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
FEDERATION OF LAW SOCIETIES OF CANADA
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS and ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS
WOMEN'S LEGAL EDUCATION AND ACTION FUND
COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED

Intervenors

FACTUM OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

TORY, TORY, DesLAURIERS & BINNINGTON
P.O. Box 270, Suite 3200
IBM Tower
Toronto Dominion Centre
Toronto, Ontario M5K 1N2

Mary Eberts

Gwen Brodsky
SOLICITORS FOR THE WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

AITKEN, GREENBERG
410-150 Kent St.
Ottawa, Ontario K1P 5P4

Ottawa Agents for the solicitors for LEAF

TO: THE REGISTRAR OF THIS COURT

AND TO:

DAVIS & COMPANY
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver, B.C. V6C 2Z7
Solicitors for the Appellant
The Law Society of British Columbia

OSLER, HOSKIN & HARCOURT
1400 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Ottawa Agents for the
Solicitors for the
Appellant The Law Society
British Columbia

JOSEPH J. ARVAY, ESQ.
WICK
Attorney General of British Columbia
609 Broughton Street
Victoria, B.C. V8V 1X4
Solicitor for the Attorney General
British Columbia

BURKE-ROBERTSON, CHAD-

1600 - 130 Albert Street
Ottawa, Ontario K1P 5G4
Ottawa agents for the
Appellant The Attorney of
General of British Columbia

RUSSELL & DUMOULIN
Barristers & Solicitors
17 - 1075 West Georgia Street
Vancouver, B.C. V6E 3G2
Solicitors for the Respondents

SCOTT & AYLEN
170 Laurier Avenue West
Ottawa, Ontario K1P 5V5
Ottawa agents for the
Solicitors for the Respondents

ATTORNEY-GENERAL OF ALBERTA

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
P.O. Box 466, Station A
Ottawa, Ontario K1N 8S3
Ottawa agents for the
Attorney-General of Alberta

ATTORNEY-GENERAL OF SASKATCHEWAN

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
P.O. Box 466, Station A
Ottawa, Ontario K1N 8S3
Ottawa agents for the
Attorney-General of
Saskatchewan

ATTORNEY-GENERAL OF ONTARIO

MORIN

SOLOWAY, WRIGHT, HOUSTON
GREENBERG, O'GRADY,

Barristers & Solicitors
99 Metcalfe Street
Ottawa, Ontario K1P 6L7
Ottawa agents for the Attorney
General of Ontario

PROCUREUR GENERAL DE LA
PROVINCE DE QUEBEC

NOEL, DECARY, AUBRY & ASSO.
Barristers & Solicitors
111 Champlain Street
Hull, Quebec J8X 3R1
Agents for the Procureur
général de la Province de Québec

ATTORNEY GENERAL OF NOVA SCOTIA

BURRITT, GRACE, NEVILLE AND
HALL
Suite 500, 77 Metcalfe Street
Ottawa, Ontario K1P 5L6
Ottawa agents for the
Attorney General of
Nova Scotia

FRASER & BEATTY
41st Floor, Box 100
First Canadian Place
Toronto, Ontario M5X 1B2
Barry Pepper, Q.C.
Solicitors for the Intervenor
Federation of Law Societies
of Canada

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
P.O. Box 466, Station A
Ottawa, Ontario K1N 8S3
Ottawa agents for the
Intervenor Federation of Law
Societies of Canada

SACK, CHARNEY, GOLDBLATT &
MITCHELL
20 Dundas St. West, Ste. 1130
Toronto, Ontario M5G 2G8
Solicitors for the Intervenors
CAUT and OCUFA

NELLIGAN/POWER
77 Metcalfe St., Ste. 1000
Ottawa, Ontario K1P 5L6
Ottawa agents for the
Intervenors CAUT and OCUFA

ADVOCACY RESOURCE CENTRE FOR
THE HANDICAPPED
40 Orchard View Blvd., Ste. 255
Toronto, Ontario M4R 1B9
Solicitors for the Intervenor
Coalition of Provincial
Organizations of the Handicapped

AITKEN, GREENBERG
410 - 150 Kent St.
Ottawa, Ontario K1P 5P4

Ottawa agents for the
solicitors for the Intervenor
Coalition of Provincial
Organizations of the Handicapped

INDEX

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
FEDERATION OF LAW SOCIETIES OF CANADA
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS and ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS
WOMEN'S LEGAL EDUCATION AND ACTION FUND
COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED

FACTUM OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

PART I — THE FACTS

1. The Women,'s Legal Education and Action Fund (LEAF) offers no comment on the facts as outlined by the Appellants and Respondents.

PART II — POINTS IN ISSUE

2. LEAF takes no position on the constitutional validity of the citizenship requirements in section 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c.26. In any event there does not seem to be enough in the record to support an analysis of this question in the fashion LEAF recommends for the analysis of equality questions under section 15.

3. LEAF restricts its arguments to the question of what approach should be taken by this Court in analysing section 15 of the Canadian Charter of Rights and Freedoms and in determining its relationship to section 1 of the Charter.

> Canadian Charter of Rights and Freedoms, Constitution Act, 1982, as enacted by Canada Act 1981 (U.K.), 1982, c . 11

4. Although it does not restrict itself to this perspective, LEAF acknowledges that its approach to section 15 and equality is that of an advocate for women's equality.

