IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF BRITISH COLUMBIA)

B E T W E E N:

THE LAW SOCIETY OF BRITISH COLUMBIA

Appellant
(Respondent)

A N D:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Respondent)

A N D:

MARK DAVID ANDREWS

Respondent
(Petitioner)

A N D:

GOREL ELIZABETH KINERSLY

Co-Respondent

A N D:

THE ATTORNEY GENERAL OF ALBERTA
THE ATTORNEY GENERAL OF SASKATCHEWAN
THE ATTORNEY GENERAL OF ONTARIO
PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC

Intervenors

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FACTUM OF THE INTERVENANT, THE ATTORNEY GENERAL OF ONTARIO

PART I

THE FACTS

1. The Attorney General of Ontario accepts the facts as set out in the factum of the Appellant.

2. The Attorney General of Ontario intervenes in this appeal by Notice of Intention to Intervene dated February 25, 1987.

PART II

POINTS IN ISSUE

3. The points in issue in this appeal, as set out in the Appellant's factum, are as follows:

1. Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in section 42 of the Barristers & Solicitors Act, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by section 15(1) of the Canadian Charter of Rights and Freedoms?

2. If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in section 42 of the Barristers & Solicitors Act, R.S.B.C. 1979, c. 26 infringes or denies the rights guaranteed by section 15(1) of the Canadian Charter of Rights and Freedoms, is it justified by section 1 of the Canadian Charter of Rights and Freedoms?

4. The issues raised in this appeal concern the proper interpretation of s.15(1) of the Canadian Charter of Rights and Freedoms. Specifically, the issues to be addressed by the Attorney General of Ontario are the following:

A) What is the purpose of s.15(1)?

B) What is the interpretation of s.15(1) that will best achieve that purpose, including

- whether or not s.15(1) protects against discrimination based on grounds other than those enumerated;

- if so, how are those additional grounds to be identified; and

- what is the meaning of "discrimination" as that term is used in s.15(1)?

5. The Attorney General of Ontario will take the following position with respect to the interpretation of s.15(1):

A) The purpose of s.15(1) is to guarantee equality for individuals to enable them to participate fully in the rights, benefits, privileges and burdens extended to the public by legislatures and governments, to the extent of their individual abilities, regardless of any personal attribute which identifies them with a particular group. The focus of s.15 is to protect those who are disadvantaged because of stereotyping, prejudice or paternalism.

B) The interpretation that will best achieve this purpose, is that s.15(1) applies to legislation and other government action which discriminates against individuals where such discrimination is based either on one of the nine enumerated grounds, or on an unenumerated ground which is akin to the enumerated grounds. A law or government action which treats an individual adversely based on those recognized grounds would be inconsistent with s.15(1).

PART III

ARGUMENT

A. THE PURPOSE OF SECTION 15(1).

6. Section 15 of the Charter provides 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 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.

7. The general approach to the interpretation of the provisions of the Charter was set down by this Honourable Court in R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295 at 344 by Dickson J (as he then was) as follows:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In Lawson A.W. Hunter v. Southam Inc. this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161, illustrates, be placed in its proper linguistic, philosophic and historial contexts.

8. It is therefore submitted that to identify the purposes of s.15, regard should be had to the following:

(a) the historical origins of the Charter's guarantee of equality rights;

(b) the text of s.15;

(c) the place of s.15 within the Charter and of the Charter within the greater context of the Constitution.

(a) Historical Origins of the Charter's Guarantee of Equality Rights.

9. It is appropriate to examine the historical origins of a Charter provision as an aid to the identification of its purposes.

Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 505-507 per Lamer J

Quebec Association of Protestant School Boards et al v. Attorney General of Quebec, [1984] 2 S.C.R. 66

10. The historical origins of s.15 demonstrate that it is the product of the evolution of a series of legislative anti-discrimination initiatives, developed over several decades in response to society's gradual recognition of the problem of discrimination. These initiatives were aimed at providing increasing protection against discrimination to persons who have traditionally been disadvantaged in Canadian society, by virtue of their being victimized by stereotyping, prejudice, and paternalism which led to discriminatory practices and consequential inequality.

(i) Human Rights Legislation

11. Prior to the second World War there was no legislative or common law protection for those who were victims of discrimination resulting from stereotyping, prejudice and paternalism.

W.S. Tarnopolsky, "Equality and Discrimination" in R.S. Abella and M.L. Rothman, etc., Justice Beyond Orwell, 267, at p.270.

12. As Canadian society came to recognize the existence of the problem of discrimination, Ontario enacted the first major equality rights legislation in Canada. The Ontario Racial Discrimination Act, S.O. 1944, c.51 protected only against discrimination in the provision of services to the public on the basis of race.

Tarnopolsky, "Equality and Discrimination", supra, at 270.

