EQUALITY FOR SOME

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Introduction

The Supreme Court of Canada appears to have taken a more generous approach in recent years to the interpretation of equality provisions under federal and provincial human rights legislation than it has in its interpretation and application of related guarantees under section 15 of the *Canadian Charter of Rights and Freedoms*[1].

Several decisions illustrate the Supreme Court's liberality concerning gender issues and other equality questions under human rights statutes. In *Brooks* v. *Canada Safeway Ltd*,[2] the Court held that an employee benefits policy which treated pregnant women detrimentally contravened provincial legislation prohibiting sex discrimination; and in doing so it rejected one of its own earlier decisions to the effect that distinctions based on pregnancy did not constitute sex discrimination.[3] In *Janzen* v. *Platy Enterprises Ltd*[4] it found an employer liable to two female employees for "discrimination on the basis of sex," contrary to provincial human rights legislation, as a result of sexual harassment of the women by a male co-employee in a position of apparent authority over them. The Court recognized and applied the concept of "systemic discrimination" under both provincial and federal human rights laws in *Re Ontario Human Rights Commission and Simpsons-Sears Ltd*[5] and *Action Travail des Femmes de C.N.R.*[6] In a recent decision, *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool*,[7] it applied the concept of "reasonable accommodation" in ruling that failure of an employer to make "reasonable accommodation" for the special religious needs of an employee constituted discrimination on the basis of religion contrary to a provincial human rights statute.

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[1]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter Charter].

[2][1989] 4 W.W.R. 193 (S.C.C.).

[3]*Bliss* v. *A.G. Canada*(1978), 92 D.L.R. (3d) 417 (S.C.C.).

[4][1989] 4 W.W.R. 39 (S.C.C.).

[5](1985), 23 D.L.R. (4th) 321 (S.C.C.).

[6](1987), 40 D.L.R. (4th) 193 (S.C.C.).

[7](S.C.C.) September 13, 1990.

In its first major rulings concerning equality rights under section 15 of the Charter, however, the Supreme Court of Canada has given equality seekers less to applaud. It is true that the Court's first major section 15 decision, *Andrews* v. *Law Society of British Columbia*,[8] contained much that was encouraging. A majority of the Court held that a statutory requirement of Canadian citizenship in order to practice law in British Columbia contravened section 15, and every judge called for a generous interpretation of the equality guarantee. McIntyre J. said:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.[9]

Wilson J. added:

> It is consistent with the constitutional status of section 15 that it be interpreted with sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come.[10]

Even LaForest J., who took a somewhat more restrained approach than his colleagues, remarked that the interpretation of section 15 should not be "out of keeping with the broad and generous approach given to other Charter rights... ."[11]

The decision also contained useful holdings to the effect that American precedents are of limited assistance, that decisions made under the *Canadian Bill of Rights*[12] will have limited application, and that experience under Canadian human rights legislation will often be germane to decisions under section 15(1) of the Charter.[13]The *Andrews* decision also contained some rather disturbing portents, however. Two call for attention here.

"Discrete and Insular Minorities"

The first of these was the adoption by McIntyre J. and Wilson J. of a singularly unhelpful phrase from American jurisprudence, "discrete and insular minorities," to describe those who are protected by section 15(1).[14] That phrase, which comes from a footnote in an entirely irrelevant 1938 United States Supreme Court

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[8][1989] 2 W.W.R. 289 (S.C.C.).

[9]*Ibid.* at 305.

[10]*Ibid.* at 324.

[11]*Ibid.* at 329.

[12]1960 (Can.), c.44 (R.S.C. 1970, App.III).

[13]See, generally, D. Gibson, *The Law of the Charter: Equality Rights* (Calgary: Carswell, 1990) at 48-51 [hereinafter *Equality Rights*].

[14]*Supra*, note 7 at 323-24.

decision,[15] has been used by American courts and writers as a label for the notion that the greatest benefit of equality rights under the American constitution should accrue to the members of certain disadvantaged groups.[16]

Although the use of that term had no immediate practical significance in the *Andrews* case, it played a crucial role in the next Supreme Court of Canada decision concerning section 15(1): *R.* v. *Turpin*.[17] The question in the *Turpin* case was whether a Criminal Code provision which entitled certain accused persons to trial by judge alone in some provinces, but not in others, violated the Charter's guarantee of equality "before and under the law," and of "equal protection and equal benefit under the law without discrimination ... ." The Court held, unanimously, that it did not. Madam Justice Wilson, who wrote for the Court, articulated, as the basis of her decision, a restrictive view of the scope of section 15(1) which derived from the concept of "discrete and insular minority." She linked the factor of disadvantage to the section's reference to "discrimination:"

> A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.[18]

This would have been a quite unexceptional statement if she had not characterized the disadvantage as existing "apart from and independent of" the immediate complaint. All discrimination unquestionably involves disadvantage to those it affects; benign distinctions are not prohibited. The type of disadvantage that Justice Wilson had in mind seems to have been something special, however: a *general* condition of disadvantage on the part of some group of which the particular claimant is a member; a disadvantage pre-dating the particular conduct complained of. She described the "purposes of section 15" as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society,"[19] and she stated that a decision as to whether such disadvantage existed would involve "[a] search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice ... ."[20] She rejected the claim that the Criminal Code discriminated against accused persons in certain parts of the country because of its uneven application since, she held, those persons "do not constitute a disadvantaged group

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[15]*United States* v. *Carolene Products Co.* (1938), 304 U.S. 144 at 152-3, note 4 (U.S.S.C.).

[16]See, for example: J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

[17][1989] 1 S.C.R. 1296 (S.C.C.) [hereinafter *Turpin*].

[18]*Ibid.* at 127.

[19]*Ibid.* at 123.