5. LEAF will argue that the approach developed by the Court of Appeal of British Columbia in the decision appealed from was erroneous in several respects, and will propose for the consideration of this Court a purposive analysis of sections 15 and 1.

PART III — ARGUMENT

The Context for Interpreting Section 15

(i) Human Rights and Equality Values

6. It is submitted that the interpretation of section 15 and the determination of its relationship to section 1 should be consistent with the decisions of this Court on the interpretation of the Charter, the meaning and significance of equality, and the importance to be accorded human rights and respect for human dignity.

7. In particular, it is to be remembered that this Court has adopted a purposive approach to the interpretation of the Charter, looking to the value that the right or freedom seeks to protect and rejecting a narrow and technical interpretation.

> Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at 366
>
> Hunter v. Southam, [1984] 2 S.C.R. 145, at 156-157
>
> Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, at 209, 218-19
>
> R. v. Oakes, [1986] 1 S.C.R. 103, at 119

8. This Court has identified equality as one of the fundamental values of society, against which the objects of all legislation must be measured.

R. v. Oakes, supra, at 136

9. This Court has acknowledged the importance of promoting the equality of particular groups.

R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295, at 337-338

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, at 579

Caldwell v. Stuart, [1984] 2 S.C.R. 603, at 626

10. This Court has also decided that the interests of true equality may require differentiation in treatment.

R. v. Big M. Drug Mart Ltd., supra, at 347

11. It has, moreover, recognized that dominant groups in society should not be permitted to use the Charter to cut back legislative measures designed for the advancement of the less advantaged.

R. v. Edwards Books and Art Limited, [1986] 2 S.C.R. 713, at 779

12. This Court has acknowledged the importance of human rights legislation in a series of decisions which ruled that persons may not contract out of their rights under human rights legislation, and established the primacy of human rights legislation over other statutes. Human rights legislation has been characterized by this Court as quasi-constitutional.

> O.H.R.C. et al. v. The Borough of Etobicoke, [1982] 1 S.C.R. 202
>
> I.C.B.C. v. Heerspink et al., [1982] 2 S.C.R. 145, per Lamer J. at 157-158
>
> The Winnipeg School Division No. 1 v. Craton et al., [1985] 2 S.C.R. 150
>
> O.H.R.C. and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, at 546-547

13. This Court's respect for human rights legislation and equality principles reflects the trend in Canadian public policy and legislation over the past century toward increasing the substantive equality of those groups previously excluded from power and full participation in society. Anti-slavery legislation, extension of the franchise and the right to hold public office, reform of family law, and enactment of human rights legislation all reflect this growing commitment to egalitarian goals.

> Walter S. Tarnopolsky & William Pentney, Discrimination and The Law: Including Equality Rights Under the Charter, (Toronto: DeBoo, 1985) at PART I, Background and Setting
>
> Mary Eberts, "The Rights of Women" in The Practice of Freedom, ed. Ronald St.J. MacDonald and John P. Humphrey (Toronto: Butterworths, 1979), 225, at 225-236

Lynn Smith, "A New Paradigm for Equality Rights" in Righting the Balance: Canada's New Equality Rights, ed. Lynn Smith (Saskatoon: The Canadian Human Rights Reporter Inc., 1986), 353, at 357

N. Colleen Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" in Charterwatch: Reflections on Equality, ed. Christine Boyle et al., (Toronto: Carswell, 1986), 195, at 198-200

14. In recent years, the range of prohibited grounds of discrimination in human rights legislation has been extended, from the original grounds of race, religion and ethnic origin, to include sex, marital status, family status, age, disability and in some jurisdictions, political belief, sexual orientation, and record of offences.

Walter S. Tarnopolsky & William Pentney, Discrimination and the Law, supra,. at PART II, The Prohibited Grounds of Discrimination

15. Similarly, both the decisions of this Court and human rights legislation itself have expanded the concept of discrimination to include indirect and unintentional discrimination.

Simpson-Sears Ltd., supra, at 546-550

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

Human Rights Code, 1981, S.O. 1981, c.53, as amended 1984, c.58, s.39; 1986, c.64, s.10

The Yukon Territory Human Rights Act, S.Y. 1987, c.3, s.11

The British Columbia Human Rights Act, S.B.C. 1984, c.22, s.13(1.1)

The Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c-12, s.10

16. This Court has recognized the need for effective remedies to redress conditions which prevent women from achieving equality in the workplace in two recent decisions under the Canadian Human Rights Act.

Action Travail des Femmes et al. v. CNR et al., June 25, 1987

Robichaud and CHRC v. The Queen, July 29, 1987

17. This Court has also recognized the importance of protecting the rights of disadvantaged persons in contexts outside both the Charter and human rights legislation.

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388

18. It is thus submitted that the interpretation of section 15 should be informed by egalitarian principles and the necessity to protect the rights of historically disadvantaged persons, and by the strong recognition of the place of equality values and human rights legislation in the Canadian legal system. The concept of equality in section 15 should be no less broad.

(ii) Legislative History and Purpose

19. It is also submitted that the interpretation of section 15 should take account of its legislative history.

20. The legislative history and language of section 15 suggest that it continues the guarantee of evenhandedness in the legal process which had been provided by paragraph l(b) of the Canadian Bill of Rights, although it is clear both from the history and the language of section 15 that the section is not confined to safeguarding process rights.

