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# THE CHARTER OF RIGHTS AND FREEDOMS: EQUALITY RIGHTS

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# THE CHARTER OF RIGHTS AND FREEDOMS: EQUALITY RIGHTS

## ISSUE DEFINITION

By virtue of section 32(2) of the Canadian Charter of Rights and Freedoms, section 15, the equality provision, did not come into force until 17 April 1985, three years after the Charter took effect. This allowed the federal and provincial governments time to amend any legislation not in conformity with the section. It also reflected an appreciation that, as Professor Peter Hogg has suggested, section 15 is potentially the most intrusive provision of the Charter.

The discussion that follows will review significant decisions under the section and consider the major issues that have already arisen or that may arise in the future. The body of case law on section 15 continues to grow.

## BACKGROUND AND ANALYSIS

Section 15 reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (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.

### A. Definitions and Application

Section 32 of the Charter limits the application of its provisions to matters under the legislative capacities of the federal and provincial governments. This would remove it from the private sphere, although private associations and activities that come under government control may be captured. In the United States, for example, under the doctrine of “state

function," the equality provisions of the Constitution have been applied to employers who receive government funding for job creation, and to private airlines and hospitals which come under government regulation. In Ontario, the Charter has recently been interpreted to apply to community college collective agreements (in the Lavigne case*), but not to university retirement policies (McKinney). Discriminatory actions by individuals are left to regulation by human rights codes, other statutes and the common law (Re Blainey and Ontario Hockey Association). An Ontario Supreme Court Judge also recently ruled that an Ontario Teachers' Federation bylaw forcing men and women elementary teachers to belong to different unions is an internal private matter, not subject to Charter scrutiny (Tomen v. F.W.T.A.O.).

Section 15 accords its protection to "individuals." Use of the term in the Canadian Bill of Rights was held by the Ontario Court of Appeal in R. v. Colgate-Palmolive to exclude entities other than human beings. "Individual" has consistently received a similar interpretation under section 15 (Mund v. City of Medicine Hat; Re Homemade Winecrafts (Canada) Ltd. and A.G. of British Columbia; Re Surrey Credit Union and Mendonca; Smith, Kline and French Laboratories Ltd. v. A.G. Canada). Corporations may, however, defend criminal charges by arguing that the legislation is constitutionally invalid, and thus may raise Charter defences (Big M Drug Mart Ltd.).

1. Equality

The concept of equality means equality of opportunity. Equality in section 15 does not, therefore, require that all people be treated in the same manner no matter what the circumstances, but rather, that persons similarly situated be treated the same (Re Weinstein and Minister of Education for British Columbia).

Equality in section 15 does not mean absolute equality. Section 15(2) underscores this point by recognizing that in certain circumstances it may be necessary to give effect to people's differences through affirmative action programs.

Equality in section 15 does not include economic equality, that is, a guarantee of an equal distribution of economic benefits. This is inferred from the courts' approach to other sections of the Charter, especially section 6 which, despite its apparent economic content, has been held simply to guarantee the free movement of labour and capital and not the right to work (Skapinker), and from Canada's obligations under international treaties which similarly exclude

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* The full citation of all cases mentioned by name appears in a table of cases at the conclusion of this paper.

such a guarantee. Section 15 may have the effect of improving the economic status of an affected individual or group, but this would be a consequence of improved access to benefits and opportunities, not of claims made for economic equality itself.

Finally, it is open to question, given its wording, whether section 15 guarantees one general right to equality or whether it provides several distinct rights: the right to equality before the law, the right to equality under the law, the right to equal protection of the law, and the right to equal benefit of the law. Some of the language represents an attempt to abrogate earlier restrictive interpretations of the equality provisions under the Bill of Rights. In the case of A.G. Canada v. Lavell, a provision of the Indian Act which disenfranchised native women who married non-native men was upheld. "Equality under the law" was restricted to equality in the administration of the law. The substance of the law could not be challenged on this basis.

"Equal benefit of the law" addresses the situation in Bliss v. A.G. Canada where the Supreme Court of Canada under the Bill of Rights upheld a provision of the Unemployment Insurance Act which denied ordinary benefits to women who leave work because of pregnancy.

Whether section 15(1) provides one general right or several distinct rights, the effect would be the same: it would encourage a comprehensive interpretation of the equality provision by the courts.

