# A Flawed Synthesis of the Law

June Ross

While other recent equality cases have had greater or more immediate societal significance, such as *M.* v. *H.*[1] regarding maintenance rights and obligations between same-sex partners, and *Corbière* v. *Canada (M.I.N.A.)*[2] regarding residency requirements for band council elections, it is *Law* v. *Canada (Minister of Employment and Immigration)*[3] that, for better or worse, will stand beside the Supreme Court of Canada's decade-old judgment on section 15(1) of the *Canadian Charter of Rights and Freedoms*,[4] *Andrews* v. *Law Society of British Columbia*.[5] *Law* does not claim to supersede the *Andrews* approach to section 15(1) interpretation, or even to strike out in a new direction, but merely to synthesize the law as stated in *Andrews* together with insights from the ensuing jurisprudence.[6] I will argue that while *Law* is indeed an important decision, its synthesis of the law is ultimately flawed.

In *Law*, Iaccobucci J. for the Court set down a reformulated set of guidelines[7] to the interpretation of section 15(1), purportedly "derived from the jurisprudence of [the] Court."[8] It is therefore appropriate that *Law* be evaluated, at least in part, by the accuracy and comprehensiveness of its review of the jurisprudence it engages. To this end I will examine *Andrews* and other cases cited in *Law* to determine whether they provide support for the *Law* guidelines. I will argue that upon close examination, the *Law* approach is not, as the Court claims, a derivation from *Andrews* and the succeeding case law. It is more accurately described as the adoption of one of Madame Justice Wilson's minority positions, and a contradiction of one of the underlying premises in *Andrews*. The implications of this departure from precedent, and of its covert introduction into section 15(1) interpretation, will also be explored.

## The *Law* Guidelines

*Law* addressed the constitutionality of *Canada Pension Plan* provisions[9] which draw distinctions on the basis of age regarding entitlement to survivors' pensions. The issue was whether these provisions discriminate against persons under age forty-five contrary to section 15(1) of the *Charter* and, if so, whether they are justified under section 1. In *Law*, a contributor to the Plan died, leaving a wife, aged thirty. She attempted to obtain surviving spouse benefits from the Plan, but was ineligible due to her age. The Plan provides reduced benefits for spouses aged thirty-five to forty-five, and provides no benefits for spouses under thirty-five, unless the spouse is disabled or caring for dependent children.

In earlier cases involving age discrimination claims relating to issues of retirement and benefits, the Court found violations of section 15(1) resulting from differential treatment based on the enumerated ground of age. A flexible, or deferential approach to section 1 justification followed. This led to upholding mandatory retirement, but invalidating the denial of unemployment insurance benefits to persons over sixty-five.[10] *Law* departed significantly from this model, with a unanimous Court finding no violation of section 15(1).

In the course of coming to this conclusion, Iaccobucci J. developed a set of guidelines to the interpretation of section 15(1) that emphasizes the importance of a purposive and contextual approach, and

1 (1999) 171 D.L.R. (4th) 577 (S.C.C.).
2 (1999) 173 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Corbière*].
3 (1999) 170 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Law*].
4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].
5 (1989) 56 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Andrews*].
6 *Supra* note 3 at 19.
7 Iaccobucci J. for the Court emphasized that these guidelines did not constitute a "rigid test," but "points of reference which are designed to assist a court" in identifying and evaluating contextual factors in a purposive manner (*ibid.* at 37).
8 *Ibid.*
9 *Canada Pension Plan*, R.S.C. 1985, c. C–8, ss. 44(1)(d) and 58 [hereinafter the Plan].
10 *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 [hereinafter *McKinney*]; *Tétrault-Gadoury* v. *Canada (Canada Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

provided the following articulation of the underlying purpose of section 15(1):[11]

> In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

This statement of the purpose of section 15(1) is beyond reproach. However, the relationship between this purpose and the scope that should be given to section 15(1) raises a significant issue. *Charter* interpretation has been dominated by a two-stage analysis in which the definition of a right or freedom is addressed first, and the justifiability of its restriction examined subsequently. Under this approach there are, in every case, *two* opportunities for a court to consider the underlying purpose of a *Charter* guarantee. In some contexts, notably in the interpretation of section 2(b) and, I will argue, in the pre-*Law* approach to section 15(1), the Court purposively adopted a definition that overshoots the underlying purpose, in order to ensure that the justification stage was not circumvented. This was the *Andrews* method and, as I will argue, it was well suited to achieve the purpose of section 15(1).

The *Law* guidelines set out three "broad inquiries" that should be undertaken to "determine a discrimination claim:"[12]

> (a) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (b) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

The third inquiry requires engagement in a case-by-case, context-specific determination that a challenged form of differential treatment violates the purpose of section 15(1)[13] by violating human dignity.[14] This direct case-by-case reference to the underlying purpose of section 15(1) is the innovation of *Law*.

While the third inquiry is reminiscent of the approach to section 15(1) advocated by L'Heureux-Dubé J. in *Egan* v. *Canada*[15] and in *Miron* v. *Trudel*,[16] there exists a major difference. In *Law* the requirement to demonstrate a violation of human dignity is an addition to, not a substitution for the requirement to demonstrate differential treatment based on enumerated or analogous grounds. The *Law* requirement thus narrows the definition of discrimination, whereas L'Heureux-Dubé J.'s approach had the potential to expand it.