[20]*Ibid.*

in Canadian society within the contemplation of section 15."[21] As I have argued previously,[22] this approach to section 15(1) does violence to the language in which that provision is expressed and, more significantly, it severely truncates the protection promised by the provision.

The silliest aspect of the approach is the phrase "discrete and insular minorities," by which it has been labelled. The case in which the phrase was coined by Mr. Justice Stone of the United States Supreme Court in 1938 involved the constitutionality of federal legislation prohibiting the sale of certain milk substitutes.[23] The Court held that the legislation fell within the interstate commerce power of Congress, and that it did not violate "due process of law." In the course of discussing the latter point, Stone J. made tangential reference, in a footnote, to certain things the Court did *not* have to decide:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny ... than are most other types of legislation. .... Nor need we inquire whether similar consideration enters into the review of statutes directed at particular religious ... or national ... or racial minorities ...: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Several things should be noted about this statement. First, it referred to an issue the Court *declined* to deal with. Second, that issue related to constitutional protections – the due process clause and, by "incorporation" therein, the equal protection clause – which differ markedly from section 15 of the Canadian Charter. Third, the issue before the Court did not concern the scope of the constitutional protections, as the decision in *Andrews* did; it involved the appropriate level of "judicial scrutiny" to be applied. Fourth, the expression "discrete and insular minorities" does not seem to have been used with any restrictive intent; while it provided Stone J. with a convenient label for groups that experience discrimination, there was no indication that he was attempting to define the category exhaustively.

Finally, the phrase "discrete and insular minorities" contains little that assists

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[21] *Ibid.*

[22] See *Equality Rights*, *supra*, note 13 at 150-57; D. Gibson "Equality Rights Under the Charter" in F.E. McArdle, ed., Cambridge Lectures: Can. Inst. for Advanced Legal Studies (Montreal: Editions Yvon Blais, 1990).

[23] *Supra*, note 15. See L. Lusky, "Footnote Redux: A Carolene Products Reminiscence" (1982) Col. L.R. 1093; G.J. Erlier, "Equal Protection and Personal Rights: The Regime of the Discrete and Insular Minority" (1982) 16 Georgia L.R. 407. The following remarks are drawn from *Equality Rights*, *supra*, note 13.

us to define those who commonly experience discrimination. "Discrete" simply designates distinctiveness, without which discrimination could not occur in the first place. "Minorities" is misleading, since if applied to sex discrimination it would restrict Charter protection to males, who are less numerous than females in Canada. "Insular" is even more troublesome, since it reflects an out-dated approach to the proper treatment of discriminated groups. In 1938, when Mr. Justice Stone wrote, most victims of discrimination were "ghettoized," or otherwise isolated, and this insularity was generally thought to be appropriate. Blacks and whites lived in different neighbourhoods. Indians were expected to stay on their reservations. The disabled were restricted, for the most part, to special institutions. Woman's proper place was thought to be in the home. "Separate but equal" was the motto. One of the major revolutions of recent decades has involved the recognition that such insularity is undesirable. "Integration" and "mainstreaming" are now the bywords. But as neighbourhoods and work forces integrate, and women and the disabled move toward equal participation in all aspects of life, discrimination is not disappearing, at least not in the short run. If the Charter's protection against discrimination were restricted to those who are still in "insular" situations, the promise of section 15 would be cruelly crushed.

Much more than the label is at fault, however. What is most damaging to equality rights from this aproach is its restriction of the benefit of section 15(1) to members of groups which are under some pre-existing group disadvantage. The reasons for judgement of both Wilson J. and La Forest J. in *Andrews* drew attention to the fact that the "group factors" specified in section 15(1) can be considered bases for the vulnerability of certain groups to social or economic disadvantage because of relative political powerlessness. Both suggested the possibility of restricting the protection of section 15(1), at least so far as unspecified grounds of discrimination are concerned, to members of minorities and other groups that lack sufficient influence to ward off disadvantage. Madam Justice Wilson's judgement in *Turpin* took that suggestion even further.

The emphasis on groups is perplexing. Section 15(1) of the Charter makes no reference to groups. On the contrary, its protection is stated to be available to "every individual." Madam Justice Wilson herself pointed out in *Turpin* that equality before the law under section 15(1) of the Charter is designed to ensure that "all persons" are equally subject to both the demands and the burdens of the law.[24] The special "affirmative action" exemption in section 15(2) does mention "groups," but even it is equally applicable to "individuals." The effect of Madam Justice Wilson's interpretation in *Turpin*, if generally adopted, would be to restrict the term "individual" in both parts of section 15 to individuals who are members of groups that are generally disadvantaged apart from the particular inequality complained of. This would constitute a major shrinkage of the protection

[24] *Supra*, note 17 at 123.

guaranteed by section 15(1), quite out of line with the generally generous interpretation the Court has given to equality guarantees under human rights legislation, and to other provisions of the Charter itself.

Is it fair to say that all the prohibited forms of discrimination listed in section 15 necessarily involve people who are generally disadvantaged or politically powerless? Historically, there can be no doubt that the most frequent victims of discrimination have been members of disadvantaged minorities (non-whites, non-Christians, the aged, the disabled and so on) and others who, though not minorities, lack effective influence on the community. (The latter category would include women who constitute a numerical majority in Canada, and the poor, who might well also be in the majority, depending on how poverty is defined.) Yet section 15(1) does not on its face address the plight of those traditional groups of victims. It prohibits discrimination "based on race," rather than "discrimination against non-whites," for example. To interpret "discrimination based on ... sex" as meaning "discrimination against women" would require a gross distortion of the words used. Grammatically, section 15 prohibits discrimination on the grounds listed, without regard to the victim's economic, social or political status. It is true that subsection (2) refers to "disadvantaged individuals and groups," but that is an *exception* clause, stipulating that special affirmative action measures to assist the disadvantaged are not precluded by the general prohibition of discrimination in subsection (1). This cannot be reasonably construed to restrict the general ambit of subsection (1) to situations of disadvantage; indeed it could be read as confirming that apart from the special exception it creates, governmental discrimination against *anyone*, high or low, majority or minority, influential or voiceless, is proscribed by section 15 of the Charter.[25]

Even if grammar were ignored, treating the section 15 specifics as relating only to discrimination against the disadvantaged would raise other difficulties. The implications would logically extend beyond the question of identifying "analogous" grounds to the application of even those that are listed; no protection would be available for discrimination against whites, Christians, males, or the middle-aged. Not in most circumstances, at least, which brings us to the next difficulty.

