
COMMENTS

CHRONIQUE DE JURISPRUDENCE

Comment: *Andrews v. Law Society of British Columbia*

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In *Andrews v. Law Society of British Columbia*,¹ the Supreme Court of Canada upheld a challenge to the requirement that one must be a Canadian citizen to be a member of the bar in British Columbia.² The Court was unanimous in concluding that this requirement infringed section 15 of the *Charter*,³ and a majority of the Court rejected the argument that it was justified under section 1.⁴

The importance of *Andrews* lies not in what it held with regard to the citizenship requirement, but in the fact that it is the first decision of the

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¹*Andrews v. Law Society of British Columbia*, [1988] 1 S.C.R. 143, aff'g 27 D.L.R. (4th) 600, [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) (B.C.C.A.), rev'g (1985), 22 D.L.R. (4th) 9, [1986] 1 W.W.R. 252, 66 B.C.L.R. 363 (B.C.S.C.) [hereinafter *Andrews*].

²*Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 41.

³*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴Separate opinions were written by Justice McIntyre (Justice Lamer concurring), Justice Wilson (Justices Dickson and L'Heureux Dubé concurring) and Justice La Forest. On the interpretation of s. 15, the opinion of Justice McIntyre attracted the agreement of the Court, Justice Wilson expressing her "complete agreement", *supra*, note 1 at 151, and Justice La Forest being in "substantial agreement" to the extent "relevant to this appeal", *supra*, note 1 at 193. Regarding s. 1, Justice McIntyre would have upheld the law, while Justices Wilson and La Forest wrote separate opinions striking it down. When discussing the interpretation of s. 15, references to "the Court" refer to the opinion of Justice McIntyre.

Supreme Court of Canada interpreting the equality rights provisions of the *Charter*.⁵ The Court addresses many of the issues that have divided lower courts and commentators concerning the appropriate framework for analyzing equality cases, and appears to have settled a number of those issues. In other respects, the decision leaves open important questions concerning the scope of section 15 and the appropriate standard of review under section 1. The purpose of this note is to outline what *Andrews* decided and what it left unresolved.

I. The Meaning of Equality

Andrews affirms a number of important, albeit (by now) familiar points regarding equality as a constitutional ideal. These include the commonplace that equality does not necessarily require identical treatment; that not every legislative classification offends equality;⁶ that equality is a comparative concept;⁷ and that a core value underlying equality is the idea of human dignity and the treatment of all as worthy of equal "concern, respect and consideration".⁸

The most dramatic aspect of the Court's general discussion of equality lies in its treatment of the Aristotelian principle of formal equality (or the "similarly situated test" as it has become known in the Canadian caselaw). This principle, treat like cases alike and unlike cases unlike,⁹ had emerged as the dominant approach in the case law to date, but the Court was very harsh in its criticism. Arguing that this conception of equality ignores the content of the law, and invoking the horrors of Nazi legislation as well as the sorry history of the Court's treatment of equality under the *Canadian Bill of Rights*,¹⁰ the Court does not mince words in its apparent rejection of the principle of formal equality. It is "seriously deficient",¹¹ "does not afford a realistic test for a violation of equality rights",¹² and "cannot be

⁵The importance of the case can be illustrated by the fact that a number of organizations intervened in order to advance their conceptions of the meaning and scope of s. 15, even though they took no position on the merits of the case itself. See, for example, *Factum of the Women's Legal Education and Action Fund (LEAF)*, at 2.

⁶*Andrews, supra*, note 1 at 168, McIntyre J.

⁷*Ibid.* at 164.

⁸*Ibid.* at 15. For a compelling answer to the skeptical argument that it is impossible to identify the ways in which people are deserving of equal concern and respect, see J. Feinberg, *Social Philosophy* (1973), at 94.

⁹Aristotle, *Ethica Nichomacea*, trans. W. Ross, Book V3, at p. 1131a-6 (1925).

¹⁰R.S.C. 1970, App. III; now, R.S.C. 1985, App. III.

¹¹*Andrews, supra*, note 1 at 166, McIntyre J.

¹²*Ibid.* at 167.

accepted as a fixed rule or formula for the resolution of equality questions under the *Charter*.”¹³

A number of questions arise from the Court's analysis of the principle of formal equality. First, the Court does not say that the principle of formal equality has no role to play in any case whatsoever, only that it would be wrong to attempt to resolve all issues “within such a fixed and limited formula”.¹⁴ Second, notwithstanding the harshness of its criticisms, the Court does not reject the underlying premise of this principle. For example, Justice McIntyre cites the following in support of the proposition that equality does not necessarily demand identical treatment: “It was a wise man who said that there is no greater inequality than the equal treatment of unequals”.¹⁵ If the “wise man” was not Aristotle, it certainly could have been: this passage is a pure expression of the principle of formal equality.

