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**Watershed or Fragile Patchwork?
An Evaluation of the Supreme Court's Approach
to Section 15(1) of the Charter**

by

Tina Asdrubolini, B.A. Honours

**A thesis submitted to the
Faculty of Graduate Studies and Research in partial fulfilment
of the requirements for the degree of Master of Arts**

Department of Law

**Carleton University
Ottawa, Ontario
January 2001**

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**Watershed or Fragile Patchwork? An Evaluation of
The Supreme Court's Approach to
Section 15(1) of the Charter**

Submitted by

Tina Asdrubolini, B.A. Hons.

**in partial fulfilment of the requirements for
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Thesis Supervisor

Chair, Department of Law

**Carleton University
January 2001**

Abstract

This thesis examines the decisions of the Supreme Court of Canada in which section 15(1) of the *Canadian Charter of Rights and Freedoms* is the basis of the case. Emphasis is placed on *Law v. Canada*, a recent decision that sets out what the Court considers to be the “proper approach” to the interpretation of the Charter’s equality provision. To determine whether or not the Court is building an equality jurisprudence capable of addressing the systemic conditions of inequality experienced by women and other oppressed groups, the thesis assesses the analytical framework used by the Court in terms of whether it adopts a contextual, inequality-based and intersectional approach. It argues that the unanimous approach articulated in *Law* is a fragile patchwork of previous articulations. Although it contains elements of a contextual, inequality and intersectional analysis, this approach is likely to break down as the Court considers more complex cases of inequality. To this extent, the ameliorative potential of the approach, although it exists, is limited and uncertain.

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Chapter 1 - Introduction

(In) Equality in Context: Framing the Debate

Quite often these days I find myself engaging in discussions with colleagues, family and friends on the issue of gender equality and, in particular, whether women have made progress in their attempts to gain social and economic equality. Surprisingly, at least to me, in the majority of these discussions I am among the few who believe that, although women have made modest gains in the workplace and on many other fronts, they still face considerable discrimination and barriers in many facets of their lives (e.g., discrimination in reproduction, workplace, domestic work etc.). In fact, on several occasions, I have been confronted by individuals who believe that women are receiving preferential or special treatment at the expense of white, heterosexual men, who are now, in their view, the targets of “reverse discrimination”.

After a few of these discussions, I have started to question whether my beliefs are somewhat outdated. For example, in examining my own experiences, do I have any grounds to claim that I have been treated unequally? In other words, has my ‘status’ as a woman prevented me from achieving my goals or denied me any benefits provided to other individuals or groups? Although, to my knowledge, I can respond negatively to these questions,¹ unfortunately, it takes only a few moments to remember why I believe there are

¹My response to these questions is a *qualified* “no”. To my knowledge, I have not suffered any intentional discrimination or economic loss as a result of my gender, and I may not be aware of unintentional or adverse effects discrimination. However, the facts that I fear for my physical safety when walking alone at night, and that I am struggling with the issue of how to balance my career with future childcare responsibilities (i.e., the career opportunities I, as opposed to my partner, may have to miss as a result of child rearing), are, in my opinion, indications that I am negatively affected by my gender.

still many inequalities for women, as a group, to overcome.² In this respect, an abundance of feminist literature has just begun to unravel and document the pervasive inequalities suffered and being suffered by women, both individually and collectively, inequalities and discrimination that are experienced differently depending on the intersections of race, culture, class, age, sexuality, disability and other power relations.³

1.1. Research Objectives:

Indeed, the issue of equality has, for centuries, provoked considerable debate. When I first started my research on this subject, I was quickly overwhelmed by the many different approaches to, and theories of, equality proffered by judges, legal scholars and other academics. I was particularly captivated by the diversity of views found within feminist literature on an issue so central to women's interests and struggles -- gender inequality. In addition to extensive dialogue on the multiple meanings, theories and/or approaches to and of equality, feminist legal scholarship also engages in extensive debates about whether the law can be used as part of a strategy for pursuing social and economic change for women.

²The experiences of women in relation to child care and maternity benefits are a telling example of the equality issues still facing women. In her examination of the maternal/parental benefits provided in provincial employment legislation, Nitya Iyer argues that:

[b]y presenting who stays home as a simple matter of individual choice regardless of gender, a gender-neutral leave provision implies that if more women than men take it, this phenomenon merely reflects 'private' (gender based) preference, not a 'public' (gender discrimination) problem... By assuming a non-existent sex equality, the provision supports the perception that any continued sexual inequality in the market is not an issue requiring public response; it is merely a function of legitimate 'private choice'.

"Some Mothers are Better than Others: A Re-examination of Maternity Benefits", in Susan Boyd, ed., *Challenging the Public/Private: Feminism and Social Legal Policy* (Toronto: University of Toronto Press, 1997), 168 at 184.

³For a list of the extensive Canadian legal literature on these issues, see the section on Intersecting Oppression in Josée Bouchard, Susan B. Boyd and Elizabeth A. Sheehy, "Canadian Feminist Literature on Law: An Annotated Bibliography," *Canadian Journal of Women and the Law*, 11 (1999), 1 at 295-351.

In Canada, the use of section 15(1) of the *Canadian Charter of Rights and Freedoms*⁴ by oppressed⁵ groups has further fueled this debate and has been a catalyst for exploring the broader question of the utility of law as an ameliorative tool in more detail.

The purpose of this paper is to contribute to these discussions by assessing one specific, yet important, measure of the ameliorative potential of the Charter's equality guarantee -- the Supreme Court of Canada's approach to resolving section 15 cases. I recognize that it is not possible to reach any conclusions about whether equality rights litigation is a viable mechanism for effecting change by examining the outcome in any one case or even a series of cases.⁶ Nonetheless, it is possible to gain some insights about the potential to secure change through section 15 by assessing a feature that is influential in the resolution of cases. In my view, the approach employed by the top court in the country to interpret and analyze claims invoking section 15 of the Charter sets the parameters around

⁴Section 15(1) [hereinafter, "section 15"] of the *Canadian Charter of Rights and Freedoms* states: "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter, "the Charter"].

⁵A variety of terms are used interchangeably in legal literature to describe groups who seek the protection of the Charter guarantee of equality (i.e., 'disempowered', 'subordinated', 'oppressed', 'marginalized', 'subjugated' or 'disadvantaged'). Since the Supreme Court of Canada's decision in *Andrews v. The Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter, *Andrews*], the use of the term "disadvantaged" has been prevalent in legal discourse. However, this term has been criticized for reinforcing the privilege of dominant groups and conveying the idea that these disadvantaged groups are inferior or helpless. For an elaboration on this critique, refer to Patricia Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah," *Canadian Journal of Women and Law*, 2 (1986), 159. I use the term "oppressed" in order to, as Colleen Sheppard maintains, shift the source of the problem to the dominant groups rather than implicating the groups in question. Colleen Sheppard, "The 'I' in the 'It': Reflections on a Feminist Approach to Constitutional Theory," in Richard F. Devlin, ed., *Feminist Legal Theory* (Toronto: Emond Montgomery, 1991), 81 at 87.

⁶Mary Jane Mossman, for example, argues that an assessment of Charter equality litigation as a strategy for change must take a longer and broader view than the "win/lose" result of a single case. "Feminism and the Law: Challenges and Choices," *Canadian Journal of Women and the Law*, 10 (1998), 1 at 13.

how equality issues are framed and how decisions are reached and, for this reason, is one important indicator of the Charter's ameliorative potential.⁷

By approach, I do not just mean whether the Court employs a two-step or three-pronged inquiry into an equality claim. I tend to agree with feminist and Charter scholars who are of the view that a mechanical or formulaic approach to equality denies the complexity of inequality.⁸ I use the term "approach" more broadly to encompass the interpretative lens by which members of the Court view inequality. On this point, the general approach is very much informed by the purpose of section 15 of the Charter.⁹ From my perspective, one which is largely informed by the writings of feminist scholars and, in particular, the work of the Women's Legal Education and Action Fund,¹⁰ the objective of section 15 of the Charter is to eradicate the substantive conditions of inequality experienced

⁷I recognize that the judicial approach is not the sole factor responsible for the outcomes of cases. Other factors are obviously important to what decides a case, including, the composition of the court, the arguments of the litigants, and as Amy Bartholomew argues, "the social, economic, political and cultural assumptions, arguments and statuses that actors bring to the court . . . and their relationship to interest groups, social movements, and the like. . . ." "Achieving a Place for Women in a Man's World: Or, Feminism with No Class," *Canadian Journal of Women and the Law*, 6 (1993), 465 at 474.

⁸See, M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?," *National Journal of Constitutional Law*, 7 (1997), 363 at 374; and Diana Majury, "Strategizing in Equality," in Martha A. Fineman and Nancy S. Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991), 320 at 331.

⁹Assumptions and expectations on the meaning and purpose of equality will affect any assessment of the judicial approach employed by the courts. Not surprisingly, expectations in this regard are as diverse as the various individuals and groups who seek Charter protection. For a description of the various approaches of legal scholars to the Charter equality provisions, refer to Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada," *Canadian Journal of Women and the Law*, 4 (1991), 407 at 409-415.