The notion of a "disadvantaged group" is a flexible concept, highly dependent upon context. Generally speaking, anglophones are members of the favoured linguistic majority in Canada, for example, but in Quebec they are in the minority. Would discrimination against anglophones be prohibited in Quebec, but permitted in Ontario? What about discrimination against francophones by municipal officials

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[25]See J. Ross, "Levels of Review in American Equal Protection and under the Charter" (1985-86) 24 Alta. L. Rev. 441 at 445-46. See also the remarks of Powell J. concerning the "artificial line of a 'two class theory' " and the difficulty of distinguishing minorities from majorities in *Regents of Univ. of California* v. *Bakke* (1978), 985 S.C. 2733 (U.S.).

in predominantly anglophone areas of Quebec?

Another problem relates to the notion of powerlessness. Since there are more women than men in Canada, it could be argued that women have all the power they need to protect themselves by political action; it is simply a question of marshalling their electoral strength and using it effectively. If that argument is valid, sex discrimination does not involve a category of powerless persons. Perhaps the argument is not valid. Numbers do not necessarily mean power, even in a democracy.[26] Social and economic pressures have, at least in the past, prevented women from exercising political power in a concerted and effective fashion; but is it realistic, or desirable, to expect the courts to stop dealing with discrimination against women at the point where they feel women have become sufficiently effective in the political arena? If so, what indicia of power should the courts employ?

Because the *Turpin* case concerned a very minor (and, by the time the case was decided, spent) provision of criminal law, and did not appear to engage the Court's full attention, it would be tempting to treat it as an aberration. In view of its unfortunate potential ramifications, it is to be hoped that it will be so regarded in the future. It cannot be overlooked, however, that *Turpin* was a unanimous decision of the Supreme Court of Canada, and that the comments of Madam Justice Wilson about the restrictive application of section 15(1) constituted part of the ratio decidendi of the case. Those comments were, moreover, applied by the Court, again unanimously, in *Wolff* v. *The Queen*,[27] and they have been applied by lower courts in several cases.[28]

Happily, Madam Justice Wilson left two doors slightly ajar. She raised, but did not settle, the possibility that section 7 of the Charter might contain an implicit equality guarantee broader than that to be found in section 15(1).[29] She also prefaced her remarks about group disadvantage with the acknowledgement that such disadvantage must be present in "most but perhaps not all cases."[30] We will return to the latter proviso below.

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[26]In *Frontiero* v. *Richardson* (1973) 411 U.S. 677, at 682, n. 17 (U.S.S.C.), Brennan J. correlated under-representation in "decision-making circles" with political powerlessness. Ely, *supra*, note 16 at 151-2, suggested that blacks might not qualify for protection under the discrete and insular test any longer, given their growing influence in the United States. For a discussion of possible criteria of powerlessness in this context, see M.J. Ball, "Minorities and the Supreme Court" (1974) 59 Iowa L.R. 1054 at 1074.

[27][1990] 1 S.C.R. 695 at 702 (S.C.C.).

[28]For example, *Rheaume* v. *A.G. of Ontario* (1989), 70 O.R. (2d) 602 (H.C.); *Haddock* v. *A.G. of Ontario* (1990), 73 O.R. (2d) 545 (H.C.).

[29]*Supra*, note 17 at 128.

[30]*Ibid.* at 126.

"Similarly Situated"

Another disturbing thing about the *Andrews* decision was its confusing treatment of the difficult problem of determining appropriate standards of comparison. The right to equality is meaningless until we know the answer to the question: "equal compared to what or whom?" In principle, a simple answer to that question has been accepted since at least the time of Aristotle: equality involves "treating likes alike and treating unalikes differently." Since no two persons and no two circumstances can ever be identical, this means according *similar* treatment to *similar* situations. But what standard of similarity is required? Which differences of detail can be properly disregarded when deciding whether equal treatment is called for?

Prior to the Supreme Court of Canada's decision in the *Andrews* case, Canadian courts had begun to develop a "similarly situated" test whose key was the relevance or irrelevance of a particular difference between situations to the overall purpose of the activity involved. If the activity was the teaching of mathematics in public schools, for example, a difference of instructional content between what was taught to boys and to girls would not be justified because both sexes are equally needful of and qualified for mathematical instruction. If the activity was the provision of appropriate washroom facilities for boys and girls in public schools, certain differences would be generally accepted as appropriate. The sexes are not entirely similarly situated in that regard. In a middle range of situations, such as sex education for boys and girls in public schools, with respect to which there are sharp differences of opinion about the appropriateness of distinctive treatment, the "similarly situated" test would consult prevailing community (in other words, majoritarian) standards. In some communities the prevailing view would be that boys and girls are not similarly enough situated to justify mixed-gender classes, in others the matter would be seen quite differently.[31]

While most Canadian courts adopted some form of "similarly situated" test prior to *Andrews*, some declined to do so,[32] and there was also some academic criticism of the test.[33] In *Andrews*, Mr. Justice McIntyre, with the apparent approval of his colleagues, roundly condemned the concept, as he understood it.