Of greater practical significance is the issue of whether "equal before and under the law" is a separate right or a statement of legal status. Because an individual is equal before and under the law he or she can bring a claim that he or she has not enjoyed the equal protection or equal benefit of the law. If it is a separate right it would stand apart from the anti-discrimination clause in section 15 and would allow individuals who cannot show that they have been disadvantaged by a proscribed ground of discrimination nevertheless to make claims under section 15.

2. Discrimination

Discrimination occurs when legislation uses irrelevant considerations to effect its policies, imposes burdens or confers benefits in a way that stigmatizes an individual or group or imposes burdens on groups or persons based on criteria beyond these persons' control (ReBritish Columbia and Yukon Territory Building and Construction TradesCouncil and A.G. British Columbia). Section 15 recognizes a number of considerations which are prima facie irrelevant or suspect grounds for legislatively differentiating between groups or persons: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

There are several unresolved issues related to the concept of discrimination. One is whether the term implicitly requires the aggrieved party to demonstrate that he or she has suffered an adverse impact or to demonstrate that he or she is vulnerable to a specific form of discrimination. The latter instance would place a greater burden of proof on the party. This appears to have been the approach of the Ontario High Court in Re Gerol and A.G. Canada. The concept of discrimination under section 15 implies the need for some detrimental effect on the complainant. Distinctions which do not create adverse results are not themselves discriminatory. The British Columbia Court of Appeal stated its view of the meaning of discrimination in Re Andrews and Law Society ofBritish Columbia. It held that "the question to be answered under s. 15 should be whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected... The test must be objective and the discrimination must be proved on a balance of probabilities..."

There is the question of whether "discrimination" requires intent, or whether section 15 recognizes cases of constructive or systemic discrimination; that is, cases where a particular policy or action has a disproportionately adverse effect on an identifiable group, even though on its surface the policy of action does not appear discriminatory. The Supreme Court of Canada has, in two decisions under Canadian human rights legislation, Ontario Human Rights Commission v. Simpson-Sears Ltd. and Bhinder v. Canadian National Railways, affirmed that the legislation in question recognizes systemic discrimination. Moreover, the approach by the Ontario Court of Appeal in Videoflicks, where the effect of Sunday closing legislation was considered under section 2(a) of the Charter, suggests the more extensive guarantee of equality offered by the concept of systemic discrimination will apply to section 15 of the Charter. In that case, the court held that an indirect effect of the Retail Business Holidays Act was to infringe the freedom of religion of one of the defendants.

3. Application of Section 1

There is a question of whether section 1, wherein the onus is on the government to establish that a limitation on a right or freedom is demonstrably justified in a free and democratic society (Hunter v. Southam Inc.), applies to section 15. Currently, the predominant judicial view as expressed in Re Federal Republic of Germany and Rauca and R. v. Videoflicks Ltd. appears to be that all rights and freedoms in the Charter are subject to the application of section

1. Specifically, the Ontario Court of Appeal has noted that the equality guarantee under section 15 is not absolute; a law which denies that right may nevertheless be constitutional if it can be brought within section 1 (Re Blainey and Ontario HockeyAssociation). Once the plaintiff establishes a prima facie case that there has been an infringement of an equality right, the onus shifts to the government to justify the infringement either in terms of the limitations set out in section 1 or those as read in the right itself.

In R v. Oakes (dealing with the presumption of innocence), the Supreme Court of Canada discussed procedure in relation to Charter rights, urging that sections defining constitutional rights and section 1 limitations be kept analytically separate. In its interpretation of Oakes, in the Andrews case, the British Columbia Court of Appeal stated that "merely to establish a prima facie case of interference with constitutional rights as a necessary condition of proceeding to s. 1 is insufficient." The question of discrimination must be determined entirely under section 15; section 1 is confined to the question of "whether legislation established to be discriminatory under s. 15 may nevertheless be valid because it constitutes a reasonable limit on rights which is demonstrably justified in a free and democratic society."

B. Procedure

The issue of standing appears to have been resolved. An individual must have had his or her own rights infringed under the Charter and this infringement must have taken place; future infringements are not actionable (R. v. Operation Dismantle Inc.). The question of whether class actions are possible is unclear, although the use of the expression "every individual" in section 15 leaves this possibility open.

