

ALL I'M ASKING FOR IS A LITTLE RESPECT:
EQUALITY RIGHTS AND SAME-SEX SPOUSAL BENEFITS

by

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A B S T R A C T

This thesis explores same-sex spousal benefits claims against the background of Canada's equality rights jurisprudence. This, in turn, is examined in light of the right to respect for one's private life, as developed in European human rights jurisprudence, and contrasted with the right to privacy doctrine developed in the United States of America.

The judicial development of limitations of constitutionally guaranteed rights and freedoms is also examined with a view to developing a successful same-sex spousal benefit claim.

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For many, the subject of equality rights does not merit much consideration. Their experience has been such that their participation in society has not necessitated the development of a rights discourse. Accustomed to their own social equality, respect and benefits, rights are thus seen as redundant. However, for many others equality rights are very much a matter for consideration and concern, and the Canadian Charter of Rights and Freedoms¹ and its equality provisions² were seen as the culmination of decades of struggle towards equality for all Canadians.

Yet in fact this represents only the beginning, for we are now faced with extraordinarily difficult questions stemming from our social commitment to equality as embodied in the Charter. For those whose rights have been too long ignored, the mere guarantee of equality is not good enough: to achieve true equality these rights must be validated publicly through our laws by the legislatures and courts. Public recognition and validation is particularly important when the right relates to an aspect of personality that is critical to self-definition and fulfillment, and even more so when that right is repeatedly denied. The lack of validity dooms some members of society to a life of invisibility that is hardly consonant with the equality values enshrined in the Charter.

Homosexual persons³ know this invisibility and invalidity only too well. An examination of the law reveals that Canada ought not to be proud of its treatment of this minority. The struggle towards equal treatment has been arduous and disappointing.

In particular, the exclusion of same-sex couples from the benefits and protections of legislation that applies only to heterosexual couples through a restrictive definition of the term "spouse" serves to ensure the less than equal status of homosexual persons in society by denying them a public identity. It is only through the

development of an approach to equality rights that is cognizant of the importance of self-definition and public validation that this inequality will cease.

To this end, the European right to respect for private life will be examined in the context of the regulation of homosexual behaviour. This will reveal that the private aspects of a person's life must be given public validity to give the right any meaningful content. This is in sharp distinction to the right to privacy as developed in American jurisprudence which, as will be demonstrated, has served to deny rather than promote the rights of homosexual persons. Additionally, attempts by homosexual couples in Canada to secure the rights and benefits enjoyed by their heterosexual counterparts will be reviewed. Finally, Canada's emerging equality rights jurisprudence will be examined with a view to developing an analysis that will extend the equal benefit and equal protection of the law to homosexual persons in same-sex relationships. This will necessarily entail an examination of the jurisprudence developed with respect to the justification of infringements of constitutionally guaranteed rights and freedoms as set out in section 1 of the Charter.

THE RIGHT TO RESPECT FOR ONE'S PRIVATE LIFE

The European Convention for the Protection of Rights and Fundamental Freedoms⁴ (the "Convention") seeks to secure a broad range of rights and freedoms.⁵ Of particular interest here is Article 8 of the Convention, which guarantees the right to respect for one's private life.⁶ Initial attempts to secure the rights of homosexual persons through the guarantee of respect for private life met with little success. The European Commission of Human Rights (the "Commission") generally had no difficulty in finding legislation prohibiting and punishing homosexual behaviour to be a justifiable interference with a person's right to respect for his or her private life under

the health and morals exception to Article 8 of the Convention. For example, in 1959 the Commission received the complaint of a German citizen who had been convicted of repeated offences against Article 175 of the German Criminal Code, which prohibited male homosexual relationships, and imprisoned for "an indefinite duration as a dangerous and habitual offender."⁷ He asserted that his right to respect for his private life as guaranteed in the Convention had been violated by Article 175. The Commission's response was brief:

... [T]he Commission has already decided on many occasions that the Convention allows a High Contracting Party to punish homosexuality since the right to respect for private life may, in a democratic society, be subject to interference as provided for by the law of that Party for the protection of health or morals (Art. 8(2) of the Convention); whereas it is clear from the foregoing that Article 175 of the German Criminal Code is in no way in contradiction with the provisions of the Convention; whereas it thus appears that this part of the Application is manifestly ill-founded and must be declared inadmissible under Article 27(2) of the Convention.⁸

The Commission responded in a similar manner to another application from a German citizen again challenging the validity of Article 175 of the German Criminal Code.⁹ This was the applicant's third petition to the Commission respecting the German prohibition against homosexual behaviour,¹⁰ the previous two having been declared inadmissible. In dismissing the third application, the Commission restated its assertion that Article 175 did not violate Article 8 of the Convention as it was dictated by "the legitimate interests of society"¹¹ and was necessary "to prevent crime and protect the health and morals of others."¹² Moreover, the Commission stated that the Application "was abusive 'having regard ... to the fact that [the applicant] has already lodged several other Applications which have been declared inadmissible'"¹³ and "the present Application is proof of a querulous and abusive exercise of the right of petition given to individuals .. it follows that this Application must also be rejected as being abusive ...".¹⁴

It is significant to note that the Commission had no hesitation in upholding the German legislation as necessary for the protection of health and morals without articulating exactly why. Nowhere in their reasons is there any discussion of the purported health and morals basis for prohibiting homosexual conduct. This omission is particularly curious considering the applicants provided the Commission with evidence that homosexual relationships between adults are not subject to criminal sanction in many other democratic countries.¹⁵ While each country is free to enact its own laws legislating morality, one would think the purported health considerations underlying anti-homosexual behaviour laws would remain the same from country to country. Moreover, given the apparent exasperation the Commission felt in dealing with repeated challenges to Article 175 of the German Criminal Code,¹⁶ it is surprising it did not foreclose these challenges by outlining with greater precision why these claims would not succeed. As they stand, the Commission's reasons do not contribute a great deal to a reasoned jurisprudence on the regulation of homosexual behaviour.

Thus, it appeared the right to respect for one's private life was to be of little assistance to persons subject to criminal sanctions for their homosexual behaviour. However, in the 1970s the Commission demonstrated a willingness to examine the regulation of homosexuality in a more detailed manner while at the same time developing an expanded interpretation of the right to respect for private life that considerably widened the scope of interests included. In 1975 the Commission heard yet another complaint against Article 175 of the German Criminal Code.¹⁷ The German Criminal Code had been amended to remove the prohibition against adult male homosexual behaviour, yet it retained the criminalization of homosexual relations between males over the age of 18 and partners under the age of 21.¹⁸ The complainant asserted that his conviction under Article 175 was an interference with his right to

respect for his private life and was discriminatory on the basis of sex in that only male homosexuality constituted a criminal offence and was thus contrary to the sex equality provisions found in Article 14 of the Convention.¹⁹ The findings of the Commission are worth setting out in length. With respect to the privacy issue, the Commission stated:

A person's sexual life is undoubtedly part of his private life of which it constitutes an important aspect. Some of its aspects however may be the subject of state interference and in particular that of the national legislature in accordance with the provisions of paragraph 2 of Article 8.

... The purpose of the German legislature as it appears from the text of the Act ... is to prevent homosexual acts with adults having an unfortunate influence on the development of heterosexual tendencies in minors. In particular it was feared that on account of the social reprobation with which homosexuality is still frequently regarded a minor involved in homosexual relationships with an adult might in fact be cut off from society and seriously affected in his psychological development.

...[T]he action of the German legislature was clearly inspired by the need to protect the rights of children and adolescents and enable them to achieve true autonomy in sexual matters ...

The only difficulty which remains is therefore to decide up to what age the protection of an adolescent is necessary and justifies making homosexuality a criminal offence. Opinions on this point are very varied; some consider that the age of consent to homosexual relationships must be the same as that of puberty or the same as that required for heterosexual relationships. Some States have fixed at 16 and others at 21 the age after which homosexual relations cannot give rise to criminal proceedings. Ideas are developing rapidly in this field.

It can therefore be admitted that the age above which homosexual relationships are no longer subject to the criminal law may be fixed within a reasonable margin and vary depending on the attitude of society. In the instant case it would not seem that the age limit of 18 - 21 although relatively high and since lowered can be considered as going beyond this reasonable margin.

At all events the applicant was convicted for having had homosexual relationships with adolescents under 16.

As applied to the applicant the German legislation would therefore appear to comply with the provisions of Article 8(2) of the Convention as being a measure necessary in a democratic society for the protection of the rights of others. It follows that this complaint must be rejected ...²⁰

As for the argument that the German law was discriminatory in that it prohibited certain male homosexual behaviour without similar sanctions against female homosexual relations, it was the Commission's opinion that the distinction was justified by a clearly established need for protecting young males from adult homosexuals. The Commission noted that a difference in treatment that is justified by objective and reasonable proportionality in legislative aims does not constitute discriminatory treatment.²¹ Citing the submissions of the government of the Federal Republic of Germany, the Commission stated:

... It was not necessary to provide special protection for girls against homosexual acts by adults for the following reasons:

- (a) It is generally admitted that there are comparatively few female homosexuals as compared with males.
- (b) Experience shows that adult female homosexuals prefer partners of their own age.
- (c) It is generally admitted that these women seldom change their partners.
- (d) It follows that homosexual relationships between an adult woman and a girl under age are very rare.
- (e) In the rare case of the seduction of a girl by an adult woman experience shows that the girl's personal development and the insertion in society are not generally affected because female homosexuality does not usually show itself in public.

The situation was fundamentally different as regards male homosexuality.

- (a) This was much more frequent.
- (b) Male homosexuals prefer young partners.
- (c) These homosexuals frequently change their partner.
- (d) It follows that young men are much more exposed to the risk of homosexual relations with adults than girls.
- (e) On account of the tendency of masculine homosexual couples to show themselves in public, a young man or adolescent is much more exposed to social isolation and conflicts with society.²²

Accordingly, there existed "a specific social danger in the case of masculine homosexuality. This danger results from the fact that masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytize adolescents and that the social isolation in which it involves the latter is particularly marked."²³ Any difference in treatment between male and female homosexual behaviour was, therefore, justified and thus not discriminatory. The Commission declared the application inadmissible as the applicant failed to establish that Article 175 violated either Article 8 or 14 of the Convention.²⁴

Despite its disappointing outcome and suspect reasoning, this decision is important in that it represents the first real attempt by the Commission to articulate the circumstances under which a homosexual person's right to respect for private life might validly be interfered with. Additionally, the Commission's comments concerning the social justification for treating male and female homosexuality differently form the basis for dismissing subsequent Article 14 challenges to similar legislation and upholding legislation regulating homosexual relations between adults and adolescents.²⁵

Concurrent with their decisions upholding legislation regulating homosexual relations, the Commission began to develop an approach to the right to respect for private life that gave it greater depth and that recognized that a private life entailed more than mere privacy. In a 1976 decision concerning the freedom to keep a dog,²⁶ the Commission stated:

For numerous Anglo-Saxon and French authors the right to respect for 'private life' is the right to privacy, the right to live, as far as one wishes, protected from publicity ...

In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other

human beings, especially in the emotional field for the development and fulfillment of one's own personality.²⁷

This idea was further elaborated on the following year in Bruggemann and Scheuten v. Federal Republic of Germany,²⁸ a decision concerning restrictions on obtaining abortions. The Commission reiterated its assertion that the right to respect for private life "is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfillment of his personality"²⁹ and added:

... To this effect, [the individual] must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, whenever the State sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life and such interference must be justified in the light of Article 8(2).³⁰

In a later decision concerning transsexualism, the Commission held that the State had a positive duty to recognize essential elements of an individual's personality, including his or her sexual identity.³¹

Against this background, the Commission and the European Court of Human Rights (the "Court") returned to the issue of the regulation of homosexual behaviour. The issue before the Court in Dudgeon v. United Kingdom³² concerned the validity of legislation in Northern Ireland making homosexual relations between consenting adult males a criminal offence. The Court stated that the legislation represented a continuing and direct interference with the applicant's right to respect for his private life in that

... either he respects the law and refrains from engaging (even in private with consenting male partners) in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.³³

The Court considered whether the legislation could be justified under the exceptions of Article 8(2). With respect to the principles relevant to determining the necessity of legislation in a democratic society, the Court pointed out that "'necessary'" in this context does not have the flexibility of such expressions as 'useful', 'reasonable' or

'desirable', but implies the existence of a 'pressing social need' for the interference in question."³⁴ The Court acknowledged that each nation must determine for itself the climate surrounding the pressing social need for legislation and, thus, a "margin of appreciation"³⁵ is left to the discretion of the national legislators. However, in determining the acceptable range of the margin of appreciation, the Court said:

... not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2).

Finally, in Article 8 as in several other Articles of the Convention, the notion of 'necessity' is linked to that of a 'democratic society'. According to the Court's case law, a restriction on a Convention Right cannot be regarded as 'necessary in a democratic society' (two hallmarks of which are tolerance and broadmindedness) unless, amongst other things, it is proportionate to the legitimate aim pursued.³⁶

The Court then turned to an examination of the justification of the interference with the applicant's right to respect for his private life:

... As compared with the era when that legislation was enacted [1861 and 1865], there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States ... No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a pressing social need to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts,

this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.³⁷

The Court concluded that the legislation represented an unjustified interference with the applicant's right to respect for his private life and that a breach of Article 8 had occurred.

The significance of the foregoing decisions is that they signal a clear departure from the restrictive notion of the right to privacy as merely a right to private behaviour behind closed doors. Rather, what is emphasized instead is the development of the personality, including its sexual aspects, in an atmosphere that not only limits the circumstances in which the State can justifiably interfere, but also includes the positive element of a right to public and State recognition of certain aspects of an individual's identity. Put another way, as developed by the European Commission of Human Rights and Court, the right to respect for private life -- including sexuality -- must be recognized in the public sphere in order for the right to be truly meaningful. The right to consensual homosexual relationships is, indeed, an empty one if one cannot compel public recognition by the State of homosexuality. Moreover, the "freedom to have an impact on others -- to make the 'statement' implicit in a public identity -- is central to any adequate conception of the self."³⁸ This development is a notion of privacy that encompasses the public recognition of private life avoids a strict and artificial delineation between a truly private and separate life free from any governmental action, positive or otherwise, and a public life subject to all the rights and obligations the law bestows on individuals. People do not live in an easily compartmentalized fashion permitting a strict separation of public and private life, and the law does a disservice to the principle of validity by reflecting such a separateness. This dichotomy between private and public life has been particularly well developed in United States jurisprudence and, as the following will demonstrate, has utterly failed to promote the

rights of homosexual persons, leading one commentator to critique this development as the "poverty of privacy".³⁹

THE RIGHT TO PRIVACY: AMERICAN JURISPRUDENCE

The eloquent rhetoric that flows through the right to privacy cases⁴⁰ is passionate in its assertion and defence of the "'right to be let alone' -- the most comprehensive of rights and the right most valued by civilized man."⁴¹ Yet the right to be let alone ends abruptly at precisely the point where it is most acutely felt. Private sexual conduct is very heavily regulated indeed by the legislators and courts. Private consensual homosexual relations are particularly closely scrutinized with a view to prohibiting the conduct and punishing the offenders through state sodomy statutes.⁴² Cases that do not expressly concern the validity of statutes regulating sexual behaviour focus on an individual's sexuality as a valid ground for dismissal from employment or denial of some legal benefit. Taken as a whole, such cases do little to secure rights for homosexual persons, let alone work to actively promote them.

The constitutional validity of a Virginia statute prohibiting private consensual homosexual activity was challenged in Doe v. Commonwealth's Attorney for City of Richmond.⁴³ The challenge was based chiefly on the right to privacy and the sanctity of the home, as articulated in Griswold v. Connecticut.⁴⁴ The majority had no difficulty in dismissing this contention on the basis that the right to privacy developed in Griswold applied only to marital privacy. Having stated that, the Court then cited passages in Griswold of a minority dissenting opinion demonstrating that homosexual intimacy is denunciable by the State:

'... Adultery, homosexuality and the like are sexual intimacies which the state forbids ... but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an

institution which the State not only must allow, but which always and in every age it has fostered and protected. *It is one thing when the State exerts its power either to forbid extra-marital sexuality ... or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.'*

.....

... In sum, even though the State has determined that the use of contraceptives is an iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.⁴⁵ [emphasis in original]

Having dismissed the argument that private homosexual activities were included in the right to privacy and thus immune from governmental interference, the Court then turned to discuss the circumstances under which the State could validly describe such conduct as criminal. Here, the analysis was brief: as long as the legislature decides that the conduct ought to be prohibited in the name of morality and decency, the Court will not interfere.⁴⁶ The State need only show that it has "a legitimate interest in the subject of the statute or that the statute is rationally supportable"⁴⁷ and that homosexual conduct is likely to end in a contribution to moral delinquency. To demonstrate the State's interest in the statute, the Court referred to the longevity of the statute, dating back to 1792⁴⁸ and noted its Judaic and Christian ancestry.⁴⁹ Thus the Court was not prepared to declare the statute invalid.

The dissenting opinion in Doe is worthy of note. Merhige J. held that the Statute was a violation of the constitutional right to privacy and felt that the majority had applied an overly restrictive interpretation of the principles set out in Griswold:

To say, as the majority does, that the right of privacy, which every citizen has, is limited to matters of marital, home or family life is unwarranted under law. Such a contention places a distinction in

marital-nonmarital matters which is inconsistent with current Supreme Court opinions and is unsupportable.⁵⁰

In an almost total repudiation of the majority opinion, Merhige J. stated that the right to privacy encompasses

... the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual acts between adults are matters, absent evidence that they are harmful, in which the State has no legitimate interest.⁵¹

As private consensual sex acts are protected by the constitutional right to privacy, they cannot be regulated by government action absent compelling justification such as the protection of minors or where force is used to coerce the participation of one of the parties.⁵² No such evidence of the requisite compelling justification was present in this case:

[The State] ... made no tender of any evidence which even impliedly demonstrated that homosexuality causes society any significant harm ... To suggest as [the State does] that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response.⁵³

Finally, to focus as the majority did on the promotion of morality and decency as the basis for upholding the validity of the Statute was to miss the point completely: the case, as the lack of evidence showed, had little to do with promoting morality and decency and everything to do with the unjustified invasion of the applicant's constitutional right to privacy.⁵⁴ At the end of the day, however, the majority opinion prevailed and the Virginia statute was held not to be unconstitutional. The United States Supreme Court denied Doe's petition for rehearing without reasons,⁵⁵ and the Supreme Court's implied affirmation of the Doe reasoning was used to dismiss a similar challenge to the validity of a Louisiana state law prohibiting private consensual sex acts.⁵⁶

Similarly, in Singer v. United States Civil Service Commission⁵⁷ a decision of the U.S. Court of Appeals, Ninth Circuit, the Court upheld the dismissal of a federal employee (employed, ironically, with the Equal Employment Opportunity Commission) for openly and publicly flaunting or advocating homosexual conduct "while identifying himself as a member of a federal agency."⁵⁸ The termination of the employee was justified on the basis that

these activities were such that 'general public knowledge thereof reflects discredit upon the federal Government as his employer, impeding the efficiency of the service by lessening public confidence in the fitness of the Government to conduct the public business with which it was entrusted.'⁵⁹

These reasons reveal that the government was clearly concerned about its reputation.

Evidence of actual harm need not be established; the Court need only

be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service.⁶⁰ [emphasis added]

In other words, the Equal Employment Opportunity Commission was worried about looking bad. This decision is troubling not only because it reveals a bias in an agency supposedly committed to alleviating employment inequities, but also because it indicates how readily the courts will uphold dismissals from employment for homosexual conduct absent any evidence of harm to the agency or public.

This latter point is demonstrated particularly well in the decision of Dronenburg v. Zech by the U.S. Court of Appeals, District of Columbia.⁶¹ The United States Navy's policy of mandatory discharge for homosexual conduct was challenged on the grounds that it violated the constitutional right to privacy. The Court reviewed the development of the right to privacy cases stating:

The [Supreme] Court has listed as illustrative of the right to privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be said that none of these cover a right to homosexual conduct.⁶²

Again, by focusing on a restrictive interpretation of privacy and a right to homosexual conduct, the Court misses the point entirely of what privacy is all about: to be free from unwarranted governmental interference with one's decisions on private matters of intimate concern.

The Court then stated that it is up to legislatures to make laws concerning morality, echoing the sentiment of the majority in the Doe decision.⁶³ The Court further held:

If a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context. That the military has needs for discipline and good order justify restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court.⁶⁴

That being so, the only question then left to the Court was whether the Navy's policy was rationally related to a permissible end:

The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of a controlled experiment to prove what common sense and common experience demonstrate.

The Navy's policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which the maintenance of 'discipline, good order and morale[,] ... mutual trust and confidence amongst service members, ... insur[ing] the integrity of the system of rank and command, ... recruit[ing] and retain[ing] members of the naval service ... and prevent[ing] breaches of security ...' ... we believe that the policy requiring discharge for homosexual conduct is a rational means of achieving these legitimate interests.⁶⁵

Like the Court in Singer,⁶⁶ the Court here managed to find the necessary justification for upholding a policy prohibiting and punishing homosexual conduct absent any evidence that such conduct was in any way harmful. Indeed, the Court

refers only to the "common sense and common experience"⁶⁷ that indicate homosexual conduct is "almost certain to be harmful to morale and discipline."⁶⁸ One is left wondering whether such a tenuous evidentiary finding would have been acceptable and probative in any other proceeding not involving homosexual conduct.

This decision may be contrasted with the findings of the New York Court of Appeals in People v. Onofre,⁶⁹ again a challenge to state penal laws prohibiting consensual sodomy. In a statement reflecting a sentiment noted in the Doe dissent,⁷⁰ the Court emphasized that privacy is not about secrecy behind closed doors, but something more:

At the outset it should be noted that the right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behaviour; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint ...⁷¹

The Court turned to the issue of the supposed moral justification for the criminalization of consensual sodomy. The Court noted the distinction between public and private morality and stated that "the private morality of an individual is not synonymous with nor necessarily will have an effect on what is known as public morality."⁷² Further, the Court stated:

We express no view as to any theological, moral or psychological evaluation of consensual sodomy ... [I]t is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values ... That is not the issue before us ... The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective.⁷³

The Court then pointed out that no evidence of harm to public morality had been demonstrated. Additionally, there was no evidence of elements of commercialization, force or the involvement of minors.⁷⁴ In short, the Court concluded,

... the people have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behaviour out of the view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.⁷⁵

Against this background is introduced Bowers v. Hardwick,⁷⁶ the United States Supreme Court's sweeping repudiation of a meaningful right to privacy. The issue before the Court was the constitutional validity of Georgia's sodomy statute, which prohibited private consensual acts of sodomy between any persons and provided for imprisonment for not less than one year nor more than 20 years upon conviction.⁷⁷ Writing for the majority, White J. framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."⁷⁸ So stated, it is hardly surprising that the majority would find no such right exists. In a review of the right to privacy cases focusing on the most restrictive interpretation possible of the meaning of privacy, then limiting it to child rearing and education, family relationships, procreation, marriage, contraception and abortion,⁷⁹ the Court stated:

Accepting the decisions in these cases and the above descriptions of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated ... Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.⁸⁰

The Court held that the extension of rights not specifically defined in the Constitution was appropriate in situations involving "fundamental liberties that are 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if [they] were sacrificed'"⁸¹ and that such fundamental liberties were those "that are 'deeply rooted in this nation's history and tradition.'"⁸² The Court added that "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."⁸³ Further, the Court noted legislative proscriptions against consensual sodomy have existed in the United States since 1791 and that 25 States and the District of Columbia continue to prohibit consensual acts between adults in private.⁸⁴ Thus, "to claim that a right to engage in such conduct is 'deeply rooted in this nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."⁸⁵

With respect to the argument that there was insufficient evidence to support a presumed belief that sodomy and homosexual sodomy in particular is immoral and unacceptable and is an inadequate rationale to support the law, the Court simply replied:

... The law ... is constantly based on notions of morality, and if all the laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.⁸⁶

Burger C.J. concurred with the majority, adding a separate opinion emphasizing the Judeo-Christian condemnation of homosexual sodomy: "[t] hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teachings."⁸⁷

The minority, in a dissenting opinion written by Blackmun J., took an entirely different approach:

This case is no more about 'a fundamental right to engage in homosexual sodomy' ... than Stanley v. Georgia ... was about a fundamental right to watch obscene movies ... Rather, this case is about ... 'the right to be let alone.'⁸⁸

He added that "I believe [i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simple persists from blind imitation of the past."⁸⁹

The right to privacy that this case involves encompasses something more than the right to be "let alone" -- important as that right is. Further, what is necessary is to examine why the need to be let alone arises in the first place. In reviewing the development of the right to privacy cases in the context of the protection of the family, Blackmun J. observed: "We protect those rights not because they contribute, in some direct or material way, to the general public welfare, but because they form so central a part of an individual's life."⁹⁰ When framed in this manner, the privacy interest is thus seen in terms of decisions that are properly for the individual to make as a critical aspect of self-definition.⁹¹ From that, Blackmun J. recognized

... that the 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others.'

Only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality' ... The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a nation diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.⁹² [emphasis in original]

Quoting from Stanley v. Georgia,⁹³ Blackmun J. noted:

'The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, and their emotions and their sensations.'⁹⁴

This, according to the minority dissent opinion, is what the right to privacy is all about:

"Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me the heart of the Constitution's protection of privacy."⁹⁵

Blackmun J. then turned to the purported justification of the State's interference with the right to privacy found to exist and found there was no evidence tendered to support the claim that the sodomy law was necessary for "the general health and welfare."⁹⁶ Religious justification or public intolerance was simply not enough:

... '[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization ... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order' ... It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority ...

.....

A state can no more punish private behaviour because of religious intolerance than it can punish such behaviour because of racial animus.' The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly, or indirectly, give them effect' ... No matter how uncomfortable a certain group may make the majority of this Court, we have held that '[M]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'⁹⁷

Blackmun J. concluded his dissent with the hope that the Court would soon reconsider its analysis of this case and cast it in a light that does not betray the values underlying the right to privacy.

It may be seen from the foregoing that a steady progression of United States jurisprudence, culminating in Bowers v. Hardwick, has essentially eviscerated the right to privacy of any meaningful content. By insisting on a strict line between private and public behaviour the courts have developed an artificially compartmentalized view of privacy and its impact on an individual's self-definition. Moreover, in emphasizing religious and moral overtones in upholding legislation that prohibits consensual adult sexual behaviour the courts again miss the point that the government must not interfere with the development of an individual's personality absent compelling evidence of necessity.

The decision in People v. Onofre⁹⁸ and the dissenting opinions in Doe⁹⁹ and Bowers v. Hardwick¹⁰⁰ represent the high water mark of the judiciary's development of the right to privacy. Yet even these decisions only partially develop a truly meaningful right. For while these opinions are passionate in their defence of privacy and articulation of the need to independently define one's identity free from governmental intrusion, they do little to ensure the concomitant need to have one's private life and identity recognized, officially sanctioned and respected in the public sphere. This aspect of a right to privacy is perhaps most crucial, for the freedom to make a public statement about one's identity is central to the concept of the self.¹⁰¹

CANADIAN JURISPRUDENCE ON SEXUAL ORIENTATION: PRE- AND NON-CHARTER CASES

Turning from European and American jurisprudence on privacy to an examination of Canadian law, it will be seen that the law has failed to promote the rights of homosexual persons. Specifically, attempts by homosexual couples to obtain

the benefits accorded heterosexual couples have been repeatedly denied. Persons in same-sex partnerships have argued that their relationships are the same as any other common law relationship and that their partners thus constitute spouses for the purposes of obtaining spousal benefits available through legislation. These claims have been denied on the basis that common law relationships are an alternative form of marriage and as such can only include opposite sex partners. Marriage is thus seen as the foundation upon which all rights and benefits are based.

The legal rights and benefits conferred on homosexual couples through marriage and common law do not extend to homosexual persons in same-sex relationships. This is based on the reasoning that homosexual persons lack the legal capacity to marry and thus cannot be married and thus cannot obtain the legal benefits that flow from being married. One of the essential requirements for the capacity to marry is that one of the partners be of the opposite sex.¹⁰² One judicial definition of marriage, found in Hyde v. Hyde and Woodmansee¹⁰³ stated that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others."¹⁰⁴ Corbett v. Corbett (Otherwise Ashley)¹⁰⁵ offered the further elaboration that

sex is clearly an essential element determinant of the relationship called marriage, because it is and always has been recognized as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.¹⁰⁶

A Canadian attempt to register the marriage of two homosexual men was rejected. It was argued in Re North and Matheson¹⁰⁷ that the Manitoba Marriage Act,¹⁰⁸ in failing to stipulate an opposite-sex requirement, could apply to same-sex

couples by virtue of Section 2 of the Act, which provided for the registration of a marriage between "any two persons not under a legal disqualification to contract the marriage." The Manitoba County Court found the marriage to be a nullity, stating: "I cannot conclude that the Legislature, in using the words 'any two persons', intended to recognize the capacity of two persons of the same sex to marry."¹⁰⁹ Citing Hyde¹¹⁰ and Corbett¹¹¹ the Court concluded that only persons of the opposite sex had the capacity to enter into a valid marriage.¹¹² Marriages between same-sex couples are void *ab initio*.¹¹³

Judicial recognition of common law same-sex relationships have fared little better. In Anderson v. Luoma¹¹⁴ such a relationship was at an end and one partner attempted to claim a division of property and support for herself and her children in accordance with the provisions of the British Columbia Family Relations Act.¹¹⁵ The issue before the Court was whether the Act had any application where the parties were of the same sex. The answer was succinct:

The Family Relations Act does not purport to affect the legal responsibilities which homosexuals may have to each other or to children born to one of them ... The Act's application is, in general, directed to the spousal and parental relations of men and women in their role of husband, wife and parent. For example, s.1 of the Family Relations Act defines 'spouse':

'spouse' means wife or husband and includes ... (c) ... a man or woman not married to each other, who have lived together as husband or wife for a period of not less than three years ...'¹¹⁶

Any remedies sought by the parties must, therefore, be found in law or equity. Ms. Anderson's claim for support was rejected on the ground that she failed to meet the definition of "spouse" and her success in obtaining a division of property was based on the existence of a constructive trust between her and her former partner.

Similarly, the meaning of the term "spouse" was at issue in Re Andrews and Minister of Health for Ontario¹¹⁷ ("Karen Andrews"), a decision concerning a challenge to legislation that denies same-sex couples the benefits accorded to their heterosexual counterparts. The legislation in this instance was the Ontario Health Insurance Act,¹¹⁸ which provides a scheme of health insurance for residents of Ontario. Ms. Andrews sought to include her same-sex partner under her (Andrews') medical, dental and optical coverage as her dependent spouse. The Ontario Hospital Insurance Commission refused to extend coverage to Ms. Andrews' partner on the basis that her partner could not be defined as a "dependent spouse". The Ontario High Court of Justice agreed, holding that the term "spouse" as used in Ontario legislation and defined in dictionaries always refers to a person of the opposite sex and thus cannot be extended to include same-sex partners.¹¹⁹

The Karen Andrews case is significant because it represents the first time s.15 of the Charter was used to challenge legislation that denies same-sex couples benefits accorded to heterosexual couples. On this issue the Court found that homosexual partners living together in a domestic situation represent a distinct class¹²⁰ but held that as a distinct class they are not similarly situated to heterosexual couples in that homosexual couples do not and cannot marry, procreate and raise children and have the legal obligation to support those children.¹²¹ The Court further held that the purpose of the legislation was to "promote and assist with the establishment and maintenance of families":¹²² that is, families "in the more traditional heterosexual context."¹²³ Thus, the difference in treatment between heterosexual couples and homosexual couples could not be seen as discriminatory because the two groups were decidedly different because of the above reasons. Further, homosexual couples were treated in "exactly the same manner"¹²⁴ as "all of the other unmarried people in the province":¹²⁵

Heterosexual couples of the same sex, brothers and brothers, sisters and sisters, brothers and sisters, cousins, parents and adult children and any combination of them may be living together under similar circumstances to the applicant but would in each case pay OHIP premiums as 'single persons'.¹²⁶

This reasoning entirely misses the point that Ms. Andrews and her partner are not exactly like "all the other unmarried people in the province." They are a domestic partnership and as such are exactly like all heterosexual common law couples in the province except that they are denied the benefits so readily available to heterosexual couples. By including homosexual couples with unmarried brothers and sisters, sisters and sisters, cousins and parents, the Court is completely invalidating homosexual relationships as domestic partnerships. This strikes directly at the heart of a public identity that is so central to a conception of the self.

In June 1990 the Federal Court of Canada held that the term "family status", as contained in the Canadian Human Rights Act,¹²⁷ did not extend to two persons living together in a homosexual relationship.¹²⁸ The circumstances giving rise to this decision are as follows.

In June 1985 Brian Mossop¹²⁹ was employed by the Treasury Board of Canada and through his employment was a member of the Canadian Union of Professional and Technical Employees (CUPTE). He had been living with Ken Popert since 1976 in an openly homosexual relationship. They shared a home which they jointly owned, shared a bank account, shared domestic tasks, and publicly represented each other as his lover. Mr. Mossop attended the funeral of Mr. Popert's father, and applied for bereavement leave as provided for in the collective agreement that governed his place of work. The collective agreement provided for bereavement leave as follows:

19.02 For the purpose of this clause, immediate family is defined as father, mother, brother, sister, spouse (including common law

spouse resident with the employee), or ward of the employee, father-in-law, mother-in-law ...

...

2.01 For the purpose of this Agreement ...

- (s) a "common law spouse" relationship is said to exist when, for a continuous period of at least one year, an employee has lived with a person of the opposite sex, publicly represented that person to be his/her spouse, and lives and intends to continue to live with that person as if that person were his/her spouse.¹³⁰

The Department of Secretary of State refused bereavement leave on the basis that Mr. Mossop's partner was a man.¹³¹ He applied for one day vacation leave relating back to the day of the funeral. This application was granted. He then filed a complaint under the Canadian Human Rights Act¹³² (the "Act") alleging his employer "committed a discriminatory practice on the prohibited ground of family status in a matter related to employment."¹³³ The Act lists as prohibited grounds of discrimination "race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction of an offence for which a pardon has been granted."¹³⁴ Family status is not defined in the Act and thus became the focal point of the proceedings before the Human Rights Tribunal (the "Tribunal").

Counsel for Mr. Mossop argued that homosexual couples can constitute a family. In seeking to define "family" it is important to look beyond mere appearance and examine the content of the relationship. Dr. Margrit Eichler, an expert witness for Mr. Mossop, stated that there are many *indicia* of a familial relationship and that there is no standard list because no single factor is always present in the relationship,¹³⁵ but stated:

From what I've heard this is a relationship of some standing in terms of time with the expectation of continuance. So it's not a relationship that is defined in terms of time. You have the joint residence, you have economic union in many ways as expressed by the fact that the house is jointly owned, that life insurance -- the people, the two (2) partners are

beneficiaries -- that there's joint financing, it's a sexual relationship, housework is shared and it's an emotional relationship which is a very important aspect of familial relationships.¹³⁶

"Family" may mean many things depending on the context in which it is used and includes various types of relationships including blood (or consanguinity), kinship (which would include relationships beyond blood ties), marriage or adoption, and bonds made between people on some other basis.¹³⁷ Thus, it is important to examine the nature of the relationship in question to determine whether it is familial as described above.

The Treasury Board and Department of Secretary of State argued that "family" should be confined to its plain meaning, founded in "traditional values"¹³⁸ with the "common denominator"¹³⁹ of children. The Tribunal noted that counsel generally "did not cite any authorities establishing these principles."¹⁴⁰

A review of the parliamentary history of the addition of family status to the Act as a prohibited ground of discrimination revealed that the phrase was left undefined because it included a variety of relationships and "[i]t will be up to the commission, the tribunals it appoints, and, in the final cases, the courts, to ascertain in a given case the meaning to be given to [family status]."¹⁴¹

The Tribunal stated that it must approach the definition of family status in light of the objectives of the Act. The goal of the Act is "that of equal opportunity for each individual to achieve 'the life that he or she is able and wishes to have'"¹⁴² and is intended to address group stereotypes.¹⁴³ As "family" is capable of different meanings in different circumstances, the Tribunal was reluctant to ascribe an all-inclusive meaning to the term, preferring instead to adopt a meaning that is reasonable and best accords with the intentions of the Act.¹⁴⁴ The Tribunal rejected the "traditional" view

of the family "as generally understood" as put forth by the Treasury Board and Department of Secretary of State,¹⁴⁵ noting the lack of evidence to support this argument and further noting that views "generally understood" may sometimes be generated by "bias or prejudice against homosexuals."¹⁴⁶ The Tribunal also noted:

It must be remembered that to exclude any person from invoking a prohibited ground of discrimination bars any further consideration under the Act, with potentially serious consequences for individuals. In the view of this Tribunal, such an approach to definition does not give effect to, or advance, the special purpose of the Act ...¹⁴⁷

The Tribunal thus held that a reasonable definition of family would include homosexual families, given the purpose of the Act, the realities of people's living situations, and an understanding that *pro forma* dictionary definitions often trap people in outdated meanings that do little to promote rights.¹⁴⁸

The next question that arose was whether Mr. Mossop's employer had committed a discriminatory practice by entering into a collective agreement which "for the purposes of bereavement leave, excludes people from the definition of 'immediate family' a person of the same sex as the employee who, except for the sex of that person, would otherwise meet the definition of 'common law spouse'".¹⁴⁹

An examination of the terms for bereavement leave reveals that it is available to an employee upon the death of a member of his or her immediate family. As identified, immediate family members may be directly related by blood or marriage, such as spouses (including common law spouses) or indirectly related through a spousal relationship, such as in-laws. Common law relationships are said to exist

when, for a continuous period of at least one year, an employee has lived with a person of the opposite sex, publicly represented that person to be his/her spouse, and lives with and intends to continue to live with that person as if that person were his/her spouse.¹⁵⁰

So described, the immediate family defined in the collective agreement includes some of the *indicia* of familial relationships outlined by Dr. Eichler. The Tribunal concluded:

The definition of 'immediate family' includes some familial relationships and excludes others. The collective agreement therefore treats some types of familial relationships differently than others. In particular, it excludes from the benefit of bereavement leave an employee who is in a permanent and public relationship with a person of the same sex. Having determined that persons of the same sex *prima facie* may have the status of family under the Act, and having determined that the family of the complainant is treated differently under the Act than other families ... this Tribunal therefore finds that the collective agreement deprived the complainant of the employment opportunity of bereavement leave on a prohibited ground of discrimination and that therefore each of the Treasury Board and [CUPTE] have committed a discriminatory practice ...¹⁵¹

Clearly this decision represented a radical departure from conventional conceptions of family status. Not surprisingly, the Attorney General of Canada (joined by the Salvation Army, Focus on the Family Association of Canada, Realwomen, the Pentacostal Assemblies of Canada and the Evangelical Fellowship of Canada) appealed this decision on the basis that the Tribunal had erred in interpreting the term "family status" to extend to two persons living together in a homosexual relationship. The Court relied on a narrow, legalistic interpretation of family that limited its meaning by stating that "the basic concept signified by the word has always been a group of individuals with common genes, common blood, common ancestors" (emphasis added)¹⁵² that has been extended to include "individuals connected by affinity or adoption, an inclusion rendered normal by the fact that marriage was made the only socially accepted way of extending and continuing the group, and adoption a legally established imitation of natural filiation" (emphasis added).¹⁵³ However, this "normal" extension of family does not affect that "core meaning conveyed by the word."¹⁵⁴ Similarly,

[i]t is true that the term is also the subject of analogous uses which may still be debatable and will remain susceptible to changes (hence the lack of complete uniformity in the dictionaries). But so long as these analogous uses are clearly seen as being what they are semantically, i.e. used by analogy, the peripheral area of uncertainty they bring in is quite residual and should not be misleading.¹⁵⁵

(Emphasis added)

Thus the term "family" may be properly used to refer to groups that are clearly beyond the "core meaning" of the word, so long as the word is only used as analogy and is understood as such. Supposedly, this would apply to any close network of support that consisted of individuals other than those related by common genes, common blood, common ancestors, affinity or adoption. These individuals would thus be considered "residual". As the Court stated, "[t]here is a difference being, in certain respects, functionally akin to a family and being a family."¹⁵⁶

Along with the difficulties the Court found with conceptualizing homosexual families, it also expressed concern that

family is not used in isolation in the Act, but rather coupled with the word 'status'. A status, to me, is primarily a legal concept which refers to the particular position of a person with respect to his or her rights and limitations as a result of his or her being a member of some legally recognized and regulated group. I fail to see how any approach other than a legal one could lead to a proper understanding of what is meant by the phrase 'family status'. Even if we were to accept that two homosexual lovers can constitute 'sociologically speaking' a sort of family, it is certainly not one which is now recognized by law as giving its members special rights and obligations.¹⁵⁷

(Emphasis added)

This latter statement amply demonstrates the absurd catch-22 position in which legalistic reasoning places homosexual persons seeking spousal benefits. One can only be accorded rights and obligations if one is legally recognized, and cannot be legally recognized without belonging to some group that has been accorded a legal status. Being denied legal recognition thus sentences an individual or group to legal invisibility and invalidity: out of sight, out of mind, out of luck. The Court went on to hold that the Human Rights Tribunal

had no authority to reject the generally understood meaning given to the word 'family' and adopt in its stead, through a consciously *ad hoc* approach, a meaning ill-adapted to the context in which the word appears and obviously not in conformity with what was intended when the word was introduced, as shown by the legislative history of the amendment.¹⁵⁸
(Emphasis added)

Clearly the Court thought it was entirely inappropriate to ascribe to a homosexual relationship a status reserved for a narrowly and legally defined group that homosexual relationships were not even analogous to. Even if this relationship was analogous to a family, it was still beyond the "core meaning" of the term "as generally understood" and remained analogous in a residual, peripheral manner. The dividing line between "normal" (hence legitimate and recognized) and "other" (illegitimate and unrecognized, invisible) is thus maintained. But for the Court, the whole issue of whether homosexual relationships could be considered family relationships was secondary. "The real issue"¹⁵⁹ underlying Mr. Mossop's complaint, said the Court, was sexual orientation.¹⁶⁰ Indeed, it was the fundamental issue:

[S]hould it be admitted that a homosexual couple constitutes a family in the same manner as a husband and wife, it then becomes apparent that the disadvantage that may result to it by the refusal to treat it as a heterosexual couple is inextricably related to the sexual orientation of its members. It is sexual orientation which has led the complainant to enter with Popert into a 'familial relationship' (to use the expression of the expert sociologist), and sexual orientation, therefore, which has precluded the recognition of his family status with regard to his lover and that man's father. So in the final analysis, sexual orientation is really the ground of discrimination involved.¹⁶¹

Again, this reasoning implies the distinction between a "normalcy" and "otherness", this time with sexual orientation serving as the "otherness" that is sufficiently peripheral to place homosexual couples beyond the reach of a status that would confer benefits and legitimacy. Implicit in this is a sort of double legal curse visited upon homosexual persons: their relationships may be "family", but only in a peripheral and residual (hence marginal) sense and not really family as that term was intended and generally understood,¹⁶² and their sexual orientation is sufficiently "otherly" to place

them outside the individuals whose relationships are "normal" enough to be considered family.

With respect to recent decisions which held that sexual orientation is a prohibited ground of discrimination under s.15 of the Charter,¹⁶³ the Court held that it did not believe that the Charter is

capable of being used as a kind of *ipso facto* legislative amendment machine requiring its doctrine to be incorporated in the human rights legislation by stretching the meaning of the terms beyond their boundaries.¹⁶⁴

Rather, the more appropriate use of the Charter would be to use it as the primary means of challenging legislation that contained discriminatory provisions, instead of superimposing Charter jurisprudence onto human rights Acts.¹⁶⁵ Nevertheless, the Court's use of language such as "stretching the meaning of terms beyond their boundaries"¹⁶⁶ and the "core meaning conveyed by the word"¹⁶⁷ implies that irrespective of whether the Charter of human rights legislation is used to examine the meaning of "family", anything considered not "normal" in the sense of heterosexual relationships and sexuality will not be recognized.

This decision serves as a particularly clear example of how deeply entrenched social and judicial thinking about the family is. The use of language such as "normal", "has always been", "core meaning", "generally understood" and "peripheral", "residual", "not in conformity" and "meaning which it was not intended to possess" clearly delineates between what is considered appropriate and legitimate and that which is marginal and illegitimate. Implicit in this is the belief that some relationships are "natural" (hence normal and legitimate) while those that occupy the periphery are unnatural and thus somehow lacking in quality; therefore, not deserving of social and judicial approval.

