



Understanding Section 15 of the Charter of Rights

An Information Paper

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Overview

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 of law as members of Canadian society, equally capable and equally deserving of concern, respect and consideration: *Law v. Canada (Minister of Employment and Immigration)*¹

The analysis under s. 15(1) proceeds in three stages, with close regard to context.

1. Firstly, the claimant must show that the law, program or activity imposes differential treatment between the claimant and others with whom the claimant may fairly claim equality.
2. Secondly, the claimant has to demonstrate that this differentiation is based on one or more of the enumerated or analogous grounds.
3. Thirdly, the claimant has to establish that the differentiation results to a form of discrimination that has the effect of demeaning the claimant's human dignity. The "dignity" aspect of the test is designed to separate out trivial or other complaints that do not engage the purpose of the equality provision: *Law v. Canada (Minister of Employment and Immigration)*; *Lovelace v. Ontario*².

A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison. Claims of discrimination under s. 15(1) can only be evaluated by comparison with the condition of others in the social and political setting in which the question arises. *Hodge v. Canada (Minister of Human Resources Development)*³

The enumerated grounds are only indicators of suspect grounds of distinction. It follows that decisions on these grounds are not always discriminatory. The same applies to the grounds recognized by the courts as "analogous" to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*⁴; *Gosselin v. Quebec (Attorney General)*⁵

¹ [1999] 1 S.C.R. 497.

² [2000] 1 S.C.R. 950, 2000 SCC 37.

³ [2004] 3 S.C.R. 357, 2004 SCC 65, hereinafter *Hodge*.

⁴ [1999] 2 S.C.R. 203.

⁵ [2002] 4 S.C.R. 429, 2002 SCC 84.

The Canadian Charter of Rights and Freedoms⁶ came into force on April 17, 1982. Section 15 of the Charter (equality rights) came into effect three years after the rest of the Charter, on April 17, 1985, to give governments time to bring their laws into line with section 15.

Subsection 15(1) of the Charter, in effect since April 1985, provides that:

Every individual is equal before and under the law and has the right to the equal protection 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.

Although section 15 is written, case law shaped how it is interpreted. Hence, the review of the case law below will provide you with a better understanding of how section 15 works.

The *Andrews* Decision

The Court issued its first section 15 ruling in 1989. *Andrews v. Law Society of British Columbia*⁷ established an initial interpretive framework for the application of subsection 15(1) in future equality rights cases. Accordingly, subsequent determinations as to whether legislative distinctions or other government action violated section 15 of the Charter required lower courts to apply the *Andrews* framework.

Andrews determined that a finding of section 15 infringement requires:

- inequality, or a distinction based on personal characteristics with respect to treatment and/or impact in the formulation or application of the law; and
- discrimination, evidenced by an effect of prejudice to a disadvantaged individual or group, as determined by the enumerated grounds and/or those non-enumerated grounds analogous to them.

The Trilogy - 1995

Although the *Andrews-Turpin*⁸ analytical scheme was applied, essentially unchanged, in subsequent Court rulings, three 1995 decisions revealed a marked three-way division among members of the Court as to the appropriate approach to section 15 interpretation. These rulings also articulated variations from the original *Andrews-Turpin* approach. In *Miron v. Trudel*⁹, a majority of the

⁶ *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.

⁷ [1989] 1 S.C.R. 143.

⁸ *R v. Turpin*, [1989] 1 S.C.R. 1296.

⁹ [1995] 2 S.C.R. 418.

court commented that the factors set out in *Turpin* to determine if a group was “analogous” to those enumerated in section 15, need not necessarily be present to make such a finding, although they were valid indicators. In their view, if the Charter was to retain future relevance, analogous grounds could not be restricted to historically disadvantaged groups. The “overarching” purpose of section 15 was also restated as being “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.”

Law Decision 1999 – Another Leading Case

Following the trilogy, it was difficult to gauge how the Court’s division would affect the future evolution of section 15 interpretation, among other reasons because the *Andrews* framework had served as the authoritative guide in this area. The issue remained unresolved through 1998 in the Court’s post-trilogy rulings in which section 15 issues were addressed.

The full Court’s unanimous 1999 ruling in *Law v. Canada (Minister of Employment and Immigration)*¹⁰ marked an apparent attempt to reconcile the Court’s earlier split and to set benchmarks for the following years of section 15 analysis. The decision therefore represented a significant development.