13. By the 1950's, similar legislation was enacted in several provinces. The scope of the protection afforded was increased in some jurisdictions by extending it to accommodation and employment, and expanding the grounds of discrimination to include such personal characteristics as creed, colour, ancestry, nationality or place of origin.

The Fair Employment Practices Act, S.O. 1951, c.24;
S.N.S. 1955, c.5;
S.N.B. 1956, c.9;
S.B.C. 1956, c.16;
S.S. 1956, c.69;

The Fair Accommodation Practices Act, S.O. 1954, c.28;
S.S. 1956, c.68;
S.N.B. 1959, c.6;
S.N.S. 1959, c.4.

14. In 1962 the Ontario Human Rights Code, S.O. 1961-62, c.93 was enacted. This first comprehensive codification of human rights prohibited discriminatory practices in housing, employment, and the provision of services and facilities to the public where such practices were based on certain specified personal characterisics, namely, race, creed, colour, nationality or place of origin. In addition, the nature of enforcement was altered from quasi-criminal prosecution to adjudication by administrative tribunal.

15. At the present time every jurisdiction in Canada has enacted comparable human rights legislation.

See list in Appendix "A"

16. Since 1962, the Ontario Human Rights Code has been progressively amended to extend protection in some circumstances to those similarly victimized by discriminatory practices on the basis of sex, marital status, age, ethnic origin, family status, handicap, citizenship, receipt of public assistance and record of offences. Protection was extended as society identified additional personal characteristics which had been the subject of prejudice, stereotyping or paternalism, resulting in pervasive discriminatory practices.

Ontario Human Rights Code, R.S.O. 1970, Chap. 318, amended S.O. 1971, Vol. 2, c.50, s.63; proclaimed in force April 17, 1972, amended S.O. 1972, c.119; in force June 30, 1972, amended S.O. 1974, c.73; in force December 2, 1974;

Ontario Human Rights Code, R.S.O. 1980, Chap. 340, repealed S.O. 1981, c.53, s.48; proclaimed in force June 15, 1982, and superseded by the Human Rights Code, 1981.

Equality Rights Statute Amendment Act, 1986. (Bill 7).

Ontario Human Rights Commission, Life Together: A Report on Human Rights in Ontario, 1977.

17. Although human rights legislation initially applied only to the private sector, it was extended to the Crown and Crown agencies in every jurisdiction.

Human Rights Code, R.S.B.C. 1979, c.186, as amended, s.25;

Individual's Rights Protection Act, R.S.A. 1980, c.I-2, s.12;

The Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1, s.43;

The Human Rights Act, S.M. 1974, c.65, as amended, s.35;

Human Rights Code, 1981, S.O. 1981, c.53, s.46;

Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s.54;

Human Rights Act, S.N.B. 1976, c.31, s.9;

Human Rights Act, S.N.S. 1969, c.11, as amended, s.15;

Prince Edward Island Human Rights Act, S.P.E.I. 1975, c.72, as amended, s.3;

Canadian Human Rights Act, S.C. 1976-77, c.33, as amended, s. 63(1).

18. In addition, in some jurisdictions, the provisions of the human rights legislation is given primacy over other legislation. For example, s.46(2) of the Human Rights Code, 1981 of Ontario provides as follows:

> "46.(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act."

See also:

Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s.1;

The Saskatchewan Human Rights Code, S.S.1979, c. S-24.1, s.44;

Charter of Human Rights and Freedoms, R.S.Q. c. C-12, s.52.

19. The significance of protecting disadvantaged persons from discrimination was given further and better recognition by this Honourable Court when it stated that the "special nature"

of human rights legislation made it "not quite constitutional but certainly more than the ordinary."

> Ontario Human Rights Commission v. Simpsons-Sears, [1985] 2 S.C.R. 536 at 547 per McIntyre J
>
> See also Scowby v. Glendinning, [1986] 6 W.W.R. 481 at 488-9 per Estey J.

20. It is submitted that the purposes of human rights legislation as reflected by the evolution of the legal protection of victims of discrimination is to recognize the dignity and worth of every person and to provide for equal rights and opportunities for every person. It seeks to rectify the denial of equality faced by minorities and women in order to enable them to achieve their full potential.

> Ontario Human Rights Commission v. Simpsons-Sears, supra, at 546-547.
>
> Re Blainey and the Ontario Hockey Association et al (1986), 54 O.R. (2d) 513 (C.A.) at 525 per Dubin JA
>
> Cameron v. Nel-Gor Nursing Home (1984), 5 C.H.R.R. D/2170
>
> Human Rights Code, 1981 S.O.1981, Preamble.

