IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

SHARON TURPIN and LATIF SIDDIQUI

APPELLANTS

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENORS

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I N D E X

PART I

STATEMENT OF FACTS

1. The Attorney General of British Columbia takes no position with respect to the facts.

PART II

ISSUES ON APPEAL

2. The Attorney General of British Columbia respectfully submits:

(a) that ss. 429 and 430 of the Criminal Code (as they read in May, 1985) do not violate s. 11(f) of the Charter and that therefore the first constitutional question should be answered in the negative and the second constitutional question need not be answered;

(b) that the third constitutional question should not be answered as it raises an academic issue, but if it is answered, then ss. 429 and 430 of the Criminal Code (as they read in May, 1985) do not violate s. 15 of the Charter and therefore it is not necessary to answer the fourth constitutional question.

PART III

ARGUMENT

Section 11(f)

3. There is no constitutional right to be tried by a court composed of a judge alone. As the Appellants were afforded their constitutional right to be tried by a court composed of a judge and jury, they have no valid claim under s. 11(f) of the Charter. The Attorney General of British Columbia adopts the reasons of the Court of Appeal with respect to this issue at pp. 83-86 of the Appeal Book.

Section 15(1) of the Charter - The Issue is Academic

4. The Attorney General of British Columbia respectfully submits that the third constitutional question should not be answered since the issues raised therein are of academic interest only.

5. A ruling from this Court that s. 430 of the Criminal Code (as it read in May, 1985) violates s. 15 of the Charter would be of no assistance to the Appellants or to anyone else. If s. 430 of the Criminal Code was struck down, the

only result would be that in Alberta an accused charged with murder would not be entitled to a trial by a court composed of a judge alone. This ruling would not change the position of the Appellants at all. They would still be limited to a trial by a judge and jury.

6. Since s. 430 has now been repealed and replaced, there is absolutely no reason to determine whether it was valid prior to December of 1985. Invalidating it will not result in any convictions in Alberta being quashed, as it was a mode of trial that an accused in Alberta chose.

7. The learned trial Judge in the Court below erred insofar as he held that any inequality occasioned by ss. 429 and 430 could be remedied by affording to the Appellants the option of being tried by a judge alone as well as by a court composed of a judge and jury. If there was any unjustifiable inequality caused by ss. 429 and 430 of the Code (which is denied), and if any remedy was to be granted then it would have been to invalidate this exceptional provision rather than extend its content to all accused in all provinces of Canada. The approach adopted by the learned trial Judge unnecessarily cast doubt on the validity of all murder

convictions prior to Dec. 1985 in every province, other than Alberta, where appeals are still outstanding.

8. To extend to the accused in Ontario the same right that the accused has in Alberta to elect a trial by a judge of the superior court without a jury involves extensive rewriting of the provisions of the Criminal Code. The Court would be required not only to strike down s. 429 of the Code but to "amend" ss. 464, 484 and 488 of the Code by deleting the reference in those sections to "section 427", so that the election of the accused applies to every indictable offence. However, that "remedy" simply creates a new "inequality". The accused in Ontario would now be entitled to be tried by a magistrate (and arguably by a County Court judge) for any indictable offence whereas the accused in Alberta would only be entitled to be tried by a superior court judge. To correct this unequal treatment ss. 464 and 484 would have to be rewritten to limit the accused's right to a trial by superior court judge when the offence charged is one listed in s. 427 of the Code. Invalidating both ss. 429 and 430 does not assist the Appellants because s. 498 of the Code still provides the Attorney General with the right to require a trial by a judge and jury. If, however, only s. 429 is struck down then it would be necessary for the Court to also

strike down s. 498 since that limit on the accused's right to be tried by judge alone probably does not apply in Alberta. (See Appendix A for the above-mentioned provisions.)

9. This rewriting of the Criminal Code is inconsistent with the Court's function under the Charter. In Hunter v. Southam, [1984] 2 S.C.R. 145 @ 169. Mr. Justice Dickson (as he then was) stated:

> "While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional."

10. The only way to ensure identical treatment between an accused in Alberta and an accused in all other provinces is for Parliament to step in and legislate amendments to the Criminal Code as it did in 1985 with the repeal and re-enactment of s. 430.

11. The third constitutional question, if answered, will resolve important and complex issues under the Charter. The resolution of these issues should, however, be left to a case where the impugned legislation is extant and the controversy between the parties is real and meaningful.

Section 15 - The Merits

12. If the third constitutional question is to be answered, then the Attorney General of British Columbia submits that ss. 429 and 430 of the Criminal Code do not violate s. 15 of the Charter. Accordingly, these sections do not require justification under s. 1 of the Charter.

13. Parliament does not violate s. 15 of the Charter when it prescribes different rules of criminal procedure depending upon which Province an accused is tried.

14. "Province of trial" is not a ground enumerated in s. 15 of the Charter. Nor is it a ground akin thereto. It does not describe any human or immutable characteristic. It does not refer to any group that has been subject to a history of prejudice, misguided paternalism or ill-founded stereotyping. Nor does it pertain to a group that has been denied equal access to the political process. In R. v. CLP Canmarket Lifestyle Products Corp. et al, [1988] 2 W.W.R. 170 (Man. C.A.) Sullivan, J.A. stated:

> "... the type of discrimination there prohibited [in s. 15] is related to the quality of persons or the class to which they belong. It does not in

itself prohibit discrimination of a geographical nature."

15. The Attorney General of British Columbia submits, therefore, that ss. 429 and 430 of the Criminal Code (as they read in May of 1985) do not trigger any scrutiny under s. 15 of the Charter. It is neither necessary nor appropriate to review the rationale for treating Alberta differently than the other provinces. This legislative distinction presents solely a political issue.