21. In particular, the legislative history of section 15 shows an intention that the equality guarantees of section 15 would reach not only the process but also the substance of the law, affect all levels of government, and be entrenched in the Constitution. The language of section 15 was shaped so as to eliminate certain specific problems disclosed by judicial interpretation of paragraph l(b), problems which had deprived it of any strength as a guarantee of equality, for women or any other disadvantaged group.

> Peter Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Canadian Charter of Rights and Freedoms: Commentary, ed. Walter S. Tarnopolsky and Gerald Beaudoin (Toronto: Carswell, 1982) 1, at 19-20

Laskin's Canadian Constitutional Law, ed. Neil Finkelstein (Toronto: Carswell, 1986, fifth ed.) Vol. 2 at 1267-1273

Walter S. Tarnopolsky, "The Equality Rights", in Canadian Charter of Rights and Freedoms: Commentary, Tarnopolsky and Beaudoin, supra, 395 at 396, 421-422

Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Minutes of Proceedings and Evidence - Feb. 2-13, 1981, at 5A:2, 9:81, 19:30, 22:10-11, 22:55-60

Motion tabled by Minister of Justice in House of Commons, February 13, 1981, at 5

Robin Elliot, "Interpreting the Charter - Use of the Earlier Versions as an Aid" (1982), U.B.C. Law Review Charter Edition, 11-57

Mary Eberts, "Women and Constitutional Renewal" in Women and the Constitution, ed. Audrey Doerr and Micheline Carrier (Ottawa: Minister of Supply and Services Canada, 1981), 3-27

Beverley Baines, "Women, Human Rights and the Constitution" in Women and the Constitution, supra, 31-63

Leslie A. Pal and F. L. Morton, "Bliss v. Attorney-General of Canada: From Legal Defeat to Political Victory", (1986) 24 Osgoode Hall L.J. 141

22. Moreover, section 28 was added to the Charter to confirm and strengthen that instrument's commitment to the equality of women.

"Summary of Conference Resolutions" in Equality Rights and The Canadian Charter of Rights and Freedoms, ed. Anne Bayefsky and Mary Eberts (Toronto: Carswell, 1985), 634-44

Katherine de Jong, "Sexual Equality: Interpreting Section 28", in Equality Rights and the Canadian Charter of Rights and Freedoms, supra, 493

23. The history of the Charter's guarantees of substantive equality clearly shows that they were intended to benefit individuals and groups which historically have had unequal access to social and economic resources, either because of overt discrimination or because of the adverse effects of apparently "neutral" forms of social organization premised on the subordination of certain groups and the dominance of others. In this factum, we refer to these intended beneficiaries as the powerless, the excluded, the disadvantaged.

24. It is submitted that this purpose of promoting the equality of the powerless, excluded and disadvantaged should animate interpretation of the guarantees of substantive equality in section 15.

25. It is further submitted that this Court is entitled to recognize, in formulating its approach to the equality guarantees, that the groups intended to benefit from these guarantees, whether enumerated in the section or akin to those so enumerated, have not yet achieved equality.

26. For example, a recent Parliamentary survey heard evidence which confirms that women have not yet achieved equality, that serious barriers remain, and that new areas of need are emerging. It affirmed commitments made in government Speeches from the Throne in 1984 and 1986 giving women's equality national priority.

House of Commons, Standing Committee on Secretary of State, Fairness in Funding: Report on the Women's Program, May 26, 1987

27. The compendious nature of section 15 has received judicial recognition in the Ontario Court of Appeal, and its commitment to equality for the disadvantaged, powerless and excluded has been confirmed in Parliament.

Reference Re an Act to Amend the Education Act, (1986), 53 O.R. (2d) 513 at 554 (C.A.) per Howland C.J.O. and Robins J.A., affirmed in Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 at 524-5, per Dubin J.A.:

> In our view, s.15(1) read as a whole constitutes a compendious expression of a positive right to equality both in the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of "equal justice" and "equal access to the law," the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and equal respect.

Equality for All, Report of the Parliamentary Committee on Equality Rights, October 1985 (Boyer Report), at 5-6

Toward Equality, The Response to the Report of the Parliamentary Committee on Equality Rights by the Department of Justice Canada, at 2-4

28. The commitment of section 15 to the achievement of substantive equality for powerless, excluded and disadvantaged groups is also reflected in other guarantees in the Charter which promote and preserve the diversity and distinctive interests of identifiable groups.

Canadian Charter of Rights and Freedoms

Religious minorities:	sections 2, 15 and 29
Language rights:	sections 14, 15, and 16 to 23
Multiculturalism:	sections 14, 15 and 27
Native peoples:	sections 15 and 25 and section 35 of the Constitution Act, 1982
Women:	sections 15 and 28

Equality for All, supra, at 1-5, 9-16, 33-36, 69-74, 129-131

Jennifer Bankier, "Equality, Affirmative Action, and the Charter: Reconciling 'Inconsistent' Sections" in Research Studies of the Commission on Equality in Employment, Judge Rosalie Silberman Abella, Commissioner, April 1985 at 307, 314 (footnote 10)

Mary Jane Mossman, "Gender, Equality, and the Charter" in Research Studies of the Commission on Equality in Employment, supra, at 299-304

Implications of Adopting the Purposive Approach

29. It is submitted that this Court can take into account both the legislative history of section 15 and the place of section 15 in the evolving societal commitment to equality by acknowledging that both process claims and claims to substantive equality can be dealt with under the section.