The plaintiff or aggrieved party need show only a prima facie case of denial or infringement of an equality right. If discrimination is not on the basis of one of the enumerated grounds of discrimination in section 15 (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability), the plaintiff will be required to demonstrate that the ground should be protected. This may be more difficult in cases of systemic discrimination. The plaintiff will need to marshal statistical evidence which demonstrates that, in the absence of direct discrimination, the impugned action, which appears neutral on its face, has had a disproportionately adverse impact upon him or her.

C. Grounds of Discrimination

1. Unenumerated Grounds

The phrase "and in particular" in section 15(1) suggests that the list of enumerated grounds is open-ended. This raises the problem of how to determine whether a particular classification or criterion constitutes a ground of discrimination and whether it should be treated differently from the enumerated grounds under section 15. A legislative distinction on a non-enumerated ground will be considered discriminatory under section 15 where it is arbitrary, capricious or unnecessary, rather than rationally based in order to meet special conditions or attain a necessary and desirable social objective (Smith, Kline and French Labora-tories Ltd. v. A.G. Canada). The test is essentially the same for unenumerated grounds as it is for the enumerated grounds (Re Andrews andLaw Society of British Columbia). Resolving the issues would probably include an examination of the jurisprudence of other jurisdictions under human rights legislation and showing the suspect criterion to be analogous to one of the enumerated grounds in section 15. Examples of possible unenumerated grounds of discrimination include discrimination based on political beliefs, place of residence, citizenship or marital status.

Although there have been an increasing number of inventive attempts to advance unenumerated grounds of discrimination as a basis for the application of section 15, few have been successful. The few successful instances involve the following grounds:

- the disparity among the provinces in an accused's right to a trial in French under section 462.1 of the Code because of a delay in proclamation (Tremblay v. R.);
- the provision under section 561 of the Code for a jury of six persons in the Yukon and Northwest Territories as opposed to 12 persons in the rest of Canada (R. v. Bailey; R. v. Punch; R. v. Emile);
- the unequal application of section 234.1 of the Code, which creates an offence for failing to comply with a roadside breath test, to allow its phased-in implementation. As a result it remains unproclaimed in B.C. and Quebec (R. v. Sawchuck);
- the inapplicability of section 429 of the Code, the accused's right to waive a jury trial, in Alberta (R. v. Turpin, Siddiqui and Clauzel);
- the requirement of Canadian citizenship for admission to the practice of law was held to violate section 15 and not to be a reasonable limit within section 1, Re Andrewsand Law Society of British Columbia, B.C.C.A.);

- the common law practice of denying costs to a litigant appearing in person where costs would be ordered to be paid to a litigant represented by counsel (McBeth v. Dalhousie College);

- the provisions of the Federal Court Act which give exclusive jurisdiction to the Federal Court where relief is claimed against the federal Crown were struck down as infringing an individual's right to equality before the law by placing the subject and the Crown in different positions as litigants (Zutphen v. Dywidag);

- Ontario's failure to authorize alternative measures programs within the province for purposes of section 4 of Young Offenders Act violated equality rights of a young offender on the basis of his residence in Ontario. There was no way the policy of the legislation could be carried out unless such programs existed. The Act imposed a positive duty on the provinces to authorize such programs; failure to do so would amount to contravention of section 15(1) of the Charter by the provincial Attorney-General (R. v. Sheldon);

- The failure to proclaim in force in Saskatchewan Part XIV.1 of the Criminal Code, giving accused persons whose language is French the option of being tried in that language, infringed section 15. The effect of non-proclamation is to nullify or impair the right of a Francophone accused in that province to a trial in French; the appropriate remedy is to declare that the person is entitled to the same rights as if the law were in force. (Reference Re Use of French in CriminalProceedings in Saskatchewan).

The following grounds of discrimination have been unsuccessfully advanced under section 15 of the Charter:

- amendments to a provincial labour code which designated an area where construction work is taking place as an area of special economic importance, thereby preventing the operation of a non-affiliation clause by unionized workers refusing to work with non-unionized workers (Re British Columbia and Yukon Territory Building andConstruction Council and A.G. British Columbia);

- a difference in the number of stand asides accorded to the defence and prosecution under the Criminal Code (R. v. Johnstone);

- the Crown's right under the Code to prefer an indictment and thereby deny a defendant a preliminary hearing (R. v. Flight; R. v. Ertel);

