]

While Justice Iacobucci referred to the purpose of section 15(1) in terms of "human dignity," it is worth noting that he also described it as having more than one feature. It is practically self-evident that section 15(1) is supposed "to prevent ... the imposition of disadvantage, stereotyping or political or social prejudice" because of its reiterated reference to "without discrimination."[46] However, it is even more encouraging to discover Justice Iacobucci also subscribed to the view that section 15(1)

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35 *Ibid.*

36 *Law*, SCC, *supra* note 1 at paras. 6 and 88.

37 *Ibid.*, para. 2.

38 *Ibid.*, para. 42.

39 *Ibid.*

40 *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 391.

41 *Miron, supra* note 29 at para. 131.

42 *Egan, supra* note 29 at para. 39.

43 *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at para. 67.

44 *Supra note* 1 at para. 51.

45 Peter W. Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 1997) s. 52.7 at 52–53 (1999–Rel. 1). At 52–24 Professor Hogg mentioned the "element of human dignity that has now been injected into the s. 15 jurisprudence"; at 52–25 he referred to "the new human-dignity rule"; and at 52–26 he stated that all nine judges in *Law* had "imported into s. 15 the requirement ... of 'human dignity'," a statement that he repeated at 52–27. Finally, at s. 52.13 at 52–55 Professor Hogg reported again that the decision in *Law* involved "human dignity (an element of s. 15 that the Court in this case introduced into the jurisprudence for the first time)."

46 *Law*, SCC, *supra* note 1 at para 51.

is intended "to promote a society in which all persons enjoy equal recognition at law as human beings or a members of Canadian society, equally capable and equally deserving of concern, respect and consideration."[47] In other words, section 15(1) has two goals: preventing discrimination (or the "evil of oppression," as Justice McIntyre referred to it)[48] and promoting equality (or "human dignity," as Justice Wilson referred to it).[49] Regrettably, Justice Iacobucci did not address the consequences of ascribing more than one objective to section 15(1). Instead, he preferred to rely on the fact that past cases had focused on only one of these objectives, namely "the goal of assuring human dignity by the remedying of discriminatory treatment."[50] Therefore, until the Court confronts a case requiring it to intervene in order to promote human dignity, we can only speculate about the relevance of that feature of section 15(1) analysis.

Justice Iacobucci was more forthcoming about the meaning of human dignity. After noting that in *Rodriguez*, Chief Justice Lamer portrayed section 15(1) as being "concerned with the realization of personal autonomy and self-determination,"[51] Justice Iacobucci proceeded to offer his own rendition of how the Court's previous jurisprudence delineated the meaning of human dignity. "Human dignity means," he wrote, "that an individual or group feels self-respect and self-worth."[52] Continuing, he maintained that human dignity "is concerned with physical and psychological integrity and empowerment."[53] Accordingly, while human dignity is harmed by unfair treatment and marginalization, it is enhanced by sensitivity and recognition.[54] Ultimately, Justice Iacobucci concluded that human dignity "does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law."[55] Given the lengths to which he went to elaborate his meaning, it is hard to see how Professor Hogg could maintain that the Court's reliance on the element of human dignity is "vague" and "confusing."[56]

Moreover, Justice Iacobucci's elaboration makes it easy to understand his insistence that the "overriding concern" of section 15(1) is "protecting and promoting human dignity."[57] He failed, however, to explain why he asserted that determining "whether the fundamental purpose of s. 15(1) is brought into play in a particular claim" makes it "essential to engage in a comparative analysis."[58] When Justice McIntyre rejected the American "similarly situated" test in *Andrews*,[59] some of us dared to hope this rejection would be extended to comparative analysis in general.[60] The spuriousness of the similarly situated test derived from the false comparisons that had been forged in many of the *Canadian Bill of Rights* cases.[61] Comparative analysis is no less vulnerable to such comparisons absent the rhetoric of the similarly situated test. Another way to express this concern is to point out that comparison and the promotion of human dignity are inherently antithetical processes. In effect, comparison abstracts and generalizes, whereas human dignity — or in Justice Iacobucci's words, how an individual "feels" — could not be more specific and particularized. That Justice Iacobucci has not as yet recognized the incongruity of his approach is, of course, not to despair of future enlightenment.

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47 *Ibid.*

48 *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143 at 180-81.

49 *McKinney, supra* note 41.

50 *Ibid.*, para. 52.

51 *Rodriguez* v. *British Columbia* (A.G.), [1993] 3 S.C.R. 519 at 554.

52 *Law*, SCC, *supra* note 1 at para. 53.

53 *Ibid.*

54 *Ibid.*, stating: "Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."

55 *Ibid.*, continuing: "Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?"

56 Hogg, *supra* note 46, s.52.7 at 52-24. On the one hand, Professor Hogg seems to have an aversion for human dignity, claiming "the concept of human dignity is inherently vague and unpredictable in its application." On the other hand, Justice Iacobucci never pretended to define human dignity in the abstract. Rather, he readily acknowledged there could "be different conceptions of what human dignity means;" and he claimed he was relying on the Court's jurisprudence, which he stated, "reflects a specific, albeit non-exhaustive, definition:" *Law*, SCC, *supra* note 1 at para. 53. Could this be merely a conflict of semantic dimensions between antediluvian titans?

57 *Law*, SCC, *supra* note 1 at para. 54.

58 *Ibid.*, para. 55.

59 *Andrews*, *supra* note 49 at 166: "The similarly situated test is a restatement of the Aristotelian principle of formal equality.... The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews."

60 *Ibid.* at 164, where Justice McIntyre explicitly failed to take this step, saying instead that equality "is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises." In *Law*, SCC, *supra* note 1 at para. 24, Justice Iacobucci repeated this statement.

61 *Ibid.* at 166–8, referring to its application in *Gonzales* (BCCA) and *Bliss* (SCC) and its rejection in *Drybones* (SCC).

(ii) Contextual factors

In summarizing the approaches to section 15(1) analysis that the Court had relied upon in previous equality cases, Justice Iacobucci turned once again to *Andrews* for his starting point. He set out the three key elements Justice McIntyre had identified: "differential treatment, an enumerated or analogous ground, and discrimination in a substantive sense involving factors such as prejudice, stereotyping and disadvantage."[62] Justice Iacobucci traced these elements through intervening cases, particularly *Miron* and *Egan*, both of which he characterized as setting out a two-step approach.[63] Thus, he conveniently overlooked the third or relevancy step promoted by Justices Gonthier and La Forest. Again, he claimed to synthesize the previous articulations, this time into "three broad inquiries" that nevertheless very closely resembled Justice McIntyre's original three elements.[64] However, in the process of elaborating on the third or discrimination inquiry, Justice Iacobucci extended it beyond Justice McIntyre's original conception. While Justice McIntyre was content to define discrimination in terms of historical disadvantage, prejudice and stereotyping, Justice Iacobucci opted to import three additional factors that he categorized as "contextual."[65] In other words, only the first of his four contextual factors — "pre-existing disadvantage" — correlated with his predecessor's approach.

The three remaining contextual factors identified by Justice Iacobucci were: the extent to which the legislation takes into account the need, capacity or circumstances of the claimant; whether the purpose or effect of the law is the amelioration of the greater need or the different circumstances of a disadvantaged person or group; and the "nature and scope of the interest affected by the ... law," viz. whether it has "severe and localized consequences for the affected group."[66] To the extent that these three factors are novel, it is only by comparison with Justice McIntyre's opinion in *Andrews*. The reality is that each derives from one or more of the section 15(1) decisions that the Court has rendered since *Andrews*. In effect, these factors are internally distinguishable only in so far as Justice Iacobucci could attribute each one mainly but not entirely to a different jurisprudential source. In other words, he drew his emphasis on the claimant's actual situation mainly from Justice Sopinka's opinion in *Eaton*; his focus on amelioration, mainly from Justice La Forest's decision in *Eldridge*; and his concern for consequences, mainly from the Justice L'Heureux-Dubé's dissent in *Egan*.[67] Thus, even in developing this portion of his opinion, which most accurately could be called his unique contribution, Justice Iacobucci was quintessentially formatting rather than advancing the Court's approach to section 15(1) equality analysis. Of course, it is as important to assume responsibility for the consequences of formatting as it is for those of any other intervention.

(iii) Application

When it came to applying the third or discrimination inquiry — that is, the four contextual factors — to *Law's* facts, Justice Iacobucci began simply by asserting that: "Relatively speaking, adults under the age of forty-five have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities."[68] He might be right or he might be espousing a stereotype, but how to tell? Without more, who's to say whether adults over forty-five or their counterparts under forty-five are the more disadvantaged? More concretely, if this issue, which is crucial to *Law*'s claim, must be evaluated from the perspective of "a reasonable person in circumstances similar to those of the claimant,"[69] what qualifies the members of the Court, all of whom currently are over fifty? The easy answer is that all have lived through the under-forty-five years.[70] The harder problem is that not only times but also perspectives may change as we age. Consider for example the perspective of today's younger generations, especially those who faced incredibly high rates of unemployment when they tried to enter Canada's labour force during the past decade. I suspect at least some of them would have experienced debilitating circumstances that might prompt them to strongly disagree with Professor Hogg's assertion that "[a] minority defined by age is much less likely to suffer from the hostility, intolerance and prejudice of the majority than is a minority defined by race or religion or any other characteristic that the majority has never possessed and never will possess."[71] These selfsame unemployed youth also might question whether someone over fifty who claimed that people under thirty-five can more easily find or maintain employment than those who are over thirty-five really understood the "reality"[72] of the contemporary Canadian workforce from their perspective.

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62 *Law*, SCC, *supra* note 1 at para. 30.
63 *Ibid.*, paras. 32, 33 and 39.
64 *Ibid.*, para. 39.
65 *Ibid.*, para. 62.
66 *Ibid.*, para. 88 at 552.
67 *Ibid.*, paras. 62–74.
68 *Ibid.*, para. 95.
69 *Ibid.*, para. 60.
70 Hogg, *supra* note 20 at 1027, observing "Each individual of any age has personally experienced all earlier ages ...."
71 *Ibid.*
72 Hogg, *supra* note 46 at 52–55.

Moreover, Justice Iacobucci exacerbated his failure to analyse whether there was a pre-existing disadvantage posed by age by assuming *Canada Pension Plan* survivor benefits "concern, not the relatively immediate financial needs of surviving spouses, but their long-term financial needs."[73] While he accurately attributed this assumption to statements made by the Minister when the Plan was first introduced in the House, he neglected to mention the intervening amendments detailed in the De March report that have all but obviated the original rationales for limiting these benefits on the grounds of sex and age.[74] Finally, Justice Iacobucci appeared to entirely abandon his "contextual factors" when he conceded, "Yes, the law imposes a disadvantage on younger spouses in this class," and then immediately added, "But it is unlikely to be a substantive disadvantage, viewed in the long term."[75] Insofar as this unsubstantiated speculation was addressed to Nancy Law, who had unsuccessfully endeavoured to continue after her husband's death in the small business they had co-owned,[76] it is difficult to appreciate just how it exemplified the "subjective-objective" focus on discrimination advocated by Justice L'Heureux-Dubé in *Egan* and adopted by Justice Iacobucci in *Law*.[77]

Critique

In what follows, I critically assess only the consequences of *Law*'s failure to advert explicitly to the third test expounded in the trilogy. In *Miron* and *Egan*, Justices Gonthier and La Forest intruded a relevancy test into section 15(1) equality analysis. While in neither case did a majority of their colleagues join in their advocacy of this test, all but a majority shared their view in both cases. According to this test, if the impugned legislative distinction was based on a personal characteristic that the Court believed was relevant to the fundamental values underlying the legislation, there was no violation of the section 15(1) equality rights. If adopted, this test would have two consequences. First, as with the reasonableness or minimal scrutiny test in American equal protection jurisprudence, this test would make it rare for a court to refuse to uphold legislation under section 15(1) analysis. Fundamentally, it assumes legislative ignorance (of equality rights) in enacting legislation — a belief that is unreal, at least in the era of the *Charter* in Canada. What it neglects, in turn, is the majority's deliberate and well-rationalized incursion into minority rights. Second, it also follows that section 1 will be underutilized, governments will have fewer burdens of justification to meet and the occasions for their owning as well as explaining an interference in minority rights will all but disappear. Thus, the relevancy test threatened, and was intended to threaten, equality seekers.

Under these circumstances, I deeply regret having to suggest that *Law*'s opinion did not lay this test to rest.[78] I would be delighted to be proved wrong. In the meantime, I contend the relevancy test underlies, both directly and indirectly, the three contextual factors Justice Iacobucci identified anew. Consider the first of these factors. It requires the Court to assess the extent to which the impugned legislation takes the claimant's actual situation into account, with the result that "legislation which takes into account the actual needs, capacity or circumstances of the claimant ... will be less likely to have a negative effect on human dignity."[79] Accounting for "actual needs" seems not unlike espousing fundamental values. In both cases they are relied upon to excuse what would otherwise constitute discrimination. In Nancy Law's case this meant accepting the age limits on *Canada Pension Plan* survivor benefits on the ground that they valued the employability (or actual need), if not the marriageability, of younger surviving spouses.[80] Similarly the second contextual factor which holds that laws with "ameliorative purposes or effects" are not likely to "violate the human dignity of more advantaged individuals,"[81] seems equally consistent with the notion of sustaining values that are fundamental. Again, in Nancy Law's case this meant recognizing that *Canada Pension Plan* survivor benefits distinctions had an ameliorative purpose insofar as they actually provided remediation for older, albeit not younger, surviving spouses.[82] Finally, since the third or "nature of the interest affected" factor holds that the legislative intervention must be not only severe and localized but also economically as well as constitutionally and socially significant to qualify as

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73 *Law*, SCC, *supra* note 1 at para. 98.

74 *Ibid.*, para. 97, 102, 103, 104 and 106.

75 *Ibid.*, para. 102.

76 *Ibid.*, para. 10, noting she "was responsible for business operations and her husband had the requisite technical knowledge and expertise."

77 *Ibid.*, paras. 59 and 61.

79 *Ibid.*, para. 70.

80 *Ibid.*, para. 101 stating: "It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice." Or para. 104: "A reasonable person under the age of forty-five who takes into account the contextual factors relevant to the claim would properly interpret the distinction created by the CPP as suggesting that younger people are more likely to find a new spouse, are more able to retrain or obtain new employment, and have more time to adapt to their changed financial situation before retirement."

81 *Ibid.*, para. 72.

82 *Ibid.*, para. 102, stating: "By being young, the appellant, a fortiori, has greater prospect of long-term income replacement." Again, at para. 104: "Young people are inherently better able to initiate and maintain long-term labour force participation, and as such the impugned CPP provisions cannot be said to impose a discriminatory disadvantage upon them."

discriminatory,[83] it also resonates with upholding laws that are consistent with fundamental values. Indeed, Nancy Law's downfall was that the interests affected by *Canada Pension Plan* survivor benefits were ostensibly expressed in terms of long-term, rather than short-term, security for surviving spouses.[84]

In sum, irrespective of whether a legislative distinction is based on historical disadvantage, prejudice or stereotype, the Court can find that it is not discriminatory if it is also based on the claimant's needs, ameliorative benefits or affected interests. Applied to *Law*, it was evident from its inception that the *Canada Pension Plan* had denied benefits to women under thirty-five who were surviving spouses (i.e., historical disadvantage). This denial was triggered by their youthful age (i.e., prejudice). And it presumed they wanted remarriage and were employable (i.e., stereotype).[85]

However, Justice Iacobucci held that the age distinction was not discriminatory or, more accurately, he stated: "Yes, the law imposes a disadvantage on younger spouses in this class. But it is unlikely to be a substantive disadvantage, viewed in the long term."[86] To the contrary, it became an acceptable distinction "when the dual perspectives of long-term security [i.e., affected interests] and the greater opportunities of youth [i.e., claimant's needs] are considered."[87] More specifically, he held Nancy Law "is more advantaged by virtue of her young age [i.e., ameliorative benefits]."[88] Under these circumstances, whether the three contextual factors proposed by Justice Iacobucci were considered individually or in combination, they made the *Canada Pension Plan* survivor benefits age distinction not only relevant (or acceptable) but also legal (or permissible). Perhaps *Law*'s lesson is to teach us to be cautious when all the ducks line up so easily in a row, notwithstanding whether it is in the Court's interest to propagate it.