The case involved an appeal of a ruling against a claim of age-based discrimination arising because *Canada Pension Plan* survivor benefits are denied to able-bodied surviving spouses under the age of 35 who are without dependent children. In dismissing the appeal, the Court consolidated and refined previously stated principles concerning the purpose of and approach to section 15, with a view to providing guidelines for lower courts’ future evaluation of discrimination claims under the Charter.

The basic elements focus on human dignity. They are as follows:

- The prevention of the violation of human dignity and freedom by the imposition of disadvantage, stereotyping or prejudice, and to promote equal recognition at law of all persons as equally deserving is the purpose of section 15;
- A claim of discrimination is founded if there is a conflict between the purpose or effect of the law under challenge and the purpose of section 15, as determined by analyzing the context of the claim and claimant;
- A distinction in treatment will likely constitute discrimination for section 15 purposes if it violate human dignity, and particularly if it also helps improve the position of disadvantaged individuals or groups;
- Equality is a comparative concept; therefore, relevant “comparators” must be established; within the scope of the ground(s) of alleged

¹⁰[1999] 1 S.C.R. 497.

- discrimination claimed, a court may refine a claimant's comparison, should it be insufficient or inaccurate;
- An evaluation of the contextual factors to determine whether the law demeans a claimant's dignity is conducted, first from the perspective of the claimant and, secondly, to ensure that her or his assertion is supported objectively, from the perspective of a reasonable person in circumstances similar to the claimant's, who takes into account those contextual factors.
 - The list of contextual factors to prove that a law is demeaning to dignity is not closed.
 - Some contextual factors which influence the decision in finding a section 15 infringement:
 - pre-existing disadvantage or vulnerability experienced by the claimant, with the effect of the challenged law always of central significance;
 - the extent of the link, if any, between the ground(s) raised and the claimant's actual circumstances, with discrimination more difficult to establish to the degree the law takes those circumstances into account in a way that values the claimant;
 - the ameliorative purpose or effect of the law under challenge for a relatively more disadvantaged group which, if present, is unlikely to violate the dignity of more advantaged claimants; and
 - the nature and scope of the interest affected by the law, with more severe localized results of the law for those affected more likely to show that the distinctions in treatment responsible are discriminatory under section 15.
 - The claimant's is not obliged to adduce evidence of violation of human dignity or freedom; the fact that a distinction in treatment is based on one or more section 15 grounds will often be sufficient to establish such an infringement in that it will be apparent, through judicial notice and logic, that the distinction is discriminatory.

Applying these principles to the case at hand, the Court concluded that, while the challenged provisions of the *Canada Pension Plan* do create differential treatment based on the enumerated ground of age, they do not impose a substantive long-term disadvantage on younger adults and do not violate the essential human dignity of surviving spouses under the age of 35; thus, they are not discriminatory.

Post 1999

As anticipated, the Court's assessment of the human dignity factor in subsequent decisions to date has continued to play a pivotal role in determining whether a section 15 claim of discrimination will be allowed or dismissed.

The Court has continued to develop guidelines as to how contextual factors are to be weighed and analyzed in individual cases. Additional explanation can be found, for example, in *Trociuk v. British Columbia (Attorney General)*¹¹, in which the Court ruled that legislation excluding some fathers from the birth registration and naming process was discriminatory on the basis of sex. It noted that absence of historical disadvantage need not necessarily preclude a finding of discrimination, underscoring the point that “neither the presence nor absence of any of the [Law] contextual factors is dispositive of a s. 15(1) claim” or “determines the outcome of the dignity analysis.”

The Court has also maintained its focus in post-*Law* decisions on the significance of the “comparator group” in section 15 analysis. It returned to the matter most fully in *Hodge*.

Here the Court observed that because section 15 analysis proceeds throughout on a comparative basis, the choice of comparator group is an ongoing issue in every case and initial misidentification “can doom the outcome” of the section 15 examination. *Hodge* reaffirmed the judiciary’s role in scrutinizing the claimant’s choice of comparator, and its duty “to step in and measure the claim to equality rights in the proper context and against the proper standard” when a claimant’s choice is mistaken. The Court’s rather complex discussion of the comparator group issue asserts that “[t]he appropriate comparator group is the one which mirrors the characteristics of the claimant ... relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter.”

In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*¹², the discrimination was based on Aboriginality-residence which was an analogous ground. This was a successful Section 15 challenge to federal rules which excluded band members living off-reserve from voting in band elections. This led to off-reserve band members being less deserving than on-reserve band members; therefore, engaging the dignity aspect of section 15. It could not be saved under section 1.

Subsection 15(2)

Subsection 15(2) reads:

Subsection [15(1)] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹¹[2003] 1 S.C.R. 835.