- a peer-assessment program by Ontario College of Physicians and Surgeons to review the professional competence of doctors with more than five years in practice (Charbonneau v. College of Physicians andSurgeons of Ontario);

- geographical disparity in the proclamation of sections 234(2) and 236(2), the discharge provisions under the Criminal Code for impaired driving offences (R. v. Dupuis; R. v. Hamilton);

- a one-year residency requirement as a condition precedent to filing a petition under the Divorce Act (Koch v. Koch); residency requirement for a change of name application (Re Tit and Director of Vital Statistics);

- compulsory licensing under the Patent Act, R.S.C. 1970, c. P-4 for the manufacture or importation of medicine that is the subject of a Canadian patent (Smith, Kline and French Laboratories Ltd. v. A.G. Canada);

- the denial, because of the doctrine of state immunity, of a defendant's right to commence third party proceedings against a provincial government outside the province in which the action is being tried (Western Surety Co. v. Elk Valley Logging Ltd.);

- exemption of a certain class of persons from mandatory provision in provincial legislation prescribing the wearing of seat belts in a motor vehicle (R. v. Doucette);

- provision in provincial legislation which enables the making of bylaws designating zones in which development permits for development are required (Re Brown and City of Vancouver);

- the ability of the Attorney-General or Crown counsel under s. 508(1) of the Code to intervene in a private prosecution (Re Baker and R.);

- under section 67 of the Canada Elections Act, R.S.C. 1970, c. 14, the prevention of the sale of liquor during polling hours by hotels and taverns (Parkdale Hotel Ltd. v. A.G. Canada);

- the difference in the treatment of sane and insane acquittees under section 542(2) of the Criminal Code, whereby insane acquittees are held in custody until the pleasure of the Lieutenant-Governor of the province is known (R. v. Swain);

- disparity in the treatment of young offenders between the ages of 16 and 17 because of the provinces' different phase-in periods for the Young Offenders Act, 1980-81-82-83 (Can.), c. 110. It is a reasonable disparity because of the problem of resource allocation (Re McDonald and the Queen; contra, see R. v. D., B. and S.)

- making sex engaged in on private premises for commercial reasons instead of personal gratification an offence under section 193(1) of the Code (R. v. G.);

- disparity in the administration of section 251 of the Criminal Code because some hospitals in parts of Ontario do not have therapeutic abortion committees (R. v. Morgentaler);

- the exclusion of a "young offender" from the application of the Prisons and Reformatories Act, R.S.C. 1970, c. P-4, (as amended) and thereby the earned remission provisions of the Act (R. v. M.).

There have been conflicting decisions on certain unenumerated grounds; e.g., a three-month limitation period for actions against a municipality was held valid in Saskatchewan (Meldrum v. City ofSaskatoon), but invalid in Ontario (Streng v. Township of Winchester).

A series of decisions (Singh v. Dura, Isabelle v. Campbellton Regional Hospital) reversed the earlier ruling in Kask v. Shimizu that rules of court requiring non-residents to pay security for costs (when residents are not required to do so) are discriminatory.

In the Schachter case, the Federal Court Trial Division declared that benefits should be payable under the UI Act to natural fathers who take time off from work to care for newborn infants, on the same basis as such benefits are payable to adoptive parents. Issues of sexual stereotyping and unjustifiable distinctions between natural and adoptive parents formed the basis of the court's decision, which found an inequality of benefits under section 15(1).

2. Enumerated Grounds

Notwithstanding the prime facie nature of the enumerated grounds of discrimination, the courts have to date adopted an equally cautious approach in applying section 15. Many spheres of governmental activity and various legislative initiatives have already been subjected to scrutiny by the courts under this section. The following discussion outlines the current position of the courts and considers possible legislative targets in the future.

a. Age

Legislative provisions which provide for mandatory retirement are a major area of vulnerability on both the federal and provincial levels. On the federal level, for example, the R.C.M.P. Superannuation Regulations, section 99(2) of the Constitution Act and section 12 of the Public Service Employment Act, R.S.C. 1970, c. P-32, as amended respectively make retirement at prescribed ages mandatory for members of the R.C.M.P., federal court judges and public servants.

The mandatory retirement policy applicable to university professors in Ontario was upheld in the McKinney case. The Charter ruling actually applied to the validity of the Ontario Human Rights Code, which permits age discrimination over the age of 64. This provision was upheld as a reasonable limit under section 1 of the Charter, having regard to the valid objectives of increased opportunity and reduced unemployment for youth, and the prevalence of age 65 as the basis for pension eligibility. The British Columbia Supreme Court came to a similar conclusion in Harrison v. University of British Columbia.

