Court File No. 19955/19956

IN THE SUPREME COURT OF CANADA

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

BETWEEN:	THE LAW SOCIETY OF BRITISH COLUMBIA	Appellant (Respondent)
AND:	THE ATTORNEY GENERAL OF BRITISH COLUMBIA	Appellant (Respondent)
AND:	MARK DAVID ANDREWS	Respondent (Petitioner)
AND:	GOREL ELIZABETH KINERSLY	Co-Respondent

AND:

THE ATTORNEY GENERAL OF ALBERTA
THE ATTORNEY GENERAL OF SASKATCHEWAN
THE ATTORNEY GENERAL OF ONTARIO
PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC
THE ATTORNEY GENERAL OF NOVA SCOTIA
THE FEDERATION OF LAW SOCIETIES OF CANADA
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS and ONTARIO COLLEGES AND UNIVERSITIES FACULTY ASSOCIATIONS
COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED
THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenors

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PART I

STATEMENT OF FACTS

1. The intervenor, the Coalition of Provincial Organizations of the Handicapped, takes no position with respect to the facts which give rise to this appeal.

PART II

POINTS IN ISSUE

2. Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in section 41 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?

3. 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?

PART III

ARGUMENT

4. The Intervenor, the Coalition of Provincial Organizations of the Handicapped, submits that the principles underlying sections 15 and 1 of the Charter of Rights and Freedoms are:

(a) The combined effect of s. 15(1) and 15(2) is to guarantee members of disadvantaged groups "substantive equality" in their relations with government, (i.e., protection against direct or adverse effects discrimination which stands as a barrier to full participation).

(b) S. 15(1) guarantees all Canadians "formal equality" in their relations with government (i.e., protection against direct discrimination for which there is no rational basis).

(c) The limits to the two kinds of equality referred to in (a) and (b) above are contained in s. 1.

5. TWO KINDS OF EQUALITY

Aristotle defined equality as requiring that persons who are alike should be treated alike, while persons who are different should be treated differently in proportion to their differences. His cool logic belies the difficulties later generations have had determining whether people are "alike" or "similarly situated". Once a difference has been established, these difficulties are compounded when attempts are made to calculate proportionality. For this reason the equality of Aristotle has been criticized as "empty" and devoid of any "criteria of relevance". Aristotle, it will be recalled, had no difficulty reconciling his conception of equality with the institution of slavery.

References: Aristotle, Ethica Nichomachea, Book V. 3.
Politics, Book III. 9.

Westen, "The Empty Idea of Equality", 95 Harv. L. Rev. 537 (1981-82).

Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts (eds.), Equality Rights and the Canadian Charter of Rights and Freedoms (1985) 1 at 3.

6. Formal equality is furthered by the removal rather than the creation of distinctions by government. Thus it is hostile towards pluralism, and encourages homogeneity; its paradigm is the melting pot rather than the mosaic and it is based on the assumption that everyone can and should participate in the private marketplace without special status or government

intervention. Not all distinctions are suspect however, only those which are irrational or arbitrary according to the values being imposed by the decision-maker. Formal equality is consistent with Dicey's elaboration of the "rule of law", i.e., the "universal subjection of all classes to one law".

References: Baker, "The Changing Norms of Equality in the Supreme Court of Canada", (1987) 9 Supreme Court L.R. (forthcoming)

Dicey, The Law of the Constitution (10th ed.) pp. 193-4.

7. The "rule of law" is fundamental to the judicial review of administrative action. The principle has been violated when the motivation of the administrative decision-maker is outside the scope of the discretion conferred.

Reference: Roncarelli v. Duplessis, [1959] S.C.R. 121 at 141 per Rand, J.

8. Formal equality is more difficult to apply in a constitutional context because it requires a judicially created standard of reasonableness. The Canadian Bill of Rights, s. 1(b), posed this problem for the courts. A "valid federal objective" test emerged which virtually precluded judicial invalidation of legislation.

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

9. This limitation of formal equality, together with its inability to respond to (1) the historically entrenched

consequences of racial discrimination, (2) the constricting stereotypes which restrict women to traditional roles, and (3) the barriers erected out of neglect rather than malice which prevent disabled people from participating in the mainstream of society, have resulted in its decline as the prevalent type of equality.