## *ANDREWS* REVISITED[17]

From its review of *Andrews*, the Court in *Law* drew the three inquiries in a discrimination claim set out above. This extrapolation involved a substantial reworking in the case of the third inquiry, accompanied by a significant omission in the recapitulation of the *Andrews* rationale.

*Andrews* has been, and ostensibly remains, central to section 15(1) analysis. It was the point of departure in *Law*'s survey of the jurisprudence, which commenced

---

11 *Supra* note 3 at 39.

12 *Ibid.* at 38.

13 *Ibid.* at 39: "The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant."

14 *Ibid.* The search for a purposive violation is summarized in these terms: "contextual factors ... determine whether legislation has the effect of demeaning a claimant's dignity;" "a variety of factors ... may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity" (at 40).

15 (1995) 124 D.L.R. (4th) 609 at 635–38 (*"The imperfect vehicle of 'grounds'"*) and 638–42 (*"Putting 'discrimination' first"*) (S.C.C.) [hereinafter *Egan*].

16 (1995) 124 D.L.R. (4th) 693 at 727–28 (S.C.C.) [hereinafter *Miron*].

17 *Supra* note 3 at 13.

with the assertion that the basic principles laid down in *Andrews* "continue to guide s. 15(1) analysis to the present day."[18]

The *Andrews* principles were formulated with both the purpose of section 15(1) *and* its constitutional context in mind.[19] They were intended to create a right to equality that would operate appropriately within the judicial setting.[20] In designing an approach to achieve this, the Court in *Andrews* drew from an established body of law interpreting human rights statutes.[21]

As a matter of constitutional theory, section 15(1) does not merely authorize, but obliges judicial enforcement. To best achieve the purpose of section 15(1), its interpretation should limit judicial discretion to the point where it will be perceived by members of the judiciary and by the public as not merely enabling, but requiring action. Such an interpretive approach promotes fulfilment of the goals of section 15(1) by providing a firm basis for judicial action, rather than relying on subjective perceptions of individual judges. The *Andrews* approach contained features that provide focus and force to the equality right, limiting judicial discretion in this positive way.

One of the most important elements of *Andrews*, reflecting one of the most important characteristics of human rights law, was its placement of the onus of justification in *prima facie* instances of discrimination on the discriminator. The identification of the justification process with section 1 also ensured that the objective and the proportionality of a potentially discriminatory action were fully considered. In this way, the right to equality was given force: the court was required to act in the absence of sufficient proof that differential treatment pursued an important objective in a reasonably proportional manner. The court's intervention was explained and justified by government's failure to meet this burden of proof.[22]

It is true, as noted in *Law*, that McIntyre J. in *Andrews* held that discrimination involved more than "a mere finding of a distinction" and that section 15(1) forbade only those distinctions "which involve prejudice or disadvantage."[23] However, the identification of distinctions involving prejudice or disadvantage was, to a large extent, accomplished by the presence of enumerated or analogous grounds. McIntyre J. noted that enumerated grounds "reflect the most common and probably the most socially destructive and historically practised bases of discrimination."[24] Both McIntyre and Wilson JJ. related analogous grounds to "discrete and insular minorities," identified, at least in part, by the presence of stereotyping, historical disadvantage, or vulnerability to political and social prejudice.[25] Enumerated or analogous grounds were treated, to use the words of McLachlin and Bastarche JJ. in *Corbière,* as "markers of suspect decision-making or potential discrimination."[26] A suspect decision might not amount to a constitutional violation, but, as stated by LaForest J. in *Andrews*, it must be justified:[27]

> While it cannot be said that citizenship is a characteristic which "bears no relation to the individual's ability to perform or contribute to society" ... it certainly typically bears an attenuated sense of relevance to these. That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification.

It is also the case, again noted in *Law*, that McIntyre J. held in *Andrews* that a section 15 inquiry must go beyond the finding of a distinction based on an enumerated or analogous ground.[28] However, the additional step contemplated by McIntyre J. did not involve a search for some indication of stereotyping or prejudice apart from the presence of enumerated or analogous grounds. Rather, he looked to the "*effect* of the impugned distinction or classification on the complainant."[29] The nature of the required effect was addressed in McIntyre J.'s definition of discrimination:[30]

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of

---

18 *Ibid.*

19 *Andrews, supra* note 5 at 15 and at 19–21 under the heading "*Relationship between s. 15(1) and s. 1 of the Charter.*"

20 *Ibid.* at 23, rejecting the argument that "without discrimination" should be interpreted as "without distinction," as this would subject "universally accepted and manifestly desirable legal distinctions" to *Charter* review (quoting McLachlin J.A., as she then was).

21 *Ibid.* at 22.

22 *Miron, supra* note 16 at 744–45, per McLachlin J. (as she then was) contains a full discussion of the importance of this aspect of *Andrews, ibid.*

23 *Ibid.* at 22–23, cited in *Law, supra* note 3 at 14–15.

24 *Ibid.* at 18.

25 *Ibid.* at 24 (McIntyre J.) and 32–33 (Wilson J.).

26 *Supra* note 2 at 13.

27 *Andrews, supra* note 5 at 40–41.

28 *Law, supra* note 3 at 14–15, referring to *Andrews, ibid.* at 23.

29 *Andrews, ibid.* at 23 (emphasis added).

30 *Ibid.* at 18 (emphasis added).