16. This submission that s. 15 only applies to laws that discriminate on one of the enumerated grounds, or on grounds akin thereto, was set out by the Attorney General of British Columbia in Andrews v. Law Society of British Columbia. In the event that this Court does not decide in Andrews whether such a "threshold test" exists, then the submissions made by the Attorney General of British Columbia in Andrews (excerpts of which are included as Appendix B to this factum) are adopted in this case.

17. Even if, arguendo, s. 15 scrutiny can be triggered by legislative distictions that bear no relation to the enumerated grounds, nevertheless federal legislation which bestow benefits or imposes burdens differently from province

to province should be accorded a special measure of deference and indeed be presumptively valid. It should be presumed that Parliament when it employs the criteria of "province" is reacting to or is motivated by concerns of federalism.

18. If Parliament has used the criteria of "province" as a short hand means of identifying the characteristics or circumstances of individuals in a province, then that criteria will almost invariably be underinclusive or overinclusive. There will rarely, if ever, be a situation where all of the people in one province share a common characteristic that is not shared by some or all the people in another province. If Parliament wants to bestow a benefit on all "red-haired people" it will have to use the criteria of "red-haired people" and not limit the benefit to persons in British Columbia simply because there are statistics suggesting a higher proportion of red-haired people in British Columbia than in any other province.

19. If, however, Parliament employs the criteria of "province" to reflect the institutional or jurisdictional claims of a province, i.e. is responsive the interests of the province qua province (which will ordinarily be the case and hence the reasonableness of the presumption) then such laws

should always be held to be valid. Whether the province's claim is compelling or reasonable should not present a justiciable issue - that is an issue for Parliament in deciding whether to treat one or more provinces differently.

20. Where the non-uniformity of federal legislation is based on principles of federalism, it cannot violate s. 15 of the Charter. This is because the federal principle being the bedrock principle in our Constitution is paramount to the principle of equality in the Charter. Or, simply, that the right of equality guaranteed in s. 15 of the Charter must be interpreted in a way which accommodates the federal principle.

21. In Reference Re Full Funding for Roman Catholic Separete High Schools, [1987] 1 S.C.R. 1148 @ 1207, Mr. Justice Estey stated that s. 15 "cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867". And Madam Justice Wilson stated @ p. 1197: "It was never intended ... that the Charter could be used to invalidate other provisions of the constitution ...".

22. Federalism has two aspects: interstate and intrastate federalism. Interstate federalism describes the allocation of legislative power and financial resources between central and regional governments. Intrastate federalism refers to the "arrangements by which the interests of regional units - the interest either of the government or of the residents of these units - are channeled through and protected by the structures and operations of the central government": Smiley and Watts, The Return of Federal Institutions: Intrastate Federalism in Canada, (Study Paper, Vol. 39, the Royal Commission On The Economic Union And Development Prospects For Canada, 1985).

23. Patrick Monahan in The Charter, Federalism and the Supreme Court of Canada (1987 @ 170-171) writes:

> "The writing on 'intrastate' federalism has illustrated the unduly restrictive nature of these traditional concerns. According to the intrastate model, federalism can be defined in much broader and unbounded way than has previously been supposed. Federalism is simply a response to the need to protect regional units in the structures and operations of government. But there is no necessary form that this federalist response will take ... The central point is that protection for regional units or communities can be acheived in at least two quite distinct ways. The first is to assign responsibility for matters in which territorial interests are particularly sensitive to state or provincial governments. The second is to design mechanisms within the national government

itself which will channell and protect regional interests. Either solution should be seen as an acceptance of the federal principle.

There is no necessary contradiction between these two strategies. Indeed, the British North America Act incorporated both interstate and intrastate elements in its attempt to devise a workable scheme of government for the British Colonies."

24. Federal legislation which provides for different rules of behaviour in different provinces in response to legitimate provincial interests is a good example of intrastate federalism in action. It is a direct and commendable means of making the central government more responsive to provincial concerns without in any way "enhancing the power of provincial governments and legislatures at the expense of the federal government": Smiley and Watts, supra, p. 34.

In a case commentary that is critical of the Ontario Court of Appeal decision in R. v. Hamilton (1987), 57 O.R. (2d) 412, Dean John Whyte states:

"The Constitution does not merely allocate legislative powers, it creates federalism, that is, it endorses provinces as distinct political communities for which separate regulatory treatment is possible.

Furthermore, as has already been established, it does not confine the capacity for separate treatment to those matters listed in s. 92. Since

> the Constitution expressly recognizes political categories (provinces) and expressly recognizes that different legislative regimes producing different burdens and benefits can be created (s. 92) and imposes no constraint on federal law treating provinces as salient political units, the decision of Dubin, J.A. [in Hamilton] represents the application of a theory of Charter paramountcy over other constitutionally - recognized arrangements. This is pure invention. There is no primacy of Charter values over federalist values; one set of constitutional rules does not trump the other. ... In fact, the very specific adoption of provinces as a salient category in the Constitution ought to prevail over the very general direction in s. 15 not to adopt discriminatory categories in legislation; the working out of which categories, of all of the thousands of categories that legislation contains, are to found violative of s. 15 should reflect the presumption that constitutionally - created categories are permissible. ... This is not to suggest that Parliament in creating province-based distinctions can escape review under s. 15 altogether. It the differentiation between provinces cannot be related to distinct political claims, or to sensitivity to the likelihood of there being distinct political claims, the legislative regime should be struck down."

20. In Cornell v. The Queen (Mar. 24, 1988, as yet unreported), this Court held that Parliament could, consistent with the Bill of Rights, make the proclamation of s. 234.1 of the Criminal Code in any province conditional upon the agreement of that province. This was held to be a valid federal objective because "the question whether s. 234.1 should be proclaimed in force in British Columbia was viewed as one of [provincial] law enforcement priorities

efficacy and allocation of resources": @ p. 14. In Cornell this Court gave effect to the principle of intrastate federalism.

