SECTION 15: EQUALITY? WHERE?

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INTRODUCTION

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

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

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

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

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

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

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

WHATEVER HAPPENED TO EQUALITY?

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

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

> [d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits or capacities will rarely be so classed.

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

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

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

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

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

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

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

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

> The analysis to be undertaken under section 15(1) of the Charter involves three steps. The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others, or does not provide them with a benefit which it grants others (*Andrews*, supra). It is at this second step that the direct or indirect effect of the legislation is examined.

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

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

Gonthier J. elaborates:[24]

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

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

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

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

Gonthier J. asserts that the three-step approach "in no way departs from this Court's approach in *Andrews*."[27] In support of this assertion, he cites McIntyre J. in *Andrews* that "a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."[28] Thus, Gonthier J. holds that the relevancy of the particular law to the particular ground enumerated in section 15 or one analogous thereto has long been the subject of examination under section 15.

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

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

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

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

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

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

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

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

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

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

McLachlin J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cory and Iacobucci JJ.

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

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

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

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

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

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

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

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

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

L'Heureux-Dubé J.

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

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

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

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

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

> (1) that there is a legislative distinction;
>
> (2) that this distinction results in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group;
>
> (3) that this distinction is "discriminatory" within the meaning of section 15.

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

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

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

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

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

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

ON REFLECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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

Endnotes

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

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

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

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

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

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

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

8. *Thibaudeau*, para.154.

9. *Supra* note 7 at 175.

10. See *infra* note 35.

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

12. *Supra* note 7 at 172.

13. *Ibid.* at 175.

14. *Ibid.* at 175-176.

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

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

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

18. *Supra* note 7 at 182.

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

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

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

22. *Miron*, para. 13.

23. *Miron*, para. 14.

24. *Miron*, para. 15.

25. *Miron*, para. 15.

26. *Miron*, para. 15.

27. *Miron*, para. 28.

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

29. *Miron*, para. 25.

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

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

32. *Miron*, para. 28.

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

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

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

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

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

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

38. Sopinka, Cory and Iacobucci JJ. concurring.

39. *Miron*, para. 133.

40. *Egan*, para. 45.

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

42. *Ibid.* (emphasis added).

43. *Ibid.*

44. *Ibid.*

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

46. *Ibid.* (emphasis added).

47. *Ibid.*

48. *Egan*, para. 21.

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

50. *Thibaudeau*, para. 154.

51. *Ibid.*

52. *Ibid.*

53. *Ibid.*

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

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

56. *Egan*, para. 35.

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

58. *Ibid.*

59. *Egan*, para. 55.

60. *Egan*, para. 56.

61. *Ibid.*

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

63. *Egan*, para. 56.

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

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

65. *Miron*, para. 15.

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

67. *Ibid.*

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

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

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

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

72. *Egan*, para. 56.