Even were I not persuasive about imputing the relevancy test directly to these three contextual factors, I would nonetheless contend that they are indirectly related to it. In effect, these factors share three similar consequences with this test. First, they evince the same underlying negativity with respect to promoting equality rights as did the relevancy test. Semantics notwithstanding, these three contextual factors are designed as impediments that equality seekers much overcome rather than as assistive devices.[89] For some peculiar reason, the Court seems afraid to develop a section 15(1) equality rights test that is as permeable as the *Irwin Toy* test with respect to infringements of the right to freedom of expression.[90] Second, since the three contextual factors resemble the relevancy test in that they burden the equality seeker's case, the result is that neither approach burdens the government. Indeed, the government is never required to justify the legislative distinction under section 1 because the equality seeker cannot meet the onerous (and seemingly, ever increasing) requirements of section 15(1). I agree with Professor Hogg's contention that *Law*'s approach blurs the relationship between section 15(1) and section 1 such that most, if not all, of the analysis takes place in section 15(1).[91] Where we differ is in our identification of the cause. He attributed the collapse to the "new element of human dignity," whereas I fault the three ostensibly new contextual factors. Third, the three factors newly identified as contextual by Justice Iacobucci are no more self-evident, nor fundamental, than the values recognized as relevant by Justices Gonthier and La Forest in *Miron* and *Egan* respectively.

In effect, *Law*'s three factors are demonstrably over-inclusive when we examine who benefits, or might benefit, from *Canada Pension Plan* survivor benefits simply because they are over forty-five. Consider that such benefits would be routinely awarded not only to female, but also male, vice-regal spouses irrespective of whether their mates were federal or provincial appointees; not only to female, but also to male, administrators and/or academics whose salaries of over $100,000 are a matter of public record, yet who may have spouses who work and therefore contribute to the *Canada Pension Plan*; or even to judges, who have spouses who

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83 *Ibid.*, para. 74.

84 *Ibid.*, para. 100, stating that "the purpose and function of the impugned CPP provisions is not to remedy immediate financial need experienced by widows and widowers, but rather to enable older widows and widowers to meet their basic needs during the longer term." Or para. 104, "[I]it is open to the legislature to use age as a proxy for long-term need."

85 *Ibid.*, para. 96, where Justice Iacobucci set this out as one of the appellant's arguments. Cf. para. 108, where he subsequently denied its merit: "The impugned distinctions in the present case do not stigmatize young persons, nor can they be said to perpetuate the view that surviving spouses under age forty-five are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the appellant happens to be a member."

86 *Ibid.*, para. 102.

87 *Ibid.*

88 *Ibid.*, para. 105.

89 Professor Hogg, *supra* note 46, s. 52.7 at 52–25 also voiced this critique, although he attributed it to the new element of human dignity; in contrast, I limit it specifically to these three contextual factors.

90 *Irwin Toy Limited* v. *Québec (Attorney General)*, [1989] 1 S.C.R. 927.

91 Professor Hogg, *supra* note 46, s. 52.7 at 52–25 portrayed *Law*'s decision as confusing the relationship between section 15 and section 1 and leaving section 1 "with little work to do;" and at 52–26 as suffering from the vice of blurring "the roles of s. 15 and s. 1."

also work and contribute to the *Canada Pension Plan*, including current members of the Court. These readily imaginable possibilities make it hard to look Nancy Law in the eye and maintain that her "human dignity" has not been impaired by the age limits of the *Canada Pension Plan* survivor benefits regime.

Conclusion

Fortunately, the Court did not maintain that *Law*'s opinion was the last word on section 15(1) equality analysis. Hopefully, the Court will opt to bring its contextual analysis more into line with its delineation of that section's purpose. Clearly, I share the Court's designation of human dignity as a primary, if not the primary, purpose of section 15(1). The genealogy of human dignity as a philosophical inspiration and as an aspiration with internationally defined dimensions is well recognized. In my view, Professor Hogg was right to criticize *Law*'s opinion for coming "close to saying that the legislative distinction must be invidious"and for being "inconsistent with the ruling in *Andrews*."[92] However, I suggest that he threw out the baby with the bathwater when he condemned the goal of human dignity, rather than simply eschewing the three additional contextual factors that Justice Iacobucci had formatted. While the Justice's formatting treats equality seekers egregiously, his reliance on human dignity will still save some babies, as the Court's subsequent decisions in *M.* v. *H.* and *Corbière* v. *Canada* illustrate.[93]

I am more pessimistic about the Court's ability to re-vision its perspectives on age-based legislative distinctions. The Court's record on age is almost as bad as its record on sex,[94] even though the judges did recognize that section 15(1) had been violated in *McKinney*.[95] That case revealed the Court's vulnerability to age-based equality claims, not least because it upheld legislation permitting mandatory retirement policies to prevail in Ontario for persons over sixty-five even though federally appointed judges can themselves sit till they reach the age of seventy-five. As well, the split opinions in *McKinney* revealed that the bench was unable to agree about who was disadvantaged; namely, whether it was those who were forced to retire at sixty-five or the under-sixty-fives waiting for the vacated jobs. Since the contextual factors formatted in *Law* require the Court to take a position on who is advantaged and who is disadvantaged, *Law*'s consensus may yet come unglued. Were some members of the Court finally to acknowledge their partiality towards age classifications, perhaps they would consider re-visiting Nancy Law's claim or advocate adding age to the factors pertinent to ensuring that future judicial appointments are sufficiently diverse to meet twenty-first-century constitutional needs.❑

Beverley Baines
Faculty of Law, Queen's University.

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92 *Ibid.*, s. 52.7 at 52–27, although his self-indulgence surfaced when he continued: "If this new doctrine becomes firmly established, this section of this chapter will have to be eliminated as heresy, despite the soundness of the original *Andrews* rule."

93 *M.* v. *H.*, [1999] 2 S.C.R. 3; and *Corbière*, *supra* note 7.

94 Beverley Baines, "Another Century of Inequality" (paper delivered at the Massey College/School of Graduate Studies Symposium, Stepping forward, Stepping back: Women's Equality at Century's End, University of Toronto, 3 March 2000).

95 *McKinney*, *supra* note 41.

A Flawed Synthesis of the Law

June Ross

While other recent equality cases have had greater or more immediate societal significance, such as *M.* v. *H.*[1] regarding maintenance rights and obligations between same-sex partners, and *Corbière* v. *Canada (M.I.N.A.)*[2] regarding residency requirements for band council elections, it is *Law* v. *Canada (Minister of Employment and Immigration)*[3] that, for better or worse, will stand beside the Supreme Court of Canada's decade-old judgment on section 15(1) of the *Canadian Charter of Rights and Freedoms*,[4] *Andrews* v. *Law Society of British Columbia*.[5] *Law* does not claim to supersede the *Andrews* approach to section 15(1) interpretation, or even to strike out in a new direction, but merely to synthesize the law as stated in *Andrews* together with insights from the ensuing jurisprudence.[6] I will argue that while *Law* is indeed an important decision, its synthesis of the law is ultimately flawed.

In *Law*, Iaccobucci J. for the Court set down a reformulated set of guidelines[7] to the interpretation of section 15(1), purportedly "derived from the jurisprudence of [the] Court."[8] It is therefore appropriate that *Law* be evaluated, at least in part, by the accuracy and comprehensiveness of its review of the jurisprudence it engages. To this end I will examine *Andrews* and other cases cited in *Law* to determine whether they provide support for the *Law* guidelines. I will argue that upon close examination, the *Law* approach is not, as the Court claims, a derivation from *Andrews* and the succeeding case law. It is more accurately described as the adoption of one of Madame Justice Wilson's minority positions, and a contradiction of one of the underlying premises in *Andrews*. The implications of this departure from precedent, and of its covert introduction into section 15(1) interpretation, will also be explored.

The *Law* Guidelines

Law addressed the constitutionality of *Canada Pension Plan* provisions[9] which draw distinctions on the basis of age regarding entitlement to survivors' pensions. The issue was whether these provisions discriminate against persons under age forty-five contrary to section 15(1) of the *Charter* and, if so, whether they are justified under section 1. In *Law*, a contributor to the Plan died, leaving a wife, aged thirty. She attempted to obtain surviving spouse benefits from the Plan, but was ineligible due to her age. The Plan provides reduced benefits for spouses aged thirty-five to forty-five, and provides no benefits for spouses under thirty-five, unless the spouse is disabled or caring for dependent children.

In earlier cases involving age discrimination claims relating to issues of retirement and benefits, the Court found violations of section 15(1) resulting from differential treatment based on the enumerated ground of age. A flexible, or deferential approach to section 1 justification followed. This led to upholding mandatory retirement, but invalidating the denial of unemployment insurance benefits to persons over sixty-five.[10] *Law* departed significantly from this model, with a unanimous Court finding no violation of section 15(1).

In the course of coming to this conclusion, Iaccobucci J. developed a set of guidelines to the interpretation of section 15(1) that emphasizes the importance of a purposive and contextual approach, and

1 (1999) 171 D.L.R. (4th) 577 (S.C.C.).
2 (1999) 173 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Corbière*].
3 (1999) 170 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Law*].
4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].
5 (1989) 56 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Andrews*].
6 *Supra* note 3 at 19.
7 Iaccobucci J. for the Court emphasized that these guidelines did not constitute a "rigid test," but "points of reference which are designed to assist a court" in identifying and evaluating contextual factors in a purposive manner (*ibid.* at 37).
8 *Ibid.*
9 *Canada Pension Plan*, R.S.C. 1985, c. C–8, ss. 44(1)(d) and 58 [hereinafter the Plan].
10 *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 [hereinafter *McKinney*]; *Tétrault-Gadoury* v. *Canada (Canada Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

provided the following articulation of the underlying purpose of section 15(1):[11]

> In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

This statement of the purpose of section 15(1) is beyond reproach. However, the relationship between this purpose and the scope that should be given to section 15(1) raises a significant issue. *Charter* interpretation has been dominated by a two-stage analysis in which the definition of a right or freedom is addressed first, and the justifiability of its restriction examined subsequently. Under this approach there are, in every case, *two* opportunities for a court to consider the underlying purpose of a *Charter* guarantee. In some contexts, notably in the interpretation of section 2(b) and, I will argue, in the pre-*Law* approach to section 15(1), the Court purposively adopted a definition that overshoots the underlying purpose, in order to ensure that the justification stage was not circumvented. This was the *Andrews* method and, as I will argue, it was well suited to achieve the purpose of section 15(1).

The *Law* guidelines set out three "broad inquiries" that should be undertaken to "determine a discrimination claim:"[12]

> (a) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (b) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
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> and
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> (c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

The third inquiry requires engagement in a case-by-case, context-specific determination that a challenged form of differential treatment violates the purpose of section 15(1)[13] by violating human dignity.[14] This direct case-by-case reference to the underlying purpose of section 15(1) is the innovation of *Law*.

While the third inquiry is reminiscent of the approach to section 15(1) advocated by L'Heureux-Dubé J. in *Egan* v. *Canada*[15] and in *Miron* v. *Trudel*,[16] there exists a major difference. In *Law* the requirement to demonstrate a violation of human dignity is an addition to, not a substitution for the requirement to demonstrate differential treatment based on enumerated or analogous grounds. The *Law* requirement thus narrows the definition of discrimination, whereas L'Heureux-Dubé J.'s approach had the potential to expand it.

ANDREWS REVISITED[17]

From its review of *Andrews*, the Court in *Law* drew the three inquiries in a discrimination claim set out above. This extrapolation involved a substantial reworking in the case of the third inquiry, accompanied by a significant omission in the recapitulation of the *Andrews* rationale.

Andrews has been, and ostensibly remains, central to section 15(1) analysis. It was the point of departure in *Law*'s survey of the jurisprudence, which commenced

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11 *Supra* note 3 at 39.

12 *Ibid.* at 38.

13 *Ibid.* at 39: "The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant."

14 *Ibid.* The search for a purposive violation is summarized in these terms: "contextual factors ... determine whether legislation has the effect of demeaning a claimant's dignity;" "a variety of factors ... may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity" (at 40).

15 (1995) 124 D.L.R. (4th) 609 at 635–38 (*"The imperfect vehicle of 'grounds'"*) and 638–42 (*"Putting 'discrimination' first"*) (S.C.C.) [hereinafter *Egan*].

16 (1995) 124 D.L.R. (4th) 693 at 727–28 (S.C.C.) [hereinafter *Miron*].

17 *Supra* note 3 at 13.

with the assertion that the basic principles laid down in *Andrews* "continue to guide s. 15(1) analysis to the present day."[18]

The *Andrews* principles were formulated with both the purpose of section 15(1) *and* its constitutional context in mind.[19] They were intended to create a right to equality that would operate appropriately within the judicial setting.[20] In designing an approach to achieve this, the Court in *Andrews* drew from an established body of law interpreting human rights statutes.[21]

As a matter of constitutional theory, section 15(1) does not merely authorize, but obliges judicial enforcement. To best achieve the purpose of section 15(1), its interpretation should limit judicial discretion to the point where it will be perceived by members of the judiciary and by the public as not merely enabling, but requiring action. Such an interpretive approach promotes fulfilment of the goals of section 15(1) by providing a firm basis for judicial action, rather than relying on subjective perceptions of individual judges. The *Andrews* approach contained features that provide focus and force to the equality right, limiting judicial discretion in this positive way.

One of the most important elements of *Andrews*, reflecting one of the most important characteristics of human rights law, was its placement of the onus of justification in *prima facie* instances of discrimination on the discriminator. The identification of the justification process with section 1 also ensured that the objective and the proportionality of a potentially discriminatory action were fully considered. In this way, the right to equality was given force: the court was required to act in the absence of sufficient proof that differential treatment pursued an important objective in a reasonably proportional manner. The court's intervention was explained and justified by government's failure to meet this burden of proof.[22]

It is true, as noted in *Law*, that McIntyre J. in *Andrews* held that discrimination involved more than "a mere finding of a distinction" and that section 15(1) forbade only those distinctions "which involve prejudice or disadvantage."[23] However, the identification of distinctions involving prejudice or disadvantage was, to a large extent, accomplished by the presence of enumerated or analogous grounds. McIntyre J. noted that enumerated grounds "reflect the most common and probably the most socially destructive and historically practised bases of discrimination."[24] Both McIntyre and Wilson JJ. related analogous grounds to "discrete and insular minorities," identified, at least in part, by the presence of stereotyping, historical disadvantage, or vulnerability to political and social prejudice.[25] Enumerated or analogous grounds were treated, to use the words of McLachlin and Bastarche JJ. in *Corbière*, as "markers of suspect decision-making or potential discrimination."[26] A suspect decision might not amount to a constitutional violation, but, as stated by LaForest J. in *Andrews*, it must be justified:[27]

> While it cannot be said that citizenship is a characteristic which "bears no relation to the individual's ability to perform or contribute to society" ... it certainly typically bears an attenuated sense of relevance to these. That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification.

It is also the case, again noted in *Law*, that McIntyre J. held in *Andrews* that a section 15 inquiry must go beyond the finding of a distinction based on an enumerated or analogous ground.[28] However, the additional step contemplated by McIntyre J. did not involve a search for some indication of stereotyping or prejudice apart from the presence of enumerated or analogous grounds. Rather, he looked to the "*effect* of the impugned distinction or classification on the complainant."[29] The nature of the required effect was addressed in McIntyre J.'s definition of discrimination:[30]

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of

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18 *Ibid.*

19 *Andrews, supra* note 5 at 15 and at 19–21 under the heading "*Relationship between s. 15(1) and s. 1 of the Charter.*"

20 *Ibid.* at 23, rejecting the argument that "without discrimination" should be interpreted as "without distinction," as this would subject "universally accepted and manifestly desirable legal distinctions" to *Charter* review (quoting McLachlin J.A., as she then was).

21 *Ibid.* at 22.

22 *Miron, supra* note 16 at 744–45, per McLachlin J. (as she then was) contains a full discussion of the importance of this aspect of *Andrews, ibid.*

23 *Ibid.* at 22–23, cited in *Law, supra* note 3 at 14–15.