27. Because the province is charged with the enforcement of the criminal law and has the constitutional authority over the administration of criminal justice (even if there is also concurrent federal jurisdiction, see Hogg, Constitutional Law of Canada, 2nd Ed. @ pp. 430-433) and because the field of criminal law will often overlap with other fields of provincial jurisdiction, differences in the criminal law or procedure between provinces in response to provincial claims should always be valid on the basis of the federal principle.

28. The result in Cornell therefore should be the same if the non-uniformity of s. 234.1 of the Criminal Code was challenged under s. 15 of the Charter. Once the non-uniform application of the criminal law is understood as being in response to provincial law enforcement priorities and allocation of resources that should end the inquiry. It is for the province and the federal government, and not the courts, to determine whether those priorities and resources merit the non-uniform application of the criminal law. Should it be necessary to decide, it is respectfully

submitted that the decision of the Ontario Court of Appeal in R. v. Hamilton, supra, was wrongly decided and the opposite conclusion reached by McKay, J. in The Queen v. Hansen (1986), 32 C.C.C. (3d) 199, (B.C.S.C.) is correct. See also R. v. CLP Canmarket Lifestyle Products Corp. et al, supra.

29. Section 430 of the Criminal Code (prior to its repeal in 1985):

> "grew out of the difficulties associated with conducting such trials and getting twelve-person juries in the Northwest Territories during the nineteenth century. The preservation of the special provisions in the Criminal Code regarding murder trials in Alberta were retained at the request of Alberta, and thus served a valid federal objective in that it preserved a mode of procedure to which Alberta had become attuned prior to becoming a province in 1905."
>
> Appeal Book, pp. 91-92

30. The demographics in Alberta were and are no doubt similar to the demographics in some other provinces. The validity of s. 430 need not depend upon the people or circumstances in Alberta being different from those in any other province. Indeed, it is valid even if there are no differences between the people or circumstances in Alberta and those in any other province. It is valid because the Attorney General of Alberta, unlike the Attorney General of

any other province, requested that Parliament permit the retention in Alberta of a mode of trial that was rooted in history and had been the traditional and acceptable way of trying cases in that province. Tradition aside, s. 430 is valid simply because it is reasonable to assume that every Attorney General in Alberta believed that the administration of justice was better served by affording the accused the option of being tried by a judge alone, as well as by a judge with a jury. Although Parliament has the exclusive authority to enact criminal procedure, the fact is that most rules of criminal procedure have a significant impact on the administration of criminal justice in the province. It is entirely appropriate, therefore, that Parliament be permitted to tailor its rules of criminal procedure to meet legitimate provincial concerns. Parliament obviously does not have to do so but as long as Parliament ensures that an accused in every province is afforded his or her basic constitutional rights then there should be nothing unconstitutional if Parliament, at the behest of a province, prescribes additional rights to the accused in that province. The fact that trials by judge alone are less costly and less onerous for the citizenry than are trials by judge and jury, is but another reason why s. 430 should be seen as having an impact

on the allocation of provincial resources and priorities, and for that reason as well, is valid.

31. Balkanization of the criminal law will not result by reason of a decision of this Court that it will not review or invalidate federal criminal laws that vary in their scope or application from province to province. There has always been a strongly held belief in Canada which can be traced right back to the Confederation debates, that uniformity of the criminal law is highly desireable. Even though the administration of justice is a matter within provincial competence "plurality of criminal law administration ... to correspond to plurality or diversity of social conditions ... has just not occurred": McWhinney, "Pluralistic Federalism In Canada" in Federalism and Development of Legal Systems, 25 @ 44 (1971). The political forces favouring uniformity of the criminal law are accordingly very strong. Diversity to reflect provincial concerns has been an exceptional occurrence and will undoubtedly remain so. If, however, Parliament in its wisdom chooses to vary the criminal law or procedure in order to accommodate provincial claims, then that progressive process of intrastate federalism should not be thwarted by Charter.

PART IV

NATURE OF ORDER SOUGHT

32. That the appeal be dismissed.

33. That the first constitutional question be answered in the negative and the second constitutional question not be answered.

34. That the third constitutional question not be answered because it raises an academic issue.

35. In the event that the third constitutional question be answered, then it should be answered in the negative and the fourth constitutional question need not be answered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Joseph J. Arvay

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Counsel for the Attorney General
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DATED: This 2nd day of June , 1988,
Victoria, British Columbia

COURT OF CRIMINAL JURISDICTION—Treason—Alarming Her Majesty—Intimidating Parliament—Inciting to mutiny—Sedition—Piracy—Piratical Acts—Murder—Threat to murder—Corrupting justice—Attempts—Conspiracy.

427. Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

(a) an offence under any of the following sections, namely,

(i) section 47,

(ii) section 49,

(iii) section 51,

(iv) section 53,

(v) section 62,

(vi) section 75,

(vii) section 76,

(viii) section 218, or

TRIAL BY JURY COMPULSORY.

429. Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury. 1953-54, c. 51, s. 415.

TRIAL IN SUPERIOR COURT OF CRIMINAL JURISDICTION—Bribery—Sexual assault—Death by criminal negligence—Manslaughter—Attempted murder—Threat to murder.

429.1 Where an accused who is charged with

(a) an indictable offence under any of the following provisions, namely,

(i) section 109,

(ii) section 246.1, 246.2 or 246.3,

(iii) [*Repealed*. 1980-81-82, *c*. 125, *s*. 24.]