In Nova Scotia, the Supreme Court held that mandatory retirement and related provisions discriminating on the basis of age (limited definition of age discrimination, exemption of pension and insurance plans from prohibition on age discrimination) were justified under section 1 (Sniders v. N.S.)

A hospital regulation setting out an "expected retirement age" with the possibility of doctors applying for retirement deferral, based on a review of health and continuing performance, was ruled not to be discriminatory in itself. A policy denying deferral unless the applicant had special skills did amount to discrimination, since it denied applicants the benefits of the hospital regulations on the basis of age (Stoffman v. Vancouver General Hospital).

Applications under section 15 advancing "age" as a ground of discrimination have enjoyed some measure of success. Where they have been unsuccessful the alleged discriminatory legislative provision or practice has been characterized as a reasonable limit under section 1 of the Charter or as part of an "affirmative action" program as sanctioned by section 15(2). Examples of the former include: age as a criterion for determining the maturity of an RRSP under the Income Tax Act, 1970-71-72 (Can.), c. 73 (Re Gerol and A.G. Canada); Bell Canada's mandatory retirement policy (Re Madisso and Bell Canada); and differentiations between adult offenders under the Code and young offenders under the Young Offenders Act with respect to the evidentiary requirements for a conviction under section 246.4 of the Code (R. v. Goler) and with respect to the right to a jury trial (R v. R.L., Ontario Court of Appeal reversing decision at trial). In the following cases the discriminatory provisions or treatment were regarded as part of a scheme which was to improve the conditions of disadvantaged individuals: the exclusion of young offenders from the application of the Prison and Reformatories Act, R.S.C. 1970, c. P-21 and its provision for earned remission (Re Mayo and R.), a provision of the Young Offenders Act which permits a different procedure for juveniles older than 14 years of age (R. v. W.); the possibility under the Young OffendersAct of reviewing or changing a disposition of a young offender within six months where there has a wilful breach or failure to comply with the disposition (R. v. G.M.).

Successful applications under section 15 using "age" as a ground of discrimination have included striking down the section that provides for different retirement dates for federal judges under the Federal Court Act, R.S.C., c. 10 (2nd Suppl.), depending on whether they were appointed before or after 1 June 1971 (Addy v. R.). Section 158(1)(b) of the

Criminal Code (which creates a defence to offences of buggery and bestiality where the act is committed in private between two persons each of whom is 21 years of age or more and both of whom consent) was also found invalid because it makes the defence available only to those over 21 years of age, thus discriminating against young persons.

There have also been challenges to the differentiation on the basis of age under section 246.1(2) of the Code. This states that the consent of a victim under the age of 14 is not a defence to a charge of sexual assault where the defendant is more than three years older than that victim. In R. v. Bearhead, denial of the defence was held to be a reasonable limit and the legislation was upheld. The decision on appeal in R. v. LeGallant (B.C.C.A.) also upheld section 246.1(2), on the basis that it was not discriminatory; adults and adolescents are not similarly situated in this respect and therefore it is neither unreasonable nor unfair to treat them differently.

In B.C. a welfare regulation by which lower support payments were to be paid to persons under 26 years of age was struck down because of the absence of any logical basis for selection of age 26 as a distinguishing factor (Silano v. R.). Denial of UI benefits to claimants over age 65 was held to be discriminatory and the relevant provision of the UI Act was struck down by the Federal Court of Appeal in September 1988 (Tetreault Gadoury v. CEIC).

b. Race or Colour

The threshold issue in dealing with this ground concerns the meaning of the term "race." As the House of Lords pointed out in Ealing London Borough Council v. Race Relations Board, there is no clear scientific basis for establishing such a category. No guidance is afforded in jurisprudence under Canadian human rights legislation. One can only speculate that a colloquial understanding of the term will prevail, and, on the experience of jurisprudence under human rights legislation, will usually be considered conjunctively with "ethnic origin" or "colour."

Human rights jurisprudence also suggests that the issue of constructive discrimination will be frequently associated with discrimination based on race.