¹⁰The Women's Legal Education and Action Fund, founded in 1985, is a not for profit national feminist litigation and legal education organization that contributes to the goal of advancing women's equality in Canada [hereinafter, LEAF].

by women and other oppressed groups that are subject to systemic discrimination. Rather than focus on decontextualized and abstract individual experiences, the provision should be used to reject laws and practices that reinforce the disempowerment of women and other oppressed groups.¹¹

For the purpose of my assessment, I review decisions of the Supreme Court of Canada involving direct equality challenges; that is, those Charter cases in which section 15 is the basis of the case. The recent decision in *Law v. Canada*,¹² sets out, on a unanimous basis, what the Court considers to be the “proper approach” to analyzing a section 15 equality claim and, for this reason, will be the primary subject of my analysis. As my interests relate to how judges conceptualize equality and inequality, my examination of *Law* and cases decided prior to, and post, *Law* will focus on the Court’s interpretation of section 15. Section 1 of the Charter,¹³ the justificatory analysis, will be discussed only to the extent that the Court has made pronouncements on the relationship between section 15 and section 1.¹⁴

¹¹See, LEAF, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Canada: Emond Montgomery Publications Ltd., 1996), xix.

¹²[1999] 1 S.C.R. 497 [hereinafter, *Law*].

¹³Section 1 of the Charter reads as follows, “[t]he 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”. *Supra* note 4.

¹⁴Examining section 15 in isolation from section 1 of the Charter is somewhat of a false separation, as a meaningful approach to section 15 is of little importance if claims of substantive inequality can be justified under the reasonable limits clause of the Charter. However, an in-depth analysis of the Court’s interpretation of section 1 would be a thesis onto itself and is beyond the scope of this paper.

1.2. Organization of Work:

Chapter two provides a brief excursion into the terrain of feminism and the law, giving an overview of some of the limitations of using the law as a vehicle to remedy unequal social relations. The chapter goes on to explore how feminists can transform these insights into strategies or possibilities for change that might respond to, or mitigate, the formidable perils associated with trying to use the equality provision of the Charter as a vehicle to remedy unequal social relations. It concludes by setting out the feminist criteria, relating to contextualization and the recognition of inequality and intersectionality, that will form part of the backdrop against which I will assess the judicial approaches to the legal guarantee to equality.

Chapter three provides an overview of the various interpretations that have been articulated by the Supreme Court since its first decision on section 15(1) of the Charter in *Andrews*.¹⁵ The decisions of the Supreme Court from 1989 to 1998 have helped shape the Court's analysis in *Law*, and for this reason, provide an important context from which to assess whether the approach adopted in *Law* is capable of responding to the inequalities faced by women and other oppressed groups. Based on a review of literature by feminist and Charter scholars, the chapter highlights key advancements in the Court's analysis of section 15(1), as well as the decisions that demonstrate competing visions among judges of the country's top court about the meaning of equality and the role of the courts with respect to remedying patterns of pervasive and systemic discrimination.

Chapter four describes the analytical framework for assessing equality claims

¹⁵*Supra* note 5.

articulated by the Supreme Court in *Law* and assesses this framework in terms of whether it embraces contextualization and recognizes inequality and the need for intersectionality. It also reflects upon where *Law* stands in relation to the approaches taken by the Court to section 15(1) in its previous jurisprudence. The second part of the chapter critically evaluates how the approach adopted in *Law* is applied in practice in *Corbiere v. Canada*,¹⁶ which is a case decided shortly after *Law* that expressly deals with intersectional analysis.

Chapter five provides my concluding reflections, based on the review of the approach set out in *Law*, as to whether or not the Court is building an equality jurisprudence capable of addressing the pervasive and systemic conditions of inequality experienced by women and other oppressed groups.

¹⁶[1999] 2. S.C.R. 203 [hereinafter, *Corbiere*].

Chapter 2

Feminism and Equality

This chapter sets out criteria, derived from feminist literature, that will be used to assess the Supreme Court of Canada's approach to resolving equality challenges under section 15(1) of the Charter. These criteria are based on what some feminists have identified as key components of an equality analysis that are necessary if the Charter is to have any possibility of effecting positive change. To better understand the importance of incorporating these components into an approach to equality, I first sketch out briefly a number of feminist critiques of the law and relate these critiques to the equality provision of the Charter.

2.1. Feminism and the Law:

In the words of Mary Jane Mossman "[t]o put it bluntly, the relationship between feminism and the law is a paradox".¹⁷ In a similar vein, with the phrase "running hard to stand still", Carol Smart captures the experience of many feminists who have attempted to advance social and economic change through the legal arena.¹⁸ These are but two women, of many, who have contributed to a significant body of literature that explores the relationship between feminism and law¹⁹ and, more specifically, why it is that, while it is

¹⁷Mary Jane Mossman, *supra* note 6 at 2.

¹⁸Carol Smart, "Feminism and Law: Some Problems of Analysis and Strategy," *International Journal of the Sociology of Law*, 14 (1986), 109 at 116.

¹⁹Although I refer to "feminist critiques of the law" throughout this chapter, I recognize that there is tremendous diversity in the work of feminist theorists and their critiques of the law. To quote Brettel Dawson, "[t]here are external perspectives on what law is and how it works just as there are a range of

capable of responding to feminist analyses and reform, the law simultaneously demonstrates considerable resistance to feminist interventions or analyses. The paradoxical relationship between feminism and the law is indeed complex.²⁰ While it is not necessary for my purposes to engage deeply with these complexities, which are widely discussed in feminist legal literature,²¹ this section outlines a number of general feminist critiques of the law and relates these critiques to some of the more specific problems that are associated with the equality provision of the Charter.

2.1.1. Feminist Critiques of the Law:

Undoubtedly, an overarching obstacle identified by feminists in using the law as a strategy to facilitate change is that the battle is being waged on a terrain that is notoriously unequal.²² Feminists have exposed how the legal terrain is “gendered” or “patriarchal”,²³

expressions of what feminisms are and how they engage critique of a field such as law and legal regulation.” “Mapping Law: An Introduction to Core Concepts in Legal Studies and Women’s Studies,” in T. Brettel Dawson, ed., *Women, Law and Social Change: Core Readings and Current Issues* (2nd Edition) (North York: Captus Press Inc., 1993), 146 at 155.

²⁰Mary Jane Mossman, *supra* note 6, explores some aspects of the paradox that exists between feminism and the law through an analysis of three Supreme Court of Canada decisions, namely: *Bliss v. Attorney-General of Canada*, [1979] 1 S.C.R. 183 [hereinafter, *Bliss*], *Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219, and *Symes v. Canada* [1993] 4 S.C.R. 695 [hereinafter, *Symes*].

²¹For a comprehensive annotated bibliography of Canadian feminist legal scholarship developed by women from 1988-1998, please refer to Josée Bouchard et al., *supra* note 3.

²²The idea that legal terrain is unequal is explored as part of the critique of rights advanced by feminists and critical legal studies scholars. For an elaboration of this critique, see Amy Bartholomew and Alan Hunt, “What’s Wrong with Rights,” *Journal of Law and Inequality*, 9 (1990), 1.

²³It is beyond the scope of this paper to discuss the notion of patriarchy and how it has evolved in feminist discourse. Dawn Currie explains two themes of patriarchy that are dominant in feminist theories of law, namely: “law as patriarchal ideals” and “law as patriarchal relations”. For an elaboration on these themes, refer to “Feminist Encounters with Postmodernism: Exploring the Impasses of Debates on Patriarchy and Law,” *Canadian Journal of Women and the Law*, 5 (1992), 63.

how its basic assumptions and concepts are premised on male norms and biases, often to the detriment of women. Carol Smart, among many others, cautions women about using the law, citing its likeness to “masculine culture” and the manner in which it disqualifies women’s knowledge and experiences as reasons to tread carefully.²⁴ Similarly, the law’s use of exclusionary language,²⁵ and its tendencies to reinforce and reproduce the status quo in gendered social relations are also cited as impediments to feminist legal strategies.²⁶ The use of precedent in the common law tradition generally, and more specifically judicial choice in the application of precedents, is an example of the law’s propensity to reinforce the status quo. Mary Jane Mossman, in her critiques of legal method, explores how in the process of choosing earlier cases and deciding whether they are in fact binding precedents, judges are able to make choices about the aspects of cases which are ‘relevant’ or ‘similar’. Arguably, these choices are normative rather than neutral, and gendered rather than impartial.²⁷ In this way, the law sustains and reflects the status quo and tends to resist progress and new theoretical understandings.²⁸

Another critique advanced by feminists is the idea that the law does not embrace

²⁴Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989), 2.

²⁵The perils associated with legal language have been the subject of feminist study for quite some time. For some discussion on language see, Deborah Cameron, *Feminism and Linguistic Theory*, (2nd ed.) (New York: St Martin’s Press, 1992); Karen Busby, “The Maleness of Legal Language,” *Manitoba Law Journal*, 18 (1989), 191; Lucinda Finley, “Breaking Women’s Silences in Law: What Language Can We Use? The Dilemma of the Gendered Nature of Legal Reasoning,” *Notre Dame Law Review*, 64 (1989), 886.