24 *Ibid.* at 18.

25 *Ibid.* at 24 (McIntyre J.) and 32–33 (Wilson J.).

26 *Supra* note 2 at 13.

27 *Andrews, supra* note 5 at 40–41.

28 *Law, supra* note 3 at 14–15, referring to *Andrews, ibid.* at 23.

29 *Andrews, ibid.* at 23 (emphasis added).

30 *Ibid.* at 18 (emphasis added).

> the individual or group, which has the *effect of imposing burdens, obligations, or disadvantages on such individual or which withholds or limits access to opportunities, benefits, and advantages available to other members of society*. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

That the section 15(1) test should be limited to the issues of distinction (intentional or not), grounds (enumerated or analogous), and effect (imposition of a disadvantage or denial of a benefit) is made clear in its application within *Andrews*. In finding that there had been discrimination, McIntyre, Wilson, and LaForest JJ. emphasized the grounds for the exclusion (citizenship, an analogous ground) and the impact of the rule on affected individuals (a bar to employment, or a "burden in the form of some delay").[31] Evidence that might support or discount stereotyping in relation to the law was not addressed under section 15(1), but under section 1. LaForest J. followed his statements regarding the "attenuated" relevance of citizenship in relationship to merit or ability, by stating that justification for a decision based on citizenship should occur under section 1, "essentially because, in matters involving infringements of fundamental rights, it is entirely appropriate that government sustain the constitutionality of its conduct."[32]

Another important aspect of *Andrews* was the relationship between discrimination and enumerated or analogous grounds. This feature provided clarity and boundaries to the scope of section 15(1).[33] Further, its link to the language of section 15(1) and human rights law generally made a strong case that the interpretation reflected their common underlying purpose.[34] Finally, the reference to grounds made the onus shift possible, as discrimination was defined by factors distinguishable from those considered in the course of a section 1 review.[35]

A concern to reserve an appropriate role for section 1, and to define section 15(1) in a way that would avoid undue overlap with section 1 considerations, ran throughout the *Andrews* decision. The desirability of keeping "right guaranteeing sections ... analytically separate from s. 1" was discussed at length.[36] This was a primary reason for rejecting the approach taken by McLachlin J.A. (as she then was) in the British Columbia Court of Appeal decision in *Andrews*, which would have considered the reasonableness or fairness of classifications under section 15(1), and adopted instead the "enumerated or analogous grounds" approach.[37] Despite this, in *Law* the maintenance of separate functions for section 15(1) and section 1 does *not* appear as one of the basic interpretive principles. In contrast to *Andrews*, the Court in *Law* did not express particular concern to avoid including section 1 issues of justification under the reformulated section 15(1) test.[38] It is this major and unacknowledged departure from *Andrews* that gives me the greatest pause about the *Law* approach to the right to equality.

POST-*ANDREWS* JURISPRUDENCE[39]

Law's review of the jurisprudence after *Andrews* is notable for its failure to deal with or even recognize the Court's divided decisions in *Egan*[40] and *Miron*[41] or the controversial relevancy test that caused those divisions. Further, its assertion that "the jurisprudence of the Court has affirmed and clarified ... the necessity of establishing discrimination in a substantive or purposive sense, beyond mere proof of a distinction on enumerated or analogous grounds"[42] is supported by no more than a list of cases and page references, lacking any detailed examination. I propose to explore the case law cited in support of this proposition in detail, and subsequently, to consider the relationship of the relevancy test to the *Law* approach.

The following cases, along with specific references, were cited in *Law* to support the requirement to establish discrimination in a purposive sense: *R.* v. *Hess*, *R.* v.

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31 *Ibid.* at 24 and 32–33.

32 *Ibid.* at 41.

33 In contrast with, for example, the approach advocated by L'Heureux-Dubé J. in *Miron, supra* note 16, and in *Egan, supra* note 15. As noted in P.W. Hogg, *Constitutional Law of Canada, 3d ed.*, loose-leaf (Toronto: Carswell, 1997) at 52–22, her approach, which "relies heavily on judicial discretion" would likely "produce quite variable results from judges who would place different weights on the values in play."

34 *Andrews, supra* note 5 at 18, 23. These comments in *Andrews* introduce the rejection of the approach to s. 15(1) that would have equated *any* distinction with discrimination.

35 *Ibid.* at 24.

36 *Ibid.* at 19–21.

37 *Ibid.* at 23–24.

38 A relatively brief reference to the issue was made (*Law, supra* note 3 at 34–35), but the point was not incorporated into the summary of basic principles.

39 *Ibid.* at 16.

40 *Supra* note 15.

41 *Supra* note 16.

42 *Supra* note 3 at 18.

Nguyen,[43] *McKinney* v. *University of Guelph*,[44] *R.* v. *Swain*,[45] *Weatherall* v. *Canada (Attorney General)*,[46] *Haig* v. *Canada*,[47] *Benner* v. *Canada (Secretary of State)*,[48] and *Eaton* v. *Brant County Board of Education*.[49] I will address these cases in four groups: cases which provide limited and partial support for *Law*'s approach; the *McKinney* decision, contradicting *Law*; irrelevant cases, which neither support nor contradict *Law*; and the *Eaton* case, a precursor to *Law*.

Cases Which Provide Limited and Partial Support for *Law*'s Approach

R. v. *Hess; R.* v. *Nguyen*[50]

The Court in *Law* referred to Wilson J.'s majority judgment in this case which found that the *Criminal Code* provision for statutory rape, making it an offence for a male person to have intercourse with a female person under the age of fourteen, did not violate section 15(1). Wilson J. stated as follows:[51]

> [W]e must not assume that simply because a provision addresses a group defined by reference to a characteristic that is enumerated in s. 15(1) of the *Charter*, we are automatically faced with an infringement of s. 15(1). There must also be a denial of an equality right that results in discrimination . . . [W]e are asked to consider when a distinction drawn on the basis of sex may legitimately be made and when it may not ... [T]he answer to this question will depend on the nature of the offence in issue.

Wilson J. adds that she is[52]

> fully aware of the dangers inherent in arguments that seek to justify particular distinctions on the basis of alleged sex-related factors. All too often arguments of this kind are used to justify subtle and sometimes not so subtle forms of discrimination. They are tied up with popular yet ill-conceived notions about a given sex's strengths and weaknesses or abilities and disabilities.
>
> Nevertheless there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences ... [T]he fact that the legislature has defined an offence in relation to these realities will not necessarily trigger s. 15(1).

McLachlin J. for the minority would have found a violation of section 15(1) on the basis that the differential treatment was based on enumerated or analogous grounds and resulted in the imposition of a burden.[53] This conclusion supports the view that what the majority was endorsing was a departure from exclusive reliance on these elements. Wilson J.'s judgment made it clear that this departure was intended to be a modest one related to biological differences between the sexes — gender characteristics, as opposed to gender stereotypes. Wilson J. also cautioned on the risks inherent in the approach, endorsing the view that gender-based distinctions are almost always suspect, and that distinctions based on "ill conceived notions" should be subject to justification under section 1.

Weatherall v. *Canada*[54]

In *Weatherall,* LaForest J. for the Court held that prison rules permitting frisk searches of men by women, in contrast to prohibited frisk searches of women by men, probably did not violate section 15(1):[55]

> It is also doubtful that s. 15(1) is violated ... The jurisprudence of this Court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women ... the reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors ... Viewed in this light, it becomes clear that the effect of cross-gender searching is

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43 [1990] 2 S.C.R. 906 at 927–28 [hereinafter *Hess*] per Wilson J.
44 *Supra* note 10 at 392–93 per Wilson J.
45 [1991] 1 S.C.R. 933 at 992 [hereinafter *Swain*] per Lamer C.J.
46 [1993] 2 S.C.R. 872 [hereinafter *Weatherall*].
47 [1993] 2 S.C.R. 995 at 1043–44 [hereinafter *Haig*] per L'Heureux-Dubé J.
48 [1997] 1 S.C.R. 358 at 395 [hereinafter *Benner*].
49 [1997] 1 S.C.R. 241 at 272 [hereinafter *Eaton*].
50 *Supra* note43.
51 *Ibid.* at 928–29.
52 *Ibid.* at 928–29.
53 *Ibid.* at 944; Gonthier J. concurring.
54 *Supra* note 46.
55 *Ibid.* at 877–78.

> different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all.

Even if this differential treatment had been found to be discriminatory, the Court went on to hold that any discrimination would clearly be saved by section 1. The section 15(1) holding is thus an alternative ground only. If it is to be credited at all, it should be considered no more than a modest extension of the holding in *Hess* that different treatment based on biologically based gender characteristics, perhaps particularly where the treatment is protective of women in view of their greater vulnerability, does not violate section 15(1).

Benner v. *Canada*[56]

Iaccobucci J. for the Court held that differential entitlement to citizenship for children born before 1977 whose mothers were Canadian, as compared to children born at the same time whose fathers were Canadian, violated section 15(1). He commented that where a denial of equality is based upon enumerated or analogous grounds, "it will generally be found to be discriminatory, although there may, of course, be exceptions" (citing *Weatherall*).[57] Canada argued that the differential treatment did not constitute discrimination because the challenged provision was intended to remedy an earlier, more extreme form of discrimination. The Court held that Parliament's remedial intent did not insulate the amended law from *Charter* review. Canada argued further that the differential treatment was not based on stereotyping, but on a desire to end discrimination and increase access to citizenship while continuing to ensure the safety of Canadians. The Court held that the previous legislation had been based on a stereotype, and that the new law, by maintaining a distinction based on parenthood, maintained the stereotype. In sum, while the Court made reference to stereotyping, the case is consistent with the view that despite good intentions, in general, adverse distinctions based on enumerated or analogous grounds will be found to be discriminatory.

Contradicting Law: *McKinney* v. *University of Guelph*[58]

In this case, Wilson J., in the dissent[59] agreed with other members of the Court that mandatory retirement discriminated on the basis of age, noting with respect to the enumerated grounds of discrimination:[60]

> The listing of sex, age and race, for example, is not meant to suggest that any distinction drawn on these grounds is *per se* discriminatory. Their enumeration is intended rather to assist in the recognition of prejudice when it exists. At the same time, however, once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory ... [T]he mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrefutable presumption of prejudice. Rather it compels one to ask the question: is there prejudice? Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue?

LaForest J., for the majority, addressed the argument that mandatory retirement did not violate section 15(1) because there was no "proof of irrationality, stereotypical assumptions and prejudice."[61] He rejected this argument as irrelevant on the ground that *Andrews* had made it clear that the *Charter* prohibited unintentional as well as intentional discrimination. L'Heureux-Dubé J. agreed with LaForest J.'s reasons, and also noted with approval comments made by MacGuigan J.A. in *Headly* v. *Canada (Public Service Commission Appeal Board)* regarding the significance of age-based differential treatment:[62]

> [T]he fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings ... can only mean, I believe, that non-trivial pejorative distinctions

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56 *Supra* note 48.
57 *Ibid.* at 393–94.

58 *Supra* note 10.
59 *Ibid.* LaForest J. for the majority found a violation of s. 15(1), but held that it was justified under s. 1 (Dickson C.J. and Gonthier J. concurred); Sopinka J. agreed with the reasons of LaForest J. as to s. 15(1) and s. 1, and L'Heureux-Dubé J., dissenting, also agreed with LaForest J. as to s. 15(1). Five of seven of the sitting justices thus agreed with LaForest J.'s s. 15(1) reasons. Cory J. agreed with Wilson J. as to s. 15(1), but with LaForest J. as to s. 1. Wilson J. and L'Heureux-Dubé J. both found violations of s. 15(1) that were not justified under s. 1.
60 *Ibid.* at 393.
61 *Ibid.* at 279.
62 [1987] 2 F.C. 235 at 245 (C.A.), in *McKinney*, *supra* note 10 at 423.

> based on such categories are intended to be justified by governments under section 1 rather than to be proved as infringements by complainants under section 15. In sum, some grounds of distinction are so presumptively pejorative that they are deemed to be inherently discriminatory.

In conclusion, the majority of the Court in *McKinney* rejected an approach to section 15(1) that would have addressed irrationality, stereotyping, or prejudice in mandatory retirement provisions under section 15(1), reserving these concerns for the section 1 analysis.

Irrelevant Cases Which Neither Support Nor Contradict *Law*

R. v. *Swain*[63]

Lamer C.J., Sopinka, and Cory JJ. concurring, dealt with the claim that the ability of the Crown to raise the insanity of the accused, even though limited to cases in which the accused has been proven to be otherwise guilty of the offence, violated section 15(1). Lamer C.J.'s summary of the framework for section 15(1) analysis referred to the elements of a distinction (intentional or not), effect (the imposition of a burden or denial of a benefit), and relationship to enumerated or analogous grounds, with stereotyping and prejudice discussed only in reference to the last element.[64]

Lamer C.J.'s finding that no violation of s. 15(1) had occurred was not because of a failure to demonstrate stereotyping or prejudice, but was made on the basis that the claim of a burden or disadvantage could not be objectively maintained.[65]

Haig v. *Canada*[66]

Here, a different rule as to entitlement to participate in a referendum on the Charlottetown Accord in Québec, as compared with rules regarding participation in other parts of Canada, was held not to violate section 15(1). L'Heureux-Dubé J. for the majority, in considering whether or not place of residence constituted an analogous ground, suggested that this might be true in "a proper case," but that the adversely affected residents in this case, "persons moving to Québec less than six months before a referendum date," did not suffer from stereotyping or prejudice and that the differential treatment was therefore not based on an analogous ground of discrimination.[67]

As in *Swain* then, stereotyping and prejudice were raised in *Haig* only in relation to the identification of analogous grounds. While a case-specific approach to the determination of analogous grounds can also be criticized as providing an inadequate "jurisprudential marker,"[68] it seems clear that reference to stereotyping in this context does not provide precedent for a case-by-case search for stereotyping under the *Law* inquiry.

A Precursor to *Law*: *Eaton* v. *Brant County Board of Education*[69]

As I have attempted to demonstrate, each of the foregoing cases is largely consistent with the *Andrews* requirements of differential treatment, enumerated or analogous grounds, and disadvantageous effect. Exceptions to this approach in *Hess* and (perhaps) in *Weatherall* are very limited. *Eaton*, on the other hand, I would accept as being much more consistent with *Law*, *and* fundamentally inconsistent with *Andrews*. In *Eaton*, Sopinka J. on behalf of the undivided Court, while referring to an expansive concept of equality, found no violation of section 15(1). In reaching this conclusion, the Court in practical although not explicit terms incorporated section 1 justification issues into its section 15(1) analysis. The Supreme Court of Canada decision in *Eaton* may be contrasted with Arbour J.A.'s (as she then was) Ontario Court of Appeal decision in the same case.[70] Her decision, which was overruled, applied the *Andrews* test.

Emily Eaton was an elementary school student with cerebral palsy. Her parents asserted her entitlement to be educated in a regular classroom. For some time she had been placed in regular classes in a public school with a full-time aide. Eventually, a decision was made to place her in a special class for disabled children. The decision regarding placement was affirmed by a special education

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63 *Supra* note 45.

64 *Ibid.* at 992.

65 *Ibid.* at 995. Lamer C.J., for the majority, held that "to move an individual from the category of those who will surely be convicted and sentenced to those who may be acquitted, albeit on the grounds of insanity, [could not] be said to impose a burden or a disadvantage on that individual." Wilson J., in a separate judgment, agreed, but did additionally consider the question of stereotyping under s. 15(1) (at 1035–36). In a post-*Law* decision, *Winko* v. *British Columbia (Forensic Psychiatric Institute)* (1999), 175 D.L.R. 193 [hereinafter *Winko*], the Supreme Court of Canada found no violation of s. 15(1) in the current provisions of the *Criminal Code* dealing with persons found not criminally responsible, applying the *Law* approach.

66 *Supra* note 47.

67 *Ibid.* at 1044.

68 *Corbière, supra* note 2 at 14.

69 *Supra* note 49.