(ii) Canadian Bill of Rights

21. In 1960 Parliament sought further protection for those disadvantaged by discrimination by enacting the Canadian Bill of Rights, S.C. 1960, c.44 which was "quasi-constitutional" legislation, in the sense that it was given primacy over other federal legislation. It provides for a general right of equality before the law in section 1(b) as follows:

"1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(b) the right of the individual to equality before the law and the protection of the law;"

Hogan v. the Queen, [1975] 2 S.C.R. 574 at 579 per Laskin J

22. It has been recognized by this Honourable Court however, that a legislative guarantee of rights such as the Canadian Bill of Rights should rarely be used to strike down otherwise valid legislation. In addition, although s.1(b) speaks of a "right to equality", the rights it conferred were not egalitarian in nature. It is therefore submitted that the Canadian Bill of Rights provided inadequate protection against discrimination.

Curr v. the Queen, [1972] S.C.R. 889 at 899 per Laskin J

The Queen v. Beauregard, [1986] 2 S.C.R. 56

Attorney General v. Lavell et al, [1974] S.C.R. 1349

W.S. Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin, eds, Canadian Charter of Rights and Freedoms 1982 at 395.

(iii) Summary

23. It is submitted that this legislative evolution reflects a growing concern in Canada for the protection of persons who have been disadvantaged because of prejudice, stereotyping or paternalism based on a personal characteristic. This legislation has attempted to eradicate discrimination based

on prejudice or stereotyping in order to permit equality for individuals to participate fully in society to the extent of their individual abilities. It is submitted that the constitutional protection of equality rights in s.15(1) of the Charter was aimed at increasing the reach and effectiveness of the protection offered by this legislation.

(b) Text of Section 15.

24. In the years prior to the introduction of the Charter in 1980, several drafts of a constitutional Bill of Rights were considered. Each of these incorporated a provision aimed at prohibiting discriminatory practices which made specific reference to a list of enumerated grounds of prohibited discrimination, such as race, religion and sex.

> A.F. Bayefsky, "Defining Equality Rights" in Bayefsky and Eberts, eds, Equality Rights and the Canadian Charter of Rights and Freedoms, 1985, p.1.

25. It is submitted that the wording of s.15, including the consideration of changes to the text that were made before its final enactment, assist in determining its purpose. This textual material demonstrates that the primary focus of s.15 was to ensure equality for individuals who have in the past been treated disadvantageously because of a personal characteristic which has led to their being the target of prejudice, stereotyping or paternalism.

26. Initially, in the version of the Charter tabled in Parliament in October, 1980, s.15 provided as follows:

(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

(2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

As s.15 was debated in the Special Joint Committee of the Senate and the House of Commons in 1980-81, there were various revisions to the text.

27. Firstly, the word "everyone" was replaced by the words "every individual", to make it clear that the equality guarantee was to apply only to human beings and not to corporations. It is submitted that this change indicates that s.15 is not intended to protect economic interests and that the grounds of discrimination should be related to individual, personal characteristics.

Elliot, "Interpreting the Charter - Use of the Earlier Versions as an Aid", 1982 U.B.C.Law Rev. - Charter Edition.

Milk Board v. Clearview Dairy Farm Inc., [1987] 4 W.W.R. 279 (B.C.C.A.).

R. v. Edwards Books and Art et al, [1986] 2 S.C.R. at 713 at 781-2 per Dickson CJC

28. Secondly, the declaration of equality under the law and the right to equal benefit of the law were added to the substantive guarantees of s.15(1). It is submitted that these additions indicate that s.15's guarantee of equality is to be comprehensive, and not limited to the administration of the law but extended to its substance.

Hogg, Constitutional Law of Canada, 2nd ed, 1985 at 798.

W.S. Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin, eds, Canadian Charter of Rights and Freedoms, 1982 at 396 and 421-2.

Elliot, "Interpreting the Charter" supra.

29. Thirdly, the words "in particular" were added before the enumerated grounds of discrimination. It is submitted that this demonstrates that the list of enumerated grounds is not exhaustive. However, it is further submitted that it was intended that the Courts would expand the protected grounds beyond those enumerated as society's appreciation and understanding of the need for constitutional protection matured, a process which mirrors the development of human rights legislation. As the Minister of Justice said before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, when proposing this change:

> Mr. Chrétien:
>
> Toute disposition sur les droits à l'égalité doit faire la preuve qu'il existe un principe positif de l'égalité dans le sens le plus large; à cela s'ajoute le droit à des lois qui assurent protection égale et bénéfice égal sans discrimination.
>
> ...
>
> Le gouvernement exprime l'opinion que certain motifs de discrimination sont depuis longtemps réprouvés. La race, les origines ethniques ou nationales, la couleur, la religion et le sexe, autant de motifs que l'on retrouve dans la Déclaration canadienne des Droits, et que l'on définit plus facilement que d'autres.
>
> Je veux insister sur le fait que l'établissement d'une liste spécifique des motifs les plus évidents de discrimination ne signifie pas qu'il n'existe pas d'autres motifs de discrimination. Dans la mesure même où notre société évolue, nos valeurs changent; et l'on

découvrira toujours de nouveaux motifs de discrimination. En des circonstances normales, ces motifs devraient se retrouver dans les textes de la loi sur la Protection des Droits de la Personne, car c'est là que le législateur peut les définir clairement, en prévois les conditions d'exercice et en préciser les mesures de protection.