Also unresolved is the question of how developments under other sections of the Charter, notably the language guarantees in sections 16 to 22 and the protection of multiculturalism under section 27, will affect the issue of race under section 15.

c. National or Ethnic Origin

"National origin" appears a ground of discrimination in both the Canadian Bill of Rights and the Canadian Human Rights Act, but has not been the subject of judicial interpretation. Because the Charter already makes distinctions on the basis of citizenship in sections 3, 6 and 23, "nationality" will not likely be interpreted to mean present nationality.

Similarly there is no guidance on the meaning of "ethnic origin." The point of departure may be a definition of the term, formulated in the English courts, which depends on a number of essential characteristics; e.g., belonging to a group of people with a long-shared history and associated cultural, social and familial traditions.

In the case of Re Bakht and Newfoundland Medical Board, categorization of medical schools and imposition of additional training requirements upon graduates of foreign universities was held not to be discriminatory on the basis of race, national or ethnic origin.

d. Sex

Jurisprudence under human rights legislation suggests that the initial difficulty with this ground of discrimination is in characterizing a situation as one of sex discrimination. In Bliss, for example, a differentiation in the treatment of pregnant women with respect to the receipt of UI benefits was not considered an example of sex discrimination. Nor does sex discrimination under human rights legislation recognize discrimination on the basis of sexual preference (Re Board ofGovernors of the University of Saskatchewan and the Saskatchewan Human Rights Commission; Gay Alliance Toward Equality v. The Vancouver Sun). In R. v. Morgentaler, the Ontario Court of Appeal did not accept the argument that section 251 of the Code discriminates on the basis of sex because only women need to obtain abortions.

In Re Shewchuk and Ricard, the British Columbia Court of Appeal upheld the validity of the province's Child Paternity and Support Act. Under the Act the putative father does not have the same remedies to require the mother to support a child she has abandoned as the mother would have if the father had abandoned the child. The majority of the court held that although the Act violated section 15(1) on the basis of sex and could not be saved by section 15(2), the limit upon the father's rights was a reasonable one in view of the broad public purpose of the Act.

In Re Phillips and Lynch, section 5(4) of the Family Benefits Act of Nova Scotia was held to be invalid. It entitled single mothers with dependent children to apply for family benefits, but did not entitle single fathers to do so, thus discriminating against single males.

A section of the B.C. Adoption Act requiring written consent of the parents to adoption but dispensing with consent of the father where he had not married the mother was struck down by the B.C. Supreme Court as making an unreasonable distinction based on sex, not on legitimate factors related to the objectives of the legislation. (Re MacVicar and the Superintendent of Family and Child Services). In March 1988, the Ontario Court of Appeal upheld the constitutionality of a provision of the Ontario Child and Family Services Act dispensing with the consent of a biological father who does not fall within the definition of "parent." The only natural father not by definition a "parent" would be a male person who by an act of casual sexual intercourse impregnated a woman and demonstrated no sense of responsibility for her or the child. Different treatment was thus based not on sex, but on differences in demonstrated responsibility to the child. The court held that section 15 was not violated, or if it was, that any such violation was justified under section 1 in view of the objective of the legislation (A.G. Ont. v. Nevins).

Section 153 of the Criminal Code, which makes it an offence for male persons to engage in illicit sexual intercourse with step-daughters, foster daughters, or wards, was struck down as discriminatory on the basis of sex (R. v. Howell). However, the Ontario Court of Appeal in R. v. Boyle upheld former section 146(1) of the Code which made it a more serious offence for a male to have sexual intercourse with a female under 14 than for a female to have sexual intercourse with a male under 14, finding that the distinction was neither unfair nor irrational having regard to its purpose and effect.

The effect of section 28 of the Charter on sex equality under section 15 may be of radical significance. Section 28 guarantees the rights and freedoms under the Charter equally to both sexes. Taken as an absolute prohibition against sex discrimination, it would appear that sex discrimination could not thereby be justified under section 1 or be legislatively overridden by invoking section 33 of the Charter. This remains ambiguous, however, in light of the Ontario Court of Appeal's decision in Re Blainey where discrimination on the basis of sex was found given the facts of the case, but where it was also acknowledged that in different circumstances such discrimination might be reasonable within the meaning of section 1 of the Charter. The Blainey case was sent back to the Ontario Human Rights Commission, which ruled that discrimination was not justified in this instance (request of girl to be allowed to play on a boys' hockey team).