70 (1995) 22 O.R. (3d) 1 (C.A.).

tribunal, following a hearing at which expert evidence was heard. The tribunal made a choice based on what it perceived to be Emily's best interests, and provided reasons for its choice. Emily's parents had a different view of her best interests, and refused to place her as directed. For one term they educated her at home rather than place her in a special class; subsequently they enrolled her in the separate school system, where she was placed in a regular classroom. Thus, while Emily's educational placement was, finally, determined by her parents, Emily's and her parents' options were restricted as to where that choice of education might be pursued.

The Court agreed with the claimants that integration in the regular classroom, with accommodation as appropriate, should be the presumptive starting point in educational placement decisions. It accepted that integration provides educational and community benefits. The Court acknowledged that there was a clear historical link between segregated education and discriminatory stereotypes, and asserted that special placement decisions should be based on real needs, not on stereotypes.[71] But the Court did not require that the special placement decision be justified under section 1. The appropriateness of the placement was treated as a section 15(1) issue, so that there was no presumption in favour of the educational setting desired by Emily's parents, and no corresponding onus on the tribunal to justify its decision.[72] This approach was employed even though some of the considerations relied on by the tribunal in support of its decision involved balancing institutional concerns and Emily's needs in a manner that is usually associated with section 1.[73] Effectively placing the analysis within section 15(1), rather than section 1, resulted in deference to the tribunal's assessment, rather than to the parents' choice, in a context in which, it seems, neither could clearly be shown to better serve Emily's interests. In contrast, Arbour J.A. for the Ontario Court of Appeal addressed the justification for Emily's placement decision under section 1, and concluded that the tribunal had not met the section 1 onus.[74]

Eaton's failure to shift the onus of justification, in the context of a form of decision-making in which stereotyping has been and may continue to be involved, represents a major departure from *Andrews*. The conflicting judgments at the appellate and Supreme Court of Canada levels demonstrate the significance of this departure.

In justifying its approach to addressing the placement decision under section 15(1), rather than under section 1, the Supreme Court in *Eaton*, in the passage referred to subsequently in *Law*, stated:[75]

> The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons.

While it is unassailable that discrimination based on disability does arise as much or more from the differential effect of laws as from differential treatment, it should be a matter for great concern that the potential for adverse impact discrimination is offered as a reason for finding that differential treatment does not violate section 15(1). Discrimination may arise from *either* differential impact or differential treatment. Obviously, these potential forms of discrimination should not cancel each other out. Just as a case of disparate impact discrimination is not met by the assertion that all persons are treated the same, so a case of differential treatment should not be met by the claim that the discriminator sought to respond to difference. What is more, the potential for some other form of discrimination should not affect the burden of proof. That burden, whether to prove the need for the same treatment and the unfeasibility of accommodation, or the need for and proportionality of differential treatment, should remain on the party responsible for the challenged action.[76]

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71 Eaton, *supra* note 49 at 272–73 (S.C.C.).

72 *Ibid.* at 274, 278–79 (S.C.C.).

73 For example, in addressing Emily's safety needs arising from her tendency to put objects in her mouth, the tribunal noted its concern that Emily's protection would require either radical alterations to the classroom or an isolating level of adult supervision: *Eaton, supra* note 69 at 23 (C.A.).

74 *Ibid.* at 20 (C.A.).

75 *Ibid.* at 272 (S.C.C.).

76 Human rights case law, relied on in *Andrews, supra* note 5, has always taken this approach and so far continues to do so: *B.C. (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.* (1999), 176 D.L.R. (4th) 1 at 24–25 and 30 (S.C.C.) [hereinafter *Meiorin*] and *B.C. (Superintendent of Motor Vehicles)* v. *B.C. (Council of Human Rights)* (1999), 181 D.L.R. (4th) 385 at 393 and 394–95 (S.C.C.). It seems strange that *Charter* interpretation should cast off in a different direction from standard human rights interpretation. In *Meiorin*, discussing another issue of human rights interpretation, the Court emphasized the desirability of adopting an approach similar to that employed in *Charter* cases (at 22–23). One must wonder whether the partial onus shift in *Law* will eventually find its way into human rights interpretation.

THE RELEVANCY OR FUNCTIONAL VALUES TEST

While the *Law* survey of equality jurisprudence referred to *Egan* and *Miron*, it did not attempt to reconcile the division in those cases regarding the incorporation into section 15(1) of a test of relevance of the ground of discrimination to the "functional values" underlying a law. In fact, the *Law* decision did not refer to the relevancy test at all in its synthesis of the principles of equality analysis. The relevancy test was advanced by a minority of the Court in both *Miron* and *Egan*,[77] was expressly criticized by other justices in those cases,[78] and has not subsequently obtained majority support. It is not explicitly included in the *Law* guidelines. Why then should the test be of any continuing concern?

One reason is that the justification advanced for the relevancy test, similar to the justification for the inquiry into human dignity in *Law*, was a perceived need to limit the circumstances in which differential and disadvantageous treatment based on enumerated or analogous grounds would give rise to a violation of section 15(1) requiring justification under section 1.[79] Another reason is that some of the same jurisprudence relied on to support the reformulated inquiry in *Law* was offered as precedential support for the relevancy test.[80] In addition, both the relevancy test and the search for a violation of dignity are expressly contextualized investigations.[81] Finally, the contextual factors that determine whether dignity has been demeaned may invite an analysis similar to the relevancy test.

The *Law* guidelines identified "some important contextual factors influencing the determination of whether section 15(1) has been infringed," including "the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others."[82] In general, it will "be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society."[83] Consideration of this factor, to a significant extent, has the same effect as the relevancy test. This is because an "actual" difference is a difference that is real or significant in context; in other words, a relevant difference in the setting of a challenged law, or a difference that is relevant to the goal or "functional values" of that law. This is demonstrated in the application of *Law* in *M.* v. *H.*, particularly in Gonthier J.'s dissenting judgment.[84]

M. v. *H.* challenged the restriction of maintenance provisions of the *Ontario Family Law Act* to opposite-sex couples. The justifiability of excluding same-sex couples depended on the purpose of the law and the relationship of the exclusion to that purpose. The majority found that the purpose of the challenged law was to allow "persons who became financially dependent in the course of a lengthy intimate relationship some relief from financial hardship resulting from the breakdown of that relationship."[85] This made it easy to dismiss any notion that the differential treatment corresponded with actual needs, capacities, or circumstances. It is obvious that same-sex couples, like opposite-sex couples, live in "conjugal relationships of a specific degree of permanence."[86]

Gonthier J., dissenting, found that the purpose of the law was to address the unique biological reality and social function of opposite-sex couples, with regard to procreation and the raising of children, and the resulting economic disadvantage for women within those couples.[87] This conclusion led to his view that actual needs, capacities, and circumstances in the context of this law differed depending on sexual orientation, and that because the differential treatment was based on a difference in "actual needs, capacity and circumstances," no discrimination was shown.[88] Gonthier J.'s analysis essentially replicated the analysis of LaForest J. in

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77 *Miron, supra* note 16 at 702–3, and *Egan, supra* note 15 at 621–22.

78 *Miron, ibid.* at 741–44 per McLachlin J. and *Egan, ibid.* at 623–24, per L'Heureux-Dubé J., both expressing concern that the relevance test would not place limits on the purposes or functional values underlying challenged laws, and would lead to inquiries better suited to s. 1.

79 *Ibid.* at 620, per La Forest J.: "It would bring the legitimate work of our legislative bodies to a standstill if the court were to question every distinction that had a disadvantageous effect on an enumerated or analogous groups. This would open up a s. 1 enquiry in every case involving a protected group."

80 *Miron, supra* note 16 at 704–5 per Gonthier J., citing *Hess, supra* note 43 and *Weatherall, supra* note 46.

81 *Miron, ibid.* at 703–6; *Law, supra* note 3 at 39.

82 *Law, ibid.* at 40. See also the discussion at 27–32. The remaining factors were the existence of "pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue, ... the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society," and "the nature and scope of the interest affected by the impugned law." The first two factors in this list raise issues as to the relationship of s. 15(1) and s. 15(2), and mean that there will be a reduced need or none at all for reference to s. 15(2) where affirmative action programs are challenged as discriminatory: *Lovelace* v. *Ontario* [2000] S.C.J. No. 36 [hereinafter *Lovelace*].

83 *Law, ibid.* at 40. See also the discussion at 29–30.

84 *Supra* note 1.

85 *Ibid.* at 614.

86 *Ibid.* at 620.

87 *Ibid.* at 658.

88 *Ibid.* at 688.

Egan,[89] although in that case it was undertaken under the auspices of the relevancy test. Because LaForest and Gonthier JJ. addressed relevance to functional values, or correspondence with actual needs, under section 15(1), they were able to complete their analyses after finding general relevance or correspondence between child-bearing and the sexual orientation of couples. Had they been compelled to go on to apply section 1, they would have had to deal with difficult questions of proportionality. For example, neither Gonthier J. nor LaForest J. addressed the issue of minimal impairment of equality rights. In order to satisfy this part of the section 1 test, it would have to be shown that the equality rights of same-sex couples were impaired as little as reasonably possible for the achievement of the objectives of providing support to child-bearing couples and relieving against the economic disadvantage suffered by women in child-bearing relationships. Under the legislative schemes in question, same-sex couples were excluded even if they had children and even if one member of the couple took on a traditional mother's role and suffered economically as a result. On the other hand, opposite-sex couples were included in the schemes, regardless of whether they had or intended to have children. Further, the schemes gave rights to men in opposite-sex couples as well as women, although they presumably would not experience the type of economic disadvantage that was purportedly targeted. It is difficult to see how this impairment of equality rights could be described as reasonably necessary to the accomplishment of the stated objectives.

Conclusion

In summary, the history of section 15(1) jurisprudence as outlined in *Law*, and *Law*'s requirement for a case-by-case, contextualized demonstration of a violation of human dignity under section15(1), are problematic in the following respects:

(1) There is little, if any reference to significant aspects of the *Andrews* rationale requiring section 15(1) and section 1 analyses to be kept analytically distinct, and the burden of justification for "suspect" government decisions to be placed on the government;

(2) The new approach adopts what was essentially the position of Wilson J. in *Hess* and *McKinney*, representing this as embodying a consensus by the Court, without setting out contrary views and their relationship to the above aspects of the *Andrews* rationale. Further, the Court in *Law* did not advert to previous occasions in which arguments based on an alleged lack of stereotyping or harm to dignity were raised by government to justify challenged laws, and were dismissed by the majority of the Court as not properly forming a part of section 15(1) analysis (as in *Andrews*, *McKinney*, and to some extent in *Benner*). Had these cases and arguments been fully addressed, the new approach to section 15(1) might have been differently formulated so as to maintain some distinction between the processes of identifying and justifying discrimination;

(3) The new approach ignores divisions of the Court in *Egan* and *Miron*, and thus rather than confirming the Court's rejection of the relevancy test, leaves open the possibility that it may come to incorporate that test.

Notwithstanding these concerns, the extent of the change in section 15(1) represented by *Law* should not be overstated. Hogg has assessed the impact of *Law* as follows:[90]

> The element of human dignity is a reversion to the idea that was rejected in *Andrews*, namely, that s. 15 should be restricted to unreasonable or unfair distinctions. Distinctions that impair human dignity are presumably much the same as unreasonable or unfair distinctions ... [B]y introducing this kind of evaluative step into s. 15, the relationship between s. 15 and s. 1 is confused, and s. 1 is left with little work to do. Moreover, any increase in the elements of s. 15 has the undesirable effect of increasing the burden of proof on the claimant.

In my view, the doctrine established in *Andrews* is far superior to the new human-dignity rule. It is simpler and less burdensome for the claimant to establish only a distinction based on listed or analogous grounds in order to show a breach of s. 15. Then it is up to the government to satisfy the elements of s. 1 justification.

While I agree that *Law* confuses the boundaries of section 15(1) and section 1, and increases the burden on a claimant, in other respects this may be somewhat of an exaggeration of the change wrought by *Law*. Even prior to *Law* there were rare cases, such as *Hess*, in which differential treatment based on enumerated or analogous grounds did not violate section 15(1). Further, it does not seem to have been the Court's intention to place on the claimant the full onus of proving that a distinction is

[89] *Supra* note 15 at 626–27.

[90] *Supra* note 33 at 52–24.

unreasonable or unfair. The Court in *Law* indicated that "often" a distinction based on enumerated or analogous grounds will violate human dignity because "the use of these grounds frequently does not correlate with need, capacity, or merit."[91] In the post-*Law* decision of *Corbière*, the majority reiterated the concept that enumerated or analogous grounds are "constant markers of suspect decision-making or potential discrimination."[92] It seems that there remains a presumption of some sort that distinctions based on enumerated or analogous grounds are discriminatory, as the Court continues to assert that it will *still* be only in "rare"[93] or "exceptional"[94] cases that these distinctions will not violate section 15(1). Further, *Law* provided qualifications to a claimant's burden of proof. A claimant should not be required to "prove any matters which cannot reasonably be expected to be within his or her knowledge,"[95] and some distinction between section 15(1) and section 1 should be maintained.[96] On the last point, however, the Court offered no guidance as to how this should be done.

It appears that the rare or exceptional cases have been multiplying in number. In *Law* itself, as well as the subsequent cases of *Winko*,[97] *Granovsky*,[98] and *Lovelace*,[99] differential treatment based on enumerated or analogous grounds was found not to violate human dignity and therefore not to contravene section 15(1). However, the discrimination complaint in *Winko* was similar to that made in *Swain*, where it was also rejected, and *Lovelace* dealt with the special circumstances and considerations involved when it is an affirmative action program that has been challenged. It is also noteworthy that while appellate courts in *Law* and *Granovsky*, applying the pre-*Law* approach to section 15(1), found *prima facie* violations of section 15(1), they also found the restrictions of equality rights to be justified under section 1. Typically, the result in a *Charter* case is unlikely to depend on the onus of proof, especially given the flexibility and contextuality of the burden of proof under section 1.

Nevertheless, there will be circumstances in which an increase in the onus on the claimant, and an opportunity for government to avoid the full section 1 proportionality test, will reduce the impact of the equality guarantee. *Eaton* and Gonthier J.'s judgment in *M.* v. *H.* are examples of this effect. In *Eaton*, because of difficulty in establishing which educational setting was in the best interests of a severely disabled child, the reversal of onus meant a switch from a decision in favour of the parents' wishes, to deference to the educational authorities. For Gonthier J. in *M.* v. *H.*, the *Law* guidelines circumvented the application of the full section 1 proportionality test. Thus Gonthier J. did not have to address the issue of whether the exclusion of same-sex couples from the legislative scheme was necessary in order to protect women or support child-bearing relationships.

Although *Law*'s effect on section 15(1) analysis may be limited, it does indeed represent a change rather than a mere continuation. Because this change was unacknowledged by the Court, no rationale for it was provided. Linking a distinction to enumerated or analogous grounds creates at least a potential for or suspicion of discrimination. What is wrong with placing the full onus on government to justify such distinctions? Why is the Court pulling back from this requirement?[100] *Law*'s introduction of subjectively defined limits to the scope of section 15(1) will in at least some cases compromise the scope or strength of the protection of equality that was formerly provided. Without a clearly defined rationale for this new approach, one is inevitably left with the concern that the Court's overt commitment to the protection of equality may be subject to covert qualifications.❑

June Ross
Faculty of Law, University of Alberta.

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91 *Supra* note 3 at 35.
92 *Supra* note 2 at 13.
93 *Law, supra* note 3 at 49.
94 *Winko, supra* note 65 at 236.
95 *Law, supra* note 3 at 34.
96 *Ibid.* at 34–35.
97 *Supra* note 65.
98 *Granovsky* v. *Canada (Minister of Employment and Immigration)* (2000), 186 D.L.R. (4th) 1 (S.C.C.).
99 *Supra* note 82.

100 Hogg, *supra* note 33 at 52–25 asks a similar question.

UNBALANCED BALANCING: BILL C–46, "LIKELY RELEVANCE," AND STAGE-ONE BALANCING

Wayne Renke

We know that in the *Mills* case,[1] the Supreme Court upheld the constitutionality of the Bill C–46 provisions, which now constitute sections 278.1 to 278.91 of the *Criminal Code*.[2] We know that the Bill C–46 provisions changed the production rules established in the *O'Connor* case,[3] generally making it more difficult for accuseds to obtain production of records containing personal information concerning complainants and other witnesses or, alternatively, providing better protection for the personal information of complainants and other witnesses. Nearly every aspect of the Bill C–46 provisions has been the subject of learned dispute. I cannot and shall not tackle all the production issues. I shall consider two issues bearing on the first stage of an application for production, the stage of production of records to the court for review by the trial judge. After (I) surveying the statutory background, I will consider (II) whether the "likely relevance" standard sets a reasonable standard for accuseds to meet, and (III) whether the statutory provisions for balancing at the first stage of production are appropriate.