How could the Court both reject and affirm the principle in the same case? The answer lies in distinguishing between two conceptions of the principle of formal equality. The first looks at the categories as set out *in the law itself*, and asks only that all those identified by the law as “similarly situated” be treated similarly. As a test for evaluating the *content* of law, this conception of equality is tautological.¹⁶ So long as the law draws a distinction between one group and another, the similarly situated test is satisfied, inasmuch as the groups are not similarly situated *in terms of the distinctions drawn in the law itself*. Because no law could ever fail this test, regardless of how odious it might be, this interpretation of formal equality is deserving of the harsh criticism it receives at the hands of the Court.¹⁷

There is, however, a second and more plausible interpretation of the principle of formal equality, one which appears to have been adopted by most of the lower courts applying the similarly situated test. The core idea is that legislative distinctions must be relevant to the purposes of the law, and that equality is violated where a law distinguishes between two classes that are similarly situated with respect to the purpose of the law. In this view, formal equality is a demand for legislative rationality (if not reason-

¹³*Ibid.* at 168.

¹⁴*Ibid.*

¹⁵*Ibid.* at 164, citing Frankfurter J. in *Dennis v. United States*, 339 U.S. 162 at 184 (1949).

¹⁶P. Westen, “The Empty Idea of Equality” (1982) 95 *Harvard L.R.* 537 at 548-50.

¹⁷As has been argued elsewhere, however, this conception of equality is defensible, if not indeed indispensable, in the context of a challenge to the *application* of law. See M. Gold, “Equality Before the Law in the Supreme Court of Canada: A Case Study” (1980) 18 *Osgoode Hall L.J.* 336 at 371-72. Indeed, it is a necessary (though not sufficient) condition of justice that law be applied fairly according to its terms. So although the Court is correct in rejecting this interpretation of formal equality as the test for resolving challenges to the content of legislation, it would be incorrect to reject it altogether.

nableness). When combined with constitutional principles that impose limits on the purposes legislation might legitimately pursue, this interpretation escapes the Court's criticism that it would automatically legitimate discriminatory legislation.

It does not, however, escape a number of other well-known criticisms: that it begs all the important questions rather than resolving them;¹⁸ that there will be cases where the approach simply cannot work due to the fact that there is no comparable class (as in the case of reproduction); and that perceived differences between classes may reflect stereotypes based upon past discrimination.¹⁹ In addition, the principle of formal equality seems misplaced as a test for legislation that classifies on a ground enumerated in section 15, given that these grounds were specifically identified as presumptively suspect. And it may also be misplaced in cases (like *Andrews*) where the basis of classification is deemed analogous to those enumerated. But it is much less clear that the principle of formal equality is not an appropriate starting point in cases where legislation classifies on the basis of a non-enumerated, non-analogous ground. We return to this question below.

Finally, even if the similarly situated test has been rejected as a test in all cases, it would be wrong to assume that the essence of it disappears from equality analysis under the *Charter*. Wherever a legislative distinction burdens one group at the expense of another such that section 15 is violated, the section 1 analysis will have to confront the question of whether there are differences between these two groups that would justify the different treatment. Indeed, it is precisely because the principle of formal equality is so question-begging that it cannot be banished from the analysis altogether. It is like pushing in a bump on a balloon. It may be flattened, but the bump will reappear at some other place on the balloon.

¹⁸If all it requires is that legislators do not act irrationally, it is exceptionally easy to satisfy. And if it is to be given more "bite", one must ultimately articulate a theory of substantive rights that provides criteria of relevance upon which one can draw. See P. Westen, *supra*, note 16; M. Gold, "Moral and Political Theories in Equality Rights Adjudication" in J. Weiler and R. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 85 at 90-91. As such, it is difficult to disagree with the comment that the principle of formal equality "seems indisputable as far as it goes, but perhaps only because it goes almost nowhere": W. Black & L. Smith, "Section 15 Equality Rights Under the Charter: Meaning, Institutional Constraints and a Possible Test" in G. Beaudoin, ed., *Your Clients and the Charter: Liberty and Equality: proceedings of the 1987 Colloquium of the Canadian Bar Association in Montreal* (Cowansville: Y. Blais, 1988) 225.

¹⁹This point was underlined by the Ontario Court of Appeal in *R. v. Century 21 Ramos Realty Inc. and Ramos* (1987), 58 O.R. (2d) 737 at 756-57, [1987] 1 C.T.C. 340.

II. Section 15: Framework of Analysis

Andrews affirms a number of familiar points regarding the interpretation of section 15(1): section 15 applies to both the substance of the law and its manner of application;²⁰ the scope of section 15 is limited to inequalities in the formulation and application of law, and neither provides for material equality between individuals or groups, nor imposes duties on individuals or groups to treat each other equally;²¹ and the narrow interpretations of equality advanced by the Court under the *Canadian Bill of Rights* will not be carried over into the *Charter*.²²

However, *Andrews* leaves open a number of important issues concerning the scope of section 15 and the nature of the interests it is designed to protect. The Court does not settle the question of whether section 15 is limited to the protection of socially disadvantaged groups, as some have argued,²³ and does not address directly the question of whether corporations can benefit from the protection of section 15.²⁴ As well, the Court does not

²⁰*Andrews, supra*, note 1 at 171, McIntyre J.