(iv) section 203,

(v) section 219,

(vi) section 222, or

(vii) paragraph 331(1)*(a)*,

(b) the offence of attempting to commit any offence referred to in paragraph *(a)*, other than an offence under section 222, or 222, or

(c) the offence of conspiring to commit any offence referred to in paragraph *(a)*

elects under section 464 or 484 to be tried by a court composed of a judge and jury, then unless the accused

(d) at the time he so elects, under section 464 or 484, agrees to be tried by a court composed of a judge, who is not a judge of a superior court of criminal jurisdiction, and a jury, or

(e) subsequently re-elects under section 492,

the trial shall, subject to any requirement by the Attorney General under section 498, be conducted by a court composed of a judge of a superior court of criminal jurisdiction and a jury. 1972, c. 13, s. 34; 1974-75-76, c. 93, s. 38; 1980-81-82, c. 125, s. 24.

TRIAL WITHOUT JURY IN ALBERTA.

430. Notwithstanding anything in this Act, an accused who is charged with an indictable offence in the Province of Alberta may, with his consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without a jury. 1953-54, c. 51, s. 417.

REMAND BY JUSTICE TO MAGISTRATE IN CERTAIN CASES—Election before justice in certain cases—Procedure where accused elects trial by magistrate—Procedure when accused does not elect trial by magistrate.

464. (1) Where an accused is before a justice other than a magistrate as defined in Part XVI charged with an offence over which a magistrate, under that Part, has absolute jurisdiction, the justice shall remand the accused to appear before a magistrate having absolute jurisdiction over that offence in the territorial division in which the offence is alleged to have been committed.

(2) Where an accused is before a justice other than a magistrate as defined in Part XVI charged with an offence other than an offence that is mentioned in section 427, and the offence is not one over which a magistrate has absolute jurisdiction under section 483, the justice shall, after the information has been read to the accused, put him to his election in the following words:

> You have the option to elect to be tried by a magistrate without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. How do you elect to be tried?

(3) Where an accused elects to be tried by a magistrate, the justice shall endorse on the information a statement that the accused has so elected and shall remand the accused to appear and plead to the charge before a magistrate having jurisdiction over that offence in the territorial division in which the offence is alleged to have been committed.

(4) Where an accused does not elect to be tried by a magistrate, the justice shall hold a preliminary inquiry into the charge and if the accused is committed for trial or, where the accused is a corporation, is ordered to stand trial, the justice shall

(a) endorse on the information a statement showing the nature of the election or that the accused did not elect, and

(b) state in the warrant of committal, if any, that the accused

(i) elected to be tried by a judge without a jury,

(ii) elected to be tried by a court composed of a judge and jury, or

(iii) did not elect. 1953-54, c. 51, s. 450; 1968-69, c. 38, s. 32.

Magistrate's Jurisdiction with Consent

TRIAL BY MAGISTRATE WITH CONSENT—Election—Procedure where accused does not consent—Procedure where accused consents.

484. (1) Where an accused is charged in an information with an indictable offence other than an offence that is mentioned in section 427, and the offence is not one over which a magistrate has absolute jurisdiction under section 483, a magistrate may try the accused if the accused elects to be tried by a magistrate.

(2) An accused to whom this section applies shall, after the information has been read to him, be put to his election in the following words:

> You have the option to elect to be tried by a magistrate without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. How do you elect to be tried?

(3) Where an accused does not elect to be tried by a magistrate, the magistrate shall hold a preliminary inquiry in accordance with Part XV, and if the accused is committed for trial or, in the case of a corporation is ordered to stand trial, the magistrate shall

(a) endorse on the information a statement showing the nature of the election or that the accused did not elect, and

(b) state in the warrant of committal, if any, that the accused

(i) elected to be tried by a judge without a jury,

(ii) elected to be tried by a court composed of a judge and jury, or

(iii) did not elect.

(4) Where an accused elects to be tried by a magistrate, the magistrate shall

(a) endorse on the information a record of the election, and

(b) call upon the accused to plead to the charge, and if the accused does not plead guilty the magistrate shall proceed with the trial or fix a time for the trial. 1953-54, c. 51, s. 468.

Jurisdiction of Judges

TRIAL BY JUDGE WITH CONSENT.

488. An accused who is charged with an indictable offence other than an offence that is mentioned in section 427 shall, where he elects under section 464, 484 or 492 to be tried by a judge without jury, be tried, subject to this Part, by a judge without a jury. 1953-54, c. 51, s. 472.

ATTORNEY GENERAL MAY REQUIRE TRIAL BY JURY.

498. The Attorney General may, notwithstanding that an accused elects under section 464, 484, 491 or 492 to be tried by a judge or magistrate, as the case may be, require the accused to be tried by a court composed of a judge and jury, unless the alleged offence is one that is punishable with imprisonment for five years or less, and where the Attorney General so requires, a judge or magistrate has no jurisdiction to try the accused under this Part and a magistrate shall hold a preliminary inquiry unless a preliminary inquiry has been held prior to the requirement by the Attorney General that the accused be tried by a court composed of a judge and jury. 1968-69, c. 38, s. 43.

APPENDIX B

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR 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

RESPONDENT

AND:

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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PART III

ARGUMENT

1. The Appellant, the Attorney General of British Columbia, agrees generally with the approach to s. 15 of the Charter adopted by the British Columbia Court of Appeal. It is submitted, however, that the Court of Appeal erred in concluding that the Respondent had discharged his onus of proving that the citizenship requirement in s. 42 of the Barristers and Solicitors Act was unreasonable or unfair and therefore in violation of s. 15 of the Charter.

2. Section 15 applies to both the administration of the law ("equality before the law") and to the content of the law ("equality under the law"). This interpretation is consistent with the "explanatory note" which accompanied the final draft of s. 15 when it was tabled in the House of Commons: see Elliott, "Interpretating The Charter - Use of The Earlier Versions As An Aid" (1982), U.B.C. L. Rev. 11 @ 38. Professor Elliott says (@ p. 17) that the explanatory note suggests "that the phrase 'equal before and under the law' is intended to describe not the scope of the right to equality as such, but the spheres of governmental activity

to which the right to equality can be applied".