> The major criticism [of formal equality] was that, by treating different individuals as equals despite their unequal access to power and resources, it created merely an illusion of equality while it allowed real economic and social disparities to grow.
>
> This criticism of formal equality reflected a concern for "substantive equality" - that is, the enjoyment of equal opportunity in daily life - which is taking its place in the second half of this century as the dominant approach. ... the 1960's and 1970's saw a sharper focus on equality of opportunity and a new recognition that treating every kind of person in exactly the same way sometimes resulted in unintentional discrimination, as it did not make allowances for the special needs of some kinds of persons.
>
> Reference: The Honourable John Crosbie, Department of Justice, Report to Parliament: Toward Equality (1986), p. 2.

10. Substantive equality commences with the recognition that members of some groups have experienced systemic discrimination because of their membership in the group. Human rights legislation in virtually every jurisdiction in the country includes protection against not only direct discrimination but also adverse effects discrimination. The special circumstances of the group (which in the language of "formal equality" would result in a finding that members are not "similarly situated" with others) must be considered in accomplishing "substantive

equality".

> At present, society's disadvantages are disproportionately assumed by the four designated groups. Clearly, some distinctions have been made or overlooked in the past that have resulted in the disproportionate representation of native people, visible minorities, disabled persons and women on the lower rungs of the ladder to society's benefits. By reversing our approach and by using these same distinctions to identify, confront and eliminate barriers these distinctions have caused in the past, we can reverse the trends, provide access, and open the door to equality.

Reference: Royal Commission Report on Equality in Employment (1984), pp. 3-4 (The Abella Report).

Further Reference: Action Travail des Femmes v. C.N.R., et al. S.C.C. Judgment rendered June 25, 1987.

11. Substantive equality requires that the barriers which create the inequality experienced by disadvantaged groups be identified, that the goal of equality of opportunity through the removal of these barriers be established, and that a legal mechanism be established which will advance this goal in a principled way. The statutory mechanism which has been established is human rights legislation. Not only has substantive equality become the dominant type of equality in Canada, but it has also been accorded "quasi-constitutional" status. Conflicts between human rights and other legislation will be resolved in favour of the human rights legislation, absent an express statement indicating a contrary legislative intention.

Reference: Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150.

12. CONSTITUTIONAL EQUALITY GUARANTEE

The political support of disadvantaged groups for the equality clause in the Charter of Rights and Freedoms is worthy of note. Whether supportive or opposed to the concept of an entrenched Charter, political scientists agree this support was decisive in achieving the requisite consensus which led to the patriation of the Constitution with a Charter of Rights and Freedoms attached.

References: Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982), 25 Can. Pub. Admin. 1 at 25.

Banting and Simeon, "Federalism, Democracy and the Constitution", and Whittaker, "Democracy and the Canadian Constitution", in Banting and Simeon (eds.), And No One Cheered (1983), at 5-20 and 254-57.

Romanow, Whyte and Leeson, Canada Notwithstanding (1984) at 253.

Sheppard and Valpy, The National Deal (1982) at 135-59.

13. The legislative history of s. 15 contains a series of amendments intended to strengthen the equality guarantees, and to permit the inclusion of non-enumerated groups, together with the enumerated ones, among those entitled to protection against discrimination. Nothing in the Minutes and Proceedings of Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada suggests these changes were intended to broaden the courts' jurisdiction to review the policy of the multifarious decisions made daily by elected

representatives. The changes responded to the requests for protection by specific disadvantaged groups. For example, the inclusion of "mental and physical disability" resulted from the need for structural changes which would allow disabled people to participate in the mainstream of society.

References: Elliott, "Interpreting the Charter - Use of Earlier Versions as an Aid" (1982), U.B.C. Law Rev. (Charter Edition) 11.

Bayefsky, supra, at 3-11 and 69-73.

Lepofsky and Bickenbach, "Equality Rights of the Physically Handicapped" in Bayefsky and Eberts (eds.), supra, 323 at 335-40.