²⁶Mary Jane Mossman, *supra* note 6 at 11.

²⁷Mary Jane Mossman, “Feminism and Legal Method: The Difference it Makes,” *Australian Journal of Law and Society*, 3 (1986), 30 at 45.

²⁸*Ibid.*

complexity or contingency with ease. Individuals who use the legal system are forced to fit their version of events and their diverse experiences into narrowly defined legal terms and categories. These categories are particularly problematic for women and other oppressed groups since, historically, they have had no role in the creation of the categories nor in their definition. As Regina Graycar explains, the law's reliance on categories, its process of relegating problems into categories that have been and continue to be "fashioned by men, about men, and constructed by reference to men's experiences", is a key limitation to women employing the law.²⁹ Lucinda Finley cites numerous illustrations of how the law requires women to "fit" their experiences of oppression into existing legal categories based on male norms, and how this "fit" problem permeates the law.³⁰ For example, women are asked to "fit" their experiences of living in a world of violent pornography into obscenity doctrine that has historically been based on morality; to "fit" the difference between a wanted and an unwanted pregnancy into the rhetoric of privacy and choice; and to "fit" repressed memories of assault within the narrow temporal requirements of statutes of limitations law.³¹ These are examples, among many others, that demonstrate how the law requires women's claims to "fit" into legal categories based on male norms, and their experiences to be de-contextualized in order to be presented in the legal arena.³²

²⁹Regina Graycar, "Legal Categories and Women's Work: Explorations For A Cross-Doctrinal Feminist Jurisprudence," *Canadian Journal of Women and the Law*, 7 (1994), 34 at 36.

³⁰Lucinda Finley, *supra* note 25 at 904.

³¹*Ibid.*

³²Providing benefits to pregnant women as part of a general scheme to provide compensation for workers who are temporarily disabled is also cited as an example of the "fit" problem. See, Mossman, *supra* note 6 at 9; and Diana Majury, *supra* note 8.

To conclude this brief overview, a quote by Lucinda Finley is appropriate as it quite clearly describes what the law commands of those who employ it, and hence captures some of its key limitations:

Legal language commands: abstract a situation from historical, social, and political context; be “objective” and avoid the lens of nonmale experience; invoke universal principles such as “equality” and “free choice;” speak with the voice of dispassionate reason . . . avoid the complexity of varying, interacting perspectives and overlapping multi-textured explanations; and most of all, tell it and see it “like a man” – put it in terms that relate to men and to which men can relate.³³

A discussion of how these general limitations of the law are applicable to section 15(1) of the Charter is presented in the next section.

2.1.2. Critiques of Law in Relation to Section 15(1) of the Charter:

The abstractness of law and its partial and biased perspective permeate all facets of law; and anti-discrimination doctrine³⁴ is by no means an exception. In fact, a common critique of the Charter’s equality guarantee is the abstractness inherent in the concept of equality itself. In the words of Madam Justice L’Heureux-Dubé, the concept of equality has had “a long and not-so-glorious history”.³⁵ During the days of Aristotle, equality was conceptualized in terms of proportionality. It has evolved through history from being about “egalitarianism”, to being about “a common good” and, more recently, to being about

³³*Supra* note 25 at 905.

³⁴The terms “anti-discrimination” doctrine, law or legislation are used interchangeably in this chapter to refer to both the rights in section 15 of the Charter and the rights in human rights legislation.

³⁵The Honourable Claire L’Heureux-Dubé, “The Search for Equality: A Human Rights Issue,” *Queen’s Law Journal*, 25 (2000), 401 at 403.

ensuring “human dignity and respect”.³⁶ The concept of equality has, historically, been abstracted from the experiences of people, which limits its potential as an ameliorative tool because the primary focus is on the meaning of equality rather than on how to “operationalize it”.³⁷

The law’s resistance to complexity and contingency and its adherence to categorical thought is nowhere more prevalent than in anti-discrimination law. In fact, increasingly, one of the most criticized aspects of section 15(1) of the Charter, from the perspective of feminists and critical legal theorists, is its reliance on the use of categories; that is, on articulated and specific “grounds” of discrimination. I will elaborate on two critiques relating to the use of categories that are articulated in feminist literature. The first is the neutrality attached to the grounds set out in anti-discrimination legislation. As Diana Majury points out, a “neutral” approach to grounds of discrimination does not distinguish between the dominant and subordinate within the category and, as a result, ignores the histories of systemic discrimination and inequality that frame current practices.³⁸ The second problem identified by feminist writers in Canada and the United States is that prohibited grounds of discrimination have been read restrictively to exclude claimants who experience discrimination on more than one enumerated ground, as well as claimants who are not seen

³⁶*Ibid.* at 403-405.

³⁷Radha Jhappan, “The Equality Pit or the Rehabilitation of Justice,” *Canadian Journal of Women and the Law*, 10 (1998), 60 at 68.

³⁸Diana Majury, “Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context,” *Canadian Journal of Women and the Law*, 7 (1994), 286 at 299.

to belong to the group whom the ground was meant to protect.³⁹

In Canada, Nitya Iyer is well known for her critiques of the categorical approach to equality found in both human rights and Charter cases.⁴⁰ Nitya Iyer argues that a mechanical approach to equality, which focuses on categories of discrimination, obscures the complexity of social identity. Through case analysis, Iyer demonstrates how individuals who are discriminated against in complex ways fail in the courts if their claims do not correspond to the dominant group's narrow understanding of the category grounding the claim of unequal treatment.⁴¹ In the case of women of colour, which is the primary focus of her analyses, Nitya Iyer shows that their experiences of inequality and discrimination disappear in law unless they can present themselves as 'similar' to or 'different' from Black men or White women.⁴² This is because anti-discrimination law is structured in favor of categorization and ignores intersecting disadvantage.

The inability of anti-discrimination law to address intersecting axes of discrimination has been one of the catalysts for the body of work developed, in large part, by women of

³⁹See, Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Law Forum*, (1989), 139; Nitya Duclos (now Iyer), "Disappearing Women: Racial Minority Women in Human Rights Cases," *Canadian Journal of Women and the Law*, 6 (1992), 25; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," *Queens Law Journal*, 19 (1993), 179; Mary Eaton, "Patently Confused: Complex Inequality and *Canada v. Mossop*," *Review of Constitutional Studies*, 1 (1994), 203.

⁴⁰*Ibid.*

⁴¹In her 1992 analysis, Nitya Iyer examines race and sex discrimination cases reported in the Canadian Human Rights Reporter from 1980 through 1989. Her 1993 work critiques the decisions in *Canada (Attorney-General) v. Mossop* [1993] 1 S.C.R. 554 [hereinafter, *Mossop*], and *Symes v. Minister of National Revenue* [1991] 3 F.C. 507. *Ibid.*

⁴²Nitya Iyer (1992), *ibid.*, at 40-41; Nitya Iyer (1993), *ibid.*, at 192-193.

colour regarding essentialism.⁴³ Although there are differing definitions, essentialism in feminist theory can be very broadly understood to mean that women possess an intrinsic “feminine nature”.⁴⁴ Trina Grillo describes essentialism as:

the notion that there is a single woman’s, or Black person’s, or any other group’s, experience that can be described independently from other aspects of the person – that there is an “essence” to that experience. An essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.⁴⁵

In the context of anti-discrimination law, essentialist critiques explore how the structure of law is unable to deal with the complexity of what unites and divides claimants.⁴⁶ This critique was touched upon earlier in the discussion of the ‘fit’ problem in using the law. In relation to section 15(1) of the Charter, claimants are forced to articulate a claim of unequal treatment based on a falsely universalist conception of identity (e.g., sex) that, in effect, decontextualizes the claimants from other aspects of their identity (e.g., race, age,

⁴³See Nitya Iyer (1993), *supra* note 39; Archana Parashar, “Essentialism or Pluralism: The Future of Legal Feminism,” *Canadian Journal of Women and the Law*, 6 (1993), 328; Sherene Razack, “Beyond Universal Women: Reflections on Theorizing Differences Among Women,” *University of New Brunswick Law Review*, 45 (1996), 209; Sherene Razack, *Canadian Feminism and the Law* (Toronto: Second Story Press, 1991). The efforts of Gay and Lesbian groups to have the category of sexual orientation listed as a prohibited ground of discrimination in anti-discrimination legislation also sheds light on the essentialist nature of categorical thought and how some claimants have slipped through the cracks created by these narrow legal categories. See, Mary Eaton, *supra* note 39; Jody Freeman, “Defining Family in Mossop v. DDS: the Challenge of anti-essentialism and interactive discrimination for human rights litigation,” *University of Toronto Law Review*, 44 (1994), 417; Diana Majury, *supra* note 38; Carl Stychin, “Essential Rights and Contested Identities: Sexual Orientation and Equality Jurisprudence in Canada,” *Canadian Journal of Law and Jurisprudence*, 8 (1995), 49.