It will be remembered that the *Andrews* case offered the Supreme Court of

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[31]See, generally, *Equality Rights*, *supra*, note 13 at 58-81.

[32]See, for example, the remarks of J.A. Kerans in *Mahe* v. *R.* (1987), 42 D.L.R. (4th) 514 at 546 ff. (Alta. C.A.), and in *Cabre Exploration Ltd* v. *Arndt* (1988), 51 D.L.R. 451 at 454 ff. (Alta. C.A.).

[33]For example: M.D. Lepofsky and H. Schwartz, "Constitutional Law – Charter of Rights and Freedoms – Section 15 – An Erroneous Approach to the Charter's Equality Guarantee" (1988) 67 Can. Bar Rev. 115 at 121 ff.

Canada its first significant opportunity to comment on the substance of section 15. At issue was the constitutionality of British Columbia legislation requiring that the lawyers of that province be citizens of Canada. The majority of the Court struck down the legislation on the ground that it violated the equality rights of non-citizens who were otherwise fully qualified to practise law in British Columbia. Mr. Justice McIntyre, along with Mr. Justice Lamer, dissented from that conclusion on the ground that, in their opinion, the citizenship requirement was justified under section 1 of the Charter as a "reasonable limit in a free and democratic society." Despite his dissenter status, however, a number of Mr. Justice McIntyre's general observations about section 15 were approved by members of the majority, and this appears to have been the case with his comments about the notion of being "similarly situated."

The McIntyre critique began by acknowledging that the "similarly situated test," a "restatement of the Aristotelian principle of formal equality," had been "widely accepted with some modifications in both trial and appeal court decisions throughout the country."[34] He then took strong issue with the notion, as he understood it:

> The test as stated ... is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. The similarly situated test would have justified the formalistic separate but equal doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 ... (1896). ...
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> I would also agree with the following criticism of the similarly situated test made by Kerans J.A. in *Mahe v. Alta. (Govt.)*, 54 Alta.L.R. (2d) 212 at p. 244 ...:
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> > ... the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity...[35]

He pointed out[36] that the Supreme Court of Canada was already on record in *R.* v. *Drybones*[37] as denying that the right to equality can be satisfied, "so long as all the other members" of the same racial group are being discriminated against in the same way.

This indictment is wholly warranted with respect to certain misapplications of the "similarly situated" concept, which equate "similarly" with "identically," and

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[34]*Supra*, note 8 at 301.

[35]*Ibid.* at 301, 302.

[36]*Ibid.* at 301-302.

[37](1969), 9 D.L.R. (3d) 473 at 484 (S.C.C.).

seize upon any distinction between persons or groups to justify unequal treatment, regardless of how important or irrelevant the distinction might be. To contend that males and females are not "similarly situated" with respect to their right to educational opportunities, for example, merely because of their differing physiques or their differing roles in the reproductive process, would be altogether unacceptable. But such reasoning is a perversion of the "similarly situated" concept. Properly applied, the measure provides no support for such ludicrous contentions. "Similarly" does not mean "identically," and it is only those similarities and differences that are reasonably *relevant* to the situation in question that are properly taken into account when comparisons are made. Turning to Mr. Justice McIntyre's illustrations, German Jews *were* "similarly situated" to other citizens of Nazi Germany vis-a-vis their moral entitlement to fair and humane treatment; American blacks were not *relevantly* different from whites, vis-a-vis their need for and right of access to governmental services, at the time of the *Plessy*[38] case; Canadian Indians *are* similar to all other Canadians in their right to fair treatment by laws and legal institutions. The "similarly situated" standard, applied in the fair and common-sense manner that most modern courts have employed it, would indicate a right to equal treatment in all those situations.

It cannot be denied, however, that there is a risk that unthinking or wrong-headed applications of the "similarly situated" test could result in denial of equal treatment to persons or groups that are substantially similar in all relevant respects. Mr. Justice McIntyre's concern about this risk caused him to reject such misapplications of the test as those he cited:

> For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.[39]

While these words could be construed, if read in a vacuum, as a complete rejection of the "similarly situated" idea, it would be a mistake to do so.[40] What was rejected was employment of the notion "as a fixed rule or formula." It seems clear from his preceding remarks that Mr. Justice McIntyre intended this

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[38]The problem posed by the pernicious "separate but equal" doctrine was not one of refusing to recognize that blacks and whites were similarly situated in respect of their right to equal services; it was one of not affording services that were truly equal once that right was theoretically acknowledged.

[39]*Supra*, note 8 at 303.

[40]Madame Justice Wilson fell into this error, it is submitted, in her obiter dictum comment in *Turpin*, *supra*, note 17 at 126, that the similarly situated test was "clearly rejected by this Court in *Andrews*." It is true, however, that La Forest J. made a similar assertion, on behalf of a majority of the Court, quite recently. See *infra*, note 44, and associated text.

to mean applications of the test that would permit unequal treatment to be excused by any differences between persons or groups, without regard to whether the differences were relevant to the activity in question. This is what he understood by the "similarly situated" test. Such blind or mischievous uses of the formula stand condemned.

The essence of the exercise involved in the "similarly situated" test remains, however. Mr. Justice McIntyre stressed that equality is "a comparative concept," the discernment of which requires "comparison with the condition of others in the social and political setting in which the question arises."[41] It is precisely this comparative function that courts have been performing when seeking to determine whether persons or groups are "similarly situated" enough to be entitled to equal treatment. Mr. Justice McIntyre insisted that the exercise must be carried out in a sophisticated manner, with due regard to the many differences of which governments must legitimately take account:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of section 15 of the Charter. ... [L]egislatures may - and to govern effectively - must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main pre-occupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. ... [F]or the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.[42]

The "similarly situated" standard, properly applied, provides a rubric under which courts may draw the line between those distinctions that are acceptable and those that are not.