14. It is accepted that the language of s. 15 reflects an intention to reverse the outcome of many cases under the Canadian Bill of Rights. This Court has stated that an individual need not be a member of an enumerated group in order to assert a claim to "equal protection of the law" under s. 1(b) (R. v. Burnshine, [1975] 1 S.C.R. 693 at 700). It was stated that the prohibition of "discrimination by reason of race, national origin, colour, religion or sex" was "an additional lever to which federal legislation must respond" (Curr v. The Queen, [1972] S.C.R. 889 at 896-97 per Laskin J. (as he then was)). This is a lever which has never been used. Chief Justice Laskin returned to this theme in a dissenting judgment where he stated the enumerated categories provided "a touchstone in the legislation" for subjecting distinctions based on them to more rigorous scrutiny (Morgentaler v. The Queen (1975), 53 D.L.R. (3d) 161 at 175-76). Denied protection against discrimination,the enumerated groups were left with formal equality which did very little to

ameliorate the discrimination they were experiencing.

15. By including the protection against discrimination in the body of the Charter's equality rights guarantee it was no longer possible to disregard it. By limiting protection against discrimination to certain enumerated groups in the October 5, 1980 version of the Charter tabled in the House of Commons and the Senate, it was clearly demonstrated that substantive equality on behalf of groups widely acknowledged to have suffered systemic discrimination was intended. The subsequent amendment, contained in the January 12, 1981 version submitted to the Special Joint Committee on the Constitution, broadened the scope of the anti-discrimination guarantee to afford protection for non-enumerated groups. By retaining the list of enumerated groups, and prefacing them by the words "in particular", the courts were provided guidance about which groups are presently known to be disadvantaged as a result of discrimination. Consistent with the Charter's status as a constitutional instrument and a "living tree", the courts can extrapolate from the list in order to determine which other groups should be accorded substantive equality.

16. The word "discrimination" is notably absent from the Equal Protection Clause of the United States Bill of Rights. It is a term which is in current usage in civil and human rights legislation in the United States and Canada. As noted supra, the word "discrimination" in Canada has consistently been interpreted

as affording substantive rather than formal equality. This has been possible because human rights protection is available only to members of groups which have experienced discrimination because of one of an enumerated list of grounds. Moreover, there is no evidence that advantaged groups have been successful in asserting statutory human rights claims (i.e., "equality with a vengeance") in Canada. This is because human rights commissions have screened out the complaints of advantaged groups.

References: Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Comm. and Huck, [1985] 3 W.W.R. 717, leave to appeal to S.C.C. denied (1985), 60 N.R. 240.

Ontario Human Rights Commission and O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536.

17. The equal protection clause of the United States Bill of Rights is not subject to any express limits. Its scope has been interpreted as extending to direct but not adverse effects discrimination (Washington v. Davis, 426 U.S. 229 (1976)). Further limits have been developed by placing a heavier onus of justification upon a government which differentiates upon some grounds than upon others. The heaviest onus, "strict scrutiny" is, in theory, applied to groups which are

> ... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process.

Reference: San Antonio Independent School District v. Rodriguez, 411 U.S. 1 at 28 (1973).

In practice it has been accorded to groups which have suffered discrimination as a result of stigmatization (Weber v. Aetna Casualty & Surety 406 U.S. 164 (1972)). This type of discrimination would not survive even the minimum scrutiny standard. The ironic result is that the "level of scrutiny" approach benefits most the disadvantaged groups which require it least. A second irony results from its emphasis upon direct rather than adverse effect discrimination. When, for example, disadvantaged racial groups were accorded "strict scrutiny", they gained it not only for themselves but for advan ged racial groups as well. Thus members of races which are not the object of prejudice or contempt have been able to invoke the equal protection clause to strike down affirmative action programs (Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986)).

This counterintuitive result has been reversed in factually similar cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C., ss. 2000e (which includes protection against "adverse effect" as well as "direct" discrimination (Griggs v. Duke Power Co., 401 U.S. 424 (1970))

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long", constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy. [citation omitted]

Reference: United Steelworkers of America v. Weber, 443 U.S. 193 at 204 (1978).