²¹*Ibid.* at 163-64. This latter point is merely an application of the principle that the *Charter* does not apply directly to private action. See *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 71 N.R. 83, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273.

²²Most commentators assumed that the combination of the entrenchment of the *Charter* and the text of s. 15 itself would result in the Court repudiating the conception of equality it had advanced under the *Canadian Bill of Rights*. Indeed, *Andrews* suggests that *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, 78 C.L.L.C. 14,175, and *A.G. Canada v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 341, 23 C.R.N.S. 197, would both be decided differently under the *Charter*. See *Andrews, supra*, note 1 at 167-71, McIntyre J. In two cases decided after *Andrews*, the Court rejected the definitions of equality before the law set out under the *Canadian Bill of Rights*. In *Brooks, Allen and Dixon et al. v. Canada Safeway Ltd* (1989), 94 N.R. 373, the Supreme Court overruled *Bliss* in holding that discrimination based upon pregnancy did constitute sex discrimination under Manitoba's *Human Rights Act*, S.M. 1974, c. 65, as amended; and in *R. v. Turpin* (May 4, 1989), File Nos. 20509 and 20510, the Supreme Court rejected the definition of equality set out in *R. v. Burnshine*, [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584, [1974] 4 W.W.R. 49.

²³That s. 15(1) is limited to the protection of disadvantaged groups was underlined by Justice Wilson in *Andrews, supra*, note 1 at 152, and was central to the Court's holding in *R. v. Turpin, supra*, note 22 at 41. For a general discussion of the issue, see Black & Smith, *supra*, note 18 at 245-47.

²⁴There are two discrete situations. First, are corporations included in the term "every individual"? The case law is virtually unanimous that they are not. See, e.g., *Energy Probe v. A.G. Canada* (1987), 42 D.L.R. (4th) 349, 61 O.R. (2d) 65 (H.C.). The second situation arises by virtue of the principle affirmed in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 18 C.C.C. (3d) 385, that a corporation can challenge the constitutionality of legislation even if it cannot possess the right itself. Here the case law is less uniform, and it remains an open question whether the *Big M* principle will be held to extend to s. 15. For an argument that standing should not be granted, see *Institute of Edible Oil Foods v. R.* (1987), 63 O.R. (2d) 436 at 442-43 (H.C.).

decide whether there are any limits to the kinds of legislative classifications that engage section 15.²⁵ Accordingly, for the time being at least, claims based upon any ground whatsoever, whether brought by individuals, groups or (possibly) corporations, however “advantaged” they might be, would appear to be justiciable under section 15. We return to some of these issues in a subsequent section of this comment.

Although the Court left these issues open, it did provide a clear framework for analyzing cases where a law classifies on the basis of an enumerated or analogous ground. It also provided guidance as to the criteria relevant to determining whether a particular ground is analogous to those enumerated.

To establish a breach of section 15, the complainant must establish two elements: that the law offends one of the equality rights guaranteed by section 15 *and* that the law is discriminatory:

it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification must be considered. ...[A] role must be assigned to section 15(1) which goes beyond the mere recognition of a legal distinction.²⁶

²⁵Justice McIntyre writes: “The enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition” (*Andrews, supra*, note 1 at 175). Justice Wilson agrees with Justice McIntyre “that it is not necessary in this case to determine what limit, if any, there is on the grounds covered by s. 15. . .” (*ibid.* at 153, Wilson J.). Justice La Forest is the only member of the Court to state his views clearly, arguing that the protection of s. 15 should extend beyond the prohibition of discrimination on enumerated or analogous grounds (*ibid.* at 194). Although Justice Wilson is less clear, there are aspects of her opinion that suggest that she would support the idea of limiting the scope of s. 15, notably her conception of s. 15 as “designed to protect those groups who suffer social, political and legal disadvantage in our society” (*ibid.* at 154). In addition, the opinion of Justice McIntyre can be read as supporting some limitation on the scope of s. 15, especially in his endorsement of the “enumerated and analogous grounds” approach as one that “most closely accords with the purposes of s. 15” (*ibid.* at 182). More recently, the Supreme Court has clarified its view on the scope of s. 15(1). In *Reference re The Workers’ Compensation Act, 1983 (Nfld.)* (April 24, 1989) [unreported], the Supreme Court dismissed a challenge to the *Workers’ Compensation Act, 1983*, S.N. 1983, c. 48, stating that the “situation of the workers and dependents here is in no way analogous to those listed in s. 15(1), as a majority in *Andrews* stated was required to permit recourse to s. 15(1)” (La Forest J. at 1, emphasis added). In *R. v. Turpin, supra*, note 22, the Court rejected a challenge to s. 430 of the *Criminal Code* which gives an accused charged with murder in Alberta (but nowhere else) the right to elect trial by judge alone. The Court held that although the accused’s rights to equality had been infringed, persons charged with murder outside Alberta “do not constitute a disadvantaged group in Canadian society within the contemplation of s.15” (Wilson J. at 41.)