The preceding are clear examples of the denial of the equal protection and the equal benefit of the law based on sexual orientation. But for the fact of their sexuality, none of the parties' claims would have been denied or even given rise to adjudication. A definition of spouse that extends only to heterosexual partners clearly affects same-sex couples' rights and benefits under such legislation as the British Columbia Family Relations Act¹⁶⁸ and the Ontario Health Insurance Act.¹⁶⁹ Indeed, such a definition precludes any rights and benefits at all. Moreover, in denying these claims the courts serve to perpetuate the invalidity of a homosexual identity by refusing the public recognition and official sanction so critical to self-identification. Government and judicial refusal to acknowledge the reality of homosexual relationships constitutes the highest form of social repudiation and dooms homosexual persons to invisibility and invalidity: out of sight, out of mind, out of luck. Trapped by a jurisprudence that refuses to hear their voices, homosexual persons appear destined to move from a tradition of disadvantage to a future of the same fate.

However, recent decisions indicate that the courts are finally awakening to the plight of the historically disadvantaged and may now be seen as recognizing and actively promoting their rights through s.15 of the Charter. This is now undertaken in light of the particular process of constitutional adjudication. In Hunter v. Southam, Mr. Justice Dickson stated that a constitution

is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.¹⁷⁰

Specific provisions of a constitution, he continued, must therefore be subject to a "broad, purposive" analysis in light of the constitution's larger objectives.¹⁷¹

Addressing the Charter, Dickson J. stated that its purpose

is to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.¹⁷²

Additionally, there are clear indications that the courts view the principles that underlie the Charter as a mandate to foster an environment that encourages and respects self-fulfillment. In Morgentaler, Smoling and Scott v. The Queen¹⁷³ Wilson J. observed:

The Charter is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The Charter reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity ... [Liberty is] 'a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life' ...

.....

The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely, that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without

interference from the state. This right is a critical component of the right to liberty. Liberty ... properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.¹⁷⁴

From this may be heard echoes of the European sentiment of the right to respect for one's private life and its concomitant right to fulfillment of one's own personality in a manner that is officially validated. Clearly the way one defines oneself sexually is an important aspect of one's personality,¹⁷⁵ and clearly marriage in both its formal and common law manifestations is an equally important aspect of self-definition and, indeed, a right deemed fundamental.¹⁷⁶ That certain legally recognized benefits and obligations flow from the state of marriage and being a spouse cannot be disputed: the spousal support provisions contained in the British Columbia Family Relations Act¹⁷⁷ and the insurance scheme contained in the Ontario Health Insurance Act¹⁷⁸ are but two obvious examples. How, then, can s.15 of the Charter be used to promote the claims of those denied the equal benefit and equal protection of the law?

EQUALITY RIGHTS JURISPRUDENCE

Less than one year after the Karen Andrews decision, the Supreme Court of Canada released its judgment in Andrews v. Law Society of British Columbia.¹⁷⁹ This gave the Supreme Court of Canada its first opportunity to articulate its views on the concepts of equality and discrimination within the context of s.15. At issue was whether the citizenship requirement for entry into the legal profession in British Columbia contravened s.15 and, if so, whether this was justified under the provisions of s.1.

With respect to the concept of equality, McIntyre J. stated that it was something more than treating likes alike and unalikes unlike. Such an approach could lead to a

mechanical application of the law, resulting in decisions similar to that in Bliss v. A-G Can.¹⁸⁰ where a pregnant woman was denied the benefit of the law because the law worked to deny a particular benefit to all pregnant women and thus all pregnant women were treated equally.¹⁸¹ Rather, in keeping with the purposive approach to the Charter the Court has sought to undertake,¹⁸² it held that s.15 contained three basic and separate rights beyond the right to equality before the law: the right to equality under the law, the right to the equal protection of the law, and the right to the equal benefit of the law.¹⁸³ Thus, the equality provisions were designed to cast a much wider net than previous equality legislation.¹⁸⁴ However, the Court also recognized that s.15 provided something more than "mere equality":

It is clear the purpose of s.15 is to ensure equality in the formulation and application of the law. 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. It has a large remedial component ... It must be recognized, however, as well that the promotion of equality under s.15 has a much more specific goal than the mere elimination of distinctions.¹⁸⁵

That specific goal is equality without discrimination. Discrimination

is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s.15 provides a guarantee.¹⁸⁶

Clearly, then, discrimination is an integral aspect of the equality guarantee.

McIntyre J. defined discrimination as

a distinction, whether intentional or not but based on grounds relating to personal characteristics of an individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages to other members of society.¹⁸⁷

It is also necessary to consider what kinds of discrimination will be brought within the protection of s.15. All laws and legislation by their very nature make distinctions.

The question thus becomes which distinctions will result in discriminatory treatment. The Court adopted an approach that focuses on the enumerated grounds found within the text of s.15 and those analogous to them, stating [t]he words 'without discrimination' require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s.15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage."¹⁸⁸ The following was cited as illustrative of the approach:

The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantage, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others.¹⁸⁹

Thus, a claim under s.15 involves two distinct steps. An individual claiming a breach of s.15 must demonstrate

... not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or the benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.¹⁹⁰

If a breach of s.15 is found to have occurred, that is, that a denial of one of the equality rights with the requisite discriminatory element has been established, it falls to those seeking to uphold the discriminating legislation¹⁹¹ to establish that the legislation is "demonstrably justified in a free and democratic society" under the provisions of s.1 of the Charter. This involves a two step analysis:

...[T]he first question the court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights. The second step in a s.1 inquiry involves a proportionality test whereby the court must attempt to balance a number of factors. The court must examine the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the desirable social goal embodied in the legislation. Also involved in the inquiry will be the importance of the right to the individual or group concerned, and the broader social impact of both the impugned law and its alternatives.¹⁹²

This decision is significant in that it sets the parameters for developing an analysis for the application of the Charter's equality guarantees. This is an important step in giving expression to the large social values that underlie the Charter and what it seeks to secure and guarantee. It is in this sense that the decision is particularly significant, for it identifies the politically and socially weak and the traditionally disadvantaged as the true beneficiaries of the protections found in s.15. Commenting on the relative positions of citizens to non-citizens in society, Wilson J. noted:

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society whose needs and wishes elected officials have no apparent interest in attending.'¹⁹³

Wilson J. then examined politically vulnerable groups within the context of

... the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

I believe also that it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone J., writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s.15, the framers of the Charter embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the ground of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s.15 that it be interpreted with sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come.¹⁹⁴

From this it may be seen that the court is alive to the concerns of the traditionally disadvantaged and is seeking to promote their rights. This point was further developed by Wilson J. in R. v. Turpin¹⁹⁵ where she emphasized the importance of examining the "larger social, political and legal context" within which

"discrimination on grounds relating to the personal characteristics of the individual or group"¹⁹⁶ occurs:

... [I]t is only by examining the large context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. 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.¹⁹⁷

Wilson J. noted that the purpose of s.15 was to remedy or prevent "discrimination against groups suffering social, political and legal disadvantage in our society"¹⁹⁸ and that the *indicia* of discrimination included "stereotyping, historical disadvantage or vulnerability to potential and social prejudice."¹⁹⁹ These are clear signals that the Court is prepared to actively promote the rights of the historically disadvantaged to ensure that those individuals or groups who have been denied any of the equalities in s.15 are not further denied their rights by operation of the law. Section 15 is thus not merely about "anti-discrimination";²⁰⁰ rather, it has an active and progressive element that seeks to ameliorate disadvantage by asserting rights against the relatively advantaged. In this sense s.15 may be seen as not merely maintaining the status quo but actively working to overcome it.

The following case concerning equality rights claims against the federal government is noteworthy. In Rudolph Wolff & Co. v. Canada,²⁰¹ the appellant company claimed that federal legislation conferring exclusive jurisdiction on the Federal Court of Canada for all claims made against the federal government violated s.15(1) of the Charter. The appellant stated that the effect of the legislation was to treat those litigants bringing a claim against the federal government differently from litigants bringing claims against any other party.²⁰²

This claim is rejected on two grounds. First, the Court holds that the Crown "is not an individual with whom a comparison can be made to determine a s.15(1) violation."²⁰³ Second, the appellants failed to show that if any irregularity existed, it was discriminatory. The legislation granting the Federal Court of Canada exclusive jurisdiction over claims against the federal Crown does not distinguish between classes of individuals on the basis of any of the grounds enumerated in s.15(1) nor on any analogous grounds. It could not be said that individuals claiming relief against the federal Crown are "a disadvantaged group in Canadian society within the contemplation of s.15."²⁰⁴

These reasons flow directly from the development of discrimination in Andrews. Thus, it is not surprising that the Court would hold that litigants seeking to sue the federal Crown are not discriminated against on the basis of the personal characteristics found in s.15 or those analogous to them. It is interesting to note, however, that the Court also found that the Crown was not an individual with whom a comparison can be made in determining a s.15 violation. What this means is that the Crown is simply different from others against whom a comparison can be made. This aspect of the judgment appears to be the application of the "similarly situated" test, expressly rejected in Andrews as appropriate for the resolution of equality questions arising under the Charter.²⁰⁵ The reasons for judgment in this case were followed in Dywidag Systems v. Zutphen Brothers Construction.²⁰⁶ It is unclear whether these developments signal a narrowing of the scope of s.15, or simply represent aberrations in the Court's reasoning with respect to s.15.

THE JUSTIFICATION OF LIMITATIONS OF RIGHTS AND FREEDOMS:

SECTION ONE OF THE CHARTER

The rights and freedoms set out in the Charter are not absolutely guaranteed but subject to the limitation found in section 1 of the Charter. This provision reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.

Section 1 thus serves both to guarantee the rights and freedoms set out in the Charter and to provide the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured. The presence of s.1 is a recognition of the necessity to limit rights and freedoms at times to realize collective goals of fundamental importance. The textual primacy of a section focussing on the limitation of rights suggests that the concept of justification is the Charter's fundamental organizing principle.

The jurisprudence developed by the Supreme Court of Canada with respect to s.1 reveals that whether legislation is upheld or declared constitutionally invalid depends very much on the approach taken to the justificatory criteria. A relaxed s.1 analysis will result in the finding that legislation infringing rights and freedoms is justified in the circumstances. A strict analysis of the s.1 components will result in the finding that the legislation is constitutionally invalid. In this sense the approach taken by the courts to s.1 may be seen as results-oriented, with the outcome dictated by the level of analysis applied.

Initial Supreme Court of Canada decisions on the justification of limitations of constitutionally guaranteed rights and freedoms are dealt with very much on an individual basis.

LIMITS v. DENIALS

A-G Quebec v. Quebec Association of Protestant School Boards²⁰⁷ concerned the validity of Quebec's provincial legislation dealing with minority language education rights, Bill 101, which, it was conceded, were inconsistent with the minority language education rights in s. 23 of the Charter.²⁰⁸ The Court concludes that the Quebec legislation, being inconsistent with the Charter, is of no force or effect,²⁰⁹ without resorting to the limitations clause found in s. 1. The Court finds it unnecessary to resort to a discussion of the substantive elements of s. 1 for two reasons. First, it states that s. 23 of the Charter was specifically intended to override the provisions of the Quebec legislation.²¹⁰ Thus,

the limits which [the Quebec legislation] imposes on rights involving the language of instruction, so far as they are inconsistent with s. 23 of the Charter, cannot possibly have been regarded by the framers of the Constitution as coming within 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' Accordingly, the limits imposed by Chapter VIII of Bill 101 are not legitimate limits within the meaning of s. 1 of the Charter ...²¹¹

The Court's second reason for holding the Quebec legislation invalid without a substantive consideration of s. 1 focuses on the effects of Bill 101. The Court states that the real effect of the Bill was to make an exception to the minority language education rights in s. 23 of the Charter.²¹² The Court holds that the effect of the Bill was to

collide directly with those of s. 23 of the Charter, and are not limits which can be legitimized by s. 1 of the Charter. Such limits cannot be exceptions to the rights and freedoms guaranteed by the Charter nor

amount to amendments of the Charter. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. The same applies to Chapter VIII of Bill 101 in respect of s. 23 of the Charter.²¹³

Thus it appears that the Court contemplates a distinction between the limitation of rights and freedoms, and the denial of them. Denials must properly be pursued through s. 33 of the Charter or by way of constitutional amendments.²¹⁴ Limits that "collide directly" with a Charter right or freedom, or go to its core, are not considered reasonable limits or demonstrably justified in a free and democratic society and thus must be ruled invalid without reference to s. 1.²¹⁵

The Court also finds it unnecessary to discuss the substantive elements of s. 1 in Hunter v. Southam,²¹⁶ concerning the constitutional validity of provisions of the Combines Investigation Act authorizing a search and seizure. Southam Inc. asserted that sections of the Act were inconsistent with the right to be secure against unreasonable search and seizure, as provided by s. 8 of the Charter. The Court states that the crux of the case is the meaning to be given to the term "unreasonable" in s. 8.²¹⁷ The federal government made no submissions that even if the searches provided for by the Act were "unreasonable" within the meaning of s. 8, they nevertheless constituted "reasonable limits" and were "demonstrably justified" within a free and democratic society under s. 1.²¹⁸ The Court therefore finds it unnecessary to consider s. 1.²¹⁹

Thus, the vision of the Charter and its limitations the Supreme Court of Canada appears to be developing through Hunter v. Southam and A-G Quebec v. Quebec Association of Protestant School Boards²²⁰ is one where Charter guarantees serve to ensure

freedom from governmental action and where limitations must be carefully drafted to warrant consideration under s. 1 at all.

LIMITATIONS OF CONSTITUTIONALLY GUARANTEED RIGHTS AND FREEDOMS

The Court again had the opportunity to address the substantive requirements of s. 1 in Singh et al v. Minister of Employment and Immigration.²²¹ The issue here was whether the procedure for the determination of refugee status under the Immigration Act, 1976²²² was in accordance with the principles of fundamental justice as established in s. 7 of the Charter. The Act was challenged on the basis that it did not provide an adequate opportunity for refugee claimants to state their case and know the case they have to meet.²²³ Wilson J., writing on behalf of the three justices who decided this case on the basis of the Charter,²²⁴ finds this inadequacy of the Act contravenes s. 7 of the Charter. She then moves on to consider whether the shortcomings of the Act in relation to the standards set by s. 7 constitute reasonable limits which can be demonstrably justified in a free and democratic society according to the principles of s. 1 of the Charter.²²⁵

Wilson J. notes that the

question of the standards which the Court should use in applying s. 1 is, without a doubt, a question of enormous significance for the operation of the Charter. If too low a threshold is set, the courts run the risk of emasculating the Charter. If too high a threshold is set, the courts run the risk of unjustifiably restricting government action. It is not a task to be entered upon lightly.²²⁶

This task is made all the more difficult, she states, by the comparatively few arguments made on the principles the Court should be guided by in applying s. 1 and the limited scope of the factual material provided by the Minister of Employment and Immigration

to support the contention that the Act's procedures constitute reasonable limits on claimants' rights.²²⁷ On the relationship between s. 1 and the rest of the Charter, she says:

One or two comments are in order respecting this approach to s. 1. It seems to me that it is important to bear in mind that the rights and freedoms set out in the Charter are fundamental to the political structure in Canada and are guaranteed by the Charter as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be 'demonstrably justified in a free and democratic society' it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in other sections of the Charter.²²⁸

That said, Wilson J. then addresses the argument made on behalf of the Minister of Employment and Immigration to uphold the legislation. The Immigration Appeal Board, it was argued, was

already subjected to a considerable strain in terms of the volume of cases which it was required to hear and that a requirement of an oral hearing in every case where an application for redetermination of a refugee claim has been made would constitute an unreasonable burden on the Board's resources.²²⁹

However, it is Wilson J.'s opinion that "administrative convenience" could not "overrule the need to adhere" to principles of fundamental justice.²³⁰ Indeed, to do so would render the guarantees of the Charter "illusory".²³¹ Declining to state precisely what factors would give rise to justification under s. 1 and what standards of review should be applied with respect to s. 1,²³² she holds that they must be more compelling than those advanced by the Minister.²³³

The Court's concern about administrative expediency in Singh is echoed in R. v. Big M Drug Mart et al.²³⁴ The issue in this case was whether federal legislation compelling Sunday as a day of religious observance was contrary to s. 2(a) of the Charter as infringing the right to freedom of conscience and religion and, if so, whether the legislation could be saved by s. 1 as a demonstrably justified reasonable

limit. In commenting on the nature of legislation generally, Dickson J. states that it is necessary to assess both the purpose and the effects of legislation to determine its constitutionality.²³⁵ Indeed, the court must assess the object of legislation "if rights are to be fully protected."²³⁶ Such an inquiry would ensure that the aims and objectives of the legislatures are in accordance with the guarantees set out in the Charter. This assessment, he says, is vital.²³⁷ Further, Dickson J. states,

[t]he declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.²³⁸

Thus, the initial test of legislation's constitutional validity is to look to its purpose: if the legislation is found to have an improper purpose, there is no need to consider its effects, as it has already been found to be invalid. He notes that the legislation must be examined in light of its purpose at the time it was drafted and enacted, dismissing the argument that the legislative purpose can shift or be transformed over time by changing social conditions. To hold otherwise, he says, would create uncertainty in the law, encourage relitigation of the same issues, and undermine the doctrines of *stare decisis* and Parliamentary intention.²³⁹ With respect to the purpose of the right or freedom at issue, he states it is to be sought

by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, be placed in its proper linguistic, philosophic and historical contexts.²⁴⁰

Dickson J. determines that the true purpose of the legislation was to compel the observance of the Christian Sabbath and thus contravened the guarantee of freedom of conscience and religion found in s. 2(a) of the Charter.²⁴¹ He then turns to a consideration of whether the infringement could be justified on the basis of s. 1.

Before addressing the arguments advanced in support of the legislation, Dickson J. makes some general comments indicating what the scope of a s. 1 test might be:

At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable -- a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.²⁴²

This passage is the first indication of the Court attempting to develop a comprehensive approach to the s. 1 inquiry, rather than simply indicating, as in previous cases, what reasonable limits do not consist of.²⁴³

Responding to the argument that Sunday as a day of rest and religious observance was the most practical since it was adhered to by the Christian majority, Dickson J. states that

[t]his submission is really no more than an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which is attacked for violating s. 2(a).²⁴⁴

In dismissing this argument of convenience and expediency he echoes the Court's earlier statements in Singh.²⁴⁵

Finding the legislation was religious in nature by compelling Sunday observance,²⁴⁶ Dickson J. holds that it was not open for the federal government to rely on secular grounds (the need and value of a universal day of rest) the legislators did not

primarily intend.²⁴⁷ "Parliament", he says, "cannot rely upon an *ultra vires* purpose under s. 1 of the Charter."²⁴⁸

Wilson J., while agreeing with the conclusions of Dickson J., comments on the distinction between an analytical approach appropriate to a Charter case and the traditional approach in determining questions of the division of power between the federal and provincial legislatures. While the approach to the latter focuses on the purpose or primary function of the legislation,²⁴⁹ the entrenchment of constitutionally guaranteed rights and freedoms necessitates an examination of the consequences of legislation. The question to ask is whether the legislation "has the effect of violating an entrenched individual right."²⁵⁰ The Charter, she says, is "first and foremost an effects-oriented document."²⁵¹ In this approach she differs with Dickson J. that the initial test of legislation's constitutional validity is to look to its purpose: for Wilson J. the first stage is to "inquire whether legislation in pursuit of what may well be an *intra vires* purpose has the effect of violating an entrenched right or freedom."²⁵² In her view, the purpose of a statute is irrelevant as long as it has an actual or potential effect on a constitutionally guaranteed right.²⁵³

The last of the pre-Oakes decisions concerning s. 1 was the Reference Re Section 94 (2) of the Motor Vehicle Act,²⁵⁴ concerning the constitutional validity of provincial legislation providing for a minimum period of imprisonment for the absolute liability offence of driving without a valid driver's licence or with a licence under suspension. The matter came before the courts by way of a reference under the Constitutional Question Act²⁵⁵ asking whether the offence created by s. 94 (2) of the Motor Vehicle Act was consistent with the Charter.

In addressing the issue of whether the legislation offended s. 7 of the Charter,²⁵⁶ the Court focuses on the scope of the term "principles of fundamental justice." This issue, in turn, is narrowly restricted to whether the principles of fundamental justice have a substantive content or a merely procedural content.²⁵⁷ In expressly considering a purposive analysis of this term,²⁵⁸ Lamer J. states that to interpret "the principles of fundamental justice" so as to have a merely procedural content would be wrong, because

to do so would strip the protected interests [of life, liberty and security of the person] of much, if not most, of their content and leave [those] 'right[s]' ... in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of Charter rights in ... Hunter v. Southam ...²⁵⁹

Lamer J. then goes on to state that absolute liability in penal law with the potential of imprisonment offends the principles of fundamental justice as it has the potential of depriving an individual of life, liberty or security of the person.²⁶⁰ The legislation in question clearly falls within this category, and thus could only be salvaged by the government demonstrating that it is a justified and reasonable limit of one's s. 7 rights under s. 1.

Before addressing s. 1, Lamer J. notes that absolute liability does not *per se* offend s. 7; rather, it is the combination of absolute liability and potential imprisonment that imperils the legislation. Further,

Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional

conditions, such as natural disasters, the outbreak of war, epidemics, and the like.²⁶¹

No evidence was presented either in the British Columbia Court of Appeal or in the Supreme Court of Canada to uphold the legislation under s. 1 of the Charter. The argument to sustain the legislation suggests that limiting rights under s. 7 is a reasonable means of "reducing the human and economic cost of bad driving" and getting "bad drivers off the road" by imposing "severe penalties on those who drive while prohibited from driving and those who drive while their driver's licence is suspended."²⁶² While Lamer J. finds keeping bad drivers off the road and severely punishing drivers "in contempt of prohibitions against driving" laudable goals, he asks

whether the Government of British Columbia has demonstrated as justifiable that the risk of imprisonment of a few innocent is, given the desirability of ridding the roads of British Columbia of bad drivers, a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more than let those few who did nothing wrong remain free.

As did the Court of Appeal, I find that this demonstration has not been satisfied, indeed, not in the least.²⁶³

In this passage Lamer J. indicates that there is a less drastic means of accomplishing the legislative objective, that of a strict liability offence open to a defence of due diligence, a test first suggested in R. v. Big M. Drug Mart.²⁶⁴ Because the legislation employs a more drastic means than necessary to accomplish its objective, it fails to meet the requirements of s. 1.

Justice Wilson reaches the same conclusion that s.94(2) of the Act violates s.7. She reaches that result, however, by a different route. In an opinion that stresses the primacy of the principles of fundamental justice found in s.7, she states that the purpose of s.7 is to ensure that deprivations or impairments of life, liberty or security of the person are only effected in accordance with the principles of fundamental

justice.²⁶⁵ Thus, an inquiry into s.7 must begin with a determination of whether the right has been impaired in accordance with the principles of fundamental justice. If so, the inquiry moves to the s.1 stage.²⁶⁶

If, however, the limit on the s.7 right has been effected through a violation of the principles of fundamental justice, the enquiry, in my view, ends there and the limit cannot be sustained under s.1. I say this because I do not believe that a limit on the s.7 right which has been imposed in violation of the principles of fundamental justice can be either 'reasonable' or 'demonstrably justified in a free and democratic society'. The requirement in s.7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s.7 right under s.1. It can only limit the s.7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the test under s.1.²⁶⁷

In this instance, it is Justice Wilson's view that mandatory imprisonment for an offence committed unknowingly and unwillingly, and after the exercise of due diligence is grossly excessive and inhumane and offends the principles of fundamental justice in s.7.²⁶⁸ Resort to s.1 is thus unnecessary.

Notable among these five pre-Oakes cases is the lack of any successful s.1 argument. While the Court failed to develop a comprehensive approach to s.1 and instead dealt with each case on its own, it nevertheless demonstrated which arguments would not succeed in a s.1 analysis. Moreover, on this issue the Court presented a united front: no dissenting judgments were given in these decisions.²⁶⁹ In two cases, A-G Quebec v. Quebec Association of Protestant School Boards and Hunter v. Southam,²⁷⁰ the Court found it unnecessary to resort to a discussion of s.1 at all, while the three remaining cases indicated the Court's willingness to establish high standards the government must meet when seeking to uphold limitations on constitutionally-protected rights. The Court made it clear that legislation that serves to deny rather than limit rights will fail the test of constitutionality before it reaches the s.1 stage,²⁷¹ indicating that legislation must be carefully drafted to warrant consideration under s.1 at all. The contrast between limits and denials points to a particular approach taken by

the Court in addressing the different institutional roles of ss.1 and 33. The denial of a right represents a particularly political stance taken by a legislative body, with overtly political consequences in terms of voter reaction and public perception. The very act of denying a constitutionally guaranteed right -- an event so significant it must be specifically enacted notwithstanding the Charter's guarantees or by way of constitutional amendment -- speaks volumes about a legislature's particular political agenda and the value it places on the particular right denied. The act of limiting the right, on the other hand, allows the legislative body the relative political luxury of appearing to maintain the integrity and principles of the Charter's rights by limiting, rather than denying, them.²⁷²

In embracing a "purposive" approach to Charter jurisprudence, the Court emphasizes it must move away from formal and technical legal analysis and instead focus on "the character and larger objects of the Charter itself", the language used to articulate the right, and "the historical origins of the concept enshrined".²⁷³ This approach necessitates a discussion of "values, social needs, competing interests and policy alternatives" and of the social and political concerns raised by the Charter's guarantees.²⁷⁴ This, in turn, encourages judges to develop and elaborate on ideas of the good society that give expression and foundation to guaranteed rights. At the same time, it should be recognized that the definitions and content given to rights and freedoms are very much dependent on a judge's own particular values and policies. Moreover, the general language used to articulate the rights and freedoms in the Charter is so open as to allow differing definitions and purposes according to different judges. Thus, while a purposive approach encourages judges to view Charter adjudication in a more open and less formalistic manner, it by no means is determinative of the content and interpretation of rights.²⁷⁵

The Court made some significant comments concerning arguments of administrative efficiency and the costs involved in guaranteeing rights and freedoms to all. The point is made in Singh, Big M and the Motor Vehicle Reference that administrative convenience *per se* does not constitute a reasonable and demonstrably justified limit on rights.²⁷⁶ However, the Court cautioned that "prohibitive costs" may be sufficient to justify the limitation of rights.²⁷⁷ Yet cost arguments usually do not state that funding for a particular program is a prohibitive burden itself; rather, the argument states that the funding is an excessive burden given prevailing resource allocations.²⁷⁸ In rejecting this argument the Court indicated that the government cannot escape "Charter commitments by failing to fund a particular department or programme sufficiently to meet constitutional standards."²⁷⁹ This implies that constitutionally guaranteed rights must receive higher priority in the distribution of financial resources than non-constitutional rights. This has significant meaning to traditionally disadvantaged groups who have experienced difficulty gaining access to resources and programs. The new constitutional guarantees set forth in the Charter cannot be abridged by the government resorting to arguments of greater cost.

Finally, the Court began to develop for the first time a comprehensive framework for a s.1 analysis. In Big M, Dickson J. noted that government objectives would have to be of sufficient importance to override constitutionally protected rights and freedoms, and that the means chosen to do so are reasonable. He termed this a form of proportionality test.²⁸⁰ He also indicated that the Court may look to see if the means taken to restrict the right or freedom are the least restrictive.²⁸¹ This least restrictive means test was later applied by Lamer J. in the Motor Vehicle Reference. These elements would be subjected to more serious scrutiny in later cases. Taken together, then, the preceding cases, while dealt with very much on an individual basis,

indicate that denials rather than limits will not succeed at the s.1 stage, nor will *ultra vires* legislation or arguments of administrative convenience.

R. v. Oakes²⁸² represents the Court's most serious attempt thus far to construct a comprehensive framework of analysis for s.1. At issue here was the constitutional validity of s.8 of the Narcotic Control Act,²⁸³ which contained a "reverse onus" clause requiring an accused person to prove, on a balance of probabilities, that he or she is not in possession of a narcotic for the purpose of trafficking once the basic fact of possession is proven. It was argued that this was contrary to the right to be presumed innocent until proven guilty as set forth in s.11(d) of the Charter.²⁸⁴

In developing the framework for a s.1 analysis, Dickson C.J. notes that s.1 has two separate functions. The first is that it constitutionally guarantees the rights and freedoms set out in the Charter. The second is that it "states explicitly the exclusive justificatory criteria (outside s.33 of the Charter) against which limitations on those rights and freedoms must be measured."²⁸⁵ Further, he states that the Court must be guided by the underlying values and principles of a free and democratic society which

embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide body of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.²⁸⁶

In limiting rights, the criteria in s.1 impose what Dickson C.J. terms a "stringent standard of justification" in the face of constitutionally guaranteed rights and "the fundamental principles of a free and democratic society."²⁸⁷

Turning to the evidence necessary in a s.1 analysis, Dickson C.J. states that the standard of proof is that of a preponderance of probability and that it must be applied rigorously, as the phrase "demonstrably justified" implies. The evidence necessary to sustain a violation of a constitutionally protected right or freedom must be "cogent and persuasive and make it clear to the Court the consequences of imposing or not imposing the limit." He also notes that the Court must be advised of what other means of accomplishing the legislative objective were available when the legislators made their decision to breach a right or freedom.²⁸⁸ It is worth setting out in full Dickson C.J.'s comments concerning the elements of s.1:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of 'sufficient importance to warrant overriding a constitutionally protected right or freedom': R. v. Big M Drug Mart Ltd., *supra*, at p.352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s.1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': R. v. Big M Drug Mart Ltd., *supra*, at p.352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: R. v. Big M Drug Mart Ltd., *supra*, p.352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.

With respect to the third component, it is clear that the general effect of any measure impugned under s.1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort

to s.1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms is guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on an individual or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be demonstrably justified in a free and democratic society.²⁸⁹

With respect to the reverse-onus clause in s.8 of the Narcotic Control Act, Dickson C.J. finds that while the legislation addressed the pressing and substantial concern of curbing drug trafficking and that this was of sufficient importance to warrant overriding constitutionally protected rights, it fails at the proportionality test. He states that there is no rational connection between the basic fact of possession and the presumed fact of possession for the purposes of trafficking. It would be irrational, he holds, to infer that an individual has an intent to traffic when the quantity of drugs seized is very small.²⁹⁰ The presumption of trafficking is found to be overinclusive, potentially resulting in irrational and unfair instances. This, together with a potential for life imprisonment upon conviction of the offence, could not successfully sustain a s.1 analysis.²⁹¹ While the ends of the legislation were legitimate, the means are not.

The element of proportionality exists in several contexts in this judgment. First, to ensure that "trivial" claims or those "discordant with the principles integral to a free and democratic society"²⁹² are not afforded s.1 protection, the importance of the legislative objective containing a limitation on rights must be proportionate with the importance of the principle of constitutionally-protected rights and freedoms. For example, it may be argued that legislation limiting the right to vote to citizens over 18 years of age is discrimination based on age and thus contrary to the guarantees of

equality found in s.15 of the Charter. Yet is difficult to imagine the courts declaring the legislation invalid and the age limitation unreasonable, thus paving the way for five-year olds to vote. Such a finding would trivialize both the equality rights guarantees in s.15 and the right to vote found in s.3 of the Charter.²⁹³ There must also be proportionality between the legislative objective and the means chosen to achieve that objective. Each of these two elements must be reasonable and demonstrably justified by the party seeking to uphold the limitation. A law that seeks to reduce the amount of litter on city streets may well be seen as a reasonable and important objective, but the imposition of a mandatory five year jail term upon a first conviction for littering would rarely be seen as reasonable when less drastic means of accomplishing the goal are available. Finally, the legislative objective must be proportionate with the effects of the measure on individuals or groups. The greater the deleterious effect of the measure, the more important the objective must be in order to survive at the s.1 stage.

The framework of analysis for s.1 is telling of the Court's approach to the limitation of rights and, in a broader sense, of the nature of the relationship between individuals and groups on the one hand and the state on the other. The Court makes it clear that it is the purpose of the Charter to protect individuals and groups from governmental action that is inconsistent with fundamental rights and freedoms. Indeed, this is Chief Justice Dickson's express statement in Hunter v. Southam.²⁹⁴ Significant also is his statement in the same case that the Charter does not itself authorize governmental action,²⁹⁵ again indicating the view that the Charter is to be considered a shield to be used by citizens in the face of governmental objectives that effect rights and freedoms.

Also clearly evident is the Court's view of the Charter as having a collectivist intent. In addressing the elements of a free and democratic society, the Chief Justice

identifies a "commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."²⁹⁶ In this sense the Court may be seen as supporting the view of the state as an agency through which the collective goals of society are advanced.²⁹⁷ That collective goals are given significant consideration is not surprising, given that the final word of s.1 is "society".²⁹⁸ The Court's statement of the necessity to limit rights and freedoms at times to realize collective goals of fundamental importance²⁹⁹ supports the view that society's rights and benefits are to be enjoyed by the greatest number of citizens equally, rather than by a fortunate few at the expense of the rest.³⁰⁰ This is further supported by the Court's earlier dismissal of s.1 justifications based on arguments of administrative convenience and expediency, increased costs for programs and religious tradition.³⁰¹

The Court is also careful to point out that it is not inconsistent to speak of guaranteeing fundamental rights and freedoms and at the same time of conditions under which they may be limited. Indeed, this is one of the fundamental tensions of the Charter. Chief Justice Dickson explicitly addresses this in his observation that s.1 serves two distinct functions: to constitutionally guarantee the rights and freedoms set out in the Charter, and to state explicitly the exclusive justificatory criteria against which limitations must be measured.³⁰² In determining whether a limitation is justified, the Court is guided by the underlying values and principles of a free and democratic society. At the same time, these values and principles "are the genesis of the rights and freedoms guaranteed by the Charter."³⁰³ Thus, the terms of reference for constitutionally guaranteed rights and freedoms and their limitations are identical, rooted in the concept of a free and democratic society.³⁰⁴ Relating this notion back to the collectivist intent of the Charter, in a free and democratic society, rights and

freedoms may be limited in some circumstances to further "collective goals of fundamental importance"³⁰⁵ and to balance individual Charter principles against broader social goals. It is for future decisions to indicate under what circumstances collective goals will trump rights, but it is significant to note that the Oakes judgment specifically contemplates this.

The retreat from the stringent test of Oakes and the near-unanimous position of the Court with respect to the justification of limitations on rights and freedoms began almost immediately. The issues of freedom of religion and conscience and the right to life, liberty and security of the person (ss.2(a) and 7 of the Charter) were raised in Jones v. The Queen.³⁰⁶ This case concerned a fundamentalist pastor who was educating his own children and several others in a schooling program operating in his church basement. He refused to send his children to public school, as required by s.142(1) of the Alberta School Act,³⁰⁷ nor would he apply to the Department of Education to have his school approved as a private school as permitted by s.143(1)(e) of the Act. He stated that his authority over his children and his duty to attend to their education came from God, and that obtaining permission from the state to do what he is authorized by God to do would violate his religious convictions as guaranteed by s.2(a). He further refused to apply for an exemption under s.143(1)(a) of the Act, under which a pupil is excused from attendance at school if a Department of Education official certifies in writing that the pupil is receiving efficient instruction at home or elsewhere. He argued that the obligation on him to seek an exemption for his children infringed his freedom of religion in that it compelled him to acknowledge that the government, rather than God, has the final authority over the education of his children.³⁰⁸ He also stated that s.143(1)(a), in limiting the evidence of efficient instruction to a certificate issued by the Department of Education, deprived him of his liberty, contrary to the principles of fundamental justice in s.7, by preventing him from

making a full answer and defence to the charges of truancy he faced under s.180(1) of the Act.

It is significant to note that the near unanimity that distinguishes Oakes and its precedators breaks down in Jones. Four judgments are rendered here, with Justices La Forest and Wilson offering opposing views, Justice Lamer concurring with La Forest J. in a brief judgment, and Justice McIntyre agreeing with both La Forest and Wilson JJ. on separate issues.

La Forest J. limits his discussion of s.1 as it applies to freedom of religion and conscience, having found that the legislation did not deprive Mr. Jones's right to life, liberty and security of the person in a manner inconsistent with the principles of fundamental justice. Even assuming that the word "liberty" as used in s.7 includes the right of parents to educate their children as they see fit, the system provided by the Act to ensure the requirements necessary to regulate the education of young persons is not so manifestly unfair as to violate the principles of fundamental justice.³⁰⁹ Clearly, the province has a compelling interest in the quality of education, and it "seems normal enough to refer a question of efficient instruction within the meaning of the School Act to a school inspector or Superintendent of Schools who is knowledgeable of the requirements and workings of the educational system ...".³¹⁰ No breach of s.7 is found, and a discussion of s.1 is thus unnecessary.³¹¹

With respect to the freedom of conscience and religion argument, La Forest J. identifies the purpose of the School Act as serving to "regulate the education of the young people in the schools of the province."³¹² While he states that this is secular and has no religious purpose, he concedes that the effect of the Act is to constitute an interference with Mr. Jones's freedom of religion. Nevertheless, he says,

Education is today a matter of prime concern to government everywhere ... Indeed, in modern society, education has far-reaching implications beyond the province, not only at the national, but at the international level.

.....

The interest of the province in the education of the young is thus compelling. It should require no further demonstration that it may, in advancing this interest, place reasonable limits on the freedom of those who, like the appellant, believe that they should themselves attend to the education of their children and do so in conformity with their religious convictions.³¹³

This is clearly enough for La Forest J. The compelling state interest in education easily justifies the minimal impairment of freedom of religion in requiring the appellant to apply to the Department of Education for a certificate stating his instruction efficiently complied with provincial standards of efficiency.

It is significant to note that no evidence is tendered by the Province of Alberta to show the importance of education. It is more significant to note that the province does not tender any evidence that the compelling objective of the education of the young could be accomplished by other, less drastic, means. This is the second part of the means test outlined in Oakes, and it is completely absent in Justice La Forest's s.1 analysis in Jones. Indeed, his analysis is lacking in a detailed, strict, Oakes-style approach to s.1.

This latter point is made all the more apparent in Wilson J.'s dissenting judgment in Jones. In finding that the impugned sections of the School Act did not infringe Mr. Jones's freedom of conscience and religion, she does not have to address s.1 on that issue.³¹⁴ However, she states that if the School Act did in fact violate s.2(a), it could not be saved by s.1. Focussing directly on the lack of evidence put forth by the province of a less drastic means of insuring the education of the young, she says:

While there can be no doubt that the province has a compelling interest in education, more than this is required under s.1. There has to be a form of proportionality between the means employed and the end sought to be achieved. In particular, the means employed must impair as little as possible the right or freedom in issue: R. v. Oakes. The government adduced no evidence to establish that having the parent apply for a certificate was the least drastic means of ensuring that their children were receiving efficient instruction. The legislature, for example, could clearly have given the education authorities the power to inspect on their own initiative. I do not believe, therefore, that the government has discharged its burden under s.1. [citation omitted]³¹⁵

On this issue, Wilson J. disagrees with the conclusions of La Forest J. Wilson's approach adheres strictly to the tenets of the Oakes test; indeed, quoting directly the words of Chief Justice Dickson on the least drastic means part of the analysis.

Turning to Jones's submissions that his right to liberty is violated by the School Act in a way that offends the principles of fundamental justice, Wilson J. first addresses the meaning of the term "liberty" in s.7:

I believe that the framers of the Constitution in guaranteeing 'liberty' as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in today's parlance, 'his own person' and accountable as such.³¹⁶

She finds that the term "liberty" includes a parent's right to raise and educate his or her children in accordance with the parent's conscientious beliefs.³¹⁷ She further states that failure to obtain a certificate of efficient instruction from the school authorities means that a parent loses the right to educate his or her children in accordance with the parent's conscientious beliefs. Moreover, she says, the lack of the certificate means the parent has no legal right to educate his or her children, and exposes the parent to a charge of truancy under the School Act, which could result in the loss of physical liberty for the non-payment of fines. This loss of physical liberty is clearly encompassed by the term "liberty", as stated in the B.C. Motor Vehicle Reference.³¹⁸ Further, the School Act, in restricting proof of efficient instruction to a certificate

supplied by the school authorities, prevents parents from proving efficient instruction by any other manner. This, she states, thus prevents the parent from making full answer and defence to the charges before him or her by introducing any other evidence relevant to the case. For these reasons, the School Act violates the parent's rights pursuant to s.7.

Turning to s.1, Wilson J. repeats her opinion that a violation of a person's rights under s.7 by legislation which offends the principles of fundamental justice could neither be reasonable nor demonstrably justified in a free and democratic society.³¹⁹ However, she says, if she is incorrect in this opinion, it is still her view that the government had failed to justify the violation of s.7 under s.1. In keeping with the Oakes test, Wilson J. holds that the strict standard of justification necessary to uphold a violation of a Charter guarantee had not been met. The government, she says, put forth no justification for the one exclusive method of proving efficient instruction. The government has "proffered no argument as to why exclusivity is necessary to achieve the province's objective of insuring adequate instruction for its children."³²⁰ Other jurisdictions, she notes, allow proof of efficient instruction to be decided in court. This failure to address the least drastic means aspect of the Oakes test means that the province failed to justify the violation of s.7. In her reasons for judgment, Wilson J. clearly differs in her application of the Oakes criteria. She may be seen to be adhering strictly to the form of analysis set out in Oakes, while La Forest J.'s judgment indicates a move away to a slacker standard of justification.

The decision of Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.³²¹ signaled a further move away from the strict approach to justification developed in Oakes. At issue was whether secondary picketing by members of a trade union involved in a labour dispute was an activity protected by

s.2(b) of the Charter, which guarantees freedom of expression³²² and accordingly is not the proper subject of an injunction to restrain it. The respondent company had obtained an injunction preventing the appellant union from engaging in secondary picketing of the company's place of business. The trade union appealed on the basis that the injunction infringed on freedom of expression. McIntyre J., for the majority, holds that the Charter does not apply to litigation between purely private parties and thus dismisses the union's appeal.³²³ However, he does express the view that secondary picketing, indeed, all forms of picketing, involves some form of expression.³²⁴ He further states that action on the part of the picketers will always accompany the expression. He then makes this significant statement:

... not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct.³²⁵

McIntyre J. then declares that the picketing in this instance does involve the exercise of the right of freedom of expression and moves to consider whether the injunction against secondary picketing constituted a reasonable limit on freedom of expression under s.1. He notes that a balance must be struck between the competing interests of the union's right to freedom of expression on the one hand and the respondent company's "pressing and substantial" concern that it will suffer economically in the absence of an injunction restraining secondary picketing at its premises.³²⁶ McIntyre J. then states that picketing and industrial conflict may be tolerated, but "only as an inevitable corollary to the collective bargaining process."³²⁷ It is necessary, he says, that picketing be limited in the general social interest. Thus, he says, it is reasonable to restrain picketing to the actual parties so that it will not harm others.³²⁸ He further states that the "requirement of proportionality is also met, particularly when it is recalled that this is an interim injunction effective only until trial when the issues may be more fully

canvassed on fuller evidence."³²⁹ He therefore concludes that the injunction constituted a "'reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society'."³³⁰

This approach, particularly the statements that some forms of freedom of expression, such as threats or acts of violence or property damage, would not be protected,³³¹ indicates a significant shift in approach to the justification of Charter infringements. Rather than keeping the issues of breach and justification analytically distinct by limiting the justification of Charter infringements strictly to the s.1 stage, the Court has indicated a willingness to consider limiting substantive rights at the definitional stage.³³² In indicating that some forms of "expression" would be protected by s.2(b) while others would not, the Court has blurred the boundaries between breach and justification. Moreover, in limiting rights at the definitional stage, the Court may avoid the necessity of a s.1 analysis altogether.

Such an approach may be problematic. It appears to run contrary to Chief Justice Dickson's comments in Oakes that s.1 is to provide the criteria for justification of limitation of rights guaranteed by the Charter.³³³ In stating that s.1 serves this function, the implication is that rights are not to be limited in their substantive sections. Also, it would appear that the standard of justification of limitations would be greater at the s.1 stage than at the definitional stage. By implication, this means that the party seeking to uphold a limitation of a right (usually the government) would be put to a higher standard of justification if obliged to undertake a s.1 analysis than if the right were limited by definition, thereby avoiding the necessity of considering s.1 at all. Thus, if the government succeeds in limiting a right at the definitional stage, it is possible to view that right as less significant as a right that is limited at the s.1 stage. This raises the potential of some constitutionally-guaranteed rights being seen as more

fundamental than others. This does not seem to be in accordance with Dickson's comments in Oakes.

It also appears that the Charter itself is organized on the basis of a strict separation between the issues of breach and justification. The textual primary of a section focussing on the limitation of rights, combined with compelling statements by the Court in previous cases,³³⁴ advances the theory that the concept of justification is the Charter's fundamental organizing principle.³³⁵ Moreover, that the substantive rights appear in the Charter in individual self-contained sections preceded by a limitations section suggests an intention to keep the relationship between breach and justification analytically distinct.³³⁶ Indeed, the existence of s.1 itself compels this approach.

The practice of definitional balancing suggested in Dolphin Delivery raises significant issues with respect to the interpretation and justification of constitutionally-guaranteed rights and freedoms. On the one hand, protection of all activity claimed under a substantive section would leave virtually all constitutional litigation to the s.1 stage. Obvious effects of this include hopelessly clogged courts and woefully trivialized rights as any and all litigants could claim Charter protection of a right and put the state to the proof of justifying limitations. A trivialized right is tantamount to no right at all, and hardly seems consonant with the Court's earlier statements of their importance in the constitutional fabric of Canada. On the other hand, defining rights so as to suggest that some activities are protected while others are not precludes resort to s.1 and offers the potential for some rights to be seen as more fundamental than others. This is equally problematic.