> the individual or group, which has the *effect of imposing burdens, obligations, or disadvantages on such individual or which withholds or limits access to opportunities, benefits, and advantages available to other members of society*. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

That the section 15(1) test should be limited to the issues of distinction (intentional or not), grounds (enumerated or analogous), and effect (imposition of a disadvantage or denial of a benefit) is made clear in its application within *Andrews*. In finding that there had been discrimination, McIntyre, Wilson, and LaForest JJ. emphasized the grounds for the exclusion (citizenship, an analogous ground) and the impact of the rule on affected individuals (a bar to employment, or a "burden in the form of some delay").[31] Evidence that might support or discount stereotyping in relation to the law was not addressed under section 15(1), but under section 1. LaForest J. followed his statements regarding the "attenuated" relevance of citizenship in relationship to merit or ability, by stating that justification for a decision based on citizenship should occur under section 1, "essentially because, in matters involving infringements of fundamental rights, it is entirely appropriate that government sustain the constitutionality of its conduct."[32]

Another important aspect of *Andrews* was the relationship between discrimination and enumerated or analogous grounds. This feature provided clarity and boundaries to the scope of section 15(1).[33] Further, its link to the language of section 15(1) and human rights law generally made a strong case that the interpretation reflected their common underlying purpose.[34] Finally, the reference to grounds made the onus shift possible, as discrimination was defined by factors distinguishable from those considered in the course of a section 1 review.[35]

A concern to reserve an appropriate role for section 1, and to define section 15(1) in a way that would avoid undue overlap with section 1 considerations, ran throughout the *Andrews* decision. The desirability of keeping "right guaranteeing sections ... analytically separate from s. 1" was discussed at length.[36] This was a primary reason for rejecting the approach taken by McLachlin J.A. (as she then was) in the British Columbia Court of Appeal decision in *Andrews*, which would have considered the reasonableness or fairness of classifications under section 15(1), and adopted instead the "enumerated or analogous grounds" approach.[37] Despite this, in *Law* the maintenance of separate functions for section 15(1) and section 1 does *not* appear as one of the basic interpretive principles. In contrast to *Andrews*, the Court in *Law* did not express particular concern to avoid including section 1 issues of justification under the reformulated section 15(1) test.[38] It is this major and unacknowledged departure from *Andrews* that gives me the greatest pause about the *Law* approach to the right to equality.

## POST-*ANDREWS* JURISPRUDENCE[39]

*Law*'s review of the jurisprudence after *Andrews* is notable for its failure to deal with or even recognize the Court's divided decisions in *Egan*[40] and *Miron*[41] or the controversial relevancy test that caused those divisions. Further, its assertion that "the jurisprudence of the Court has affirmed and clarified ... the necessity of establishing discrimination in a substantive or purposive sense, beyond mere proof of a distinction on enumerated or analogous grounds"[42] is supported by no more than a list of cases and page references, lacking any detailed examination. I propose to explore the case law cited in support of this proposition in detail, and subsequently, to consider the relationship of the relevancy test to the *Law* approach.

The following cases, along with specific references, were cited in *Law* to support the requirement to establish discrimination in a purposive sense: *R.* v. *Hess*, *R.* v.

---

31 *Ibid.* at 24 and 32–33.

32 *Ibid.* at 41.

33 In contrast with, for example, the approach advocated by L'Heureux-Dubé J. in *Miron, supra* note 16, and in *Egan, supra* note 15. As noted in P.W. Hogg, *Constitutional Law of Canada, 3d ed.*, loose-leaf (Toronto: Carswell, 1997) at 52–22, her approach, which "relies heavily on judicial discretion" would likely "produce quite variable results from judges who would place different weights on the values in play."

34 *Andrews, supra* note 5 at 18, 23. These comments in *Andrews* introduce the rejection of the approach to s. 15(1) that would have equated *any* distinction with discrimination.

35 *Ibid.* at 24.

36 *Ibid.* at 19–21.

37 *Ibid.* at 23–24.

38 A relatively brief reference to the issue was made (*Law, supra* note 3 at 34–35), but the point was not incorporated into the summary of basic principles.

39 *Ibid.* at 16.

40 *Supra* note 15.

41 *Supra* note 16.

42 *Supra* note 3 at 18.

*Nguyen*,[43] *McKinney* v. *University of Guelph*,[44] *R.* v. *Swain*,[45] *Weatherall* v. *Canada (Attorney General)*,[46] *Haig* v. *Canada*,[47] *Benner* v. *Canada (Secretary of State)*,[48] and *Eaton* v. *Brant County Board of Education*.[49] I will address these cases in four groups: cases which provide limited and partial support for *Law*'s approach; the *McKinney* decision, contradicting *Law*; irrelevant cases, which neither support nor contradict *Law*; and the *Eaton* case, a precursor to *Law*.

## Cases Which Provide Limited and Partial Support for *Law*'s Approach

### *R.* v. *Hess; R.* v. *Nguyen*[50]

The Court in *Law* referred to Wilson J.'s majority judgment in this case which found that the *Criminal Code* provision for statutory rape, making it an offence for a male person to have intercourse with a female person under the age of fourteen, did not violate section 15(1). Wilson J. stated as follows:[51]

> [W]e must not assume that simply because a provision addresses a group defined by reference to a characteristic that is enumerated in s. 15(1) of the *Charter*, we are automatically faced with an infringement of s. 15(1). There must also be a denial of an equality right that results in discrimination . . . [W]e are asked to consider when a distinction drawn on the basis of sex may legitimately be made and when it may not ... [T]he answer to this question will depend on the nature of the offence in issue.