30. It is further submitted that the Court can follow a purposive approach to the section with respect both to process and to substantive equality claims. In the case of the process claims, the Charter purpose against which a provision will be measured is that of furthering the social interest in access to justice. Such a purpose is allied to the Diceyan purpose earlier suggested for paragraph l(b) of the Canadian Bill of Rights. It ensures that section 15 is complementary to the provisions of the Charter dealing with legal rights. For reasons developed more fully below, the intervenor submits that the concepts of disadvantage, powerlessness or exclusion need not play as large a role in the analysis of process claims as they would do in claims for substantive equality.

31. It is submitted that the purpose which informs the analysis of claims to substantive equality is that described in paragraphs 23 and 24 above, namely, the purpose of promoting the substantive equality of the powerless, excluded, and disadvantaged.

32. Accepting such an equality promoting purpose has implications for the analysis of claims to equality under section 15.

(i) Implications with respect to the enumerated grounds

33. Some of the terms in section 15 indicate clearly the type of disadvantage which is meant to be addressed by the equality guarantees: e.g., mental and physical disability. Others are all encompassing on their face: e.g., race, sex. These latter grounds appear to place on the same footing the equality claims of those who have been historically disadvantaged (like women and people of colour) and those who, traditionally, have been members of the dominant group (men, whites). In assessing claims to substantive equality brought under section 15, it is submitted that a Court should bear in mind that the purpose of the section is to promote the equality of those who have been disadvantaged. While not categorically ruling out the equality claims of members of a dominant group, a purposive approach would lead a Court to interpret section 15 in such a way that these claims would be viewed with caution.

34. In applying the purposive approach, a Court will have to determine which of the groups described by an apparently all encompassing term (sex, national origin) is dominant and which disadvantaged. The historical and contemporary record will make such determinations relatively straightforward in some cases; indeed, the record is so clear in these instances that a categorical determination may be made. It is submitted, for example, that there is widespread agreement in society that women and people of colour have been disadvantaged in Canadian society. In other situations, the determination will depend more closely on the context of the inquiry: e.g., members of traditionally dominant religious groups may, in some contexts, be in a minority and in

need of certain guarantees (see, for example, the legislative protection for non-Catholic teachers in the Catholic system incorporated into Ontario Bill 30).

An Act to Amend the Education Act, S.O. 1986, c.21,
sections 136-1 and 136-la

35. The foregoing approach meshes well with the Court's statement that the Charter's guarantees should not be used by dominant groups in society to cut back legislative measures designed for the advancement of the disadvantaged. It is submitted that the equality claim of a member of a dominant group could often be a disguised attempt to invalidate legislation aimed at attacking a persistent disadvantage affecting the counterpart subordinate group. For example, attacks by men on legislation creating certain sexual assault offences, affording protections to victims of sexual assault, or providing financial assistance to low- income single mothers, may be seen in this light.

R. v. Edwards Book and Art Limited, supra

36. Because of the need to address the asymmetry inherent in inequality, it is submitted that a proper test for applying the substantive equality guarantees of section 15 need not aim at creating perfect symmetry in each case. As the disadvantaged must be the beneficiaries of legislative change if they are to achieve equality, section 15 is meant to accommodate legislation which favours the disadvantaged over the advantaged. This preference is apparent in the express language of subsection 15(2). Moreover, the language of subsection 15(2) colours the interpretation to be placed on the language of subsection 15(1), indicating, in our submission, that any test developed for assessing whether a denial of substantive equality has occurred should be one that does not prejudice the interests of the disadvantaged.

37. It is further submitted that the Court should not adopt a narrow approach to the interpretation of the grounds listed in section 15. A ground which seems to be non-enumerated, e.g., pregnancy, is actually an aspect of a "sex" distinction. Since only women become pregnant, any disadvantage visited upon a pregnant person is inevitably a disadvantage visited upon a woman. The intervenor criticizes in this regard the decision in Bliss v. A.G. Canada. Because of the sexual element in the subordination

of women, it will also be seen that sexual harassment can be a "sex" distinction amenable to examination under section 15.

Bliss v. A. G. Canada, [1979] 1 S.C.R. 183, at 190-191

38. Similarly, the Court should not require that an inequality in substance be visited upon all women in order to constitute a denial of equality on the basis of sex. Distinctions focussing particularly on prostitutes as a class or on pregnant women are nonetheless distinctions on the basis of sex. The intervenor criticizes in this regard the reasoning in certain cases under the Canadian Bill of Rights.

R. v. Lavoie (1970), 16 D.L.R.(3d) 647, per Schultz, J. at 652 (B.C.Co.Ct.)

R. v. Beaulne, Ex p. Latreille (1971), 16 D.L.R.(3d) 657, per Houlden, J. at 659 (Ont.H.C.J.)

39. In its first two and a half years of women's equality litigation, the intervenor has found that cases of explicit "facial" distinctions against women are comparatively few, yet sex inequality in society is pervasive and damaging. The greatest harm is done by distinctions which are facially neutral. It is thus important, in its submission, that courts develop a sensitivity to "impact" or "adverse effect" analysis. Approaching an issue with such sensitivity will often reveal that an issue which seems to be one involving a

non-enumerated ground may actually raise, in substance, an issue of sex equality. In the employment context, for example, certain height and weight requirements, neutral on the surface, are actually proxies for a more explicit requirement to hire male workers.