It should be noted as well in Dolphin Delivery that at the s.1 stage McIntyre J. fails to follow the strict framework of analysis developed in Oakes. Indeed, Oakes here appears to receive little more than lip service, with a nod toward a pressing and substantial interest on the part of the respondent and a form of proportionality in balancing the interests of freedom of expression and social costs due to industrial conflict. Oakes itself is passingly referred to, and there is no discussion of the necessity of a rational connection between the legislative objective and the measures taken to achieve that; nor of a least restrictive means of ensuring the objective is achieved; nor is there any discussion of the effects of the measure in proportion to the limitation of the right. In short, Oakes is almost entirely absent from the s.1 analysis in Dolphin Delivery, thus indicating a further erosion of its original principles.

A far more detailed analysis of s.1 is offered in R. v. Edwards Books and Art Ltd. and reveals widely varying applications of the test for justifying limitations on rights and freedoms. The question before the Court was whether the Ontario Retail Business Holiday Act³³⁷ infringed the freedom of conscience and religion guaranteed by s.2(a) of the Charter. The Act required retail businesses to close on Sundays and provided limited exemptions to stores that closed on Saturdays, were smaller than 5,000 square feet, and employed no more than seven people to serve the public. Failure to close on Sunday resulted in charges against several retail stores, which claimed that the Act violated freedom of religion. Four judgments are written in this case. Chief Justice Dickson, joined by Chouinard and Le Dain JJ., holds that the Act violated freedom of religion but is saved by s.1. La Forest J., in a separate opinion, holds that the Act is a reasonable limit under s.1. Wilson J., dissenting in part, holds that the Act infringed freedom of religion and can not be saved by s.1. Beetz J., joined by McIntyre J., is of the opinion that the Act did not constitute a violation of s.2(a) and thus does not find it necessary to resort to s.1.

Chief Justice Dickson, addressing the purpose of the Act, finds it was enacted to provide a uniform holiday or day of rest for retail workers.³³⁸ The choice of Sunday reflected a secular rather than religious reason: research indicated Sunday as the preferred day of social interaction and leisure activities between family and friends.³³⁹ However, the effect of the Act was to significantly infringe on the freedom of Saturday retail observers who, for religious reasons, close their stores on Saturday to practice their religious beliefs. Exemptions aside, the Saturday observer is disadvantaged by being closed an extra day relative to the Sunday observer. The effect of this is not insignificant given the competitive pressures on retailers. The effect of the Act, then, is to make it more expensive for Saturday observers to practice their faith than Sunday observers. This, the Chief Justice says, constitutes an interference with freedom of religion.³⁴⁰

Turning to s.1, he reiterates the form of the s.1 test, adding that in considering the proportionality requirement, "the Court has been careful to avoid rigid and inflexible standards."³⁴¹ Addressing the first component of the test, the importance of the legislative objective of the Act, he states that the aim of ensuring a common pause day to pursue leisure and other activities with family and friends is a pressing and substantial concern, thus satisfying the first part of the s.1 test.³⁴²

The rational connection part of the test involves determining "how well the legislative garment has been tailored to suit its purpose."³⁴³ The legislature was justified in focussing on the retail industry because its labour force, characterized by its low level of unionization, its high proportion of women and its heterogeneous composition, was believed to be "especially vulnerable to subtle and overt pressure from its employer"³⁴⁴ to work on Sunday and was thus in need of special attention.

The exemptions provided by the legislation were justified on the basis that there is a need to have leisure facilities available on Sunday and, consequently, people to staff them.³⁴⁵

What Dickson C.J. characterizes as the "heart of this litigation" is the question of whether the Act infringed the freedom of religion of Saturday observers as little as possible: the least drastic means test.³⁴⁶ He states that the exemptions in the Act were intended to "very substantially" reduce the impact of the Act on Saturday observers. What must be decided, he says, "is whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom."³⁴⁷ The implication of this statement is that an alternative scheme must be "equally as effective as the means actually chosen."³⁴⁸ The Chief Justice proceeds to examine a number of alternatives to the Act which would ensure a common pause day for retail workers. A right by workers to refuse Sunday employment is rejected on the basis that it ignores the coercive pressures an employer can exert on workers, and workers' vulnerability to that pressure.³⁴⁹ An exemption for retailers having sincerely held religious beliefs requiring them to close their stores on a day other than Sunday is also rejected due to the undesirability of state-sponsored inquiries into religious beliefs. Dickson C.J. is of the opinion that such inquiries should be avoided wherever possible, "since they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting."³⁵⁰ The legislature has attempted, he says, to "minimize the adverse effects of pause day legislation on Saturday observers."³⁵¹ The scheme provided by the legislation constitutes a

trade-off between a scheme which provides complete relief from burdens on religious freedom to most Saturday-observing retailers by avoiding a distasteful inquiry, and, on the other hand, an alternative scheme which provides substantial relief from burdens on religious freedom to all Saturday observing retailers.³⁵²

This balancing of interests engaged in by the legislature was the process envisaged by s.1 in determining reasonable limits, Dickson C.J. says. He then states that he would uphold the legislation on the basis that the infringement is not disproportionate with the legislative objectives and that a serious effort had been made to accommodate the freedom of religion of Saturday observers.³⁵³

La Forest J., writing for himself, agrees with Dickson C.J. that the legislation violates s.2(a) of the Charter. In his view, the Act would be valid even if it did not contain the Sabbatarian exemption for Saturday observers. He agrees that the legislation was aimed at a pressing and substantial concern. Given this, he says, "the Legislature must be allowed adequate scope to achieve that objective."³⁵⁴ It is necessary to recognize that if the legislative objective is to be achieved, "it will inevitably be achieved to the detriment of some."³⁵⁵ Thus, in terms of proportionality,

[i]n seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course, what is reasonable will vary with the context. Regard must be had to the nature of the interest infringed and to the legislative scheme sought to be implemented. In a case like the present, it seems to me, the Legislature is caught between having to let the legislation place a burden on people who observe a day of worship other than Sunday or create exemptions which in their practical workings may substantially interfere with the goal the Legislature seeks to advance and which themselves result in imposing burdens on Sunday observers and possibly on others as well. That being so, it seems to me that the choice of having or not having an exemption for those who observe a day other than Sunday must remain, in essence, a legislative choice. That, barring equality considerations, is true as well of the compromises that must be made in creating religious exemptions. These choices require an in-depth knowledge of all the circumstances. They are choices a court is not in a position to make.³⁵⁶

La Forest J. states that absent unreasonableness or discrimination, the courts are not in a position to second guess decisions that are essentially legislative in nature.³⁵⁷ In this he clearly differs from the opinion of the Chief Justice, who does not hesitate to review alternative legislative options in this case. This deference to the legislature and lack of

adherence to the Oakes principles indicates a further distancing from what La Forest refers to as "rigid and inflexible standards"³⁵⁸ -- impliedly the Oakes test.

Dissenting in part, Wilson J. agrees with Dickson C.J. that the purpose of the Act was to establish a common pause day for those employed in retail business and that the Act infringes the freedom of religion of those who close their retail businesses on Saturday for religious reasons because the effect of the Act was to impose an economic penalty to their religious observance in that it required them to be closed two days instead of one.³⁵⁹ She disagrees, however, with Dickson C.J.'s approach to s.1. Focussing on the legislative exemption that would allow some Saturday observers -- specifically, those whose retail premises are smaller than 5,000 square feet and employ seven or fewer people to serve the public -- to stay open Sundays, she holds that the effect of this disparate treatment is that "the religious freedom of some is respected by the legislation and the religious freedom of others is not."³⁶⁰ When the Charter protects group rights such as freedom of religion, she states, it protects the rights of all members of the group. To do otherwise is to "introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together."³⁶¹ The scheme the legislature adopted had the effect of subordinating "the freedom of religion of some members of the group to the objective of a common pause day to the freedom of religion of other members of the same group."³⁶² This, she says, represents the legislature's failure to make a decision as to the type of justice it wished to promote. Wilson J. further states that if she is wrong and this disparate treatment could be justified under s.1, it is her opinion that the Crown has not discharged its burden under s.1 in that it adduced no evidence to establish that such treatment was necessary in order to achieve the government objective of a common pause day. Much more compelling evidence is needed.³⁶³ In her judgment, Wilson J. is much more faithful to the principles of the Oakes test than La Forest J. and the Chief Justice. Her adherence

to it is strict, more so than Dickson C.J.'s and far more so than La Forest J. who appears to move away from it immediately after Oakes itself.³⁶⁴³⁶⁵

A return to the debate concerning definitional balancing is found in the Reference Re Public Service Employee Relations Act (Alta.) (The "Alberta Reference"),³⁶⁶ the first of three labour cases that would consider freedom of association. The government of Alberta had passed three Acts which prohibited strikes and imposed compulsory arbitration for resolving disputes arising from the collective bargaining process. The first Act applied to public service employees, the second to firefighters and hospital employees, and the third to police officers. The issue before the Court was whether these Acts violated freedom of association, as guaranteed by s.2(d) of the Charter and, if so, whether the legislation could be demonstrably justified under s.1. Again, the Court approached the issue from widely varying perspectives.

McIntyre J., whose reasons were substantially agreed with by Le Dain, Beetz and La Forest JJ.,³⁶⁷ states that the question presented is whether the Charter gives constitutional protection to the right of a trade union to strike as an incident to collective bargaining.³⁶⁸ The appellants in this case focussed their submissions solely on the assertion that the right to strike is a necessary incident to the exercise by a trade union of freedom of association. Thus, the resolution of the appeal turns on the meaning of freedom of association.

Looking to the purpose and value of freedom of association, McIntyre J. holds that its core rests on the "simple proposition" that "the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others."³⁶⁹ The exercise of this freedom through associations serves the interest of the individual, promotes general social goals, serves to educate members in

the operation of democratic institutions and facilitates the effective expression of political views, thus influencing governmental and social policy.³⁷⁰ However, this freedom is one vested in the individual and does not belong to the group. This, for McIntyre J., is the crux of the freedom of association.

The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.³⁷¹

[emphasis added]

This passage highlights the central theme of Justice McIntyre's vision of freedom of association and plays the pivotal role in determining the outcome of this appeal. With respect to collective bargaining, he states this to be a group concern or activity and notes that it is only possible for the group to exercise those rights that the individual members possess: "If the right asserted is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association."³⁷²

McIntyre J. next addresses the scope or definition of freedom of association. He identifies six theories advanced to define the right, ranging from the very restrictive to the virtually unlimited, which may be briefly summarized from most to least restrictive. First, freedom of association may be defined simply as the freedom to associate with others only, with no constitutional protection for the purposes of the association or the means by which those purposes may be achieved.³⁷³ Second, it may be defined as the freedom to engage collectively in those activities that are constitutionally protected for each individual. This encompasses the right to pursue objects of association which have constitutional protection.³⁷⁴ The third approach holds that freedom of association means that an individual may do with a group that which he or she may lawfully do alone. Conversely, this means that individuals and groups may not do in concert that which is unlawful when done alone.³⁷⁵ The fourth

approach extends freedom of association to activities "which may be said to be fundamental to our culture and traditions and which by common assent are deserving of protection."³⁷⁶ The fifth approach defines freedom of association as the freedom to meet and pursue the lawful objects and activities essential to the association's purposes. Finally, the sixth approach would grant constitutional protection to all activities performed in association that are incapable of individual performance, so long as the activities are not harmful to others, subject only to s.1 of the Charter.

Having outlined these possible definitions for freedom of association, McIntyre J. immediately rules out approaches five and six. The fifth approach focuses too much on the group and rejects the individual nature of the freedom. The effect of this definition, he says, is to render the whole greater than the sum of its parts: this definition accords "an independent constitutional status to the aims, purposes, and activities of the association, and thereby confer[s] greater constitutional rights upon members of the association than upon non-members."³⁷⁷ The sixth approach is similarly rejected on the grounds that it would raise activities to constitutional status simply because they were performed in association.³⁷⁸ There can be no justification for extending constitutional status to an activity solely on the basis that it is engaged in by a group.³⁷⁹ Approach number four is rejected on the grounds that in focussing on the activities or goals themselves, the fundamental purpose of the right is ignored. The purpose of the right is to guarantee that goals and activities may be pursued in common, rather than guaranteeing the goals and purposes themselves.³⁸⁰

With respect to the final three approaches, McIntyre J. states that freedom of association must, at the least, include the right to join with others in common pursuits or for certain lawful purposes (approach number one) and the right to engage collectively in activities that are constitutionally protected for each individual (approach

number two). Individual rights, he says, do not lose their constitutional protection when exercised in common with others.³⁸¹ It is the third approach that most accurately reflects McIntyre J.'s vision of freedom of association, that "whatever activity an individual can lawfully pursue as an individual, freedom of association ensures he can pursue with others. Conversely, individuals and organizations have no constitutional right to do in concert what is unlawful when done alone."³⁸² This approach extends constitutional protection to all group activity that can be lawfully performed by an individual, irrespective of an individual's constitutional right to engage in those activities. Thus, legislation proscribing the group pursuit of an activity an individual may lawfully engage in would infringe freedom of association.

In McIntyre J.'s approach, then, in determining whether legislation prohibiting strikes violates freedom of association, it is necessary to consider whether the activity is independently protected by the Charter (it is not) or if the state has forbidden a group from engaging in an activity an individual is permitted to pursue. In McIntyre J.'s opinion, it is not correct to state that an individual has a right to strike as an individual. An individual withholding his or her labour may be liable for breach of contract and ordered to pay damages for that breach and thus cannot be said to have ceased work lawfully. Moreover, there is a significant difference between an individual ceasing work and a strike undertaken by members of a trade union. The difference is qualitative: there is no individual equivalent of a strike.³⁸³ The right to strike and the lawful conduct of a strike are specifically provided for in provincial and federal labour legislation and, while specific references are made to the right to strike in foreign countries' constitutions, no such right was incorporated into Canada's. Nor is there any basis for implying a constitutional right to strike.³⁸⁴ It is McIntyre J.'s opinion that freedom of association does not extend to the constitutional guarantee of a right to strike.³⁸⁵ Obviously resort to s.1 is unnecessary.

McIntyre J. closes his reasons for judgment with a ringing endorsement for the role of specialized tribunals and boards specifically created for resolving labour disputes. Experience with labour relations, he states, has indicated that the courts are not always the best arbiters of such disputes.³⁸⁶ Courts generally lack the specialized knowledge and expertise necessary to resolve labour problems and are better suited to the resolution of purely legal matters. If the right to strike were to be constitutionalized, he goes on, questions concerning its legality would bring the courts back into the field of labour relations "and much of the value of specialized labour tribunals would be lost."³⁸⁷ McIntyre J. adds a final statement revealing his discomfort with the application of s.1 to labour policy. In enacting labour legislation, governments have already attempted to strike a balance between the interests of trade union members and the government. In litigation attempting to justify strike action, the issues are not amenable to principled resolution and involve hard choices. In his opinion, these are choices best left to the freely elected legislatures and the court should not intrude where no specific right in the Charter is involved.³⁸⁸ This is a clear indication of his increasing reluctance to abide by the principles articulated in Oakes. Here he avoids the necessity of dealing with Oakes at all by engaging in definitional balancing that allows him to resolve the question before even reaching the s.1 stage. The comments above suggest that this definitional balancing was the only way he could avoid engaging in a process he felt the Court ought not to be involved in.

In agreeing with the reasons of McIntyre J., Le Dain J., joined by Beetz and La Forest JJ., adds a further endorsement of the idea that the field of labour relations is best left regulated by legislative policy. In his opinion, the rights to bargain collectively and to strike are not fundamental freedoms but the creation of legislation, "involving a balance of competing interests in a field which has been recognized by the

courts as requiring specialized expertise."³⁸⁹ In an area where the Court has affirmed the principle of judicial restraint in the review of administrative action, he says, it is

surprising ... that we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s.1 of the Charter to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is not really fitted.³⁹⁰

Thus, definitional balancing of freedom of association again plays a significant role in escaping the necessity of a s.1 review.

Chief Justice Dickson, dissenting, with Wilson J., takes a far different approach. For him, freedom of association is the freedom to "combine together for the pursuit of common purposes or the advancement of common causes", a "*sine qua non* of any free and democratic society" and "the cornerstone of modern labour relations."³⁹¹ The question for him in this case is to what extent freedom of association "protects the freedom of workers to act in concert, and to bargain and withdraw their services collectively."³⁹² He notes that in this appeal, two varying approaches to freedom of association are urged: a narrow version suggesting that freedom of association entails simply the freedom to join together only, and a wider version that freedom of association means not only the freedom to join together but also the freedom to pursue collective activities.³⁹³ The appellants urged the latter approach while the respondents adopted the former. In reviewing jurisprudence relating to these two approaches in the context of the right to strike, Dickson C.J. rejects definitional balancing:

The cases in which a line was drawn to exclude strike activity from the scope of constitutionally protected associational activities are indicative of the strength of the countervailing concerns (i.e., the public interest) which would find recognition under the Charter in s.1 rather than in defining the scope of s.2(d).³⁹⁴

Dickson C.J. notes widely varying interpretations of the phrase "freedom of association". The narrowest of these, that the freedom does not extend beyond the freedom to belong to or form an association, and not to pursue the activities for which the organization was formed, is rejected on the basis that it renders the freedom "legalistic, ungenerous, indeed vapid"³⁹⁵ and is inconsistent with the purposive approach to Charter rights articulated in Hunter v. Southam.³⁹⁶ A wider interpretation is next examined which suggests that associational activity relating specifically to other freedoms contained in s.2 is protected is also rejected on the grounds that freedom of association is explicitly and independently set out in s.2(d) is thus clearly not derivative of other s.2 freedoms.³⁹⁷ Dickson C.J. is also unable to restrict freedom of association to purely political freedoms.³⁹⁸ Rather, the freedom in s.2(d)

relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose [of s.2(d)] is ... to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends.³⁹⁹

Individuals seek, through association, to attain and fulfil common pursuits. Turning to work, Dickson C.J. characterizes this as "one of the most fundamental aspects of a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society."⁴⁰⁰ Since a person's work is directly related to his or her "sense of identity, self-worth and emotional well-being", the conditions under which a person performs that work are highly significant.⁴⁰¹ Thus, the ability to bargain collectively to "ensure fair wages, health and safety protections, and equitable and humane working conditions" is clearly a vital aspect of association in protecting the interests of working people.⁴⁰² Similarly, the right to strike is an essential element of collective bargaining, since without the right to withdraw services, the effectiveness of collective bargaining is substantially diminished.⁴⁰³ Thus, it was Dickson C.J.'s opinion that

collective bargaining protects important employee interests which cannot be characterized as merely pecuniary in nature. Under our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s.1 of the Charter.⁴⁰⁴

There is no question that the Alberta legislation abridges freedom of association in that it prohibits strikes and imposes compulsory arbitration on certain public sector workers. Thus it falls to s.1 to determine if this can be demonstrably justified.

Dickson C.J. sets out the elements of the Oakes test and the respondent's view that the purpose of the legislation in question is to protect essential services and to protect the government from political pressure through strike action.⁴⁰⁵ While he agrees that protection of essential services is a legislative objective of sufficient importance, it is necessary to define what is meant by "essential service" and whose services this covers. The legislation covers four classes of employees: public services employees (the Public Service Act), firefighters and employees of approved hospitals (Labour Relations Act), and police officers (the Police Officers Act). The onus is on the government of Alberta to establish that each of these classes represents "essential" employees. While the government adduced no evidence on this question,⁴⁰⁶ Dickson C.J. states that the essentiality of police and firefighters is self-evident, the interruption of which would clearly endanger life, personal safety and health. Thus, the rational connection between preventing such interruptions and the objective of protecting essential services is made out with respect to police and firefighters.⁴⁰⁷

The situation with respect to hospital and public service workers is more problematic. Again, the government adduced no evidence to demonstrate either that all hospital and public service workers were essential nor that services would be interrupted by strike activity. While some workers clearly could be deemed essential, the same cannot be said of all workers absent some evidentiary basis.⁴⁰⁸ The difficulty

with the legislation is that it is too wide in its application and represents too drastic a measure for achieving the objective of the protection of essential services, and thus fails the rational connection aspect of the s.1 test.⁴⁰⁹ The second argument advanced by the government suffers equally from a lack of evidence that denying public service workers the right to strike would protect the government from political pressure through strike action.⁴¹⁰ The mere fact of government employment is not sufficient to deny this right: indeed, in many instances private sector employee strikes pose a more serious threat to the public interest.⁴¹¹ The protection of the government from the political pressure of strike action by its employees is not an objective of sufficient importance for the purpose of s.1.⁴¹² Thus, this argument fails to meet even the first aspect of the Oakes test.

Dickson C.J. next turns to a consideration of whether the legislation impairs as little as possible the freedom of association of the affected employees, the second aspect of the proportionality test. In his view, if the legislation is to survive the least drastic means test, it must be accompanied by "adequate" guarantees for safeguarding employees' interests.⁴¹³ The legislation imposes a scheme of compulsory arbitration for the resolution of labour disputes. Among its provisions are the requirement that the arbitrators consider the fiscal policies of the provincial government and wages and benefits in private and public sectors. In Dickson C.J.'s view there is nothing improper with an arbitrator considering the employer's ability to pay and comparing wages of other employees in the public and private sectors and this does not compromise the fairness of the arbitration.⁴¹⁴ The arbitration scheme also provides that certain matters cannot be considered in arbitration nor contained in an arbitral award. These matters are generally arbitrable in other labour relations contexts. In the Chief Justice's view, the exclusion of subjects which are normally matters that are bargainable compromises the effectiveness of the arbitration process and casts "serious

doubt" upon its fairness.⁴¹⁵ Finally, he notes that the arbitration scheme does not provide a right to refer matters to arbitration but instead vests a discretionary power in a government minister or administrative board to establish an arbitration board if deemed appropriate.⁴¹⁶ This again compromises the fairness and effectiveness of the arbitration procedure as a substitute for the freedom to strike. The effect of this aspect of the scheme is to place absolute authority for determining if matters should go to arbitration with the government's executive branch. It is difficult to see how the process could be viewed by the participants as equitable and fair; "such authority considerably undermines the balance of power between employee and employer which the arbitration scheme is designed to promote",⁴¹⁷ and constitutes an unjustified interference with the effectiveness of the arbitration process in promoting equality of bargaining power between the parties.⁴¹⁸ The arbitration scheme cannot be considered an adequate replacement of the employee's right to strike and thus the legislation fails the least drastic means component of the proportionality test.

Chief Justice Dickson approached the impugned legislation in a principled manner consistent with the tenets of the Oakes test. The difference between the approach taken by him and that taken by McIntyre, Le Dain, La Forest and Beetz JJ. is striking. While the latter prefer to engage in definitional balancing to avoid the necessity of reaching s.1 at all and clearly demur to the policy choices of legislatures and role of specialized tribunals, Dickson C.J. remains true to the analytically distinct approaches to breach and justification. Such an approach is more consonant with the Court's earlier decisions, and clearly one that Dickson C.J. prefers. Equally clear is McIntyre J.'s increasing discomfort with the test as it is formulated, as evidenced by his use of definitional balancing and his frank comments concerning the Court's role -- or lack of it -- in matters of labour policy.

Very much derivative of the Alberta Reference is the second of the three labour cases, Public Service Alliance of Canada v. Canada⁴¹⁹ ("PSAC"). At issue here was federal government legislation aimed at reducing inflation. In 1982 Parliament enacted the Public Service Compensation Restraint Act,⁴²⁰ aimed at ensuring that government employees' compensation plans were in accordance with the government's restraint policy. Under the Act, compensation plans in the public sector that were in force 29 June 1982 were extended for a period of two years. Wage increases were rolled back to 6% for the first year and the Act provided for a 5% increase in the second year. Employees not subject to a compensation plan on 29 June 1982 had their previous collective agreements automatically extended for one year, with a wage increase of 9% for that year. The Act further provided that, for the period of the extensions, the compensation plans covered by the Act (s.6(1)(a)) and those collective agreements or arbitral awards which included such a compensation plan (s.6(1)(b)) continued to be in force without change, thus precluding collective bargaining on compensatory and non-compensatory components of collective agreements. Section 7 of the Act permitted the parties to a collective agreement or persons bound by an arbitral award to amend non-compensatory terms and conditions of the collective agreement by agreement only. It did not authorize employees to strike or submit proposed amendments to binding arbitration. The Act was challenged by PSAC on the basis that it infringed the affected employees' freedom of association and could not be justified under s.1 of the Charter.

Drawing on his reasoning in the previous Alberta Reference, Dickson C.J. concludes that the employees' freedom of association is infringed by the legislation. In the context of labour relations, he says, freedom of association includes the right to determine the conditions of work through collective bargaining and to strike. By extending existing collective agreements and fixing wages for two years, freedom to bargain collectively is infringed. Section 7 of the Act offers no relief in that the union

has no effective ability to strike or submit proposed amendments to binding arbitration. Lacking these abilities, the employees are simply not in an effective bargaining position. For these reasons, the Act, in infringing the right to bargain collectively, violates s.2(d) of the Charter.⁴²¹

Turning to s.1, Dickson C.J. first assesses the importance of the legislative objective, which he characterizes as the reduction of inflation. He has no hesitation in declaring this to be an objective of sufficient importance to warrant overriding a constitutionally guaranteed freedom. In aid of this decision he notes that on the trial of this matter three out of four economists agreed that inflation was a serious problem and that the Court had earlier characterized inflation as such.⁴²²

In addressing the proportionality aspect of the s.1 test, Dickson C.J. expresses a high degree of judicial deference on questions of economic policy.⁴²³ It is not the Court's role, he says, to assess the government's choice of strategy in attempting to combat inflation. Moreover, the Court must pay due deference to the symbolic leadership role of government and thus its role in this instance is to ensure the legislation is implemented fairly with "as little interference as is reasonably possible with the rights and freedoms guaranteed by the Charter."⁴²⁴ While the legislation only applied to a small proportion of the overall labour force and had an admittedly "indirect" and "partial" impact, Dickson C.J. is prepared to accept this as a positive measure in controlling inflation generally. Thus, the requirement of proportionality between the effects of the measure, together with the "temporary suspension of collective bargaining on compensation issues", to the sufficiently important objective of attempting to control inflation, is met.⁴²⁵

With respect to the rational connection aspect of the test, Dickson C.J. notes that the legislation subjects some public sector workers to harsher treatment than other workers of the federal labour force. Again he shows deference to Parliament's need to demonstrate leadership and set a "serious and striking example"⁴²⁶ that it was "prepared to take tough measures within its own sphere of employer-employee relations"⁴²⁷ by placing controls on a "discrete and homogeneous group of employees".⁴²⁸ He does not view the measures as capricious or arbitrary and is not prepared to second guess Parliament's leadership role in this endeavour.⁴²⁹ Thus the rational connection aspect of the test is made out.⁴³⁰ Dickson C.J. further states that the controls on "compensation" broadly defined, rather than wages alone, is also justified as consistent with Parliament's objective of sending a "clear and unmistakable message of restraint to other employers."⁴³¹

For the Chief Justice, the only aspect of the legislation that is not justified under s.1 is s.6(1)(b) of the legislation, which removes the right to strike over non-compensatory matters and to submit those matters to binding arbitration. He notes that the government offered "no rationale for casting its net so widely as to impair collective bargaining on non-compensatory issues in an Act designed to reduce inflationary expectations."⁴³² Indeed, the lack of evidence on this issue seems to surprise him: in a strongly worded endorsement of the right to strike and bargain collectively, he states that this aspect of the legislation

represents a profound intrusion into the associational freedoms of workers, and one which bears no apparent connection to the objectives of an inflation restraint programme. The [Act] has swept away virtually the full range of collective bargaining activities of federal employees, seemingly without any thought for whether such draconian measures were necessary.⁴³³

The effect of this specific provision is to overreach an otherwise justifiable impairment of public sector employees' freedom of association.⁴³⁴ This section was thus declared to be of no force or effect.⁴³⁵

Reiterating their opinion in the Alberta Reference that freedom of association does not include the right to strike or bargain collectively, Justices Beetz, Le Dain and La Forest conclude that the Act does not violate s.2(d) of the Charter.⁴³⁶

Similarly, relying on his reasons in the Alberta Reference that the Charter does not guarantee a constitutional right to strike, Justice McIntyre states that freedom of association is not infringed by the legislation.⁴³⁷ He leaves open the possibility that "other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association",⁴³⁸ but not in this instance: the role of the trade union as exclusive agent of the employees is not restricted by the legislation, nor does it preclude continued negotiations between employer and employees for changes in non-compensatory terms of employment.⁴³⁹ The effect of the Act, he says, is to limit the union's bargaining power by denying the "economic weapon" of a strike for two years. This limitation does not infringe freedom of association.⁴⁴⁰

What McIntyre J. characterizes as a limitation, Chief Justice Dickson terms a violation. For the latter, no equality in bargaining power can be had without the trade union's ability to withdraw their services⁴⁴¹ and the effect of the Act in proscribing collective bargaining on non-compensatory issues is to "[sweep] away virtually the full range of collective bargaining activities of federal employees".⁴⁴² It is significant to note the high degree of judicial deference paid by him to the parliamentary objective of fighting inflation and the role played by supportive evidence of government aims and objectives. For the Chief Justice, this lack of evidence contributed to his decision that

a limit on employees' ability to collectively bargain on non-compensatory issues constitutes a violation of s.2(d) that is not justifiable under s.1. McIntyre J.'s deference to Parliament on labour issues is far more pronounced, as is his reliance on definitional balancing to avoid consideration of s.1. The difference in approaches taken by Dickson C.J. and McIntyre J. is highlighted in McIntyre J.'s comment that "some aspects of collective bargaining" may find protection under s.2(d): for McIntyre J. this involves a consideration of freedom of association, whereas for the Chief Justice this is more properly addressed in s.1.

Wilson J. writes a brief dissenting opinion in PSAC. She agrees with Chief Justice Dickson that the legislation violates freedom of association, but disagrees with his view that it is justified under s.1.⁴⁴³ In her opinion, the legislation fails the proportionality requirement that it be carefully designed to achieve the legislative objective in question. She notes that the government attempted to control inflation by indirect means by setting an example of public sector restraint in the hopes that this would inspire voluntary controls in the private sector. In this the government wished to be seen publicly as a leader. However, she says, the "government as employer has no greater power *vis-a-vis* its employees than a private sector employer"⁴⁴⁴ and in "abandoning the collective bargaining process and imposing legislative restraint on its employees"⁴⁴⁵ it violated the employees' freedom of association:

It seems to me that if both public and private employees are free to engage in collective bargaining, which generally speaking they are, then public sector employees should not be deprived of this freedom as a means of government getting across its message, no matter how worthwhile that message may be.⁴⁴⁶

Further, she questions the government's method of inspiring private sector restraint: "It seems somewhat paradoxical for the government to seek to inspire voluntary compliance by imposing a program of mandatory compliance. One might well ask how this can be seen as setting an example of voluntary compliance by either government or

its employees."⁴⁴⁷ Thus, the mandatory controls imposed upon a "captive constituency", admittedly not expected to have a direct impact on fighting inflation, and which could not have set an example of voluntary compliance for the private sector to follow, were "arbitrary and unfair" according to the Oakes principle and were unjustified under s.1.⁴⁴⁸

The final case in the labour trilogy is RWDSU v. Saskatchewan⁴⁴⁹ (the "Dairyworkers" case). Again, this decision is very much derivative of the reasoning in the Alberta Reference. The government of Saskatchewan had enacted The Dairy Workers (Maintenance of Operations) Act⁴⁵⁰ (The "Act"), temporarily prohibiting dairy workers from striking and their employers from locking the workers out as a result of unsuccessful contract talks between the dairyworkers' unions and the only major dairy businesses in the province. The unions had served notice of rotating strikes on the dairies but before this could begin, the dairies served the unions with lock-out notices covering all fluid milk plants.⁴⁵¹ The legislation extended the last collective agreement between the parties and provided for final binding arbitration between them if an agreement could not be reached within a specified period.⁴⁵² The unions representing the dairyworkers sought a declaration that the Act infringed freedom of association and was therefore of no force or effect.

Again relying on their opinions in the Alberta Reference that the right to strike is not included in freedom of association, Justices Le Dain, Beetz, La Forest and McIntyre uphold the Saskatchewan legislation.⁴⁵³

For his reasons given in the Alberta Reference, Dickson C.J. declares that the legislation is in violation of s.2(d) of the Charter in that it "interferes with the freedom of the employees to engage in strike activity that would have been lawful in the absence of the Act."⁴⁵⁴

Turning to s.1, he notes two objectives advanced in support of the legislation. First, due to the unique nature of the dairy industry, a work stoppage of milk processing facilities would cause serious harm to the dairy industry and particularly to dairy farmers. Second, it was argued that milk is an essential commodity and its continued supply to consumers must be ensured.⁴⁵⁵ It is the first of these arguments that Dickson C.J. finds most significant.

He notes that it is possible for a legislature to abridge employees' right to strike if "the effect of strike is to deprive the public of essential services. The rationale for such a limitation is that members of the public who do not participate in a particular collective bargaining process ought not to be unduly harmed when the bargaining fails to produce a settlement."⁴⁵⁶ He adds, importantly, that this reasoning applies to situations where the harm to third parties is economic in nature:

It would be strange, indeed, if our society were to give constitutional protection for the freedom of employees to advance economic, as well as non-economic, interests by striking, while insisting that the state remain idle and indifferent to the infliction on others of serious economic harm.⁴⁵⁷

Thus, the significant social costs caused by a strike may properly be considered by a legislature in limiting the right to strike.

These costs must be considered in the context of the s.1 framework. In this instance, Dickson C.J. focuses on the pressing and substantial concern that the legislation is aimed at, and the balancing of the legislative objective against the deleterious effects of the legislation of limiting a constitutionally protected right or freedom.⁴⁵⁸ The question for the Chief Justice to address in this case is

Whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focussed in its intensity as

to justify the limitation of a constitutionally guaranteed freedom in respect of those employees.⁴⁵⁹

The third party in this dispute, the dairy farmers, were faced with economic harm in the form of losses caused by dumping milk that, due to the strike, would not be picked up from their farms and taken to the processing plants. According to the only evidence adduced on this point, (contained in affidavits and newspaper clippings: no further evidence was tendered), 1.3 million pounds of milk with a value of \$250,000 was produced daily by 50,000 dairy cows on 800 farms. Milk was normally picked up from the farms every second day, and could not be stored on the farm for more than three days.⁴⁶⁰ Two-thirds of the dairy farmers in the province were in a vulnerable financial position due to high debt loads.⁴⁶¹

The dairy farmers were not only threatened with significant economic losses as a result of the strike, but they would bear these losses "in their full intensity": the harm could not be distributed over a larger population, but rather visited upon the province's 800 dairy farms. Thus, in the Chief Justice's view,

the economic harm threatened by a total work stoppage in the dairy processing industry was so immediate, of such a high degree and of such an intense focus as to fall well within the ambit of discretion of the Saskatchewan legislature to substitute a fair and efficient arbitration scheme for the dairy processing employees' freedom to strike. I might add that what perhaps exacerbates the economic harm to dairy farmers and distinguishes it from the routine economic harm experienced by any supplier to a producer in the throes of a work stoppage is the combination of three unusual features: (i) the producer in this case was the sole outlet for the suppliers' only product; (ii) the product in question was highly perishable; and (iii) because of the biological imperatives of the cow, the supplier could not mitigate losses by ceasing production.⁴⁶²

The other two aspects of the Oakes proportionality test, that the measures be rationally connected to the objective and that they impair the right or freedom as little as possible, get an extremely brief consideration: Dickson C.J. states that the Act applies only to the workers in the dairy industry⁴⁶³ (the rational connection aspect), and that the

workers' rights are impaired as little as possible by the provision of a neutral, binding arbitration scheme that either party may compel the other to submit to without interference from the government.⁴⁶⁴ No additional commentary is provided on these two facets of the Oakes test.

In a dissenting opinion that the legislation can not be justified under s.1, Wilson J. focuses on the characterization of the dairyworkers' activity as an "essential service", the dairy farmers as a third party to the dispute, the "least restrictive means" aspect of the Oakes test, and the evidence relied on to uphold the legislation.

The first matter Wilson J. takes issue with is the casting of the dairyworkers' activity as an "essential service". In her opinion, this label is properly applied to a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population."⁴⁶⁵ Examples of such services include hospitals, police and firefighters.⁴⁶⁶ In her view this is very different from situations where the economic interests of a particular group are threatened, especially in the context of the collective bargaining process. The implications of this, she says,

are extremely far-reaching since some measure of damage to the economic interests of the parties and the public is an inevitable concomitant every work stoppage [sic]. Indeed, the effectiveness of this negotiating tool depends upon it.⁴⁶⁷

Government intervention in industrial relations in general and constitutionally protected freedoms in particular should occur in response to "a serious threat to the well-being of the body politic or a substantial segment of it."⁴⁶⁸ In Wilson J.'s opinion, the prevention of economic harm to a particular sector *per se* is not a sufficiently important government objective to warrant overriding a constitutionally-protected freedom.⁴⁶⁹ She notes that the evidence proffered "falls far short of establishing economic harm to

the dairy workers and the public"⁴⁷⁰ and that the provision of milk is "essential"⁴⁷¹ and that none would be available in the province should the work stoppage continue.

With respect to the evidence adduced in this case, she notes that the Government of Saskatchewan did not call any and that the only evidence before the Court was that tendered by the respondents, consisting of affidavits sworn by union officials and newspaper clippings. The newspaper clippings, relating to the effects of the work stoppage on the dairy industry, are declared by Wilson J. to be "inherently unreliable", "self serving statements"⁴⁷² used by the proponents of the legislation to influence public opinion and justify their cause. Such evidence, in her view, is of very little probative value.⁴⁷³ The sworn affidavits did not contain enough information for the Court to determine the reasonableness of the government's actions in limiting the worker's right to strike.⁴⁷⁴

For a limit to be justified pursuant to s.1, the legislative objective must relate to a pressing and substantial concern. A certain amount of damage and inconvenience is accepted by industry and the public as "the price of maintaining free negotiation in the workplace"; unless the damage to the dairy industry can be shown to be considerably greater than the damage that would occur as the result of a work stoppage of "reasonable duration", it cannot be characterized as a "pressing and substantial concern".⁴⁷⁵ Wilson J.'s fear here is that if this were not the case, all work stoppages would be deemed a pressing and substantial concern "and government intervention would be the rule rather than the exception. There has to be more to it than that."⁴⁷⁶

Wilson J. also takes issue with Chief Justice Dickson's characterizing the dairy farmers as third parties. She notes that some of the farmers collectively owned nine of the eleven milk processing plants involved in the dispute. In Dickson C.J.'s view this

did not present any difficulties, since the "co-operative company owned at least in part by some of the farmers is a separate legal entity and its directors are entitled to pursue a labour relations strategy which does not conform to the wishes of individual members."⁴⁷⁷ For Wilson J., this is problematic: she has "difficulty in appreciating how the owners of a corporation involved in the strike as a principal can be viewed as innocent third parties for the purpose of assessing the harm suffered by such parties."⁴⁷⁸ With respect to the harm to the dairy farmers, characterized by Dickson C.J. as "massive", Wilson J. again expresses concern that this conclusion was reached in the absence of evidence.⁴⁷⁹ In her opinion, the government of Saskatchewan has failed to prove that protecting the economic interests of dairy farmers was a legislative objective of sufficient importance to warrant overriding freedom of association.

She further states that, if she is wrong in this conclusion, the government has not proved that it achieved its objective by the least restrictive means. In her view, the legislation was not tailored closely enough for the objective. The legislation provided for a total strike ban and compulsory arbitration. Instead, she suggests, it could have provided for a partial strike ban that would achieve the objective of preventing harm. Again she points to the lack of evidence that a total ban was necessary: the respondents' affidavits indicated that

they would have an effective strike weapon if they were allowed to engage in a series of rotating strikes that would have allowed the industry to continue functioning at 85 per cent of normal capacity. The government has not contended that such a partial strike would have had unacceptable costs to dairy farmers.⁴⁸⁰

A partial strike ban would, in Wilson J.'s view, realize the governmental objective. A total ban simply went too far.

Finally, she notes that there was, again, no evidence adduced that the health of Saskatchewan residents would be harmed by the interruption of milk delivery. While

milk is clearly an important food product, possible adequate substitutes might be available, or milk might be imported from other areas. There is simply no evidence; hence, no threat to the health of consumers is established.⁴⁸¹

It is significant to note the differences in approaches taken by Dickson C.J. and Wilson J. Dickson C.J. is quite prepared to extend the protection of essential services to cover economic harm caused to third parties. For Wilson J., this strikes at the very heart of the collective bargaining process. Clearly her concern here is the slippery slope: once economic harm to third parties is protected, where will it stop and what does this mean in the context of labour relations? Although Dickson C.J. follows the format of the Oakes test, his application of it is significantly relaxed. He is willing to allow evidence that Wilson J. characterizes as "inherently unreliable". Indeed, it seems curious that such evidence could be considered sufficient in the context of justifying limits on constitutionally protected rights and freedoms. It seems more appropriate to consider more broadly based and substantial evidence for such a significant undertaking. The onus on the government in justifying the limitation appears to come easily in Dickson C.J.'s approach. Wilson J. puts the government to a far harsher test. In her view the evidence adduced in this case simply did not go far enough in establishing the necessity of infringing constitutional freedoms. In this, Wilson J. proves herself most loyal to the stringent standards articulated in Oakes. Her dissent in this instance is instructive of her particular view of the proper approach to breach and justification. While Chief Justice Dickson shows increasing relaxation of the s.1 test and deference to the legislature on matters of labour relations, Wilson J. continues to adhere to the view that constitutionally guaranteed rights and freedoms should only be limited in exceptional circumstances.

The labour trilogy demonstrates the widely varying approaches the Court has taken to the issues of breach and justification. The definitional balancing employed by McIntyre J. in the Alberta Reference indicates a reluctance to consider constitutional protection for some activities at all. By defining the freedom so as to exclude the activity, resort to s.1 is simply not necessary. Given his statements revealing his almost complete deference to the legislature and specialized tribunals on labour relations matters, it is hardly surprising that McIntyre J. would limit freedom of association so as to exclude strike activity. In so doing he avoids the necessity of applying s.1.

Chief Justice Dickson takes a different approach that is more consonant with the principles set out in Oakes. After defining freedom of association as including the right to strike, he focuses his attention on the s.1 test. His application of the test through the cases reveals an increasing relaxation of the standards necessary to justify a limitation. In the Alberta Reference he notes the lack of evidence that collective bargaining or strike activity would cause undue political pressure on the government.⁴⁸² Similarly, in PSAC he expresses surprise that the federal government prohibited its employees' right to strike over non-compensatory issues in an effort to control inflation absent evidence that this measure would be effective.⁴⁸³ In the Dairyworkers case, the evidence deemed sufficient to justify a limitation of a constitutionally protected freedom seems tenuous indeed. Moreover, the three aspects of the Oakes proportionality test appear to receive increasingly brief consideration, with legislation passing the rational connection test in PSAC⁴⁸⁴ and the Dairyworkers⁴⁸⁵ case easily, the latter almost as an afterthought. While the format of the Oakes test is maintained by Dickson C.J., it is considerably diluted in its application to the labour trilogy.

Wilson J. remain the most committed to the Oakes principles. Her consistent application of the stringent standards focus on all aspects of the test, with legislation failing to survive at the first criteria of "pressing and substantial" in the Dairyworkers⁴⁸⁶ case, the rational connection stage in PSAC⁴⁸⁷ and the least restrictive means test in the Dairyworkers.⁴⁸⁸ Her approach to the limitation of constitutionally guaranteed rights and freedoms is clearly premised on a commitment to uphold the right and put the government to the stringent proof with cogent evidence that limitations are justified only in the most exceptional cases.

The majority decision⁴⁸⁹ in Irwin Toy Ltd. v. Attorney-General of Quebec⁴⁹⁰ offers a particularly good example of the Court's continuing devolution of justificatory criteria at both the substantive law section and the s.1 stage. At issue here was whether provisions of the Quebec Consumer Protection Act⁴⁹¹ and Regulations⁴⁹² infringed freedom of expression in prohibiting advertising, including television, aimed at children under thirteen years of age, subject to certain exemptions.⁴⁹³ The respondent, Irwin Toy Ltd., had broadcast advertising messages that the Office de la protection du consommateur claimed were in contravention of the Act and Regulations, and in return sought a declaration that the legislation and regulations were of no force or effect as they infringed the respondent's freedom of expression.