While most members of the United States Supreme Court appear dissatisfied with the "levels of scrutiny" approach, the lack of consensus about the purposes underlying the equal protection clause has stalemated efforts at reformulation (City of Cleburne, Texas v. Cleburne Living Centre, 105 S. Ct. 313 (1985)).

18. In Canada s. 15(2) precludes the operation of s. 15(1) when a law, program or activity has as its object the amelioration of conditions of disadvantagement, "including" disadvantagement based on the enumerated categories listed in s. 15(1). If it can be assumed that s. 15(1) includes protection against "adverse effects" discrimination, it follows that s. 15(2) provides a means of resolving the unavoidable conflict between direct and adverse effects discrimination by making the latter paramount in cases of disadvantagement.

S. 15(2) does not preclude the operation of s. 15(1) when a law program or activity has as its object the amelioration of conditions of advantaged individuals or groups.

In the United States government affirmative action programs are restricted to remedying prior violations of the equal protection clause (Wygant v. Jackson Board of Education, supra). S. 15(2) was worded in such a way that "disadvantagement" is not restricted to a particular set of circumstances. S. 15(2) extends, at the very least, to governmental efforts to redress "societal discrimination", if not to the relief of disadvantagement, arising from other causes.

19. PURPOSIVE INTERPRETATION

This Court has adopted a purposive approach to the interpretation of the Charter. A purposive interpretation requires that the right or freedom be viewed in light of the value or purpose which underlies it.

20. It is submitted that the purpose underlying the s. 15 equality guarantee can best be determined by analyzing the experience of those who are acknowledged to have been denied equality: members of the enumerated groups.

"Discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability" has taken three forms. In particular circumstances any or all of the three may be present.

i) Stigmatization

One person may respond differently towards another out of malice, discomfort or patronization, without any rational basis for having differentiated. Membership in most disadvantaged groups can have a stigma attached to it. Thus stigmatization compounds the consequences of other types of discrimination. Discrimination on the basis of race has been discredited. For this reason racial discrimination is regarded as the purest example of stigmatization.

ii) Neglect

Real differences exist amongst members of society. Differences may be biological, such as a disability or an ability to bear children; a matter of choice, such as adherence to religious tenets or assumption of Indian status; or socially imposed, such as the educational disadvantagement experienced by racial minorities in a multicultural society. By neglecting the existence of these differences and treating everyone as if they were identical, the dominance of the more powerful group would be entrenched. A government, elected by the majority, may be unaware these differences exist or may conclude for utilitarian reasons they need not be addressed. A pluralistic society, committed to ensuring equality of opportunity for its members, will endeavour to accommodate these differences in order to allow individual merit and initiative to be determinative, i.e., "full participation".

iii) Stereotyping

A hybrid of the first two, stereotyping consists of overgeneralizing a real difference of some group members, to them all. The differences may be biological or social in origin. Common stereotypes include "men are stronger then women", "persons with epilepsy will have seizures" and "young people are irresponsible". These generalizations may be statistically verifiable, but for some, even most of the members of the group, they constitute "guilt by association". The barriers created by stereotyping can be broken down only if greater precision is used when establishing classifications, with the ultimate goal being the

assessment of people on their individual merits.

Formal equality is assumed to be capable of removing barriers created by stigmatization. Only substantive equality can remove the barriers to full participation which have arisen from neglect or stereotyping. This is precisely the policy underlying human rights legislation.

> Essentially, the public policy underlying the [Human Rights] Code seeks to rectify the denial of equality with respect to the inalienable basic rights of minorities and women and to enable them to realize their full potential as individuals and participate fully in society for the benefit of all people in Ontario.
>
> Reference: Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 at D/2172, adopted in Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 at 525, per Dubin J.A. (Leave to appeal to S.C.C. refused June 6, 1986.)

> ... [T]he major equality issues in the 1980's will, it is suggested, revolve around those aspirant and target groups identified previously as sufficiently "different" to have been protected or excluded from equality rights for their own good, for the common good or because equality was conceived as unattainable in their case.
>
> Reference: Vickers, "Major Equality Issues of the Eighties", [1983] Canadian Human Rights Yearbook 47 at 54.