The emphasis placed in the foregoing paragraphs on Justice McIntyre's treatment of the "similarly situated" test in *Andrews* might not be justified if it were not for the fact that in *Turpin* Madam Justice Wilson, speaking for a unanimous Court, stated that the test had been "clearly rejected by this Court in *Andrews*."[43] Very recently in *McKinney*. v. *University of Guelph*,[44] Mr. Justice

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[41]*Supra*, note 8 at 299. Wilson J. seemed to agree with this approach when she commented in *Turpin*, *supra*, note 17 at 128, that "s.15 mandates a case-by-case analysis ... to determine 1) whether the distinction created by the impugned legislation results in a violation of one of the quality rights and, if so, 2) whether that distinction is discriminatory in its purpose or effect." That "case-by-case analysis" cannot be performed effectively without employing some form of situational comparison, however it may be labelled.

[42]*Supra*, note 8 at 303.

[43]*Turpin, supra*, note 17 at 126. But see her acknowledgement that "case by case" analysis is needed: *supra,* note 41.

[44][1990] S.C.J. #122, Dec. 6, 1990 at 34.

LaForest made a similar assertion on behalf of a majority of the Court:

> The second argument was that the similarly situated test is still the governing test, provided it is not applied mechanically. Simply put, I do not believe that the similarly situated test can be applied other than mechanically, and I do not believe it survived *Andrews* ... .

Yet how could that be? How can a court facing an equality issue avoid somehow determining whether the person or group relying on section 15 is sufficiently similar to other persons or groups in relevant respects to merit equal treatment? The Supreme Court of Canada did precisely that in *Wolff*[45]. The issue in that case was whether the statutory immunity of the Crown in the Right of Canada from being sued elsewhere than in the Federal Court of Canada offended section 15(1) of the Charter, and in holding for a unanimous Court that it did not, Mr. Justice Cory explained:

> With respect to the issue of whether the appellants have received unequal treatment, it must be apparent that the Crown cannot be equated with an individual. The Crown represents the State. It constitutes the means by which the federal aspect of our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in the right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the Federal Government.
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> .....
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> ... In the circumstances of the case at bar, the Crown is simply not an individual with whom a comparison can be made to determine whether a section 15(1) violation has occurred[46].

Or, to put it in pre-*Andrews* language, the Crown and private individuals were not "similarly situated."

Perhaps it is only the label that has been rejected. The "similarly situated" label is not the only one by which this essential judicial task could be designated. Both McIntyre J. and La Forest J. described inequality in terms of detrimental differential treatment based on "irrelevant personal differences."[47] This was perhaps an invitation to substitute a "relevance" test for the long-standing but sometimes misapplied "similarly situated" standard. Another appropriate label for the process might be "comparability." It really does not matter what the exercise is called, so long as it is carried out with the situational awareness that Mr. Justice McIntyre emphasized.

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[45]*Supra*, note 27.

[46]*Ibid.* at 701.

[47]See Equality Rights, *supra*, note 13, Chapter IV, text associated with note 189ff.

Whatever the Court may have intended, the legacy of *Andrews* has included much unfortunate confusion on the subject of standards of comparison.

The Hess Case

The Supreme Court of Canada had a recent opportunity to reconsider the "discrete and insular" and "similarly situated" standards, along with other aspects of equality rights under the Charter, in *Hess and Nguyen* v. *The Queen*[48]. The issue there was whether section 146(1) of the Criminal Code (since repealed), which made it an offence for a male person to have sexual intercourse with a female person, not his wife, under the age of fourteen years, whether or not he believed that she was fourteen years of age or more. The appellants, both men accused of violating this provision, attacked its constitutionality on two grounds:

(a) that by denying the defence of honest and reasonable mistake as to age it offended principles of "fundamental justice" under section 7 of the Charter; and
(b) by restricting its ambit to male offenders and female victims it discriminated on the basis of sex, thereby contravening the guarantees of equality before and under the law and equal protection and benefit of the law enshrined in section 15(1) of the Charter.

On the first argument, a majority of the Court agreed with the accused. The majority, whose reasons were written by Madam Justice Wilson, held that it violated principles of fundamental justice under section 7 of the Charter to impose criminal liability with a potential maximum punishment of life imprisonment on a person who, by reason of honest and reasonable error, might have had no *mens rea* with respect to an essential element of the offence. The dissenting judges agreed on this point as well.

Where the dissenters and the majority judges divided was as to the applicability of section 1 of the Charter. The dissenters were of the view that the imposition of absolute liability for having intercourse with females under fourteen constituted a "reasonable limit ... demonstrably justified in a free and democratic society," and could accordingly be upheld under section 1 of the Charter. Madam Justice McLachlin, who wrote for the dissenters, pointed out that "[T]he offense of 'statutory rape', as it is commonly referred to, is so embedded in our social conscience," that it "represents the Canadian equivalent of a tradition which is known throughout the western democratic world," and that "[i]t has survived innumerable constitutional challenges in the United States."[49] She held that the

[48](S.C.C.) October 4, 1990 [unreported].

[49]*Ibid.* at 15. Reasons of McLachlin J.

objectives of the legislation were to protect children from pregnancy, physical and emotional harm resulting from early sexual intercourse, and exploitation through prostitution, as well as to protect society from consequential social problems. In her view those objectives were "pressing and substantial" and the means by which Parliament chose to achieve them were reasonable within the meaning of section 1. While the majority agreed that the objectives of the legislation were sufficient to satisfy section 1, they held that those objectives did not justify means as draconian as depriving accused persons of the defense of mens rea. The majority pointed out that Parliament has recently repealed the section in question, replacing it with a provision in which a defense of "due diligence" with respect to the age of the girl is permitted. This, they held, indicated that it was possible to achieve the objective of section 146(1) without doing as much harm to the Charter rights of accused persons as that provision did.