Wilson J. adds that she is[52]

> fully aware of the dangers inherent in arguments that seek to justify particular distinctions on the basis of alleged sex-related factors. All too often arguments of this kind are used to justify subtle and sometimes not so subtle forms of discrimination. They are tied up with popular yet ill-conceived notions about a given sex's strengths and weaknesses or abilities and disabilities.
>
> Nevertheless there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences ... [T]he fact that the legislature has defined an offence in relation to these realities will not necessarily trigger s. 15(1).

McLachlin J. for the minority would have found a violation of section 15(1) on the basis that the differential treatment was based on enumerated or analogous grounds and resulted in the imposition of a burden.[53] This conclusion supports the view that what the majority was endorsing was a departure from exclusive reliance on these elements. Wilson J.'s judgment made it clear that this departure was intended to be a modest one related to biological differences between the sexes — gender characteristics, as opposed to gender stereotypes. Wilson J. also cautioned on the risks inherent in the approach, endorsing the view that gender-based distinctions are almost always suspect, and that distinctions based on "ill conceived notions" should be subject to justification under section 1.

### *Weatherall* v. *Canada*[54]

In *Weatherall,* LaForest J. for the Court held that prison rules permitting frisk searches of men by women, in contrast to prohibited frisk searches of women by men, probably did not violate section 15(1):[55]

> It is also doubtful that s. 15(1) is violated ... The jurisprudence of this Court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women ... the reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors ... Viewed in this light, it becomes clear that the effect of cross-gender searching is

---

43 [1990] 2 S.C.R. 906 at 927–28 [hereinafter *Hess*] per Wilson J.
44 *Supra* note 10 at 392–93 per Wilson J.
45 [1991] 1 S.C.R. 933 at 992 [hereinafter *Swain*] per Lamer C.J.
46 [1993] 2 S.C.R. 872 [hereinafter *Weatherall*].
47 [1993] 2 S.C.R. 995 at 1043–44 [hereinafter *Haig*] per L'Heureux-Dubé J.
48 [1997] 1 S.C.R. 358 at 395 [hereinafter *Benner*].
49 [1997] 1 S.C.R. 241 at 272 [hereinafter *Eaton*].
50 *Supra* note43.
51 *Ibid.* at 928–29.
52 *Ibid.* at 928–29.
53 *Ibid.* at 944; Gonthier J. concurring.
54 *Supra* note 46.
55 *Ibid.* at 877–78.

> different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all.

Even if this differential treatment had been found to be discriminatory, the Court went on to hold that any discrimination would clearly be saved by section 1. The section 15(1) holding is thus an alternative ground only. If it is to be credited at all, it should be considered no more than a modest extension of the holding in *Hess* that different treatment based on biologically based gender characteristics, perhaps particularly where the treatment is protective of women in view of their greater vulnerability, does not violate section 15(1).

## *Benner* v. *Canada*[56]

Iaccobucci J. for the Court held that differential entitlement to citizenship for children born before 1977 whose mothers were Canadian, as compared to children born at the same time whose fathers were Canadian, violated section 15(1). He commented that where a denial of equality is based upon enumerated or analogous grounds, "it will generally be found to be discriminatory, although there may, of course, be exceptions" (citing *Weatherall*).[57] Canada argued that the differential treatment did not constitute discrimination because the challenged provision was intended to remedy an earlier, more extreme form of discrimination. The Court held that Parliament's remedial intent did not insulate the amended law from *Charter* review. Canada argued further that the differential treatment was not based on stereotyping, but on a desire to end discrimination and increase access to citizenship while continuing to ensure the safety of Canadians. The Court held that the previous legislation had been based on a stereotype, and that the new law, by maintaining a distinction based on parenthood, maintained the stereotype. In sum, while the Court made reference to stereotyping, the case is consistent with the view that despite good intentions, in general, adverse distinctions based on enumerated or analogous grounds will be found to be discriminatory.

[56] *Supra* note 48.
[57] *Ibid.* at 393–94.

## Contradicting Law: *McKinney* v. *University of Guelph*[58]

In this case, Wilson J., in the dissent[59] agreed with other members of the Court that mandatory retirement discriminated on the basis of age, noting with respect to the enumerated grounds of discrimination:[60]

> The listing of sex, age and race, for example, is not meant to suggest that any distinction drawn on these grounds is *per se* discriminatory. Their enumeration is intended rather to assist in the recognition of prejudice when it exists. At the same time, however, once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory ... [T]he mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrefutable presumption of prejudice. Rather it compels one to ask the question: is there prejudice? Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue?