...

Mais là où le législateur n'agit pas, les tribunaux devraient pouvoir intervenir. C'est pourquoi la modification que je propose mentionne certains motifs de discrimination; la liste n'en est pas exhaustive. Au contraire, cette modification reste largement ouverte, satisfaisant aux recommandations adresssées à ce Comité par plusiers témoins. Il est difficile d'identifier avec légitimité tout nouveau motif de discrimination dans une domaine où la loi évolue rapidement; c'est pourquoi je préfère cette attitude ouverte qui fait que l'on l'on évite d'énumérer des catégories et d'en exclure d'autres.

Minutes of Proceedings, January 12, 1981, Vol. 36:14.

Elliot, "Interpreting the Charter", supra

30. Fourthly, "mental or physical disability" was added to the enumerated grounds. It is submitted that this addition assists in understanding the scope of s.15's protection because the added ground is a personal attribute which exhibits the same characteristics as those previously enumerated. This addition was made because of evidence tendered during the Committee hearings that disabled individuals have traditionally been subjected to disadvantageous treatment because of prejudice, stereotyping or paternalism.

Elliot, "Interpreting the Charter" supra.

Lepofsky and Bickenbach "Equality Rights and the Physically Handicapped" in Bayefsky and Eberts, eds, Equality Rights and the Canadian Charter of Rights and Freedoms, 1985, at 332-341.

31. It is further submitted that the recognition of affirmative action programs for "disadvantaged individuals or groups" in s.15(2) is an indication that the protection afforded by s.15(1) is to be given to individuals who have been traditionally disadvantaged (based on either an enumerated or unenumerated ground). Affirmative action programs are designed to help persons achieve equality who have been traditionally disadvantaged as victims of past discrimination;

> Minutes of Proceedings, January 12, 1981, Vol. 36:15 per The Honourable Jean Chrétien.
>
> Action Travail des Femmes v. Canadian National Railway Co., S.C.C. unreported, June 25, 1987.

32. It is therefore submitted that the amended text of s.15 demonstrates that the section's core focus is to prevent a denial by legislatures and government of equality to persons who have in the past been treated disadvantageously, by virtue of a personal characteristic which has led to their being the target of prejudice, stereotyping or paternalism.

(c) The Place of s.15 within the Charter and of the Charter within the Greater Context of the Constitution

33. It is submitted that the purpose and scope of s.15 is in part identified by the proper roles of the courts and the Legislature under the Constitution Acts 1867-1982. Although judicial review of legislation to determine its conformity with the values expressed in the Constitution is a core principle of the democratic process, it is submitted that constitutional values against which legislation are measured must be truly fundamental. The rights and freedoms guaranteed by the Charter

must be defined so that the courts are not transformed into courts of appeal from all government policy decisions. While "the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution", neither "before [nor] after the Charter have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments."

> Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 496 per Lamer J

34. At the core of any system of democractic government is the principle that legislation and policy should be made by those who are democratically accountable to the public. However, while majority rule is an essential principle, it is not an absolute. Majority rule must give way to protection of the minority from the actions of majorities in certain special situations. According to the delicate balance which the Constitution of Canada has struck between the power of the majority and the rights of minorities, and between the authority of legislatures and policy-makers on the one hand and the courts on the other, the courts are constitutionally authorized to overturn decisions of those who are democratically accountable where majority action has interfered with the fundamental rights of members of a minority.

35. It is submitted that there are two features central to the process of legislating in a democracy. First, legislation, unlike adjudication, is a process whereby general rules are laid down to address social concerns. Second, legislation tends to be a progressive and imperfect process, whereby legislators identify social problems, and periodically fashion and refashion

measures in an attempt to redress these problems. It is submitted that s.15 was not intended to alter these essential features of the legislative process, or to declare them to be constitutionally suspect.

36. It is therefore submitted that, viewed in the context of the Constitution Acts, 1867-1982, the proper role of the guarantee of equality rights in s.15(1) of the Charter is not to require the courts to re-evaluate every legislative and policy choice made by legislatures and governments. Instead, s.15 should be interpreted as protecting those who have been found to be weak or disadvantaged in Canadian society, who have been incapable of adequately participating in the majoritarian process to obtain redress of their grievances, and who have been systematically or systemically singled out for worse treatment because of a personal characteristic unrelated to their actual ability.

CONCLUSION - THE PURPOSE OF SECTION 15.