²⁶*Andrews, supra*, note 1 at 182, McIntyre J.

A complainant under section 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.²⁷

Once it has been established that section 15(1) has been infringed, and assuming that section 15(2) is not available, the law will be struck down unless it can be justified under section 1.

Regarding the criteria by which analogous grounds are to be identified, *Andrews* appears to adopt the approach that a number of courts and commentators have advanced.²⁸ The core idea is to generate a set of criteria that explain the enumerated grounds, using those criteria to assess whether a non-enumerated ground shares a sufficient number of features so as to be deemed analogous. These features include the presumptive irrelevance of the ground to many legitimate legislative purposes, whether the group defined by the classification has suffered a history of discrimination, the extent to which they are relatively politically powerless, and whether the basis of classification concerns those aspects of one's person that are either beyond one's control or within that sphere independently protected by the Constitution.

These factors were invoked in *Andrews* to justify characterizing citizenship as an analogous ground.²⁹ Although one might question whether citizenship ought to be so classified,³⁰ it appears as if this was a matter conceded in argument by counsel for the Law Society of British Columbia.³¹

²⁷*Ibid.*

²⁸See, e.g., *Smith, Kline & French Laboratories Ltd. v. Canada (A.G.)* (1986), 34 D.L.R. (4th) 584 (F.C.A.); M. Gold, "Equality Past and Future: The Relationship Between Section 15 of the Charter and the Equality Provisions in the Canadian Bill of Rights" in Law Society of Upper Canada, *Equality: Section 15 and Charter Procedures* (1985), A-1, at 4-7.

²⁹See the discussion by Justice La Forest in *Andrews, supra*, note 1 at 195-97. Similar considerations underlie the U.S. concept of "discrete and insular minorities" invoked by Madam Justice Wilson in *Andrews, supra*, note 1 at 152. One can properly argue that the grounds enumerated in s. 15 are not "personal" in the sense of being natural, but are rather social constructs imposed on individuals by society. Nevertheless, it remains the case that groups characterized by these constructs have been discriminated against historically.

³⁰See, e.g., *Black & Smith, supra*, note 18 at 248. One can question the intelligibility of Justice La Forest's statement in *Andrews* that "[c]itizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action. . ." (*supra*, note 1 at 195).

³¹"It was conceded that the impugned legislation does distinguish the respondents from other persons on the basis of a personal characteristic which shares many similarities with those enumerated in s. 15" (*Andrews, supra*, note 1 at 195, La Forest J.).

III. The Concept of Discrimination

The Court underlined two interpretive principles that a definition of discrimination must satisfy: one should give meaning to all parts of section 15(1), and section 15(1) and section 1 should be kept analytically distinct. *Andrews* settles a number of issues surrounding the meaning of discrimination, and thus provides welcome guidance to bench and bar on an issue that had deeply divided the lower courts. It is not clear, however, that the Court succeeded in satisfying either one of its two interpretive principles.

The Court rejects the view that any distinction constitutes discrimination, arguing that this approach fails to give adequate meaning to the terms of section 15(1) itself.³² At the other extreme, the Court rejects the view that discrimination means a distinction that is unfair or unreasonable, arguing that it would rob section 1 of much of its role.³³

Drawing upon conceptions of discrimination elaborated under Human Rights legislation, the Court defines discrimination as follows:

discrimination may be described as a distinction, whether intentional or not but based upon grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.³⁴

A number of features of this definition should be underlined. By rejecting the need to establish a discriminatory intent, the Court gives section 15 a broader scope than the U.S. courts have given to the equal protection clause of the Fourteenth Amendment.³⁵ Indeed, the Court regularly invokes the importance of focussing on the impact of the law on individuals and groups. This emphasis, when combined with approving references to the

³²This is the view advanced in P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 800.

³³This was the approach advanced by McLachlin J.A. (as she then was) in the British Columbia Court of Appeal decision in *Andrews v. Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600 at 608-09, 2 B.C.L.R. (2d) 305 at 314-15.

³⁴*Andrews*, *supra*, note 1 at 174-75, McIntyre J. For further elaboration on the meaning of discrimination, see *Janzen and Govereau v. Pharos Restaurant and Grammas* (1989), 95 N.R. 81, where the Supreme Court held that sexual harassment constituted sex discrimination under Manitoba's *Human Rights Act*, *supra*, note 22.