3. The right guaranteed in s. 15 is "the right to equal protection and equal benefit of the law [both in its administration and content] without discrimination".

4. The phrases "equal protection and benefit" and "without discrimination" are "interacting expressions, colouring each other ... and hence to be considered together as a compendious expression of a norm.": Miller et al v. The Queen, [1977] 2 S.C.R. 680 @ 690. These phrases capture two essential elements of the norm of equality guaranteed in s. 15. A law violates s. 15 because of the choice of certain criteria upon which a burden is imposed or a benefit is bestowed and the unreasonableness or unfairness of that criteria given the purpose of the law.

5. The Court of Appeal's inquiry was similarly in two steps. The Court first considered whether the criteria of "citizenship" was "capable of falling with s. 15": Case, p. 104 and concluded that it was "a potential ground of discrimination under s. 15": Case, p. 105. The Court of Appeal then considered the "ultimate question": Case, p.

103, which asked whether this criteria was "unreasonable or unfair": Case, pp. 103, 105. This requirement that the criteria must be reasonable is also implicit in the aphorism that those who are "similarly situated be similarly treated": Case, pp. 96-97.

6. There are not an infinite kind of criteria which might be discriminatory. Rather, the criteria enumerated in s. 15 of the Charter are illustrative, albeit not exhaustive, of the kinds of criteria that might be discriminatory. Any law which classifies on one of the enumerated grounds or on grounds similar thereto, these triggers s. 15 scrutiny. Such law must then pass the test of reasonableness as articulated by the Court of Appeal. Conversely, a law which classifies neither on the enumerated grounds nor on grounds akin thereto does not pass this threshold test in s. 15 and therefore the Court need not and ought not scrutinize the reasonableness or fairness of the legislative classification.

7. This analytical approach to s. 15 was expressly adopted in three recent decisions of the British Columbia Supreme Court: Scott v. A.G.B.C., [1986] 5 W.W.R. 207;

A.G.B.C. v. Husband Prov. J. and Page (1986) 4 B.C.L.R. (2d) 295 and Beltz v. Law Society of B.C., [1986] 1 W.W.R. 427 @ 437. Indeed in: B.C.T.F. et al v. A.G.B.C. et al, [1987] 1 W.W.R. 527 @ 535 the B.C. Court of Appeal suggested that the enumerated grounds may, in fact, be exhaustive. And in Milk Board v. Clearview Dairy (Unreported B.C.C.A., Mar. 4, 1987, Reg. No. CA005312), the B.C. Court of Appeal rejected the s. 15 claim brought by a corporation on the ground, inter alia, that "a corporation has no race, national or ethnic origin, colour, religion, sex, age, mental or physical disability nor any other comparable quality". (emphasis added) See, however Wilson and Maxson v. Medical Services Commission of B.C. et al, [1987] 3 W.W.R. 48 @ 83 (B.C.S.C.) where this "threshold test" was not applied.

8. It is submitted that the purpose of s. 15 was to constitutionalize the values that found protection and were enhanced by human rights legislation enacted by the provincial Legislatures and the federal Parliament as well as by states pursuant to international law - all of which provide the historical and philosophical basis for s. 15. The grounds enumerated in s. 15 are similar to those that are specifically included and prohibited in such human rights (or anti-discrimination) legislation or conventions,

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all of which have a "closed list" of such prohibited grounds. (See e.g. Human Rights Act, S.B.C. 1984, c. 22, the Newfoundland Human Rights Code, R. S. Nfld. 1974, c. 22; Human Rights Code, S.P.E.I. 1968, c. 2, Human Rights Act, S.M. 1974, c. H175; Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1, Ontario Human Rights Code, R.S.O. 1980, c. 340, Human Rights Act, S.N.S. 1969, c. 11; Alberta Bill of Rights, S.A. 1972, c. A-16; Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12; Human Rights Act, S.N.B. 1971, c. 8); the European Convention for the Protection of Human Rights and Freedoms, Article 14; Universal Declaration of Human Rights, Article 2; The International Covenant on Civil and Political Rights, 1966, Article 2; Quebec Charter of Rights and Freedoms, R.S.Q. 1977, c-C-12; The International Convention of the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195; The International Convention on the Elimination of All Forms of Discrimination Against Women, UNGRA Res. 34/180, GAOR, 34th Sess., Supp. 46, p. 193; ILM 33, Article 1; I.L.O Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), 362 U.N.T.S. 31, Article 1(a), (not yet ratified by Canada).

9. Tarnopolsky in Discrimination and The Law (1982) @ 840 summarizes his review of the Canadian legislation:

> "To reiterate, the various anti-discrimination statutes in Canada prohibit specific actions taken 'because of' certain specified grounds and thereby provide illustrations of what is 'discrimination' against someone."

10. Like human rights legislation, s. 15 will likely be interpreted to prohibit both direct and indirect discrimination on the enumerated grounds and grounds akin thereto.

Reference: Ontario Human Rights Commission and O'Malley v. Simpson Sears (1965), 64 N.R. 161 (S.C.C.)

Re Blainey and Ontario Hockey Association et al (1986), 54 O.R. (2d) 513 (Ont. C.A.)

11. It is significant that although the 14th Amendment of the U.S. Constitution does not have a "without discrimination" clause, the U.S. Supreme Court has, with rare exceptions, found violations of the 14th Amendment only when there have been legislative classifications similar to the enumerated grounds in s. 15. All other classifications have been subjected to what is called the "mere rationality test" and such classifications have nearly always been held

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valid. There is, in effect, "minimal scrutiny in theory and virtually none in fact": G. Guenther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for New Equal Protection", (1982) 86 Harv. L. Rev. 1 @ 8: W. Cohen, Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Co. v. Ward (1985), 38 Stan. L. Rev. 1.