40. In the past two decades, scholarship about women has begun to document the different reality of women's lives. Such scholarship, where it is available, can illuminate issues of sexual inequality by revealing the persistent and systemic patterns of dominance and subordination in society (i.e., revealing the structural inequality in the labour market, as was done in the Action Travail des Femmes case). Accordingly, in preference to supposition and stereotype, this scholarship should be relied upon when assessing the condition of women.

(ii) With respect to the non-enumerated grounds
General Principles

41. It is submitted that a non-enumerated ground may appear as proxy for an enumerated ground. For example, citizenship restrictions may in some cases be used to restrict opportunities for members of visible minority groups, (although on the record in this case, it is not possible to say that citizenship is used in this fashion). Where it can be shown that this is occurring, the analysis should proceed as if the enumerated ground were overtly employed.

42. Although in many cases a sensitive analysis of the problem will show that it is not at all a problem involving a non-enumerated ground (but rather a problem involving an enumerated ground), in some cases the basis of distinction complained of will be a non-enumerated ground unrelated to any enumerated ground.

43. It is submitted that the language of section 15 clearly shows that the enumerated grounds are not intended to be exhaustive; legislative history and judicial interpretation reflect that this point is commonly understood.

> Minister of Justice and Attorney General of Canada, Government Response to Representations for Changes to Proposed Resolution, January 12, 1981, at 4
>
> Motion Tabled by Minister of Justice in House of Commons, supra, at 6
>
> Equality for All, supra, at 5
>
> Andrews v. Law Society of British Columbia, [1986] 4 W.W.R. 242 at 253 (B.C.C.A.)

44. The intervenor's survey of equality cases brought under section 15 to August 14, 1987 shows that far more claims involving non-enumerated grounds have come forward than have claims involving enumerated grounds.

Appendix A

45. In our submission, unlimited reception of claims truly based on non-enumerated grounds will dilute the effectiveness of the guarantees of substantive equality. In an effort not to extend protection to interests which seem intuitively not to merit protection under section 15, courts may develop such a stringent test for establishing denial of equality that a genuine claim, on a ground enumerated in section 15 or akin to an enumerated ground, would be unsuccessful.

46. It is accordingly submitted that limits should be imposed in providing access to the equality guarantees on the basis of the non-enumerated grounds. Aside from process claims discussed below, only claims based on non-enumerated grounds which are proxies for enumerated grounds or akin to enumerated grounds should be permitted.

Process Claims

47. It is submitted that a significant class of claims advanced on non-enumerated grounds are actually claims relating to the process of the law. As such, these claims would fall under the protection of the opening words of section 15, "equality before the law". It is appropriate to separate this class of case from those involving claims of denial of substantive equality, and to permit access to the process guarantees whether the basis of the distinction is enumerated or non-enumerated. Such a generous approach accords with the traditional respect for the rule of law and the social interest in evenhanded

administration of justice. Although in some cases these process claims will involve substantive enactments (e.g., Criminal Code provisions), it is submitted that they should be regarded as 'process' issues and dealt with as such.

R. v. Hamilton, Asselin and McCullough (1986), 17 O.A.C. 241 (Ont. C.A.)

48. Dealing with a claim as a process issue means, essentially, that the applicant need not show a disadvantage of the sort described immediately below in the context of the guarantees of substantive equality. Similarly, it may be appropriate for the Court to require of the applicant a showing only that he or she has been treated differentially in a way that is not "reasonable" or "fair" in order to establish the breach of the process guarantee.

Substantive Claims

49. It is submitted that in each case where a claim of denial of substantive inequality is advanced on a non-enumerated ground, the Court should determine on the facts whether it involves a denial of substantive equality of the sort meant to be within section 15. We refer to these categorizations as "akin" to the enumerated grounds.

50. To guide such a factual inquiry into whether a category raises concerns of substantive inequality, the Court may wish to inquire:

(a) whether and to what extent it is related to an enumerated ground (e.g., marital status and sex, citizenship and national origin);

(b) whether it is institutionalized throughout society so as to affect, in a systematic and cumulative way, dignity, respect, access to resources, physical security, credibility, membership in community, or power;

(c) whether it has a social history of disempowerment, exploitation, and subordination to and by dominant interests.

51. How this analysis might work is shown by its application in the case of women. Widely acknowledged indices of second class citizenship which have led to the recognition that women are a disadvantaged group include women's unequal pay, allocation to disrespected work, demeaned physical characteristics; targeting for rape, domestic battery, sexual abuse as children and systematic sexual harassment; depersonalization, use in denigrating entertainment, and forced prostitution. For women, these abuses occur in an historical context characterized by disenfranchisement, preclusion from property ownership, exclusion from public life,

and a sex-based poverty and devaluation of women's contributions in all spheres of social life which continue down to the present day.

> Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law, (Harvard University Press, 1987), 23-25, 40-41, 169-170, 277-279

52. An approach like that described in paragraphs 49 and 50 would eliminate from consideration under section 15 those cases where the only complaint of disadvantage amounts to the fact that a distinction is being made in the law under consideration. For example, two groups of business owners treated differently under a business licensing statute would not be entitled to claim the protection of section 15 where the different treatment is not based on an enumerated or akin ground, or not a genuine process claim.

53. Human rights legislation and international instruments will assist the Court in establishing what grounds are "akin" to those enumerated in section 15.