³⁵See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

concepts of adverse impact and systemic discrimination, suggests that a broad scope of protection is afforded by section 15.³⁶

On the other hand, the definition is not without its limitations, and can be seen as restricting the scope of section 15 in two ways. The first concerns the kinds of interests protected by section 15. Even if the Court ultimately decides that the scope of section 15 is *not* restricted to claims based upon enumerated or analogous grounds, the Court effectively limits the scope of section 15 by tying the definition of discrimination to the concept of “personal characteristics”.

Second, notwithstanding the references to concepts of adverse effects and systemic discrimination, it is important to underline the limits of the concepts so approved. In discussing the meaning of equality, Justice McIntyre appears to adopt the view that it is the impact alone that counts, and that even a law of universal application could offend equality:

[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.³⁷

But when the Court turns to the concept of discrimination, it defines it in terms of a distinction in the law.³⁸ This suggests that only inequalities that flow from legislative distinctions will be held discriminatory, and hence contrary to section 15.³⁹

Thus it would appear as if the Court in *Andrews* has settled a number of issues around which lower courts and commentators have divided. But at least as regards one central issue, appearances may be deceiving.

The Court purports to give a meaning and role to the phrase “without discrimination” that is distinct from the approaches attributed to Professor Hogg and Justice McLachlin, and which provides a “workable approach to the problem”⁴⁰ of keeping sections 15 and 1 analytically distinct while giving meaning to the terms within section 15 itself. But in light of the basic

³⁶Regarding the focus on impact, see *Andrews, supra*, note 1 at 165, McIntyre J. Regarding adverse effect discrimination, the Court refers to its decision in *Human Rights Comm. (Ont.) v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551. Regarding systemic discrimination, the reference is its decision in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193, 27 Admin. L.R. 172, 87 C.L.L.C. 17,022.

³⁷*Andrews, supra*, note 1 at 165, McIntyre J.

³⁸So too is the Court's view of what the s. 15 inquiry is all about: “What kinds of distinctions will be acceptable under s. 15(1) and what kinds will violate its provisions?” (*ibid.* at 169).

³⁹To be sure, most cases would still fall within the scope of s. 15, given that it is usually possible to find some distinction in the law.

⁴⁰*Andrews, supra*, note 1 at 182.

framework of analysis advanced by the Court, it is not clear that the role assigned to the concept of discrimination accomplishes that objective.

The Court held that the fact that legislation classifies on an enumerated or analogous ground is not determinative of whether it violates section 15. Nor is it sufficient that a complainant show that he or she has been deprived of some benefit or protection available to others. As mentioned earlier, there must be a finding of discrimination. But when applied to the actual facts in *Andrews*, all of these distinctions appear to collapse:

The distinction [between citizens and non-citizens] therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad *and is, therefore, discriminatory*.⁴¹

As has been noted elsewhere,⁴² litigants do not come to court arguing that they have been granted a benefit for which they are not entitled. Real cases always involve the claim that the impugned legislative classification results in a disadvantage. Thus, at least in the context of claims based upon enumerated or analogous grounds, the concept of discrimination introduces no additional element to the test of whether equality rights have been infringed. There will always be discrimination in the sense defined by the Court. Moreover, the Court's test is indistinguishable from that offered by Professor Hogg. As a practical matter, any distinction automatically sends you to section 1.⁴³

On the other hand, if the concept of discrimination means anything more than a classification creating a disadvantage, it threatens to introduce the question of the reasonableness and justification for the impugned legislation into the terms of section 15(1). This approach was rejected by the Court in *Andrews* as failing to respect the analytical distinction between sections 15(1) and 1.

The difficulty (if not impossibility) of holding the middle ground between the two approaches rejected by the Court is not due to any intellectual

⁴¹*Ibid.* at 183, McIntyre J. (emphasis added).

⁴²M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct L.R. 131 at 146.

⁴³Admittedly, Professor Hogg's analysis did *not* limit the scope of s. 15 to enumerated and analogous grounds. See Hogg, *supra*, note 32. But the Court in *Andrews* did not decide that issue definitively. In any event, the Court's critique of Professor Hogg's approach was not based on the need to restrict the scope of s. 15, but rather on the need to give meaning to the terms within s. 15.

failing of the Court.⁴⁴ As will be argued in the concluding section of this comment, it is endemic to any attempt to give separate meaning to the various terms in sections 15 while still preserving a distinct role for section 1. At least the Court spoke definitively on these issues, providing some guidance to bench and bar. The same cannot be said of the Court's treatment of section 1.

IV. The Standard(s) of Review Under Section 1

It is now a commonplace to observe that the Supreme Court is divided on the question of how to apply section 1 of the *Charter*.⁴⁵ *Andrews* reflects and perhaps deepens this division, and it leaves unresolved the central question concerning the standard of review to apply in equality rights cases. Are there different standards depending on the nature of the case and, if so, what are those standards?