12. This approach to s. 15 does not "limit the effect of that guarantee to the law as it stood before [its] adoption": Alberta Union of Provincial Employees et al v. Attorney General of Alberta (Unreported S.C.C., April 9, 1987, p. 14, per McIntyre, J.), and yet it is a construction consistent with "the nature, history, traditions, and social philosophies of our society": Alberta Union of Provincial Employees, supra, @ p. 14.

See also: Cromer v. B.C.T.F., [1986] 4 B.C.L.R. (2d) 273 (B.C.C.A.)

13. This approach should be compared with this Court's interpretation of the Canadian Bill of Rights. This Court has held that the "existence of any forms of prohibited discrimination is not a sine qua non of the operation of s. 1 of the Bill of Rights": The Queen v. Burnshine, [1975] 1

S.C.R. 693 @ 700; and see also: Beauregard v. Canada (1986), 70 N.R. 1 @ 57 (S.C.C.). In no case however has the Supreme Court invalidated a law which involved a non-prohibited ground. Nor has the Court ever said that the list of potentially discriminatory grounds is infinite. However, even if s. 1(b) of the Canadian Bill of Rights could be violated by a legislative classification that was not similar to the prohibited grounds of discrimination, that would be due to the text of s. 1 of the Canadian Bill of Rights which is very different from s. 15 of the Charter. It will be noticed that the prohibited grounds of discrimination in the Canadian Bill of Rights are set out in the opening paragraph of s. 1 which purports to qualify all of the rights and freedoms set out in subsections 1(a) to 1 (f). It is understandable, therefore, that the existence of the prohibited grounds of discrimination could not be a sine qua non to a violation of s. 1(b) of the Canadian Bill of Rights because that would mean that these prohibited grounds would have to be a sine qua non to a violation of ss. 1(a), (due process), 1(c), (freedom of religion), 1(d), (freedom of speech), 1(e), (freedom of assembly and association) and 1(f), (freedom of the press). That would make no sense at all.

14. It is submitted that a different approach to s. 15 of the Charter is also justified because of the fundamentally different nature of the Charter and the Canadian Bill of Rights. The Charter, unlike the Canadian Bill of Rights, not only applies to all levels of government but is the supreme law of Canada. Inevitably the Charter will require the Courts "to enter the legislative sphere": Alberta Union of Provincial Employees, supra, @ 31, in a manner never contemplated by the Canadian Bill of Rights. However, it is submitted that this "intrusion into the field of legislation": Alberta Union of Provincial Employees, supra, @ 31, should only occur when expressly authorized by the Constitution and not by any "implication": Alberta Union of Provincial Employees, supra, @ 31. It is submitted that to interpret s. 15 of the Charter as "open-ended" is not only to "overshoot its purpose": R. v. Big M. Drug Mart, supra, @ 344, but is also inconsistent with the "character and the larger objects of the Charter itself": Big M. Drug Mart, supra, @ 344, which is founded on the fact that "Canadian society is to be free and democratic": R. v. Oakes, [1986] 1 S.C.R. 103 @ 136 (emphasis added).

15. If every legislative classification is potentially

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discriminatory then no distinction will exist between the Court's legitimate function of scrutinizing legislation for its constitutionality and its illegitimate function in a democracy of scritinizing the wisdom, policy or merits of legislation viz its rationality, reasonableness or fairness: see Reference Re S. 94(2) of the Motor Vehicle Act, [1986] 1 W.W.R. 481 @ 489-490 (S.C.C.).

16. If s. 15 scrutiny was triggered by any legislative classification then the courts will inevitably and continually be thrust into the "bog of legislative policy-making": Curr v. The Queen, [1972] S.C.R. 889 @ 902. All laws draw distinctions on the basis of who we are or what we do. If the ultimate measure of equality is the rationality, reasonableness or fairness of the legislative distinction, then it will always be possible for someone to present a reasonable argument (often at great length and expense) that the Legislature would have acted rationally or reasonably or fairly only if it had redrawn its legislative lines to encompass or exclude certain individual or group of individuals.

17. It is also very likely that these claims, even if

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ultimately unsuccessful, will be frequently made. Anyone who is charged pursuant to legislation and perhaps anyone who seriously objects to the policy of an enactment will be tempted to invoke s. 15:

> "Section 15, like the 14th Amendment in the U.S. Constitution will dwarf the other provisions of the Charter and be the central issue in virtually all Charter litigation. Laws which do not violate any other fundamental right or freedom, will almost always (if the U.S. experience is any guide) be alleged to violate s. 15 because the Legislature classified or failed to classify. Even though legislation does not violate any other sections, it will always be required to run the gauntlet of s. 15 and s. 1. In my view, this cannot have been the intention of the enactors of the Charter."

Reference: Case, p. 100

18. Indeed, this prophecy is in the process of being fulfilled. Section 15 has already spawned the kind of litigation that is not infrequently brought under the 14th Amendment of the U.S. Constitution. For example, the following legislative classifications have been alleged to be potentially discriminatory and thus violate the right to equality:

(a) a law which distinguishes between persons who work in a construction site of economic importance and those who do not: B.C. & Yukon Territory Building & Construction

Council et al v. A.G.B.C. and Expo 86 Corporation et al (1985), 66 B.C.L.R. 279 (B.C.S.C.);

(b) a law which distinguishes between persons who manufacture softdrinks in steel cans rather than tin cans: Aluminum Company of Canada Ltd. v. Her Majesty the Queen and Dofasco Inc. (1986), 55 O.R. (2d) 522 (Ont.Div.Ct.); Cp. Minnesota v. Cloverleaf Creamery Co., 449 US 596 (1986) where the challenge was to a law which distinguished between persons who sell milk in plastic containers rather than paper containers;

(c) a law which distinguishes between persons who are resident in one electoral district but registered in another and those who are not: Scott v. A.G.B.C., [1986] 5 W.W.R. 207 (B.C.S.C.);