37. It is therefore submitted that the purpose of s.15(1) is to guarantee equality for individuals to enable them to participate fully in the rights, benefits, privileges and burdens extended to the public by legislatures and governments, to the extent of one's individual abilities, regardless of any personal attribute which identifies a person with a group whose members are disadvantaged because of stereotyping, prejudice or paternalism.

(B) POSSIBLE INTERPRETATIONS OF SECTION 15(1)

38. There are a number of possible approaches to the interpretation of s.15(1). It is submitted that it is

appropriate to examine the alternative approaches which have been adopted by lower courts or suggested by commentators by evaluating the degree to which they result in the achievement of the purpose of s.15(1). It is further submitted that it is also necessary to have regard to the ability of government, legislatures and the courts to measure legislation and government activity against the test imposed by each suggested interpretation of s.15(1). The following six approaches are evaluated using the criteria.

APPROACH #1

39. Under this approach, any legislative distinction between individuals is inconsistent with section 15(1) and must be justified under s.1. Professor Hogg favours this interpretation of s.15(1) in Constitutional Law of Canada, at p.800:

> I conclude that s.15 should be interpreted as providing for the universal application of every law. When a law draws a distinction between individuals, on any ground, that distinction is sufficient to constitute a breach of s.15, and to move the constitutional issue to s.1.

40. Since virtually all legislation distinguishes between individuals on some basis, a challenge to any law or government action would require justification under s.1 in accordance with the stringent test laid down by this Honourable Court in R. v. Oakes, [1986] 1 S.C.R. 103.

41. It is submitted that this interpretation of s.15(1) would make all legislation and government action presumptively unconstitutional. It does not reflect the purpose of section 15(1) which, it is submitted above at paragraph 37, is to

protect individuals who are worse off under legislation or because of government action as a result of a personal characteristic which has traditionally resulted in prejudice or stereotyping at the hands of the majority. Making distinctions is a necessary and proper role for legislatures and governments, and not all such distinctions should be subject to constitutional review. Requiring judicial review of all distinctions under s.1 would result in an unintended and unworkable expansion of the role of the judiciary from guardian of the Constitution to overseer of the wisdom of all government activity.

R. v. Oakes, supra

R. v. Edwards Books and Art et al, supra, at 772 and 781-2 per Dickson CJC.

APPROACH #2

42. Section 15(1) has also been interpreted to include any classification as a protected ground, but only if the distinction drawn by the legislation is unfair or unreasonable, having regard to the purpose and effect of the law which imposes it.

R. v. LeGallant (1986), 6 B.C.L.R. (2d) 105 (C.A.)

Wilson et al v. Medical Services Commission of British Columbia et al (1986), 9 B.C.L.R. (2d) 350 (S.C.)

43. Under this approach a law which distinguishes between two individuals on any basis (which is virtually every law), will be subject to review by the courts within s.15(1) to determine whether it is discriminatory, that is, whether it is unfair or unreasonable, having regard to its purpose and effect.

44. This interpretation does not give effect to the purpose of s.15(1), as set out above at paragraph 37. If s.15(1) means subjecting every law to constitutional judicial review to determine whether it is reasonable and fair, its purpose would be, rather, to transform courts into overseers of the wisdom of legislation.

45. Such an interpretation would amount to a constitutional requirement that every law be reasonable and fair. These vague terms would in every instance require a judicial inquiry into the merits of the legislation in the particular circumstances. There would be no certainty for legislatures and government as to the validity of their laws or actions, there would be limited scope for precedent. Further, s.15 would consume the rest of the Charter.

APPROACH #3

46. The approach to the interpretation of s.15(1) adopted by the Ontario Court of Appeal provides that a law is inconsistent with s.15(1) if it treats persons differently, where they are similarly situated vis-a-vis the purpose of the law, and where this different treatment is unfair, unreasonable, or unduly prejudicial. Under this approach, a person could seek relief under s.15 against any kind of legislative distinction regardless of the ground of distinction, so long as he or she could show that he or she is similarly situated to some other person, who is dissimilarly treated by the impugned law. In effect, this approach is like Approach #2.

Re McDonald and The Queen (1985), 51 O.R. (2d) 745 (C.A.)

R. v. R.L. (1986), 14 O.A.C. 318 (C.A.)

Century 21 Ramos Realty Inc. and Ramos v. the Queen (1987), 58 O.R. (2d) 737 (C.A.)

R. v. Ertel, Ont. C.A., unreported June 3, 1987

47. The Ontario Court of Appeal has recently outlined a three-step analysis for determining whether a law is inconsistent with s.15(1):

Step one is the identification of "the class or classes of persons who are said to be treated differently".

Step two is the determination of "whether these classes are 'similarly situated'." Any differences noted must be relevant to the purposes of the legislation.