The majority and minority also differed concerning the second arm of the accused's Charter attack: that which was based upon equality rights under section 15(1). The dissenters were of the view that the impugned provision constituted sex discrimination, contrary to the equality guarantee to the Charter, but that, again, the discrimination was justified as a "reasonable limit" on the accused's equality rights in accordance with section 1 of the Charter. The majority rejected the view that there was even a prima facie violation of equality rights. It is the Court's disposition of the equality arguments upon which I wish to comment.

"Discrete and Insular Minorities" Fade

The *Hess* decision contains some evidence, though it is suggestive at best, that the Supreme Court may be willing to reconsider its previous statements concerning "discrete and insular minorities" and pre-existing group disadvantage. The Crown, in defending the impugned provision from the attack based on section 15, had seized upon Madam Justice Wilson's statement about "discrete and insular minorities" in *Turpin*, and had argued that section 146(1) could not be discriminatory against males, since males do not, as a group, constitute a "discrete and insular minority" prone to disadvantage independent of the particular distinction being challenged.[50] Madam Justice McLachlin, writing for the dissenters, was very cautious in her treatment of the *Turpin* decision. While acknowledging, and quoting, the restrictive words of Madam Justice Wilson in that case, upon which the Crown relied, she admitted only: "This language lends itself to the argument that ..."[51] and: "some of her words ... may be read as suggesting ..."[52] arguments like those raised by the Crown. She rejected the argument on two grounds, one

[50] *Ibid.* at 10. Reasons of McLachlin J.

[51] *Ibid.*

[52] *Ibid.* at 9.

of which is uniquely relevant to gender discrimination, and the other of which is more general in its implications.

First, she held, the Court must construe section 15, together with all other Charter rights, in the light of section 28:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

In light of this provision, she held, it would not be possible to treat discrimination against males differently than discrimination against females under the Charter.[53] The second reason for rejecting the Crown's "discrete and insular" argument went beyond the special situation of gender discrimination:

> Moreover, the qualified language use in *Turpin* suggests that the Court viewed the so-called requirement of independent disadvantage not as an absolute requirement for a finding of discrimination, but rather as an element which would be found in many of the cases where discrimination is found. Thus Wilson J. states that a search for independent disadvantage applies 'in most but not perhaps all cases' and says that finding a 'discrete and insular minority' is 'merely one of the analytical tools which are of assistance.' In my view, the essential requirements for discrimination under section 15 remain as set forth in *Andrews*.[54]

Even if Madam Justice McLachlin had been writing for the majority, this would not constitute a clear about-face by the Court on the question of "discrete and insular minorities." One senses discomfort with the *Turpin* test, however, and a desire to downplay its significance.

What may make the decision especially important, so far as the "discrete and insular" question is concerned, is the fact that Madam Justice Wilson, who authored the *Turpin* decision, and who also wrote for the majority in this case, made absolutely no reference to the "discrete and insular" test in her discussion of section 15. While it is rare for the Supreme Court of Canada to kill outright any idea for whose conception it has been responsible, the Court has sometimes shown itself willing to quietly remove life-support systems from an idea whose viability is dubious. This may just possibly have happened in *Hess* to the concept of "discrete and insular minorities." *Let us hope so.*[55]

Confusion Persists About the "Similarly Situated" Test

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[53] *Ibid.* at 10-11.

[54] *Ibid.* at 11.

[55] It has to be acknowledged, however, that even McLachlin J. took a group approach at one point in her reasons for judgment by stating that: "First, an inequality or distinction in the treatment of *members of groups* must be established." (*Ibid.* at 7, emphasis added).

The majority of the Supreme Court of Canada in *Hess* carried out a "similarly situated" analysis, albeit without identifying it as such. Madam Justice McLachlin, for the dissenters, eschewed the exercise, holding that the mere existence in the legislation of a distinction based on sex established a prima facie breach of section 15, which could be justified only by reference to section 1:

> *Andrews* lays down that it is sufficient to establish a violation of section 15 to show that a distinction is drawn on the enumerated or analogous grounds, and that the distinction results in a burden being placed on the complaining individual or group. Once this hurdle has been cleared the analysis moves to section 1.[56]

The majority found it unnecessary to refer to section 1, however, since the distinction between males and females in section 146(1) did not in their view constitute prima facie discrimination. The reason it did not constitute discrimination, in the opinion of Wilson J., was that "the impugned provision creates an offence that involves acts which, as a matter of fact, can only be committed by one sex...".[57] To reach that conclusion it was necessary for Madam Justice Wilson to determine whether males and females are equally capable of performing the acts prohibited by the provision, and equally in need of the protection established by the provision for the victims of such behaviour. Although she did not acknowledge the fact, Madam Justice Wilson was here engaging in an application of the "similarly situated" test.

While the Court's recognition, in deed if not in words, that it cannot always avoid comparing the similarity of situations is welcome, the manner in which the exercise was carried out in this case is open to serious criticism. The reasoning of Wilson J. began with the assertion that it would not be discrimination to prohibit self-induced abortion by women, and not by men, since only women are capable of experiencing pregnancy.[58] She then drew attention to the Criminal Code's definition of the activity prohibited by section 146(1); sexual intercourse:

> For the purposes of this Act sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted (section 3(6)).

From that definition she drew the conclusion that:

> The Legislature was of the opinion that, because only males ... were physically capable of penetrating another person, only they needed to be listed as potential accused. ... [G]iven that only males may be penetrators, it is as absurd to suggest that the provision discriminates against males because it does not include women in the category of potential offenders as it is to suggest that a provision that

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[56] *Ibid.* at 8.