The first step taken by the majority is to consider whether the respondent's activity falls "within the sphere of conduct protected by freedom of expression".⁴⁹⁴ This is an immediate signal that the Court is openly engaging in definitional balancing: indeed, it expressly states that not all activity is so protected.⁴⁹⁵ Expression is protected, the Court says, "to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."⁴⁹⁶ The Court then notes that expression has

both a content and a form, and that activity is expressive if it attempts to convey meaning. Linking content and activity in an apparent literal interpretation of expression, the Court states that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."⁴⁹⁷ Content or meaning is the centre of the Court's focus at this point: activity not ordinarily considered expressive will be so if the party claiming protection can demonstrate that it was done to convey a meaning. The example the Court uses here is an unmarried person parking a car, (not usually thought of as expressive) in a zone reserved for spouses of government employees, to express dissatisfaction with this method of allocating resources.⁴⁹⁸ In discussing the form by which content may be expressed, such as written or spoken words, gestures, the arts or physical acts, the Court states that "certainly violence as a form of expression receives no protection",⁴⁹⁹ without explaining why, simply stating that it "is clear ... that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen."⁵⁰⁰ Yet some gestures may be taken to be violent, and certainly the arts contain violent expression in the form of dance and visual imagery. While violence *per se* does not garner protection, this aspect of the Court's test indicates that some forms of violence may. This is simply to suggest that that Court's pronouncement that violence as expression cannot be brought within s.2(b) is not as clear as the Court believes, and indicate in a particularly clear way the process of balancing that ought to be reserved for the s.1 stage. Applying these rules to the facts of this case, the Court states that the advertising in question clearly attempted to convey a meaning and had expressive content and, absent a basis for excluding the form of expression chosen (television advertisements) from the sphere of protected activity, and consequently is protected.⁵⁰¹

The second step of the test involves considering whether the purpose or effect of the legislation was to restrict freedom of expression. The purpose of the legislation must be measured against the standpoint of freedom of expression. The Court here distinguishes between purposeful restrictions on the form or content of expression, which constitute a *prima facie* breach of s.2(b), and restrictions which seek to control the physical consequences or the direct physical results of expressive activity, such as harm to individuals in creating in them false beliefs as a result of the expression, and harmful consequences of acts performed as a result of the expression where the expression led the actors to believe the acts were worth performing.⁵⁰² In considering whether the effects of the legislation were to restrict freedom of expression, the onus is on the party claiming breach to demonstrate such an effect. The party must show that the activity in question conveys a meaning which "relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing".⁵⁰³ With respect to the legislation and regulations in question, the Court states that there is no question that its purpose was to restrict both a particular range of content and certain forms of expression in the name of protecting children. The legislation and regulations restrict both the manner in which a particular content must be expressed and the content directly. Advertisements must not "use a superlative to describe the characteristics of goods or services" or "directly incite a child to buy or urge another person to buy goods or services or to seek information about it".⁵⁰⁴ Evidence submitted by the Attorney-General of Quebec indicated that the mischief at which the legislation and regulations was directed was "the harm caused by the message itself".⁵⁰⁵ Thus the legislation and regulations served to prohibit freedom of expression and may only be justified according to the principles of s.1.⁵⁰⁶

What is significant about the purpose and effects discussion is that the Court is again engaging in a balancing process before it reaches the s.1 stage. The test for

expression, as outlined above, sets up a triple hurdle in which the Court considers the form and content, purpose and effect of the expression and legislation restricting it. At each stage qualifiers are grafted on to the basic principles. Activity, if performed to convey a meaning, is *prima facie* protected, unless a certain form removes it from the sphere of guarantee. Legislation that purposely restricts expression is *prima facie* in breach of s.2(b), unless done simply to control the physical consequences of the activity. The effect of legislation restricting expression must be considered in light of the principles underlying freedom of expression. Every stage involves a balancing of interests to determine whether the activity is within the sphere of guaranteed expression. The effect of this approach is to dissect the substantive right and create a convoluted path through the guarantee of expression that protects some expression and not others without resort to the considerations set out in s.1. This is curious indeed, given freedom of expression's designation as "little less vital to man's mind and spirit than breathing is to his physical existence".⁵⁰⁷ One would think that restrictions on so fundamental a freedom ought properly only be considered in light of the higher standards set out in the s.1 stage that put the government to the proof that the limitations are reasonable. Moreover, it is difficult to define expression in the abstract, as the Court has done, in articulating protected content and unprotected consequences. To separate into content and consequence is extremely problematic in the realm of ideas where acts or words can, and are often intended to, incite. The majority decision here only serves to blur the lines between breach and justification at the substantive law stage.

In moving to the s.1 stage, the Court first considers whether the legislation relates to a pressing and substantial concern. This hurdle is passed rather easily: the Court declares the legislative objective is the protection of a group that is "particularly vulnerable to the techniques of seduction and manipulation abundant in advertising."⁵⁰⁸

In aid of this finding the Court reviews evidence submitted by the Attorney-General of Quebec indicating

the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority.⁵⁰⁹

Children, particularly those six years old and younger, are completely credulous when presented with advertising, and television advertising directed at this group is "*per se* manipulative."⁵¹⁰ The Attorney-General of Quebec also filed evidence as to the age that children begin to develop cognitive abilities to recognize the persuasive nature of advertising and to evaluate its comparative worth. Although the evidence offered differing opinions on this point, the Court states, significantly, that the legislature is only required to exercise reasonable judgment in identifying the vulnerable group the legislation is aimed at:

If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess ... There is sufficient evidence to warrant drawing a line at age 13, and we would not presume to re-draw the line.⁵¹¹

Hence, on "the balance of probabilities" the evidence establishes that children 13 years and younger are manipulated by commercial advertising and the legislative aim of protecting all children in this group is a pressing and substantial concern.⁵¹²

The proportionality test in this case offers further evidence of the devolution of the Oakes criteria. The rational connection aspect is passed very easily: the first sentence of the one paragraph the Court takes to deal with this portion of the test states: "There can be no doubt that a ban on advertising directed to children is rationally connected to the objective of protecting children from advertising."⁵¹³ The connection between the means and objective is made in one sentence: "Simply put, advertisers are prevented from capitalizing on the inability of children either to differentiate between

fact and fiction or to acknowledge and thereby resist or treat with some skepticism the persuasive intent behind the advertisement."⁵¹⁴ This particular application of the test is indicative of how readily the Court will make the rational connection. Here there is no discussion whatever of the need for the legislation to be "carefully designed to achieve the objective in question", or that the means must not be "arbitrary, unfair or based on irrational considerations", as outlined in Oakes.⁵¹⁵ Indeed, the Court's treatment here suggests that this aspect is a substantially formal part of the test. There might have been some discussion with respect to the arbitrariness of drawing the age limit at 13, for instance, but again, the Court adopts a deferential posture towards the measures taken to achieve the legislative objective which, it earlier stated, need only be "reasonable".⁵¹⁶

The minimal impairment aspect of the test proves to be the major hurdle in the discussion. The question the Court addresses is whether "the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective."⁵¹⁷ Here the Court's focus is on the evidence before it of children's susceptibility to persuasion and their lack of cognitive abilities. Regulation of advertising content could not address this problem: a ban on all advertising directed at children would. A ban based on audience composition is deemed unworkable on the basis that viewing audiences are not so sufficiently segmented that a ban on advertising directed at children during certain hours of the day would catch all programs frequently watched by children.⁵¹⁸ Similarly, audience cut off figures of 30% (where children make up 30% of the viewing audience) would catch only one program. Lowering the cut off figure would catch too many non-children and still may not capture all children's programs. Moreover, it is difficult to define "advertising directed at children" in such a way as to

distinguish between young and older children.⁵¹⁹ The answer is found in the legislation and regulations themselves. The guidelines for their application suggest time periods when children compose a specified percentage of the audience. They also set forth a sophisticated method of determining when an advertisement is directed at children by identifying categories of products, advertisement and audience, which in turn are sub-categorized to target the type of advertisement the legislation is aimed at.⁵²⁰ These guidelines serve as a framework for determining permitted advertisements, with the courts having the final word as to whether the strictest limit on advertising should apply where children compose a smaller percentage of the viewing audience.⁵²¹ Self-regulation by broadcasters is raised as a means of addressing the problem of children's advertising and quickly dismissed by the Court, noting that children's advertising is *per se* manipulative and that it was reasonable, therefore, for the legislature of Quebec to ban it.⁵²² In concluding this aspect of the test, the Court once again focuses on the reasonableness of the legislative action, and suggests that for the minimal impairment hurdle to be cleared, the measures taken need only be reasonable compared to the alternatives:

While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions.⁵²³

It is hardly surprising, after all that, that the third aspect of the proportionality test, the deleterious effects component, is easily satisfied: advertisers are free to direct their messages to adults and to participate in educational advertising. The real concern of the advertisers, the Court states, is that revenues are in some degree affected. They will simply "have to develop new marketing strategies for children's products."⁵²⁴

McIntyre J.'s dissenting opinion is noteworthy. While agreeing that the advertising in question constitutes expression and that the legislation infringes this, he disagrees that the legislation can be saved by s.1. He is not convinced that the welfare of children is at risk due to the advertising directed at them. Agreeing that children have difficulty distinguishing fact from fiction, he suggests that this is the nature of children, and that no evidence has been tendered to show they suffer harm because of it:

Children live in a world of fiction, imagination and make believe. Children's literature is based on these concepts. As they mature, they make adjustments and can be expected to pass beyond the range of any ill which might be caused by advertising.⁵²⁵

For McIntyre J., the legislation fails at the first stage of the s.1 test in not constituting an objective of pressing and substantial importance. Furthermore, he says, the legislation also fails on the issue of proportionality in that a total ban of advertising aimed at children "below an arbitrarily fixed age makes no attempt at the achievement of proportionality."⁵²⁶ Limitations on freedom of expression, whether political, religious, artistic or commercial, should only be sustained in "urgent and compelling" situations and then only "to the extent and for the time necessary for the protection of the community."⁵²⁷ The legislation in question represents a "small abandonment" of a principle of "vital importance" and can not be justified.⁵²⁸ Even this opinion, while nominally adhering to a stricter s.1 standard than that of the majority's, nevertheless approves of the definitional balancing that serves to blur the lines between breach and justification.

Irwin Toy represents further proof of the Court's continuing devolution of the role of s.1 in justifying breaches of constitutionally guaranteed rights and freedoms. In initially considering whether the advertising in question was protected under the guarantee of freedom of expression, the Court begins the process of definitional

balancing. The dissection of expression into form and content further restricts the definition, with the Court readily deciding some forms of expression are protected and others not, without explaining why. The further dissection of limitations on expression into purposes and effects serves to graft yet another qualifier onto the guarantee. The result is a convoluted test that openly balances interests throughout without any consideration of the reasonable limits set out in the higher standards of s.1. The application of the s.1 criteria as an overlay to the preceding balancing of interests can only serve to further dilute the substantive freedom and obscure the line between breach and justification. Moreover, it appears that the internal framework of the Oakes test has been largely abandoned in all but formal application. The proportionality test has been collapsed from three distinct discussions to a discussion where minimal impairment is the significant factor, with rational connection and deleterious effects being rather easily satisfied. Even within the minimal impairment component, the Court suggests that restrictions may be upheld despite the existence of alternative measures that impair the freedom in question less than the legislative scheme, as long as the legislative scheme is "reasonable". Irwin Toy clearly demonstrates that the Court has travelled a great distance from its earlier pronouncement that the substantive law sections and section 1 be kept analytically distinct,⁵²⁹ and further serves to confuse the issues of breach and justification and limits the function role of s.1.

The jurisprudence developed in Irwin Toy figures prominently in R. v. Butler.⁵³⁰ This case dealt with the difficult issue of whether the obscenity provisions of the Criminal Code⁵³¹ violated freedom of expression as set out in s.2(b) of the Charter. The appellant opened a shop selling and renting "hard core" videotapes and magazines, as well as sexual paraphernalia. He was charged with numerous counts of selling obscene material, possessing obscene material for the purpose of distribution or sale, and exposing obscene material to public view, all contrary to s.163 of the Criminal

Code. At trial, he was convicted on eight counts relating to eight films, and acquittals were entered on the remaining charges. The Crown appealed the acquittals and the appellant cross-appealed the convictions. The majority of the Manitoba Court of Appeal allowed the Crown appeal and entered convictions for the appellant with respect to all the counts.⁵³² The appellant further appealed to the Supreme Court of Canada.

This appeal raises several related concerns. First, there is the matter of the definition of "obscene". Next is a consideration of whether obscenity is included in expression that is guaranteed by s.2(b) of the Charter. Finally, it is necessary to determine whether any violation of s.2(b) by s.163 of the Criminal Code is justified under s.1 of the Charter. The constitutional questions were set out as follows.

1. Does s.163 of the Criminal Code ... violate s.2(b) of the Charter ...
2. If s.163 of the Criminal Code ... violates s.2(b) of the Charter ..., can [it] be demonstrably justified under s.1 of the Charter ... as a reasonable limit prescribed by law?⁵³³

While the questions as stated raise the review of all of s.163, the analysis is confined to the examination of the constitutional validity of s.163(8) only. That section sets out what is considered obscene:

163(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed obscene.⁵³⁴

Writing for the majority,⁵³⁵ Sopinka J. reviews the legislative history of the provision and the tests that have been developed to give substance to the term "obscene". Early legislation sought to proscribe "obscene matter", "tendency to corrupt morals" and the exhibition of any "disgusting object or indecent show" without defining any of these operative terms.⁵³⁶ The common law test developed in 1868

suggested that obscenity was that which had "the tendency ... to deprave and corrupt those whose minds are open to such immoral influences ...".⁵³⁷ Unlike the previous statutes, the current provision, introduced in 1959, contained the statutory declaration of "obscene" found in s.163(8), set out above.

Judicial interpretation of s.163(8) set out the tests for determining whether matter is obscene for the purposes of criminal prosecution. The statutory definition was held to constitute an "exhaustive test of obscenity with respect to publications and objects which exploit sex as a dominant characteristic"⁵³⁸ and the common law test developed in 1868 was held no longer applicable.

One of the elements of the definition of "obscene" in s.163(8) is that the exploitation of sex as its dominant characteristic must be "undue". Varying tests have been developed in order to determine when such exploitation will be considered "undue".

The "community standard" test suggests that there exists

in any community at all times ... a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn ... There are certain standards of decency which prevail in the community ... What is obscene is something which offends against those standards.⁵³⁹

This vague test has been somewhat refined to state that it is the standards of the community as a whole, and not a small segment of it, which must be considered, the standard to be applied is a national one, expert evidence on the national standard is not necessary and the Crown need not prove it as part of its case, and the community standards test must be contemporary and responsive to changing mores.⁵⁴⁰

Recent decisions hold that material that exploits sex in a "degrading or dehumanizing" manner will necessarily fail the community standards test. Such material, Sopinka J. says, even in the absence of cruelty or violence, places

women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.⁵⁴¹

Degrading or dehumanizing material fails the community standards not for the reasons stated in the old common law test as offending against morals, but because public opinion perceives it to be harmful to society in general and women in particular.⁵⁴² It is significant to note that this perception cannot be proved. However, Sopinka J. states there is a "substantial body" of public opinion that supports these conclusions, and thus "it would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material."⁵⁴³

Sopinka J. also notes that in some instances the community may find some forms of undue exploitation that cause harm nevertheless tolerable. Quoting an early decision by Dickson C.J., it is noted

Sex related publications which portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment, may be 'undue' for the purposes of [s.163(8)] ... However, ... there is no necessary coincidence between the undueness of publications which degrade people by linking violence, cruelty or other forms of dehumanizing treatment with sex, and the community standard of tolerance. Even if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not 'undue' in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment.⁵⁴⁴

This passage serves to illustrate that the line between the mere portrayal of sex and the dehumanization of people is drawn by the "undueness" concept and that the community is the judge of what is harmful to it.

Finally, Sopinka J. notes the "internal necessities test" or "artistic defence". Material which offends community standards will not be considered undue if it is required for the serious treatment of a theme. This test flows from the recognition that artists "must have freedom in the production of a work of genuine artistic and literary merit".⁵⁴⁵ In the case of films, in order to determine whether the exploitation of sex is undue, under this test the court will consider the artistic purpose, the manner in which the artist has developed and portrayed the story, the depiction and interplay of character and the creation of visual effect through camera techniques.⁵⁴⁶ In order to survive the internal necessities test, the exploitation of sex must be found to have a justifiable role in advancing the plot or theme.⁵⁴⁷

The difficulty with these tests is that they do not precisely identify what material caught by s.163(8) will not be tolerated. In determining whether the exploitation of sex is undue, it is uncertain whether the material is found to be intolerable because it is degrading or dehumanizing or because it offends against morals or on some other grounds. Similarly, it is difficult to determine the relationship, if any, between these tests and the internal necessities test. There is no indication which, if any, of these tests takes precedence over the others. The effect of these concerns is that s.163(8) could be challenged on the grounds of vagueness and uncertainty. Such a challenge lies at the heart of the present appeal.

Turning to a consideration of pornography, Sopinka J. divides it into three categories:

(1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing. Violence in this context includes both physical violence and threats of physical violence.⁵⁴⁸

Section 163(8) of the Criminal Code specifically contemplates explicit sex with violence, the first category outlined. Explicit sex combined with crime, horror or cruelty will sometimes involve violence and thus also fall within the first category. Absent violence, explicit sex combined with crime, horror or cruelty will fall within the second category, that which subjects people to treatment that is degrading or dehumanizing. The third category is not considered in this appeal.

Because different segments of society would have differing opinions as to which categories of pornography, if any, cause harm, and what may be considered degrading and dehumanizing, and these matters are not susceptible of exact proof, the community as a whole will serve as an arbiter in determining what amounts to an undue exploitation of sex.⁵⁴⁹ The question the court must address, then, is what would the community "tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure."⁵⁵⁰

The definition of harm set forth by Sopinka J. sets the stage for the rest of his judgment and clearly informs his reasoning throughout his analysis. Harm in this context, he says,

means that it predisposes persons to act in an anti-social manner, for example the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential.⁵⁵¹

Relating this harm principle back to the three categories of pornography, he states that the portrayal of sex combined with violence will almost always constitute the undue

exploitation of sex. If the risk of harm is substantial, explicit sex which is degrading or dehumanizing may be undue. The third category of pornography, explicit sex without violence that is neither degrading nor dehumanizing will not constitute the undue exploitation of sex and will generally be tolerated unless it employs children in its production.⁵⁵² In Sopinka J.'s opinion, this harm principle deals with the inter-relationship of the community standards test and the degrading and dehumanizing test. The internal necessities or artistic defence test would only arise if a work is found to contain sexually explicit material that by itself constitutes the undue exploitation of sex. The context of the portrayal of sex must be examined to determine whether it is essential to a "wider, artistic, literary or other similar purpose" or if it is the main object of the work.⁵⁵³

The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.⁵⁵⁴

Sopinka J. then turns to consider whether s.163(8) violates freedom of expression as set out in s.2(b) of the Charter. This determination is relatively easily made. He notes that the court advocates a "generous approach to the protection afforded by s.2(b) of the Charter".⁵⁵⁵ The form of the activity in this case, he says, "is the medium through which the meaning sought to be conveyed is expressed, namely, the film, magazine, written matter, or sexual gadget. There is nothing inherently violent in the vehicle of expression, and it accordingly does not fall outside the protected sphere of activity."⁵⁵⁶ This is a straight application of the test set out in Irwin Toy concerning the types of expression protected.⁵⁵⁷ Moreover, he says, activities cannot be excluded from protection on the basis of the content or meaning being conveyed.⁵⁵⁸ In Justice Sopinka's opinion, the materials in this case convey ideas, opinions or feelings.⁵⁵⁹ He does not elaborate on what these ideas, opinions or

feelings might be, other than to note a statement made by the Court of Appeal when it considered this matter:

The subject matter of the material under review ... is sexual activity. Such activity is part of the human experience ... The depiction of such activity has the potential of titillating some and informing others. How can images which have such an effect be meaningless? ...⁵⁶⁰

In keeping with the Court's advocating a generous approach to freedom of expression and absent the violence Irwin Toy suggests would remove it from protection, the material is held to be within the scope of protection afforded by freedom of expression.

The purpose and effect of s.163(8), he says, is "specifically to restrict the communication of certain types of materials based on their content."⁵⁶¹ There is no doubt that s.163(8) seeks to prohibit certain types of expressive activity and this violates s.2(b) of the Charter.⁵⁶² Recourse to s.1 is thus necessary to determine whether s.163(8) constitutes a justifiable limit on freedom of expression.

Two competing views of the objectives of s.163 were put forth. The appellant argued that the objective of the legislation is "to have the state act as 'moral custodian' in sexual matters and to impose subjective standards of morality."⁵⁶³ While acknowledging that much of criminal law is based on moral conceptions of right and wrong, legislation to advance a particular conception of sexual morality is no longer defensible in view of the Charter's protection of freedom of expression. "To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."⁵⁶⁴ Rather, the objective of the legislation is the avoidance of the harm to society that results from anti-social behaviour caused by exposure to obscene material. The harm to society is described as follows by the Report on Pornography by the Standing Committee on Justice and Legal Affairs:

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society that holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.⁵⁶⁵

The harm, then, is clearly identified. Moreover, the undue exploitation of the material seriously harms society by impairing true equality between men and women. How can women expect equality of treatment when the materials depict them in seemingly normal situations of degradation, humiliation, victimization and violence? This is a particular concern in light of society's commitment to equality and the enhancement of dignity and the negative impact on an individual's sense of self-worth and acceptance. Given the objective of preventing harm to society and the manner in which that harm is characterized, it is not surprising that Sopinka J. finds the legislation proscribing obscenity is one of sufficient importance to warrant overriding freedom of expression. He is further persuaded that this type of legislation is found in "most free and democratic societies."⁵⁶⁶ The "burgeoning pornography industry" is also cited in aid of the pressing and substantial concern.⁵⁶⁷ While this is not articulated, perhaps if the industry was significantly smaller and less powerful in terms of economic considerations, the issue of obscenity would not seem so pressing and substantial. On the other hand, it is unlikely that a smaller industry with the same harm to society would not be considered so pressing and substantial. Size of the industry is clearly a subsidiary issue to harm to society.

Thus, Sopinka J. states that the proportionality aspect of the s.1 test must be undertaken "in light of the conclusion that the objective of the impugned section is valid only insofar as it relates to the harm to society associated with obscene materials."⁵⁶⁸ For the reasons given earlier, the objective of maintaining conventional

standards of propriety, independent of social harm, is rejected as it is no longer a valid legislative concern given the Charter's advent.⁵⁶⁹

In a comment reminiscent of the type of definitional balancing undertaken in Irwin Toy, Sopinka J. states that it is important to keep in mind the nature of expression which has been infringed. In his view, the expression here "does not stand on equal footing with other kinds of expression which directly engage the 'core' of the freedom of expression values."⁵⁷⁰ These values "relate to the search for truth, participation in the political process, and individual self-fulfillment."⁵⁷¹ He is unpersuaded that the expression relates to political discourse by engaging people in discussions of pornography and thus forcing examinations of conventional ideas of sexuality. He is similarly unpersuaded that pornography serves the search for truth or relates to individual self-fulfillment. The realities of the pornography industry's harm to society and women particularly militates against those arguments.⁵⁷² Further, he says, the impugned material "is expression which is motivated, in the overwhelming majority of cases, by economic profit. This Court held ... that an economic motive for expression means that restrictions on that expression 'might be easier to justify than other infringements'."⁵⁷³ It is unlikely that the profit factor would significantly alter the finding that obscenity is beyond the core of freedom of expression values. Since harm to society and individuals figures so prominently in these reasons, whether the profit realized through material that is harmful is greater or lesser would not appear to be a significant issue. Indeed, this may well be said for any of the values of expression. Clearly, if the harm is great, the search for truth, participation in the political process and individual self-fulfillment would always seem to come up lacking. Sopinka J. notes only that the impugned material "has the potential of titillating some and informing others"⁵⁷⁴ without elaborating further on exactly what values of expression they serve.

In keeping with the development of the jurisprudence on this issue, the rational connection between the legislation and its objective is rather easily made, and it appears that Sopinka J. has imported facets of the minimal impairment test into it. Noting that an exact causal relationship between obscenity and harm to society may be difficult, if not impossible, to establish, he says "it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs."⁵⁷⁵ Where social science evidence is inconclusive, he says, the approach in Irwin Toy is instructive. There the Court said:

The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.⁵⁷⁶

This "reasonable basis" finding is a facet of the minimal impairment aspect, not the rational connection. This appears to be blended into the rational connection consideration with this statement: "I am in agreement with the view ... that Parliament was entitled to have a 'reasoned apprehension of harm' resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization of sexual relations."⁵⁷⁷ The rational connection between the legislation and its objective is thus made. The basis for this finding is, apparently, the difficulty, if not the impossibility, of an exact determination of harm caused by obscenity. This may be problematic. Freedom of expression itself is an inherently vague concept, as the jurisprudence on this issue bears out,⁵⁷⁸ as is obscenity. The evidence of harm caused by obscenity may be considered impossible to establish, but may be "reasonably presumed."⁵⁷⁹ It seems dangerous to heap a reasonable presumption upon vague concepts in an attempt to justify violations of constitutionally guaranteed freedoms. A rational connection should be just that: a connection it is rational to make. If the Court is to take seriously its commitment to uphold the rights and freedoms set out in

the Charter,⁵⁸⁰ it ought to tread lightly on tenuous evidentiary foundations. While this does not appear to present much difficulty for the Court, perhaps it should.

Justice Sopinka defends the more abstract definition of obscenity in his consideration of whether the legislation constitutes a minimal impairment of freedom of expression. Earlier laws and proposed alternatives were thought to be less effective than the legislation now in place. Previous attempts to provide exhaustive instances of obscenity have failed. Moreover, attempting to define a concept inherently vague and "the intractable nature of the problem ... make the possibility of a more explicit provision remote."⁵⁸¹ Therefore, he says,

the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed. In my view, the standard of 'undue exploitation' is therefore appropriate.⁵⁸²

It is not necessary that the legislative scheme be perfect, he says, but "appropriately tailored in the context of the infringed right."⁵⁸³ Focussing again on the difficulty of proving a connection between harm to society and obscenity, he notes the deferential attitudes of the Court in Irwin Toy:

This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.⁵⁸⁴

Thus, no actual proof of harm is needed.

The legislation is designed to proscribe material that creates a risk of harm to society⁵⁸⁵ and thus does not affect sexually explicit material that does not contain violence and is neither degrading nor dehumanizing. Further, the availability of the internal necessity or artistic defence ensures that material with scientific, artistic or literary merit is not proscribed by s.163(8). Moreover, he says, the legislation does not affect the private use or viewing of obscene materials. He rejects arguments

suggesting reasonable time, manner and place restrictions on obscene materials would be preferable to outright prohibition. If the objective of the legislation is the avoidance of harm to society, particularly the degradation of women and the negative impact on women exposed to these materials, it is difficult to argue these harms could be avoided by time, place and manner restrictions. Further, making the material more expensive and difficult to obtain would not achieve the same objective. Indeed, such measures may be seen as tacit social approval by maintaining their availability. Finally, measures designed to address the harms caused to women by pornography, such as counselling sexual assault victims to charge their assailants, providing shelters for battered women and increased education for law enforcement agencies and other government authorities may only be seen as responses to the harm caused to women. While these measures may form part of the multi-pronged approach by the government to serious social problems such as violence against women, they are not seen by Sopinka J. as alternatives but complements in addressing the problem. These amount to treating the symptom rather than the disease. The measures adopted by Parliament constitute a minimal impairment of freedom of expression.

As with most recent jurisprudence on s.1, the question of the balance between the effects of the legislation and the legislative objective is dealt with almost as an afterthought. The effect of s.163 is confined to the prohibition of the distribution of sexually explicit material combined with violence or those that are degrading and dehumanizing. It is significant to note that the type of expression at issue lies far from the core of the values of freedom of expression. Sopinka J. says the expression "appeals only to the most base aspects of individual fulfillment, and it is primarily economically motivated."⁵⁸⁶ On the other hand, the objective of the legislation

is of fundamental importance in a free and democratic society. It is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as women

and children, and consequently to society as a whole by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality for their relations with each other.⁵⁸⁷

In a brief concurring judgment Gonthier J., for himself, and L'Heureux-Dube J. agree with the conclusions of Sopinka J. with the following exception. He states that the subject matter of s.163 of the Criminal Code encompasses a combination of content and representation. That is, not only is the content of the material at issue, the representation of it is as well. By representation, he means "a portrayal, a description meant to evoke something to the mind and senses."⁵⁸⁸ It is the combination of both the representation and its content that attracts criminal liability. This dual aspect comes into play in his consideration of Sopinka J.'s three categories of pornographic material.

Gonthier J. takes no issue with the first two of these categories, explicit sex with violence and explicit sex that is degrading or dehumanizing.⁵⁸⁹ However, he differs with Sopinka J. on the issue of whether material in the third category, explicit sex that is neither violent nor degrading or dehumanizing, escapes the application of s.163(8). In Gonthier J.'s opinion, the difficulty here is that Sopinka J. focussed only on the content of the material. If such an approach is taken, it seems unlikely the material would be caught by s.163(8). However, when viewed in light of its representation, it may cause harm even though its content alone would not be seen as harmful.⁵⁹⁰ He explains it this way:

The manner of representation, of public suggestion, can greatly contribute to the deformation of sexuality, through the loss of its humanity. Even if the context is not as such objectionable (and, I would say, even more so), the manner in which the material is presented may turn it from innocuous to socially harmful. After all, it is the element of representation that gives this material its power of suggestion, and it seems quite conceivable that this power may cause harm despite the apparent neutrality of the content.⁵⁹¹

Gonthier J. points out that it is important to consider the medium in which material subject to s.163(8) is presented. He states that the various media are not acknowledged often enough in considering s.163. The difficulty here, he says, is that statements "made regarding the law of obscenity where a movie is impugned, for instance, and it is often taken for granted that they will apply to all media."⁵⁹² This observation figures prominently in his consideration of the representation of the contents of obscene material. Unlike the element of content, the element of representation is subject to varying degrees of community tolerance. Gonthier J. uses the following illustration to make this point. The explicit portrayal of 'plain' sexual intercourse falls within Sopinka J.'s third category.⁵⁹³ If this imagery were portrayed in words in a book, it would not be of much concern, unless it were a children's book. If the same imagery were found in a magazine or movie, he says, the likelihood of harm increases but remains low. If the imagery were found on a poster, it is more problematic. Finally, if found on a billboard, Gonthier J. "would venture that it may well be an undue exploitation of sex, because the community does not tolerate it, on the basis of its harmfulness."⁵⁹⁴ The harm, he says, comes from the "immediacy of the representation" in that the billboard stands by itself in an absence of context. The message it contains is "at once crude and inescapable. It distorts human sexuality by taking it out of any context whatsoever and projecting it to the public."⁵⁹⁵ Thus, despite the lack of an objectionable context, the representation may cause the harm that will attract criminal liability. These comments illustrate Gonthier J.'s reservations concerning the third category of material outlined by Sopinka J. He is in agreement with Sopinka J. on the constitutional validity of s.163.

There is no doubt that the objective of avoiding harm to women, children and society, and the enhancement of respect for all members of society and non-violence

and equality in their relations with each other are laudable goals. However, the way the Court has upheld these goals may be problematic for a number of reasons.

The intentionally vague test proposed by Sopinka J. of "undue exploitation" will be in need of constant clarification. Rather than lending certainty to the law, the effect of this is to leave it uncertain as to whether material is caught by s.163(8). Particularly in the criminal law context, such uncertainty ought to be avoided. Gonthier J.'s concerns respecting "representations" are similarly lacking in clarity, particularly when placed alongside his comments concerning a shifting community standards test with respect to representations. Again, this does little to ensure reasonable certainty in knowing if material is contrary to s.163.

It would be helpful if the Court could provide a meaningful distinction between obscenity and pornography. There appears to be little effort made to do so. If the distinction is not relevant in this case, perhaps the Court should state that, and why.

Striking in this freedom of expression case is an almost complete absence of the definitional balancing that characterized the earlier expression decisions.⁵⁹⁶ Indeed, in the earlier cases definitional balancing was determinative of expression. Yet in this case there is no such consideration. This may be reflective of the Court's higher deference to the legislatures in non-criminal matters involving economic policy. This case hints at as much in its statement advocating a generous approach to freedom of expression.⁵⁹⁷ This is nothing new, of course: the Court advocates a generous approach to all Charter guarantees.⁵⁹⁸ Given the significance of definitional balancing in previous freedom of expression decisions, absent a clear explanation it is difficult to determine why s.163 is so rapidly brought within the scope of protection afforded by s.2(b) of the Charter.

The s.1 analysis follows what is by now a predictable course. The minimal impairment discussion forms the bulk of these reasons, with the balancing of the effects of the legislation against its objectives being added almost as an afterthought. Indeed, the effects portion of the proportionality test appear subsumed by the minimal impairment aspect. Like most s.1 cases, here the rational connection is made rather easily. Yet the ease of this connection is problematic. Freedom of expression and obscenity are both inherently vague concepts. Similarly, evidence of harm caused to the community is almost impossible to determine, but might be "reasonably presumed". Surely the justification of violations of constitutionally guaranteed rights and freedoms warrants a more solid evidentiary foundation than the one relied on here. This may be particularly relevant in Gonthier J.'s reasons concerning a varying degree of community tolerance for representations of obscenity.

Prohibiting material that is sexually explicit because it contains violence is also subject to criticism on the basis of vagueness. Violence itself is not defined. Once again this leaves it uncertain what material would be caught. Some activity may have the appearance of violence without the intent. According to Sopinka J.'s analysis, this would be caught by s.163. But what if it were never intended to have such an appearance? The same comments may be made with respect to the terms "degrading" and "dehumanizing".

Sopinka J.'s reasons with respect to the minimal impairment aspect of the s.1 test are also subject to comment. The definition of obscenity is replete with terms that do not lend themselves to easy definition or determination. To seek an abstract definition of obscenity that is contextually sensitive and responsive to the knowledge

and understanding of the phenomenon to which the legislation is directed appears to ensure a certain level of indeterminacy.

It is not entirely clear that limiting freedom of expression by banning obscene materials will substantially reduce the perceived harm to society. Banning material does not necessarily limit its availability: it may only serve to make access more difficult. Indeed, it may make the material even more desirable. The effect of the legislation may be to drive the hard core pornography industry underground. The harm to society would remain the same.

If harm to society is deemed to be the legislative objective, then it should not make a difference where the material is viewed. In aid of his reasons that the legislation minimally impairs freedom of expression, he states that the legislation does not affect the private use or viewing of obscene materials. If the use results in harm to society, then where that use occurs should be irrelevant. The legislation does affect the private use and viewing of obscene materials in that by banning their public distribution and exhibition, access for private use is necessarily affected.

These comments serve to suggest that the Court's reasons in Butler are subject to critical analysis both in their substantive content and in the application of the s.1 test.

It may be said that the Court's approach to s.1 is very much results-oriented. If the Court wishes to uphold legislation that is subject to a constitutional challenge, it will apply a relaxed s.1 analysis. If, on the other hand, the Court wishes to uphold the constitutional provision that is being pitted against legislation, the s.1 analysis will be strictly applied. Further, the Court may also uphold the legislation by engaging in the

definitional balancing of a constitutionally guaranteed right or freedom, thus avoiding the necessity of resort to s.1 at all.

For example, in Justice McIntyre's opinion in the Alberta Reference, freedom of association is defined in such a way as to preclude resort to s.1. Indeed, McIntyre J. undertakes a significant review of the meaning of "association" in reaching his conclusion that freedom of association does not encompass the right to strike. Yet the same intense definitional balancing that characterized freedom of association in the labour context is virtually absent in the definition of expression in Irwin Toy and Butler. Commercial expression in Irwin Toy is subject to a nominal investigation to determine whether it is within the scope set out in s.2(b). Pornography as expression in Butler is protected with hardly any reference to definitional balancing at all.

Once an impugned right or freedom is deemed to be constitutionally guaranteed, it is subject to varying degrees of scrutiny pursuant to the s.1 test. An example of this is Justice McIntyre's judgment in Dolphin Delivery. He has little difficulty in finding that restraining secondary picketing in labour disputes constitutes a reasonable limit on freedom of association. This cannot be surprising given his high degree of deference to the legislature and reliance on the expertise of specialized labour tribunals in matters of labour relations. This approach may be contrasted with that taken by Chief Justice Dickson in his dissenting opinion in the same case. Here the s.1 analysis is strictly applied, with significantly different results. In his opinion, some of the impugned legislation fails to meet even the first part of the s.1 test: some of the legislation passed by the government of Alberta was simply not of sufficient importance to override the workers' freedom of association. Dickson C.J. further questions the rational connection between the legislative aims and the means taken to achieve them and again finds it lacking in some respects. Moreover, it is his opinion that the legislation does

not impair the workers' rights as minimally as possible. What is evident throughout his analysis is a commitment to apply each aspect of the s.1 test in a rigorous fashion. Clearly Dickson C.J. exhibits none of the deference evidenced by McIntyre J. in labour issues.

Irwin Toy also offers a results-oriented approach to s.1. The first aspect of the test, whether the legislation relates to a pressing and substantial concern, is easily passed, as is the rational connection aspect. There is no discussion whatever of the need for the legislation to be "carefully designed to achieve the objective in question" or that the means not be "arbitrary, unfair or based on irrational considerations," as outlined in Oakes. Indeed, the Court's treatment here suggests that this aspect is a substantially formal part of the test. The minimal impairment aspect proves to be the major hurdle in this case. Here the Court suggests that restrictions may be upheld despite the existence of alternative measures that impair the freedom in question less than the legislative scheme, as long as the legislative scheme is "reasonable". What this suggests is that the Court was committed to uphold a ban on commercial advertising aimed at children, notwithstanding reference to the s.1 test. It is worth noting McIntyre J.'s dissent in Irwin Toy. In holding that the legislation cannot be upheld under s.1, he applies a rigorous standard throughout the stages of the test. He states that the legislative aim is not sufficiently important to warrant overriding freedom of expression. Further, he says the legislation fails at the proportionality stage in that a total ban on advertising aimed at children below an arbitrarily fixed age makes no attempt at proportionality.

In Butler it is clearly that the desired result is that the obscenity provisions of the Criminal Code be upheld. In the s.1 analysis, the objective of the legislation is declared as the avoidance of the harm to society that results from anti-social behaviour

caused by exposure to obscene material. When framed in this manner, it is difficult to imagine any legislation not surviving the s.1 stage. When viewed in this context, the legislation is clearly of sufficient importance to warrant overriding a constitutional right or freedom. Once again the major consideration is the minimal impairment aspect, diluted to a question of whether it was reasonable for Parliament to enact this legislation in light of the perceived harm created by obscene matter. Again there is no serious discussion of whether the legislation is in any way arbitrary or unfair, or based on irrational considerations. While the majority opinion very briefly considers alternative legislative measures, these are dispensed with easily in favour of the existing Code provisions. In this instance, it appears that the framing of the legislative objective all but determined the outcome. Indeed, when set against preventing harm to society, the outcome of the s.1 test seems a foregone conclusion.

It is also worth noting in Butler and in other decisions upholding legislation by applying a relaxed s.1 analysis, the evidence relied on by the Court in reaching its decision is sometimes tenuous at best. In Jones, for instance, the majority upholds provincial legislation despite the fact that the province did not tender any evidence that the compelling objective of the education of the young could be accomplished by other, less drastic means. This point became the focus of the dissenting opinion in that case. Further, in the Alberta Reference, Dickson C.J.'s dissenting reasons squarely address the lack of evidence proffered by the government that all work covered by the legislation in question was essential. Similarly, in the Dairyworkers case Wilson J., in dissent, was unable to accept arguments of economic harm or harm to the communities' health, absent compelling evidence. This is simply to note that the Court is quite willing to rely on varying standards of evidence depending on whether legislation is upheld or stopped at the s.1 stage.

Taken as a whole, then, the Court's approach to s.1 has demonstrated a considerable weakening in the rigorous approach articulated in Oakes and the pre-Oakes cases. The Court has engaged in definitional balancing in order to avoid the necessity of dealing with s.1 at all. When s.1 is considered, its components are subject to varying levels of scrutiny. The first aspect, the determination of whether the legislative objective in question relates to concerns which are pressing and substantial, is rather easily passed. The second aspect of the analysis, the proportionality test, has been seriously eroded in the time since Oakes. The three aspects of this test -- the rational connection, minimal impairment and deleterious effects considerations -- have been collapsed into a diluted consideration of minimal impairment, with the requirement that the legislature need only demonstrate, sometimes absent any evidence at all, that it was reasonable for it to have taken the measures it did in light of its objectives. The approach taken to s.1 appears to dictate its outcome: a relaxed s.1 analysis results in legislation being upheld. A strict analysis of the s.1 components results in legislation being declared constitutionally invalid.

THE JUSTIFICATION OF DISCRIMINATION: THE INTERPLAY BETWEEN SECTIONS 15 AND 1

The issue of the justification of discrimination through mandatory retirement policies was raised in McKinney v. University of Guelph.⁵⁹⁹ The appellants, eight professors and a librarian at the respondent universities, Guelph, Laurentian, York and Toronto, challenged the universities' policies of mandatory retirement at age 65 as discrimination based on age, contrary to s.15 of the Charter. The appellants further contended that s.9(a) of the Ontario Human Rights Code, 1981⁶⁰⁰ also violated s.15 in that it confined the Code's prohibition against discrimination in employment on grounds of age to persons between the ages of 18 and 65 only, thus denying protection

to the appellants. Since the majority of the Court is of the opinion that the Charter does not apply to universities, the entire discussion of whether mandatory retirement policies violate s.15 of the Charter is *obiter*. Despite this, it is worth considering the comments on this issue as the Court clearly considers it significant and it has serious implications on informing the Court's understanding of discrimination and its justification under s.1. Justice La Forest, writing for himself, Dickson C.J. and Gonthier J., holds that the Charter does not apply to universities and that mandatory retirement policies violate s.15 of the Charter, as does s.9(a) of the Code but that these are justified pursuant to s.1. In a short separate judgment Sopinka J. agrees with La Forest J. Justice Wilson, in dissent, holds that the Charter is binding on universities, and that s.15 is violated by the mandatory retirement policies and s.9(a) of the Code. She is unable to find justification for these breaches in s.1. L'Heureux-Dube J., also in dissent, finds that universities are not subject to the Charter and therefore the issue of whether mandatory retirement policies violate s.15 need not be answered. However, she finds s.9(a) of the Code is in breach of s.15, and that it cannot be justified according to s.1. Finally, Justice Cory, while agreeing that the Charter applies to the universities, is in agreement with Justice La Forest that although s.15 is violated by the policies and by s.9(a) of the Code, each may be justified by s.1.

The mandatory retirement policies at the respondent universities were established in varying manners. At the University of Guelph, mandatory retirement is based on policy and practice and a pension plan providing for retirement at age 65. At Laurentian University, retirement policy is set by the general by-laws of the university, the collective agreement between the university and faculty, and the retirement plan for staff. York University's university plan and collective agreement with the faculty association provides for retirement at age 65. The University of Toronto's mandatory retirement policy has been effected by a formal resolution of the Board, and the

university's pension plan provides for retirement at age 65 and is funded on that basis. Additionally, the collective agreement between the university and faculty association refers to retirement at age 65 and stipulates that there will be no change in this policy during the term of the agreement.⁶⁰¹ While the majority of the Court finds that the Charter does not apply to universities in this instance, the equality rights arguments were discussed because of their significance and relevance to the companion cases argued along McKinney. Thus, while the discussion with respect to mandatory retirement policies and ss.15 and 1 is *obiter*, it is instructive of the Court's approach to discrimination and justification.

Justice La Forest, writing for himself, Dickson C.J. and Gonthier J., states that, assuming the universities' policies could be considered "law", "it seems difficult to argue in light of Andrews v. Law Society of British Columbia ... that they are not discriminatory within the meaning of s.15(1) of the Charter since the distinction is based on the enumerated personal characteristic of age."⁶⁰² Applying the Andrews definition of discrimination, he holds that the policies make a distinction based upon age that imposes a burden on those over 65 by removing from them their ability to work, and are thus in violation of s.15.⁶⁰³ Noticeable here is the complete lack of hesitation in finding discrimination. Clearly this is because the breach is obviously based on one of the enumerated grounds in s.15. Because of this, the definitional balancing that characterized the finding of a Charter breach in the freedom of expression and association cases is noticeably absent. The real test of the mandatory retirement policies therefore falls to their justification under s.1 of the Charter.