Justice McIntyre (joined by Justice Lamer) would have upheld the citizenship requirement under section 1. He rejects the stringency of the test set out in *Oakes*, arguing that a more flexible and deferential standard is appropriate. Legislative objectives need not be "pressing and substantial", only "desirable", and courts ought not quickly to conclude that legislative

⁴⁴Indeed, any case decided under s. 15 could serve to illustrate the dilemma. Consider the following passage from the case of *Colangelo v. Mississauga* (1988), 30 O.A.C. 26, where the Ontario Court of Appeal struck down provisions in the *Municipal Act* which statute-barrred persons injured on ice or snow if they failed to provide timely notice to the municipality, while persons injured in other circumstances were *not* statute-barrred.

It is difficult to conclude other than that the different treatment accorded to snow or ice claimants is discriminatory having regard to its prejudicial and invidious purpose and effect. The valuable right of a snow or ice claimant will be barrred although failure to give notice results in no prejudice to a municipality whereas other claimants in the same position are allowed to pursue their claims." (*ibid.* at 37).

Either the concept of "prejudicial and invidious purpose and effect" refers to the disadvantage that the snow or ice claimant suffers, or it refers to the fact that the Court believed that the rule could not be justified. In the former case it adds nothing to the test formulated by Professor Hogg; in the latter, it introduces notions of reasonableness and justification.

⁴⁵M. Gold, "Of Rights and Roles: The Supreme Court and the Charter" (1989) 23 U.B.C. L.Rev. (forthcoming); R. Elliot, "The Supreme Court of Canada and Section 1 — The Erosion of the Common Front" (1987) 12 Queen's L.J. 277; L. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Sup. Ct L.R. 469.

initiatives were unreasonable.⁴⁶ Indeed, he rejects the idea that there is a single test under section 1:

There is no single test under section 1; rather, the Court must carefully engage in the balancing of many factors in determining whether an infringement is reasonable and demonstrably justified.⁴⁷

Although Justice La Forest does *not* find the citizenship requirement to be justified under section 1, his general approach to section 1 is not appreciably different than that of Justice McIntyre. About that approach he writes:

I am in general agreement with what he has to say about the manner in which legislation must be approached under the latter provision, in particular the need for a proportionality test involving a sensitive balancing of many factors in weighing the legislative objective. If I have any qualifications to make, it is that I prefer to think in terms of a single test for section 1, but one that is to be applied to vastly differing situations with the flexibility and realism inherent in the word "reasonable" mandated by the Constitution.⁴⁸

Justice Wilson (joined by Justices Dickson and L'Heureux-Dubé) applies the *Oakes* test in its full rigor. As the following passage reveals, however, her willingness to do so is a function of the kinds of cases that reach section

⁴⁶ [G]iven the broad ambit of legislation which must be enacted to cover various aspects of the civil law dealing largely with administrative and regulatory matters and the necessity for the Legislature to make many distinctions between individuals and groups for such purposes, the standard of "pressing and substantial" may be too stringent for application in all cases. To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation. In my opinion, in approaching a case such as the one before us, the first question the Court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights.

(*Andrews, supra*, note 1 at 184, McIntyre J.)

[I]t must be recognized that Parliament and the Legislatures have a right and a duty to make laws for the whole community: in this process, they must make innumerable legislative distinctions and categorizations in the pursuit of the role of government. When making distinctions between groups and individuals to achieve desirable social goals, it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly a wrong one. . . .

(*ibid.* at 185). The standard of review advanced in these passages is strikingly similar to the conception of equality before the law advanced by Justice McIntyre in *MacKay v. R.*, *infra*, note 55. See M. Gold, "Comment" (1982) 60 Can. Bar Rev. 137. There is some irony in the fact that the opinion of Justice McIntyre goes out of its way to distance itself from the definition of equality contained in the cases decided under the *Canadian Bill of Rights*, and then reintroduces similar notions into s. 1.

⁴⁷*Andrews, supra*, note 1 at 185, McIntyre J.

⁴⁸*Ibid.* at 197-98, La Forest J.

l analysis. Of the requirement that the legislative objective be “pressing and substantial”, Justice Wilson writes:

This, in my view, remains an appropriate standard when it is recognized that not every distinction between individuals and groups will violate section 15. If every distinction between individuals and groups gave rise to a violation of section 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation. This is not a concern, however, once the position that every distinction drawn by law constitutes discrimination is rejected as indeed it is in the judgment of my colleague, McIntyre J. Given that section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.⁴⁹

This passage is open to two readings. Either a strict standard of review is justified because the scope of section 15 is limited in some way (*i.e.*, to enumerated or analogous grounds, or to the protection of the disadvantaged) or it is justified because not every legislative distinction will amount to discrimination under section 15. The difference between these two interpretations is important. If the former is correct, it suggests the possibility that a different standard of review would be applied were the scope of section 15 to be broadened beyond the enumerated and analogous grounds. However, if the latter is correct, it would not necessarily follow that a less rigorous standard would be applied even if the scope were broadened, assuming that a legislative distinction *were* found to be discriminatory.