International Covenant on Civil and Political Rights,
in force for Canada 19 August 1976, G.A. Res.220 (XXI),
21 U.N.GAOR, Supp. (No.16) 52, U.N. Doc. A/6316(1966)

European Convention for the Protection of Human Rights
and Fundamental Freedoms, signed 4 November 1950,
entered into force 3 September 1953, 213 U.N.T.S. 222

Universal Declaration of Human Rights, adopted and
proclaimed by the General Assembly, 10 December 1948,
G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948)

International Covenant on Economic. Social and
Cultural Rights, adopted 16 December 1966,
in force for Canada 19 August 1976, G.A.
Res. 220 (XXI), 21 U.N.GAOR, Supp. (No.16) 49,
U.N. Doc. A/6316 (1966)

Application of the Purposive Interpretation and Relationship to Section 1

54. It is submitted that an initial question in any section 15 application or analysis is whether the claim relates to a process or a substantive interest.

55. Where the claim involves an alleged denial of substantive equality, the applicant would have to demonstrate his or her entitlement to the protection of the section by outlining the nature of his or her disadvantage. This may involve showing that he or she is characterized by an enumerated ground (e.g., mental or physical disability) or by the "disadvantaged" aspect of a neutral enumerated ground (e.g., is a woman, a person of colour). In other cases, such a demonstration would involve showing how he or she is

disadvantaged even though a member of a traditionally dominant group. For example, a single father who wished to assert under section 15 a claim to "mother's" allowance, would have to show that he is disadvantaged (i.e., impecunious) even though a member of a traditionally dominant group, before he could advance a claim to substantive equality under section 15. In yet other cases, this initial stage will involve a demonstration of disadvantage in the context of a non-enumerated ground. The intervenor contemplates that the showing of disadvantage could either be categorical (i.e., membership in a group that is accepted as disadvantaged) or contextual (though a member of a traditionally dominant group, the applicant is disadvantaged in the particular context of this case).

56. The applicant would also have to show how the disadvantage outlined is related to the purpose and provisions of the legislation being impugned.

57. The applicant would also have to demonstrate an impairment of his or her equality. Given the approach to section 15 outlined in the previous section of this factum, the intervenor suggests that the inquiry here might focus on establishing to a civil standard of proof the impact of the impugned provision either in purpose or effect on values like dignity, respect, access to resources, physical security, credibility, membership in community, and power.

58. It is submitted that there is no basis in the language of section 15 for importing a "reasonableness" or "fairness" standard into the analysis of substantive equality claims under section 15. To import such a reasonableness or fairness standard in effect means that a Court would be reading section 15 as if it provided that every individual is equal before and under the law and entitled to the equal protection and equal benefit of the law "to the extent that such entitlement is reasonable or fair". It is submitted that any assessment of reasonableness which is needed for purposes of a claim to substantive equality could be done in the context of section 1.

59. It is submitted that all substantive grounds, enumerated or akin, which are entitled to protection under section 15, should be accorded the same level of protection. In other words, there should be only one level of scrutiny under section 15, and that a rigorous one. One level of scrutiny for all claims of substantive equality will work because the section 1 analysis permits the Court to examine the justification for departures from equality. Accordingly, a ground like age need not be afforded a lower level of scrutiny simply because one can envision several instances where differential treatment on the basis of age may seem intuitively acceptable. Rather, the acceptability of those examples can be assessed under section 1.

60. If a violation of section 15 is established using the foregoing analysis, the party seeking to uphold the legislation under section 1 would have to establish a purpose for it that meets the tests set out by this Court in Oakes; similarly, the relationship between the purpose and the means chosen to fulfill it would have to withstand scrutiny.

R. v. Oakes, supra, at 138-140

Submissions on the Decision Under Appeal

61. Madam Justice McLachlin, speaking for the Court, said that the essential meaning of the section 15 guarantee of equality is to require that persons who are similarly situated be similarly treated and conversely that persons who are differently situated be differently treated. She then said that the nature of the analysis under section 15 is to determine whether a fair-minded person, weighing the purposes of the impugned legislation against the 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 are unreasonable or unfair in the sense of being unduly prejudicial.

> Andrews v. Law Society of British Columbia, supra, at 248, 252-253. Case Under Appeal at 97, 103

62. The intervenor agrees with the movement in the Andrews case away from mere formal differentiation and towards a substantive test for determining whether an infringement of the equality guarantees has occurred. The substantive test outlined above by the intervenor requires an applicant to explain his or her disadvantage, how it relates to the legislation at issue and how the provision impairs his or her equality. On the other hand, requiring only the formal establishment of some distinction before the analysis shifts to section 1 is really an approach which is designed to deal with formal, or facial, denials of equality. As stated above, most denials of equality which affect the disadvantaged are not evident on the surface of the legislation. However, often provisions intended to promote the equality of the disadvantaged will present a superficial differentiation between the disadvantaged (who are meant to benefit from the legislation) are the advantaged (who are not). Thus, a test which emphasizes mere distinctions might well impair the realization of the purpose of section 15 because it might facilitate attacks on legislation aimed at removing disadvantage.

63. It is submitted, however, that the definition of equality and the analytical approach propounded in Andrews suffer from the following shortcomings.

64. In our submission, it is desirable to reject quite clearly the purely formal or Aristotelian concept of equality when dealing with claims to substantive equality under section 15. This "similarly situated" definition of equality is essentially a rule of rational consistency, and thus comports well with claims to procedural equality. However, it says nothing about human rights to dignity and respect, and thus is not a test which will prove helpful in determining whether a substantive denial of equality has occurred.