21. There are respected theories of social philosophy which are consistent with the goal of full participation. For example,

> Rawls asserts that inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage ... .

> ... [A] participant in one of Rawls' practices would be well advised to reckon with the possibility of being deprived of basic needs, as well as of being subject to a range of natural and social handicaps that would impair his capacity to supply them. Consequently, he would be rash to concur in any practice that does not guarantee the satisfaction of basic needs and compensate for handicaps before conceding less urgent advantages to others, even if that means giving the handicapped special treatment at the expense of the normal and the healthy.
>
> Developed in this way, Rawls' model would take account of the fact that questions of social justice arise because people are unequal in ways they can do very little to change and that only by attending to these inequalities can one be said to be giving their interests equal consideration.

Reference: Benn, "Egalitarianism and Equal Consideration of Interests", in Bedau (ed.) Justice and Equality (1971), 152 at 162-65.

Further References: Rawls, A Theory of Justice (1971).

Dworkin, "What is Equality? Part II Equality of Resources", 10 Philosophy and Public Affairs (1983), 283.

Veatch, The Foundations of Justice: Why the Retarded and the Rest of Us Have Claims to Equality (1986).

22. 1981 was proclaimed by the United Nations to be the International Year of the Disabled Person. In February of that year an all-party House of Commons Committee submitted its Report of the Special Committee on the Disabled and the Handicapped, (The Obstacles Report) to Parliament. The Report is a detailed examination of the systemic barriers which deny disabled people equality of opportunity. It opens with a "Statement of Principles":

> Participation: Disabled Canadians must have the same opportunity to participate fully in all the educational, employment, consumer, recreational, community and domestic activities which characterize everyday Canadian society.

> Responsibility: All Canadians are responsible for the necessary changes which will give disabled persons the same choice[s] of participation that are enjoyed by those who are not disabled. (p.4)

The Report was received by Parliament at the same time as the Special Joint Committee on the Constitution of Canada was receiving submissions from persons seeking the inclusion of disabled persons amongst the protected classes in s. 15. One of those persons offers the following summary of the purposes to be achieved by enumeration:

> 1. Section 15 seeks to ensure that in its dealings with mentally and physically disabled persons, all agencies of government, legislative, judicial and administrative, respect the dignity, worth, individuality and personal autonomy of these persons, recognizing that these individuals are first and foremost individuals and not merely members of some socially-created category such as "the handicapped";
>
> 2. Section 15 seeks to ensure that when governments create, extend or protect rights, benefits, privileges or other opportunities to the public or some sector of the public, handicapped persons are afforded equality of opportunity to fully participate in these to the extent of their individual abilities. The same principle of equality of opportunity and full participation of handicapped persons should apply when governments impose burdens on members of society;
>
> 3. Section 15 seeks to ensure that when governments make or implement laws and policy or undertake initiatives having an impact on the rights, benefits, privileges, obligations or opportunities of handicapped individuals, government should conduct these activities based on a fair and accurate assessment of the individual abilities of handicapped persons, and not based upon stereotypes, preconceptions, prejudments, paternalism, or morally unacceptable indifference to handicapped persons' rights to full participation;
>
> 4. Section 15 seeks to ensure that governments recognize that every individual is equal, but that

> every individual is not identical to all others. Thus, the business of government should be carried on based on respect for the similarities between individuals, and a recognition and accommodation of differences between individuals, in order to ensure equality of opportunity for all.

Reference: Lepofsky, "Equality Rights for Disabled Persons: Putting the Accent on Individual Ability", Proceeding of 1985 Cambridge Lecture Series (forthcoming) at 27.

23. It has been suggested that judicial application of the Charter of Rights and Freedoms represents an intrusion into functions appropriate for the legislature, an unwelcome intrusion which courts should avoid. However, even these proponents of a "democratic conception of judicial review" have had to concede that legislatures elected by a majority of voters can stigmatize, neglect and stereotype groups, producing legislation which is "the tainted fruit of a tainted process". If the purpose underlying s. 15 is to remove the barriers preventing disabled persons and other disadvantaged groups from participating in society, courts can enforce substantive equality in a "principled" way, (i.e., not simply as a matter of "policy") which also enhances Canadian democracy. As this Court has already decided, "a commitment to social justice and equality" is a fundamental value in a free and democratic society.