e. Mental or Physical Disability

This ground of discrimination distinguishes Canada as the first country in the world to entrench in its Constitution equality rights for the mentally or physically disabled. As with several of the other grounds, the initial difficulty in invoking this ground is in characterizing a situation as one involving discrimination on the basis of a disability. Few situations will be as transparent as, for example, section 14(4) of the Canada Elections Act, R.S.C. 1970, (1st Suppl.) c. 14, which deprives a person whose movement is restrained or who is deprived of the management of property because of "mental disease" of the right to vote. Discrimination will more likely be of the systemic variety. Plaintiffs may, therefore, often have the burden of presenting complex statistical evidence to establish such a form of discrimination. In Re Rebic and Collver the applicant failed to establish that sections 542, 545, and 547 of the Criminal Code, which provide a special procedure for continued custody and supervision of persons found not guilty by reason of insanity, violate section 15(1) of the Charter by denying equal protection and equal benefit of the law without discrimination on the basis of mental disability. The British Columbia Supreme Court found that valid federal objectives were involved in sections 542, 545 and 547 and that they were also sanctioned under section 15(2) of the Charter (see also R. v. Swain).

f. Religion

Freedom of conscience and religion are protected under section 2(a) of the Charter as well as under section 15. The courts' approach under section 2(a) has been to ensure that laws are religiously neutral. Where this neutrality is directly infringed, as in the case of the federal Lord's Day Act (R. v. Big M. Drugmart Ltd.), the legislation has been held invalid.

In Edwards Books and Art Ltd. v. R. (the appeal from R. v. Videoflicks Ltd.) the majority of the Supreme Court of Canada ruled that Ontario's Retail Business Holidays Act was valid provincial legislation. It had a secular purpose, but had the effect of abridging the freedom of religion of Saturday-observing retailers, contrary to section 2(a). The infringement is justifiable as a reasonable limit under section 1; the Act provides a common pause day for families, a matter of substantial concern in the retail business. It infringes the freedom of Saturday observers as little as possible by means of a partial exemption. The Court gave no answer on the basis of equality rights, since the charges were laid at a time when section 15 was not yet in effect. Future issues regarding application of section 15 to Saturday exemptions were raised by La Forest, J., who noted, obiter, that "the more serious long-term question may be

whether an exemption restricted to Saturday can meet the demands of the equality provision," since other religious groups in Canada's multicultural society, e.g. Moslems, observe other days as special days of worship.

An Alberta court rejected the argument that discrimination on the basis of religion arose from legislation granting power to the courts to consent to medical treatment of a child whose parents refuse it, despite the legislation's greater impact on Jehovah's Witnesses than on other parents (Re McTavish).

g. Bill 30 Case

On 25 June 1987, the Supreme Court of Canada ruled that Bill 30, the Ontario legislation implementing a policy of full funding for Roman Catholic separate high schools in Ontario, was a valid exercise of the provincial power set out in section 93 (provincial power in relation to education) and section 93(3) (appeal to Cabinet where decisions affect separate schools) of the Constitution Act, 1867. The majority held that:

> Protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation. The basic compact of Confederation with respect to education was that rights and privileges already acquired by law at the time of Confederation would be preserved and provincial legislatures could bestow additional rights and privileges in response to changing conditions.

Some such rights are specifically guaranteed, and are thus protected by section 29 of the Charter:

> 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

However, immunity from Charter review extends beyond section 29. The Supreme Court majority held:

> Even if Bill 30 were supportable only under the Province's plenary power and s. 93(3), it is protected from Charter review ... because the whole of s. 93 represents a fundamental compromise of Confederation in relation to denominational schools. The section 93(3) rights and privileges are not guaranteed in the sense that the legislature which gave them cannot later pass laws which prejudicially affect them but they are insulated from Charter attack as legislation enacted pursuant to the plenary power in relation to education. The protection from Charter review in the case of s. 93(3) lies not in the guaranteed nature of the rights and privileges conferred on denominational schools by the

> legislation passed under it but in the guaranteed nature of the province's plenary power to enact such legislation. The Confederation compromise in relation to education is not displaced by the Constitution Act, 1982.

The broader effects of this decision are unknown. The question of what matters form part of the "basic compact of Confederation" and may therefore justify departure from principles of equality, remains to be answered as the courts apply the Bill 30 decision.