⁴⁴Archana Parashar, *ibid.* at 329.

⁴⁵Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House,” *Berkeley Women’s Law Journal*, 10 (1995), 16 at 19.

⁴⁶Amy Bartholomew, *supra* note 7 at 481.

etc.). Assumptions regarding the homogeneity within grounds of discrimination are highly problematic because inequalities are experienced differently depending on the intersections of race, culture, class, age, sexuality, disability and other power relations. By failing to comprehend complex social identities, anti-discrimination law cannot accurately describe relationships of inequality, which, as Nitya Iyer argues, “is a precondition to both redressing particular rights violations and for succeeding with the larger project of social reform”.⁴⁷

Essentialism is not only a problem in law, but in feminist theory as well. As Sherene Razack maintains, an ongoing challenge facing feminists is to recognize in their equality theories that there is no one stable core that can be called a woman’s experience and that individuals are socially constituted in different and unequal relations to one another.⁴⁸ In this respect, feminists are facing the challenge, in developing their legal strategies for change, of trying to overcome the “maleness” of the law, while, at the same time, not replacing it with a focus based on a universal and abstracted woman’s experience. An important question that feminism is struggling with is whether it is possible to retain the analytical category of ‘woman’ without rendering invisible the plurality and diversity of the experiences of women. In other words, is it possible to avoid essentialism and employ the concept of gender-based rights?⁴⁹ I tend to agree with feminists who are of the view that it is necessary to employ gender-based rights, strategically, as a countervailing force to the patriarchal nature of legal

⁴⁷Nitya Iyer (1993), *supra* note 39 at 181.

⁴⁸Sherene Razack (1996), *supra* note 43 at 210.

⁴⁹For a discussion of this matter, please refer to Marie-Claire Belleau, “Feminism Multiplied or Feminisms’ Diversity,” *University of New Brunswick Law Journal*, 45 (1996), 249; and Archana Parashar, *supra* note 43.

discourse.⁵⁰ Anna Pellatt argues that category of gender is necessary “to overcome deeply ingrained misconceptions of women and the nature of gender oppression”.⁵¹ In this respect, although gender is by no means the sole source of oppression for women, it is nonetheless a very real source of oppression and therefore can not, nor should not, be disregarded. However, in doing so, we must, as Nitya Iyer suggests, be “respectful of and attentive to differences among women”.⁵² Feminist strategies, as far as possible, must honour the complexity and intersectionality of identities by avoiding attributing essence to “woman”.⁵³ This challenge is discussed in more detail in the following section.

⁵⁰See, Michelle Boivin, “The Category of “Woman/Women” In Discrimination Based on Sex,” *Canadian Journal of Law and Sociology*, 14 (Fall 1999), 203 at 240; Anna S. Pellatt, “Equality Rights Litigation and Social Transformation: A Consideration of the Women’s Legal Education and Action Fund’s Intervention in *Vriend v. R.*,” *Canadian Journal of Women and the Law*, 12 (2000), 117 at 134.

⁵¹*Ibid.* at 135.

⁵²Nitya Iyer (1997), *supra* note 2 at 170.

⁵³The approach to equality of LEAF is an example of feminists’ struggles in this regard. In its initial approach to equality, LEAF has been accused of claiming to speak the “Chartered” voice of Canadian feminism. See, Lise Gotell, “*Litigating Feminist ‘Truth’: An Antifoundational Critique*,” *Social and Legal Studies*, 4 (1995), 99; and Sherene Razack, *supra* note 43. However, over the years LEAF has grown into a better and fuller understanding of its own initial position by developing a contextualized and inequality-based approach to Charter claims and by embracing intersectional analysis. In its recent interventions, LEAF has criticized the categorical and essentialist approach to equality employed by the courts in interpreting section 15 of the Charter and acknowledged that women who are discriminated against on the basis of race, class, sexual orientation or other factors relating to their unequal status, experience inequality differently and in various contexts. LEAF, *supra* note 11 at xxi.

2.2. Essential Components of an Equality Analysis:

Having outlined feminist critiques relating to the gendered nature of the law, its abstractness and its reliance on categories,⁵⁴ it is abundantly clear that the law is not the most likely arena within which to effect fundamental social change. Nonetheless, I believe it should not be abandoned as an arena for struggle as feminists have also recognized that the law is not a monolithic site and there is room to pry away at dominant interests, hence making law a potential force for change, albeit slow and incremental change.⁵⁵ The question arises as to if and how we might transform the critiques and insights of feminist scholars into strategies to respond to, or lesson, the serious risks associated with the invocation of law as a tool for social change.

In the context of assessing the judicial approach to section 15(1), which is the focus of this paper, drawing on the work of feminist legal scholars is again quite useful, particularly in terms of understanding the kind of analyses necessary if the equality provision is to have any potential to effect positive change. The following section discusses three inter-related criteria or essential components of an equality analysis, derived from feminist scholarship, that will be used to assess the approaches to equality articulated by the Supreme Court of Canada, namely: contextualization, recognition of inequality and the recognition of

⁵⁴There are additional concerns about using litigation as a means to effect progressive social change to which I have not referred. Some additional problems are that employing the law drains women's financial resources and fosters the belief that change is possible, even though existing social and political structures remain intact, therefore precluding systemic change. For an elaboration on these and other critiques see, LEAF, *ibid.* at xxiv.

⁵⁵I found the work of Anna S. Pellatt, *ibid.*, quite helpful in explaining why the law should not be abandoned as a vehicle for social change. The cumulation of writings in Brettel T. Dawson's (ed.) *Women, Law and Social Change: Core Readings and Current Issues* (2nd Edition), *supra* note 19, were also helpful in this regard.

intersectionality. On contextualization and recognition of inequality, I rely predominantly on the work of Diana Majury who has succinctly synthesized feminist scholarship in this area.⁵⁶ Although, it can be argued that intersectional analysis is part of a contextualized approach to equality, I believe it warrants its own description as a means to challenge essentialism and the problems it gives rise to.

As many feminists will point out, the feminist method of contextualization is an essential feature of an equality analysis insofar as it grounds an understanding of equality in material reality.⁵⁷ Employing a contextual approach helps to give meaning to an equality provision in the 'context' (e.g., historical and current conditions) of the particular instance of discrimination in which it is raised. Diana Majury argues that this is an important point since inequality and discrimination are based on the experiences of "very real and damaged people".⁵⁸ Accordingly, if courts can begin to use substantive and concrete examples of inequality and discrimination experienced in the lives of people, from the general to the specific and from the historical to the economic, legal and social, they will be better able to move beyond the abstractness associated with the concept of equality. The method of contextualization is viewed by feminists as a way to demystify traditional abstract interpretations and formal applications of equality provisions and is therefore an essential component to an equality analysis.⁵⁹ It is a method that if employed by the courts will assist

⁵⁶Diana Majury, *supra* note 9 at 415-420.

⁵⁷*Ibid.* at 416.

⁵⁸*Ibid.* at 417.

⁵⁹*Ibid.* at 416.

the courts to understand conditions of inequality, which as discussed earlier is a precondition for succeeding with the larger project of social reform.

A second approach adopted by feminists in analyzing equality claims is what has been coined the inequality-based approach. This approach stems from the importance of recognizing inequality in society, both “as a part of the context of a claim and as a distinct perspective or starting point”.⁶⁰ It requires members of the judiciary to begin their case analysis from an understanding of the underlying inequalities at issue. This approach is co-dependant on the method of contextualization, insofar as the latter method is used to assess the substantive context within which a claim is assessed, while the inequality-based approach is the tool used to analyse the particular content of the claim.⁶¹ An equality-based approach is a key component of an equality analysis because it recognizes the historical context upon which discriminatory practices and inequalities are based. In this way, the recognition of inequality places focus on the systemic and pervasive nature of discrimination rather than on abstract individual comparisons typical in formal equality analysis. By acknowledging the existence of power relations between subordinate and dominant groups, the recognition of inequality also challenges the application of neutral grounds of discrimination, which, as described earlier, envisions the parties in assumed positions of equality.⁶² For a number of feminists, the approach also helps to refocus the equality analysis toward what feminists are really concerned with -- inequality.

⁶⁰*Ibid.* at 418

⁶¹*Ibid.* at 419.

⁶²*Ibid.* at 420.

A third key component of an equality analysis, which is increasingly emerging from feminist legal literature, in large part due to the debates over the interaction of race and gender, is the concept of intersectionality. This component is very much related to the method of contextualization, and I agree with Trina Grillo that it is an indispensable tool to “dismantle the master’s house”.⁶³ Mary Eaton explains intersectionality as a term “used to describe the experiential reality of those for whom existing single-axis analyses of oppression are inadequate”.⁶⁴ In her words,

intersectional oppression arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone. . . With respect to the interaction of race and sex, for instance, women of colour may experience subordination which is a product of both forms of discrimination and which is unshared by men of their communities or by women irrespective of their race.⁶⁵

According to Nitya Iyer, if the construction of grounds of discrimination and the assignment of membership in them were able to embrace elasticity and contingency, the use of categories would not be so problematic.⁶⁶ In other words, if categories and their contents could be revised as ‘context’ changes, and all parties were part of the revision process, the limits of the categorical approach could be somewhat mitigated.⁶⁷ This is where embracing the concept of intersectionality is key. Intersectional analysis challenges the centralizing and essentialist tendencies of the law and its reliance on categorical thought by respecting the

⁶³*Supra* note 45 at 16.