Step three is the determination of whether there is discrimination which is "an inherent disadvantage ... [which is] ... so unfair as to be discriminatory, having regard to the purpose and effect of the legislation". The onus of establishing discrimination is on the person alleging it, except "where the Crown is better equipped to lead evidence with respect to reasonableness, as well as the purpose and effect of the legislation" in which case the analysis will occur in s.1, as a fourth step in the approach.

R. v. Ertel, supra, at pp. 31-38.

48. This approach requires the courts to undertake a wholesale review of the wisdom of legislation since there is no restriction on the nature of the classes that are deserving of

constitutional protection. Because every law draws distinctions, it would be open to anyone to claim that he or she had been unfairly included or excluded by any legislation. Thus, this approach does not reflect the purpose of s.15, as set out above.

49. Further, this approach, like the first and second, gives little or no meaning to the express enumeration of certain grounds of discrimination and makes it appear that the enumerated grounds are purely random.

50. This approach can result in an empty concept of equality. Tautological reasoning could result in any law being upheld if the purpose of the law is framed in a manner which perfectly fits the distinction which the legislation draws. The "similarly situated" test was criticized by the Alberta Court of Appeal as follows:

> [T]he test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.
>
> Mahe et al v. the Queen (Alta C.A.) unreported, August 26, 1987 at p.51.

51. The principle that those similarly situated should be similarly treated underlies the development of the common law and forms the basis of the doctrine of stare decisis. Such analysis is appropriate to adjudication which is carried out on an

individual case-by-case basis. It is submitted however, that it is inappropriate as a standard of constitutional review since legislation cannot always treat similarly those similarly situated. Legislation must, at times, address social problems on a gradual basis and the adoption of a "similarly situate" approach puts such legislative initiatives which may be somewhat under-inclusive or over-inclusive at risk.

> Charney, "R.L.: Bootstrap Equality" (1986), 52 C.R. (3d) 232
>
> R. v. Edwards Books and Art et al, supra at 772 per Dickson CJC citing with approval Williamson v. Lee Optical, 348 U.S. 483 (1955).

52. An interpretation which focuses on the right to similar treatment for those similarly situated ignores a fundamental component of equality propounded by this Honourable Court in R. v. Big M Drug Mart Ltd., supra. at 347: "[T]he interests of true equality may well require differentiation in treatment".

> See also:
> Ontario Human Rights Commission v. Simpsons-Sears, supra.

APPROACH #4

53. Approach #4 to the interpretation of s.15(1) would be to adopt the test developed by this Honourable Court to interpret s.1(b) of the Canadian Bill of Rights. Generally, legislation which was directed at a valid federal objective was held to be consistent with the equality guarantee of that statute. Then in one case, MacKay v. the Queen, [1980] 2 S.C.R. 370, McIntyre J in a concurring opinion expanded the test to be used for determining consistency with s.1(b) of the Canadian Bill of Rights as follows:

> I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective.

See also: The Queen v. Beauregard, [1986] 2 S.C.R. 56

54. The approach developed for the Canadian Bill of Rights was the result of its "merely statutory status ... and the declaratory nature of the rights it conferred." Neither of these constraints is applicable to s.15(1) of the Charter. To the extent, therefore, that this approach is concerned only with the validity of the objective, even coupled with an assessment of its rationality, it is submitted that it is inappropriate for the interpretation of a constitutional guarantee of equality.

R. v.Big M Drug Mart Ltd., [1985] 1 S.C.R. 295

APPROACH #5

55. Under the fifth approach American equal protection jurisprudence would be applied to the interpretation of s.15(1). A distinction on any basis would require constitutional review of legislation although different kinds of distinctions would be treated differently by the courts. Legislative classifications which are inherently suspect, such as race or religion, or those which bear on the exercise of fundamental rights are subject to "strict scrutiny" and will be unconstitutional unless they are necessary to secure a compelling state interest. Most legislative classifications, such as those in regulatory

statutes, are subjected only to "minimal scrutiny" and will be constitutional if the distinction drawn is rationally related to a legitimate government objective. Between these two extremes, there is "intermediate scrutiny" which applies to some "semi-suspect" legislative classifications, such as sex.

56. The American approach is a product of the historical and textual context within which the fourteenth amendment has operated. It was enacted after the American civil war, in order to protect blacks from at least some forms of discriminatory governmental distinctions. There are no enumerated grounds of discrimination and there is no equivalent to s.1 in the American Constitution.

57. It is submitted that it would be inappropriate to incorporate the American approach to equal protection to the interpretation of s.15(1). There are significant historical and textual differences between the guarantees of equality rights in the two countries. Firstly, as set out above, s.15(1) is a product of the evolution of human rights statutes with their affirmation of equality without discrimination based on various personal attributes. Secondly, s.15(1) contains nine enumerated grounds which typify the scope and nature of the interests it is designed to protect. Thirdly, s.1 of the Charter sets out a uniform standard for justifying legislation which infringes equality rights.