LaForest J., for the majority, addressed the argument that mandatory retirement did not violate section 15(1) because there was no "proof of irrationality, stereotypical assumptions and prejudice."[61] He rejected this argument as irrelevant on the ground that *Andrews* had made it clear that the *Charter* prohibited unintentional as well as intentional discrimination. L'Heureux-Dubé J. agreed with LaForest J.'s reasons, and also noted with approval comments made by MacGuigan J.A. in *Headly* v. *Canada (Public Service Commission Appeal Board)* regarding the significance of age-based differential treatment:[62]

> [T]he fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings ... can only mean, I believe, that non-trivial pejorative distinctions

[58] *Supra* note 10.
[59] *Ibid.* LaForest J. for the majority found a violation of s. 15(1), but held that it was justified under s. 1 (Dickson C.J. and Gonthier J. concurred); Sopinka J. agreed with the reasons of LaForest J. as to s. 15(1) and s. 1, and L'Heureux-Dubé J., dissenting, also agreed with LaForest J. as to s. 15(1). Five of seven of the sitting justices thus agreed with LaForest J.'s s. 15(1) reasons. Cory J. agreed with Wilson J. as to s. 15(1), but with LaForest J. as to s. 1. Wilson J. and L'Heureux-Dubé J. both found violations of s. 15(1) that were not justified under s. 1.
[60] *Ibid.* at 393.
[61] *Ibid.* at 279.
[62] [1987] 2 F.C. 235 at 245 (C.A.), in *McKinney*, *supra* note 10 at 423.

> based on such categories are intended to be justified by governments under section 1 rather than to be proved as infringements by complainants under section 15. In sum, some grounds of distinction are so presumptively pejorative that they are deemed to be inherently discriminatory.

In conclusion, the majority of the Court in *McKinney* rejected an approach to section 15(1) that would have addressed irrationality, stereotyping, or prejudice in mandatory retirement provisions under section 15(1), reserving these concerns for the section 1 analysis.

## Irrelevant Cases Which Neither Support Nor Contradict *Law*

### *R.* v. *Swain*[63]

Lamer C.J., Sopinka, and Cory JJ. concurring, dealt with the claim that the ability of the Crown to raise the insanity of the accused, even though limited to cases in which the accused has been proven to be otherwise guilty of the offence, violated section 15(1). Lamer C.J.'s summary of the framework for section 15(1) analysis referred to the elements of a distinction (intentional or not), effect (the imposition of a burden or denial of a benefit), and relationship to enumerated or analogous grounds, with stereotyping and prejudice discussed only in reference to the last element.[64]

Lamer C.J.'s finding that no violation of s. 15(1) had occurred was not because of a failure to demonstrate stereotyping or prejudice, but was made on the basis that the claim of a burden or disadvantage could not be objectively maintained.[65]

### *Haig* v. *Canada*[66]

Here, a different rule as to entitlement to participate in a referendum on the Charlottetown Accord in Québec, as compared with rules regarding participation in other parts of Canada, was held not to violate section 15(1). L'Heureux-Dubé J. for the majority, in considering whether or not place of residence constituted an analogous ground, suggested that this might be true in "a proper case," but that the adversely affected residents in this case, "persons moving to Québec less than six months before a referendum date," did not suffer from stereotyping or prejudice and that the differential treatment was therefore not based on an analogous ground of discrimination.[67]

As in *Swain* then, stereotyping and prejudice were raised in *Haig* only in relation to the identification of analogous grounds. While a case-specific approach to the determination of analogous grounds can also be criticized as providing an inadequate "jurisprudential marker,"[68] it seems clear that reference to stereotyping in this context does not provide precedent for a case-by-case search for stereotyping under the *Law* inquiry.

## A Precursor to *Law*: *Eaton* v. *Brant County Board of Education*[69]

As I have attempted to demonstrate, each of the foregoing cases is largely consistent with the *Andrews* requirements of differential treatment, enumerated or analogous grounds, and disadvantageous effect. Exceptions to this approach in *Hess* and (perhaps) in *Weatherall* are very limited. *Eaton*, on the other hand, I would accept as being much more consistent with *Law*, *and* fundamentally inconsistent with *Andrews*. In *Eaton*, Sopinka J. on behalf of the undivided Court, while referring to an expansive concept of equality, found no violation of section 15(1). In reaching this conclusion, the Court in practical although not explicit terms incorporated section 1 justification issues into its section 15(1) analysis. The Supreme Court of Canada decision in *Eaton* may be contrasted with Arbour J.A.'s (as she then was) Ontario Court of Appeal decision in the same case.[70] Her decision, which was overruled, applied the *Andrews* test.

Emily Eaton was an elementary school student with cerebral palsy. Her parents asserted her entitlement to be educated in a regular classroom. For some time she had been placed in regular classes in a public school with a full-time aide. Eventually, a decision was made to place her in a special class for disabled children. The decision regarding placement was affirmed by a special education

---

63 *Supra* note 45.

64 *Ibid.* at 992.

65 *Ibid.* at 995. Lamer C.J., for the majority, held that "to move an individual from the category of those who will surely be convicted and sentenced to those who may be acquitted, albeit on the grounds of insanity, [could not] be said to impose a burden or a disadvantage on that individual." Wilson J., in a separate judgment, agreed, but did additionally consider the question of stereotyping under s. 15(1) (at 1035–36). In a post-*Law* decision, *Winko* v. *British Columbia (Forensic Psychiatric Institute)* (1999), 175 D.L.R. 193 [hereinafter *Winko*], the Supreme Court of Canada found no violation of s. 15(1) in the current provisions of the *Criminal Code* dealing with persons found not criminally responsible, applying the *Law* approach.

66 *Supra* note 47.

67 *Ibid.* at 1044.

68 *Corbière, supra* note 2 at 14.

69 *Supra* note 49.