Once again the Oakes test is briefly outlined, with a warning against its application in a "mechanistic fashion" and the need to "avoid rigid and inflexible standards".⁶⁰⁴ This is particularly so, La Forest J. states, in issues concerning

discrimination, where the "degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by easy calculus."⁶⁰⁵ In such cases, the balancing test must be approached in a flexible manner, weighing the character of the discriminatory classification, the social and constitutional importance of the interests adversely affected, the importance to the individual of the deprived benefit, and the importance of the state interest.⁶⁰⁶

That said, the objectives aspect of the s.1 analysis is raised and easily met. Indeed, this part of the test has become all but a mere formality, with the notable exception of McIntyre J. in Irwin Toy.⁶⁰⁷ The objectives of the mandatory retirement policies, the respondents submit, are intended

(1) to enhance and maintain their capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal; and (2) to preserve academic freedom and the collegial form of association by minimizing distinctive modes of performance evaluation.⁶⁰⁸

La Forest J. states that these objectives easily meet the "objectives test": "Certainly, excellence in higher education is an admirable aim and should be fostered. The preservation of academic freedom is also an objective of pressing and substantial importance."⁶⁰⁹

With respect to the proportionality test, it is evident that once again this has been collapsed into a primary consideration of minimal impairment, with the rational connection and effects discussion relatively easily met. In addressing the rational connection aspect, La Forest J. states that the mandatory retirement policies are intimately tied to the universities' tenure systems. Tenure, he says, ensures the academic freedom that is essential to the "free and fearless search for knowledge and the propagation of ideas"⁶¹⁰ by minimizing interference with or evaluation of faculty members after rigorous initial assessment. Absent mandatory retirement, stricter

performance appraisal systems might be required, which "would be fraught with many difficulties, and would probably require an assessment by one's peers or by outside experts." This type of appraisal "could not be unilaterally imposed by university administration because of the role of the faculty or faculty associations in the governance of the university."⁶¹¹ Mandatory retirement clearly supports the tenure system, he says, in that it ensures stability of employment and continuing faculty renewal, a process crucial to universities' abilities to be centres of excellence. In a "closed system with limited resources",⁶¹² such faculty renewal can only be accomplished by the orderly departure of other faculty. Mandatory retirement ensures this in a manner that permits long term planning by both faculty members and universities. Thus the rational connection between the policies of mandatory retirement and the objectives sought to be achieved by them is easily made.

The minimal impairment aspect also shows evidence of a declining standard of scrutiny. Here La Forest J. repeats the standard articulated in Irwin Toy that the government need only demonstrate it had a reasonable basis for concluding that it impaired the constitutionally guaranteed right as little as possible given its pressing and substantial objectives.⁶¹³ Given the objectives of enhancing and maintaining academic excellence by permitting flexibility in resource allocation and faculty renewal, and preserving academic freedom by minimizing distinctive forms of performance evaluation, mandatory retirement "contributes significantly to an enriched working life"⁶¹⁴ for faculty members. Far from having a detrimental impact, he says, the policies ensure academic freedom, minimize supervision and performance reviews, provide security of employment and protection against periods of diminished productivity. While the policy may be the cause of considerable anxiety to those who do not wish to retire, mandatory retirement is part of the "bargain" involved in taking a tenured position.⁶¹⁵ Moreover, in universities, characterized as "closed systems with

limited resources", La Forest J. notes a "significant correlation between those who retire and those who may be hired,"⁶¹⁶ along with evidence of "a significant problem of an older teaching staff in universities."⁶¹⁷ This raises the consideration of the balancing of interests between groups competing for the distribution of scarce resources, a matter La Forest J. suggests must be weighed at the s.1 stage, an undertaking that may not be achieved with great certainty. These comments, together with the finding that the universities had a reasonable basis for concluding that their mandatory retirement policies impaired the appellants' rights as little as possible given the objectives of the policies suggests a high degree of judicial deference to policies reconciling competing claims for scarce resources. The "reasonable basis" standard articulated here appears a good deal less stringent than the "least restrictive means" test set out in Oakes. Where in earlier s.1 cases the Court indicated that the means taken to restrict the right or freedom should be the least restrictive available⁶¹⁸ that is equally as effective as the means actually chosen,⁶¹⁹ here La Forest J., for the majority, is comfortable with the party infringing the right simply demonstrating that its conclusions that the right is impaired as little as possible is reasonable. The Court appears to be unwilling to look behind the reasonableness of the claim. Given this, it is not surprising to find that the discussion of the effects of the mandatory retirement policies consider the same factors as the minimal impairment aspect and is easily passed. The result of the s.1 analysis, which in this case essentially consisted of a discussion of the minimal impairment aspect with the lower standard of reasonable basis, is that the universities' mandatory retirement policies are a justifiable breach of the appellants' equality rights.⁶²⁰

The discussion of whether s.9(a) of the Human Rights Code violated s.15 by confining protection against age discrimination in employment to those between 18 and 65 receives a somewhat more detailed analysis. The discrimination aspect is again

easily dealt with: the Code clearly denies the appellants a benefit of the law on the basis of their age and thus, according to the test in Andrews, is in conflict with s.15.⁶²¹ La Forest J. next reviews what he refers to as the "history and place of mandatory retirement", stating that retirement is "a by-product of industrialization"⁶²² which is premised on the orderly transition of older workers leaving the work force in the interests of younger ones entering. Concurrent with the development of retirement was the introduction of social security legislation aimed at providing security for the aged. The adoption of the age of 65 for eligibility for social security appears to be based on a widely accepted consensus that this was the age workers left the work force. As individuals who were regularly employed were not eligible to receive social security benefits, 65 became the "normal" age of retirement.⁶²³ The development of mandatory retirement in Canada began with the introduction of private and public pension plans aimed at providing income security to older persons. The development of these plans has been such that one half of the Canadian work force are employed in jobs subject to mandatory retirement, and approximately two-thirds of collective agreements contain mandatory retirement provisions at age 65.⁶²⁴ This, La Forest J. says, "has had profound implications for the organization of the workplace -- for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others."⁶²⁵

The purpose of s.9(a) of the Human Rights Code, it is stated,

was to arrive at a legislative compromise between protecting individuals from age-based employment discrimination and giving employers and employees the freedom to agree on a date for the termination of the employment relationship. Freedom to agree on a termination date is of considerable benefit to both employers and employees. It permits employers to plan their financial obligations, particularly in the area of pension plans and other benefits. It also permits a deferred compensation system whereby employees are paid less in earlier years than their productivity and more in later years, rather than have a wage system founded on current productivity. In addition it facilitates the recruitment and training of new staff. It avoids the stress of continuous

reviews resulting from ability declining with age, and the need for dismissal for cause. It permits a seniority system and the willingness to tolerate its continuance having the knowledge that the work relationship will be coming to an end at a future date. Employees can plan for their retirement well in advance and retire with dignity.

Another important objective of s.9(a) was the opening up of the labour market for younger unemployed workers. The problem of unemployment would be aggravated if employers were unable to retire their long-term employees.

To put it in its simplest terms, mandatory retirement has become part of the very fabric of the organization of the labour market in this country.⁶²⁶

Set in this light, mandatory retirement may be viewed as an essential aspect of employment and after-employment organization that forms the foundation of a complex and entrenched social security system. It is premised on the desirability of knowing with reasonable certainty when older workers would be leaving the workplace and receiving after-employment benefits, thus creating employment opportunities for younger workers. Implicit in this is the understanding of workers and employers that mandatory retirement is, by and large, part of the bargain of the workplace. Employment is taken with the knowledge and understanding that retirement is fixed and certain.

The determination of whether the discrimination in s.9(a) of the Code is justified under s.1 of the Charter receives a somewhat lengthy consideration. Following the Oakes criteria, the objectives of s.9(a) of the Code are stated to extend protection against employment discrimination to individuals within a specific age range. Those between the ages of 45 and 65 were deemed to be the most in need of protection in that generally those over 45 have more difficulty finding work than others, lack the flexibility of younger persons in terms of skills and training, and are paid more and will work a shorter term of employment than younger persons.⁶²⁷ Protection was extended to those between 18 and 45 as youth employment became a more serious factor.⁶²⁸ Those 65 years and older were not considered to be as seriously exposed to

the adverse results of unemployment as those under 65, as they were eligible for social security and pension benefits.⁶²⁹ An examination of the legislative debates concerning s.9(a) of the Code reveals the legislature attempted to strike a balance between protecting those over 65 from age discrimination and fears that extending such protection might result in delayed retirement and delayed benefits for older workers, with significant labour market and pension ramifications.⁶³⁰ Mandatory retirement is part of a complex socio-economic problem with an effect on pension plans, youth employment, seniority, tenure and "almost every aspect of the employer-employee relationship."⁶³¹ These issues, La Forest J. says, "are surely of 'pressing and substantial concern in a free and democratic society'".⁶³²

The rational connection aspect of the proportionality test is easily made and is again collapsed into the minimal impairment discussion. The legislation's purpose of maintaining stability in pension arrangements is rationally connected to that end, according to La Forest J. Moreover, mandatory retirement "is part of a complex web of rules which results in significant benefits as well as burdens to the individuals affected ...[t]here is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement ...".⁶³³

In addressing the minimal impairment aspect, once again the reasonable basis test figures prominently. Given the historical origins of mandatory retirement and its development as a crucial structural element in the organization of the workplace, it is not surprising that La Forest J. would find that the legislature had a reasonable basis for concluding that the legislation impairs older workers' equality rights as little as possible. Removing mandatory retirement, part of "a web of interconnected roles mutually impacting upon each other",⁶³⁴ would result in repercussions through hiring, training, dismissals, monitoring and evaluations and compensation.⁶³⁵ Moreover, since

65 has come to be considered the "normal" age of retirement, there is no stigma attached to being retired at that age. Indeed, La Forest J. notes an increasing trend towards early retirement.⁶³⁶ Within the university system, mandatory retirement is closely related to issues of faculty renewal, seniority and tenure, which is in turn linked with performance review, minimal supervision and stability of employment.

Tampering with mandatory retirement would necessitate compensating adjustments throughout the entire labour and social fields, such as pensions and social security benefits. In areas such as this, the Court expresses a clear deference to legislative policy. This minimal intrusion stance by the Court is further evidenced by La Forest J.'s statement that mandatory retirement is not government policy in respect of which the Charter may be directly invoked, but is an arrangement negotiated in the private sector. As an aspect of the employment relationship, it has been negotiated by trade unions or individual employees and is beneficial, he says, to both employees and employers, with expectations built up on both sides.⁶³⁷ Indeed, freedom of employees and employers to determine for themselves the conditions of employment is "a very desirable goal in a free society."⁶³⁸ Particularly in areas with considerable socio-economic concerns and consequences, the Court is concerned with whether the legislature had a reasonable basis for concluding the legislation in issue impaired older workers' equality rights as little as possible given the government's pressing and substantial concern. In this instance, this aspect of the s.1 test is met.⁶³⁹

Turning to the issue of the proportionality between the effects of s.9(a) of the Code on the guaranteed right and the objectives of the legislation, La Forest J. states that "this enquiry really involved the same considerations as were discussed in dealing with the issue of whether the legislation met the test of minimal impairment."⁶⁴⁰ Yet, he says, it is important to keep in mind that the purpose of the legislation was not to

legislate mandatory retirement, but to protect workers within a certain age range from age-based employment discrimination. Because of the significant socio-economic concerns of extending this protection to those over age 65, the legislation did not accord the same protection beyond 65. The effect, clearly, is to deny those over age 65 the equal protection of the law. Again, La Forest J. expresses a high degree of deference to the legislature:

In looking at this type of issue, it is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety.⁶⁴¹

For Justice La Forest, the question becomes whether the cut-off point of age 65 can be reasonably supported. In this instance, he does not believe that such a cut-off point, which is not only reasonable by appropriately defined in terms of age, is necessarily invalid because it is in conflict with a prohibited ground of discrimination.⁶⁴² It is possible that s.1 of the Charter may allow for partial solutions to discrimination where there exist reasonable grounds for limiting a measure.⁶⁴³ Thus, although s.9(a) of the Human Rights Code violates s.15(1) of the Charter, the limit is justified under s.1 of the Charter.

Wilson J., in a dissenting opinion, reaches the opposite conclusion. First, she begins her analysis at whether the universities' mandatory retirement policies violate s.15 of the Charter. In her opinion, "one would be hard pressed to construe any rule prohibiting employment past a certain age as anything other than a clear example of direct discrimination."⁶⁴⁴ The focus of s.15, she states, is clearly prejudice and stereotype:

The purpose of the equality guarantee is the promotion of human dignity. This interest is particularly threatened when stereotype and prejudice inform our interactions with one another, whether on an individual or collective basis. It is for this reason that the central focus of the equality guarantee rests upon those vehicles of discrimination, stereotype and prejudice.⁶⁴⁵

For Wilson J., the focus is whether the mandatory retirement policies constitute prejudice and reflect the stereotype of old age. Further, is there an element of human dignity at issue? And, "are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity?"⁶⁴⁶ For her, the answer to these questions is "clearly yes" and thus s.15 is violated.⁶⁴⁷

Turning to s.1, Wilson J. states that the mandatory retirement policies fail at the minimal impairment stage. She acknowledges a willingness on the part of the Court to adopt a more flexible approach to the minimal impairment breach of the proportionality test set out in Oakes, as evidenced by the Court's approach to this aspect in Edwards Books and Irwin Toy.⁶⁴⁸ In those cases, she says, judicial deference was particularly appropriate where something less than a straightforward denial of a right was involved. The Court should exercise deference where the legislature has been forced to strike a balance between competing claims by groups and particularly where the legislature has sought to promote or protect the interests of the less advantaged.⁶⁴⁹ In those instances,

the requirement of minimal impairment will be met where alternative ways of dealing with the stated objective meant to be served by the provision in question are not clearly better than the one which has been adopted by government. It is not a question of the Court refusing to entertain other viable options ... [T]his branch of the Oakes proportionality test will be met where the means chosen by government are the most reasonable ones available in light of the objective sought to be achieved.⁶⁵⁰

She dismisses the argument that younger academics constitute a vulnerable group in that they will be denied employment opportunities if older faculty are not required to retire. Younger academics are not denied employment because of their age, she says,

but for reasons of the universities' (and government) policies of fiscal restraint.⁶⁵¹ Only an apparent lack of funding is preventing younger academics from pursuing their careers.

Justice Wilson notes that the stringent application of the minimal impairment test may be relaxed in circumstances where competition for scarce resources exists and the legislature is forced to strike a compromise, but not in instances of legislative initiatives aimed at protecting vulnerable members of society;⁶⁵² yet, she says, the courts "should probably not intervene where competing constitutional claims to fixed resources are at stake."⁶⁵³ In such cases, judicial deference should be exercised. Returning to the issue of mandatory retirement, she says that since young academics do not constitute a vulnerable group and there are no other factors that would justify a deferential standard of review, such as a one to one ratio between the retiring of older faculty and the hiring of junior faculty, the more stringent minimal impairment standard should be applied. Moreover, she states, the minimal impairment test has not been met due to the existence of viable and equally effective means of achieving the objective. These include voluntary retirement coupled with strong incentives to retire. This has the advantage of not impairing the rights of older academics and not "completely sacrificing the admittedly important objective of achieving faculty renewal."⁶⁵⁴ Since the mandatory retirement policies are not, in Wilson J.'s view, clearly better than the alternatives, they fail the minimal impairment test. At least with respect to this aspect of her discussion, the minimal impairment test is clearly the most significant of the Oakes criteria, the rational connection and effects aspects not being mentioned at all. This is further evidence of the test's overall devolution into a consideration of minimal impairment *simpliciter*.

Addressing the issue of whether s.9(a) of the Human Rights Code violates s.15 by denying protection against employment discrimination based on age to those over 65, Wilson J. states that it is discriminatory because it fails to distinguish between "those who are and those who are not able to work", thus perpetuating the stereotype of older workers as unproductive, inefficient and lacking in competence.⁶⁵⁵ The effect of s.9(a) of the Code, she says, is to "reinforce the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with."⁶⁵⁶ She finds this is a violation of s.15 of the Charter.

The legislation cannot be justified under s.1. Since it is her opinion that mandatory retirement in the universities violates s.15 and cannot be saved by s.1, it follows that s.9(a) of the Code cannot be justified at least to the extent that it allows such discriminatory practice.⁶⁵⁷ For Justice Wilson, however, the greater difficulty with the legislation is that it is overbroad in that it permits all forms of age-based discrimination in employment for those over 65. In failing to confine s.9(a) to instances of mandatory retirement, the legislature has not met the rational connection aspect of the s.1 test.⁶⁵⁸ This is a breach of such significance that s.9(a) must be struck down as a whole and declared of no force and effect.

In any event, she says, s.9(a) would not pass the minimal impairment aspect of the s.1 test. The respondents had argued that pension plans were so closely linked to mandatory retirement that any changes in retirement schemes would significantly disrupt pension benefits. Yet the evidence established that a great number of the workforce in Ontario, where the case arose, is unorganized and thus are not covered by pension plans in collective agreements. Moreover, immigrant and female workers and the unskilled constitute a "disproportionately high percentage" of non-unionized workers. This group, Wilson J. says, represents the most vulnerable employees who,

"if forced to retire at age 65, will be hardest hit by the lack of legislative protection."⁶⁵⁹ More problematic yet is the evidence that women workers are unable to amass adequate pensions because of interrupted work histories due to child bearing and child rearing. Mandatory retirement for these people could constitute a significant hardship. Thus,

when the majority of individuals affected by a piece of legislation will suffer disproportionately greater hardship by the infringement of their rights, it cannot be said that the impugned legislation impairs the rights of those affected by it as little as reasonably possible ... [T]he fact of the matter is that the majority of working people in the province do not have access to such arrangements.⁶⁶⁰

The contrast between the approach taken by Wilson J. and that of La Forest J. is striking. La Forest J. takes a formal approach to the issue of equality and discrimination and focuses his justification of the legislation on socio-economic grounds. Clearly for him the interference with mandatory retirement policies would cause significant disruption to the labour market and benefit and security schemes. In areas of such social and economic policy, a high degree of judicial deference is exercised. Of obvious importance to La Forest are such notions as freedom of contract and the high administrative costs of alternative arrangements. Also noticeable is his reliance on the less stringent standard of the minimal impairment test in justifying limitations that are "reasonable" given the governmental objective.

Justice Wilson begins her analysis from the position that s.15 is intended to assist the disadvantaged in promoting human dignity and allaying prejudice and stereotype. She then proceeds to view the policies and legislation through this perspective and finds it lacking. The less stringent minimal impairment standard should not be applied where the legislature has undertaken to promote or protect the interests of the disadvantaged. In these cases, a low level of judicial deference should

be exercised. The perspective of the disadvantaged informs each step of her analysis and remains loyal to the sentiments expressed in Andrews that s.15 is intended to act as a sword for those lacking in political power who rely on the courts to protect their interests.⁶⁶¹ Here, Wilson J. finds the legislation failing in its very purpose.

Justice L'Heureux-Dube, also in dissent, confines her discussion to whether s.9(a) of the Code is in breach of s.15 of the Charter. S.15, she says, is intended to ensure that individuals are treated on the basis of their own worth, abilities and merit, and not according to external or arbitrary characteristics that serve to restrict individual opportunity.⁶⁶² Drawing from the definition of discrimination set out in Andrews, she states s.9(a) is discriminatory on its face in that "it clearly excludes designated segments of society from the ambit of protection otherwise provided by the Code. Furthermore, the exclusion is predicated on age, a ground specifically enumerated in s.15(1)."⁶⁶³ The finding of discrimination is easily met as the language in Andrews clearly encompasses the circumstances of s.9(a): "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 classified."⁶⁶⁴ Clearly, s.9(a) denies the equal benefit of the law to those over age 65 solely on the basis of age, an arbitrary and artificial barrier preventing those affected from raising a complaint where their right to equal treatment with respect to age-based employment discrimination has been infringed. This denies the appellants the fundamental values of s.15: "the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based upon individual ability."⁶⁶⁵

Turning to consider whether the breach of s.15 by s.9(a) of the Code may be justified under s.1 of the Charter, Justice L'Heureux-Dube embarks on a lengthy

review of the legislative objectives of s.9(a). She disagrees with La Forest J.'s judgment that mandatory retirement is directly linked to the tenure system. The value of tenure, she says, is threatened by incompetence rather than age, and the presumption of academic incapacity at age 65 is not well founded. Further, while there is a fear that older faculty "will rest on their laurels and wallow in a perpetual and interminable quagmire of unproductivity and stagnation",⁶⁶⁶ there is nothing to suggest that younger tenured faculty would not pursue this course as well. She also challenges the proposition that the abolition of mandatory retirement would threaten tenure as a result of increased performance evaluations. There is no evidence of this, she says; moreover, performance evaluations are an integral and ongoing part of university life, occurring at the hiring and promotion stages and in determining distribution of research grants, merit awards and administrative positions. It has never been suggested that performance evaluations threaten tenure, collegiality or academic freedom.⁶⁶⁷ She further states that if mandatory retirement were abolished, the number of academics choosing to remain in active and productive academic life after age 65 is, in her opinion, relatively small, while tenure will continue to exist. The nexus between tenure and mandatory retirement is simply not made.

L'Heureux-Dube J. has significant difficulties with the justification of mandatory retirement on the basis of declining ability with age. She notes there is no evidence that the aged are less competent than younger persons. Stating that the conclusion that excellence in universities can only be maintained by replacing older faculty members with younger ones is overbroad, she says that professional abilities should be gauged on merit rather than on a chronological basis.⁶⁶⁸ Just as abilities vary from person to person, so does their decline, and the imposition of a cut-off age for any occupation at age 65 is arbitrary.⁶⁶⁹ The financial burden argument is similarly problematic: some retired professors earn up to 90 per cent of their working salaries,

and thus "economically it makes sense to allow them to contribute fully at a marginal "cost" to the universities of only 10 per cent of their salaries."⁶⁷⁰

Focussing on La Forest J.'s statement that the legislation interferes with the appellant's equality rights as little as possible given the government's pressing and substantial objectives, L'Heureux-Dube J. notes that there is an increasing trend towards early retirement and the estimates of workers who would choose to work beyond age 65 varied between 0.1 and 0.4 per cent of the labour force. "These figures hardly pose a 'pressing and substantial' quandary that the government must contend with", she says.⁶⁷¹ Her comments concerning Justice La Forest's argument that an evaluation scheme would "'constitute a demeaning affront to individual dignity'"⁶⁷² are even more pointed:

Are objective standards of job performance a demeaning affront to individual dignity? Certainly not when measured against the prospect of getting 'turfed-out' automatically at a prescribed age, and witnessing your younger ex-colleagues persevere in condoned relative incompetence on the strength of a 'dignifying' tenure system. The elderly are especially susceptible to feelings of uselessness and obsolescence. If '[i]n a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth', does this mean that upon reaching 65 a person's interest in self-identity and stake in self-worth disappear? That is precisely when these values become most crucial, and when individuals become particularly vulnerable to perceived diminutions in their ability to contribute to society.⁶⁷³

This latter sentiment is particularly significant, she says, given the evidence of the impact of forced retirement on individuals who may suffer trauma and depression upon job loss, loss of significant social participation and feelings that their skills "are consigned to the scrap heap overnight."⁶⁷⁴ In L'Heureux-Dube J.'s opinion, the objectives sought to be achieved through mandatory retirement do not warrant overriding the constitutionally protected rights of the appellants, and thus the inquiry fails at the first stage of the s.1 analysis.⁶⁷⁵ However, she goes on to consider the

"means" aspect of the test on the assumption that a legitimate objective does in fact exist.

The legislation fails at this stage as well on the basis that s.9(a) of the Code not merely limits the appellants' rights under s.15, it eliminates them because no protection against age-based employment discrimination is provided after age 65.⁶⁷⁶ It is interesting to note the parallels between this statement and the conclusions in A.G. Quebec v. Quebec Association of Protestant School Boards that legislation that denies rights will fail to be upheld.⁶⁷⁷ Yet it is significant to note the differences as well: in the Quebec case the finding of a denial of the right caused the legislation to fail before a consideration of s.1 at all; in the instant case this finding becomes determinative only in the "means" aspect of the s.1 analysis. Surely this should be an error on Justice L'Heureux-Dube's part, for this constitutes a considerable shift in importance of the finding of a rights denial rather than limitation. It seems unlikely that she could have intended to diminish the significance of such a finding.

Assessing mandatory retirement's impact, L'Heureux-Dube J. finds it is most painfully felt by the poor, who are often faced with "staggering financial difficulties" such as pensions which have not kept up with inflation and a dollar diminished in value.⁶⁷⁸ This is particularly true for the 50 per cent of the work force who are non-unionized employees. Moreover, she says, many workers have little or no private pension incomes, especially women who have a greater chance of employment with no pension coverage due to interrupted work histories partially as a result of childrearing responsibilities. Finally, she notes that other Canadian provinces have eliminated mandatory retirement without suffering any adverse effects to tenure systems, pension plans and benefit schemes.⁶⁷⁹ On the whole, there appears to be little justification for a scheme that sets age 65 as a time for mandatory retirement:

It is discriminatory, in the most prejudicial sense of the word, to make generalizations about diminished competence or productivity purely on the basis of the attainment of a certain age. Since the number of people who (a) attain that age, and (b) wish to continue working after that age and are physically and intellectually capable of doing so, is not overwhelming, it is difficult to conclude that the labour force will be adversely affected.⁶⁸⁰

The discrimination found in s.9(a) of the Code cannot be justified under s.1.

Agreeing with La Forest J., Justice Sopinka upholds the mandatory retirement policies by relying on a combination of judicial deference and a preference for the specialized competence of trade unions. With respect to judicial deference, he says the federal government and several provinces have seen fit to legislate on mandatory retirement. "These decisions have been made by means of the customary democratic process and no doubt this process will continue unless arrested by a decision of this Court."⁶⁸¹ Clearly he is reluctant to impose the Court's judgment upon that of a democratically-elected legislature's. Endorsing the freedom of contract argument put forth by La Forest J., he states that employers and employees have been deciding for themselves matters of mandatory retirement in the collective bargaining process and wish to continue to do so. Holding that mandatory retirement is constitutionally invalid, he says, "would impose on the whole country a regime not forged through the democratic process but by the heavy hand of the law."⁶⁸² Implicitly endorsing a high degree of judicial deference where freedom of contract is involved, he states that in setting aside mandatory retirement policies, "the Charter would be used to restrict the freedom of many to promote the interests of a few."⁶⁸³ In this case, this would be "quite unwarranted."⁶⁸⁴

Justice Cory also focuses on the impact on collective bargaining should the Court interfere with mandatory retirement policies. As with Justices La Forest and Sopinka, he exhibits a high degree of deference to the collective bargaining process and

suggests that invalidating contractual agreements attacks "the very foundations of collective bargaining and might well put in jeopardy some of the hard won rights of labour."⁶⁸⁵ Such matters are best left to the participants to work out, adding "it would be unseemly and unfortunate for a court to say to a union worker that, although this carefully made decision is in the best interests of you and your family, you are not going to be permitted to enter into this contract."⁶⁸⁶ For Justice Cory, this is unacceptable.

Striking in these judgments is the contrast in approaches taken by the majority and Justices Wilson and L'Heureux-Dube. Central to the majority opinions are the notions of judicial deference and freedom of contract. The strict adherence to freedom of contract is especially apparent in the reasons of Justices Sopinka and Cory: indeed, they appear unwilling to look beyond these ideas at all. Noticeable in their judgments is the absence of any consideration of the impact of mandatory retirement on workers who are not covered by collective agreements or are otherwise adversely affected by compulsory retirement. Such considerations form the foundation of the strong dissents by Justices Wilson and L'Heureux-Dube. The dire predictions of economic chaos following the abandonment of mandatory retirement that form a significant part of La Forest J.'s opinion are pointedly dismissed by L'Heureux-Dube in a judgment stressing the economic chaos visited upon the elderly poor because of such policies. Absent as well from the majority judgments is any meaningful consideration of discrimination at all. Rather, the bare formula of Andrews is followed and a finding of discrimination is reached rather easily. Yet it is a careful consideration of the nature of discrimination and its effects that informs the dissenting opinions. Only by considering what discrimination is can its effects be measured. Put in that light, the effects of the mandatory retirement policies on the elderly poor cannot be considered justifiable. Here, the contrast is between an examination of discrimination that is lacking in

substance and results in judicial deference and a ringing endorsement of freedom of contract, and a reflective analysis of discrimination resulting in the failure of mandatory retirement policies at the s.1 stage.

Very much derivative of the reasoning in McKinney is the second of the three mandatory retirement cases, Stoffman v. Vancouver General Hospital.⁶⁸⁷ At issue was the hospital's Medical and Allied Professional Staff Regulation 5.04, which established a policy of mandatory retirement at age 65, barring a recommendation to the contrary by a medical advisory committee whose decision is based on a personal interview and a review of the health and the continuing performance of the applicant.⁶⁸⁸ The implementation of this regulation appears to be based on the principle that all physicians are expected to retire at age 65 "unless it could be shown that they 'had something unique to offer the hospital'".⁶⁸⁹ The respondents in this case, a group of eight physicians whose admitting privileges at the hospital were terminated pursuant to Reg. 5.04, sought to have the decision of the board of trustees⁶⁹⁰ not to renew their admitting privileges set aside, and a declaration that Regulation 5.04 violated s.15 of the Charter either by its terms or by the manner of its application.⁶⁹¹ Vancouver General Hospital, the appellant, is the major acute care hospital for the province of British Columbia and handles approximately 18,000 high risk patients annually. It is also one of the principal teaching hospitals in the province. Approximately 1,000 physicians practice at the hospital, with about three-quarters of those as specialists. The hospital does not employ the physicians; rather, they are retained by their patients and paid through the provincial medical plan. They practice at the hospital by virtue of admitting privileges which are granted on an annual basis. Admitting privileges allow physicians to book patients into the hospital, to assume primary responsibility for patients' treatment and, in the case of surgeons, to book operating rooms.

La Forest J., for himself, Dickson C.J. and Gonthier J., Sopinka J. concurring, takes the position that the policy and its application is discriminatory in that they make a distinction based on age, and impose a burden on physicians who have reached the age of 65 that is not imposed on younger physicians. Without the renewal of admitting privileges, physicians over age 65 will have to drastically curtail their practices or end them entirely, forcing them into partial or full retirement. The effect of the regulation and its application is to deprive physicians over age 65 of their employment on the basis of a personal characteristic solely due to their association with a group of those over 65.⁶⁹² As in McKinney, the discrimination test is passed easily, with a passing reference to the Andrews form.⁶⁹³

In considering whether the regulation and the policy under which it was applied could be justified under s.1, La Forest J. again warns against approaching the balancing task involved in a "mechanistic fashion".⁶⁹⁴ While guaranteed rights must be given priority in the balancing equation, the Court must be sensitive to the underlying values of the particular context and "other values of a free and democratic society sought to be promoted by the legislature."⁶⁹⁵ He repeats Dickson C.J.'s statement in Edwards Books that "[b]oth in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the court has been careful to avoid rigid and inflexible standards."⁶⁹⁶ Following this, La Forest J. acknowledges that

judicial evaluation of the State's interest will differ depending on whether the state is the 'singular antagonist' of the person whose rights have been violated, as it usually will be where the violation occurs in the context of the criminal law, or whether it is instead defending legislation or other conduct concerned with 'the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources' ... In the former situation, the courts will be able to determine whether the impugned law or other government conduct is the 'least drastic means' for the achievement of the state interest with a considerable measure of certainty, given their familiarity with the values and operation of the criminal justice system and the judicial system generally. As this court has noted in Irwin Toy, however, the same degree of certainty may not be achievable in the latter situation.⁶⁹⁷

What *La Forest J.* means here is that a higher degree of judicial deference will be exercised in cases where a legislature has balanced competing interests for the allocation of scarce resources prior to enacting legislation that may give rise to a constitutional challenge. In such cases the Court has demonstrated a clear reluctance to interfere with legislative choices.

Turning to the application of the s.1 test to the regulation, *La Forest J.* notes that the appellant hospital did not specifically define the underlying objectives of Reg. 5.04 and its application policy, but did proffer several "institutional concerns" that it hoped the regulation would address. These were the need to limit the growth of staff due to the hospital's budgetary and resource limitations, the desire to limit the size of staff to encourage and preserve a cohesive staff capable of taking a team approach to the practice of medicine, and the need to make some of the hospital's staff positions and resources available to younger physicians recently trained in the latest approaches to medicine.⁶⁹⁸ *La Forest J.* holds that this latter point is the fundamental objective of the regulation: to maintain and enhance the quality of medical care at the hospital. The regulation and policy were "intended to promote excellence in the hospital's pursuit of its mandate as a centre of medical research and teaching and as the major acute care hospital in the province of British Columbia."⁶⁹⁹ These objectives clearly meet the first part of the s.1 test. Excellence in the practice of medicine is a highly important goal with obvious social benefits. Central to this is the hospital's pre-eminent role in research, teaching and acute care, which is "beyond the capabilities of most, if not all, the other hospitals in the province."⁷⁰⁰ As such, the quality of treatment available at the hospital determines whether patients in all parts of the province obtain high quality medical care.⁷⁰¹ This constitutes a pressing and substantial objective.

La Forest J. then considers the proportionality aspect of the test. The rational connection between Regulation 5.04 and its policy and the underlying objectives of promoting excellence in the practice of medicine and the provision of hospital services is rather easily made. Hospitals, he says, must be "on the cutting edge of new discoveries and ideas",⁷⁰² particularly where the hospital provides the type of sophisticated and specialized treatment, research and teaching functions available at the Vancouver General Hospital. Crucial to this is the "continuing infusion of new people"⁷⁰³ who enable the hospital to keep up with new discoveries and ideas. This is achieved by making room for younger physicians who, "by virtue of their recent training, are fully conversant with the latest theories, discoveries and techniques."⁷⁰⁴ Characterizing the hospital as a "closed system with limited resources", he states that "this regular infusion with the vitality and perspective of the young can only be achieved by the corresponding departure of some of those already on staff."⁷⁰⁵ Moreover, he says, the mandatory retirement policy ensures that physicians will retire prior to the deterioration that common experience and the evidence suggests befalls those entering the later stages of life. This is particularly pertinent in the case of those physicians who, due to advancing age, "will be increasingly unable to function at the high level the Vancouver General must demand of its doctors."⁷⁰⁶ Thus the rational connection aspect of the s.1 test is met.

As may be expected now in the s.1 analysis, the minimal impairment aspect draws the most consideration. La Forest J. again warns that courts must exhibit considerable flexibility in assessing cases relating directly to the allocation of resources or that attempt to strike a balance between competing social groups.⁷⁰⁷ Because the choices involved have an impact on "many different and interrelated aspects of society and government policy",⁷⁰⁸ a high degree of judicial deference should be exercised where democratically elected representatives have made choices on the distribution of

scarce resources between competing groups.⁷⁰⁹ In such cases, he says, it is appropriate that the Court consider whether "the hospital authorities had a reasonable basis for concluding that it impaired the relevant right as little as possible in its attempts to achieve its pressing and substantial objectives."⁷¹⁰ (Emphasis in original)

In this instance, the minimal impairment aspect of the test is also easily met in La Forest J.'s view. Given the budgetary restraint pervasive in the public sector, he says, the hospital authorities were "amply justified ... in concluding that its ability to bring new doctors on staff depended on the timely retirement of some of those already there."⁷¹¹ Further, given the concern that older physicians' abilities deteriorate as they reach the later stages of their lives, it was not unreasonable for the hospital to conclude that retirement at age 65 would "ensure the departure from staff of those who would generally be less able to contribute to the hospital's sophisticated practice."⁷¹² La Forest J. acknowledges that the effects of the mandatory retirement policy on physicians who wish to continue in practice may be onerous, but that the anguish and sense of loss suffered by older physicians must be balanced with the frustration and anger experienced by younger physicians if they were prevented from entering into a full practice after long years of study and preparation.⁷¹³

One alternative to the mandatory retirement policy is considered and rejected. It was suggested that the hospital could have instituted a program of skills testing or performance evaluation. La Forest J. dismisses this readily. First, he says, the evidence indicates such a program would be costly both to implement and operate, a significant consideration given the financial circumstances under which hospitals must operate. More important, though, are the effects of such testing and evaluations. According to La Forest J., these would be "invidious and disruptive" to the work environment in which hospital staff must function:

[S]kills testing and performance evaluation can be demeaning, especially when applied to highly trained and senior members of a professional community. As a trigger for the application of a rule of mandatory retirement, they would be the very antithesis of the kind of dignified departure that should be the crowning moment of a professional career. Just as detrimental is the added pressure which performance-based retirement would introduce into what must already be a very high pressure work environment. Nor is it difficult to imagine how such a scheme could sow suspicion and dissention among a hospital staff.⁷¹⁴

This latter point is significant when considered in light of the hospital's "institutional concern" that it encourage and preserve a cohesive staff, La Forest J. says. Finally, again displaying a considerable degree of judicial deference, he states that it is not appropriate for "this court to 'second guess' the government's determination that 65 is the appropriate age at which to implement its policy of *de facto* mandatory retirement ... [This] 'line-drawing' ... should generally be left to the legislature."⁷¹⁵ In keeping with the Court's approach to the s.1 analysis, the discussion of whether the effects of the regulation and its policy of application are so severe as to outweigh the pressing and substantial objectives is simply referred back to the discussion of minimal impairment. Given the latter reasons, there appears to be no reason for La Forest J. to consider the former.

It is obvious that the approach taken here by La Forest J. follows precisely the track taken in McKinney. The aspect of discrimination is readily disposed of, and the s.1 analysis proceeds along a deferential path strongly grounded in reasons of economic policy. What discussion there is of the impact of the mandatory retirement policy on those affected is confined to the indignity of suffering performance evaluations. Passing mention is made of the effect of loss of employment, but this is offset against an equally brief consideration of younger physicians' "anguish" in not being able to enter into full practice. The s.1 analysis itself is essentially collapsed into a somewhat detailed discussion of minimal impairment, with the deleterious effects aspect receiving virtually no acknowledgement. Despite La Forest J.'s admonishments to the contrary,

the reasoning here follows a mechanistic, rigid course through the steps to predictable conclusion.

As with McKinney, the approach taken by Wilson J. in Stoffman is markedly different from that of the majority. Basing her dissenting opinion on the premise that the Charter applies to Vancouver General Hospital, she turns to consider whether Regulation 5.04 both on its face and in the way it is administered violates s.15.

Stating that the Regulation stipulates that physicians wishing to maintain their admitting privileges must make special application to the medical advisory committee, the question then is whether the regulation is discriminatory despite the fact that it provides an exception for those who can demonstrate individual capacity to perform.⁷¹⁶ In her view, the answer is yes. Despite the provision of non-discriminatory exceptions, the unarticulated premise of the regulation, in expecting retirement at age 65, is that with increasing age comes increasing incompetence and decreasing ability.⁷¹⁷ This, she says, is the central concept of the regulation and the exceptions do not detract from it. A further difficulty with the regulation is that it obliges those wishing to work to prove that the stereotype does not apply to them. In effect, this exposes older individuals to a discriminatory double-whammy: "It seems to me clearly discriminatory to impose this burden upon those who already suffer the burden of stereotype and prejudice and who thereby have suffered a blow to their sense of self-worth and self-esteem as useful and productive citizens."⁷¹⁸ With respect to the administration of the regulation, this also fails to pass muster in that the board of trustees interpreted Reg. 5.04 as a mandatory retirement policy and its practice was to terminate admitting privileges at age 65 subject not only to a finding that the applicant was in good health and performing satisfactorily, but that he or she also possessed "unique" skills. This is clearly discriminatory in that it perpetuates and reinforces the stereotype of older workers as

incompetent.⁷¹⁹ Thus it is necessary to examine the hospital's mandatory retirement policy in the light of s.1.

With respect to the first aspect of the s.1 test, Wilson J. notes two objectives cited by the hospital in support of its mandatory retirement policy. First, as an acute care and teaching hospital, it is crucial that it provide the highest standard of modern medical care, education and research. Vancouver General, the evidence establishes, is a highly specialized institution providing unique treatment and services which other hospitals in the province can not. This first objective is undoubtedly one that is sufficiently important to override a Charter right.⁷²⁰ The second objective advanced by the hospital was that mandatory retirement is necessary to allow younger physicians opportunities to practice medicine, since the hospital can only accommodate a fixed number of medical personnel. If older physicians did not retire, younger ones would be denied opportunities. However, Wilson J. states that the evidence does not support this argument. The trial court and Court of Appeal both accepted that other physicians would not be prevented from gaining admitting privileges if the respondents in this case retained theirs. It is incumbent on the hospital to establish a pressing and substantial concern, and in this instance, where no evidence was put forward to support the allegation that a significant problem exists, the first part of the s.1 test will not be met. "The purpose behind this branch of the Oakes test is to ensure that constitutional rights and freedoms will only be sacrificed where it is reasonable and justifiable to do so."⁷²¹ There is simply no evidence that the hospital constitutes a "closed" system of the type envisaged by La Forest J. Therefore, the only objective to be considered is the hospital's aim of providing high quality health care.

The rational connection aspect of the means test is considered next. Wilson J. accepts the rational connection between the imposition of mandatory retirement and

ensuring a high standard of medical care, education and research through the infusion of young physicians with new discoveries and ideas, and that retiring older physicians from and introducing younger physicians to the hospital system will upgrade the quality of medical service.⁷²² While she is prepared to accept that the rational connection between the objectives and the measures taken has been made, she warns that "the question whether the foundations of prejudice are based upon observable, reliable facts is one which this court should approach in the most cautious manner."⁷²³ Accepting the "common knowledge" that with age comes some decline in ability, she makes this further comment:

[I] would not wish to be understood as suggesting that all infringements of equality have some basis in fact and that a rational connection between various objectives and stereotypes will in all cases be established. Indeed, this Court will doubtless be obliged in future to address whether other forms of discrimination based on different grounds have any foundation in biology or whether they are premised instead on misplaced notions about the nature and abilities of various groups. This is a most delicate determination. History unfortunately demonstrates how easily such misperceptions can be accepted with untold costs.⁷²⁴

An example of the type of caution she is urging is revealed in the assumption that increasing age brings on a decline in skills. Yet, she says, diagnostic ability may well increase with years in practice. These comments are made to make the point that the rational connection aspect of the proportionality test serves an important function and "should not be forgotten."⁷²⁵ The purpose of this stage is to examine whether there is logic in the government's pursuit of its aims. These comments are particularly significant given that often the connection appears almost as an afterthought.⁷²⁶

As with her decision in McKinney, Wilson J. acknowledges a differing standard of review with respect to the minimal impairment aspect of the s.1 test. However, it is her opinion that the lower, more deferential standard ought not to apply in this case. The evidence does not establish that the hospital operates within a "closed system" necessitating that older physicians retire to enable younger ones to commence their

practices. Indeed, the evidence indicated that permitting the respondent physicians to continue their admitting privileges would have "absolutely no effect" on the availability of practice opportunities for younger physicians.⁷²⁷ Because the evidence does not disclose there are competing claims for scarce resources, Wilson J. is not prepared to apply the deferential standard.

In her opinion, the test for minimal impairment is not met by the mandatory retirement regulation and its application. Wilson J. is of the view that alternative measures are available to achieve the objective of high quality medical care that takes account of the abilities of individual physicians aged 65 and over. Prior to the hospital's adopting Reg. 5.04, the hospital ensured it met its goal of providing high quality medical care in the following manner. Admitting privileges were renewed on an annual basis, with renewal assured so long as the board of trustees was satisfied that the physician was in good health and was able to continue performing safely and competently. Internal auditing procedures were in place by which department heads were charged with the responsibility of ensuring staff competency.⁷²⁸ The respondents in this case were seeking a reinstatement of this procedure, abandoned with the introduction of Reg. 5.04. In Justice Wilson's opinion, the primary reason for the introduction of Reg. 5.04 was one of administrative convenience: it was easier for the hospital to allow the mechanism of mandatory retirement to remove incompetent physicians than it was to undertake annual performance reviews as it had done earlier. No evidence was tendered to suggest that annual performance reviews were unsatisfactory in terms of "weeding out" incompetent physicians.⁷²⁹ These comments raise squarely the argument of administrative convenience that was so readily dismissed in earlier s.1 decisions. Indeed, Wilson J. finds them particularly trenchant with respect to equality rights claims:

It seems to me that it will always be more convenient from an administrative point of view to treat disadvantaged groups in society as an indistinguishable mass rather than to determine individual merit. But s.15(1) demands otherwise. In discrimination claims of the kind involved here, if the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as individuals deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less.⁷³⁰ (emphasis in original)

Administrative convenience cannot, on its own, serve to support the minimal impairment aspect of the s.1 test. The previous method of determining physician competence was a constitutionally sound one: the substitution of a method of review premised on stereotyped assumptions about competence based on age renders it constitutionally invalid.⁷³¹

Justice L'Heureux-Dube agrees with La Forest J. that Reg. 5.04 is clearly in violation of s.15 in that it discriminates on the basis of age.⁷³² Following her reasons in McKinney, she is unable to agree with him that the policy is justified under s.1. In her opinion, and in this she disagrees with Wilson J., the hospital's mandatory retirement policy fails at the first stage of the s.1 test, as well as at the rational connection and minimal impairment aspects. Agreeing with Wilson J. that there was no evidence to suggest that the hospital is a "closed system", L'Heureux-Dube J. finds the hospital's objective of promoting opportunities for younger physicians to practice medicine is not sufficiently pressing to warrant overriding a constitutionally protected right.⁷³³ She also finds the hospital's objective of maintaining high levels of competency among staff to be problematic. Age alone, she says, is not determinative of capacity or competence. Physicians fall "below acceptable levels of proficiency through inattention to medical advances and, *inter alia*, inadequate physical stamina and health ... It confounds logic to suggest that these concerns simply occur on the passing of a given day in all cases."⁷³⁴ While highly competent staff is clearly

fundamental to a hospital, the nexus between age and competence is not made, and a forced retirement policy remains arbitrary and unfair.