⁶⁴Mary Eaton, *supra* note 39 at 229.

⁶⁵*Ibid.* at 229-230.

⁶⁶Nitya Iyer (1993), *supra* note 39 at 183.

⁶⁷*Ibid.*

complexity of social identity and social relations.⁶⁸ While working within the parameters of the language of the constitutional guarantee to equality, intersectional analysis attempts to move beyond essentialism by recognizing the complex hierarchies of oppression and incorporates the intersections of gender, race, class and other unequal power relations.

Although I discuss these three components separately, they can be more broadly understood as a substantive approach to equality, an approach that rejects formal definitions of legal equality focused on sameness, in favor of a more effects-based, contextual and inequality-based focus on oppression. At the risk of over-simplifying, a substantive approach to equality requires that section 15 target not only the process of the law, but the substance and impact of the law on members of oppressed group. It encompasses an analysis that is grounded in and responsive to the pervasive and systemic experiences of discrimination.⁶⁹ In applying a substantive equality analysis in order to achieve equality of result, the impact of the law must be examined within the social context of the individual and groups claiming discrimination.

In my evaluation of the Supreme Court's approach to equality and its application, conducted in the next two chapters, I examine whether the Court is applying the substantive equality approach I have just outlined; that is, whether the Court is beginning their analysis of equality and discrimination from an understanding of the underlying inequalities at issue. I will also consider whether the judiciary is moving beyond essentialism by recognizing and

⁶⁸*Ibid.* at 204.

⁶⁹For a brief overview of substantive equality theories, refer to Andrea York, "The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1)," *University of Toronto Faculty of Law Review*, 54 (1996), 327 at 331.

effectively dealing with complex intersectional inequalities. The purpose of this analysis is to assess whether the judicial framework developed by the Supreme Court of Canada for the application of section 15(1) of the Charter embraces contextualization, and recognizes both historical and existing inequalities, and multiple forms of discrimination and oppression that are experienced simultaneously. On the basis of this analysis, it will be possible to draw some conclusions as to whether or not the Court is building an equality jurisprudence capable of addressing the pervasive and systemic conditions of inequality experienced by women and other oppressed groups.

Chapter 3

The Supreme Court's Equality Jurisprudence from 1989 to 1998: A Backgrounder

The Supreme Court of Canada's decision in *Law*, which represents the current stage of development of equality rights in this country, is preceded by a long list of decisions that make up the Court's equality jurisprudence. These decisions have helped shape the Court's analysis in *Law* and, for this reason, provide an important context from which to assess, on the basis of the discussion in chapter two, whether the judicial approach adopted in *Law* is capable of responding to the inequalities faced by women and other oppressed groups. Accordingly, this chapter surveys the path taken by the Supreme Court over the past nine years to arrive at its current approach in *Law*. I draw significantly on articles and case commentaries written by Charter and feminist scholars to highlight key advancements in the Court's analysis of section 15(1), as well as the decisions that demonstrate competing visions among judges on the country's top court about the meaning of equality and the purpose of section 15(1) with respect to remedying patterns of pervasive and systemic discrimination. The chapter concludes with reflections on how to characterize the pre-*Law* jurisprudence and with some thoughts on the issues that need to be resolved by the Court in order for it to make use of the full potential of its approach to equality.

3.1. The Judicial Path to *Law*:

Trying to capture close to a decade of decisions into a background chapter is easier said than done. From 1989 to 1998, the Supreme Court released 43 judgements in which section 15(1) was the basis of the case.⁷⁰ The starting point for discussion of the Supreme Court's approach to section 15(1) is the 1989 decision in *Andrews*, which is the Court's first interpretation of the constitutional equality guarantee. This case then becomes the benchmark for reviewing the Court's jurisprudence prior to its decision in *Law* in terms of whether the decisions generally build on or depart from the original approach in *Andrews*, particularly with respect to the essential components of an equality analysis set out in chapter two.

3.1.1. *Andrews v. Law Society of British Columbia*:

Andrews involved a challenge to the citizenship requirement in the *Barristers and Solicitors Act*⁷¹ of British Columbia. In a four to two decision, the Supreme Court struck down the provision in the impugned legislation that excluded non-citizens from the practice of law.⁷² Mr. Justice McIntyre delivered the reasons of the Court regarding the interpretation

⁷⁰For a list of section 15(1) cases decided by the Supreme Court from 1989 to 1995 please refer to Andrea York, *supra* note 69 at 327. From 1996 to 1998 the Court decided 5 more cases directly involving section 15(1) of the Charter, namely: *Adler v. Ontario* [1996] 3 S.C.R. 609 [hereinafter, *Adler*]; *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 [hereinafter, *Eaton*]; *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 [hereinafter, *Benner*]; *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 [hereinafter, *Eldridge*]; *Vriend v. Alberta* 1 S.C.R. 493 [hereinafter, *Vriend*].

⁷¹R.S.B.C. 1979, c. 26, s. 42.

⁷²Justice Wilson, with Chief Justice Dickson and Justice L'Heureux-Dubé concurring, held that the citizen requirement violated section 15(1) and could not be saved under section 1; Justice La Forest concurred in separate reasons. Justice McIntyre, with Justice Lamer concurring, held that the citizenship requirement could be saved under section 1.

of the constitutional equality provision⁷³ and, in doing so, established a two-step approach to analyzing section 15(1) claims. The first step required determining if the impugned legislation draws a distinction that violates one of the four equality rights guaranteed by the section, namely: equality before and under the law and equal protection and benefit of the law. The second step required establishing discrimination, which, according to Justice McIntyre, consists of two elements. The claimant must first demonstrate that the distinction is made on the basis of an enumerated or analogous ground and, second, that the legislative impact of the law is discriminatory.⁷⁴ On the latter point, Justice McIntyre defined discrimination 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 society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁷⁵

The Court also considered the interaction between sections 15(1) and 1 of the

⁷³Justice McIntyre wrote the opinion of the Court regarding the approach to section 15(1), although he dissented with the majority regarding the application of section 1. With respect to the interpretation of section 15(1) articulated by Justice McIntyre in his dissenting opinion, Justice Wilson expressed "complete agreement", whereas Justice La Forest expressed "substantial agreement". *Supra* note 5 at 151 and 192, respectively.

⁷⁴*Ibid.* at 179-182. The two-step approach to determining an equality infringement adopted in *Andrews* was re-affirmed in *R. v. Turpin* [1989] 1 S.C. R. 1296 [hereinafter, *Turpin*], which was decided shortly after *Andrews*. *Turpin* involved alleged discrimination on the basis of provincial residence. In this case, the Court upheld provisions in the *Criminal Code*, R.S.C. 1970, c. C-34, that allowed an individual charged with an indictable offence in Alberta to be tried by judge alone, while residents in other provinces could be tried by judge or jury.

⁷⁵*Supra* note 5 at 174-175.

Charter, which was an issue that had received considerable attention from Charter and feminist scholars prior to *Andrews*.⁷⁶ On this point, Mr. Justice McIntyre was clear on the need to keep both sections “analytically distinct”, and that matters of reasonableness and justification should be left to section 1.⁷⁷ With respect to the application of section 1, members of the Court disagreed on approach as well as result. Justice Wilson and three other judges adopted the *Oakes* test⁷⁸ as the appropriate standard and held that the citizenship requirement could not be saved.⁷⁹ In contrast, Justices McIntyre and Lamer dissented by adopting a more relaxed standard and concluded that the citizen requirement could be saved as a reasonable limit on equality.⁸⁰

Despite the disagreement on the disposition of the case, the Supreme Court accomplished many tasks with its decision in *Andrews*. First, the Court established the scope and applicability of the constitutional equality guarantee by adopting the “enumerated and

⁷⁶For a review of commentary on the expectations regarding the interrelations of the two provisions, see, Diana Majury (1991), *supra* note 9 at 411-414.

⁷⁷*Supra* note 5 at 177-178, and again at pp. 182-183. The need to keep sections 15(1) and 1 of the Charter analytically distinct was reinforced by Justice Wilson in *Turpin*. Writing on behalf of the full Court, she held that it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under section 1 of the Charter. *Supra* note 74 at 1328.

⁷⁸The test applied by the majority in *Andrews* was established by Chief Justice Dickson in *R. v. Oakes* [1986] 1 S.C.R. 103. The first step involves determining whether the objectives of the impugned law relate to concerns that are “pressing and substantial” in a free and democratic society. The second step involves the application of a proportionality test, which requires the Court to balance a number of factors, such as the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the legitimate goal reflected in the legislation.

⁷⁹*Supra* note 5 at 153-157.