For reasons of institutional legitimacy and competence, it can be argued that courts ought to apply a more relaxed standard of review in cases based upon non-analogous grounds. Given the role and definition of discrimination in the application of section 15, however, this view seems problematic. Would it not be fitting and proper that the government be required to justify the law every bit as strictly as in the case based upon an enumerated or analogous ground? The answer (like so much in *Andrews*) is not self-evident.

For the moment it suffices to underline the following points. First, the Court in *Andrews* appears equally divided on the general approach to section 1, even though all members of the Court agreed that there had been discrimination on an analogous ground. There is no reason to doubt that this disagreement will carry over in cases based upon enumerated grounds. Nor is there reason to dismiss the possibility that some judges will draw dis-

⁴⁹*Ibid.* at 154, Wilson J.

tinctions between some of the enumerated grounds themselves.⁵⁰ Second, many (if not all) members of the Court in *Andrews* appear willing to relax the standard of review in certain kinds of cases. For example, all three opinions allude to “social and economic legislation” as if this were a category of legislation calling for a greater degree of judicial deference.⁵¹ Based largely on the U.S. experience under the Bill of Rights, this way of characterizing legislation is not a particularly helpful way of analyzing or predicting when a court ought to defer to legislative judgments. What legislation is not either “social” or “economic” in some sense? In any event, legislation does not come so neatly packaged, and it is hard to resist the conclusion that one attaches this label to legislation after one has decided to uphold it. This only reinforces the point made earlier that *Andrews* leaves unresolved all of the key questions concerning the appropriate standard of review in equality cases.

V. The Scope of Section 15: What Did *Andrews* Leave Open?

The Court explicitly leaves open the possibility that section 15 applies to legislation that classifies on *any* ground whatsoever, not only legislation that classifies on the basis of enumerated or analogous grounds. This forms a significant proportion of the cases decided to date under section 15, and it is reasonable to expect that litigation of this kind will continue to be brought unless and until the Supreme Court clearly holds that these cases are not justiciable under section 15.

I confess to being of two minds about the merits of restricting the scope of section 15, but this will not be pursued further.⁵² The point to be made

⁵⁰I continue to believe that one standard, and a fairly rigorous one at that, is appropriate for all claims based upon enumerated or analogous grounds. See, M. Gold, “Litigating Equality: Some Formative Issues” in L. Smith *et al.*, eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 243 at 246-47. And, as suggested below, a similarly rigorous standard might also be justified in cases based upon non-analogous grounds, *assuming* that a stringent test is imposed under s. 15.

⁵¹*Andrews, supra*, note 1 at 154, Wilson J.; at 194, La Forest J.; at 185, McIntyre J.

⁵²It is beyond the scope of this comment to assess the arguments for and against restricting the scope of s. 15. For a helpful review of the arguments on both sides, see Black & Smith, *supra*, note 18. Those who would restrict the scope of s. 15 to legislation that classifies on grounds that are either enumerated or analogous to those enumerated argue that the purpose of s. 15 is not intended to remedy all unfairness in law, but rather to protect historically disadvantaged groups from discrimination. To the extent that the enumerated (and analogous) grounds define groups who are disadvantaged, restricting the scope of s. 15 accomplishes that objective. Underlying the argument for restricting the scope of s. 15 is also a concern for the legitimacy of judicial review, a fear that equality jurisprudence will become distorted if the case law is dominated by cases brought by the advantaged, a concern about the institutional capacities of courts, and the belief that some limiting principles need to be developed lest the courts drown in a sea of equality litigation. Those who deny that there should be any *a priori*

here is a narrower one. Not only is *Andrews* silent as to the proper test for analyzing legislation that classifies on non-analogous grounds, but it may very well have closed the door on most, if not all, of the possible tests appropriate for the resolution of such issues.

The problem is to establish a definition of equality for such cases.⁵³ One possibility would be to treat all such legislative distinctions as violating equality, moving then to the definition of discrimination to determine whether section 15 was infringed. The obvious difficulty is in squaring this approach with the oft-repeated statement in *Andrews* that not every distinction will offend equality. Indeed, one might wonder why the Court devoted the attention it did to identifying citizenship as an analogous ground, if the first step in the process would be so easily satisfied in cases of non-analogous grounds. Moreover, given that legislative distinctions based upon enumerated and analogous grounds are generally considered to be more suspect than others, and deserving of greater judicial scrutiny, it would seem bizarre to make it *easier* for a claim based on a non-enumerated ground to satisfy the first step.