L'Heureux-Dube J. next raises the argument advanced by the hospital that the mandatory retirement policy is necessary to keep the hospital on the cutting edge with regular staff renewals of physicians trained in the latest techniques. Here the rational connection between the mandatory retirement policy and these objectives is not met. Physicians, she says, will almost always be sensitive to new theories and discoveries. Again, age is irrelevant in this respect: "The fact that a practitioner has a 40th, 50th or 60th birthday alters this no more than the 65th birthday."⁷³⁵ The need for continual training and learning remains the same irrespective of age.

Turning to the minimal impairment consideration, L'Heureux-Dube J. states that as this case is not one in which the allocation of resources is a fundamental issue, she is unprepared to apply special considerations in addressing this aspect of the test.⁷³⁶ The hospital's board of trustees is not being forced to choose between two competing social groups, but between competent physicians who happen to be over 65, and those under 65, usually entering the practice of medicine. This statement is tacit approval of a two-tiered approach to the minimal impairment test, with legislative choices of allocation of resources between competing social groups receiving a lower, more relaxed and deferential consideration than choices beyond this range.

Again focussing on the lack of connection between age and incompetence, Justice L'Heureux-Dube states that the policy pursuant to the regulation that physicians over age 65 must demonstrate extra competence or special qualities is too great an infringement of the physician's rights. The effect of the regulation is that physicians over age 65 are held to a higher standard of competence than those under age 65 simply

on the basis of age. While the health of a physician may be a factor in the review of his or her abilities, this is clearly not contingent on age and would remain a factor in any review of any physician's performance. The policy serves to deny practitioners any leeway in its application beyond demonstrating that he or she has "something unique" to offer the hospital. These factors represent "a grave intrusion into the right to be treated equally",⁷³⁷ and suggest a justification of administrative convenience, a justification the Court has found wanting.⁷³⁸

The rights of the respondents were not impaired as little as possible. Acceptable alternatives to mandatory retirement were available to encourage retirement. L'Heureux-Dube J. suggests that a recommended age of retirement, based at the point where it is clear physical difficulties are prevalent, be established. Exceptions to the recommended age of retirement could be made in the appropriate cases. Competency reviews, administered discreetly, could be undertaken semi-annually for those over age 70.⁷³⁹ Such reviews would survive the criticisms mentioned above if the recommended age of retirement was based on clear evidence of physical difficulty. Finally, L'Heureux-Dube J. adds a pragmatic observation: the number of physicians wishing to work beyond age 70 or 75 will not be great. Yet, she says, many people do make significant contributions far beyond their 65th year, and they should be afforded the opportunity to do so, and not be suddenly deemed no longer able to perform. Moreover, people of these ages are usually well aware of any decrease in physical capacities, and if handled in a mature and respectful manner, "the retirement process can be a smooth and dignified transition for both the individual and for the institution in question."⁷⁴⁰ Subjecting physicians over age 65 to stereotypical presumptions of incompetency based on age is an affront to their dignity. If equality rights are to have any meaningful content, the dignity of those claiming them must be preserved and

enhanced and not impaired absent compelling evidence. Such evidence was lacking here.

In a brief opinion agreeing with Wilson J., Justice Cory, in dissent, outlines his reasons for finding that the hospital's mandatory retirement regulations can not be saved by s.1. He contrasted this with his finding that mandatory retirement regulations could be justified in universities.⁷⁴¹ There are substantial differences between hospitals and universities, he says. Mandatory retirement was found to be an essential part of the bargain of the tenure system in universities. Since physicians with admitting or operating privileges are appointed on an annual basis, they cannot be said to have any security of tenure.⁷⁴² Moreover, in the university setting, the faculty association supported mandatory retirement; the same could not be said of the medical association.⁷⁴³ Physician's skills testing occurs at least annually, unlike professors who, upon being granted tenure, enjoy a relatively test-free appointment. Finally, continual testing of physicians skills throughout their years of association with a hospital is essential for the operation of the hospital, and occurs without regard to age. There is no valid reason, in Cory J.'s view, that this testing could not serve to ensure physicians over age 65 retain high levels of skills.⁷⁴⁴

As with the majority opinion in McKinney, the approach taken by the majority here follows a deferential path through the s.1 analysis. Having made the decision that the choices in this case involved claims by competing groups for the allocation of resources, the outcome is almost a foregone conclusion. Committing themselves to the application of the lower, deferential standard of the minimal impairment test, the majority appears reluctant to move beyond the confines of its rigid framework. No real consideration is made of the impact of discrimination and reliance on stereotypical assumptions. Rather, the entire judgment appears grounded in considerations of

economic policy and the consequences of the court interfering with these. What considerations there are of alternative measures to a mandatory retirement policy are again trapped within an economic framework. Given their reluctance to inquire beyond those borders, the reasons of the majority can hardly be said to be surprising.

Wilson and L'Heureux-Dube JJ. base their reasons on the effect of discrimination and the purpose of s.15. Reasons of economic policy are found wanting and rejected on the basis of administrative convenience. Both agree that the minimal impairment test, applied to the higher, less deferential standard, is not met due to the availability of alternative measures for ensuring physician competence. The majority had suggested these tests would be an affront to the older physicians' dignity. Wilson J. reasoned that their dignity would be more impaired by an assumption of incompetence at an arbitrarily fixed age. What is striking in the difference between Wilson and L'Heureux-Dube JJ.'s judgments is the latter's readiness to find the first aspect of the s.1 test lacking. Age alone cannot be used to justify the mandatory retirement of physicians over 65. Physician competence, the primary objective of the regulation, is not ensured by requiring those over 65 to retire. Incompetence, health concerns and lack of stamina can occur at any time. Ensuring competency based on the stereotypical assumption that those over 65 does not satisfy the first part of the s.1 test. Wilson J. appears to accept this without much difficulty.

Wilson and L'Heureux-Dube JJ. also disagree as to the rational connection test. Wilson J. accepts that younger physicians are necessary to ensure the hospital keeps up with the latest theories and techniques. L'Heureux-Dube J. cannot see why this can only be achieved by replacing older physicians with younger ones. Such a practice, she says, ignores the lifelong learning most physicians must undertake in stay in practice. Both agree that the minimal impairment test fails because of the availability of

alternative measures for ensuring physician competence, and that the mandatory retirement policy really appeared to be an administratively convenient means of "weeding out" incompetent physicians. In her strongly worded dissent stressing the unfair treatment of physicians forced to retire on the basis of stereotypical assumptions about age, Justice L'Heureux-Dube appears the most aggressive in her scrutiny of the s.1 test.

The final case in the mandatory retirement trilogy is Harrison v. University of British Columbia.⁷⁴⁵ The issues are similar to those raised in McKinney. The respondents, a tenured professor and an administrative officer at the university, argued that the university's mandatory retirement policy requiring retirement at age 65 represented age-based discrimination, contrary to s.15 of the Charter. They further argued that the definition of "age" in s.1 of the British Columbia Human Rights Act,⁷⁴⁶ which limited the prohibition of age-based employment discrimination found in s.8(1) of the Act to those between 45 and 65, also violated s.15 of the Charter.⁷⁴⁷

In a very brief opinion, La Forest J., for himself, Dickson C.J. and Gonthier J., Sopinka J. concurring, applies the reasoning he set out in McKinney. If the Charter did apply to the university, the mandatory retirement policy would violate s.15 but is justified under s.1. The limitation of protection from age-based discrimination in s.8(1) of the Code is also contrary to s.15 but saved by s.1.⁷⁴⁸ Justice Cory is in agreement with these conclusions.⁷⁴⁹

For the reasons she gave in McKinney, Justice Wilson finds the mandatory retirement policy to be contrary to s.1 and not justified under s.1.⁷⁵⁰ She also addresses the argument raised by the intervening Attorney-General of British Columbia that s.1 of the Act, where age is defined, should be considered an affirmative action

measure within the meaning of s.15(2) of the Charter and thus could not be in conflict with s.15(1). The Attorney General argued that older workers under age 65 could not enjoy the benefits and privileges of such programs as social security, guaranteed income supplements and pension plans. Thus, in order to "redress the balance" between older workers under age 65 and those over 65 who were eligible for these benefits, the provincial legislature enacted the prohibition of discrimination based on age "and thus somewhat equalized the income opportunities of persons above and below the age of 65".⁷⁵¹ Wilson J. does not find this to be the type of measure envisioned by the affirmative action section of s.15, stating that while the Court has not had an opportunity to examine the scope and meaning of s.15(2), at the least it is meant to ensure that measures aimed at ameliorating the conditions of those who have been the victims of discrimination are constitutionally valid. In this instance, she says, it cannot be said that older workers under age 65 suffer the burden of prejudice and stereotype by reason of the fact that they are ineligible to enjoy the benefits accorded to those over 65. The failure to extend benefits to workers under age 65 does not serve to perpetuate or create stereotyping or prejudice against such people. As this type of discrimination has not been made out, s.8(1) of the Act cannot be considered an affirmative action measure aimed at redressing the drastic effects of discrimination.⁷⁵² The discriminatory nature of the mandatory retirement policy and s.8(1) of the Act are not saved by s.1 of the Charter.⁷⁵³

Justice L'Heureux-Dube, confining her reasons to a consideration of whether s.8(1) of the Act contravened s.15,⁷⁵⁴ holds that it did so. For the same reasons she expressed in McKinney and those of Justice Wilson in the present case, she further holds that the breach could not be justified under s.1 of the Charter.⁷⁵⁵

But for Justice Wilson's brief remarks concerning affirmative action, Harrison is completely derivative of the reasoning in McKinney.

SAME-SEX SPOUSAL BENEFITS CLAIMS IN LIGHT OF THE CHARTER

The first judicial recognition of sexual orientation as a prohibited ground of discrimination under s.15 occurred in November 1989 with the decision of Dube J. of the Federal Court of Canada (Trial Division) in Veysey v. Canada (Commissioner of the Correctional Service).⁷⁵⁶ Mr. Veysey, an inmate in a federal penal institution, had applied to participate in the "Private Family Visiting Program" at the institution with his homosexual partner. The program includes conjugal visits. The purpose of the program was defined as "the maintenance of family ties and the preparation of inmates for their return to life in the community outside the penitentiaries."⁷⁵⁷ Family members eligible to participate in the program were identified as "wife, husband, common-law partners, foster parents, brothers, sisters, grandparents and, in special cases, in-laws."⁷⁵⁸ Mr. Veysey wished to participate in the program with his homosexual partner because he wanted to maintain his relationship with his partner and believed "that his successful reintegration into society [would] depend to a very great extent on the continuing support"⁷⁵⁹ of his closest relationship in the community. His application was refused on the basis that the program does not apply to common law partners of the same sex. He alleged that this constituted a breach of s.15 on the basis of sexual orientation as he was denied a benefit available to heterosexual inmates.

The Commissioner of the Correctional Service argued that no such breach had occurred, as the program only includes persons related to the applicant "by consanguinity, marriage (including common law marriages) or affinity."⁷⁶⁰ The term "common law partners" is synonymous with common law spouses, which cannot

include same-sex spouses.⁷⁶¹ Thus, Mr. Veysey's application was denied not because of his sexual orientation but because the person with whom he wished to participate in the program is not included among the eligible participants. Mr. Veysey argued that the program is discriminatory for exactly these reasons: his homosexual partner is not his spouse and is not included as family as described in the program.⁷⁶² By excluding homosexual relationships the program discriminates on the basis of sexual orientation.

Dube J. noted that sexual orientation was not specifically identified as a prohibited ground of discrimination in s.15 but observed "it is now well-established that discriminatory treatment will infringe s.15 if it is based on grounds analogous to those specifically enumerated."⁷⁶³ To determine whether sexual orientation is an analogous ground, Dube J. referred to the comments by the Supreme Court of Canada directing an examination of "the entire social, political and legal fabric of our society."⁷⁶⁴ For Dube J. this entailed a consideration of existing human rights legislation that expressly identifies sexual orientation as a prohibited ground of discrimination.⁷⁶⁵ He also noted the findings of the House of Commons Parliamentary Committee on Equality Rights,⁷⁶⁶ which recommended the inclusion of sexual orientation as a prohibited ground of discrimination under the Canadian Human Rights Act in 1985.⁷⁶⁷ Dube J. then noted the definition of discrimination as stated by McIntyre J. in Andrews and stated:

... [A] characteristic common to the enumerated grounds is that the individuals or groups involved have been victimized or stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation ...⁷⁶⁸

Dube J. concluded that sexual orientation is an analogous ground recognized in several human rights legislations and that Mr. Veysey's equality rights had been breached.⁷⁶⁹

Turning to the s.1 analysis, Dube J. found the family visit program to be a desirable goal for both Mr. Veysey and society as a whole, but that this goal was not furthered by denying Mr. Veysey the benefit of his most supportive relationship. The Commissioner of the Correctional Service argued that allowing Mr. Veysey to participate in the program with his homosexual partner would threaten Mr. Veysey's personal safety and the good order of the institution, as many of the inmates within the institution had "a high regard for family values and a strong belief in traditional morality, coupled with a strict, harsh and retributive inmate code."⁷⁷⁰ This argument was dismissed on the basis that the reasons were not sufficiently compelling to justify the violation of a constitutionally protected right. In terms of his safety, it was held, Mr. Veysey was aware of the potential risks he was taking in seeking to participate in the program. Further, there was evidence before the court that inmates' sexual orientation did not compromise security in the medium-security institution where Mr. Veysey was an inmate.⁷⁷¹

Finally, it was held that the refusal to allow Mr. Veysey the benefit of participation in the program with his homosexual partner impaired his right more severely than was necessary in the furtherance of the goals of the program. Any risk to the security of either Mr. Veysey or the institution could be significantly reduced by merely maintaining the confidentiality of the participants of the program.⁷⁷² The exclusion of homosexual common law partners simply went too far in the balancing of rights and interests in this particular case. Thus, the refusal to allow homosexual common law partners to participate in the program constituted discrimination on the basis of sexual orientation under s.15 which could not be justified under s.1.

A same-sex spousal benefit claim was raised in Knodel v. British Columbia (Medical Services Commission),⁷⁷³ where Mr. Knodel sought to have his same-sex

partner included as his dependent spouse under his medical services plan coverage. Mr. Knodel's application to the Medical Services Commission (the "Commission") was denied on the basis that the definition of "spouse" in s.2.01 of the Medical Service Act Regulations⁷⁷⁴ applied to both legal marriages and common-law relationships, but only those of a heterosexual nature.⁷⁷⁵ Mr. Knodel sought a declaration that same-sex couples are included in the definition of "spouse", and that defining "spouse" so as to exclude same-sex relationships is contrary to the provisions of s.15 of the Charter. Alternatively, he said that if "spouse" is defined so as to exclude same-sex relationships, he sought a declaration that s.2.01 of the Regulations infringes his right to equality pursuant to s.15 of the Charter, and that an appropriate and just remedy pursuant to s.24(1) of the Charter is to "read in" the inclusion of same-sex couples into the definition of "spouse" in the regulations.⁷⁷⁶ In response, the Commission stated that the definition of spouse did not inflict any disadvantage or have any adverse impact on Mr. Knodel and thus the impact of the Regulations was not discriminatory and was not contrary to s.15 of the Charter. The Commission further stated that s.15 of the Charter does not prohibit the making of distinctions, and that the distinction in this case was not one based on sexual orientation but one between "spouses" and "non-spouses" who do not consider themselves man and wife but who may live in the same household unit, such as brother and sister, parent and adult child, and be financially dependent on the other.⁷⁷⁷

In an application to the Commission in June 1988, Mr. Knodel sought to have his same-sex partner included as his dependent spouse under his medical plan coverage. In September 1988 this application was denied on the basis of the interpretation of "spouse". "Spouse" was defined in the Regulations as follows:

'Spouse' includes a man or woman who, not being married to each, live together as husband and wife.⁷⁷⁸

At trial, Mr. Knodel submitted evidence of his relationship with his partner. They lived together in a monogamous homosexual relationship until his partner's death in 1989. They offered each other financial, emotional and moral support, and exchanged wedding bands symbolizing their love and commitment towards each other. Their relationship was known and supported by their family and friends. Both their names were on the rental agreement of their accommodation. They had a joint chequing account into which they both deposited their pay cheques. All household expenses, including the cost of furnishings, were paid from this account. In 1985 Mr. Knodel's partner was diagnosed as having a potentially fatal illness and was unable to work after May 1988. He executed a will naming Mr. Knodel as sole beneficiary and died in 1989.

An expert report prepared by Dr. Myers, a clinical professor in the Department of Psychiatry at the University of British Columbia, was submitted in support of Mr. Knodel. Dr. Myers stated that 'there is a high degree of similarity between homosexual and heterosexual life partners and that they are much more the same in their attitudes, expectations, and values than are different.'⁷⁷⁹ He further stated that despite the fact that homosexuality was no longer considered a form of psychiatric or mental illness, "lay persons continue to believe that there is something wrong or strange with individuals who develop attachments to members of their own sex, and label them as 'deviant and immoral'."⁷⁸⁰ It was Dr. Myers' opinion that there is no one definition of the term "family", and the language by which families are described evolves as families evolve. He used the term "familial relationship" to describe relationships outside traditional and legally married families, such as that which existed between Mr. Knodel and his partner:

There was an expectation of continuance. They were deeply committed to each other (emotionally and sexually), exchanged vows and rings in a private ceremony, established a home together, pooled their finances,

and shared bank accounts and credit cards. Further, Mr. Knodel did not separate from or abandon Mr. Garneau when the latter became ill. Like a heterosexual spouse, Mr. Knodel was named the sole beneficiary in Mr. Garneau's will; he assisted and supported his life-partner, including nursing and comforting him, until his death March 17, 1989. It was only after threatening a grievance charge that Mr. Knodel was granted a few days of compassionate leave (as opposed to days deducted from his vacation leave) from work to organize and attend Mr. Garneau's funeral.⁷⁸¹

It was also Dr. Myers' opinion that "homosexual persons as a group are stigmatized in our society"⁷⁸² and this causes psychological and related social problems:

For most [homosexual persons realizing their same-sex attraction], this is very frightening and lonely because they have come to believe that what they are experiencing is not considered normal by most of society. This then leads to isolation, unhappiness, self-loathing, and a sense of inferiority. I have listened to the life stories of hundreds of homosexual men and women and I can attest to the pervasive influence of discriminatory ideas, beliefs, and laws on the sense of these individuals. This indifferent or hostile climate not only damages one's worthiness as a free and healthy individual in our society but causes many people to lead double or fragmented lives. They dare not be open for fear of further ridicule and rejection. Many attempt to pass as heterosexual people and do their best to conform. When they meet someone else, fall in love, and become a couple, they are usually much happier and find it easier to cope with life.⁷⁸³

Against this background of Mr. Knodel's relationship and the evidence of Dr. Myers, Rowles J. considers the structure of the legislation and regulation giving rise to Mr. Knodel's claim.

The Medical Service Act⁷⁸⁴ provides a voluntary medical plan for residents of British Columbia. The regulations provide the institutional structure necessary for the operation of the plan. The premiums payable by subscribers to the plan are set by the Commission. The definition of "spouse" in s.2.01 of the regulations allows legally married couples and common-law heterosexual couples to claim their spouses as dependants under the plan. Under the schedule in place at the time of trial, a single subscriber with no dependants who does not qualify for premium assistance would pay \$372 per year for medical coverage. Thus, two separate subscribers would pay exactly twice that amount, \$744, per year. Yet the same subscriber with one dependant,

whether "spouse" or "child", would pay \$660 per year. Thus, the effect of excluding same-sex couples from the definition of "spouse" would result in an annual premium that is \$84 (or 13 per cent) more than that paid by heterosexual couples.⁷⁸⁵ Mr. Knodel stated that the effect of the regulation is to discriminate against him solely on the basis of his sexual orientation by denying him the equal benefit of the law available to heterosexual spouses. He further stated that the regulation adversely affected his dignity and self-esteem and perpetuated the homophobia expressed by members in society.⁷⁸⁶

In addressing the grounds of discrimination, Rowles J. first considers whether sexual orientation is included in the term "sex" found in s.15 of the Charter. Previous Supreme Court of Canada cases⁷⁸⁷ considering that term defined it in terms of gender specificity or a characteristic that affects one gender primarily. Sexual orientation is neither gender specific nor is it restricted to men, so Mr. Knodel was unable to base his claim on discrimination on the basis of sex. This is not significant in that the Commission, in keeping with recent case law,⁷⁸⁸ conceded that discrimination based on sexual orientation is contrary to s.15 of the Charter.⁷⁸⁹

With respect to the definition of "spouse", counsel for Mr. Knodel suggested that the term is ambiguous as evidenced by the phrase "live together as man and wife" and the use of the word "includes" clearly indicates that the definition is not exhaustive. Thus, the definition does not expressly or necessarily exclude same-sex spouses. Counsel for the Commission stated that the definition of "spouse" was clearly intended to cover married and common law heterosexual couples. The distinction the definition makes is not based on sexual orientation but simply one between "spouses" and "non-spouses". According to Counsel's submission, "a same-sex couple is not treated any differently from any other adult couple whose members do not hold themselves out as

man and wife but share a household."⁷⁹⁰ Implicit in this statement is the assumption that a same-sex partner cannot be considered a "spouse".

Rowles J. states that the definition clearly contemplates legally married and common law couples and that the phrase "live together as husband and wife" is intended to exclude other types of relationships such as siblings or adults who live together but "do not share an emotional and sexual commitment."⁷⁹¹ Focussing on the word "as", she states that this "suggests a particular type of relationship that involves both emotional and sexual aspects."⁷⁹² In this case, she says, the evidence "is overwhelmingly that [Mr. Knodel] and Mr. Garneau lived 'as husband and wife'",⁷⁹³ referring to the specific circumstances of their relationship and the evidence of Dr. Myers suggesting the emotional bond between homosexual couples is no different from that between heterosexual couples. Yet a review of authorities considering the interpretation of "spouse" clearly indicates that it has been interpreted to refer to legally married couples and opposite-sex partners.⁷⁹⁴ Therefore, the next step in the inquiry is to consider whether a definition of "spouse" that excludes same-sex couples is contrary to the equality provisions found in s.15 of the Charter.

According to the two-step process for the application of s.15 set out in Andrews,

a complainant ... must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.⁷⁹⁵

Discrimination was defined in Andrews as

a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of the

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 classified ...⁷⁹⁶

The Supreme Court has also held that groups forming "discrete and insular minorities" are also protected by s.15 of the Charter. Such groups were defined by Wilson J. as follows:

I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.⁷⁹⁷

In order to bring a claim within the ambit of s.15, discrimination must be found based on the grounds set out in that section or those analogous to it. While sexual orientation is not specifically set out in s.15 as a prohibited ground of discrimination, it has been held to be included within s.15.⁷⁹⁸

Rowles J. states that

the rights enumerated in [s.15] signify rights according human dignity. The respect for the individual person means respect for the unique and diverse character of every human person. This implies a large degree of tolerance within a pluralistic society. Discrimination is abhorrent because it treats individuals as abstractions rather than as individuals. Personal qualities are lost in the group stereotype.⁷⁹⁹

Applying s.15 to the facts before her, she states that the effect of the definition of "spouse" in the regulations is to treat homosexual couples differently than heterosexual couples. This difference in treatment, she says, cannot readily be explained or related to the purpose of the legislation. Thus, Mr. Knodel's claim of unequal treatment is made out.⁸⁰⁰ The effect of the distinction is to "exacerbate conditions of disadvantage".⁸⁰¹ Recalling the evidence of Dr. Myers of the "'pervasive influence of discriminatory ideas, beliefs, and laws on the sense of'" homosexual persons, Rowles J. notes this serves to "damage one's worthiness as a free and healthy individual in our

society."⁸⁰² Moreover, in denying a benefit available to heterosexual couples, the regulation imposes an economic penalty on homosexual couples. She states that the Commission's argument that any burden imposed on Mr. Knodel is minimal or insubstantial is not properly a matter for consideration under s.15; rather, once a burden is imposed, the balancing of interests between the legislature and an individual's rights occurs at the s.1 stage and not within the substantive structure of s.15.⁸⁰³ Significantly, Rowles J. states that legislation that is underinclusive on the basis of a discriminatory ground -- here, sexual orientation -- is not constitutionally permissible.⁸⁰⁴ She bases this on the statement by Dickson C.J.C. in Brooks v. Canada Safeway that "underinclusion may be simply a backhanded way of permitting discrimination."⁸⁰⁵ Thus, in Rowles J.'s opinion, the way underinclusion plays out is as follows:

Where the state makes a distinction between two classes of individuals, A and B, that has the effect of imposing a greater burden on individuals within Class B, and if the individuals within Class B fall within the class of individuals protected by s.15(1) of the Charter, the manner in which the legislative provision or law is drafted is irrelevant for constitutional purposes; i.e., it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B. In both cases, the impact upon the individual within group B is the same.⁸⁰⁶

A burden placed on an individual solely on the basis of sexual orientation is thus *prima facie* a breach of s.15. Any answer to the breach must be found in s.1 of the Charter. Moreover, Rowles J. says, in this instance, the distinction made by the regulation is not one based on Mr. Knodel's merit or capacity,⁸⁰⁷ an element the Andrews test suggests may save a distinction from being considered discriminatory. Further, recalling the evidence of Dr. Myers that 'homosexual people as a group are stigmatized in our society', and Wilson J.'s statement in R. v. Turpin, Rowles J. states that Mr. Knodel falls within a group that constitutes a discrete and insular minority within the meaning of s.15 and thus is protected by the Charter.⁸⁰⁸ The purpose of the equality provisions of the Charter, she says, is to ensure the full participation in society of those who fall

within its ambit. "Therefore, when the government takes on an obligation and provides a benefit, s.15(1) makes denial of the benefit to other groups questionable."⁸⁰⁹ In this instance, the definition of "spouse" in s.2.01 of the regulations so as to exclude homosexual couples is discriminatory within the meaning of s.15 of the Charter.⁸¹⁰ No submissions were made with respect to s.1 as counsel for the Commission conceded that a definition of "spouse" contrary to s.15 could not be justified.⁸¹¹

Rowles J. next considers the appropriate remedy available pursuant to s.24(1) of the Charter. This section states

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The purpose of this section is to provide standing to litigants who allege a violation of their Charter rights, and to serve a remedial function. The choice of the remedy appropriate is primarily dictated by the nature of the right infringed. Here, a particularly important Charter right is infringed, one the Supreme Court of Canada stated has a "large remedial component".⁸¹²

One option is to strike down the definition of "spouse" by declaring it to be of no force or effect pursuant to s.52(1) of the Charter. The effect of this would be to render an otherwise constitutionally valid provision invalid and result in the denial of the benefit to others. In Judge Rowles' opinion, this option goes too far beyond eliminating the inconsistency of the regulation.⁸¹³ Rather, an appropriate remedy in this instance would be a declaration that the definition of "spouse" in s.2.01 of the regulations includes same-sex couples. This is deemed the least intrusive remedy that is consonant with the remedial aspect of s.15 of the Charter:

Active judicial intervention may be appropriate when a distinction is likely to stigmatize or perpetuate discrimination as in this

case. In such circumstances, it is important to consider whether it is more intrusive to strike the legislation or 'read in' the benefits to the excluded class. In the present case, it would clearly be far more intrusive to strike the legislation and deny the benefits to the individuals receiving them than it would be to extend the benefits to the small minority who demonstrated their entitlement to them.⁸¹⁴

The economic cost of extending benefits to same-sex couples plays a role in Rowles J.'s decision. "The Medical Services Plan", she says, "is presently available to all residents of the province. A declaration would not have the effect of adding anyone to the plan who had not previously been eligible for coverage."⁸¹⁵ Yet the remedial aspect of s.15 and the effect of stigmatization and perpetuation of discrimination are clearly the most significant factors informing this reasoning.

What is interesting about Justice Rowles' judgment is not so much the result but the way in which that result is reached. In order to support a claim of discriminatory treatment, Mr. Knodel is obliged to submit evidence as to the nature of his relationship with his partner, as well as psychiatric evidence of the similarity of homosexual couples to heterosexual couples and the effect of discrimination on homosexual persons. Such evidence is completely unnecessary for heterosexual couples applying for spousal benefits. Indeed, eligibility for medical coverage appears to be something slightly more than a formality with virtually no investigation into the nature of a potential subscriber's relationship with his or her "spouse". Yet homosexual persons face an invasive search into the most private and personal aspects of their relationships which is then exposed to judicial testing to substantiate their claim. That this is undertaken in the name of promoting their dignity and self-worth through the equality provisions of the Charter is ironic indeed. More interesting yet is the assumption that heterosexual couples structure their lives in the manner set forth in the evidence of Mr. Knodel's relationship. It is simply assumed that heterosexual couples live together, are committed to and morally and financially support each other, share joint bank accounts

and title in property, are each others' beneficiary, and hold themselves out as "spouses". Yet it seems likely that many heterosexual couples do not possess these *indicia* of a "spousal relationship". Many couples have separate bank accounts, for instance, hold property separately and, in the case of couples who pursue separate careers, may not even live together on a permanent basis. Yet there is never any question of denying spousal benefits to these couples lacking stereotypical *indicia* of relationships. In these cases it could be said that homosexual couples appear more heterosexual than heterosexual couples. In determining eligibility for spousal benefits, the common denominator between homosexual and heterosexual couples is, or should be, an emotional and sexual commitment to share their lives together. The application process should simply consist of a declaration of such. This would capture the essence of a spousal relationship, avoid invasive investigations into applicants' private and personal lives, and serve to distinguish spousal relationships from those of a non-spousal form, such as siblings or other adults living together who do not share an emotional and sexual commitment.

The reasoning in Knodel may be contrasted with that found in Egan v. Canada.⁸¹⁶ In 1987 Mr. Egan applied to the Department of National Health and Welfare on behalf of his same-sex partner, Mr. Nesbit, for a spouse's allowance pursuant to the Old Age Security Act.⁸¹⁷ He was advised that Mr. Nesbit was ineligible for the spouse's allowance because he did not come within the meaning assigned to the word "spouse" in the Act. The word "spouse" is defined in section 2 of the Act as follows:

s.2. "Spouse", in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.

Mr. Nesbit similarly applied to the Department of National Health and Welfare in 1989 for a spouse's allowance, describing Mr. Egan as his spouse in the application. He was informed that his application was denied on the basis that he was not the spouse of Mr. Egan as defined by the Act and that he was therefore ineligible to receive a spouse's allowance. Mr. Egan and Mr. Nesbit applied to the Federal Court of Canada for a declaration that the definition of the word "spouse" in the Act violated s.15 of the Charter in that it discriminated against them on the basis of sexual orientation.

Mr. Egan and Mr. Nesbit had been living together since 1948. They shared joint bank accounts, credit cards and property ownership. They appointed each other as their executors and beneficiaries in their wills. They travelled and took their holidays together. At one point, they publicly exchanged rings. To their friends and families they referred to themselves as partners. Judge Martin of the Federal Court also made this observation:

They have never gone through a marriage ceremony, do not introduce themselves as a married couple, wife, husband or spouse, and do not consider themselves to be a married couple.⁸¹⁸

Judge Martin notes the similarity of the evidence in this case with both Knode and Karen Andrews, where McRae J. of the Ontario High Court of Justice found there was no spousal relationship because that relationship required the persons to be of the opposite sex.⁸¹⁹ He further notes that Mr. Egan and Mr. Nesbit's claim for a spouse's allowance pursuant to the Act was denied because, in the view of that program's administrators, they, as a homosexual couple, did not come within the definition of "spouse". Thus, he says, "Given the contradictory interpretation by the Courts to the meaning of the word 'spouse' it must be said that there is a serious issue as to the validity of interpreting the word so as to exclude from it a single sex couple."⁸²⁰

Turning to the claim based on s.15 of the Charter, Martin J. draws on the jurisprudence developed by the Supreme Court of Canada in Andrews and Turpin to frame the issue before him as whether "it can be said then that the appellants' [sic] right to equality before the law has been denied with discrimination?"⁸²¹ This, in turn, is further narrowed to two questions to be addressed in determining whether a given law infringes s.15:

- a) does the law distinguish between different individuals or classes of individuals, i.e. has a distinction been created by the law?
- b) if a distinction is found to have been created by the law is it one which gives rise to discrimination?⁸²²

Martin J. notes that s.15 prohibits discrimination not only on the enumerated grounds within that section, but also on those analogous to the specified grounds. He further notes that counsel for the defendant Government of Canada conceded that sexual orientation is an analogous ground in s.15. Thus, if it is shown that the interpretation of the word "spouse" discriminates against Mr. Egan and Mr. Nesbit, a violation of s.15 will be established. The defendant will thus be obliged to demonstrate the justification of the violation pursuant to the provisions of s.1 of the Charter.⁸²³

As did the Court in Knodel, here Martin J. first attempts to determine whether sexual orientation is included in the term "sex" in s.15. This is rather easily disposed of: relying on the statement in Knodel that sexual orientation is not gender specific nor is it a characteristic that affects one gender primarily,⁸²⁴ Judge Martin holds that Mr. Egan and Mr. Nesbit are unable to rely on that ground as a basis for discrimination to support their claim.⁸²⁵ He then turns to consider whether they are able to use discrimination on the basis of sexual orientation as a ground to support their claim.

It is at this point that Knodel and Egan part ways. Addressing the first question in determining whether a law infringes s.15, set out above, Judge Martin agrees with Judge Rowles in Knodel that the definition of the word "spouse" in the Old Age Security Act does indeed create a distinction:

The legislation denies the financial benefits, the Spouse's Allowance, to homosexual couples which benefits are accorded to heterosexual couples where one spouse has reached the age of 65 and the other is between the age of 60 and 65 ...⁸²⁶

Yet, he says, the distinction made by the legislation is not one made on the basis of the sexual orientation of the applicants and thus it does not discriminate against them on that basis.⁸²⁷

The purpose of the legislation, he says, is to provide a benefit to spouses "as the term is traditionally understood"⁸²⁸ who live together and publicly represent themselves as husband and wife:

Parliament has chosen to address the needs of persons of the opposite sex who live together in a conjugal state, either statutory or common law, as husband and wife. This unit has traditionally been treated as the basic unit of society upon which society depends for its continued existence.⁸²⁹

Here the reasoning of Martin J. closely resembles that of McRae J. in Karen Andrews. A homosexual couple who live together do not fall within the meaning of the word "spouse" any more than any other two individuals who live together and who do not publicly represent themselves as husband and wife. Martin J. equates a homosexual couple with other "couples" living together such as brother and sister, brother and brother, sister and sister, two relatives, two friends, or parent and child. All these, he says, are within the "non spousal couple category."⁸³⁰ Thus, a homosexual couple, "just as a bachelor and a spinster who live together ... do not fall within the traditional meaning of the conjugal unit or spouses."⁸³¹ Martin J. further states that while Mr. Egan and Mr. Nesbit's

lifestyle mirrors many of the characteristics or attributes of the spousal group ... that does not, in my view at least, bring them within the traditionally understood meaning of a spousal couple which forms the fundamental building block of any society.⁸³²

It is Judge Martin's opinion that Mr. Egan and Mr. Nesbit are ineligible for the spousal allowance not because of their sexual orientation but because their relationship is not a spousal one.⁸³³

Judge Martin's reasoning here is circular. He states that a homosexual couple cannot be considered spouses because their relationship is not spousal, not because of their sexual orientation. But he fails to consider that the reason theirs cannot be a spousal relationship is because of their sexual orientation. He makes this observation: "I think it is fair to say that had Nesbit been a woman cohabiting with Egan substantially on the same terms as he in fact cohabited with Egan he would have been eligible for the Spouse's Allowance."⁸³⁴ Martin J.'s reasoning is inconsistent with that in Knodel, where Rowles J. held that the phrase "live together as husband and wife" suggests a particular type of relationship that involves both emotional and sexual aspects.⁸³⁵ For Rowles J., this specifically excluded such relationships as siblings, relatives or friends who live together but do not share a relationship of the quality shared by Mr. Egan and Mr. Nesbit. Yet Martin J. ignores this, which suggests he either fundamentally misunderstood the nature of the applicants' relationship or was simply unprepared to grant it judicial validity. Focusing on the traditional meaning ascribed to the term "spouse", he states that a spousal couple forms the fundamental building block of any society. He does not indicate why or how this is, nor does he offer any explanation as to why a homosexual couple does not constitute a building block of society. He notes that one of the elements of a spousal relationship is that the couple publicly represent themselves as "husband and wife" and that at no time did Mr. Egan and Mr. Nesbit do so.⁸³⁶ This ought not to be surprising: the term "husband and wife" does not accurately reflect a homosexual couple. Indeed, Mr. Egan and Mr.

Nesbit referred to themselves as "partners". Moreover, they publicly represented themselves as partners, and at one point exchanged rings. This appears to be more in accordance with a spousal relationship than that of a bachelor and a spinster who live together.

It seems Judge Martin failed to grasp the nature of the relationship shared by Mr. Egan and Mr. Nesbit. Rather than focusing on the differences between a heterosexual couple and a homosexual couple, he ought to have addressed the similarities. As was found in Knodel, the criteria for a spousal relationship of either a heterosexual or homosexual couple should remain the same: a couple living together with an emotional and sexual commitment. Martin J. does not even raise this. As they stand, his reasons do not contribute much to the jurisprudence in this field.

One final development in the law of discrimination on the basis of sexual orientation is found in Haig v. Canada.⁸³⁷ In this case, the applicant, Joshua Birch, was a member of the Canadian Armed Forces from 1985 to 1990. When he informed his commanding officer that he was homosexual, he was advised of a policy directive that would prevent him from qualifying for promotions, postings or further military career training. With no career opportunity left to him, he was released from the military on medical grounds. Seeking some sort of redress, he attempted to lodge a complaint under the Canadian Human Rights Act,⁸³⁸ only to find that discrimination based solely on sexual orientation was not included in the Act. Section 3(1) of the Act reads as follows:

For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Birch sought a declaration pursuant to s.24(1) of the Charter that the exclusion of sexual orientation from the Act violates the guarantee of equality rights found in s.15 of the Charter. Mr. Birch was not seeking a declaration that he had been the victim of discrimination on the basis of sexual orientation. Rather, he sought the right to put his case before an appropriate tribunal convened under the Canadian Human Rights Act. He argued, simply, that if homosexual persons are not included within s.3(1) of the Act, then they, either as individuals or as a group, are not afforded the equal benefit of the law as set out in the equality provisions in s.15 of the Charter. No arguments to the contrary are set forth in the reasons for judgment.

The decision of McDonald J. is concise and to the point. It is worth setting out in its entirety:

To put the case in its simplest terms, should any Canadian who perceives discrimination on sexual grounds not have some recourse to a legislative tribunal? If the Charter purports to give him such a right, then is s.3(1) of the Canadian Human Rights Act not under-inclusive, and therefore discriminatory, as being contrary to the guarantee of equal benefit of the law set out in s.15 of the Charter?

I have concluded in the affirmative and I am, therefore, declaring that the absence of sexual orientation from the list of prohibited grounds of discrimination in s.3(1) of the Canadian Human Rights Act is discriminatory as being contrary to the guarantee of equal benefit of the law set out in s.15 of the Charter.

So far as I am able, I also declare that this decision shall be stayed for a period of six months from this date or until an appeal has been heard within which time period the existing legislation shall remain in full force and effect.⁸³⁹

As a result, the Act's provision is declared unconstitutional, but continued in effect for six months or until the hearing of an appeal.

McDonald J.'s reasons do not refer to any case law. It may be inferred that the finding of discrimination based on under-inclusion derives from Dickson C.J.'s comment in Brooks v. Canada Safeway Ltd. that "under-inclusion may be simply a

backhanded way of permitting discrimination."⁸⁴⁰ Absent any reliance on case authority, this is merely an assumption. Indeed, it is difficult to see how McDonald J. reaches this decision. Yet its implications are sweeping. While several provinces prohibit discrimination on the basis of sexual orientation,⁸⁴¹ its absence in the Canadian Human Rights Act has been acutely felt. Absent specific protection in the Act, applicants have been unable to raise discrimination on the grounds of sexual orientation in areas beyond the Charter's reach. This has effectively denied protection to those discriminated against in such areas as housing, employment, and the provision of goods, services, facilities or accommodation available to the general public⁸⁴² on the basis of their sexual orientation. Thus, this judgment may be taken to state that in order for s.3(1) of the Canadian Human Rights Act to be constitutional, it must include sexual orientation as a prohibited ground of discrimination.

EQUALITY RIGHTS AND SAME-SEX SPOUSAL BENEFITS CLAIMS

The Supreme Court of Canada has indicated that the purpose of s.15 of the Charter is to promote the rights and freedoms of the traditionally disadvantaged.⁸⁴³ Integral to this is the notion of the validation of one's dignity and self-worth. This is particularly crucial in the case of those who have suffered from the effects of invidious stereotyping and prejudice that has served to rob them of their dignity, self-esteem and sense of belonging in the community. The denial of equality rights to these individuals dooms them to a life of invisibility and invalidity that is discordant with the values of a society committed to the equality and full participation of all its members. The politically and socially weak and traditionally disadvantaged are identified as the true beneficiaries of the protections found in s.15.⁸⁴⁴ Discrimination, the Court has said,

is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from

discriminatory measures having the force of law. It is against this evil that s.15 provides a guarantee.⁸⁴⁵

The Court has exhibited varying approaches to the finding of discrimination as evidenced by the distinctions between Justice La Forest's finding in McKinney of discrimination based on imposition of a burden on those over age 65 on the basis of age,⁸⁴⁶ and Justices Wilson and L'Heureux-Dube in the same case, for whom discrimination is found in the reliance on prejudice and stereotypical myths that with aging comes incompetence.⁸⁴⁷ Central to the decisions of Wilson and L'Heureux-Dube JJ. is the notion that the purpose of s.15 is to promote human dignity⁸⁴⁸ and to ensure that individuals are treated on the basis of their own worth, abilities and merit, and not according to external or arbitrary characteristics that serve to restrict individual opportunity.⁸⁴⁹ This approach to s.15 looks beyond the formal finding of an inequality of treatment by the law and delves deeper into the discriminatory aspect of the law and how its impact is felt by the individual claiming discrimination. The inquiry, then, is very much concerned not only with the effects of the law on the individual but also with the invidious effects of the perpetuation of prejudice and stereotyping.

SEXUAL ORIENTATION AND DISCRIMINATION

With respect to same-sex spousal benefits claims, the Andrews test as developed dictates a two-part investigation to determine whether s.15 of the Charter has been infringed by legislation. First, it is necessary to determine whether a claimant is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law. Secondly, the claimant must also demonstrate that the legislative impact of the law is discriminatory in that it makes a distinction based on one of the grounds specified in s.15 or on a ground analogous to those set out in s.15.

Sexual orientation, while clearly not an enumerated ground within s.15, has found judicial recognition as a ground analogous to those set out in the equality rights provisions. Judge Dube in Veysey stated that a

characteristic common to the enumerated grounds is that the individuals or groups involved have been victimized or stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation ...⁸⁵⁰

Further, in the Federal Court of Appeal judgment of this case, the Court was formally informed that it was now the position of the Attorney General of Canada that sexual orientation is a ground covered by s.15 of the Charter.⁸⁵¹ This is also the position taken by the Province of British Columbia in Knodel⁸⁵² and Egan.⁸⁵³ Moreover, sexual orientation is a prohibited ground of discrimination in four provinces and one territory.⁸⁵⁴ This is compelling evidence that discrimination on this basis is unacceptable as discordant with the full and equal participation of all members of society.

Set in this light, it is possible to construct a same-sex spousal benefit claim in accordance with the jurisprudence of both s.15 and s.1 of the Charter. Using the Egan case as an example, this will demonstrate that a correct application of the s.15 test will result in a finding of discrimination in legislation denying spousal benefits to same-sex couples, and that such an infringement of equality rights is unsupportable under s.1.

The legislative provisions at issue in Egan was the definition of the word "spouse" in s.1 of the Old Age Security Act.⁸⁵⁵ This was defined so as to exclude homosexual couples from claiming the spousal allowance available pursuant to the Act by limiting spouses to opposite sex partners.⁸⁵⁶ Mr. Egan's application for the allowance for his same-sex partner was denied on the basis that his partner was not a

"spouse" as defined by the Act and that he was therefore ineligible to receive a spouse's allowance. Mr. Egan claimed that the definition of the term "spouse" violated s.15 of the Charter in that it discriminated against his same-sex partner on the basis of sexual orientation.