STATUTORY BACKGROUND

The Bill C–46 provisions (A) apply to specified offences, in relation to (B) specified records, in (C) the hands of third parties or the Crown and (D) establish a two-stage procedure for determining whether records may be produced to an accused.

A. Specified Offences

The Bill C–46 provisions only apply in proceedings respecting offences listed in s. 278.2(1). These are all sexual offences. The list includes the sexual assault offences, sexual interference and prostitution offences. In proceedings for non-listed offences, the rules developed in *O'Connor* will continue to apply respecting records in the possession or custody of third parties,[4] and the *Stinchcombe* rules will continue to apply respecting records in the possession or custody of the Crown.[5]

B. Specified Records

The Bill C–46 provisions only apply respecting records falling within the definition of "record" in section 278.1:

> For the purposes of section 278.2 to 278.9, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child

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1 *R.* v. *Mills* (1999), 28 C.R. (5th) 207 (S.C.C.) [hereinafter *Mills*]. McLachlin JJ. and Iacobucci JJ. wrote jointly for the Court; Lamer C.J.C. dissented solely on the issue of the application of the Bill C–46 regime to records in the hands of the Crown.

2 R.S.C. 1985, c. C–46, as amended. Further references to the *Criminal Code* shall be to section numbers only.

3 *R.* v. *O'Connor* (1996), 103 C.C.C. (3d) 1 (S.C.C.) [hereinafter *O'Connor*]. On the production issue, Lamer C.J.C. and Sopinka J. wrote jointly for the 5:4 majority; Cory, Iacobucci, and Major JJ. concurring (the "*O'Connor* majority"). L'Heureux-Dubé J. wrote for the dissenting minority on the production issue, La Forest, Gonthier, and McLachlin JJ. concurring (the "*O'Connor* minority").

4 As under the Bill C–46 regime, *O'Connor* contemplates a two-stage application for the production of records in the possession or control of third parties. At the first stage, the accused is required only to establish that the record sought is likely to contain information relevant to an issue at trial or the testimonial competence of a witness. If the accused is successful, the judge orders production of the record to the court for review. In light of the produced record, the judge then balances the interests of the accused in production and the interests of the complainant in maintaining the privacy of the record, and determines whether to produce the record to the accused (on any conditions required to protect privacy and any social interests connected with the type of record in question).

5 *R.* v. *Stinchcombe* (1992), 68 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Stinchcombe*]: "In that case, it was determined that the Crown has an ethical and constitutional obligation to the defence to disclose all information in its possession or control, unless the information in question is clearly irrelevant or protected by a recognized form of privilege." *O'Connor*, *supra* note 3 at 13, para. 4, per Sopinka J.

> welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

Records may relate to either a complainant or a witness.[6] For the sake of simplicity, in the remainder of this paper I will refer only to complainants' records.

"Records" include only records in which the complainant has a "reasonable expectation of privacy."[7] "Records" does not include — and this may turn out to be a significant exception — "records made by persons responsible for the investigation or prosecution of the offence." Hence, records made by police officers, including records of interviews with complainants, do not fall within the Bill C–46 regime.

C. In the Hands of Third Parties or the Crown

O'Connor concerned records in the possession or control of third parties. *O'Connor* confirmed that the access of accuseds to records in the hands of the Crown was governed by the *Stinchcombe* rules.[8] The Bill C–46 provisions apply not only to records in the hands of third parties, but also to records in the possession or control of the Crown: the provisions apply "where a record is in the possession or control of any person, including the prosecutor in the proceedings."[9] The Bill C–46 production rules do not apply, however, if the Crown has possession or control of the records but the complainant has "expressly waived the application" of the Bill C–46 regime.[10] We can expect a jurisprudence to develop respecting "informed waiver" by complainants, and can expect offices of the Crown to develop lengthy waiver forms. The Crown does have an obligation to notify an accused of records in its possession or control.[11] I shall not pursue the issues arising from the application of the Bill C–46 production rules to the Crown.[12]

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6 Subsection 278.2(1).
7 *Mills*, *supra* note 1 at 257, para. 99.
8 *O'Connor*, *supra* note 3 at 14, para. 6.
9 Subsection 278.2(2).
10 *Ibid.*
11 Subsection 278.2(3).
12 See the dissent of Lamer C.J.C. in *Mills*, *supra* note 1 at 221, para.1; see also P. Sankoff, "Crown Disclosure After *Mills*: Have the Ground Rules Suddenly Changed?" (2000) 28 C.R. (5th) 285; D. M. Paciocco, "Bill C–46 Should Not Survive Constitutional Challenge" (1996) 3 S.O.L.R. 185.

D. Two-stage Application Procedure

An accused who seeks production of a record must make an application for production before the trial judge.[13] The application must be in writing, and must set out[14]

> (a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and
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> (b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

The application must be served on the Crown, the record custodian, the complainant, and any other person to whom the record relates. At the time of serving the application, the accused must also serve on the record custodian a subpoena in Form 16.1.[15] The application has two stages.

(1) Stage One: Production to the Court

At the first stage, the judge — who at this point will not have seen the record — is to determine whether to order the record custodian to produce the record to the court for review by the judge. The hearing is *in camera*. The record custodian, the complainant and any other person to whom the record relates may appear and make submissions, but none are compellable, and no costs may be ordered against them in respect of their participation in a hearing.[16] The judge may order production to the court if the application complied with formal requirements, the accused established that "the record is likely relevant to an issue at trial or to the competence of a witness to testify," and "the production of the record is necessary in the interests of justice."[17] In section 278.5(2), the *Criminal Code* sets out a list of

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13 Subsections 278.3(1) and (2). The restriction of jurisdiction for production applications to the trial judge raises important practical issues.
14 Subsection 278.3(3). While *O'Connor* had suggested that affidavit evidence is normally required to support the production application (*O'Connor*, *supra* note 3 at 18, para. 20), Bill C–46 does not expressly impose this requirement — although prudence, with an eye to the weight of defence evidence in the application, might incline toward filing an affidavit. The use of affidavit evidence raises the vexing issue of the appropriate affiant (if not the accused, for fear of cross-examination, then who? Not counsel, but a secretary? An articling student? What is the probative value of an affidavit based solely on information and belief?).
15 Subsections 278.3(5) and (6).
16 Subsections 278.4(1), (2), and (3).
17 Subsection 278.5(1).

factors to be considered in determining whether to order production to the court.

The judge must provide reasons for ordering or refusing to order production to the court.[18] For the purposes of the appeal rules, the determination to order production to the court or to refuse to make the order is a question of law.[19]

(2) Stage Two: Production to the Accused

If the judge does order production to the court, the application enters its second stage. The issue at this stage is whether the record or part of the record should be produced to the accused. In making this determination, the judge will have reviewed the record in question.[20] The judge may hold an *in camera* hearing, of the same nature as at the first stage of the application.[21] The very same tests as at the first stage — "likely relevance," "necessary to the interests of justice" — apply at the second stage, and the very same factors considered at the first stage are to be considered at the second stage.[22]

Production of the record to the accused may or may not be ordered. If it is ordered, the judge may impose conditions on production, to protect the interests of justice and the privacy and equality of the complainant.[23] The judge shall direct that a copy of the record be provided to the Crown, "unless the judge determines that it is not in the interests of justice to do so."[24]

The judge must provide reasons for ordering or refusing to order production to the accused.[25] For the purposes of the appeal rules, the determination to order production to the accused or to refuse to make the order is a question of law.[26]

[18] Section 278.8.

[19] Section 278.91. The accused would appeal an adverse decision as part of an appeal from trial. The complainant, on the other hand, may appeal directly to the Supreme Court.

[20] Subsection 278.6(1).

[21] Subsections 278.6(2) and (3).

[22] Subsections 278.7(1) and (2).

[23] Subsection 278.7(3).

[24] Subsection 278.7(4). Doubtless some curious situations will emerge with the accused gaining access to a record, while the Crown is denied access. The subsection reinforces the idea that the Crown is not the lawyer for the complainant — that the complainant has or is developing a sort of relative autonomy in criminal proceedings. The complainant's records may turn out to be "none of the Crown's business" (a difficult notion, given that the proceedings are carried by Her Majesty and Her representative, the prosecutor).

[25] Section 278.8.

[26] Section 278.91. See note 19, *supra*.

"Likely Relevance" at Stage One of a Production Application

A crucial part of an accused's application for production is the accused's tendering of "grounds" which "establish" that the record sought is "likely relevant to an issue at trial or to the competence of a witness to testify."[27] The "likely relevance" standard generates three main issues: (A) why should the accused be compelled to meet a "likely relevance" standard? (B) what is the nature of the "likely relevance" test? and (C) what statutory restrictions apply to attempts to establish "likely relevance" and are those restrictions just?

A. The Rationale for "Likely Relevance"

Why should the accused bear a burden of proof in a production application, and why should the accused be compelled to discharge that burden by establishing "likely relevance" — as opposed, say, to showing that the record sought would be "useful to the defence," or some lesser burden?

The "likely relevance" standard was established in *O'Connor*, and, at least as a phrase appropriate to describe the accused's burden, was supported by both the majority and minority. The phrase has been imported into the Bill C–46 regime. The "likely relevance" onus and standard was not challenged in *Mills*.[28] Three main reasons supporting the imposition of the burden and standard of proof on the accused found favour with the *O'Connor* majority:[29]

(i) the information is not part of the state's "case to meet;"

(ii) the state has not been granted access to the material to prepare its case; and

(iii) third parties have no obligation to assist the defence.

Interestingly, while the *O'Connor* majority alluded to privacy rights shortly before listing these factors justifying the burden on the accused, privacy did not enter its list of justifying factors. In contrast, the *O'Connor* minority, while accepting the factors

[27] Subsections 278.3(3) and (4); s. 278.5(1)(b).

[28] *Mills*, *supra* note 1 at 267, para. 128.

[29] *O'Connor*, *supra* note 3 at 18, para. 19.

mentioned by the majority,[30] squarely based the accused's burden on the privacy and equality interests of complainants and others. The minority went so far as to hold that privacy analysis yields a "presumption" against ordering the production of records containing personal information.[31] In the minority's view, casual and easy production should be discouraged because it offends a person's privacy and dignity, and the threat of disclosure of confidential records tends to deter persons from reporting offences and from seeking treatment or assistance.[32] The *Mills* court followed the *O'Connor* minority lead, and linked "likely relevance" to privacy and equality issues: "Where the records to which the accused seeks access are not part of the case to meet ... privacy and equality considerations may require that it be more difficult for accused persons to gain access to therapeutic or other records."[33] Essentially, the *Mills* and *O'Connor* minority view was that accuseds must bear a significant burden in production applications, because accuseds are interfering with or threatening others' privacy and equality rights. The burden on accuseds is a way of balancing accuseds' rights to access with complainants' rights to resist access.

The approach of the *Mills* court to "likely relevance" was entirely consistent with its general approach to the Bill C–46 regime. The *Mills* court recognized three sets of rights at play in criminal trials — accuseds' rights to full answer and defence, the privacy rights of complainants and other witnesses, and the equality rights of women and children.[34] Following *Dagenais*,[35] as had the *O'Connor* minority before it,[36] the *Mills* court eschewed a "hierarchical" approach to the sets of rights, and instead sought "definitions" of the rights that would allow for their harmonious co-existence or coordination, rather than dictate their priorization and subordination.[37] Privacy and equality should underlie "likely relevance" as much as other aspects of Bill C–46.

Those who are troubled by the *Mills* case and Bill C–46 can trace their unease to *Dagenais*. Reliance on *Dagenais* effects a significant re-conceptualization of criminal litigation. One might have been forgiven for thinking that in a criminal trial, there is or should be a hierarchical arrangement of rights. One might have thought that in criminal litigation, accuseds' rights to full answer and defence and to be presumed innocent were paramount, subject to limitation only under section 1 of the *Canadian Charter of Rights and Freedoms*. The motivating fear in criminal proceedings has been the threat of the conviction of the innocent. Moreover, in criminal litigation, one might have thought that there is or should be conflict between different interests, and no expectation that all interests can and should be satisfied in procedures, rulings, verdicts or sentences. At least over the stretch of our criminal litigation history moving into the 1990s, the main protagonists in the criminal litigation conflict were the accused on the one side and the Crown on the other. The *Dagenais* approach employed in *Mills* signals that the old hierarchical, conflictual, dualistic (adversarial?) system is becoming outmoded. The interests of complainants and others have become mixed into criminal litigation. Conflict is being replaced by coordination and harmonization.

B. The Nature of "Likely Relevance"

For the judge to order production to the court, the accused must establish that the record is "likely relevant to an issue at trial or the competence of a witness to testify." This test has three aspects: (1) identifying the facts-in-issue to which the record is allegedly "relevant"; (2) establishing the relationship of "relevance" between information contained in the record and the identified fact-in-issue; and (3) demonstrating that it is "likely" that the record contains information that is relevant to the identified fact-in-issue.

(1) Facts-in-issue

The record might contain information relevant to (a) an issue at trial or (b) testimonial competence.

The *Criminal Code* does not define "an issue at trial." "An issue at trial" in a sexual assault case could include the following:

(i) the *actus reus* of the offence (whether the offence took place at all; whether the accused was the perpetrator; whether the contact was "sexual;" whether the complainant consented to the sexual contact; whether any circumstances existed that would vitiate any apparent consent or caused mere submission);

(ii) the *mens rea* of the offence (whether the accused intentionally applied force to the complainant; whether the accused knew that the complainant did not consent; whether the accused believed that the complainant had consented to the contact; whether the accused took reasonable steps to ascertain consent in

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30 *Ibid.* at 64, para. 141.
31 *Ibid.* at 59, para. 128.
32 *Ibid.* at 69–70.
33 *Mills*, *supra* note 1 at 248, para. 71.
34 *Mills*, *supra* note 1 at 247–55.
35 *Dagenais* v. *Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.), Lamer C.J.C.
36 *O'Connor*, *supra* note 3 at 59, para. 129.
37 *Mills*, *supra* note 1 at 245, para. 61.

the circumstances known to the accused at the material time;[38] and whether the accused was wilfully blind or reckless);[39]

(iii) the availability of any defences (in extraordinary circumstances, evidence could conceivably support the availability of the defence of common law duress, for example);[40]

(iv) the existence of circumstances rendering the conviction of the accused an abuse of process or a violation of fundamental justice;

(v) the credibility of the complainant or another witness; or

(vi) the reliability of any evidence.

Testimonial competence concerns the capacity of a witness (including the complainant), determined at the time of giving testimony,

(i) to observe events, including the "ability to differentiate between that which is actually perceived and that which the person may have imagined, been told by others, or otherwise have come to believe;"[41]

(ii) to remember events, including "the ability to distinguish those retained perceptions from information provided to the person from other sources;"[42]

(iii) to communicate his or her evidence, including "the ability to understand questions and to respond to them in an intelligible fashion;"[43] and

(iv) to understand the duty to tell the truth.[44]

Competence is likely to be a production issue only if the complainant is very young[45] or mentally disordered.[46]

(2) Relevance

The accused must establish that the record is "likely *relevant*." Bill C–46 does not establish a new type of inferential relationship — as if mid-way between relevance on the one hand and irrelevance on the other were the newly discovered relation of "likely relevance." The "likely relevant" phrase is best thought of as shorthand for "likely to contain information that is relevant."