65. The "similarly situated" rule is already embodied in the rule of law. The rule of law is satisfied if officials enforce rules impartially against all those to whom they apply, blind to differences that are irrelevant from the standpoint of the policy or principle of the rules. To say that likes should be treated alike in the formal sense of equality is to say only that laws should be laws. Such a standard may not be out of place in analysing process claims, which deal with the administration of these laws and, on a larger scale, access to the legal process. However, this formal approach does not assist in deriving the underlying meaning of equality in the context of a claim to substantive equality.

66. This flaw inherent in the similarly situated approach is demonstrated in the reasoning of Tysoe, J.A. in R. v. Gonzales, who interpreted the guarantee of "equality before the law" in the Canadian Bill of Rights to mean, "They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends." His interpretation was specifically rejected by Hall, J. in his concurring judgment in R. v. Drybones and impliedly rejected in the result of that case.

> R. v. Gonzales (1962), 37 C.R. 56 (B.C.C.A.) per Tysoe, J.A. at 62
>
> R. v. Drybones, [1970] S.C.R. 282, per Hall, J. at 299-300

67. Moreover, as was recognized by Madam Justice McLachlin, the similarly situated rule requires reference to underlying criteria which the rule itself does not articulate and it thus often imports sub silentio the values of an unequal society into its equality standard. This weakness has also been noted by the Ontario Court of Appeal:

> [I]t is not always clear whether persons are or are not similarly situated, and whether, even if they are not, this is relevant to a section 15 inquiry.
>
> ....

> It is usually possible to find differences between classes of persons and, on the basis of these differences, conclude that the persons are not similarly situated. However, what are perceived to be "differences" between persons or classes of persons could be the result of stereotypes based on existing inequalities which the equality provisions of the Charter are designed to eliminate, not perpetuate.

Century 21 Ramos Realty Inc. v. The Queen (1987), 58 O.R. (2d) 737, at 756-757

68. The similarly situated rule presumes that all persons are similarly situated in most respects. The error in this assumption is illustrated by its application in cases of sex equality. Because men and women are not similarly situated with respect to their reproductive capacities, the rule is said to permit different treatment where there is a biological difference. There are, however, a number of problems with this approach.

> The most important problem is the inherent contradiction it contains. The law is trying both to admit and to deny that differences exist between women and men. The result is confusion. For example, judges confound biological differences with socially-determined differences, or in confirming biological differences they justify detrimental differential treatment. Professor Catharine MacKinnon captures the essence of the problem when she writes:
>
> > The relationship between woman's anatomy and her social fate is the pivot on which turns [sic] all attempts, and opposition to attempts,

> to define or change her situation. At every turn, nature appears hand in glove with culture, so that the special definition of woman's place within man's world appears to conform exactly to her differences from him. But the same reality can be seen as the fist of social dominance hidden in the soft glove of reasonableness — the ideology of biological fiat.

N. Colleen Sheppard, Charterwatch: Reflections on Equality, supra, at 277

69. It is submitted that this Court should not adopt the "reasonable and fair" analysis propounded by the Court of Appeal in Andrews for the following reasons.

70. It is submitted that the Court in Andrews adopted a two-step approach to section 15, first deciding on the basis of the "similarly situate" analysis whether there is a denial of equality and then proceeding under the "without discrimination" rubric to ask whether such a denial is "reasonable" or "fair".

71. It is submitted that the without discrimination rubric does not give rise to a "reasonable" or "fair" test: rather, it reflects the preoccupation in the guarantees of substantive equality with those who have traditionally been the victims of discrimination. Thus, this echo of the language of human rights codes should not be

taken as an invitation to assess the fairness of denials of equality, but instead should provide a reminder of the egalitarian purpose of section 15.

72. In deciding that the words "without discrimination" in section 15 necessitate a test of reasonableness and fairness, the Andrews Court both ignores the egalitarian content of section 15 expressed in the words "equal before and under the law" and "equal protection and equal benefit of the law", and invents an unprecedented meaning for "discrimination".

O'Malley v. Simpson-Sears, supra, at 551-552

73. The balancing of means and ends is, according to the Oakes test, the role of section 1. As the Federal Court of Appeal said in Smith Kline, "If a category must be shown to be unreasonable or unfair before it can be said to give rise to a breach of equality rights, it is difficult to see how there can ever be room for application of s.1." The reasonable and fair test propounded in Andrews in fact leaves no, or almost no, room for the application of section 1. Although the Court in Andrews suggests a possible application for section 1, that application is markedly more restricted than that developed in cases like Oakes and applied to other sections of the Charter.

Smith Kline & French Laboratories Ltd. et al. v. Attorney-General of Canada (1986), 12 C.P.R. (3d) 386 at 393 (F.C.A.)

R. v. Oakes, supra, at 138-139

74. At the same tie that it effectively moves the "means and ends" analysis from section 1, governed by Oakes, to section 15, Andrews omits or changes aspects of the Oakes approach in ways that significantly weaken the Charter's commitment to equality. In particular,

(a) Oakes requires that the purpose of legislation be evaluated against fundamental values, including equality, and Andrews does not;

(b) the test of reasonableness in Andrews is more onerous than in Oakes in that it requires the applicant to show undue prejudice, a requirement that is nowhere mandated by the words of section 15;

(c) Oakes requires that there be a rational connection and proportionality between the object and the means chosen, and Andrews does not, so that an equality rights limitation that is out of proportion with its ends could still survive section 15 analysis.