Reference: Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" [1987] 21 U.B.C. Law Rev. 87 at 151.

Further References: Dworkin, A Matter of Principle (1985) at 196. Law's Empire (1986) at 254-75.

R. v. Oakes, [1986] 1 S.C.R. 103 at 135-36.

24. THE STRUCTURE OF EQUALITY

If the consequences of neglect and stereotyping are to be reversed, s. 15 must include protection against "adverse effects" as well as "direct" discrimination. Adverse effects discrimination has been defined as conduct

> ...which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.

Reference: Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, supra, at 551.

It has been broadly accepted that adverse effect discrimination is within the scope of s. 15(1).

References: Re Blainey and Ontario Hockey Association, supra, at 526.

Smith Kline & French Laboratories v. A.G. Canada (1987) 34 D.L.R. (4th) 584 at 590 fn 3 and 592 (F.C.A. per Hugesson J.)

Kask v. Shimizu et al. (1986), 26 D.L.R. (4th) 64 at 70 (A.C.Q.B. per McDonald J.)

Several courts have supported this conclusion by referring to the decision in R. v. Big M. Drug Mart, [1985] 1 S.C.R. 294 which stated that both the purposes and the effects of legislation are relevant to determining its constitutionality, and in particular to the statement of Dickson C.J. at p. 347 that "the interests of

true equality may well require differentiation in treatment".

References: R. v. Century 21 Ramos Realty (1987), 58 O.R. (2d) 737 at 760 per Tarnopolsky J.A.

Re Andrews v. Law Society of British Columbia (1986) 27 D.L.R. (4th) 600 at 605.

Reference re Act to Amend Education Act (1986), 53 O.R. (2d) 513 at 554-55 per Howland C.J.O. and Robins J.A.

Headley v. Public Service Commission Appeal Board (1987), 35 D.L.R. (4th) 568 at 575 F.C.A. per MacGuigan J.

It is therefore conceivable that not only every distinction made by a legislature falls within the scope of a s. 15(1) review, but also every failure to make a distinction.

25. There is no purpose to be served by making every conceivable legislative action or failure to act a violation of a fundamental right, salvageable only by reference to s. 1. There is however a purpose, worthy of Constitutional recognition, to be served by reviewing legislative action or inaction which has the result of preventing full participation or equality of opportunity for a member of a group which is disadvantaged as a result of discrimination. Removing such barriers is not a prima facie right, but a goal worthy of a free and democratic society.

Several judges have attempted to draw the line by affording a different type of equality protection to members of

the enumerated groups than to those which are unenumerated.

References: Headley v. Public Service Commission Appeal Board, supra, p. 577.

Smith, Kline and French v. A.G. of Canada (1986), 1 F.C. 274 at 318 per Strayer J.

One court has employed a purposive test to make the distinction, using the enumerated categories as a jumping off point. Unfortunately the judgment goes on to establish hierarchies of interests and disadvantaged groups as internal limits within s. 15(1), contrary to the purposes which have been identified supra.

Reference: Smith Kline and French v. A.G. of Canada, supra, at 591-92 (F.C.A.).

26. It is submitted that members of groups

(a) which have been victimized by systemic discrimination (i.e., stigmatization, neglect or stereotyping) based upon a group characteristic, and

(b) which have suffered disadvantagement over an extended period of time, sufficient to prove powerlessness to secure justice within a majoritarian political process,

should receive protection of their right to substantive equality pursuant to s. 15(1). Each enumerated category can be used to identify at least one such group. In addition, non-enumerated groups exist, or will come into existence, which meet these criteria. This standard is substantially similar to the

theoretical standard established by the United States Supreme Court in the case of San Antonio Independent School District v. Rodriguez, supra. It is purposive in the way Boards of Inquiry were when interpreting the Human Rights Code of British Columbia S.B.C. 1973 (2nd Sess.) c. 119 before the list of protected classes was closed by the Human Rights Act S.B.C. 1984 c. 22.