¹²[1999] 2 S.C.R. 203.

*Lovelace v. Ontario*¹³ is the case where the Court had a first discussion of the appropriate interpretation of subsection 15(2), as well as the provision's relationship with subsection 15(1). The case is about the exclusion of certain "non-band" Aboriginal groups in Ontario from the fund that provides Ontario First Nations (OFN) registered under the *Indian Act* with shares in the proceeds of the reserve-based Casino Rama. Casino Rama's goal was to strengthen OFN economic and social development. The Ontario Court of Appeal found that the casino project was allowed by section 15(2), and could not amount to discrimination under subsection 15(1). The Court relied on the interpretation of section 15(1) in the 1999 *Law* decision rather than on subsection 15(2). There was no finding as to a ground of discrimination.

The Court commented that section 15(2) is "confirmatory and supplementary" to section 15(1) and this is supported by the language of the two provisions. In addition, the court interpreted section 15(2) as an independent right or as an exemption to section 15(1). As a result, it is preferable to "recognize the interpretive interdependence" of the two provisions.

Lower Court Decision

In *Misquadis v. Canada (Attorney General)*¹ the applicants from four communities claimed that the implementation of the AHRDS infringed section 15(1) of the Charter and asked for a declaration that HRDC has an obligation to negotiate agreements under AHRDS with urban and non-status Aboriginal communities on the same basis as it negotiates with all others – Indian Act bands, Metis and Inuit groups. The judge found that the Applicants "have been excluded and unjustifiably differentially treated by HRDC from the purpose and significant benefit of AHRDS...local control of programming and funding tailored to each community's different needs in the labour market." The court found that HRSDC was responsible to implement a remedy in each of these communities.

Restrictions on S. 15

The advent of the Charter was a contentious element in the debates preceding the adoption of the Charter. Everyone agreed that the Charter rights were not absolute. Section 1 has two components: all limits on rights be "prescribed by law" and the limits be "reasonable" and "demonstrably justifiable in a free and democratic society." The "prescribed by law" restricts the number of cases the court may find Charter infringements justified. In other words, it narrows the opportunity of the government to argue for the justification infringement of a guarantee right or freedom².

Section 1 reads:

¹³ [2000] 1 S.C.R. 950.

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

The Supreme Court, in *R. v. Oakes*³ set out a two-fold test to evaluate and determine whether an infringement constitutes a reasonable limit to the equality rights guarantee. First, the objective of the legislation or government action must be shown to be sufficiently “pressing and substantial” to warrant overriding a Charter right. Second, the means adopted to attain that objective must be reasonable and demonstrably justified. This step entails a proportionality test in which the courts are required “to balance the interests of society with those of individuals or groups.” Three elements must be satisfied:

1. the measures adopted must be rationally connected to the objective;
2. the measures adopted should cause minimal impairment to the right or freedom in question; and
3. there must be a proportionality between the *effects* of the measures limiting the right or freedom and the objective identified as being sufficiently important, and between the deleterious and salutary effects of the measures at issue.

Recurring issues when considering section 1 are whether and when financial or budgetary measures may justify Charter violations (the dollars vs. rights question).

The Court concluded in *Nova Scotia v. Martin and Laseur* and *N.A.P.E.*⁴, that “[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective” for section 1 purposes, but *could* qualify as sufficiently important in exceptional cases where they are “wrapped up with other public policy considerations.” The Court has stated its intention to continue to view budgetary justifications for Charter breaches with scepticism, “because there are *always* budgetary constraints and there are *always* other pressing government priorities.” Nevertheless, on the minimal impairment aspect, the Court has noted that in some cases involving difficult choices on resource distribution where there is no obvious solution, “[g]overnments act as they think proper within a range of reasonable alternatives” and have a large margin in doing so. In the Court’s view, the “scope of that ‘margin’ will be influenced ... by the scale of the financial challenge confronting a government and the size of the expenditure required to avoid a *Charter* infringement in relation to that financial challenge.”

Considerations to Pursue S. 15

Because of the complexity in understanding how a section 15 challenge works, the long delays and the costs, it is recommended that the board decides which

issue will be challenged. Any section 15 challenge should be a coordinated effort between the PTMAs and NWAC.

¹ [2002], F.C.J. no. 1427, F.C.C. T.D.

² P. Macklem, 2 ed., *Canadian Constitutional Law*, 2d ed. (Toronto: Emond Montgomery, 1997).

³ [1986] 1 S.C.R. 103.

⁴ [2003] 2 S.C.R. 504.