"Relevance," in this context, means logical relevance.[47] The record, or more exactly the information it contains, is either relevant to a fact-in-issue or it is not. That is to say that the information either tends to make a fact-in-issue more likely or less likely, more probable or less probable; the information either has probative value or it does not.[48] If it does not, it is irrelevant. If it does, it is relevant. Logical relevance does not bear admixture with other issues, such as the balancing of privacy concerns. In this sense, privacy considerations do not form part of the "likely relevance" analysis, although these are part of the conceptual and justificatory backdrop for the "likely relevance" requirement.[49]

The "relevance" standard sets both a floor and a ceiling. The accused must, at a minimum, be able to establish "likely relevance." This standard is not satisfied by proof that records would merely be useful to the accused. An inferential link must be demonstrated between the likely contents of the record sought and a fact-in-issue. The accused, however, need not go so far as to establish that the record or any information in the record is not only relevant, but admissible as evidence at trial.[50] The "likely relevance" test, by itself, is not concerned with exclusionary rules such as the hearsay rules; neither is this test (by itself) concerned with whether the probative value of likely relevant evidence outweighs any prejudicial effects of

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38 Para. 273.2(b).
39 Para. 273.2(a).
40 *R.* v. *Ruzic* (1998), 128 C.C.C. (3d) 97, 481 (addendum) (Ont. C.A.), Laskin J.A.; heard and reserved by the S.C.C., 13 June 2000.
41 *R.* v. *Farley* (1995), 99 C.C.C. (3d) 76 (Ont. C.A.), Doherty J.A. at 81.
42 *Ibid.*
43 *Ibid.*
44 *Ibid.* at 82, 84; *R.* v. *Rockey* (1996), 110 C.C.C. (3d) 481 (S.C.C.), McLachlin JJ. at 494.

45 If the witness is under age fourteen, a competence hearing must be held: s. 16(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C– 5, as am.
46 Under ss. 16(1) and (5) of the *Canada Evidence Act*, a party challenging the competence of a witness over age fourteen has the burden of satisfying the court that "there is an issue as to the capacity of the proposed witness to testify under an oath or solemn affirmation;" a competence hearing is held only on cause being shown.
47 *O'Connor*, *supra* note 3 at 19, para. 22.
48 *R.* v. *Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.), Sopinka J. at 411 [hereinafter *Mohan*].
49 *O'Connor*, *supra* note 3 at 66, para. 147.
50 *Ibid.* at 20, para. 24; at 72, para. 164.

that evidence. Furthermore, to establish "likely relevance," the accused need not go so far as to show that the record or information in it is "material," in the sense of being relevant to some demonstrably important, significant or decisive issue in the litigation.

(3) Likelihood

For both the *O'Connor* majority and the *Mills* court, the burden on the accused in a production application must be interpreted in light of the fundamental principle that the innocent not be convicted. This principle entails — as section 7 of the *Charter* would have it — that accuseds have the right not to be deprived of life, liberty or security of the person, except in accordance with the principles of fundamental justice. Fundamental justice requires that accuseds have the right and ability to make full answer and defence, which in turn requires that accuseds have access to information necessary for their defence.[51] The burden imposed on accuseds in production applications cannot be so difficult to satisfy that they will be denied full answer and defence, leading to the conviction of the innocent.

The *O'Connor* majority viewed the "likely relevance" burden as being significant, but not "onerous."[52] The burden could not be onerous, since it is only to establish "likely" relevance. Furthermore, at this stage the accused has not seen the record in question. The "catch-22" arises. If the standard were set too high, the accused would lack the information requisite to establish relevance, but because the accused cannot obtain production, the accused cannot get that information.[53] The *O'Connor* majority held that the accused had to do more than simply show that production would be useful for the defence, but the main purpose of the "likely relevance" test was to screen out "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" production applications.[54] The majority settled on this equivalent expression for the "likely relevance" test: "the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to *an issue at trial or the competence of a witness to testify*."[55] The *O'Connor* minority felt that the majority expected too little of accuseds. The minority described the accused's burden as "significant," without the majority's "but not onerous" qualification.[56]

Under Bill C–46, the accused's task is to "establish" that the record is "likely" to contain relevant information. The language suggests that the burden imposed is tougher than the burden recognized by the *O'Connor* majority. The term "establish" suggests that the accused's burden is to be discharged on the balance of probabilities,[57] and that the burden would not be established by making out only reasonable possibilities. What the accused must show is that it is "probable" or "more likely than not" that the record sought contains information relevant to a fact-in-issue. A sort of double probability is at work: the accused must show that it is probably true that the record probably contains relevant information. Because the standard is one of likelihood only, the accused need not show that it is certain or even highly probable that the record contains relevant evidence. Because the burden is on the balance of probabilities, the accused need not show that his or her estimate of the probability of the presence of relevant information is itself certain.

C. Statutory Constraints on Establishing "Likely Relevance"

The accused must set out the "grounds" on which he or she relies to establish the likelihood that a record contains relevant information. Accuseds' "likely relevance" arguments are governed by one of the most controversial provisions of Bill C–46, section 278.3(4), which has as its marginal note or title, "[i]nsufficient grounds:"

> Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:
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> (a) that the record exists;
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> (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
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> (c) that the record relates to the incident that is the subject-matter of the proceedings;

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[51] *Ibid.* at 17, para. 15; *Mills*, *supra* note 1 at 247, para. 70.
[52] *O'Connor*, *supra* note 3 at 20, para. 24.
[53] *Ibid.* at 20–21, para. 25.
[54] *Ibid.* at 19, para. 22; at 20, para. 24.
[55] *Ibid.* at 19, para. 22.
[56] *Ibid.* at 64, para. 142.
[57] *R.* v. *Whyte* (1988), 42 C.C.C. (3d) 97 (S.C.C.), Dickson C.J.C., as he then was, at 108.

(d) that the record may disclose a prior inconsistent statement of the complainant or witness;

(e) that the record may relate to the credibility of the complainant or witness;

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(h) that the record relates to the sexual activity of the complainant with any person, including the accused;

(i) that the record relates to the presence or absence of a recent complaint;

(j) that the record relates to the complainant's sexual reputation; or

(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

Subsection 278.3(4) should not be interpreted too weakly or too strongly. Properly interpreted, it does not impose undue limitations on the already difficult job of establishing "likely relevance."

(1) Excessively Weak Interpretation: "Assertions"

One interpretation of the term "assertion" is that it denotes only a submission, claim, allegation, statement, declaration or argument about inferences — without any evidential foundation. An "assertion" is just an hypothesis offered by counsel. If, however, evidence exists that supports the claim made, then the claim is not merely an "assertion" but a description of a conclusion to be drawn or an inference to be made from the evidence. On this approach, if evidence supports one or some of the matters referred to in sections 278.3(4)(a)-(k), then submissions based on that evidence cannot be mere "assertions," and can serve to establish likely relevance. Some support for this approach may be drawn from the *Mills* case. The majority writes that sections 278.3(4)(a)-(k) do not "entirely prevent an accused from relying on the factors listed, but simply prevents reliance on *bare 'assertions'* of the listed matters, where there is no other evidence and they 'stand on their own;'"[58] and "[t]he purpose and wording of section 278.3 does not prevent an accused from relying on the assertions set out in subsection 278.3(4) where there is an *evidentiary or informational foundation to suggest that they may be related to likely relevance*... The section requires only that the accused be able *to point to case specific evidence or information* to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify ..."[59] If this approach were correct, then, for example, an affidavit could be tendered in the application for production which sets out evidence supporting the claims that a record exists, it relates to psychiatric treatment, and it relates to the incident that is the subject-matter of the proceedings; since the application is based on an affidavit, and therefore is based on more than simply "assertions" of the relevant matters, this could be an adequate foundation for a finding of "likely relevance." The easy way around section 278.3(4) would be to file an affidavit.

This interpretation cannot be correct. The term "assertion" doubtless is synonymous with the terms "submission," "claim," "allegation," "statement," "declaration" or "argument about inferences." The subsection presupposes, however, that the assertions it lists do have some evidential foundation. The subsection concerns arguments about inferences based on evidence, not arguments about inferences based on no evidence. Suppose that an accused were to argue for production on the basis that a record exists, but the accused could point to no evidence supporting the existence of the record. A judge would not need section 278.3(4) to find the accused's argument inadequate. A mere claim by counsel is not evidence. A mere claim by counsel raises no probabilities. A mere claim by counsel could not support an inference of "likely relevance."

Subsection 278.3(4) is not about "no evidence," but about "insufficient evidence." It screens out inferences that have a very low probative value, as compared with the prejudicial effects of production of complainants' personal information. The listed assertions "are not sufficient on their own" to establish likely relevance. It cannot be denied that, for example, the fact that psychiatric records respecting a complainant exist provides some evidence in support of the claim that the records contain relevant information

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[58] *Mills*, *supra* note 1 at 264, para. 118.
[59] *Ibid.*, para. 120 [emphasis added].

— that claim is rendered more probable than if those records did not exist at all. Similarly, the facts that psychiatric records exist, that they concern the incident in question, and that they were created shortly before a complaint was made make it more likely that the records contain relevant information, than if the records merely existed or than if no records existed at all. But the *Mills* court did not say that the paragraph (a)-(k) matters were irrelevant. What the court and section 278.3(4) forbid is reliance on the listed factors as a foundation for a finding of "likely relevance," if there is "no *other* evidence and they stand 'on their own.'"[60] The "assertions" have some probative value — but just not enough to warrant a finding that it is likely that the record in question is likely to contain relevant information. The assertions may be combined with other evidence — so that the assertions do not "stand on their own" — to establish likely relevance.

(2) Excessively Strong Interpretation: Insufficient Evidence

The argument was made in *Mills* that section 278.3(4) hamstrings accuseds in production applications, since it prevents accuseds from relying on important, relevant evidence. How could an accused ever establish "likely relevance," if the accused could not rely on the facts that (for example) a record exists, the record relates to the incident that is the subject-matter of the proceedings, or the record contains a statement inconsistent with the testimony of the complainant?[61] Subsection 278.3(4) does not prevent reliance on such matters. It provides that the listed assertions (arguments about inferences) are "not sufficient on their own" to establish "likely relevance." The Supreme Court expressly confirmed that accuseds are entitled to rely on the assertions in production applications, with the qualification that the assertions are not, on their own, an adequate foundation for production: sections 278.3(4)(a) - (k) do not "entirely prevent an accused from relying on the factors listed, but simply prevents reliance on *bare 'assertions'* of the listed matters, where there is no other evidence and they stand 'on their own;'"[62] and "[t]he purpose and wording of section 278.3 does not prevent an accused from relying on the assertions set out in subsection 278.3(4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance."[63]

(3) The *Mills* Majority Interpretation

The *Mills* court provided direction to accuseds seeking production to the court in light of section 278.3(4). In addition to evidence of the matters referred to in section 278.3(4), the accused must be able "to point to case specific evidence or information" to show likely relevance; in the language of some US cases, a "factual predicate" is required.[64] One might approach the court's directive in this way: On the one hand, counsel knows (for example) that a psychiatric record respecting the complainant exists. On the other hand, counsel wants to show that the record contains information that is relevant to the complainant's credibility. What counsel needs is a sort of evidential "bridge," some evidence that goes beyond the mere general characteristics of the record, that shows that the record contains (or is likely to contain) particular, specific contents that are relevant to the particular, specific identified facts-in-issue.

(4) The Probative Value of the Listed Insufficient Grounds

One might question the accuracy of Parliament's estimates of the lack of probative value of the listed insufficient grounds. The insufficient grounds provisions have been subjected to vigorous attacks.[65] These attacks have been based on the excessively strong interpretation of these provisions. The insufficient grounds provisions must be approached literally and abstractly (a-contextually). Once circumstance and context begin to be filled in, once the evidential "bridge" or the "factual predicate" are established, these provisions lose their exclusionary effect, since the insufficient inferences are no longer the sole basis for argument. Given this approach, Parliament's estimates of the probative value of the "insufficient grounds" are right:

> re (a) "the record exists:" If the mere existence of a record warranted production, then the "likely relevance" test would be superfluous. Production to the judge would, in effect, simply be directed for all records in the possession or control of the complainant or record custodian.
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> re (b) "medical or psychiatric treatment:" The mere fact that the accused is receiving psychiatric treatment (for example) generates few legitimate inferences about the contents of psychiatric records. It would be improper to

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60 *Ibid.*, para. 118 [emphasis added].
61 *Ibid.* at 263, para. 117.
62 *Ibid.*, para. 118.
63 *Ibid.*, para. 120.
64 *Ibid.* See P. DerOhannesian, *Sexual Assault Trials*, Vol. 1, 2nd ed. (Charlottesville, Virginia: Lexis Law Publishing, 1998) 17.
65 See, for example, Paciocco, *supra* note 12 at 187–88.

assume a likelihood that psychiatrists will somehow tamper with or skew the memories of complainants, or that they will otherwise behave in an unprofessional and unscientific way, leading to the production of tainted evidence. If, however, the complaint arose in a "recovered memory" context, and if there were evidence that the memory had been elicited through improper therapeutic techniques, then there could be a solid basis for production of the therapeutic records.[66]

re (c) "relates to the incident:" The mere fact that the complainant has talked about the incident in question generates few inferences about whether what was said has any bearing on the litigation. The prior consistent statement and hearsay rules indicate the law's usual disinterest in out-of-court statements. It should not be simply assumed that just because a complainant talked about the incident that either she made statements inconsistent with her testimony, or that the other party to the conversation improperly influenced the complainant. Paciocco, I should note, adopted a contrary position, correctly pointing out that in *Stinchcombe* prior statements by proposed witnesses are considered relevant and should be disclosed by the Crown.[67] All prior statements by a witness are relevant (even if not admissible). In response, we should keep in mind that section 278.3(4) does not describe the "insufficient grounds" as "irrelevant" — the subsection is concerned with lack of probative value, and that the notion of "relevance" for production purposes is not the same as the notion of "relevance" for *Stinchcombe* disclosure purposes.

re (d), (e), (f) and (g) "may" assertions: The key term in these four paragraphs is "may." If the accused established that it is likely that a record *does* disclose a prior inconsistent statement, or *does* undermine the credibility of a complainant, then "likely relevance" warranting production to the court could be established.[68] If the accused had evidence that the complainant has displayed a pattern of behaviour, whereby she made false accusations against persons who frustrated and angered her (and the accused did at least this); if the accused had evidence that the complainant's cognitive abilities were impaired by mental disorder; or if accused had evidence that the complainant for other reasons had problems with her memory, perception or recollection; and if the records sought would contain further information about these matters, then an adequate basis would have been established for production of those records.[69] If, however, the accused can only speculate about the contents of a record, if the accused cannot point to evidence raising a likelihood that the record does contain information bearing on the complainant's credibility, then the accused has not established "likely relevance." These paragraphs prevent reliance on possibilities or guesses (a record "may" contain anything).

re (g) and (h) "sexual history evidence:" If a record contains sexual history evidence respecting a complainant, the evidence may well be relevant to the identity of the perpetrator (the evidence could tend to show that a person other than the accused committed the offence, and that the complainant has confused the accused with another person); or to the presence or perceived presence of consent (the evidence could tend to show an ongoing consensual relationship between the complainant and the accused). The mere fact that a record contains information about the prior sexual abuse of a complainant by some third party, however, does not establish any evidential link with the particular charges against an accused. A complainant is not automatically tainted as a witness because she had been abused at some earlier time. From abuse there is no automatic inference to fabrication or inaccurate evidence. Similarly, the mere fact that a record contains information about the prior relationship between the complainant and the accused does not, by itself, establish any evidential link with the particular charges against the accused. The accused and the complainant, for example, may have had one instance of consensual sexual contact many years before the alleged events. The presence of consent at the earlier time is not evidence of consent at a later time. Very generally, evidence of a complainant's prior sexual

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66 *O'Connor*, *supra* note 3 at 23, para. 29; *R.* v. *W.G.* [2000] N.J. No. 86 (S.C.T.D.), Adams J. [hereinafter *W.G.*]; *R.* v. *P.E.*, [2000] O.J. No. 574 (C.A.) *per curiam* at para. 16.

67 Paciocco, *supra* note 12 at 187; *Stinchcombe*, *supra* note 5.

68 *W.G.*, *supra* note 66; *R.* v. *Osolin* (1993), 86 C.C.C. (3d) 481 (S.C.C.), Cory J. at 526.