[57] *Ibid.* at 22. Reasons of Wilson J.

[58] This statement seems indisputable, so far as it goes. It is submitted, however, that a Criminal Code which prohibited *only* self-induced abortion, and not forms of abortion which males are capable of performing, would violate section 15(1) of the Charter.

> prohibits self-induced abortion is discriminatory because it does not include men among the potential class of offenders.[59]

Here is a logical leap of Olympic proportions. Penetrators are confused with perpetrators. The fact that penetration is necessary to constitute sexual intercourse for the purposes of section 146(1) in no way implies that the penetrator must be the wrongdoer and the penetratee the victim. The seduction of a physically mature thirteen year old boy by an older woman would fully satisfy the definition of "sexual intercourse" if penetration ensued. Therefore, it is submitted, a female offender would be "similarly situated" to a male offender vis-a-vis intercourse with someone under the age of fourteen.

It is also submitted that male and female *victims* of sexual activity under fourteen are similarly situated. There is one significant difference, of course, in that some females are susceptible to pregnancy and males are not. Given, however, that the crime included intercourse with pre-pubescent girls, and that the Court was unanimously of the opinion that the purpose of section 146(1) went beyond the avoidance of youthful pregnancy, that difference would not be sufficient to justify the exclusion of boys from the protection of the provision. McLachlin J. listed several objectives of the provision, of which "the need to protect ... [girls] ... from the consequences of pregnancies with which they are ill-equipped to deal from the physical, emotional and economic point of view" was only one.[60] While Madam Justice Wilson, for the majority, declined to accept as broad a view of the purposes of section 146(1) as her colleague, even she acknowledged that the section is designed to protect children from much more than the danger of pregnancy.[61] In her view, the "primary objective" of the provision was "to protect children from premature sexual intercourse,"[62] and she acknowledged that "some older women do ... on occasion seek to have sex with males under fourteen years of age."[63] She also acknowledged that young boys could be the victims of homosexual penetration, and that "a very young male who is sodomized and a young female who has sexual intercourse are ... equally likely to suffer physical and psychological harm as a result of these experiences."[64] She eliminated homosexual penetration from the ambit of section 146(1), however, for the unconvincing reason that at the time that section was in force, another provision of the Criminal Code prohibited all forms of buggery, even between consenting adults, though with a lesser maximum sentence than that which was imposed by

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[59] *Supra*, note 43 at 24.

[60] *Ibid.* at 16. Reasons of McLachlin J.

[61] *Ibid.* at 11-12. Reasons of Wilson J.

[62] *Ibid.* at 12.

[63] *Ibid.* at 24.

[64] *Ibid.* at 25.

section 146(1).[65]

Of course boys and girls are not *identical* in the harm they may suffer from premature sexual activities. Of course men and women are not *identical* in the ways in which they can force their sexual attentions on children. But the right to equality is not restricted to situations that are entirely identical. If it were, it would be a meaningless norm, since no two circumstances are ever identical. What the guarantee of equality demands is that *similar* situations be treated *similarly*. With respect to sexual activities under the age of fourteen, males and females are similarly situated, it is submitted, whether they be victims or perpetrators. Boys and girls are equally susceptible to the possibility of grievous psychological and physical harm from such outrages; and males and females are equally capable, in certain circumstances, of inflicting such outrages on children.

This means, in the writer's view, that section 146(1) of the Criminal Code did violate the guarantee of sexual equality contained in section 15(1) of the Charter, at least in a prima facie sense. Whether the provision ought to have been saved by section 1, as a reasonable limit in a free and democratic society, as the dissenting judges and Mr. Justice Sopinka held, would depend, in my view, on whether it was within the remedial power of the Court to remove the gender discrimination from the provision, without striking down the entire section. That question will be addressed next.

Remedies

Having found that section 146(1) violated section 7 of the Charter because it imposed absolute liability, the majority of the Court performed judicial surgery on the section, by holding that the words "whether or not he believes that she is fourteen years of age or more" were of no force or effect, and ordered new trials for the accused persons on the basis of "the section shorn of its offensive words."[66] This conservative remedial response by the Court is to be applauded. I have urged elsewhere that courts should employ such fine-tuned remedies in Charter challenges to legislation, whenever possible, rather than indiscriminately striking down the good with the bad.[67]

What would have been the appropriate response if the Court had agreed with the writer that section 146(1) had also violated the Charter's guarantee against sex discrimination? It is submitted that judicial surgery would also have been

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[65]*Ibid.* at 25-26.

[66]*Ibid* at 29. Reasons of Wilson J.

[67]See: D. Gibson, "Non-Destructive Charter Responses to Legislative Inequalities" (1989) 27 Alta. L.R. 181.

appropriate in that case, although the problem would admittedly have been complicated by the need for certain "plastic surgery." The provision, after the removal of the words which offended section 7 of the Charter, read as follows:

> Every male person who has sexual intercourse with a female person who
> (a) is not its wife, and
> (b) is under the age of fourteen years,
> is guilty of an indictable offence and is liable to imprisonment for life.

It would have been a simple matter to strike out the words "male" and "female" from the opening clause. The reference to "his wife" in clause (a) would have constituted a problem, however. To leave those words in would have perpetuated the sexual inequality of the provision, but to strike them out would substantially have altered the nature of the offence, by criminalizing sexual intercourse under fourteen even within the bounds of marriage. The only satisfactory solution to the problem would therefore have been to insert the words "or her husband" after the word "wife."