75. The Court in Andrews places the burden of proving unreasonableness, unfairness or irrationality on the equality-seeker, a requirement that is neither supported by the text of section 15 nor in keeping with the approach outlined in Oakes. Under the Andrews test, the equality-seeker must show that the limit is not a reasonable one and

demonstrably justified, whereas section 1 and Oakes require the party relying on the provision to assume the burden of showing that it is reasonable and demonstrably justified. The result of so collapsing the section 1 analysis into section 15, with a reversal of the burden of proof, is that a limit which could not survive section 1 scrutiny might never be subjected to it.

76. Nowhere in the language of the Charter is there a requirement that Courts defer to a "right of the legislature to pass laws for the good of all." An early version of section 1 of the Charter was amended to remove from it this type of justification for a limit on a Charter right. Moreover, such a requirement is tantamount to saying that there is a presumption of constitutional validity, whereas this Court has said that such a presumption is not compatible with the innovative and evolutive nature of the Charter.

Robin Elliot, U.B.C. Law Review Charter Edition, supra, at 24-25

The Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd. et al., unreported, March 5, 1987 (S.C.C.) at 8-14

77. The similarly situated definition of equality in Andrews has been widely accepted by Canadian courts, including provincial Courts of Appeal. In addition, the Andrews "reasonable and fair" analysis of section 15 has been adopted by several Courts of Appeal. However, for all of the reasons stated above, it is submitted that this Court should decline to approve the approach taken in Andrews to the section 15 guarantees of substantive equality, although it may wish to explore what aspects of it are useful in the context of a process claim.

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

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

Bregman v. Attorney General of Canada (1986), 18 O.A.C. 82 (C.A.)

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

Ramos, supra

78. The Andrews "reasonable and fair" limitation on equality has been rejected by the Nova Scotia Court of Appeal and the Federal Court of Appeal.

Smith Kline, supra

Reference Respecting The Family Benefits Act, unreported, November 27, 1986 (N.S.C.A.)

79. Variations on the approaches discussed thus far appear in the decisions of the B.C. Court of Appeal in Rebic and Shewchuk; the Federal Court of Appeal in Smith Kline and the Nova Scotia Court of Appeal in the Reference Respecting The Family Benefits Act. The approaches adopted in these cases differ from one another but none scrutinizes the impugned legislation in light of the purpose of section 15.

Rebic v. Collver Prov J. and Attorney General For British Columbia (1986), 2 B.C.L.R.(2d) 364 (C.A.)

Shewchuk v. Ricard (1986), 28 D.L.R.(4th) 429

Smith Kline, supra

Reference Respecting The Family Benefits Act, supra

PART IV - NATURE OF ORDER SOUGHT

80. It is accordingly respectfully requested that this Court adopt a purposive approach to the interpretation of section 15, which would recognize both the legal process and substantive aspects to equality, and acknowledge that the purpose of the substantive equality guarantees is to promote the equality of hitherto powerless, excluded and disadvantaged groups.

81. LEAF takes no position on the nature of the Order to be granted in this Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Mary Eberts

Gwen Brodsky

Of counsel for the Women's Legal

Education and Action Fund (LEAF)

September 22, 1987

PART V - LIST OF AUTHORITIES

LIST OF SCHOLARLY AUTHORITIES

House of Commons, Standing Committee on Secretary of State, Fairness in Funding: Report on the Women's Program, May 26, 1987 11

Laskin's Canadian Constitutional Law, ed. Neil Finkelstein (Toronto: Carswell, 1986, fifth ed.) Vol. 2 9

MacKinnon, Catharine, Feminism Unmodified: Discourses on Life and Law, (Harvard University Press, 1987) 23

Minister of Justice and Attorney General of Canada, Government Response to Representations for Changes to Proposed Resolution, January 12, 1981 19

Mossman, Mary Jane, "Gender, Equality, and the Charter" in Research Studies of the Commission on Equality in Employment, supra 12

Motion tabled by Minister of Justice in House of Commons, February 13, 1981 9, 19

Pal, Leslie A, and F. L. Morton, "Bliss v. Attorney-General of Canada: From Legal Defeat to Political Victory", 1986) 24 Osgoode Hall L.J. 141 9

Sheppard, N. Colleen, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" in Charterwatch: Reflections on Equality, ed. Christine Boyle et al., (Toronto: Carswell, 1986), 195 6, 32

Smith, Lynn, "A New Paradigm for Equality Rights" in Righting the Balance: Canada's New Equality Rights, ed. Lynn Smith (Saskatoon: The Canadian Human Rights Reporter Inc., 1986), 353 6

Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Minutes of Proceedings and Evidence - Feb. 2-13. 1981, at 5A:2, 9:81, 19:30, 22:10-11, 22:55-60 9

Tarnopolsky, Walter S. & William Pentney, Discrimination and The Law: Including Equality Rights Under the Charter, (Toronto: DeBoo, 1985) 5, 6

Tarnopolsky, Walter S., "The Equality Rights", in Canadian Charter of Rights and Freedoms: Commentary, eds., Tarnopolsky and Beaudoin, supra, 395 9

LIST OF INTERNATIONAL INSTRUMENTS

LIST OF LEGISLATION