69 *O'Connor*, *supra* note 3 at 23, para. 29; DerOhannesian, *supra* note 64, 19.

activity does not, by itself, support inferences that the complainant is "more likely to have consented to the sexual activity that forms the subject matter of the charge," or "is less worthy of belief."[70]

re (i) "recent complainant:" The "recent complaint" doctrine has been "abrogated."[71] The *Mills* court commented that "'recent complaint' has been abolished by the jurisprudence and cannot be relied on in any event."[72] This comment is not quite right. The "abrogation" does not entail that evidence bearing on the timing of the complainant's first report of the alleged offence can never be pursued or is never admissible. The accused is entitled to exploit the lack of recent complaint, and an adverse inference may be drawn on the basis of an absence of recent complaint; but if the accused opens this door, the Crown is entitled to tender recent complaint evidence to rebut the inferences sought to be drawn by the accused.[73] Again, however, the mere fact of delayed complaint may have little probative value. Delay itself does not generate automatic inferences adverse to the complainant – that the events did not take place, that the complainant is fabricating, that some third party unduly influenced the complainant or tainted the complainant's memories: "The importance to the complainant's credibility of his or her failure to make a timely complaint will vary from case to case" and shall be dependent upon the jury's assessment of that failure.[74]

re (j) "sexual reputation:" Evidence of a complainant's sexual reputation has no probative value: "evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant."[75] If an accused can only show that a record contains information about the complainant's sexual reputation, that information would have no legitimate use at trial, so obtaining production of it would be of no practical use for the defence.

re (k) timing of creation of record: This is probably the most difficult of the "assertion restrictions." The *O'Connor* majority had held that "[t]here is a possibility of materiality where there is a 'reasonably close temporal connection between' the creation of the records and the date of the alleged commission of the offence ... or in cases of historical events, as in this case, a close temporal connection between the creation of the records and the decision to bring charges against the accused."[76] The reasoning in these cases is similar to that concerning "recent complaint." The mere fact of timing may or may not be significant. If a relatively restricted time frame is involved, so that (for example) the alleged event in question, the creation of the record, and the making of the complaint all took place within a matter of days, then the fact that the record was made close in time to the complaint or that it was made close in time to the event raises few inferences. If, in contrast, the case is one involving a significant delay in reporting (if it is an "historical" case), then the creation of a record shortly before the report becomes more significant. If a record were made shortly after an event was alleged to have taken place and, again, there was a significant delay in reporting, the record could take on special significance. Approached in this way, understanding paragraph (k) as speaking to sheer timing without contextual significance, paragraph (k) is consistent with the *O'Connor* majority's view of the "materiality" of timing.

(5) Sources of Evidence

The requisite case-specific information may be derived from Crown disclosure, witness interviews (e.g., with members of the complainant's family or with neighbours),[77] evidence given in chief or in cross-examination in the preliminary inquiry,[78] defence

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70 Paragraphs 276(1)(a) and (b).

71 Section 275.

72 *Mills*, *supra* note 1 at 264, para. 120.

73 *R.* v. *J.E.F.* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), Finlayson J.A. at 469; *R.* v. *T.E.M.* (1996), 110 C.C.C. (3d) 179 (Alta. C.A.), Kerans J.A. at 183; *R.* v. *Henrich* (1996), 108 C.C.C. (3d) 97 (Ont. C.A.), Osborne J.A. at 102.

74 *R.* v. *P.S.M.* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), Doherty J.A. at 409.

75 Section 277; *R.* v. *Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), McLachlin J. at 392.

76 *O'Connor*, *supra* note at 21–22, para. 26.

77 The practical and ethical difficulties that could attend such interviews must be kept in mind – care would have to be taken by defence counsel to avoid any appearances of impropriety and to avoid the risk of being called as a witness.

78 One difficulty is that sexual assault is a Crown election offence, with a maximum penalty available on summary conviction proceedings of eighteen months imprisonment. The Crown may elect to go by way of summary conviction, depriving an accused of a preliminary inquiry, and still leave the accused facing a potentially significant penalty. Another difficulty is that the preliminary inquiry judge may seek to restrict cross-

counsel's knowledge of any of the persons involved (e.g., a notorious psychotherapist), voluntary disclosure by a medical professional,[79] evidence given in chief or in cross-examination at trial, or expert witnesses who have reviewed the evidence. I will not comment further on the sources of foundational evidence or on the practicalities of obtaining this evidence.

BALANCING AT STAGE ONE

If an accused does succeed in establishing "likely relevance," that does not mean that the accused has been successful on the first stage of the application. The accused faces further hurdles. Under section 278.5(1) the judge must be satisfied not only that the accused has established that the record is likely relevant to an issue at trial or the testimonial competence of a witness, but that "the production of the record is necessary in the interests of justice." In connection with this analysis, under section 278.5(2),

> the judge shall consider the salutary and deleterious effects of the determination [to produce a record to the court] on the accused's right to make full answer and defence and on the right to privacy and equality of the complainant .... In particular, the judge shall take the following factors into account:
>
> (a) the extent to which the record is necessary for the accused to make a full answer and defence;
> (b) the probative value of the record;
> (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
> (d) whether production of the record is based on a discriminatory belief or bias;
> (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
> (f) society's interest in encouraging the reporting of sexual offences;
> (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
> (h) the effect of the determination on the integrity of the trial process.

We will consider three aspects of section 278.5(2) – (A) the differences between the Bill C–46 approach and the *O'Connor* approach; (B) arguments in favour of the section 278.5(2) balancing; and (C) arguments against the section 278.5(2) balancing.

A. Balancing at Stage One: *O'Connor* v. *Bill C–46*

The *O'Connor* majority denied that balancing should take place in the stage-one production to the court inquiry. At this stage, "likely relevance" is a sufficient burden to assign to the accused.[80] That burden being satisfied, the judge is warranted in compelling production of the record to the court, so that the record may be reviewed. The balancing of the complainant's privacy interests would be considered at the second stage, after review of the record, when determining whether to produce the records to the accused. The Bill C–46 approach runs contrary to the *O'Connor* majority approach, and instead follows the approach of the *O'Connor* minority which advocated balancing at the first stage.

A further difference between the *O'Connor* majority and the Bill C–46 approaches concerns the factors considered in balancing. The factors relevant to the balancing permitted by the *O'Connor* majority at the second stage of the application did include the factors referred to in the current paragraphs 278.5(2)(a) to (f). The *O'Connor* majority allowed that the factors referred to in paragraphs (f) and (g) could be considered in the balancing (the social interests in encouraging the reporting of sexual offences and in the obtaining of treatment by complainants), although it did not accord these factors much weight.[81] The *O'Connor* majority expressly excluded the factor referred to in paragraph (h) from the balancing ("the effect of the determination on the integrity of the trial process"), on the ground that this factor was best taken into account when the admissibility of evidence (including record evidence) is being determined.[82] The *O'Connor* minority, in contrast, permitted all of factors (a) to (h) to be considered in the balancing. Bill C–46 adopted the minority approach.

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examination on issues foundational for a production of records application, since this application is, technically, irrelevant to the preliminary inquiry proceedings. Practice and case law does support the accused's entitlement to obtain foundational evidence at the preliminary inquiry: see, e.g., *R.* v. *J.F.S.*, [1997] O.J. No. 5328 (Prov. Div.); *R.* v. *Bell*, [1997] O.J. No. 3508 (Prov. Div.). If, however, a preliminary inquiry judge were to restrict defence counsel's efforts, there would be no practical remedy, unless the judge's error could be characterized as a jurisdictional error: *R.* v. *Al-Amoud* (1992), 10 O.R. (3d) 676 (Gen. Div.), Then J.; *R.* v. *George* (1991), 69 C.C.C. (3d) 148 (Ont. C.A.), Carthy J.A.

79 *R.* v. *Ross* (1993), 79 C.C.C. (3d) 253 (N.S.C.A.).

80 *O'Connor*, *supra* note 3 at 19, para. 21.

81 The societal interests were not paramount considerations: *Ibid.* at 24, para. 33.

82 *Ibid.*, para. 32.

B. In Favour of Balancing at Stage One

The main justification for balancing at stage one is that an order for production to the court limits, reduces or interferes with a complainant's privacy interests.[83] It is a form of State-ordered search for and seizure of personal information. Production to a judge violates privacy and threatens other social interests, as does production to an accused. Presumably production to a court (or the threat of such production) causes less damage to privacy and other interests than production to an accused. The quantity of damage is an empirical matter. Neither the *O'Connor* minority nor *Mills* court referred to any empirical research on the impact (if any) of production to a court as opposed to production to an accused — although I understand that evidence relating to this matter was tendered by the Crown in the *Mills* case. We shall assume, however, that even if production to a court causes less damage to privacy and other interests than production to an accused, the degree of damage caused is still significant.

If privacy is damaged and other interests are threatened by production to a judge, then complainants and others should be protected, so that records are produced only when "necessary in the interests of justice." A record should not be produced when the "salutary" effects of production (the contribution of the record to the fact-finding mission of the trial and to the defence of the accused) is less than the "deleterious" effects of production (on the complainant and others). In the case of the admissibility of evidence, even if an accused can show that prospective evidence has some probative value, the trier of law may exclude the evidence if its prejudicial effect substantially exceeds its probative value.[84] By analogy, even if an accused can show that a record is likely to contain some relevant information, the trier of law should be able to deny production, if the prejudicial effects of production exceed the proven value of the record for the litigation. In the case of the admissibility of evidence, prejudice is assessed according to factors which include the following: the degree to which the evidence tends to support unfair or inadmissible inferences (e.g., respecting the character of an accused or a complainant), whether the evidence would engender an undue emotional reaction in the trier of fact, whether the evidence would be given undue weight by the trier of fact, whether the evidence would confuse the issues and mislead the trier of fact, and whether admitting the evidence would create delay or waste time.[85] In the case of production, the damage caused by unnecessary production would affect the complainant, other persons, and the trial process. The complainant would be damaged by the unnecessary violation of her privacy interests (her security of the person and equality interests could also be argued to be damaged). Others' interests would be impaired, because the risk of unnecessary production could deter them either from seeking the assistance of records custodians or from reporting sexual offences. The trial process is impaired by producing unnecessary records, since time and resources must be spent by the judge in reviewing the records, and by the judge, counsel and the parties in connection with the hearing at the second stage of the application for production to the accused. Thus, the factors to be considered for first stage balancing under section 278.5(2) are just those that we would expect, given the *O'Connor* minority perspective.

A further analogy can be drawn to the search-and-seizure process (after all, an order for production, even to the court, is a form of search and seizure). Under section 8 of the *Charter*, a constitutional requirement for a legal rule authorizing search and seizure is that it extend "discretion" to the judicial officer empowered to issue a warrant.[86] This discretion should permit a judge to decline to authorize a search and seizure, if that result accords with the judge's assessment of the balancing of the interests supporting and opposing the search and seizure; and should permit the judge to impose conditions on the search and seizure.[87] The balancing provisions at the first stage of production merely give statutory expression (and thereby make more definite and certain) the discretion that a judge should have in deciding whether to compel production, even to himself or herself. If the stage-one balancing were eliminated, either the judge would consider similar sorts of balancing considerations in any event (without the benefit of statutory guidance), or the discretion of the judge would be impaired. The stage-one balancing, it might be argued, keeps the position of a complainant facing production analogous to the position of an accused facing search and seizure.

C. Against Balancing at Stage One

The balancing before production to the judge contemplated by section 278.5 is not appropriate, for three reasons:

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[83] *Ibid.* at 62, para. 151.

[84] *Seaboyer*, *supra* note 75 at 390.

[85] *Ibid.*; *Mohan*, *supra* note 48 at 411.

[86] *Baron* v. *Canada* (1993), 78 C.C.C. (3d) 510 (S.C.C.), Sopinka J. at 523.

[87] *Ibid.* at 524, 526.

(1) Double-weighting

The main reason for the inappropriateness of the section 278.5(2) balancing at the first stage of the application for production is that it gives double weight to factors favouring the interests of the complainants and persons other than the accused.

To get to the point where the *Criminal Code* directs the first-stage balancing, the accused must already have established that the record is likely to contain relevant information. The accused's case cannot have been based on any of the "insufficient grounds" set out in section 278.3(4). The reason the accused bears the "likely relevance" onus is precisely because the interests of the complainant and others are at stake. It is to prevent the accused from obtaining unnecessary production that the "likely relevance" burden is imposed on the accused. That is, the interests of complainants and others (referred to in sections 278.5(c), (e), (f) and (g)) have already been taken into account in setting the "likely relevance" burden. Those interests should not be taken into account a second time, after the accused has succeeded in establishing "likely relevance" but before the accused and the judge have seen the record. After the record is produced to the court for review, then balancing may be done, on the basis of the actual contents of the record.

The accused's satisfaction of the "likely relevance" standard assuages the concern that unnecessary production would impair the integrity of the trial process (section 278.5(2)(h)). The accused must establish his or her case respecting the "likely relevance" of the record. Only those records for which "likely relevance" has been established would require review by the judge. The "likely relevance" test screens out unmeritorious, unnecessary record access claims.

Many of the paragraphs in section 278.3(4) screen out arguments for production based on "discriminatory beliefs or biases" (section 278.5(2)(c)). If the "likely relevance" test has been passed, then the accused cannot relied on improper inferences.

These considerations are also relevant to the search-and-seizure analogy argument. Balancing is already built into the case the accused must establish to warrant production to the judge. Furthermore, it should be noted that, unlike the statutory situation in *Baron*, section 278.5(1) does not compel a judge to order production: the judge "may" do so — the subsection preserves judicial discretion. It is true that section 278.5 does not (unlike section 278.7) expressly provide for conditions to be attached to the production to the judge, but that is because conditions are not necessary. The disclosure is already the least possible (to the judge alone).

(2) Insufficient Weighting

By establishing "likely relevance," the accused has demonstrated that his or her rights to make full answer and defence are implicated by the information contained in the records.[88] As has been seen, an accused must make out a fairly substantial case to establish "likely relevance." What would it mean if a judge could disregard the showing made by the accused, without even looking at the record in question to verify whether the record does contain relevant information?

If an accused has shown that his or her full answer and defence rights have been implicated, the accused has shown that if those rights are ignored or dismissed, the accused is at risk of being wrongfully convicted. That risk is being set against the risk to a complainant that her records may be unnecessarily produced to a judge. To dismiss the accused's claim is to conclude that the risk of wrongful conviction is less serious than the risk of unnecessary production. Without in any way minimizing the seriousness of the unnecessary production of records, it would seem that the risk of wrongful conviction is a more serious, a weightier risk — particularly for a stigmatic offence such as sexual assault. To even permit balancing at this stage is, in effect, to underestimate the jeopardy faced by accuseds.

(3) Inconsistent Speculation

The section 278.5(2) balancing factors create a double standard with respect to "speculation." An accused should not obtain access to a complainant's records on the basis of mere claims and speculation — that is to say, on the basis of mere allegations about records that the accused has never seen. The accused overcomes the charge of speculation only if he or she can establish, on the basis of evidence, that a record is likely to contain relevant information.

There is no parallel onus, one might note, in relation to the establishing of the factors arrayed against the accused. While the term "record" is stated to apply to records for which "there is a reasonable expectation of privacy," no procedural rule is created allocating a burden to the complainant or anyone else to establish this reasonable expectation of privacy.[89] No burden is allocated to any person to establish the extent of the complainant's expectation of privacy in a record — although complainants would not have equal expectations of privacy in all of the forms of records

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[88] *O'Connor*, *supra* note 3 at 19, para. 21.
[89] Section 278.1.

referred to in section 278.1 (including psychiatric records, educational records, employment records and social services records). No burden is allocated to any person to establish the extent of the harm that would be caused by production to the court, or to establish the degree to which others will be deterred from seeking treatment or reporting offences.

If the judge considers factors such as those referred to in paragraphs 278.5(2)(c), (e), (f) and (g), the judge is speculating. Speculation could be used to deny production to the court. The accused cannot succeed by speculation, but the accused may be defeated by speculation.