(d) a law which distinguishes between persons who are criminal lawyers rather than real estate lawyers: Beltz v. Law Society of B.C. et al, [1981] 1 W.W.R. 527 (B.C.C.A.);

(e) a law which distinguishes between persons who have milk quota and those who do not: Milk Board v. Clearview Dairy Inc. (Unreported, B.C.C.A., March 4, 1987);

(f) a law which distinguishes between the taxpayer and the tax assessor: Coast Tractor and Equipment Ltd. v. Allan

Halliday et al (Unreported, B.C.S.C., March 24, 1987); and

(g) a law which distinguishes between persons who rent residential premises that are government subsidized and those who rent resident premises that are not subsidized: A.G.of Newfoundland v. Newfoundland & Labrador Housing Corp. (Unreported, Nfld. C.A., March 31, 1987)

19. It is submitted that judicial review which is directed solely to the rationality, reasonableness or fairness of a legislative classification, where the classification is not an enumerated ground or one similar thereto, cannot be reconciled with democratic theory. Dean John Hart Ely in Democracy & Distrust: A Theory of Judicial Review (1980 @ 103), argues persuasively that in a democracy judicial review should focus on the democratic process to ensure that the process does not dysfunction rather than on the outcomes of the process. A review of the reasonableness of every impugned legislative criteria and thus the outcome of the legislative process is not required by the text of the Constitution. It should not be read in.

See also: Linde, "Due Process of Law Making" (1975) 55 Neb. L. Rev. 197 @ 254:

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"As a Charter of government a Constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times."

20. Professor Patrick Monahan claims that "the democratic conception" of judicial review propounded by Dean Ely and others in relation to the U.S. Constitution is even more compelling in Canada. In "Judicial Review And Democracy: A Theory of Judicial Review", (1987), 21 U.B.C. Law Rev. 87 @ 89-90 Professor Monahan states:

"The claim which I defend is premised on a distinction between the substantive outcomes of the political process and the fairness of that process itself. In my view, the judiciary should not undertake the task of testing the substantive outcomes of the political process against some theory of the right or the good. The resolution of Charter issues is not to be found in the philosophies of John Rawls, Robert Nozick or Ronald Dworkin. Rather, the central focus of judicial review should be on the integrity of the political process itself. The judiciary should interpret constitutional guarantees in such a way that the opportunities for public debate and collective deliberation are enhanced. To put the matter simply, constitutional adjudication should be in the name of democracy, rather than right answers.

Readers familiar with the American literature will recognize the similarlity between this argument and the work of John Hart Ely. ...

My claim is that the representation - reinforcing theory of judicial review, although originally formulated in the American context, actually

offers a far more convincing account of the purposes underlying the Canadian Charter.

See also: Dickson, C.J., "The Democratic Character of the Charter of Rights" in Law and Politics Of The Judicial Process In Canada, (edited by F.L. Morton, (1984) @ 325-327):

> "In this regard I commend to you a statement by the Committee on the Constitution of the Canadian Bar Association:
>
> 'A democracy is the basis and prerequisite for the operation of the supremacy of Parliament. That being so, it would seem justifiable to entrench in a constitution principles which are prerequisites to the existence of democracy. ...

21. A review of the rationality or reasonableness of legislative classifications "leads courts and counsel into a labyrinth of fictions:" Linde, supra, @ 207. Testing the law for rationality creates intractable difficulties that are intrinsic to the process of judicial review. Linde summarizes these difficulties as follows:

> "[T]he test depends on attributing a purpose to the law maker; but laws are often an accommodation of several unrelated purposes. Commonly, a law will push toward a goal only within the limits of objectives that may or may not be apparent in retrospect. Legislative declarations and legislative history cannot be relied on to reflect the actual balance of considerations that shaped the law, and often no such records are available. Although proponents might have wished for more and opponents for less, all that is certain about the law as a means to an end is that a majority could be found to undertake what the law in fact undertakes, no more, no less. That much is its

> immediate goal. If judicial review may hold a law invalid for failure to match some greater purpose, it places a premium on the manner in which the counsel and court phrase the supposed legislative goals. Many of our laws simply reflect old notions of right and wrong, or sympathy toward the equity of some particular claim to legislative consideration, without intending to achieve any pragmatic aim. Such a law may be unconstitutional if it pursues a goal that the Constitution forbids, but not because the values it reflects are merely sentimental, or parochial, or old fashioned, or foolish, rather than goal oriented. ... Finally, judicial review of rationality is irretrievably ambivalent about time - whether to match past facts to past purposes, or present facts to past purposes, or present facts to present purposes - because it is ambivalent about its premise, whether it means to review the one time reasonableness of lawmakers or the continuing reasonableness of laws." (pp. 220 - 222).

22. The comments of McIntyre, J. in Alberta Union of Provincial Employees, supra, @ 30 are an equally apt response to the claim that courts should review the rationality or reasonableness of all legislative classifications: "None of these issues is amenable to principled resolutions. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature".

23. Furthermore, review of rationality involves important assumptions about the lawmaking process. Linde asserts that "no courts should invalidate an act of

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government for failure to comply with the constitutional rule unless the rule is one with which the government should have complied, or should know how to comply with in the future" (p. 222). Linde suggests that if we were to take the formula of rational law making seriously it would impose on lawmakers demands which would involve an enormous requirement of time and which bear no relation to the reality of the lawmaking process: Linde, supra, @ pp. 222 - 224.

24. It might be argued that this threshold test would allow some entirely arbitrary and capricious laws to escape s. 15 scrutiny. A law, e.g., which stipulate that "only persons who drive red cars are entitled to a driver's licence" would seem entirely arbitrary but the legislative classification "those who drive red cars" is not similar to an enumerated ground and thus would not potentially discriminate. It is submitted, however, that it would be a grave mistake for the Court to approach and interpret s. 15 on the assumption that such legislation would ever be possible. It would not. Prior to the Charter the Legislature did not act in such arbitrary fashion. There is no reason to believe or assume that it would do so after the Charter.