70 (1995) 22 O.R. (3d) 1 (C.A.).

tribunal, following a hearing at which expert evidence was heard. The tribunal made a choice based on what it perceived to be Emily's best interests, and provided reasons for its choice. Emily's parents had a different view of her best interests, and refused to place her as directed. For one term they educated her at home rather than place her in a special class; subsequently they enrolled her in the separate school system, where she was placed in a regular classroom. Thus, while Emily's educational placement was, finally, determined by her parents, Emily's and her parents' options were restricted as to where that choice of education might be pursued.

The Court agreed with the claimants that integration in the regular classroom, with accommodation as appropriate, should be the presumptive starting point in educational placement decisions. It accepted that integration provides educational and community benefits. The Court acknowledged that there was a clear historical link between segregated education and discriminatory stereotypes, and asserted that special placement decisions should be based on real needs, not on stereotypes.[71] But the Court did not require that the special placement decision be justified under section 1. The appropriateness of the placement was treated as a section 15(1) issue, so that there was no presumption in favour of the educational setting desired by Emily's parents, and no corresponding onus on the tribunal to justify its decision.[72] This approach was employed even though some of the considerations relied on by the tribunal in support of its decision involved balancing institutional concerns and Emily's needs in a manner that is usually associated with section 1.[73] Effectively placing the analysis within section 15(1), rather than section 1, resulted in deference to the tribunal's assessment, rather than to the parents' choice, in a context in which, it seems, neither could clearly be shown to better serve Emily's interests. In contrast, Arbour J.A. for the Ontario Court of Appeal addressed the justification for Emily's placement decision under section 1, and concluded that the tribunal had not met the section 1 onus.[74]

*Eaton*'s failure to shift the onus of justification, in the context of a form of decision-making in which stereotyping has been and may continue to be involved, represents a major departure from *Andrews*. The conflicting judgments at the appellate and Supreme Court of Canada levels demonstrate the significance of this departure.

In justifying its approach to addressing the placement decision under section 15(1), rather than under section 1, the Supreme Court in *Eaton*, in the passage referred to subsequently in *Law*, stated:[75]

> The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons.

While it is unassailable that discrimination based on disability does arise as much or more from the differential effect of laws as from differential treatment, it should be a matter for great concern that the potential for adverse impact discrimination is offered as a reason for finding that differential treatment does not violate section 15(1). Discrimination may arise from *either* differential impact or differential treatment. Obviously, these potential forms of discrimination should not cancel each other out. Just as a case of disparate impact discrimination is not met by the assertion that all persons are treated the same, so a case of differential treatment should not be met by the claim that the discriminator sought to respond to difference. What is more, the potential for some other form of discrimination should not affect the burden of proof. That burden, whether to prove the need for the same treatment and the unfeasibility of accommodation, or the need for and proportionality of differential treatment, should remain on the party responsible for the challenged action.[76]

---

71 Eaton, *supra* note 49 at 272–73 (S.C.C.).

72 *Ibid.* at 274, 278–79 (S.C.C.).

73 For example, in addressing Emily's safety needs arising from her tendency to put objects in her mouth, the tribunal noted its concern that Emily's protection would require either radical alterations to the classroom or an isolating level of adult supervision: *Eaton, supra* note 69 at 23 (C.A.).

74 *Ibid.* at 20 (C.A.).

75 *Ibid.* at 272 (S.C.C.).

76 Human rights case law, relied on in *Andrews, supra* note 5, has always taken this approach and so far continues to do so: *B.C. (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.* (1999), 176 D.L.R. (4th) 1 at 24–25 and 30 (S.C.C.) [hereinafter *Meiorin*] and *B.C. (Superintendent of Motor Vehicles)* v. *B.C. (Council of Human Rights)* (1999), 181 D.L.R. (4th) 385 at 393 and 394–95 (S.C.C.). It seems strange that *Charter* interpretation should cast off in a different direction from standard human rights interpretation. In *Meiorin*, discussing another issue of human rights interpretation, the Court emphasized the desirability of adopting an approach similar to that employed in *Charter* cases (at 22–23). One must wonder whether the partial onus shift in *Law* will eventually find its way into human rights interpretation.

## THE RELEVANCY OR FUNCTIONAL VALUES TEST

While the *Law* survey of equality jurisprudence referred to *Egan* and *Miron*, it did not attempt to reconcile the division in those cases regarding the incorporation into section 15(1) of a test of relevance of the ground of discrimination to the "functional values" underlying a law. In fact, the *Law* decision did not refer to the relevancy test at all in its synthesis of the principles of equality analysis. The relevancy test was advanced by a minority of the Court in both *Miron* and *Egan*,[77] was expressly criticized by other justices in those cases,[78] and has not subsequently obtained majority support. It is not explicitly included in the *Law* guidelines. Why then should the test be of any continuing concern?

One reason is that the justification advanced for the relevancy test, similar to the justification for the inquiry into human dignity in *Law*, was a perceived need to limit the circumstances in which differential and disadvantageous treatment based on enumerated or analogous grounds would give rise to a violation of section 15(1) requiring justification under section 1.[79] Another reason is that some of the same jurisprudence relied on to support the reformulated inquiry in *Law* was offered as precedential support for the relevancy test.[80] In addition, both the relevancy test and the search for a violation of dignity are expressly contextualized investigations.[81] Finally, the contextual factors that determine whether dignity has been demeaned may invite an analysis similar to the relevancy test.