Courts are understandably reluctant to tamper unduly with legislation, and although they often find it necessary to strike down legislative provisions or portions thereof on constitutional grounds, many judges would balk at the prospect of adding *new words* to a statute in order to ensure its constitutionality. But think about the alternatives in a situation like this one. Striking down either the entire section or the words "his wife" would be *more intrusive* into the prerogative of legislators than the solution proposed. If Parliament decrees that it is a crime to have sex with a female under fourteen, and the Charter decrees that it is unconstitutional to restrict the victims of that crime to females, the most conservative, least disruptive, solution the courts could adopt would be to extend the crime to include male victims by, in effect, treating "wife" as if it were "spouse." The courts have often used the technique of "reading down" an overly broad legislative provision so as to make it comply with constitutional limitations; it would be no more "legislative" on their part to "read in" minor amendments where necessary to achieve the same purpose. From time to time, Canadian courts have expressed a willingness to do so,[68] and they have occasionally acted upon that willingness.[69]

Only if a court were unwilling to read in the words "or her husband," or to substitute "spouse" for "wife," would it be justified, in my opinion, to employ section 1 of the Charter to save a provision like this from an attack under section

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[68]See remarks of Angers J.A. in *Association of Parents for Fairness in Education* v. *Minority Language School Board* (1987), 40 D.L.R. (4th) 704 (N.B.C.A.).

[69]For example: *Re Professional Institute of the Public Service of Canada and Commissioner of the North West Territories* (1988), 53 D.L.R. (4th) 530 (N.W.T. C.A., per Kerans, J.A.).

15(1). It is submitted, in other words, that a "free and democratic society" would be less justified in permitting sexual exploitation of all children under fourteen than in doing so only with respect to boys. But in the writer's view the proper response for the courts of a free and democratic society, possessing an equality guarantee like that set out in section 15(1) of the Canadian Charter of Rights and Freedoms, would be to find that any proscription of the sexual exploitation of children applies equally to girls and boys.

Affirmative Action

There has been considerable confusion about the applicability of section 15(2) of the Charter, which permits certain "affirmative action" programs whose object is to ameliorate conditions of disadvantaged individuals or groups.[70] Those who seek to defend legislation or government programs that discriminate against males sometimes contend that the discrimination can be justified as affirmative action. In some cases, of course, this is true, but in many cases it is not, since the law or program in question is not aimed at the amelioration of conditions of disadvantage for females.

In the *Hess* case, the Crown argued that section 146(1) constituted a form of "affirmative action" in favour of young females. Madam Justice McLachlin disposed of that argument, justifiably it is submitted, as follows:

> It cannot be said in any way that young females benefit from the failure of section 146(1) to protect young males or to treat male and female offenders similarly. Section 146(1) does not constitute a true 'affirmative action program,' in the terms of the marginal note to section 15(1).[71]

This is a useful ruling because it confirms that not every law, program or activity which treats one group of people less favourably than another can be considered affirmative action vis-a-vis the preferred group. A law that denies drivers licences to persons under the age of 16 is not intended, for example, to remedy some disadvantage of persons over 16. In the *Hess* case the denial to boys of protection from sexual exploitation did not benefit girls, and could not, therefore, be considered affirmative action.

Conclusions

What impact will the *Hess* case have on Canadian equality jurisprudence? I think it made or foreshadowed some useful advances. Madam Justice McLachlin's remarks about affirmative action are helpful. The Court's performance of judicial surgery on the legislation in question, excising only the parts it found to violate the

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[70]See: *Equality Rights*, *supra*, note 13, c.VII.

[71]*Supra*, note 48 at 13. Reasons of McLachlin J.

Charter, is instructive. The majority's willingness to engage in what was in effect, if not in name, a "similarly situated" analysis was an important development. And the Court's apparent stepping back from the "discrete and insular minority" concept and the notion of pre-existing group disadvantage may constitute an important milestone on the path toward the fuller development of equality rights under the Charter.

But the silliness of the distinctions fixed upon to justify the differential treatment of males and females under section 146(1) stands in sharp contrast to the Court's wise rulings of recent years concerning equality under human rights legislation. The inconsistencies evident in all of the Court's major decisions under section 15 to date – *Andrews*, *Turpin*, *Wolff*, *McKinney* and *Hess* – present a discouragingly confusing prospect for lower courts attempting to make sense of section 15 of the Charter. How can one reconcile the niggardly approach of the Supreme Court of Canada to Charter equality rights with the generosity of its interpretation of equality concepts under the human rights legislation?

The probable explanation is that the Court is less reluctant to promote equality interests in a statutory context, where legislators may have the last word if they disagree with the courts, than in a constitutional setting, where judicial rulings are cast in concrete. But is that a justifiable position for the Court to take? True, the extreme difficulty of amending the constitution gives much greater significance to constitutional rulings of the courts than to their other decisions, but why should that necessarily call for a narrow interpretation of Charter rights? Why should it be less acceptable, in a constitutional context, for courts to err on the side of equality than inequality? Although the importance of constitutional decision-making may well call for judicial caution, there is nothing inherently more cautious in rulings that restrict rights than in those which give them full rein. Restrictive interpretations of constitutional rights are *risky*; they create the risk that, because of the difficulty of achieving constitutional amendments, the rights in question will remain truncated for the foreseeable future. Given that politicians are not likely to find either time or interest to revise the Canadian Charter of Rights and Freedoms in a major way for some years to come, it would seem to make better sense for the courts to make the most of the existing guarantees than to construe them as narrowly as possible. If, as has been established, ordinary legislation is entitled to "be given the interpretation which favours 'the liberty of the subject', "[72] why should not constitutional norms, especially those enshrined in our foremost legal guarantee of fundamental rights, be accorded similar treatment? A presumption in favour of the equality of the subject would make far more sense – historically, morally, and even legally – than a presumption in favour of interpretive timidity.

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[72]Per Lamer J. in *Abbas* v. *R.* (1984), 14 D.L.R. (4th) 449 at 451-52 (S.C.C.).