⁸⁰Justice McIntyre found that the “pressing and substantial” standard was too stringent for application in all cases. He held that the inquiry of the Court should relate to “the nature of 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”. *Ibid.* at 184.

analogous” approach to discrimination and by holding that not every distinction drawn by law will trigger section 15(1).⁸¹ Justice McIntyre held that section 15(1) did not provide a general guarantee of equality nor did it guarantee equality between individuals or groups in an abstract sense. Rather, the distinctions forbidden by the constitutional equality guarantee are those that involve “prejudice and disadvantage”.⁸²

Second, the Court recognized the existence of systemic and adverse effects discrimination by adopting an effects-based approach⁸³ to equality and rejecting the argument that only intentional discrimination violates section 15(1). Third, *Andrews* rejected the “similarly situated” test adopted by lower courts, which was based on the Aristotelian concept of formal equality.⁸⁴ In doing so, the Court acknowledged that identical treatment does not necessarily result in equality and may, in fact, frequently produce serious inequality.⁸⁵ Finally, the Court adopted an approach to equality that acknowledged group-based disadvantage,⁸⁶ and placed emphasis on the necessity of context in the examination of inequalities. On this point, Justice Wilson, in her reasons, emphasized that a determination of inequality had to be made “in the context of the place of the group in the entire social,

⁸¹*Ibid.* at 163-168.

⁸²*Ibid.* at 180-181.

⁸³In his decision, Justice McIntyre explained that the main consideration in an equality analysis must be the law’s impact on the individual or group concerned and upon those whom it excludes from its application. *Ibid.* at 165 and again at 168.

⁸⁴*Ibid.* at 166-168.

⁸⁵*Ibid.* at 164-165.

⁸⁶*Ibid.* at 154.

political and legal fabric of our society”.⁸⁷

Although the *Andrews* decision resulted in mixed reviews,⁸⁸ the commentary from feminists and others advocating on behalf of oppressed groups generally ranged from optimistic to cautiously positive.⁸⁹ In relation to the criteria outlined in chapter two, the Court’s decision in *Andrews* in many ways incorporated the kinds of analyses seen as necessary in order to counter inequality. The “disadvantage”⁹⁰ test of discrimination and discussions of “discrete and insular minorities” in relation to analogous grounds of discrimination, contained the grounding for a contextual inequality-based approach to section 15(1). In a similar vein, the Court’s reference to section 15 as having a “large remedial

⁸⁷*Ibid.* at 152. This point was reinforced in *Turpin*, where Madam Justice Wilson stated that a search for discrimination will, in most cases, entail a search for a disadvantage that exists apart from, and independent of, the particular distinction being challenged. In her words, “. . . it is only by examining the larger context that a court can determine whether a differential treatment results in equality, or contrariwise, it would be identical treatment which in the particular context result in inequality or foster disadvantage”. *Supra* note 74 at 1331-1332.

⁸⁸For commentaries that I would categorize as less than positive about the decision, please see, David W. Elliott, “Comments on *Andrews v. Law Society of British Columbia* and Section 15(1) of the Charter: the Emperor’s New Clothes?,” *McGill Law Journal*, 35 (1989), 250; Marc Gold, “Comment: *Andrews v. Law Society of British Columbia*,” *McGill Law Journal*, 34 (1989), 1063; Dale Gibson, “Equality for Some,” *University of New Brunswick Law Review*, 40 (1991), 2.

⁸⁹See, Diana Majury, *supra* note 9; Kathleen Mahoney, “The Constitutional Law of Equality in Canada,” *Maine Law Review*, 44 (1992), 229; Helena Orton, “Section 15, Benefits Programs and Other Benefits at Law: the interpretation of Section 15 of the Charter since *Andrews*,” *Manitoba Law Journal*, 19 (1990), 288; C. Lynn Smith, “Does Section 15 Have a Future?,” in *Human Rights in the 21st Century* (Montreal: Editions Thémis, 1997), 103; N. Colleen Sheppard, “*Recognition of the Disadvantaging of Women: The Promise of Andrews v. Law Society of British Columbia*,” *McGill Law Journal*, 35 (1989), 207.

⁹⁰The Court’s emphasis on disadvantage in *Andrews* was cited as important and positive by many feminist scholars, including: Kathleen Mahoney, *ibid.*; N. Colleen Sheppard, *ibid.*; and Helena Orton, *ibid.* In addition, the limitation of the enumerated and analogous grounds approach was applauded by several commentators on the basis that a completely open-ended list of grounds would dilute the protection of section 15. See, William Black and Lynn Smith, “Constitutional Law – Charter of Rights and Freedoms, Section 15 and 1 – Canadian Citizenship and the Right to Practice Law: *Andrews v. Law Society of British Columbia*,” *Canadian Bar Review*, 68 (1989), 591 at 606; A.W. MacKay and Dianne Pothier, “Developments in Constitutional Law: The 1988-89 Terms,” *Supreme Court Law Review*, 1 (1999) (2d), 81 at 93. Section 3.2 discusses how the enumerated and analogous approach has become subject to increased criticism. For a critique of this “disadvantage” terminology, see *supra* note 5.

component”,⁹¹ and Justice Wilson’s statement that section 15 “is designed to protect those groups who suffer social, political and legal disadvantage in society”,⁹² demonstrated the move of the Court toward taking inequality as the starting point for the analysis of section 15(1). Equally important, the Court’s forceful rejection of the “similarly situated” test and its focus instead on impact, context, discrimination and prejudice, as well as group-based disadvantage, suggested that the decision in *Andrews* marked an important beginning for the Supreme Court’s equality rights jurisprudence. Although the Court was silent on the need for an intersectional equality analysis, the decision was clear that the Court was employing a grounds based approach to equality, which as discussed in chapter two, has major limitations. However, Justice Wilson’s emphasis on contextualization in determining analogousness was positive and Justice McIntyre’s statement that “enumerated grounds are not exclusive and must be interpreted in a generous matter”⁹³ was encouraging.⁹⁴

Notwithstanding these important advancements, there were a number of areas in the decision where the Court’s guidance was less definitive and at times inconsistent, which gave some feminist scholars reason to qualify their optimism as ‘cautious’, ‘guarded’ or ‘limited’.⁹⁵ The Court’s pronouncements on the interplay between sections 15(1) and 1 of

⁹¹*Supra* note 5 at 171.

⁹²*Ibid.* at 154.

⁹³*Ibid.* at 175.

⁹⁴The reference to immutability in relation to the analogous ground of citizenship in the opinion of Justice La Forest raised some essentialist concerns. Critiques of immutability are discussed in chapter four.

⁹⁵See, Mary Eaton, “*Andrews v. Law Society of British Columbia*,” *Canadian Journal of Women and the Law*, 4 (1990), 276; Helena Orton, *supra* note 89; Diana Majury, *supra* note 9 at 426.

the Charter are demonstrative of this point. As explained earlier, Justices McIntyre and Wilson clearly stated that sections 15(1) and 1 should be kept analytically distinct. Yet, in their discussion of discrimination in relation to personal characteristics, both judges, perhaps inadvertently, imported a reasonableness or relevancy requirement into the equality analysis. In his discussion of discrimination, for example, Justice McIntyre stated that a law should not adversely affect some people on the basis of “irrelevant personal differences”,⁹⁶ which suggested that some differences can be relevant. In this respect, importing a relevancy requirement into the section 15 discussion is counter to a contextual inequality-based approach. The relevancy requirement promotes a more formal mode of analysis that transforms issues of inequality into problems of irrational classification, placing emphasis on irrational differential treatment rather than subordinating treatment.⁹⁷

In addition, although Justice McIntyre’s discussion of discrimination acknowledged group-based context, which is positive and necessary for a contextualized and inequality-based approach to section 15(1), a theme of “abstract individualism”⁹⁸ also flowed through parts of his decision. By referring in his discussion of discrimination to distinctions based on “personal characteristics” and an “individual’s merits and capacities”,⁹⁹ Justice McIntyre’s

⁹⁶*Ibid.* at 165.

⁹⁷For an elaboration of this critique, see N. Colleen Sheppard, *supra* note 89 at 221. Mary Eaton, *supra* note 95 at 281 and Diana Majury, *supra* note 9 at 422, make similar comments with regard to importing a relevancy requirement into the section 15(1) analysis.

⁹⁸I borrow this term from Hester Lessard, Bruce Ryder, David Schneiderman and Margot Young [hereinafter, Lessard et al.] in their discussion of the developments in equality jurisprudence from 1994 to 1995. See, “Developments in Constitutional Law: The 1994-95 Term,” *The Supreme Court Law Review*, 7 (1996), 81 at 87.

⁹⁹*Andrews*, *supra* note 5 at 174-175.

analysis was neutral with respect to the issue of whether the group is dominant or subordinate, thereby invoking a more formal mode of analysis rather than an approach to equality based on power imbalances.¹⁰⁰ What remains an issue in Justice McIntyre's analysis is whether differential treatment has to exacerbate existing group inequality or solely result in distinctions based on an individual's merits or capacities in order to constitute discrimination.