At trial, this claim was dismissed by Judge Martin of the Federal Court Trial Division on the basis that Mr. Egan was not discriminated against on the basis of sexual orientation but because his same-sex partner could not be considered "spouses" as that term has been "traditionally understood".⁸⁵⁷ A homosexual couple who live together, he said, do not fall within the meaning of the word "spouse" any more than any other two individuals who live together and who do not publicly represent themselves as husband and wife. Martin J. equates a homosexual couple with other "couples" living together such as brother and sister, brother and brother, sister and sister, two relatives, two friends, or parent and child. All these, he said, fall within what he terms the "non-spousal couple category".⁸⁵⁸ Thus, a homosexual couple, "just as a bachelor and a spinster who live together ... do not fall within the traditional meaning of the conjugal unit or spouses."⁸⁵⁹ It is thus Martin J.'s opinion that Mr. Egan and his partner are ineligible for the spousal allowance not because of their sexual orientation but because their relationship is not a spousal one.⁸⁶⁰

Viewing these reasons in light of the Andrews test and the jurisprudence developed on sexual orientation, it may be seen that Egan was wrongly decided. There is no difficulty with the first aspect of the s.15 analysis. The effect of the legislation is to deny homosexual couples a benefit accorded to heterosexual couples. This aspect of the test is satisfied rather easily. It is in the second aspect of the test, the finding of discrimination, that Martin J. misinterprets the law.

His reasoning on the discriminatory aspect of the law is circular. He states that a homosexual couple cannot be considered spouses because their relationship is not spousal, not because of their sexual orientation. What he fails to consider is that the reason theirs cannot be a spousal relationship is because of their sexual orientation. He states that Mr. Egan and his partner cannot be considered spouses as that term is "traditionally understood". This suggests an unwillingness on Judge Martin's part to look beyond the bare and formal interpretation of that word or to consider it in any light other than that of tradition. Yet such a stance virtually assures the continued reliance on entrenched and stereotypical assumptions that s.15 is committed to overcoming. Judge Martin's reasoning may thus be seen as ironic indeed. Justice Wilson comments that the purpose of the equality guarantee

is the promotion of human dignity. This interest is particularly threatened when stereotype and prejudice inform our interactions with one another, whether on an individual or collective basis. It is for this reason that the central focus of the equality guarantee rests upon those vehicles of discrimination, stereotype and prejudice.⁸⁶¹

She makes this further statement emphasizing s.15's role in promoting human dignity and ameliorating the effects of prejudice:

... if the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as individuals deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less. (emphasis in original).⁸⁶²

It is difficult to see how the denial of a spousal benefit claim to a homosexual couple could be based on anything but the personal characteristic of sexual orientation, particularly in light of the frank admission that the claim would have been successful had Mr. Egan's partner been of the opposite sex.⁸⁶³ Such a denial of a benefit based on a personal characteristic brings it squarely within the ambit of s.15's protection, as the Supreme Court of Canada has stated.⁸⁶⁴ There can be no question but that

homosexual persons fall within the range of the politically and socially weak and traditionally disadvantaged that the Supreme Court has identified as the beneficiaries of the protection afforded by s.15. Homosexual persons have for too long been subject to stereotyping and prejudice.⁸⁶⁵ There can be no doubt that they are the object of social prejudice based on their personal or group characteristics, often taken to extreme manifestations. In its least intrusive form this prejudice may mean treatment as a social pariah. In its most intrusive form it can often mean a threat to one's physical security. Newspapers too often report violent assaults on homosexual persons and are a frequent forum for the expression of opinion that is decidedly homophobic.⁸⁶⁶ It is trite to suggest that people ought not to be subject to this type of treatment. This is one of the interests s.15 is designed to protect.

One further observation concerning Judge Martin's reasoning in Egan: He denies spousal benefits on the basis that Mr. Egan and his partner do not fall within the traditional meaning of the "conjugal unit" or spouses any more than a "bachelor or spinster", brother and brother, sister and sister, two relatives, two friends or parent and child who live together and do not represent themselves as husband and wife. What he means here, of course, is that Mr. Egan and his partner are not the same as "traditional" spouses. That is, they are simply different, and not similarly situated to traditional conjugal units. This reliance on the similarly situated test is untenable. The Supreme Court of Canada expressly rejected this test as an inappropriate one for founding equality rights claims.⁸⁶⁷ The apparent re-emergence of this test in Rudolph Wolff⁸⁶⁸ may be explained either as an aberration on the part of the Court or as pointing to the difference between corporate and individual claimants under s.15. For individuals claiming a violation of their equality rights, the focus is very much on dignity and self-worth. The same cannot be said of corporations.

It is difficult to see how a denial of a same-sex spousal benefit can be anything but a violation of one's dignity and self-worth. Such a denial perpetrates the stigma of homosexual persons as undeserving of the equal benefit of the law and full participation in society. It entrenches stereotypical myths of the "deserving" and "undeserving". Lack of judicial recognition of same-sex relationships as equal to heterosexual relationships serves to invalidate homosexual relationships and thus forces officially sanctioned invisibility upon these members of society. This can hardly be said to promote the full and equal participation of all members of the community.

THE JUSTIFICATION OF LIMITATIONS OF CONSTITUTIONALLY PROTECTED RIGHTS AND FREEDOMS

Once the discriminatory denial of a benefit of the law is made out, it is then necessary to determine if the infringement can be justified pursuant to s.1 of the Charter.

OBJECTIVES OF THE LEGISLATION MUST RELATE TO PRESSING AND SUBSTANTIAL CONCERNS

A Charter infringement can only be upheld under s.1 if, at a minimum, it relates to genuinely substantial concerns. Thus, the first step is to consider whether the objective of the impugned legislation relates to concerns that are pressing and substantial in a free and democratic society. As the jurisprudence has indicated, this aspect of the s.1 test is relatively easily met, with the notable exceptions of Justices McIntyre in Irwin Toy,⁸⁶⁹ Wilson in Stoffman⁸⁷⁰ and the Dairyworkers case,⁸⁷¹ L'Heureux-Dube in Stoffman⁸⁷² and Chief Justice Dickson in the Alberta Reference,⁸⁷³ all in dissenting reasons.

It should be noted that in Knodel counsel for the Province of British Columbia conceded that if the definition of "spouse" infringed s.15 of the Charter, it could not be justified under s.1 of the Charter.⁸⁷⁴ Yet in both Veysey and Egan the Court concluded that if a violation of s.15 is made out, resort to s.1 is necessary.⁸⁷⁵

In Egan the objective of the spouse's allowance pursuant to the Old Age Security Act was stated in the following terms:

It is to ensure that when a couple is in a situation where one of the spouses has been forced to retire, and that couple has to live on the pension of a single person, that there should be a special provision, when the breadwinner has been forced to retire at or after 65, to make sure that particular couple will be able to rely upon an income which would be equivalent to both members of the couple being retired [at] 60 years of age and over.⁸⁷⁶

The focus of the legislation, then, is on alleviating the financial burdens placed on elderly couples. The question to be addressed, however, is whether alleviating the financial burdens placed on elderly couples constitutes a sufficiently important objective to warrant overriding the equality rights of Mr. Egan and his partner. There can be little doubt that the legislative objective is of some significance. Yet it is questionable whether this desirable goal is furthered by denying Mr. Egan's same-sex partner a benefit the Court admits he would receive if he were of the opposite sex. Indeed, in denying Mr. Egan the spouse's allowance, the effect is exactly that which the legislative objective seeks to avoid. It is also important to consider the purpose of the equality rights provisions in light of the legislative objectives. If s.15 is to serve to enhance and promote human dignity and self-worth and to alleviate stereotype and prejudice, the legislative objectives overriding this must be significant indeed. The effect of denying the spouse's allowance to same-sex couples thus appears to be contrary both to the principles of s.15 and the objectives of the legislation. Indeed, the direct effect would appear to be diametrically opposed to the purported purpose. Mr.

Egan and his partner are denied a benefit calculated to alleviate the financial burdens placed upon them as an elderly couple, and are faced with the continuing prejudicial and stereotypical assumption that a homosexual couple cannot be considered "spouses". This must surely be considered an affront to their dignity and self-worth. It must be questionable, then, whether the objectives in providing the spouse's allowance are of sufficient importance to warrant overriding the right to equality in s.15.

RATIONAL CONNECTION

If the objective may be considered of sufficient importance to warrant overriding the equality rights of Mr. Egan and his partner, it is still necessary to consider the proportionality aspect of the s.1 test. The first part of this test is a consideration of whether the legislation is rationally connected to the objective. It must be remembered that the legislation must be "tailored to suit its purpose"⁸⁷⁷ such that it cannot be arbitrary, unfair or based on irrational considerations.

With respect to the spouse's allowance, the legislature was justified in focussing on the financial plight of elderly couples. The abrupt decline in income suffered when a spouse retires, combined with the fact that the elderly are frequently on inadequate pensions, makes the availability of a spouse's allowance especially relevant. At least in this respect, the legislation is rationally connected to its objectives. Yet is important to bear in mind Justice Wilson's warning in Stoffman that the rational connection aspect of the proportionality test serves an important function and should not be forgotten.⁸⁷⁸ The purpose of this stage, she says, is to examine whether there is logic in the government's pursuit of its aims. These comments are particularly significant given that often the rational connection appears almost as an afterthought⁸⁷⁹ or is blended into the minimal impairment discussion.⁸⁸⁰

What may be problematic with respect to the rational connection aspect of the proportionality test in this instance is that if the federal government has perceived that elderly couples are in need of financial assistance, it seems reasonable to exclude other unmarried heterosexual people such as brothers, sisters and cousins. Yet surely a same-sex homosexual couple with one partner retiring faces the same problems as a heterosexual elderly couple. An elderly homosexual couple facing a reduced income through retirement is denied a benefit accorded to its heterosexual counterpart. It would appear that the scope of the legislation is simply not wide enough. Perhaps the drafters of the legislation were concerned that by providing too wide a scope of application the program would become overburdened by applicants seeking the spouse's allowance on behalf of their partners, and thus sought to limit eligibility to spouses. It would therefore seem reasonable to exclude other individuals not living in a spousal relationship. But the difficulty in this "floodgates" analogy is that the gates have already been opened: surely there are far more heterosexual common law couples seeking the benefit accorded by the spouse's allowance than would homosexual couples if the benefit was available to them. Heterosexual couples, both married and common law, who are in financial need due to the retirement of one partner, are able to obtain a benefit denied to homosexual couples in financial need due to the retirement of one partner: if the limiting of a benefit designed to alleviate the burdens placed on elderly couples by the retirement of one partner to heterosexual couples only is not arbitrary, it is certainly unfair. Indeed, the limitation of the benefit appears based on the irrational consideration that homosexual couples cannot be considered spouses. Both Veysey and Knodel suggest otherwise. The conclusion that homosexual couples cannot be spouses appears based upon stereotypical assumptions of "the traditionally understood meaning of a spousal couple".⁸⁸¹ In both Knodel and Egan the Court reviews evidence of the relationship shared by same-sex couples. In both instances this evidence reveals that

the relationship between same-sex couples is remarkably similar to that of heterosexual couples. What is significant to note is the degree to which homosexual couples are obliged to "prove" their relationship, while such evidence is completely unnecessary for heterosexual couples applying for spousal benefits. Homosexual persons face an invasive search into the most private and personal aspects of their relationship, which is then exposed to judicial weighing to substantiate their claim. That this is undertaken to promote their dignity and self-worth through the equality provisions of the Charter is ironic indeed, particularly in light of Chief Justice Dickson's comment in Edwards Books that "state sponsored inquiries" should be avoided wherever possible "since they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting."⁸⁸²

More interesting yet is the assumption that heterosexual couples structure their lives in the manner set forth in the evidence in Knodel and Egan. It is simply assumed that heterosexual couples live together, are committed to and morally and financially support each other, share joint bank accounts, credit cards, title in property, are each others' beneficiary and hold themselves out as "spouses". Yet it seems likely that many heterosexual couples do not possess these *indicia* of a "spousal relationship". Many couples have separate bank accounts and credit cards, for instance, hold property separately and, in the case of couples who pursue separate careers, may not even live together on a permanent basis. Yet there is never any question of denying spousal benefits to these couples lacking stereotypical *indicia* of relationships. In these cases it could be said that homosexual couples appear more heterosexual than some heterosexual couples.

In determining eligibility for spousal benefits, the common denominator between heterosexual and homosexual couples is, or ought to be, an emotional and

sexual commitment to share their lives together. The application process should simply consist of a declaration of such. This would capture the essence of a spousal relationship, avoid invasive investigations into private and personal lives, and serve to distinguish spousal relationships from those of a non-spousal nature, such as siblings or other adults living together who do not share an emotional and sexual commitment. The latter would be excluded from spousal benefits because they are not spouses in the sense that heterosexual and homosexual couples are, not would they want to be. The distinguishing feature between couples and people sharing living space together is the degree of emotional and sexual commitment that couples share. The nature of the relationship is fundamentally different. Couples characteristically think of themselves as family; roommates may as well, but are seldom legislatively sanctioned as such. Hence the difference in treatment between couples and "other unmarrieds". The denial of a spousal benefit to homosexual couples that is available to heterosexual couples appears not only to be illogical and based on irrational considerations, but is also arbitrary and unfair. It would appear that the rational connection between the legislative means and its objective is not made out.

MINIMAL IMPAIRMENT

If the nexus between the legislative objectives and means is, in fact, so carefully designed that it meets the rational connection test, the next step in the proportionality test is to consider whether the means impair as little as possible the equality rights of Mr. Egan and his partner. The jurisprudence on s.1 has revealed that this aspect of the inquiry receives the most attention.

It is clear that the minimal impairment test has been subject to varying degrees of scrutiny in its application. Perhaps most significant has been the devolution of the

requirement that the legislative measure impair the affected right by the least possible means. Initially developed in Big M Drug Mart and Oakes, this particular aspect at one time triggered a judicial investigation into whether there was some reasonable alternative scheme which would allow the government to achieve its objective with fewer detrimental effects on the constitutionally guaranteed right or freedom, as suggested by Chief Justice Dickson in Edwards Books.⁸⁸³ The implication there was that an alternative scheme must be equally effective as the means actually chosen⁸⁸⁴ and that a serious attempt must be made to minimize the adverse effect of legislation on those whose rights are infringed.⁸⁸⁵ Failure to adequately ensure the minimal adverse effects of legislation infringing employees' right to strike caused Dickson C.J. to find this aspect of the s.1 test had not been met in his dissenting opinion in the Alberta Reference.⁸⁸⁶ A finding of other, less drastic means of accomplishing the legislative objective was instrumental in the dissenting opinion of Wilson J. in Edwards Books,⁸⁸⁷ the Dairyworkers case,⁸⁸⁸ McKinney⁸⁸⁹ and Stoffman.⁸⁹⁰ Justice L'Heureux-Dube made similar findings in McKinney⁸⁹¹ and Stoffman.⁸⁹²

Irwin Toy signals a significant departure from the necessity of an equally effective least drastic means of achieving the legislative objective. In this case the Court is content to find that the government has met the minimal impairment test so long as it demonstrates it had a reasonable basis for concluding the legislation impairs rights or freedoms as little as possible given its objectives.⁸⁹³ This standard was also applied in the majority decisions in Butler,⁸⁹⁴ McKinney⁸⁹⁵ and Stoffman.⁸⁹⁶ The "reasonable basis" standard appears a good deal less stringent than the "least restrictive means" test articulated earlier. It seems to remove from judicial scrutiny any serious inquiry into the impact of the legislation infringing rights or freedoms once the government has demonstrated that its conclusions that the right is impaired as little as possible is reasonable. Indeed, the Court appears unwilling to look behind the reasonableness of

the claim. This is demonstrated particularly well in the contrast between Justices La Forest's and Wilson's opinions in McKinney. For La Forest J., the inquiry ends with the determination that mandatory retirement at age 65 can be reasonably supported. Yet for Wilson J., the inquiry begins here. Looking beyond this finding, she determines that mandatory retirement policies adversely affect women and non-unionized workers who have much to lose when obliged to retire. The existence of equally effective alternative means of achieving the objectives sought by mandatory retirement causes the policies to fail the minimal impairment test.

Reducing the level of scrutiny from the least drastic means to the reasonable basis standard also seems to shift the onus for determining the reasonableness of the impairment of a right to the government -- usually the party seeking to uphold a limitation on a right or freedom. It is possible this may be perceived as somewhat biased or unfair.

This reduced standard points to an increasing deference on the part of the Court where democratically elected representatives have made choices on the distribution of scarce resources between competing groups, as articulated by La Forest J. in McKinney⁸⁹⁷ and Stoffman.⁸⁹⁸ It is significant to note that Wilson J. in McKinney suggested that the Court should exercise deference particularly where the legislature has sought to promote or protect the interests of the less advantaged or vulnerable members of society.⁸⁹⁹ Absent these legislative aims, it is open to suggest that the higher, less deferential standard of least drastic means ought to be employed in considering whether legislation impairs rights as little as possible.

Curious as well is the apparent decline in the nature and quality of the evidence necessary to establish that rights have been minimally impaired. In Jones, for instance,

the majority upheld provincial legislation despite the fact that the province did not tender any evidence that the compelling objective of the legislation could be accomplished by other, less drastic means.⁹⁰⁰ Indeed, this point was the focus of the dissenting opinion in that case.⁹⁰¹ Further, the dissenting reasons of Dickson C.J. in the Alberta Reference squarely address the lack of evidence tendered by the government that all work covered by the legislation in question was essential.⁹⁰² Similarly, in the Dairyworkers case, Wilson J., in dissent, was unable to accept arguments of economic harm and harm to the communities' health absent compelling evidence.⁹⁰³ In Butler, the evidence relied on to support the finding of minimal impairment was tenuous at best. Sopinka J. defended his abstract definition of obscenity on the grounds that "the intractable nature of the problem ... [made] the possibility of a more explicit provision remote".⁹⁰⁴ Yet his definition is replete with terms that do not lend themselves to easy definition or determination. To seek an abstract definition of obscenity appears to ensure a certain level of indeterminacy. The Court made it clear in Irwin Toy and Butler that in applying the more deferential standard of the minimal impairment test it will not "take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."⁹⁰⁵ Yet its next statement in that case is that "[t]here must nevertheless be a sound evidentiary basis for the government's conclusions."⁹⁰⁶ It seems in some cases the Court does not follow its own directives.

Relating these concerns back to the denial of a spouse's allowance to Mr. Egan's same-sex partner, it can be demonstrated that the equality rights of Mr. Egan and his partner were not impaired as little as possible.

The Supreme Court of Canada has indicated that the higher, more deferential standard that the government need only demonstrate it had a reasonable basis for

concluding that rights were minimally impaired ought to be applied in cases where democratically elected representatives have made choices on the distribution of scarce resources between competing groups, and particularly where the legislature has sought to promote or protect the interests of disadvantaged groups and vulnerable members of society.

No evidence was tendered in Egan to demonstrate that Parliament explicitly chose to confer a benefit on financially vulnerable heterosexual couples only. Indeed, it is possible that Parliament simply failed to consider financially vulnerable homosexual couples at all. It is possible this omission was simply one based on a lack of awareness rather than a deliberate attempt to exclude this group from the benefit of the spouse's allowance. There is certainly no evidence to suggest otherwise. If the purpose of the spouse's allowance is to protect the vulnerable, here, elderly couples facing the retirement of one partner, the legislation is underinclusive in that it fails to protect a segment of the group at which the legislation is aimed. The Supreme Court of Canada has stated that underinclusion may simply be a backhanded way of permitting discrimination and is thus constitutionally suspect.⁹⁰⁷ More problematic, though, is that in this case it may not be said that there exists competition between social groups for the allocation of scarce resources. Parliament has already made a commitment to provide a benefit to vulnerable members of society. In deciding to distinguish between "spouses" and "non-spouses" in terms of eligibility for the benefit, it failed to consider all elderly couples in financial hardship due to the retirement of one partner. Indeed, it may be argued that an elderly lesbian couple facing retirement would suffer considerably greater hardship than an elderly heterosexual couple, given women's lower income and pension levels, as stated in McKinney.⁹⁰⁸ There is a difference between explicitly deciding to exclude a group and simply failing to consider it. There does not appear to be any evidence that Parliament explicitly considered two

competing groups for the allocation of scarce resources. In its decision to confer a benefit on the elderly, Parliament chose to distinguish between "spouses" and "non-spouses". In failing to include elderly homosexual couples within the meaning of the term "spouse", Parliament failed to consider this group, rather than having considered and rejected its eligibility for the benefit available. Thus, the higher, more deferential standard set out in Irwin Toy, McKinney and Stoffman ought not to apply to the minimal impairment aspect of the proportionality test.

In any event, it is difficult to see how Parliament could have reasonably concluded that the denial of the spouse's allowance impaired the equality rights of homosexual couples as little as possible absent the "sound evidentiary basis" Irwin Toy states is necessary for the government's conclusions.⁹⁰⁹ It is important to remember that the Court does not always follow its own instructions with respect to the evidentiary basis needed to substantiate the government's conclusions, as was shown in Jones where no evidence was tendered demonstrating that the governmental objective could be established by other, less drastic means. It is possible to distinguish Jones on the basis that the compelling objective of the legislation was the education of young people, an objective of such patently obvious importance as to obviate the need for ordinary proof. Indeed, La Forest J., in his majority opinion, suggests as much.⁹¹⁰ Similarly, the evidence relied on to support the governmental objectives of the legislation in question in Butler and the Dairyworkers case could be described as tenuous indeed, a point that did not escape the attention of the dissenting opinion in the latter case.

Yet it is significant to note that there is a difference between a "sound evidentiary basis" (Irwin Toy), "some evidence" (the Alberta Reference), "tenuous evidence" (Butler and the Dairyworkers case) and no evidence at all in the absence of

judicial notice of the importance of a governmental objective (Jones). It seems difficult to argue that Parliament's conclusion that the equality rights of elderly homosexual couples were impaired as little as possible could be a reasonable one absent any evidence that this group was considered at all. Surely, in order for a conclusion to have a "reasonable basis", some evidence must be required, without which that particular term becomes meaningless. The term "reason" connotes a degree of logical and rational consideration. It cannot be established that homosexual couples were given any such consideration in the determination for eligibility for the spouse's allowance, and thus it cannot be said that Parliament's conclusion that their equality rights were impaired as little as possible by their ineligibility for the benefit is a reasonable one. It may be said, therefore, that even in applying the more deferential standard of "reasonable basis" in denying eligibility for the spouse's allowance, the equality rights of homosexual couples have not been impaired as little as possible.

Even applying the higher, "least drastic means" standard of the minimal impairment test will result in the conclusion that the denial of the spouse's allowance to homosexual couples cannot be sustained under s.1. This formulation of the test suggests that the legislative measure must impair the affected right by the least possible means, and will trigger an investigation into whether there exists some reasonable alternative scheme that would allow the government to achieve its objective with fewer detrimental effects on the infringed right or freedom.⁹¹¹ The alternative scheme must be equally as effective as the means actually chosen.⁹¹² Further, there must be a serious attempt made to minimize the adverse effect of the legislation on those whose rights are infringed.⁹¹³

The context in which this s.1 analysis is being considered must be remembered. In Andrews, Justice McIntyre stated that the purpose of s.15

is to ensure equality in the formulation and application of the law. 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. It has a large remedial component ...⁹¹⁴

Wilson J. in Andrews added that the politically and socially weak and the traditionally disadvantaged are the true beneficiaries of the protection of s.15.⁹¹⁵ She further stated that it is necessary to examine politically vulnerable groups within the context of

... the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

I believe also that it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone J., writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s.15, the framers of the Charter embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s.15 that it be interpreted with sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come.⁹¹⁶

She further pointed out in Turpin the importance of the "larger social, political and legal context" within which "discrimination on grounds relating to the personal characteristics of the individual or group"⁹¹⁷ occurs:

... [I]t is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. 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.⁹¹⁸
(emphasis added)

She noted there that s.15 serves to remedy or prevent "discrimination against groups suffering social, political and legal disadvantage in our society"⁹¹⁹ and that the *indicia* of discrimination included "stereotyping, historical disadvantage or vulnerability to

potential and social prejudice."⁹²⁰ These are clear signals that the Court is prepared to actively promote the rights of the historically disadvantaged to ensure that those individuals or groups who have been denied any of the equalities of s.15 are not denied their rights by operation of the law. Section 15 is thus not merely about "anti-discrimination";⁹²¹ rather, it has an active and progressive element that seeks to ameliorate disadvantage by asserting rights against the relatively advantaged. In this sense s.15 may be seen as not merely maintaining the status quo but actively working to overcome it.

Justice Wilson expanded her view of the purpose of s.15 in McKinney. The focus, she states, is clearly on prejudice and stereotype:

The purpose of the equality guarantee is the promotion of human dignity. This interest is particularly threatened when stereotype and prejudice inform our interactions with one another, whether on an individual or collective basis. It is for this reason that the central focus of the equality guarantee rests upon those vehicles of discrimination, stereotype and prejudice.⁹²²

For Justice L'Heureux-Dube, the fundamental values of s.15 are "the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based upon individual ability."⁹²³ This was further developed by Wilson J. in Stoffman, where she stated:

In discrimination claims of the kind involved here, if the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as individuals deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less.⁹²⁴

(emphasis in original)

This emphasis on dignity and the invidious effects of stereotype was picked up by Rowles J. in Knode, where she stated that

the rights enumerated in [s.15] signify rights according human dignity. The respect for the individual person means respect for the unique and diverse character of every human person. This implies a large degree of tolerance within a pluralistic society. Discrimination is abhorrent because it treats individuals as abstractions rather than individuals. Personal qualities are lost in the group stereotype.⁹²⁵

In these passages may be heard the echoes of the European sentiment of the right to respect for one's private life and its concomitant right to fulfillment of one's personality in a manner that is officially validated. The emphasis on respect and human dignity in the Canadian cases clearly points to judicial validation of individuals who for too long have lived in the shadow of stereotype and prejudice. Legislation that has the effect of denying equality rights thus serves to entrench stereotype and prejudice and is an affront to the principle of human dignity and self-worth.

Relating this back to the minimal impairment aspect of the s.1 test, it may be seen that the denial of a spouse's allowance to homosexual couples does not impair their equality rights as minimally as possible. It cannot be said that a serious attempt has been made to minimize the adverse effects of the legislation on those whose rights have been infringed because there is no evidence whatever of the interests of homosexual couples being considered at all. If they have not been considered, it is not possible to suggest that a serious attempt to minimize adverse effects on them has been made. While it is true that the Supreme Court of Canada has not always followed its own directives with respect to the evidence that the legislature considered less drastic means of impairing rights, Irwin Toy suggested that such evidence must be sound.⁹²⁶ In this case, this is simply non-existent. In Jones, legislation was upheld despite a virtual lack of evidence that the governmental objective could be accomplished by other, less drastic means.⁹²⁷ Jones may be distinguished on the basis that the objective of educating young people was of such patently obvious importance that no evidence was required. The failure to consider elderly homosexual couples' eligibility for the

spouse's allowance more reasonably points to their invisibility rather than a conscious decision to exclude. This invisibility is precisely the focus of the remedial aspect of the equality rights in s.15. Homosexual couples suffer not only from stereotypical assumptions (they don't exist) and prejudice (they don't deserve benefits), but also from a lack of visibility and judicial recognition that directly impairs their sense of dignity and self-worth. Decisions such as that by the Ontario High Court in Karen Andrews and the Federal Court of Appeal in Mossop serve to suggest that homosexual persons are somehow undeserving of the benefits so easily accorded their heterosexual counterparts. In denying benefits, these decisions rely on, validate and perpetuate stereotypes and prejudices that directly attack homosexual people's dignity, respect and self-worth. It would be ironic indeed if this were considered a minimal impairment of the equality rights of homosexual persons. In fact, such a finding flies directly in the face of the very purposes of s.15. It cannot be said that a finding that completely eviscerates the fundamental purposes of a right nevertheless constitutes a minimal impairment of that right.

A reasonable alternative scheme that would allow the government to achieve its objective of alleviating the financial hardship faced by elderly couples when one partner retires, exists. This alternative is to simply extend the spouse's allowance to elderly homosexual couples as well. This would allow the government to achieve its objective with no detrimental effects on homosexual persons whose equality rights have been infringed by the denial of the benefit. The term "spouse" in s.2 of the Old Age Security Act could be interpreted to include two individuals who express an emotional and sexual commitment to share their lives together. This would capture the essence of a spousal relationship and serve to distinguish spousal relationships from those of a non-spousal nature, such as siblings or other adults living together who do not share an emotional and sexual life commitment. Moreover, such a definition would thus avoid

invasive investigations into applicants' private and personal lives, a procedure deemed undesirable by Chief Justice Dickson in Edwards Books.⁹²⁸

The financial cost of extending the spouse's allowance to homosexual couples would not be so great as to be considered so prohibitive as to justify the limitation of homosexual persons' equality rights, as suggested in Singh.⁹²⁹ In McKinney and Stoffman Justice L'Heureux-Dube made the observation that the financial burden of allowing workers past 65 to continue working rather than face mandatory retirement is not onerous given the small number of individuals who would choose to do so.⁹³⁰ The same argument may be made with respect to the extension of spousal benefits to homosexual couples with even greater conviction. It may be fair to say that there are far more workers facing retirement in Canada than there are homosexual persons living in spousal relationships. Estimates place the number of homosexual persons at approximately ten percent of the population, not all of whom are living in committed spousal relationships. Of that number, some may not wish to apply for spousal benefits for reasons of their own. Thus, it could be said that the increased cost to the government in extending eligibility for the spouse's allowance to homosexual couples would not be great. It should be remembered that cost arguments usually do not state that funding for a particular program is a prohibitive burden itself; rather, the argument states that the funding is an excessive burden given prevailing resource allocations.⁹³¹ However, in rejecting this argument the Court indicated that the government cannot escape "Charter commitments by failing to fund a particular department or programme sufficiently to meet constitutional standards."⁹³² This implies that constitutionally guaranteed rights, including, here, equality rights, must receive higher priority in the distribution of financial resources than non-constitutional rights. Clearly this has significant meaning to traditionally disadvantaged groups who have experienced difficulty gaining access to resources and programs. The constitutional guarantees set

forth in the Charter cannot be abridged by the government resorting to arguments of greater cost.

The alternative of extending the spouse's allowance to homosexual couples would enable the government to achieve its objective of alleviating the financial hardship imposed on elderly couples facing retirement even more effectively than restricting it to heterosexual couples only. By extending the benefit, all elderly couples could be assisted. By restricting eligibility for the benefit, the government succeeded in failing to assist a small but significant number of potential applicants. Such an omission is contrary to the principles of the equality guarantees in s.15.

Given the foregoing, it cannot be said that the denial of the spouse's allowance to homosexual couples represents a minimal impairment of their equality rights.

DELETERIOUS EFFECTS

Finally, there must be proportionality between the effects of the legislation responsible for limiting the equality rights of homosexual persons and the governmental objective. The greater the deleterious effect of the measure, the more important the objective must be in order to survive at the s.1 stage.

The effect of the denial of the spouse's allowance to homosexual couples is to continue an economic burden on them that is specifically alleviated for heterosexual couples. Parliament clearly considered the financial hardship of elderly couples facing retirement to be of such significant concern that it created a spouse's allowance to help alleviate it. The financial hardship faced by elderly homosexual couples should be no

less significant, and arguably even more so for elderly lesbian couples whose incomes and pensions are usually significantly lower than their male counterparts'.

Perhaps more significant is that the denial of spousal benefits to homosexual couples represents a serious affront to their dignity, respect and self-worth. If the purpose of equality rights is to promote and enhance human dignity and respect, it is difficult to imagine that legislation having exactly the opposite effect could be considered anything but disproportionately effective. It seems incongruous that s.15 can be used to actively promote the dignity of the socially and historically disadvantaged while s.1 may be used to sustain legislation that serves to invalidate it.

More significant yet is that the effect of the denial of the spouse's allowance to homosexual couples is to reinforce and perpetuate prejudice, stereotype and disadvantage. The decisions in Karen Andrews, Mossop in the Federal Court and Egan serve to reinforce the idea that homosexual persons are undeserving or unworthy of the benefits so easily accorded others. This only serves to entrench social views of them as "others". The value-laden language used in Mossop is particularly revealing of this, and suggestive of the judgmental terms used to describe homosexual persons in the European Human Rights Commission's findings in X. v. Federal Republic of Germany.⁹³³ The denial of spousal benefits judicially validates and reinforces invidious stereotypes of homosexual persons incapable of spousal or familial relationships. That such decisions are themselves based on stereotypical assumptions that homosexual persons cannot have spousal or familial relationships reveals the depth of prejudice against them. Continued denial of spousal benefits will only serve to further entrench stereotypical assumptions about, prejudice against and disadvantage of homosexual persons.

These deleterious effects fly directly in the face of the purpose and focus of the equality provisions in s.15 of the Charter. Rather than enhance human dignity and respect, they deny it; rather than promote tolerance in society, they impede it; rather than ensure self-worth, they invalidate it.

Relating these comments back to the denial of a spouse's allowance to Mr. Egan's same-sex partner, it may be seen that this constitutes an infringement of their equality rights that cannot be supported under s.1 of the Charter.

CONCLUSION

Including same-sex couples within the meaning of spouse would accomplish more than the extension of the equal benefit of the law to a hitherto disadvantaged group. Equally importantly it would serve to publicly validate homosexual persons through official recognition and sanction of their relationships and sexuality. In this sense, a successful s.15 challenge to legislation that discriminates on the basis of sexual orientation would be consonant with the European right to respect for one's private life and its dual aspects: to establish and develop emotional and sexual relationships and thus fulfil one's personality and identity, and the corresponding right to government recognition of one's private life -- including one's sexuality -- in the public sphere. This latter aspect of public recognition is particularly critical, for a right without a public identity is tantamount to no right at all. Public recognition is all the more important when one's identity has been subject to legislative and social invalidation for too long. The groups and interests society is willing to protect through its constitutional guarantees of equality says much about the nature of the society and what it aspires to, as does an examination of the groups and interests a society will not protect. The Charter is a signal that this society is committed to the protection and

promotion of the equal rights of all citizens and particularly to the promotion of the rights of the traditionally disadvantaged and socially prejudiced. Homosexual persons clearly suffer all the evils of prejudice, yet it is naive to believe that mere public and official recognition will change attitudes. However, this is an important step towards the full and equal participation of all persons in society. The participation of the government and courts in this journey is crucial, for the government defines and the courts defend the rights that collectively constitute society's aspirations. We look to our governments and courts as role models to promote the rights of the disadvantaged. The Charter's mandate demands this.

The decisions in Veysey and Knodel represent precisely the type of official validation that is needed to make equality rights meaningful for homosexual persons. The recognition of homosexual couples represents a significant departure from the way homosexual relationships have been viewed by courts in the past. The willingness of the courts in these decisions to look beyond mere surface appearance to craft a definition of partner or spouse that is alive to both historical disadvantage and present reality is a ringing endorsement of the philosophy that underlies the Charter and its equality guarantees. These decisions give homosexual persons the public identity they have been so long denied. These are important steps towards the equal participation of all in a society committed to equality.

It is important to continue to move forward on the momentum of these decisions. The courts have demonstrated that they take the Charter's mandate in alleviating disadvantage seriously, and the importance of judicial recognition of homosexual relationships cannot be overemphasized. Having determined that homosexual persons have historically suffered discrimination, these decisions provide important precedents for the advancement of future claims. This must be seen as

particularly heartening to those seeking same-sex spousal benefits, for there is now an escape to the circuitous reasoning that served to deny benefits previously.

Having found that homosexual persons come from a tradition of discrimination, it would be contrary to the principles of the Charter to condemn them to the same future. Moreover, judicial validation not only frees homosexual persons from the prison of discrimination, it also serves to promote the respect for one's private life that is so central to any concept of rights.

- 1 Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.), 1982, c.11.
- 2 For the purposes of this paper, only subsection 1 of section 15 will be considered. This
reads as follows:
every individual is equal before and under the law and has the right to the equal
protection and equal benefit of the law without discrimination and, in
particular, without discrimination based on race, national and ethnic origin,
colour, religion, sex, age or mental or physical disability.
All references to s.15(1), except as otherwise noted, will be in the form of "s.15".
It is significant to note that s.15 is subject to the limitation of s.1, which provides:
The Canadian Charter of Rights and Freedoms guarantees the rights and
freedoms set out in it subject only to such reasonable limits prescribed by law
as can be demonstrably justified in a free and democratic society.
- 3 The term homosexual persons refers to both homosexual men and lesbians. Although
homosexual men and lesbians is a more accurate description, it is too cumbersome for
persistent use.
- 4 Signed 1950, entered into force September 3, 1953, 213 U.N.T.S. 222.
- 5 See Articles 2 through 14 and Protocols No.1, Articles 1 through 3; No.4, Articles 1
through 4; and No.6, Article 1. For discussions concerning the development of the
Commission and the mechanics of bringing a human rights complaint before it, see J.A.
Joyce, Human Rights: International Documents Vol. III (Alphen aanden Rijn: Sythoff &
Noordhoff, 1978) at 1273-81 and H. Kindred *et al.*, International Law Chiefly as Interpreted
and Applied in Canada (Toronto: Emond Montgomery, 1987) at 682-83.
- 6 Article 8 reads:
 1. Everyone has the right to respect for his private and family life, his
home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of
this right except such as in accordance with the law and is necessary in
a democratic society in the interests of national security, public safety
or the economic well-being of the country, for the prevention of
disorder or crime, for the protection of health or morals, or for the
protection of the rights and freedoms of others.
- 7 1960 Yearbook of the European Convention on Human Rights 186.
- 8 *Ibid.* at 194.
- 9 1962 Yearbook of the European Convention on Human Rights 120.
- 10 *Ibid.*
- 11 *Ibid.* at 234.
- 12 *Ibid.*
- 13 *Ibid.* at 236.
- 14 *Ibid.*
- 15 *Supra*, note 7 at 188; *supra*, note 9 at 232.
- 16 *Supra*, note 13.
- 17 X. v. Federal Republic of Germany (1976), 3 D.R. 46.
- 18 *Ibid.* at 54.
- 19 *Supra*, note 17. Article 14 reads as follows:
The enjoyment of the rights and freedoms set forth in this Convention
shall be secured without discrimination on any ground such as sex, race,
colour, language, religion, political or other opinion, national or social origin,
association with a national minority, property, birth or other status.
- 20 *Supra*, note 17 at 54-5.
- 21 *Ibid.* at 55.
- 22 *Ibid.* at 53.
- 23 *Ibid.* at 56.
- 24 *Ibid.*

25 X. v. United Kingdom (1981), 3 E.H.R.R. 63; 9721/82 v. United Kingdom (1985), 7
E.H.R.R. 145; Johnson v. United Kingdom (1987), 9 E.H.R.R. 386.

26 X. v. Iceland (1976), 5 D.R. 86.

27 *Ibid.* at 87.

28 (1981), 3 E.H.R.R. 244.

29 *Ibid.* at 252.

30

31 Van Oosterwijck v. Belgium (1981), 3 E.H.R.R. 557 at 584.

32 (1982), 4 E.H.R.R. 149.

33 *Ibid.* at 161.

34 *Ibid.* at 164.

35 *Ibid.*

36 *Ibid.* at 165.

37 *Ibid.* at 167.

38 L. Tribe, American Constitutional Law (2d) (Mineola, N.Y.: Foundation Press, 1988)
p. 1303.

39 "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect
Classification", (1985), 98 Harvard Law Review 1285 at 1288. For discussions relating to
equality rights arguments for homosexual persons in American jurisprudence, see,
additionally, R.G. Bagnall *et al.*, "Burdens on Gay Litigants and Bias in the Court System:
Homosexual Panic, Child Custody, and Anonymous Parties", (1984) 19 Harvard Civil
Rights - Civil Liberties Law Review 497; "Custody Denials to Parents in Same-Sex
Relationships: An Equal Protection Analysis", (1989) 102 Harvard Law Review 617; H.M.
Miller III, "An Argument for the Application of Equal Protection Heightened Scrutiny to
Classifications Based on Homosexuality", (1984) 57 Southern California Law Review 797.

40 The right to privacy is not specifically articulated in the United States Constitution.
Rather, this right has been judicially developed as an aspect of the "due process" clause of
the 14th Amendment to the Constitution.

Article XIV

Passed by Congress June 13, 1866, ratified July 9, 1868. Section 1 reads as
follows:

All persons born or naturalized in the United States, and subject to
the jurisdiction thereof, are citizens of the United States and the State wherein
they reside. No State shall make or enforce any law which shall abridge the
privileges or immunities of citizens of the United States; nor shall any State
deprive any person of life, liberty or property, without due process of law; nor
deny to any person within its jurisdiction the equal protection of the laws ...

41 Omstead v. United States (1928), 277 U.S. 438 at 478 (Brandeis, dissenting opinion).
See also Griswold v. Connecticut (1965), 381 U.S. 479 at 484; Eisenstadt v. Baird (1972),
405 U.S. 438 at 453 and Stanley v. Georgia (1969), 394 U.S. 557 at 564: "[A]lso
fundamental is the right to be free, except in very limited circumstances, from unwanted
governmental intrusions into one's privacy."

42 As of 1986, 25 States plus the District of Columbia had in force criminal statutes
prohibiting private, consensual sodomy: Bowers v. Harwick (1986), 478 U.S. 186 at 198
note 1. The statutes typically define sodomy as "any sexual act involving the sex organs of
one person and the mouth or anus of another": Georgia Code Ann s. 16-6-2 (1984). *Ibid.* at
188 note 1.

43 (1975), 403 F. Supp. 1199. U.S. District Court, E.D. Virginia.

44 *Supra*, note 41.

45 *Supra*, note 43 at 1201 and 1203.

46 *Ibid.* at 1202.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

- 50 *Ibid.* at 1203.
 51 *Ibid.*
 52 *Ibid.* at 1204.
 53 *Ibid.* at 1205.
 54 *Ibid.*
 55 (1976), 425 U.S. 810, May 19.
 56 *State v. McCoy* (1976), 337 So. 2d 192.
 57 (1976), 530 F. 2d 247.
 58 *Ibid.* at 255.
 59 *Ibid.*
 60 *Ibid.* at 253.
 61 (1984), 741 F. 2d 1388. Of note, the Judges on this panel were Bork, Scalia and Williams. Born was nominated for a position on the United States Supreme Court, but failed to obtain the necessary Senate approval; Scalia was elevated to that Court shortly thereafter.
- 62 *Ibid.* at 1395-96.
 63 *Supra*, note 46.
 64 *Supra*, note 61 at 1392.
 65 *Ibid.* at 1398.
 66 *Supra*, note 57.
 67 *Supra*, note 65.
 68 *Ibid.*
 69 (1980), 415 N.E. 2d 936.
 70 *Supra*, note 51.
 71 *Supra*, note 69 at 939.
 72 *Ibid.* at 941.
 73 *Ibid.* at 940 note 3.
 74 *Ibid.*
 75 *Ibid.*
 76 *Supra*, note 42.
 77 *Ibid.* at 188 note 1.
 78 *Ibid.* at 190.
 79 *Ibid.*
 80 *Ibid.* at 190-91.
 81 *Ibid.* at 191-92.
 82 *Ibid.* at 192.
 83 *Ibid.*
 84 *Ibid.* at 193.
 85 *Ibid.* at 194.
 86 *Ibid.* at 196.
 87 *Ibid.* at 197.
 88 *Ibid.* at 199.
 89 *Ibid.*
 90 *Ibid.* at 204.
 91 *Ibid.*
 92 *Ibid.* at 205.
 93 *Supra*, note 41.
 94 *Supra*, note 42 at 207.
 95 *Ibid.* at 208.
 96 *Ibid.*
 97 *Ibid.* at 211-12.
 98 *Supra*, note 69.
 99 *Supra*, note 43.
 100 *Supra*, note 42.

101 *Supra*, note 38.

102 The capacity reasoning thus places homosexual couples who wish to obtain the benefits that flow from being "married" and "spouses" in an impossible catch-22: they cannot marry because they do not have the capacity, and they do not have the capacity because they cannot marry. The benefits of "marriage" remain, of course, utterly out of reach.

103 (1866), L.R. 1 P & D 130.

104 *Ibid.* at 133.

105 [1970] 2 All E.R. 33.

106 *Ibid.* at 48.

107 (1975), 52 D.L.R. (3d) 280.

108 R.S.M.. 1970 C. M50 [since repealed S.M. 1982-83-84, c.57, s.35].

109 *Supra*, note 107 at 282.

110 *Supra*, note 103.

111 *Supra*, note 105.

112 *Supra*, note 107 at 285.

113 C. Davis, Family Law in Canada (4th) (Calgary: Carswell, 1984) at 64.

114 (1985), 42 R.F.L. (2d) 449.

115 R.S.R.C. 1979 c.131 s.1.

116 *Supra*, note 114 at 446-7.

117 49 D.L.R. (4th) 584, 64 O.R. (2d) 258, 9 C.H.R.R.D/5089, 88 C.L.L.C. 17,023

[Karen Andrews, cited to D.L.R.].

118 R.S.O. 1980, c.197.

119 *Supra*, note 117 at 587.

120 *Ibid.* at 589.

121 *Ibid.*

122 *Ibid.* at 591.

123 *Ibid.*

124 *Supra*, note 120.

125 *Ibid.*

126 *Ibid.* at 589-90.