The *Law* guidelines identified "some important contextual factors influencing the determination of whether section 15(1) has been infringed," including "the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others."[82] In general, it will "be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society."[83] Consideration of this factor, to a significant extent, has the same effect as the relevancy test. This is because an "actual" difference is a difference that is real or significant in context; in other words, a relevant difference in the setting of a challenged law, or a difference that is relevant to the goal or "functional values" of that law. This is demonstrated in the application of *Law* in *M.* v. *H.*, particularly in Gonthier J.'s dissenting judgment.[84]

*M.* v. *H.* challenged the restriction of maintenance provisions of the *Ontario Family Law Act* to opposite-sex couples. The justifiability of excluding same-sex couples depended on the purpose of the law and the relationship of the exclusion to that purpose. The majority found that the purpose of the challenged law was to allow "persons who became financially dependent in the course of a lengthy intimate relationship some relief from financial hardship resulting from the breakdown of that relationship."[85] This made it easy to dismiss any notion that the differential treatment corresponded with actual needs, capacities, or circumstances. It is obvious that same-sex couples, like opposite-sex couples, live in "conjugal relationships of a specific degree of permanence."[86]

Gonthier J., dissenting, found that the purpose of the law was to address the unique biological reality and social function of opposite-sex couples, with regard to procreation and the raising of children, and the resulting economic disadvantage for women within those couples.[87] This conclusion led to his view that actual needs, capacities, and circumstances in the context of this law differed depending on sexual orientation, and that because the differential treatment was based on a difference in "actual needs, capacity and circumstances," no discrimination was shown.[88] Gonthier J.'s analysis essentially replicated the analysis of LaForest J. in

---

77 *Miron, supra* note 16 at 702–3, and *Egan, supra* note 15 at 621–22.

78 *Miron, ibid.* at 741–44 per McLachlin J. and *Egan, ibid.* at 623–24, per L'Heureux-Dubé J., both expressing concern that the relevance test would not place limits on the purposes or functional values underlying challenged laws, and would lead to inquiries better suited to s. 1.

79 *Ibid.* at 620, per La Forest J.: "It would bring the legitimate work of our legislative bodies to a standstill if the court were to question every distinction that had a disadvantageous effect on an enumerated or analogous groups. This would open up a s. 1 enquiry in every case involving a protected group."

80 *Miron, supra* note 16 at 704–5 per Gonthier J., citing *Hess, supra* note 43 and *Weatherall, supra* note 46.

81 *Miron, ibid.* at 703–6; *Law, supra* note 3 at 39.

82 *Law, ibid.* at 40. See also the discussion at 27–32. The remaining factors were the existence of "pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue, ... the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society," and "the nature and scope of the interest affected by the impugned law." The first two factors in this list raise issues as to the relationship of s. 15(1) and s. 15(2), and mean that there will be a reduced need or none at all for reference to s. 15(2) where affirmative action programs are challenged as discriminatory: *Lovelace* v. *Ontario* [2000] S.C.J. No. 36 [hereinafter *Lovelace*].

83 *Law, ibid.* at 40. See also the discussion at 29–30.

84 *Supra* note 1.

85 *Ibid.* at 614.

86 *Ibid.* at 620.

87 *Ibid.* at 658.

88 *Ibid.* at 688.

*Egan*,[89] although in that case it was undertaken under the auspices of the relevancy test. Because LaForest and Gonthier JJ. addressed relevance to functional values, or correspondence with actual needs, under section 15(1), they were able to complete their analyses after finding general relevance or correspondence between child-bearing and the sexual orientation of couples. Had they been compelled to go on to apply section 1, they would have had to deal with difficult questions of proportionality. For example, neither Gonthier J. nor LaForest J. addressed the issue of minimal impairment of equality rights. In order to satisfy this part of the section 1 test, it would have to be shown that the equality rights of same-sex couples were impaired as little as reasonably possible for the achievement of the objectives of providing support to child-bearing couples and relieving against the economic disadvantage suffered by women in child-bearing relationships. Under the legislative schemes in question, same-sex couples were excluded even if they had children and even if one member of the couple took on a traditional mother's role and suffered economically as a result. On the other hand, opposite-sex couples were included in the schemes, regardless of whether they had or intended to have children. Further, the schemes gave rights to men in opposite-sex couples as well as women, although they presumably would not experience the type of economic disadvantage that was purportedly targeted. It is difficult to see how this impairment of equality rights could be described as reasonably necessary to the accomplishment of the stated objectives.

## Conclusion

In summary, the history of section 15(1) jurisprudence as outlined in *Law*, and *Law*'s requirement for a case-by-case, contextualized demonstration of a violation of human dignity under section15(1), are problematic in the following respects:

(1) There is little, if any reference to significant aspects of the *Andrews* rationale requiring section 15(1) and section 1 analyses to be kept analytically distinct, and the burden of justification for "suspect" government decisions to be placed on the government;

(2) The new approach adopts what was essentially the position of Wilson J. in *Hess* and *McKinney*, representing this as embodying a consensus by the Court, without setting out contrary views and their relationship to the above aspects of the *Andrews* rationale. Further, the Court in *Law* did not advert to previous occasions in which arguments based on an alleged lack of stereotyping or harm to dignity were raised by government to justify challenged laws, and were dismissed by the majority of the Court as not properly forming a part of section 15(1) analysis (as in *Andrews*, *McKinney*, and to some extent in *Benner*). Had these cases and arguments been fully addressed, the new approach to section 15(1) might have been differently formulated so as to maintain some distinction between the processes of identifying and justifying discrimination;

(3) The new approach ignores divisions of the Court in *Egan* and *Miron*, and thus rather than confirming the Court's rejection of the relevancy test, leaves open the possibility that it may come to incorporate that test.