Reference re B.C. Motor Vehicle Act, supra

Mahe v. The Queen, supra, at p.51

58. Moreover it would be inappropriate to adopt an approach

which has come under heavy criticism from commentators in the United States and from some members of the United States Supreme Court itself.

City of Cleburn v. Cleburn Living Centre, 105 S.Ct. 3239 (1985)

G. Gunther, Constitutional Law, 1985 at pp.591-2

"Justice Stevens' Equal Protection Jurisprudence" (1987) 100 Harv. L.R. 1146

APPROACH #6

59. By the sixth approach, which it is submitted is the appropriate test, s.15(1) would invalidate legislation and other government action which discriminates against individuals where such discrimination is based either on one of the nine enumerated grounds, or on an unenumerated ground which is akin to, or similar to, the enumerated grounds.

60. The nine enumerated grounds in s.15 share the following characteristics in common:

(i) Each describes an intimate or fundamental personal characteristic of a human being by which people identify themselves or by which they are identified by others;

(ii) Each characteristic is either itself immutable, or (in the case of religion) exceedingly difficult to change involuntarily;

(iii) Each relates to a basis of discrimination which has been a significant social problem in Canada in the past. In other words, each relates to an individual characteristic which has traditionally led persons to be subject to disadvantageous treatment;

(iv) Each is a characteristic which has tended to be the focus of inaccurate or unfair generalizations, based on prejudice, paternalism or stereotyping.

61. Under this approach, an individual would have to establish that a law or government action treats him or her disadvantageously on the basis of an enumerated ground or a ground that shares the characteristics of an enumerated ground. Once disadvantageous treatment on a recognized ground is established, the law or government action is inconsistent with s.15(1) and the party seeking to uphold it must justify it under s.1 of the Charter. Unlike the first approach (all distinctions violate s.15(1)), this sixth approach involves a number of steps within s.15(1) itself.

62. A court applying this approach does not undertake an ad hoc inquiry at large into the question whether any impugned distinction found in a law is fair, reasonable or rational, in order to ascertain whether it is inconsistent with s.15. Instead, the court would view s.15(1) in a more focused manner, as a measure aimed at preventing legislatures and governments from singling out individuals for denial of rights, privileges, and benefits extended otherwise to the public, or for the

imposition of burdens not otherwise extended to the public, because of an intimate personal attribute which has traditionally been the subject of prejudice or stereotyping.

63. A number of courts have adopted an interpretation of s.15(1) which would extend protection only where discrimination was based on the enumerated grounds or grounds analogous to them.

> Re Datta and Saskatchewan Medical Care Insurance Commission (1986), 33 D.L.R. (4th) 507 (Sask. C.A.)
>
> Smith, Klein & French Laboratories v. Attorney General of Canada, [1987] 12 C.P.R. (3d) 385
>
> Aluminum Co. of Canada Ltd. v. The Queen (1986), 55 O.R. (2d) 522 (Div. Ct.) (disapproved on this point in R. v. Ertel, supra)
>
> Kask v. Shimizu, [1986] 4 W.W.R. 154 (Alta. Q.B.)
>
> Mirhadizadeh v. The Queen (1986), 57 O.R. (2d) 441 (H.C.)
>
> Contra:
>
> Wilson et al v. Medical Services Commission of British Columbia et al, supra
>
> Century 21 Ramos Realty Inc. and Ramos v. The Queen (1987), 58 O.R. (2d) 737 (C.A.)
>
> R. v. Ertel, supra

64. It is submitted that this approach will give fullest effect to the values which s.15(1) was intended to protect, while avoiding the conversion of s.15(1) into a prescription for the wholesale judicial review of the merits of virtually all legislation, as a requirement in determining its prima facie constitutionality.

65. This sixth approach to s.15(1) is fully consistent with its legislative history. As indicated above, s.15(1) is the product of a progressive evolution in the protection of human rights of those who have been disadvantaged in the past, and who have been victimized by discriminatory practices because of a personal attribute such as their race, religion, sex, age or disability.

66. Further, it best fulfills the reasons which motivated the amendment of s.15(1) to make the grounds of discrimination non-exhaustive.

See: Paragraph 29, above

67. Further, this interpretation is consistent with the text of s.15(1) which explicitly sets out nine enumerated grounds but leaves open the possibility that other groups could merit such protection, and be added by judicial recognition, rather than by constitutional amendment. It is submitted that of the various approaches to s.15 here considered, only this sixth approach takes into account the selection of the enumerated grounds as a relevant consideration in the construction of the provision. The other approaches would effectively treat the selection of the nine enumerated grounds as random or coincidental, rather than as indicative of the overall direction that s.15 was intended to have.

68. It is submitted that this approach has the further advantage of allowing the same s.1 standards to apply to justify any inconsistency with s.15(1) rather than necessitating the

incorporation of a test involving different levels of scrutiny in order to dispose of frivolous claims.