127 R.S.C. 1985, c. H-6.

128 Attorney General of Canada v. Brian Mossop [1991] 1 F.C. 18, 71 D.L.R. (4th) 661, (1990) 32 C.C.E.L. 276, 90 C.L.L.C. 17,021, 12 C.H.R.R. D355 [Mossop, cited to F.C.)

129 Mossop v. Canada (Secretary of State), (1989), 10 C.H.R.R. D/6064.

130 *Ibid.* at D/6066

131 *Ibid.* at D/6067

132 *Supra*, note 127

133 *Supra*, note 129 at D/6064-65.

134 *Supra*, note 127, s.3(1).

135 *Ibid.* at D/6073

136 *Ibid.* at D/6072

137 *Ibid.* at D/6093

138 *Ibid.* at D/6080

139 *Ibid.*

140 *Ibid.* at D/6079

141 *Ibid.* at D/6082

142 *Ibid.* at D/6089

143 *Ibid.* at D/6094

144 *Ibid.*

145 *Ibid.* at D/6091

146 *Ibid.*

147 *Supra*, note 143.

148 *Ibid.*

149 *Ibid.* at D/6095

- 150 *Supra*, note 130.
 151 *Ibid.* at D/6097
 152 *Supra*, note 128 at 34.
 153 *Ibid.*
 154 *Ibid.*
 155 *Ibid.*
 156 *Ibid.* at 34-35
 157 *Ibid.* at 35
 158 *Ibid.* at 36
 159 *Ibid.*
 160 *Ibid.* at 37
 161 *Ibid.*
 162 *Supra*, notes 155, 156 and 158.
 163 *Veysey v. Commissioner of the Correctional Services of Canada* [1990] 1 F.C. 321, affirmed on other grounds by the Federal Court of Appeal (1990), 109 N.R. 300, 43 Admin. L.R. 319, and *Brown v. B.C. Minister of Health* (1990), 42 B.C.L.R. (2d) 294 (B.C.S.C.)
 164 *Supra*, note 128 at 38.
 165 *Ibid.* at 38-39
 166 *Supra*, note 164.
 167 *Supra*, note 154.
 168 *Supra*, note 115
 169 *Supra*, note 118
 170 [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641, 55 N.R. 241, 14 C.C.C. (3d) 97, [1984] 6 W.W.R. 577, 33 Alta L.R. (2d) 193, 41 C.R. (3d) 97 (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*), 9 C.R.R. 355. [*Hunter v. Southam*, cited to S.C.R.]
 171 *Ibid.*
 172 *Ibid.*
 173 [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449, 60 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281n, (1988) 44 D.L.R. (4th) 385.
 174 *Ibid.* at 485-86 D.L.R.
 175 *Supra*, note 30 at 252.
 176 See the European Convention Article 12: Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the existence of this right. See also *Loving v. Virginia* (1967), 388 U.S. 1.
 177 *Supra*, note 115.
 178 *Supra*, note 118.
 179 [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 91 N.R. 255, 34 B.C.L.R. (2d) 273, [1989] 2 W.W.R. 289, 25 C.C.E.L. 255, 10 C.H.R.R. D/5719, 36 C.R.R. 193. [*Andrews*, cited to D.L.R.]
 180 [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 23 N.R. 527, 78 C.L.L.C. 14, 175, 92 D.L.R. (3d) 417.
 181 In *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219, the Supreme Court of Canada held that Bliss was wrongly decided, or in any event would not be decided now as it was then: at 1243.
 182 *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385, 37 Alta L.R. (2d) 97, [1985] 3 W.W.R. 481, 85 C.L.L.C. 14, 023, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81.
 183 *Supra*, note 179 at 14.
 184 For discussions concerning the inadequacies of the Canadian Bill of Rights [(1960), 8-9 Eliz II, c.44 (Can.)], the precursor of the Charter, and the legislative history of s.15, see A. Bayefsky, "Defining Equality Rights" in A. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at pp. 5-25; M. Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980)

18 Osgoode Hall Law Journal 338; W. Tarnopolsky and G. Beaudoin, eds., The Canadian Charter of Rights and Freedoms: Commentary (Toronto: Carswell, 1982) at pp. 407-22, W. Tarnopolsky and W. Pentney, Discrimination and the Law (2d) (Toronto: R. De Boo, 1985) at 16-7 to 16-11; and J. Weiler and R. Elliot, eds., Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1986) at pp. 1-77.

185 *Supra*, note 179 at 15.

186 *Ibid.* at 16.

187 *Ibid.* at 18.

188 *Ibid.* at 22-23.

189 *Ibid.* at 22.

190 *Ibid.* at 23-24.

191 The onus of justifying a limitation on a right or freedom found in the Charter is on the party seeking to limit: Hunter v. Southam Inc., *supra*, note 170 at 169 S.C.R.

192 *Supra*, note 179 at 25.

193 *Ibid.* at 32.

194 *Ibid.* at 32-33.

195 [1989] 1 S.C.R. 1296, 96 N.R. 115, 48 C.C.C. (3d) 8, 69 C.R. (3d) 97, 34 O.A.C. 115, 39 C.R.R. 306. [Turpin, cited to C.C.C.]

196 *Ibid.* at 34.

197 *Ibid.*

198 *Ibid.* at 35.

199 *Ibid.*

200 For further discussions on this point, see A. Bayefsky, "The Orientation or Goal of Section 15 of the Canadian Charter of Rights and Freedoms" in J. Weiler and R. Elliot, *supra*, note 140, W. Black and L. Smith, "The Equality Rights" in G. Beaudoin and E. Ratushny, The Canadian Charter of Rights and Freedoms (2d) (Toronto: Carswell, 1989), M. Gold, *supra*, note 140, L. Smith, "A New Paradigm for Equality Rights" in L. Smith, ed., Righting the Balance: Canada's New Equality Rights (Saskatoon: Canadian Human Rights Reporter, 1986), J. Vickers, "Major Equality Issues of the Eighties", (1983) 1 Canadian Human Rights Yearbook 47, J. Vickers, "Equality Seeking in a Cold Climate", in L. Smith, ed., *supra*.

201 [1990] 1 S.C.R. 695, 39 O.A.C. 1, 69 D.L.R. (4th) 392, 106 N.R.1, 43 Admin L.R. 1, 41 C.P.C. (2d) 1. [Wolff, cited to S.C.R.]

202 *Ibid.* at 698.

203 *Ibid.* at 701.

204 *Ibid.* at 702.

205 *Supra*, note 179 at 23.

206 [1990] 1 S.C.R. 705 at 709-710, 68 D.L.R. (4th) 147, 106 N.R. 11.

207 [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, 54 N.R. 196, 9 C.R.R. 133 (cited to S.C.R.).

208 *Ibid.* at 75.

209 *Ibid.* at 88.

210 *Ibid.* at 83-84.

211 *Ibid.* at 84.

212 *Ibid.* at 86.

213 *Supra*, note 209.

214 *Supra*, note 212.

215 For greater discussion of this point, see R.M. Elliot, "The Supreme Court of Canada and Section 1 - The Erosion of the Common Front" (1987) 12 Queen's Law Journal 277 at 304, S.R. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall Law Journal 1 at 41-44, and L.E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court Law Review 469 at 479-483.

216 *Supra*, note 170.

- 217 *Ibid.* at 154.
 218 *Ibid.* at 169.
 219 *Ibid.*
 220 *Supra.*, note 207.
 221 [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1, 14 C.R.R. 13.
 222 1976-77 (Can.), c. 52.
 223 *Supra*, note 221 at 214.
 224 Beetz, Estey and McIntyre J.J. found the procedures for determining refugee status were in conflict with s.2(e) of the Canadian Bill of Rights, R.S.C. 1970, App. III. Ritchie J. took no part in the judgment.
 225 *Supra*, note 221 at 216.
 226 *Ibid.* at 217.
 227 *Ibid.*
 228 *Ibid.* at 218.
 229 *Ibid.*
 230 *Ibid.* at 219.
 231 *Supra*, note 228.
 232 *Ibid.* at 220.
 233 *Supra*, note 230.
 234 [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, 18 C.C.C. (3d) 385, [1985] 3 W.W.R. 481, 37 Alta L.R. (2d) 97, 13 C.R.R. 64, 85 C.L.L.C. 14,023. [Big M Drug Mart, cited to S.C.R.]
 235 *Ibid.* at 331.
 236 *Ibid.*
 237 *Ibid.*
 238 *Ibid.* at 331-332.
 239 *Ibid.* at 334-335.
 240 *Ibid.* at 334.
 241 *Ibid.* at 351.
 242 *Ibid.* at 352.
 243 *Supra*, notes 211 and 218.
 244 *Supra*, note 241.
 245 *Supra*, note 230.
 246 *Supra*, note 240.
 247 *Ibid.* at 353.
 248 *Ibid.*
 249 *Ibid.* at 358.
 250 *Ibid.* at 360.
 251 *Ibid.*
 252 *Ibid.* at 360-361.
 253 *Ibid.* at 361.
 254 [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 23 C.C.C. (3d) 289, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 18 C.R.R. 30. [Motor Vehicle Reference, cited to S.C.R.]
 255 R.S.B.C. 1979, c. 63.
 256 Section 7 of the Charter states:
 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
 257 *Supra*, note 254 at 498.
 258 *Ibid.* at 499.
 259 *Ibid.* at 501-502.
 260 *Ibid.* at 514-515.
 261 *Ibid.* at 518.
 262 *Ibid.* at 520.

- 263 *Ibid.* at 521.
- 264 Elliot, *supra*, note 215 at 310.
- 265 *Supra*, note 254 at 523.
- 266 *Ibid.*
- 267 *Ibid.*, at 523-524.
- 268 *Ibid.*, at 534.
- 269 Elliot, *supra*, note 215 at 310.
- 270 *Supra*, notes 207 and 170.
- 271 *Supra*, note 209.
- 272 Weinrib, *supra*, note 215 at 482. Weinrib raises the interesting notion of rights existing at the core and penumbra. For instance, in A.G. Quebec v. Quebec Association of Protestant School Boards, *supra*, note 207, the definition of the rights holder in s.23 of the Charter appears to be an essential feature of the right guaranteed, and thus exists at its core.
- 273 *Supra*, note 240.
- 274 Peck, *supra*, note 215 at 10.
- 275 For a further discussion of this point, see Peck, *ibid.* at 6-21.
- 276 *Supra*, notes 230, 244 and 261.
- 277 *Supra*, note 221 at 218-219.
- 278 *Supra*, note 272 at 486.
- 279 *Ibid.* See also note 247.
- 280 *Supra*, note 242.
- 281 *Ibid.*
- 282 [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 14 O.A.C. 335, 19 C.R.R. 308. [Oakes, cited to S.C.R.]
- 283 R.S.C. 1970, c. N-1.
- 284 Section 11(d) of the Charter states:
 11. Any person charged with an offence has the right
 ...
 (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
- 285 *Supra*, note 282 at 135.
- 286 *Ibid.* at 136.
- 287 *Ibid.*
- 288 *Ibid.* at 138.
- 289 *Ibid.*
- 290 *Ibid.* at 138-140.
- 291 *Ibid.* at 141-142.
- 292 *Ibid.* at 142.
- 293 *Supra*, note 289.
- 294 This example raises the issues found in the arguments that the concepts of breach and justification should be kept analytically distinct, on the one hand, and the arguments that "definitional balancing", that is, that certain activities are not given constitutional protection, on the other. These issues will be explored in greater detail later in this paper.
- 295 *Supra*, note 170 at 155.
- 296 *Supra*, note 172.
- 297 *Supra*, note 286.
- 298 Elliot, *supra*, note 215 at 281.
- 299 T.A. Cromwell & A.W. MacKay, "Oakes in the Supreme Court: A Cautious Initiative Unimpeded by Old Ghosts" (1986) 50 C.R. (3d) 34 at 42-43. See also Weinrib, *supra*, note 215 at 494.
- 300 *Supra*, note 286.
- 301 Weinrib, *supra*, note 215 at 496.
- 302 The arguments based on administrative expediency and convenience were found in Singh, *supra*, note 219, Big M, *supra*, note 242 and the Motor Vehicle Reference, *supra*,

note 261. The argument based on adherence to tradition or custom was articulated in Big M Drug Mart, *ibid.* The increased cost element of broadening the programs to be more inclusive ran throughout these arguments.

303 *Supra*, note 285.

304 *Supra*, note 286.

305 Weinrib, *supra*, note 215 at 495.

306 *Supra*, note 286.

307 [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569, 69 N.R. 241, 28 C.C.C. (3d) 513, [1986] 6 W.W.R. 577, 25 C.R.R. 63.

[Jones, cited to S.C.R.]

308 R.S.A. 1980, c. S-3.

309 *Supra*, note 307 at 295.

310 *Ibid.* at 304.

311 *Ibid.*

312 On this issue, Dickson C.J., Beetz, McIntyre, Lamer and Le Dain J.J. concurred with La Forest J.

313 *Supra*, note 307 at 294.

314 *Ibid.* at 296-297.

315 *Ibid.* at 309.

316 *Ibid.* at 315.

317 *Ibid.* at 318.

318 *Ibid.* at 319.

319 *Ibid.* at 321.

320 *Supra*, note 267.

321 *Supra*, note 307 at 322.

322 [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 71 N.R. 83, [1987] 1 W.W.R. 477, 9 B.C.L.R. (2d) 273, 25 C.R.R. 321, 87 C.L.L.C. 14,002.

[Dolphin Delivery, cited to S.C.R.]

This case is probably better remembered for what it says about the Charter's applicability to common law and that the Charter does not apply to litigation between private parties, defined here as a party completely divorced from any connection with government.

323 Section 2(b) of the Charter states:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication[.]

324 *Supra*, note 322.

325 *Ibid.* at 588.

326 *Ibid.*

327 *Ibid.* at 590.

328 *Ibid.* at 591.

329 *Ibid.*

330 *Ibid.* at 592.

331 *Ibid.*

332 *Supra*, note 325.

333 *Supra*, note 285.

334 *Supra*, notes 172 and 228.

335 *Supra*, note 287.

336 J. Cameron, "The Original Conception of Section 1 and its Demise: A Comment on Irwin Toy Ltd. v. Attorney-General of Quebec" (1989) 35 McGill Law Journal 253 at 258.

For greater discussion of the issues of breach and justification generally, see also J. Cameron, "The Forgotten Half of Dolphin Delivery: A Comment on the Relationship

between the Substantive Guarantees and Section 1 of the Charter" (1988) 22 U.B.C. Law Review 147.

337 [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, 71 N.R. 161, 30 C.C.C. (3d) 385, 55 C.R. (3d) 193 (sub nom. R. v. Videoflicks Ltd.), 19 O.A.C. 239, 28 C.R.R. 1, 87 C.L.L.C. 14,001.

[Edwards Books, cited to S.C.R.]

338 R.S.O. 1980, c.453.

339 *Supra*, note 337 at 744.

340 *Ibid.* at 746.

341 *Ibid.* at 765-766.

342 *Ibid.* at 768-769.

343 *Ibid.* at 770.

344 *Ibid.*

345 *Ibid.* at 771.

346 *Ibid.*

347 *Ibid.* at 772.

348 *Ibid.* at 772-773.

349 Elliot, *supra*, note 215 at 329.

350 *Supra*, note 337 at 773.

351 *Ibid.* at 779.

352 *Ibid.* at 781.

353 *Ibid.* at 780.

354 *Ibid.* at 783.

355 *Ibid.* at 794-795.

356 *Ibid.* at 795.

357 *Ibid.* at 795-796.

358 *Ibid.*

359 *Ibid.* at 794.

360 *Ibid.* at 807.

361 *Ibid.* at 808.

362 *Ibid.*

363 *Ibid.* at 809.

364 *Ibid.* at 810.

365 A fourth opinion was given in Edwards Books, that of Beetz and McIntyre J.J., written by Beetz J. He was of the view that freedom of religion was not infringed by the legislation and thus resort to s.1 was unnecessary. In his opinion, the economic harm suffered by a Saturday observer who closes shop on Saturdays is not caused by the legislation but is independent of it, resulting from the shopkeeper's deliberate choice to give priority to the tenets of his or her religion over any financial benefit. In the absence of any Sunday observance legislation, a Saturday observer would still have to choose between observing his or her religion or opening shop to meet competition. The financial disadvantage would still be present. Moreover, there was no evidence with respect to the religion of employees or the possible impact of the legislation upon freedom of religion: *supra*, note 337 at 788-791.

366 [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, 74 N.R. 99 (sub nom. Reference Re Compulsory Arbitration), [1987] 3 W.W.R. 577, 51 Alta L.R. (2d) 97, 28 C.R.R. 305 (sub nom. Alberta Union of Public Employees v. A.G. Alberta).

[Alberta Reference, cited to S.C.R.]

367 *Ibid.* at 390.

368 *Ibid.* at 392.

369 *Ibid.* at 395.

370 *Ibid.* at 396-397.

371 *Ibid.* at 397.

372 *Ibid.* at 398-399.

373 *Ibid.* at 399.

- 374 *Ibid.* at 400.
 375 *Ibid.* at 401.
 376 *Ibid.*
 377 *Ibid.* at 404.
 378 *Ibid.* at 405.
 379 *Ibid.*
 380 *Ibid.* at 406.
 381 *Ibid.* at 407.
 382 *Ibid.* at 407-408.
 383 *Ibid.* at 412.
 384 *Ibid.* at 413.
 385 *Ibid.*
 386 *Ibid.* at 416.
 387 *Ibid.* at 417.
 388 *Ibid.* at 419-420.
 389 *Ibid.* at 391.
 390 *Ibid.* at 391-392.
 391 *Ibid.* at 334.
 392 *Ibid.* at 335.
 393 *Ibid.* at 335-336.
 394 *Ibid.* at 347.
 395 *Ibid.* at 362-363.
 396 *Ibid.* at 363 and *supra*, note 171.
 397 *Ibid.* at 364.
 398 *Ibid.*
 399 *Ibid.* at 365.
 400 *Ibid.* at 368.
 401 *Ibid.*
 402 *Ibid.*
 403 *Ibid.* at 370-371.
 404 *Ibid.* at 371.
 405 *Ibid.* at 374.
 406 *Ibid.* at 374-375.
 407 *Ibid.* at 376.
 408 *Ibid.* at 377.
 409 *Ibid.* at 376-378.
 410 *Ibid.* at 378.
 411 *Ibid.* at 378-379.
 412 *Ibid.* at 379-380.
 413 *Ibid.* at 380-381.
 414 *Ibid.* at 381-383.
 415 *Ibid.* at 384.
 416 *Ibid.*
 417 *Ibid.* at 385.
 418 *Ibid.*
 419 [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249, 75 N.R. 161, 32 C.R.R. 114, 87 C.L.L.C.
 14,022.
 [PSAC, cited to S.C.R.]
 420 S.C. 1980-81-82-83, c. 122.
 421 *Supra*, note 419 at 438-439.
 422 *Ibid.* at 439-440.
 423 *Ibid.* at 442.
 424 *Ibid.*
 425 *Ibid.*

- 426 *Ibid.* at 445.
 427 *Ibid.* at 444.
 428 *Supra*, note 427.
 429 *Ibid.*
 430 *Ibid.* at 446.
 431 *Ibid.* at 446-447.
 432 *Ibid.* at 448.
 433 *Ibid.* at 449.
 434 *Ibid.* at 450.
 435 *Ibid.* at 451.
 436 *Ibid.* at 452-453.
 437 *Ibid.* at 453.
 438 *Ibid.*
 439 *Ibid.* at 454.
 440 *Ibid.*
 441 *Supra*, note 417.
 442 *Supra*, note 433.
 443 *Supra*, note 434.
 444 *Supra*, note 419 at 455.
 445 *Ibid.* at 457.
 446 *Ibid.*
 447 *Ibid.*
 448 *Ibid.* at 458.
 449 [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277, 74 N.R. 321, [1987] 3 W.W.R. 6734, 56
 Sask. R. 277, 87 C.L.L.C. 14,023.
 [Dairyworkers, cited to S.C.R.]
 450 S.S. 1983-84, c. D-11.
 451 *Supra*, note 449 at 466-467.
 452 *Ibid.* at 469.
 453 *Ibid.* at 484-485.
 454 *Ibid.* at 475.
 455 *Ibid.* at 476.
 456 *Ibid.*
 457 *Ibid.*
 458 *Ibid.* at 477.
 459 *Ibid.* at 477-478.
 460 *Ibid.* at 479.
 461 *Ibid.* at 479.
 462 *Ibid.* at 479 and 480.
 463 *Ibid.* at 480.
 464 *Ibid.* at 483.
 465 *Ibid.*
 466 *Ibid.* at 488.
 467 *Ibid.* at 489.
 468 *Ibid.* at 486.
 469 *Ibid.* at 487.
 470 *Ibid.*
 471 *Ibid.*
 472 *Supra*, note 465.
 473 *Ibid.* at 491 and 492.
 474 *Ibid.* at 490-491.
 475 *Ibid.* at 490.
 476 *Ibid.* at 493.
 477 *Ibid.*

- 478 *Ibid.* at 478.
 479 *Ibid.* at 494.
 480 *Ibid.* at 495.
 481 *Ibid.* at 495-496.
 482 *Supra*, note 410.
 483 *Supra*, note 433.
 484 *Supra*, note 430.
 485 *Supra*, note 463.
 486 *Supra*, note 478.
 487 *Supra*, note 448.
 488 *Supra*, note 480.
 489 Forming the majority in this decision is Dickson C.J.C., Lamer and Wilson J.J. Dissenting are McIntyre and Beetz J.J.
 490 [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 94 N.R. 167, 24 Q.A.C. 2, 25 C.P.R. (3d) 417.
 [*Irwin Toy*, cited to D.L.R.]
 491 S.Q. 1978, c.9 (R.S.Q., c. P-40.1)
 492 R.R.Q. 1981, r.1.
 493 Other issues were raised in this appeal as well, including distribution of powers between federal and provincial legislatures, paramountcy, whether the provincial legislation in question was protected by the legislative override provision in s. 33 of the Charter, and whether the legislation violated s.7 of the Charter. The issue of whether commercial expression was included in s.2(b) of the Charter was affirmed in the Court's decision in *Ford v. Quebec (A.G.)* [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 90 N.R. 84, 36 C.R.R. 1. These comments focus exclusively on the freedom of expression and s.1 issues.
 494 *Supra*, note 490 at 605.
 495 *Ibid.*
 496 *Ibid.* at 606.
 497 *Ibid.* at 607.
 498 *Ibid.*
 499 *Ibid.*
 500 *Ibid.*
 501 *Ibid.* at 608.
 502 *Ibid.* at 611.
 503 *Ibid.* at 613.
 504 *Ibid.*
 505 *Ibid.*
 506 *Ibid.*
 507 *Supra*, note 496.
 508 *Supra*, note 490 at 620.
 509 *Ibid.* at 621.
 510 *Ibid.*
 511 *Ibid.* at 623.
 512 *Ibid.*
 513 *Ibid.* at 624.
 514 *Ibid.*
 515 *Supra*, note 290.
 516 *Supra*, note 511.
 517 *Supra*, note 490 at 626.
 518 *Ibid.* at 627.
 519 *Ibid.*
 520 *Ibid.* at 682.
 521 *Ibid.* at 628-629.
 522 *Ibid.* at 629.

- 523 *Ibid.* at 629-630.
- 524 *Ibid.* at 630.
- 525 *Ibid.* at 636.
- 526 *Ibid.*
- 527 *Ibid.* at 637.
- 528 *Supra*, note 526.
- 529 *Supra*, note 336.
- 530 Unreported (27 February 1992) Ottawa 22191 (S.C.C.)
- 531 R.S.C. 1985, c. C-46.
- 532 *Supra*, note 530 at 2-4.
- 533 *Ibid.* at 14-15.
- 534 *Ibid.* at 14.
- 535 The reasons for judgment of Sopinka J. were concurred in by Lamer C.J., La Forest, Cory, McLachlin, Stevenson and Iacobucci JJ.
- 536 *Supra*, note 530 at 17.
- 537 *Ibid.*
- 538 *Ibid.* at 20.
- 539 *Ibid.* at 21.
- 540 *Ibid.* at 22.
- 541 *Ibid.* at 25.
- 542 *Ibid.*
- 543 *Ibid.*
- 544 *Ibid.* at 26-27.
- 545 *Ibid.* at 28.
- 546 *Ibid.* at 28-29.
- 547 *Ibid.*
- 548 *Ibid.* at 30-31.
- 549 *Ibid.* at 31.
- 550 *Ibid.*
- 551 *Ibid.* at 31-32.
- 552 *Ibid.* at 32.
- 553 *Ibid.* at 33.
- 554 *Ibid.*
- 555 *Ibid.* at 35.
- 556 *Ibid.*
- 557 See, for example, the text on page 96.
- 558 *Supra*, note 530 at 36.
- 559 *Ibid.* at 34.
- 560 *Ibid.*
- 561 *Supra*, note 559.
- 562 *Supra*, note 530 at 37.
- 563 *Ibid.* at 40.
- 564 *Ibid.* at 41.
- 565 *Ibid.* at 43.
- 566 *Ibid.* at 47.
- 567 *Ibid.* at 48.
- 568 *Ibid.*
- 569 *Ibid.*
- 570 *Ibid.* at 51.
- 571 *Ibid.* at 50.
- 572 *Supra*, note 569.
- 573 *Supra*, note 530 at 52.
- 574 *Supra*, note 559.
- 575 *Supra*, note 530 at 53.

- 576 *Ibid.* at 54.
 577 *Ibid.* at 55.
 578 See, for example, the arguments concerning expression in *Dolphin Delivery*, *supra*,
 note 322 and *Irwin Toy*, *supra*, note 490.
 579 *Supra*, note 575.
 580 *Supra*, note 228.
 581 *Supra*, note 530 at 58.
 582 *Ibid.*
 583 *Ibid.* at 57.
 584 *Ibid.*
 585 *Ibid.*
 586 *Ibid.* at 62.
 587 *Ibid.*
 588 Reasons for judgment of Justice Gonthier, released concurrently, at 2.
 589 *Supra*, page 108.
 590 *Supra*, note 382 at 9.
 591 *Ibid.* at 10.
 592 *Ibid.* at 11.
 593 *Ibid.*
 594 *Ibid.*
 595 *Ibid.*
 596 *Supra*, note 578.
 597 *Supra*, note 555.
 598 *Supra*, note 182.
 599 [1990] 2 S.C.R. 229, 76 D.L.R. (4th) 545, 118 N.R.1, 45 O.A.C.1, 13 C.H.R.R.
 D/171, 91 C.L.L.C. 17,004. [*McKinney*, cited to S.C.R.] One of the central issues in this
 case was the Charter's applicability to universities. Much of the discussion thus turned on
 whether the University constituted "government" so as to attract a Charter review of its
 mandatory retirement policies pursuant to s.32 of the Charter. Also of significance was
 whether the mandatory retirement policies constituted "law so as to attract review pursuant
 to ss. 15 and 1 of the Charter. For a discussion of the elements of the term "prescribed by
 law" generally, see Weinrib, *supra*, note 215 at 472-478. For the purposes of this paper,
 these comments focus exclusively on the ss. 15 and 1 issues.
- 600 S.O. 1981, c. 53.
 601 *Supra*, note 599 at 256.
 602 *Ibid.* at 278.
 603 *Ibid.* at 279.
 604 *Ibid.* at 280.
 605 *Ibid.*
 606 *Ibid.* at 281.
 607 *Supra*, page 102.
 608 *Supra*, note 606.
 609 *Ibid.*
 610 *Ibid.* at 282.
 611 *Ibid.* at 283.
 612 *Ibid.* at 284.
 613 *Ibid.* at 286.
 614 *Ibid.* at 287.
 615 *Ibid.*
 616 *Ibid.*
 617 *Ibid.* at 288.
 618 *Supra*, notes 181 and 290.
 619 *Supra*, notes 349 and 350.
 620 *Supra*, note 599.

- 621 *Ibid.* at 291.
- 622 *Ibid.* at 292.
- 623 *Ibid.* at 293.
- 624 *Ibid.* at 294.
- 625 *Ibid.*
- 626 *Ibid.* at 294-295.
- 627 *Ibid.* at 299.
- 628 *Ibid.*
- 629 *Ibid.*
- 630 *Ibid.* at 300-301.
- 631 *Ibid.* at 302.
- 632 *Ibid.*
- 633 *Ibid.* at 304.
- 634 *Ibid.* at 306.
- 635 *Ibid.* at 307.
- 636 *Ibid.* at 306.
- 637 *Ibid.* at 312.
- 638 *Ibid.* at 313.
- 639 *Ibid.* at 315.
- 640 *Ibid.* at 316.
- 641 *Ibid.* at 317.
- 642 *Ibid.* at 318.
- 643 *Ibid.*
- 644 *Ibid.* at 389.
- 645 *Ibid.* at 391.
- 646 *Ibid.* at 393.
- 647 *Ibid.*
- 648 *Ibid.* at 400.
- 649 *Ibid.* at 401.
- 650 *Ibid.* at 401-402.
- 651 *Ibid.* at 402.
- 652 *Ibid.* at 403.
- 653 *Ibid.* at 404.
- 654 *Ibid.* at 405.
- 655 *Ibid.* at 413.
- 656 *Ibid.*
- 657 *Ibid.* at 414.
- 658 *Ibid.*
- 659 *Ibid.* at 416.
- 660 *Ibid.*
- 661 *Supra*, note 193.
- 662 *Supra*, note 599.
- 663 *Ibid.* at 423.
- 664 *Ibid.*
- 665 *Ibid.* at 424.
- 666 *Ibid.* at 426.
- 667 *Ibid.* at 427.
- 668 *Ibid.* at 428.
- 669 *Ibid.* at 437.
- 670 *Ibid.* at 429.
- 671 *Ibid.* at 430.
- 672 *Ibid.*
- 673 *Ibid.* at 430-431.
- 674 *Ibid.* at 431.

- 675 *Ibid.* at 432.
 676 *Ibid.* at 437.
 677 *Supra*, note 211.
 678 *Supra*, note 599 at 433.
 679 *Ibid.* at 435.
 680 *Ibid.*
 681 *Ibid.* at 446.
 682 *Ibid.*
 683 *Ibid.*
 684 *Ibid.*
 685 *Ibid.* at 447-448.
 686 *Ibid.* at 448.
 687 76 D.L.R. (4th) 700, 118 N.R. 241, (1990) 52 B.C.L.R. (2d) 1, 13 C.H.R.R. D/337, 2 C.R.R. (2d) 215, sub nom. Vancouver General Hospital v. Stoffman 91 C.L.L.O.C. 17,003, [1991] 1 W.W.R. 577. [Stoffman cited to D.L.R.] Once again, the central issue for the majority is the applicability of the Charter to the hospital. As with McKinney, *supra*, it is held that the Charter does not apply to Vancouver General Hospital, and thus the discussion of s.15 is *obiter*, but clearly of significant interest.
- 688 Regulation 5.04 reads as follows:
 5.04 Retirement: Members of the Staff shall be expected to retire at the end of the appointment year in which they pass their 65th birthday. Members of the staff who wish to defer their retirement may make special application to the board [of trustees, empowered to manage the property and affairs of the hospital]. The board shall request the Medical Advisory Committee for a recommendation in each such case. The Medical Advisory Committee shall, in making its recommendation, consider the report of a personal interview which shall take place between the applicant and the Department Head concerned which shall include a review of the health and continuing performance of the applicant.
- 689 *Supra*, note 687 at 728-729.
 690 See note 688, *supra*.
 691 *Supra*, note 687 at 728.
 692 *Ibid.* at 744.
 693 *Ibid.* at 743.
 694 *Ibid.* at 745
 695 *Ibid.*
 696 *Supra*, note 342.
 697 *Supra*, note 687 at 745-746.
 698 *Ibid.* at 746.
 699 *Ibid.*
 700 *Ibid.* at 747.
 701 *Ibid.*
 702 *Ibid.* at 748.
 703 *Ibid.*
 704 *Ibid.*
 705 *Ibid.*
 706 *Ibid.* at 749.
 707 *Ibid.*
 708 *Ibid.* at 750.
 709 *Ibid.*
 710 *Ibid.*
 711 *Ibid.* at 751.
 712 *Ibid.*

- 713 *Ibid.*
 714 *Ibid.* at 752.
 715 *Ibid.* at 752-753.
 716 *Ibid.* at 715.
 717 *Ibid.* at 716.
 718 *Ibid.*
 719 *Ibid.* at 717.
 720 *Ibid.* at 718.
 721 *Ibid.*
 722 *Ibid.* at 719.
 723 *Ibid.*
 724 *Ibid.*
 725 *Ibid.* at 720.
 726 For example, see pages 89-90, 99-100, 128 and 132, this text.
 727 *Supra*, note 687 at 721.
 728 *Ibid.*
 729 *Ibid.* at 722.
 730 *Ibid.*
 731 *Ibid.* at 723.
 732 *Ibid.* at 755.
 733 *Ibid.* at 756.
 734 *Ibid.*
 735 *Ibid.* at 757.
 736 *Ibid.*
 737 *Ibid.* at 758.
 738 *Ibid.* at 759.
 739 *Ibid.*
 740 *Ibid.*
 741 *Supra*, note 599 at 446-448.
 742 *Supra*, note 687 at 761.
 743 *Ibid.*
 744 *Ibid.* at 762.
 745 [1990] 3 S.C.R. 451, 77 D.L.R. (4th) 55, [1991] 1 W.W.R. 681, 52 B.C.L.R. (2d) 105, 13 C.H.R.R. D/317, 2 C.R.R. (2d) 193, (sub nom. Connell v. University of British Columbia) 91 C.L.L.C. 17,001, 120 N.R. 1 [Harrison, cited to D.L.R.)
 746 S.B.C. 1984, c.22.
 The relevant portions of the Act read as follows:
 1. In This Act
 "age" means an age of 45 years or more and less than 65 years;
 8(1) No person or anyone acting on his behalf shall
 (a) refuse to employ or refuse to continue to employ a person, or
 (b) discriminate against a person with respect to employment or any term or condition of employment, because of the ... age of that person...
 747 As with both McKinney and Stoffman, the case turned on the applicability of the Charter to the University of British Columbia. The fact that in this instance the Lieutenant-Governor appointed the majority of the members to the University's board of governors and that the Minister of Education may require that the University submit reports or other forms of information, did not, in the majority's view, constitute government action so as to render the Charter applicable. Government control or influence upon the core function of the University and particularly upon the mandatory retirement policy and employment contracts was not established by the fact that the University was fiscally responsible to the Government of British Columbia.
 748 *Supra*, note 745 at 73.
 749 *Ibid.* at 77.

- 750 *Ibid.* at 64.
 751 *Ibid.* at 65.
 752 *Ibid.* at 67.
 753 *Ibid.* at 68.
 754 L'Heureux-Dubé J., following her reasons in McKinney, held that the Charter did not apply to the University of British Columbia, and thus did not have to address the issue of whether the University's mandatory retirement policy violated s.15 of the Charter. *Ibid.* at 76-77.
 755 *Supra*, note 745 at 74-75.
 756 [1990] 1 F.C. 321. Appeal to the Federal Court of Appeal dismissed on other grounds, 109 N.R. 300.
 757 *Ibid.*
 758 *Ibid.*
 759 *Ibid.*
 760 *Ibid.* at 325.
 761 *Ibid.*
 762 *Ibid.* at 326.
 763 *Ibid.*
 764 *Ibid.*
 765 *Ibid.* at 327 through 328. Currently, four provinces and one territory expressly include sexual orientation in their human rights legislation as a prohibited ground of discrimination: The Charter of Human Rights and Freedoms of Quebec, R.S.Q. 1987, c-12, s.10; the Manitoba Human Rights Act, S.M. 1987-88, c.45, s.9(2); the Human Rights Act of the Yukon Territory, S.Y. 1987, c.3, s.6; the Nova Scotia Human Rights Act, R.S. 1989, c.214, s.5; and the Ontario Human Rights Code, R.S.O. 1986, c.64, s.19. The court did not cite the Ontario legislation.
 766 Report of the Parliamentary Committee on Equality Rights, October, 1985.
 767 *Ibid.* at 30.
 768 *Supra*, note 756 at 13.
 769 *Ibid.* at 207.
 770 *Ibid.* at 330.
 771 *Ibid.* at 331.
 772 *Ibid.*
 773 (1991), 58 B.C.L.R. (2d) 356.
 774 B.C. Reg. 144/68.
 775 *Supra*, note 773 at 359.
 776 *Ibid.*
 777 *Ibid.*
 778 *Supra*, note 774.
 779 *Supra*, note 773 at 363.
 780 *Ibid.*
 781 *Ibid.* at 364.
 782 *Ibid.*
 783 *Ibid.* at 364-365.
 784 R.S.B.C. 1979, c.255.
 785 *Supra*, note 773 at 367.
 786 *Ibid.* at 370.
 787 *Supra*, note 181 and Janzen v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39, 25 C.C.E.L. 1, 89 C.L.L.C. 17,011, 59 D.L.R. (4th) 352, 10 C.H.R.R. D/6205, 47 C.R.R. 274, 95 N.R. 81, 58 Man. R. (2d) 1.
 788 *Supra*, note 163.
 789 *Supra*, note 773 at 371.
 790 *Ibid.* at 372.
 791 *Ibid.* at 373.

- 792 *Ibid.*
 793 *Ibid.*
 794 *Ibid.* at 373-375.
 795 *Ibid.* at 378.
 796 *Ibid.*
 797 *Ibid.*
 798 *Ibid.* at 381.
 799 *Ibid.* at 382.
 800 *Ibid.* at 383.
 801 *Ibid.*
 802 *Ibid.*
 803 *Ibid.* at 383-384.
 804 *Ibid.* at 385.
 805 *Ibid.* at 384.
 806 *Ibid.* at 384-385.
 807 *Ibid.* at 385.
 808 *Ibid.* at 386.
 809 *Ibid.* at 387.
 810 *Ibid.*
 811 *Ibid.*
 812 *Ibid.* at 388.
 813 *Ibid.* at 389.
 814 *Ibid.* at 391.
 815 *Ibid.*
 816 2 December 1991, Vancouver, T-2425-88, unreported. (Federal Court - Trial
 Division).
 817 R.S.C. 1970, C. 0-6.
 818 *Supra*, note 8163 at 7.
 819 *Supra*, note 119.
 820 *Supra*, note 816 at 9.
 821 *Ibid.* at 10.
 822 *Ibid.*
 823 *Ibid.* at 11.
 824 *Ibid.* at 12.
 825 *Ibid.*
 826 *Ibid.* at 13.
 827 *Ibid.*
 828 *Ibid.*
 829 *Ibid.*
 830 *Ibid.* at 14.
 831 *Ibid.*
 832 *Ibid.*
 833 *Ibid.*
 834 *Ibid.* at 6.
 835 *Supra*, note 792.
 836 *Supra*, note 818.
 837 (1991) 5 O.R. (3d) 245
 838 R.S.C. 1985, c. H-6.
 839 *Supra*, note 837 at 247-248.
 840 *Supra*, note 805.
 841 *Supra*, note 765.
 842 Such discriminatory practices as are set out in ss. 5, 6 and 7 of the Act, *supra*, note
 836.
 843 *Supra*, note 198.

- 844 *Supra*, p.38.
 845 *Supra*, note 186.
 846 *Supra*, note 603.
 847 *Supra*, notes 646 and 665.
 848 *Supra*, note 646.
 849 *Supra*, notes 662 and 665.
 850 *Supra*, note 768.
 851 *Supra*, note 163 at 304 N.R.
 852 *Supra*, note 789.
 853 *Supra*, note 823.
 854 *Supra*, note 765.
 855 *Supra*, note 817.
 856 *Ibid.*, Section 12 of the Act.
 857 *Supra*, note 828.
 858 *Supra*, note 830.
 859 *Supra*, note 831.
 860 *Supra*, note 833.
 861 *Supra*, note 645.
 862 *Supra*, note 730.
 863 *Supra*, note 834.
 864 *Supra*, note 662.
 865 See, generally, commentaries noted at note 39.
 866 The October 24, 1989 edition of the Vancouver Sun newspaper (Vancouver, B.C.) carried an item on p. B7 entitled "God's Judgment Claimed". The article in its entirety read:

The San Francisco earthquake should shake Vancouverites into turning to Jesus Christ and putting an end to abortions, homosexuality and 'liberal sexual attitudes', say some Fraser Valley Christians.

"Every Christian I've talked to says it's God's judgment", John Funk said. He is a member of a group called Concerned Christians that spent thousands of dollars last spring on newspaper ads warning that God would devastate an immoral Vancouver with an earthquake in July.

Similarly, the Vancouver Sun ran a full page ad on November 4, 1989 on p. A9 entitled "Time Is Running Out", concerning the 1990 Gay Games to be held in Vancouver. The ad was sponsored by "Christian Leaders of Greater Vancouver" and stated in part: "We believe that homosexuality and therefore these gay games are contrary to the Judeo-Christian Bible. They symbolize rebellion against God, and will therefore bring disgrace to Vancouver."

Finally, advice columnist Ann Landers devoted two columns to the topic of same-sex marriage in the Vancouver Sun on November 27 and 28, 1989. Readers were invited to express their opinions on the topic. Comments by readers included: "The way you [Ms. Landers] stick up for these queers is disgusting ... I would like to say that San Francisco, which is 50-per-cent gay, is the armpit of America." "We are against legalizing homosexual relationships. It is wrong to encourage these sick people who are killing themselves and infecting others because of their filthy lifestyle." "The notion that members of the same sex should have the rights and privileges of normal couples is outrageous ... Those faggots should go back in the closet where they belong." "You are sure to be swamped with letters from every queer in the country. I hope enough normal people write so that you will get an accurate reading of what decent folks think. Those of us in our right minds find the concept of homosexuals being allowed to marry as just plain nuts." "Why give this special privilege to a segment of society that has given us AIDS?" and: "Homosexuality is against the law of nature, God and Texas. Remember that

commercial, 'It is not nice to fool Mother Nature'? Well, that's what these perverts are trying to do and it doesn't work.

Ms. Landers noted in her column that she had received more than 55,000 responses on this issue, with responses against same-sex marriages outnumbering positive ones two to one. Content of the opinions aside, the number alone speaks volumes about feelings towards homosexual persons generally.

867 *Supra*, note 205.

868 *Supra*, note 201.

869 *Supra*, p.102.

870 *Supra*, pp.152-153.

871 *Supra*, pp.191-192.

872 *Supra*, p.155.

873 *Supra*, pp.79-80.

874 *Supra*, note 811.

875 *Supra*, notes 816 and 756.

876 *Supra*, note 816 at 2-3.

877 *Supra*, note 344.

878 *Supra*, note 725.

879 See, for example, the discussions of the rational connection aspect of the proportionality test in Chief Justice Dickson's dissenting opinion in the *Dairyworkers* case, *supra*, note 463 and accompanying text, the majority opinion in *Irwin Toy*, *supra*, notes 508 through 512 accompanying text, the majority opinions in *McKinney*, *supra*, notes 610 through 612 and note 633, and *Stoffman*, *supra*, note 703 through 706 and accompanying text.

880 In *Butler*, Sopinka J. appears to have imported facets of the minimal impairment test into the rational connection aspect, *supra*, notes 575 and 576 and accompanying text.

881 *Supra*, note 832.

882 *Supra*, note 351.

883 *Supra*, note 348.

884 *Supra*, note 349.

885 *Supra*, notes 352 and 354.

886 *Supra*, notes 415 through 418 and accompanying text

887 *Supra*, note 364.

888 *Supra*, p.92.

889 *Supra*, p.136.

890 *Supra*, pp.154-155.

891 *Supra*, pp.141-143.

892 *Supra*, p.157.

893 *Supra*, note 517.

894 *Supra*, p.114.

895 *Supra*, pp. 128-129 and 133.

896 *Supra*, pp. 149-150.

897 *Supra*, p.129.

898 *Supra*, p.149.

899 *Supra*, notes 649 and 652.

900 *Supra*, p.61.

901 *Supra*, note 316.

902 *Supra*, note 408.

903 *Supra*, note 481.

904 *Supra*, note 581.

905 *Supra*, notes 523 and 584.

906 *Supra*, note 523.

907 *Supra*, note 805.

908 *Supra*, note 659.

909 *Supra*, note 523.

- 910 *Supra*, note 314.
- 911 *Supra*, note 348.
- 912 *Supra*, note 349.
- 913 *Supra*, notes 352 and 354.
- 914 *Supra*, note 185.
- 915 *Supra*, note 193.
- 916 *Supra*, note 194.
- 917 *Supra*, note 196.
- 918 *Supra*, note 197.
- 919 *Supra*, note 198.
- 920 *Supra*, note 199.
- 921 *Supra*, note 200.
- 922 *Supra*, note 645.
- 923 *Supra*, note 665.
- 924 *Supra*, note 730.
- 925 *Supra*, note 799.
- 926 *Supra*, note 523.
- 927 *Supra*, note 314.
- 928 *Supra*, note 351.
- 929 *Supra*, note 277.
- 930 *Supra*, note 671 and p.157.
- 931 *Supra*, note 278.
- 932 *Supra*, note 279.
- 933 *Supra*, note 17.

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