Reference: Brener v. Board of School Trustees District 62 (1977) at p. 6 cited in Tarnopolsky and Pentney, Discrimination and the Law (1985) at p. 9, 41-43.

This approach has also found support in the writing of legal academics.

References: Gold, "Equality Past and Future: The Relationship between Section 15 of the Charter and the Equality Provisions in the Canadian Bill of Rights", Equality: Section 15 and Charter Procedures, Law Society of Upper Canada, (1985) A-1 at A-7.

Smith, "A New Paradigm for Equality Rights" in Smith et al. (eds.) Righting the Balance: Canada's New Equality Rights (1986) at 356-60.

Brudner, "What Are Reasonable Limits to Equality Rights?" (1986) 64 Can. Bar Rev. 469 at 506.

All members of groups which meet this standard should be accorded the same level of protection or scrutiny. Once membership in a protected group and the existence of direct or adverse effects discrimination have been establish d, the onus would shift to the party seeking to uphold the legislation under s. 1.

27. In the Court below, Madam Justice McLachlin stated that s. 15 required that persons who are similarly situated be similarly treated and that persons who are differently situated be treated differently. The Court concluded that

> [t]he ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

Reference: Re Andrews and Law Society of British Columbia, supra, at 610.

It is submitted the B.C. Court of Appeal erred in its approach for the following reasons:

(a) It does not articulate any criteria for determining what is reasonable or fair and, more particularly, it is not clear what is intended when people such as disabled people are differently situated.

Reference: R. v. Century 21 Ramos Realty, supra, at 756.

(b) While the Court did state that the reasonableness and fairness of legislation must be evaluated "having regard to the ... effect on the complainant", it does not enunciate any goals or values which could be said to be the purposes underlying s. 15. In a subsequent decision Mr. Justice Tarnopolsky has noted that "differences between classes of persons" may exist as a result of biological differences,

stereotypes and the effects of past discrimination, concluding:

> ... the question ought to be whether the differences among those being treated differently by the legislation in question are relevant for the purposes of that legislation.

Reference: R. v. Century 21 Ramos Realty, supra, at 756-57.

Ultimately the "reasonable and fair" standard is inadequate: it is reduced to the question of relevance, rather than the removal of barriers which prevent people from participating fully in society.

(c) By imposing internal limits within s. 15, the two step process of establishing the right or freedom and then determining the limits separately under s. 1 is collapsed into one, making s. 1 superfluous. Unless required to do so by the text of s. 15 or the purposes underlying it, this is contrary to rules of statutory interpretation and prior decisions of this Court.

References: R. v. Oakes, [1986] 1 S.C.R. 103 at 138-39.

Smith, Kline & French v. A.G. of Canada, supra, at 592-93 (F.C.A.).

The procedural effect of shifting the limits out of s. 1 into s. 15 is to shift the burden of proving several key issues from those seeking to uphold legislation and onto equality seekers who are challenging it. Substantively, it:

i) shifts equality from being a "fundamental value" to being a prima facie objective which can be overridden if a fair-minded person judges it reasonable and fair to do so; and

ii) altogether removes the obligation to ensure that the means used to accomplish the governmental objective restrict "as little as possible" the goal of achieving equality and full participation by members of disadvantaged groups.

28. This Intervenor adopts the position that s. 15(1) assures all Canadians of formal equality. In practice this would consist of protection against "direct discrimination" which cannot be justified on some rational basis.

PART IV

NATURE OF ORDER SOUGHT

29. This Court is respectfully requested to establish that the purposes underlying s. 15 are to:

(a) guarantee substantive equality for groups which have been disadvantaged by systemic discrimination; and

(b) guarantee all Canadians formal equality.

30. The Coalition of Provincial Organizations of the Handicapped takes no position on the nature of the Order to be granted in this Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

J. DAVID BAKER

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The Coalition of Provincial
Organizations of the Handicapped.

September 15, 1987

PART V

LIST OF AUTHORITIES