R. v. Oakes, supra.

R. v. Edwards Books and Art, supra

69. It is further submitted that this sixth approach to s.15 has the substantial benefit of permitting a court to summarily dismiss frivolous s.15 claims, are brought on grounds of alleged discrimination which fall far outside the matters contemplated by s.15, without necessitating any judicial inquiry into the wisdom, reasonableness or rationality of the impugned law. To date, much of the s.15 litigation in the courts below has been taken up by claims of discrimination on alleged unenumerated grounds, which are not in any way akin to the enumerated grounds. This litigation has often focused on economic and business interests seeking in essence to challenge the wisdom of legislation. The following are some examples:

Re Aluminum Co. of Canada Ltd. and The Queen, supra (steel producers versus aluminum sheeting manufacturers).

Aerlinte Eireann Teoranta v. The Queen, Federal Court Trial Division, unreported, February 20, 1987 (trans-oceanic landing fees versus landing fees paid by domestic flights).

Beltz v. Law Society of B.C., [1987] 1 W.W.R. 427 (B.C.S.C.) (lawyers who engage in a type of practice which does not or cannot attract negligence claims versus lawyers who engage in a type of practice which attracts negligence claims).

R. v. Beazley (1984), 128 A.P.R. 145 (N.S. Co.Ct.) ("trade" vehicles v. non-trade vehicles).

Munro v. The Queen, Federal Court Trial Division, unreported, October 29, 1986, (fishermen with vessels over 45 feet in length versus fishermen with shorter vessels).

Re Chung and Amalgamated Clothing & Textile Workers Union-Toronto Joint Board; Re Ports International and Ont. Labour Relations Board (1986), 54 O.R. (2d) 650, 27 D.L.R. (4th) 248 (working supervisors versus other employees).

Re Jamorski and Attorney General of Ontario (1987), 59 O.R. (2d) 422 (H.C.) (persons graduating from accredited medical schools versus persons attending unaccredited medical schools).

70. It is submitted that an interpretation which gives effect to the purpose of s.15(1) to provide meaningful protection for traditionally disadvantaged persons shouid be adopted by this Honourable Court.

PART IV

ORDER REQUESTED

71. The Attorney General of Ontario takes no position with respect to the disposition of this appeal.

Dated at Toronto this 28th day of September, 1987.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

Elizabeth C. Goldberg

David Lepofsky
Of Counsel for the Intervenant,
The Attorney General of Ontario

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11.	City of Cleburn v. Cleburn Living Centre, 105, St.Ct. 3239 (1985)	28
12.	Curr v. The Queen, [1972] S.C.R. 889	12
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19.	Human Rights Act, S.N.S. 1969, c.11, as amended, s.15	15
20.	Human Rights Code, 1981, S.O. 1981, c.53, s.46	10
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23.	Individual's Rights Protection Act, R.S.A. 1980, c.I-2 s.1	10
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28.	Milk Board v. Clearview Dairy Farm Inc., [1987] 4 W.W.R.	14
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31.	Ontario Human Rights Code, S.O. 1961-62, c.93	8
32.	Ontario Human Rights Code, R.S.O. 1970, Chap. 318 amended S.O. 1971, Vol. 2, c.50, s.63; proclaimed in force April 17, 1972, S.O. amended 1972, c.119; in force June 30, 1972, amended S.O. 1974, c.73; in force December 2, 1974.	9
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50.	R. v. Oakes, [1986] 1 S.C.R. 103	20
51.	R. v. R.L. (1986), 14 O.A.C. 318 (C.A.)	23
52.	The Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1, s.43	9
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APPENDIX A

1. Individual's Rights Protection Act, R.S.A. 1980, c. 1-2

2. Human Rights Code, R.S.B.C. 1979, c.186, as amended by S.B.C. 1981, c.15, s.104, S.B.C. 1981, c.21, s.123, and S.B.C. 1982, c.7, s.58.

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4. The Human Rights Act, S.M. 1974, c.65, as amended by S.M. 1975, c.42, s.26, and S.M. 1982, c.23.

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9. Human Rights Code 1981, S.O. 1981, c.53.

10. Prince Edward Island Human Rights Act, S.P.E.I. 1975, c.72, as amended by S.P.E.I. 1977, c.39, S.P.E.I. 1980, c.26, and S.P.E.I. 1982, c.9.

11. Charter of Human Rights and Freedoms, R.S.Q. 1977, c.C-12, as amended by S.Q. 1978, c.7, ss. 112, 113; S.Q. 1979, c.63, s.275; S.Q. 1980, c.11, s.34; S.Q. 1980, c.39, s.61; S.Q. 1982, c.17, s.42; S.Q. 1982, c.21, s.1; and S.Q. 1982, c.61.

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