Notwithstanding these concerns, the extent of the change in section 15(1) represented by *Law* should not be overstated. Hogg has assessed the impact of *Law* as follows:[90]

> The element of human dignity is a reversion to the idea that was rejected in *Andrews*, namely, that s. 15 should be restricted to unreasonable or unfair distinctions. Distinctions that impair human dignity are presumably much the same as unreasonable or unfair distinctions ... [B]y introducing this kind of evaluative step into s. 15, the relationship between s. 15 and s. 1 is confused, and s. 1 is left with little work to do. Moreover, any increase in the elements of s. 15 has the undesirable effect of increasing the burden of proof on the claimant.

In my view, the doctrine established in *Andrews* is far superior to the new human-dignity rule. It is simpler and less burdensome for the claimant to establish only a distinction based on listed or analogous grounds in order to show a breach of s. 15. Then it is up to the government to satisfy the elements of s. 1 justification.

While I agree that *Law* confuses the boundaries of section 15(1) and section 1, and increases the burden on a claimant, in other respects this may be somewhat of an exaggeration of the change wrought by *Law*. Even prior to *Law* there were rare cases, such as *Hess*, in which differential treatment based on enumerated or analogous grounds did not violate section 15(1). Further, it does not seem to have been the Court's intention to place on the claimant the full onus of proving that a distinction is

[89] *Supra* note 15 at 626–27.

[90] *Supra* note 33 at 52–24.

unreasonable or unfair. The Court in *Law* indicated that "often" a distinction based on enumerated or analogous grounds will violate human dignity because "the use of these grounds frequently does not correlate with need, capacity, or merit."[91] In the post-*Law* decision of *Corbière*, the majority reiterated the concept that enumerated or analogous grounds are "constant markers of suspect decision-making or potential discrimination."[92] It seems that there remains a presumption of some sort that distinctions based on enumerated or analogous grounds are discriminatory, as the Court continues to assert that it will *still* be only in "rare"[93] or "exceptional"[94] cases that these distinctions will not violate section 15(1). Further, *Law* provided qualifications to a claimant's burden of proof. A claimant should not be required to "prove any matters which cannot reasonably be expected to be within his or her knowledge,"[95] and some distinction between section 15(1) and section 1 should be maintained.[96] On the last point, however, the Court offered no guidance as to how this should be done.

It appears that the rare or exceptional cases have been multiplying in number. In *Law* itself, as well as the subsequent cases of *Winko*,[97] *Granovsky*,[98] and *Lovelace*,[99] differential treatment based on enumerated or analogous grounds was found not to violate human dignity and therefore not to contravene section 15(1). However, the discrimination complaint in *Winko* was similar to that made in *Swain*, where it was also rejected, and *Lovelace* dealt with the special circumstances and considerations involved when it is an affirmative action program that has been challenged. It is also noteworthy that while appellate courts in *Law* and *Granovsky*, applying the pre-*Law* approach to section 15(1), found *prima facie* violations of section 15(1), they also found the restrictions of equality rights to be justified under section 1. Typically, the result in a *Charter* case is unlikely to depend on the onus of proof, especially given the flexibility and contextuality of the burden of proof under section 1.

Nevertheless, there will be circumstances in which an increase in the onus on the claimant, and an opportunity for government to avoid the full section 1 proportionality test, will reduce the impact of the equality guarantee. *Eaton* and Gonthier J.'s judgment in *M.* v. *H.* are examples of this effect. In *Eaton*, because of difficulty in establishing which educational setting was in the best interests of a severely disabled child, the reversal of onus meant a switch from a decision in favour of the parents' wishes, to deference to the educational authorities. For Gonthier J. in *M.* v. *H.*, the *Law* guidelines circumvented the application of the full section 1 proportionality test. Thus Gonthier J. did not have to address the issue of whether the exclusion of same-sex couples from the legislative scheme was necessary in order to protect women or support child-bearing relationships.

Although *Law*'s effect on section 15(1) analysis may be limited, it does indeed represent a change rather than a mere continuation. Because this change was unacknowledged by the Court, no rationale for it was provided. Linking a distinction to enumerated or analogous grounds creates at least a potential for or suspicion of discrimination. What is wrong with placing the full onus on government to justify such distinctions? Why is the Court pulling back from this requirement?[100] *Law*'s introduction of subjectively defined limits to the scope of section 15(1) will in at least some cases compromise the scope or strength of the protection of equality that was formerly provided. Without a clearly defined rationale for this new approach, one is inevitably left with the concern that the Court's overt commitment to the protection of equality may be subject to covert qualifications.❑

**June Ross**
Faculty of Law, University of Alberta.

---

91 *Supra* note 3 at 35.
92 *Supra* note 2 at 13.
93 *Law, supra* note 3 at 49.
94 *Winko, supra* note 65 at 236.
95 *Law, supra* note 3 at 34.
96 *Ibid.* at 34–35.
97 *Supra* note 65.
98 *Granovsky* v. *Canada (Minister of Employment and Immigration)* (2000), 186 D.L.R. (4th) 1 (S.C.C.).
99 *Supra* note 82.

100 Hogg, *supra* note 33 at 52–25 asks a similar question.