To put the *Andrews* decisions in context, it is important to emphasize that, despite certain inconsistencies or unanswered questions, the Court broke new and important ground. In relation to the specific criteria outlined in chapter two, many parts of the analysis of Justices McIntyre and Wilson contained the groundings for a contextual and inequality-based approach to the interpretation of the constitutional equality guarantee. However, its reliance on grounds or categories of discrimination suggested potential problems for the Court in being able to address intersecting axes of discrimination in the future. Colleen Sheppard put it well in her case comment by saying that “[p]erhaps the clearest conclusion to be drawn from *Andrews* is that it is but a starting point to the elaboration of a legal concept that must continually be informed by concrete life experiences of inequality”.¹⁰¹ Many Charter and feminist scholars hoped that the judgements following *Andrews* would resolve some questions that were left unanswered and build on the substantive equality principles established by the Court in the landmark decision. Unfortunately, the uncertainties in

¹⁰⁰For an elaboration of this critique, see, Mary Eaton, *supra* note 95 at 284; Hester Lessard et al., *supra* note 98 at 88; Diana Majury, *supra* note 9 at 422.

¹⁰¹N. Colleen Sheppard, *supra* note 89 at 209.

Andrews continued to shape and eventually overpower the equality landscape created by the Court over the ensuing nine years.

3.1.2. Post-*Andrews* Jurisprudence [1989-1998]:

In the nine years following the *Andrews* decision, the Supreme Court decided over forty cases in which a section 15(1) violation was claimed.¹⁰² While it is not possible, or necessary, to cover the full gamut of these cases in this chapter, it is certainly worthwhile to identify key advancements or regressions in the Court's substantive analysis and approach to the constitutional equality guarantee. Again, I have found the work of Charter and feminist scholars immensely helpful in characterizing the equality jurisprudence of the Supreme Court during these years and draw from their work for my observations.

Following its decision in *Andrews*, the Supreme Court increasingly became divided in its approach to section 15(1). An indication of this division is the number of split decisions and multiple reasons in the judgements of the Supreme Court over the nine-year period.¹⁰³ These split and conflicting decisions greatly added to the confusion and uncertainty that characterized the Charter equality jurisprudence of this period, making it difficult to say anything definitive about its direction or impact. For the most part, the Court's decisions during this period are characterized by many feminist and Charter scholars

¹⁰²See *supra* note 69 at 379 for a list of cases.

¹⁰³To provide a general idea, in 43 cases, only 19 decisions were completely unanimous; the remaining judgements were either unanimous in result with separate concurring reasons (4) or split with both separate and concurring as well as dissenting opinions (20).

as a marked regression in the Court's commitment to substantive equality.¹⁰⁴ Based on a review of literature, this period is marked, in varying degrees, by the following four general trends:¹⁰⁵ a retreat from examining the larger social, political and legal contexts of the law being challenged and from the Court's commitment to adverse effects discrimination;¹⁰⁶ a reintroduction of the similarly situated analysis into the Court's measure of equality; an inability of the Court and its approach to equality to address complex discrimination;¹⁰⁷ and a varied, and at times, contradictory approach to resolving a section 15(1) claim. In the pages that follow, I elaborate on the cases in this period cited by feminist and Charter scholars that are most demonstrative of these occurrences.

David Lepofsky and Andrea York cite the Supreme Court's decision in *R. v. Hess*¹⁰⁸

¹⁰⁴See, M. David Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?," *National Journal of Constitutional Law*, 1 (1992), 315 at 335; M. David Lepofsky, *supra* note 8 at 288-314; Dianne Pothier, "M'Aider, Mayday: Section 15 of the Charter in Distress," *National Journal of Constitutional Law*, 6 (1996), 295; Andrea York, *supra* note 69 at 340-368.

¹⁰⁵In relation to section 1 of the Charter, a number of feminist and Charter scholars have noted that many of the post-*Andrews* decisions marked a substantial weakening of the section 1 standards and of the Court's willingness to show deference to legislative objectives. *McKinney v University of Guelph* [1990] 3 S.C.R. 229 [hereinafter *McKinney*], in which mandatory retirement was upheld under section 1 of the Charter, and *Egan v. Canada* [1995] 2 S.C.R. 513 [hereinafter, *Egan*], are examples of Supreme Court decisions in this regard. Both decisions added considerations of competing claims, scarce resources and government incrementalism into the justificatory and reasonableness analysis of section 1. For critiques of these decisions in relation to section 1 of the Charter, refer to, M. David Lepofsky, *supra* note 8 and 103 at 295 and 316, respectively; Dianne Pothier, *supra* note 104; Andrea York, *supra* note 69 at 352 and again at 369.

¹⁰⁶Joel Bakan, Bruce Ryder, David Schneiderman and Margot Young, "Developments in Constitutional Law: The 1993-94 Term," *Supreme Court Law Review*, 6 (1995), 66 at 110 [hereinafter, Joel Bakan et al]; Dianne Pothier, *ibid.*, Andrea York, *ibid.* at 351.

¹⁰⁷See, Nitya Iyer (1993), *supra* note 39; Carl F. Stychin, *supra* note 43; and Claire F.L. Young, "(In)visible Inequalities: Women, Tax and Poverty," *Ottawa Law Review*, 27 (1995), 99.

¹⁰⁸[1990] 2 S.C.R. 906 [hereinafter, *Hess*].

as an example of the Court's reintroduction of the similarly situated analysis.¹⁰⁹ In a four to three decision, the Court ruled that section 146(1) of the *Criminal Code*,¹¹⁰ which made it an offence for men, but not women, to engage in sexual intercourse with children under the age of fourteen, did not violate section 15(1) of the Charter. Justice Wilson held that the provision did infringe the equality provision because, as a matter of "fact" based on "biological realities", only one sex, men, are able to commit the act of sexual intercourse against female victims.¹¹¹ Both Lepofsky and York argue that Justice Wilson's section 15 analysis is an application of the similarly situated approach to equality, which was rejected by the Court in *Andrews*.¹¹² While Justice Wilson did not use the words "similarly situated" in her discussion, by focusing on gender-related differences, her analysis parallels the similarly situated approach to equality. In the words of David Lepofsky, what Justice Wilson held in *Hess* is as follows:

Parliament's purpose is to protect females under the age of 14 from unwanted sex leading to pregnancy. From the perspective of this goal, men and women, as accused persons or as victims, are not similarly situated to each other. This is a matter of fact, and more particularly, a matter of "biological fact".¹¹³

¹⁰⁹The approach of Justices La Forest and Gonthier in their minority opinions in *Egan* and *Miron v. Trudel* 2 S.C.R. 418 [hereinafter, *Miron*], respectively, are also examples of the Court importing aspects, albeit indirectly, of the similarly situated test into its equality analysis. The judges accomplished this by holding that "functional values" underlying the legislation in question are important in determining whether a distinction constitutes discrimination, and by requiring a claimant to prove, at the section 15 stage, that the personal characteristic in question is not "relevant" to the right or opportunity sought. For example, in *Miron*, Justice Gonthier, at 460-461, stated that "unmarried couples are not in a situation identical to married spouses with respect to mutual support obligations". A discussion of their approach follows.

¹¹⁰R.S.C. 1970, c. C-34.

¹¹¹*Supra* note 107 at 929-930.

¹¹²M. David Lepofsky (1992), *supra* note 104 at 334-335; Andrea York, *supra* note 69 at 341-342.

¹¹³M. David Lepofsky (1992), *ibid.*

In addition, the Court, in *Hess*, examined discrimination from within the limited context of the law itself, rather than from the perspective of the law's broader political and social implications relating to the protection of young people.¹¹⁴

The decision in *Symes* is cited by many writers as an example of the Supreme Court's retreat from adverse effects discrimination,¹¹⁵ of the shortcomings of a categorical or grounds approach to equality, and of the Supreme Court's narrowing and decontextualizing of issues. This case concerned the tax treatment of child-care expenses and involved a challenge to provisions in the *Income Tax Act*.¹¹⁶ Elizabeth Symes, a self-employed professional, attempted to claim the costs of child-care deductions as a business expense, asserting that because women are primarily responsible for child care, disallowing the deductibility of child care expenses as a business expense has a greater impact on self-employed women than on self-employed men. The majority of the Supreme Court found that the non-deductibility of child care expenses as a business expense was not discriminatory. In rendering its decision, the majority of the Court stated that care must be taken to "distinguish between effects which

¹¹⁴Andrea York, *supra* note 69 at 341.

¹¹⁵Another example of the Court not applying adverse effects discrimination principles is its decision in *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 [hereinafter, *Rodriguez*]. The *Rodriguez* case involved the prohibition in the Criminal Code against assisting a person to commit suicide, s. 241(b). David Lepofsky argues that the provision applies equally to individuals regardless of disability, however, it has adverse discriminatory effects on individuals whose severe disability prevents them from taking their own lives without another's assistance. In the decision, Justice Sopinka, on the behalf of the majority, assumed a violation for the purpose of the judgement without an equality analysis, and then upheld the provision under section 1. Justices McLachlin and L'Heureux-Dubé, in separate opinions, held that the case did not invoke section 15(1) of the Charter. Chief Justice Lamer and Justice Cory in their dissenting opinion applied adverse effects discrimination principles in concluding that the impugned provision violated the equality rights of Sue Rodriguez. For an elaboration of this critique see David Lepofsky (1997), *supra* note 8 at 335-340. Also, Joel Bakan et al., *supra* note 106 at 116-120, provides a critique of this decision as well.