In recognition of the special status of the enumerated grounds and those analogous to them, some commentators have argued that an applicant should bear a greater burden to establish a violation of section 15 when the claim is based upon a non-analogous ground. Typically, this would involve requiring the applicant to demonstrate that the classification was not reasonably related to the legislative purpose, or some variation on this theme.⁵⁴ The difficulty here is the insistence in *Andrews* that any consideration of the reasonableness of or justification for the legislation must take place under section 1. For similar reasons, it does not seem open to adopt the approach

limits invoke the idea that s. 15 should protect against the unreasonable and arbitrary exercise of legislative power, and that any attempt to limit the grounds to those either enumerated or analogous necessarily results in the possibility that grossly unfair legislation could not be attacked. Concerns about the legitimacy and capacity of courts are not dismissed, but it is argued that there is nothing particularly unique about s. 15 in this regard. Having given a broad interpretation to the *Charter* as a whole, and in particular to s. 7, the courts already are drawn into complicated and controversial areas. In any event, such concerns ought to be addressed in terms of the standard of review, not by an automatic rule closing the courtroom door to whole categories of cases.

⁵³A related possibility would be to treat all legislative distinctions that imposed a burden as violating equality. This appears to be what the Court did in *R. v. Turpin*, *supra*, note 22 at 36, where Justice Wilson characterizes equality before the law as "designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others". Because of the realities of litigation, however, this is the equivalent of treating all distinctions as violating equality.

⁵⁴This was the thrust of the approach I developed in Gold, *supra*, note 45. For a similar approach, see Black & Smith, *supra*, note 18.

advanced by Justice McIntyre in *MacKay v. R.*⁵⁵ This approach was explicitly distinguished in *Andrews* on the basis that section 1 of the *Charter* required a different approach than that developed under the *Canadian Bill of Rights*.⁵⁶

The only other plausible approach is the similarly situated test. Were the Court to allow claims based upon non-analogous grounds, this would seem to be the best approach. But pending a clear statement by the Supreme Court, it is hard to imagine either a lawyer or judge relying on the similarly situated test in light of the rough ride it got in *Andrews*.

In sum, there are only two possibilities. Either the Court has in fact decided that the scope of section 15 is limited, or everything in *Andrews* must be confined to cases dealing with analogous grounds. The latter seems implausible, given that the general discussion of the meaning of equality, the rejection of the similarly situated test, and the repudiation of *Canadian Bill of Rights* jurisprudence, clearly were intended to apply generally to section 15. The former is unsatisfactory: the case itself did not raise the issue on its facts, and the Court clearly left the issue open in its reasons.⁵⁷

In practical terms, however, most challenges based upon non-analogous grounds will fail on the basis of the definition of discrimination advanced by the Court.⁵⁸ In this respect, the scope of section 15 has been limited significantly. But losing the case is not the same thing as being denied an opportunity to argue it, and in the short and medium run at least, we should expect such cases to continue to be brought.

VI. Conclusion

The Court in *Andrews* had a difficult task. On the one hand, it felt constrained to offer guidance to bench and bar on the general approach to interpreting the equality rights. This, after all, is one of its most important functions as a court of last resort. On the other hand, the Court clearly wished to keep its powder dry on a number of important issues not directly raised by the facts of *Andrews*. Accordingly, it left certain issues open. It is difficult to fault the Court for leaving these issues to an occasion where they are raised directly by the case before it. Unfortunately, these two legitimate considerations pulled in opposite directions, and there are aspects of *Andrews*, notably the discussions of formal equality and the scope of section

⁵⁵[1980] 2 S.C.R. 370 at 407, 114 D.L.R. (3d) 393 at 423-24, 33 N.R. 1 at 22-23, [1980] 5 W.W.R. 385 at 416-17.

⁵⁶*Andrews, supra*, note 1 at 177-78, McIntyre J.

⁵⁷But see La Forest J. in *Reference re The Workers' Compensation Act, 1983 (Nfld.)*, *supra*, note 25 at 1.

⁵⁸See, e.g., *R. v. Turpin, supra*, note 22.

15, that are unsatisfactory as a result. But in large measure this flowed from the dilemma in which the Court found itself.

In other respects, it was noted that the Court may have failed to accomplish its objective of giving a meaning to the different parts of section 15 while still providing a clear separation between section 15 and section 1. And it was also noted that the Court appears equally divided on the question of the standard of review under section 1. But lest I be misunderstood, these are difficulties that flow in large measure from the nature of equality rights themselves.

The equality provisions in the *Charter* are like the three-dimensional image in a holographic plate. Although one may break the plate into a thousand pieces, shining a laser beam through any one of the shards will reproduce the image in its entirety. So too is it with the concepts of "equality", "discrimination", "reasonableness" and "justification". Out of any one of these concepts can be generated all of the principles that we distribute amongst the various clauses of sections 15 and 1. At the risk of overstating the case, to criticize the Court for some of its shortcomings of analysis in *Andrews* is to ignore the very nature of equality itself.