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25. In Oakes, supra, @ 136, Dickson, C.J. stated that when interpreting the Charter the "Court must be guided by the values and principles essential to a free and democratic society which I believe embody ... faith in social and political institutions which enhance the participation of individuals and groups in society". (emphasis added)

26. Dean Ely, (Democracy and Distrust, supra, @ 181-183, responds to critics of his theory of constitutional interpretation, which likewise leaves open the possibility of arbitrary laws remaining unreviewable, such as those which make it "a crime for any person to remove another person's gall bladder, except to save that person's life" as follows:

> "It is an entirely legitimate response to the gall bladder law to note that it couldn't pass and refuse to play any further. In fact it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can."

27. Professors Monahan and Petter in "Developments in Constitutional Law: The 1985-86 Term" (to be published in 9 Supreme Court Law Review) ask the questions "are laws ever

'irrational'?" (p. 59) and answer as follows:

> "Laws may be enacted for reasons we happen to disagree with, but it seems implausible to suppose that laws are enacted for no reason at all ... The only real function of the rational basis test is to make the judicial balancing of interests less apparent and thus seemingly more legitimate."

And see: Felix Cohen, "Transendental Nonsense and the Functional Approach" (1930), 33 Columbia L. Rev. 808 @ 819:

> "Taken seriously this conception [of a rationality standard] makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren."

28. It is also obvious that if any truly draconion legislation was invoked the courts would be able to resort to s. 7 of the Charter which protects certain fundamental interests and s. 12 which is concerned primarily with arbitrary measures.

29. A "reasonableness" or "fairness" test involves a higher standard of scrutiny than a mere rationality test: Case, p. 103. An inquiry into the reasonableness or fairness of a legislative criteria also is patently and overtly an inquiry into the wisdom or policy of the law and

perhaps more so than would be the case if the inquiry was one of mere rationality. This higher level of scrutiny is justifiable, however, only if s. 15 review is triggered by laws that classify on the enumerated grounds or grounds akin thereto. Furthermore, if s. 15 is so construed then it makes sense to have a single test since all criteria which trigger s. 15 scrutiny will fall within either the "suspect" or "sensitive" category: Case, p. 105. This does not mean that the application of the test will yield the same result no matter what potentially discriminatory criteria is in issue. It will always be easier to demonstrate the unfairness or unreasonableness of a law which classifies on the basis of race than it will when the criteria is age or disability. See: City of Cleburne, Texas v. Cleburne Living Centre, 87 L Ed 2d 313 @ 327-329 (1985) per Stevens, J.

30. Judicial review of legislative classifications based on the enumerated grounds or grounds similar thereto is easy to reconcile with democratic theory - it is required by the text of the Constitution. There can be no question as to the legitimacy of judicial review in this context even though the ultimate test will inevitably be one of reasonableness or fairness. Even if s. 15 did not expressly enumerate these prohibited grounds, judicial review of such

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"suspect" or "sensitive" classifications can be reconciled with democratic principles since such classifications may be motivated by prejudice and "prejudice against discrete and insular minorities may be a special condition which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities": The United States v. Carolene Products Co., 304 US 144 @ 152-153, fn. 4 (1938).

31. Dean Ely recognizes the legitimacy of judicial review with respect to legislative classifications that are "race-like" (Democracy and Distrust, supra, @ p. 149) which includes classifications that relate to groups that "we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure": (id @ p. 153). Hence, Dean Ely states that malfunctions in democratic process occur when, inter alia:

> "Though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.": (@ p. 103).

32. Professor Hans A. Linde (as he then was), in "Due Process of Lawmaking", supra, @ 201 - 203, argues that the Equal Protection clause of the 14th Amendment should allow for judicial review only with respect to "suspect classifications" although he admits that there is "room for debate about what the list of suspect classifications should include." (p. 201) He describes the purpose of judicial review with respect to such classifications as follows:

> "For what is it that 'suspect classifications' are suspected of? The suspicion, in that phrase, is suspicion of prejudice - not simply prejudgment based on ignorance and mistaken notions of fact, but invidious prejudgment, grounded in notions of superiority and inferiority, in beliefs about relative worth, attitudes that deny the premise of human equality and that will not be readily sacrificed to mere facts. The suspicion of prejudice focuses on the lawmaker's sense of values, not on his rationality." (p. 201).

33. Professor Monahan is of the view that "the norm of equality is designed to take account of the fact that certain groups and individuals possess unequal access to the political system.": Monahan, supra, @ 149. Although this concept is different from the concept of prejudice that Dean Ely espouses and which Professor Monahan criticizes, it nevertheless is consistent with the submission that s. 15 is

only triggered by laws which classify on the enumerated grounds or grounds similar thereto.

34. It is submitted that whether a particular legislative classification is akin to one of the enumerated grounds must be determined on a case-by-case basis. The common underlying factors of the enumerated grounds are that they refer to human characteristics that are essentially immutable, to groups which have been subject to a history of prejudice and have directly and perhaps systemmically been denied an equal voice in and equal access to the political process. The approach must at all times be a "generous rather than a legalistic one": R. v. Big M. Drug Mart Ltd., supra, @ 344.

35. Applying these criteria and employing a generous interpretation to s. 15 of the Charter, it is conceded that "citizenship" is a classification that triggers s. 15 scrutiny. Although not an immutable characteristic it is one, like religion, that may be difficult to change without fundamentally altering one's sense of identity; it might conceivably be used by a government as a colourable means of discriminating against persons on the basis of race or national origin; since citizenship is a precondition of

PART V

LIST OF AUTHORITIES