D. Section 15(2) – Affirmative Action

Section 15(2) serves two functions: to provide a defence for government to claims of reverse discrimination and to provide a remedy for past discrimination. The remedy has been characterized as "affirmative action" and may consist of a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups. All the provinces except Newfoundland and the territories legislatively permit affirmative action programs. Unlike the provincial legislation, 15(2) is not tied to enumerated instances of discrimination or to a particular legislative design. This last factor raises the question of whether the courts will uphold a program under 15(2) where its objective is legitimate and rational, but where its poor design results in a negative impact. Its broad scope may also be circumscribed by the courts.

In the case of Weatherall v. Attorney-General of Canada it was held that the use of female prison guards in non-emergency skin searches of male inmates and in unscheduled, unannounced surveillance of cells of male inmates contravened section 15. Since hiring of women in federal penal institutions was part of an affirmative action program, this form of discrimination is saved to the extent reasonably necessary to the operation of the program, but not in the case of non-emergency searches. A section protecting female inmates against searches by male guards but not vice versa was struck down as giving continuing effect to the stereotypes that the provision was designed to preclude.

PARLIAMENTARY ACTION

The Standing Committee on Justice and Legal Affairs, pursuant to Orders-of-Reference dated 26 February 1985, undertook a review of all federal statutes to ensure their conformity with the letter and spirit of equality and non-discrimination guarantees in the

Charter. The Committee's recommendations for necessary changes to various pieces of federal legislation appear in a Report to the House entitled "Equality for All" (October 1985). A major recommendation with respect to the federal public service is the effective abolition of mandatory retirement practices by no longer recognizing the concept of "normal age of retirement" under the Canadian Human Rights Act. Another is adoption of an employment equity program to eliminate barriers and improve opportunities for women, native people, and the disabled. There is a recommendation that all federal laws be rewritten in non-sexist language. Changes to the sexual offences provisions in the Criminal Code with respect to the minimum age for consensual sexual activity are also proposed.

The federal government's response to the recommendations of the Standing Committee on Justice and Legal Affairs appeared in its Report to Parliament, "Towards Equality" (March, 1986). It accepted many of the Committee's recommendations, including: amendments to the Canadian Human Rights Act that would effectively abolish mandatory retirement in the public service; ensuring that sexual orientation is not considered in job hiring within the federal public service; amendments to the Immigration Act to ensure that the grounds of admission are in conformity with section 15 of the Charter; promoting employment equity in companies under federal jurisdiction through legislation (Bill C-62, "Employment Equity") and contract compliance programs; and amendments to the Canadian Human Rights Act to incorporate the concept of "reasonable accommodation" by employers to combat systemic discrimination.

During the summer of 1987, the Special Joint Committee on the 1987 Constitutional Accord heard significant debate concerning the potential impact of the Accord on equality rights. The terms of the Supreme Court ruling in the Bill 30 case gave rise to legal arguments that both the "distinct society clause" and the specific reference to aboriginal rights and multicultural heritage in section 16 of the Accord, with no reference to equality rights, might harm women's equality rights. The Committee Report rejected this view, adopting instead the opinion of Professor Peter Hogg, one of Canada's foremost authorities on constitutional law, who stated:

> I think it unlikely that the duality and distinct society clauses in section 2 of the Accord would be interpreted as permitting governments to discriminate directly or indirectly against women.

The Committee went on to say that:

> Under the terms proposed by the 1987 Constitutional Accord neither gender equality rights nor the "linguistic duality/distinct society" rule of interpretation will be given automatic paramountcy in all situations. Neither overrides the other. Neither is automatically subordinate to the other. The courts are entrusted with the task of maintaining a proper balance. (Report, p. 67-68)

The majority report declined to propose amendments specifically guaranteeing gender equality rights, leaving the task of interpretation to the courts, on the basis described above.

## CHRONOLOGY

17 April 1985 – Section 15 of the Charter of Rights and Freedoms came into force.

25 October 1985 – The Standing Committee on Justice and Legal Affairs tabled its report Equality for All which contained a basic agenda for equality rights reform at the federal level.

March 1986 – The federal government in its response to the report by the Parliamentary committee on Equality Rights, Toward Equality, accepted many of recommendations in Equality for All, most notably those recommending abolition of mandatory retirement, ensuring no discrimination in the federal sphere on the basis of sexual orientation and promoting employment equity in the private sector under federal jurisdiction.

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