One might, with the *Mills* court, point out that there is evidence on which these issues can be established before the judge, namely the evidence tendered by the accused in his or her application. Of particular relevance is the nature of the records in question and any evidence concerning the manner in which the records were created, since from these matters inferences concerning the complainant's expectation of privacy can be drawn.[90] The Crown, the record custodian and the complainant are all available to make any necessary arguments. Here again, though, is an inconsistency. The accused cannot establish "likely relevance" just by referring to the general nature of the records. Yet a judge is entitled to find a reasonable expectation of privacy just by referring to the general nature of the records. The accused must establish case-specific grounds for his or her "likely relevance" claim. The judge is entitled to consider the interests not only of the complainant, but of others, not even party to the litigation, who may be deterred from seeking treatment or deterred from reporting offences. The accused's burden is not symmetrical with the case he or she must meet.

CONCLUSIONS

To return to where I began: Do the "likely relevance" rules set a reasonable standard for accuseds to meet? They do. Are the balancing rules in section 278.5 appropriate at the stage of production to the judge? They are not. The satisfaction of the "likely relevance" test should suffice to permit judges to compel the production of records to the court for review. Are the rules likely to change any time soon? They are not. Until the rules do change, the job of judges and defence counsel — and Crowns — must be to ensure that the Bill C–46 regime is interpreted in a manner that does not foreclose meritorious production and lead to wrongful conviction.❑

Wayne Renke
Faculty of Law, University of Alberta.

[90] *Mills, supra* note 1 at 270, para. 136.

WALDMAN V. *CANADA:* RELIGIOUS DISCRIMINATION IN THE CONSTITUTION

David Matas

The case of *Waldman* v. *Canada*,[1] decided by the Human Rights Committee established under the International Covenant on Civil and Political Rights, presents an unusual dilemma for Canada. What is Canada to do about religious discrimination entrenched in the Canadian Constitution?

The *Canadian Charter of Rights and Freedoms*[2] prohibits religious discrimination. The *Charter* is part of the Constitution of Canada. However, the Canadian Constitution, because of another provision, Article 93, discriminates in favour of Roman Catholics and against other religious denominations.[3]

Article 93 gives provincial legislatures exclusive power over education. The article states that any law enacted under this power shall not "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union." In Ontario, at the time that the province joined Confederation, Roman Catholic schools had rights and privileges which other denominational schools did not. In particular, Roman Catholic denominational schools received state funding and other denominational schools did not.[4] The effect of Article 93 was to prevent the legislature of Ontario from prejudicially affecting those rights and privileges, from prejudicially affecting that funding. State funding of Roman Catholic schools in Ontario is, by virtue of Article 93, constitutionally entrenched.

Once the *Canadian Charter of Rights and Freedoms* was entrenched in the Constitution in 1982, and especially once the equality guarantee in the *Charter* became effective in 1985,[5] the question arose whether the discrimination flowing from Article 93 of the Constitution could survive the entrenchment of the guarantee of equality in section 15 of the *Charter*. The Supreme Court of Canada decided that it could.

Shortly after the *Charter* guarantee of equality sprang into life, the Ontario government of Premier Bill Davis introduced legislation, Bill 30, extending funding for Ontario Roman Catholic schools from primary to secondary education, and then referred to the courts the question of the constitutionality of its proposed legislation.[6] In 1987 the Supreme Court of Canada ruled that the proposed legislation was constitutional.[7]

Public funding of Roman Catholic secondary schools in Ontario was a right or privilege existing in 1867 at the time the Canadian Constitution came into effect protecting that funding. That protection survives today. One part of the Constitution, the *Canadian Charter of Rights and Freedoms*, could not be used to invalidate another part of the Constitution which guarantees denominational rights existing in 1867.[8]

Justice Wilson, writing the majority opinion, stated: "These educational rights, granted specifically to ... Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario."[9] In a concurring opinion, Estey J. conceded: "It is axiomatic (and many counsel before this court conceded the point) that if the *Charter* has any application to Bill 30, this Bill would be found discriminatory and in violation of ss. 2(a) and 15 of the *Charter of Rights*."[10]

What generated the litigation was not the funding already in place for primary education, but new funding proposed by Bill C–30, for secondary education. Even that proposed funding was, according to the Supreme

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1 Human Rights Committee, *Waldman* v. *Canada*, 67th Sess., UN Doc. CCPR/C/67/D/694/1996 (5 November 1999).

2 Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter *Charter*].

3 *onstitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

4 *Adler* v. *Ontario*, [1996] 3 S.C.R. 609 at para. 57.

5 See s. 32(2) of the *Charter*.

6 *Reference Re Bill C-30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1157 para. d.

7 *Ibid.* at para. 1.

8 *Supra* note 4 at para. 38.

9 *Ibid.* at para. 9.

10 *Ibid.* at para. 78.

Court of Canada, protected by the Constitution. Justice Wilson found that, at the time of Confederation, Roman Catholic separate schools were entitled to public funding for secondary education, even if they were not getting that funding.[11] Thus, the Constitution of Canada requires the Ontario government to fully fund Roman Catholic separate schools. Seen in this light, according to the Court, Bill 30 simply righted an old wrong.

To call Bill C–30 the righting of an old wrong, as the Supreme Court did, in light of its other remarks that Bill C–30 was discriminatory, was perverse. The failure to fully fund Roman Catholic schools in 1867 was wrong. However, by 1985 and the entrenchment of the equality guarantee in the Constitution, it had ceased to be wrong. The Roman Catholic population in Canada in 1985 was no longer in the disadvantaged position it was in 1867. Whatever constitutional protection to which it was entitled in 1867 had ceased to be relevant to 1985. The Supreme Court of Canada, rather than confirming the righting of a wrong, was confirming the accumulation of wrongs. Because the Roman Catholics were wronged yesterday, it became acceptable, according to the Ontario legislature and the Supreme Court of Canada, to wrong other minorities today.

After the Bill C–30 case was decided, parents who wanted state funding for denominational schools that were not Roman Catholic went to Court to argue that the guarantee of equality in the *Charter* required funding in Ontario for their schools. Individuals from the Calvinistic or Reformed Christian tradition, and members of the Sikh, Hindu, Muslim and Jewish faiths argued that the *Ontario Education Act*,[12] by requiring attendance at school, discriminated against those whose conscience or beliefs prevented them from sending their children to either the publicly funded secular or publicly funded Roman Catholic schools, because of the high costs associated with their children's religious education. A declaration was sought stating that the applicants were entitled to funding equivalent to that of public and Roman Catholic schools.

The Supreme Court of Canada rejected this challenge as an attempt to revisit its earlier decision on Bill 30. The Court ruled that the funding of Roman Catholic separate schools could not give rise to an infringement of the *Charter* because the province of Ontario was constitutionally obligated to provide such funding.[13]

However, that was not the end of the matter. Canada has signed and ratified the *International Covenant on Civil and Political Rights*, as well as the Optional Protocol to that Covenant. The Optional Protocol allows for an individual right of petition against signatory states. The Covenant, like the *Charter*, has a guarantee of equality.[14]

Arieh Waldman petitioned the Committee to find Canada in violation of the Covenant because of Roman Catholic separate school funding in Ontario. Given that the Supreme Court of Canada in the Bill 30 reference had already conceded that the Ontario scheme was discriminatory, it was perhaps inevitable that the Human Rights Committee, established under the Covenant to give its views on petitions, would come to the same conclusion.

The Government of Canada made a feeble attempt to argue that Ontario funding to Roman Catholic schools was non-discriminatory because the obligation to provide that funding was in the Canadian Constitution.[15] Yet the source of discrimination cannot change the fact of discrimination. The Human Rights Committee expressed the obvious view that the preferential treatment of Roman Catholic schools does not cease to offend the equality guarantee in the Covenant simply because it is in the Canadian Constitution.[16]

The *International Covenant on Civil and Political Rights* provides: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[17] So Canada, by ratifying the Covenant, freely undertook to change its laws, if necessary, to comply with the Covenant.

Canada ratified the Covenant on 19 August 1976. It entered into the Optional Protocol on 29 October 1979.[18] Neither at the time of the ratification of the Covenant or the Protocol did Canada append any reservation or understanding.

The *Canadian Charter of Rights and Freedoms* entered into force on 17 April 1982. By way of exception, the equality guarantee in the *Charter* entered

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11 *Ibid.* at para. 10.
12 *Education Act*, R.S.O. 1990, c. E.2.
13 *Supra* note 4 at para. 37.
14 1976, 999 *U.N.T.S.* No. 14668, art. 25.
15 *Waldman* v. *Canada*, *supra* note 1 at para. 4.3.4.
16 *Ibid.* at para. 10.4.
17 *Supra* note 14, art. 2(2).
18 See <http://www.unhchr.ch/pdf/report.pdf> (last modified: 16 November 2000).

into force on 17 April 1985. The three-year delay was to allow Canada to get its equality house in order.

During those three years there was much legal soul searching to root out inequalities that might offend the *Charter*. The House of Commons produced a report titled "Equality Now" in March 1984 under the auspices of a Special Committee on Visible Minorities in Canadian Society, chaired by Bob Daudlin.[19] The report had a whole chapter on education and put forth fourteen recommendations, none of which dealt with separate school funding. The federal government's Department of Justice produced a tandem report in 1985 titled "Equality Issue in Federal Law: A Discussion Paper."[20] Again, there was nothing on separate school funding.

To be fair to the House of Commons Committee, the ratifiers of *International Covenant on Civil and Political Rights* and the authors of the federal equality report, at the time of their efforts, separate school funding, though a potential equality problem, was a sleeping problem. Until Bill 30, which post-dated all of these efforts, separate school funding was far from the forefront of the equality debate. It is probably fair to say that none of the people involved in the earlier efforts anticipated that the Ontario government would later propose new discriminatory funding, and that the Supreme Court of Canada would rule that section 93 of the Constitution protected this new discrimination. Bill 30, given its timing, shortly after the entrenchment of the equality guarantee in the *Charter* and the heightened Canadian human rights consciousness, was inflammatory. The flames it lit are still burning.

The views of the Human Rights Committee are taken seriously by Canada. Canada views itself as being in compliance with its treaty obligations. When it is found not to comply, it attempts to change its practices, policies or laws in order to comply.

For instance, Sandra Lovelace petitioned the Committee claiming that Canada violated the Covenant because of its *Indian Act* legislation, removing Indian status from registered Indian women who married non-Indian men.[21] The *Indian Act* at the time allowed, as it does now, Indian men who married non-Indian women to retain their Indian status. The Committee found Canada in violation of the Covenant in 1981,[22] and Canada amended its legislation in 1985 to comply with the views of the Committee.[23] Today, Indian women who marry non-Indian men retain their Indian status.

Similarly, to give a provincial example, John Ballantyne, Elizabeth Davidson and Gordon McIntyre petitioned the Committee about the Québec law that prevented them from using the English language for purposes of advertising, on commercial signs outside the business premises or in the name of the firm.[24] The Committee in 1993 expressed the view that the Québec law violated the Covenant.[25] Québec, accordingly, changed the law that very same year to its present form, which does not prohibit the use of English, but requires that French be "markedly predominant."[26]

As contentious as separate school funding is, for Canada to adopt the stance of an international outlaw would be even more contentious. Such a stance would gut huge swathes of Canadian foreign policy and throw up an awkward obstacle to Canada's attempts to enforce obligations that other states owe to Canada. Once the Human Rights Committee says that Ontario separate school funding violates Canada's treaty obligations, something must be done.

The present Ontario government seems to not want to do anything at all. However, the implications of international lawlessness are more severe for Canada as a whole than they are for any one province.

Although the language law in Québec was politically as important to the government of Québec as separate school funding is to the government of Ontario, the government of Québec did not hesitate to change its law once the Human Rights Committee ruled against that law. The reason is, presumably, the sovereignist ambitions of Québec legislators. It matters a good deal more to Québec politicians how Québec appears in the international arena than it matters to Ontario politicians how Ontario appears in the international arena. Given the isolationism of Ontario politics, the violation of Canadian treaty obligations imposed by Ontario legislation will have to be handled

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19 Canada, Parliament, House of Commons, Special Committee on Participation of Visible Minorities in Canadian Society, *Equality Now! Minutes of Proceedings and Evidence of the Special Committee on Participation of Visible Minorities in Canadian Society* (Ottawa: Queen's Printer, 1984).

20 Canada, Department of Justice, *Equality Issue in Federal Law: A Discussion Paper* (Ottawa: Communications and Public Affairs, Department of Justice Canada, 1985).

21 *Indian Act*, R.S.C. 1970, c.I-6, s. 12(1)(b).

22 Communication R6/24, *Lovelace* v. *Canada*.

23 *Indian Act*, R.S.C. 1985, c. 27, s.4 repealing and replacing sections 5 to 14. Note especially s.7(1) replacing s.12(1).

24 *Charter of the French Language*, R.S.Q. 1977, c. 5, s. 58.

25 Human Rights Committee, *Views of the Human Rights Committee under Article 5*, para. 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, UNGAOR, 47th Sess., Supp. No. 40, UN Doc. CCPR/C/47/D/359/1989 and 385/1989 (5 May 1993) para. 12.

26 See *An Act to amend the Charter of the French Language*, S.Q. 1993 c. 40, ss. 18, 22, which amended, respectively, sections 58 and 68 of the *Charter of the French Language*, R.S.Q. c.C-11.

by the federal government and Parliament alone and directly.

Parliament cannot unilaterally amend the provisions of the Constitution dealing with separate school funding in Ontario without the agreement of the Ontario legislature.[27] As long as the Government of Ontario insists on maintaining the present regime, that regime is constitutionally protected.

Nonetheless, for the purpose of international compliance with the Covenant, the fact that separate school funding is in the Constitution is a red herring. Any constitutional provision that relates only to one province can be amended by Parliament and the legislature of that province.[28] There is little doubt that, if the Government of Ontario were willing to legislate an amendment to Article 93 of the Constitution to remove the protection for separate school funding that the Roman Catholic denominational schools now have, the federal government and Parliament would go along. The fix that Canada is now in is no different from the fix it would be in if a violation stemmed from provincial legislation without any constitutional status other than that it was within the power of the legislature to enact, and the province refused to do anything about that legislation. The only impact of the constitutional status of the Ontario legislation is that it prevents the *Charter* and the courts from solving the problem. The problem, like in the old pre-*Charter* days, will have to be solved by politicians and legislators.

Fortunately, what we are dealing with here is only money. The Parliament of Canada cannot legislate within the domain reserved to provincial legislatures simply because provincial legislation puts Canada in violation of international law. However, the government of Canada can spend on a subject matter reserved to provincial legislation, whether the subject matter has an international dimension or not.

Discrimination in funding can be resolved in one of two ways. One is to remove funding from those unfairly advantaged. The other is to give equivalent funding to those unfairly disadvantaged. Because of the Ontario government's unwillingness to act, the first alternative is not now an option. The only option is to give equivalent funding to those unfairly disadvantaged.

Money which the Government of Canada spends comes from taxpayers across Canada. While geographical inequality is not the sort of inequality against which either the *International Covenant on Civil and Political Rights* or the *Canadian Charter of Rights and Freedoms* protects, it would be unfair in a political, if not a legal sense, for the federal government to give separate school funding to Ontario schools and not to separate schools elsewhere in Canada.

Again, there are two alternatives. Either all Canadians would pay for separate school funding and all Canadians would benefit, or only Ontarians would pay and only Ontarians would benefit. The federal government could devise a scheme for Ontario-only payment by deducting any money that the federal government spent on separate school funding in Ontario from federal tax point or from funding transfers to Ontario.

The full funding of all separate schools is a politically contentious position because it has the effect of undermining the public school system. However, at the level of principle, the ending of discrimination is uncontentious.

It should be up to the voters of Ontario to decide whether they want full funding of all separate schools, or full funding of no separate schools. It can no longer be up to the voters of Ontario to decide whether they want full funding of only Roman Catholic schools and no others. The Government of Canada should put the state of Canada in compliance with Canada's treaty obligation under the *International Covenant on Civil and Political Rights*[29] by fully funding all separate schools in Ontario and deducting the money it spends on Ontario separate schools from transfer payments and tax points to Ontario. The government of Ontario should then be left to decide how it wants to respect the obligation not to discriminate, whether by maintaining funding of all separate schools or by funding no separate schools.❑

David Matas
Lawyer in private practice in Winnipeg, Manitoba.

[27] *Constitution Act, 1982*, *supra* note 2, s.43.
[28] *Ibid.* at s. 43.
[29] *Supra* note 14.