¹¹⁶R.S.C. 1952, c. 148, as amended.

are wholly caused, or are contributed to, by impugned provisions, and those social circumstances which exist independently of such a provision . . .”¹¹⁷ Mary Jane Mossman¹¹⁸ compares the majority judgement in *Symes* to the Supreme Court’s notorious decision in *Bliss*, a widely criticized ruling in 1979 under the *Canadian Bill of Rights*¹¹⁹ involving a claim by a pregnant woman who was denied unemployment benefits otherwise available to qualified recipients, on the basis of her pregnancy. According to the Court, social arrangements, not law, created inequality in the *Bliss* case.¹²⁰

With respect to the method of contextualization, the Court in *Symes* narrowly focused on one aspect of child-care policy and in doing so characterized the broader context as “irrelevant” to the legal analysis of the case. Joel Bakan et al., argue that by narrowing the claim of Elizabeth Symes to one representative of only businesswomen, Justice Iacobucci preempted the fuller equality analysis. He did so by denying the disproportionate social and economic burden child care imposes on women, which is the “very interlinkage of social, economic, and political consequences that adverse effect discrimination acknowledges and

¹¹⁷*Symes*, *supra* note 20 at 764.

¹¹⁸Mary Jane Mossman, *supra* note 6 at 11.

¹¹⁹R.S.C. 1970, Appendix III, s. 1(b).

¹²⁰With respect to the facts of the case, Stella Bliss was fired when she was pregnant and was denied benefits because the *Unemployment Insurance Act* distinguished maternity benefits from regular benefits. Stella Bliss did not qualify for regular benefits, although she met the length of service qualifications, because she was pregnant. However, Stella Bliss was not entitled to maternity benefits because she had not been employed long enough prior to the birth of her child. The Court held that it was “nature” and not law that created the inequality that existed and factors apart from the impugned legislation were not considered relevant in the determination of whether Stella Bliss had been discriminated against. Feminist scholars viewed the Court’s decision in *Andrews* as a definitive rejection of the limitations of the *Canadian Bill of Rights* exemplified by *Bliss*, and in this respect, expressed major disappointment to see this type of *Bliss* logic being reintroduced in *Symes* and other cases.

targets".¹²¹ Nitya Iyer argues that the *Symes* case is also demonstrative of the inadequacy of a grounds or categorical approach insofar as it cannot address differences among members of a group who share a common expression of one social characteristic.¹²²

These earlier post-*Andrews* decisions may have signified more than a retreat from applying the principles established in *Andrews* and may, in fact, have signaled the disintegration of the Court's approach to resolving equality claims as originally set out in *Andrews*. On the other hand, perhaps these conflicting decisions were less a failure to give expression to the substantive equality principles and rather more indicative of competing visions of what these principles should be. This concern was borne out by three equality cases decided by the Supreme Court in 1995, *Egan*,¹²³ *Miron*¹²⁴ and *Thibaudeau v. Canada*,¹²⁵ commonly referred to as the trilogy, which marked most overtly the significant differences of opinion among judges of the Supreme Court regarding the proper approach to section 15(1).¹²⁶

¹²¹Joel Bakan et al., *supra* note 106 at 112.

¹²²Nitya Iyer (1993), *supra* note 39 at 202.

¹²³The *Egan* case involved a challenge the definition of spouse in section 2 of the federal *Old Age Security Act*, R.S.C. 1985, c. O-9.

¹²⁴In *Miron*, a common law couple challenged a provision of an Ontario Standard Automobile Policy, claiming that it discriminated against them on the basis of marital status.

¹²⁵[1995] 2 S.C.R. 627 [hereinafter, *Thibaudeau*]. This case involved a challenge to subsection 56(1)(b) of the *Income Tax Act* on the basis that it infringed the equality rights of custodial parents.

¹²⁶The trilogy of decisions resulted in a wave of criticism. See, David M. Beatty, "The Canadian Conception of Equality," *University of Toronto Law Journal*, 46 (1996), 349; Brad Berg, "Fumbling Towards Equality: Promise and Peril in *Egan*," *National Journal of Constitutional Law*, 5 (1995), 263; Laura Fraser, "Rights Without Meaning: Failing to Give Effect to the Purpose of Section 15(1)," *Dalhousie Journal of Legal Studies*, 6 (1997), 347; Hester Lessard et al., *supra* note 98; Dianne Pothier, *supra* note 104; Carl F. Stychin, "Novel Concepts: A Comment on *Egan and Nesbit v. the Queen*," *Constitutional Forum*, 6 (1996), p. 101; Andrea York, *supra* note 69 at 253-268.

In two of the three cases, the Court upheld the law it was asked to review. In *Thibaudeau*, the Court dismissed a claim that the *Income Tax Act* requirement that a custodial spouse include child maintenance payments in his or her income violated section 15(1). In *Egan*, the Court upheld the constitutionality of a provision of the *Old Age Security Act* that restricted payment of spousal allowances for elderly people to heterosexual partners, either married or living together for one year. In the third case, *Miron*, the Court ruled that the definition of spouse in Ontario's automobile insurance legislation that excluded unmarried common law couples was discriminatory and not saved under section 1.

In these cases, three separate approaches were presented for addressing equality claims. Although there were some differences between their judgements in each case, Justices McLachlin and Cory, in *Miron* and *Egan*, respectively,¹²⁷ applied a two-step approach that inquired into whether the legislation in question draws a distinction between the claimant and others, and whether the distinction results in discrimination.¹²⁸ In the decision of McLachlin, discrimination was viewed as imposing unequal treatment based on the "stereotypical application" of presumed group or individual characteristics, rather than on "merit, capacity or circumstances".¹²⁹ Alternatively, Justices Gonthier and La Forest in *Miron* and *Egan*, respectively,¹³⁰ articulated an approach to section 15(1) that consisted of three steps. In the words of Justice La Forest:

¹²⁷Justices Iacobucci and Sopinka concurred with this approach.

¹²⁸*Egan*, *supra* note 105; *Miron*, *supra* note 109 at 488-490.

¹²⁹*Miron*, *ibid.* at 492.

¹³⁰Chief Justice Lamer and Justice Major concurred in both cases with this approach.

The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes a burden . . . The third step assesses whether the distinction is based on an irrelevant personal characteristic ...¹³¹

The third step consisted of two aspects: “determining the personal characteristic shared by a group and then assessing its relevancy having regard to the functional values underlying the legislation”.¹³² Although in both cases, these were minority opinions, the relevance criterion in the approach to section 15(1) put forward by Justices La Forest and Gonthier was criticized by many legal commentators.¹³³

In all three cases, Justice L'Heureux-Dubé outlined a new approach to section 15(1), which employed three steps, namely: is there a legislative distinction; does the distinction result in the denial of one of the four equality rights on the basis of membership in an “identifiable group”; and is the distinction discriminatory within the meaning of section 15(1).¹³⁴ To determine the last step, the Court should consider the “nature” of the group and the “nature” of the interests adversely affected by the distinction.¹³⁵ In the words of Justice L'Heureux-Dubé,

the more socially vulnerable the affected and the more fundamental to our

¹³¹*Egan*, *supra* note 105 at 536.

¹³²*Miron*, *supra* note 109 at 435-436 and *Egan*, *ibid.* at 536.

¹³³Brad Berg, for example, argues that “[f]ront-loading “relevancy” and “functional values” into section 15(1) as internal means by which discrimination can be justified represents nothing more than a return to the “reasonableness” theory of discrimination that was specifically rejected in *Andrews*”. *Supra* note 126 at 272. See also David M. Beatty, *supra* note 126 at 275, Dianne Pothier, *supra* note 104 and Andrea York, *supra* note 69 at 357-359 for further critiques of the relevance approach.

¹³⁴*Egan*, *supra* note 105 at 552; *Miron*, *supra* note 109 at 421; *Thibaudeau*, *supra* note 125 at 635.

¹³⁵*Ibid.*

popular conception of ‘personhood’ the characteristic which forms the basis of the distinction, the more likely that this distinction will be discriminatory.¹³⁶

In summarizing the three separate approaches, the section 15(1) framework of Justices McLachlin and Cory was most consistent with the enumerated and analogous approach established in *Andrews*. The approach set out by Justices La Forest and Gonthier expressly added a relevancy requirement to the Court’s equality framework. Justice L’Heureux-Dubé, on the other hand, rejected the relevance approach adopted by Justices La Forest and Gonthier, as well as the enumerated and analogous grounds approach employed by the Court in *Andrews*. Indeed, with these judgements, the Court left the state of equality rights jurisprudence in disarray insofar as there was no clear path for section 15(1) analysis. What emerges from these cases are three distinct approaches to analysis under section 15, the implications of which in relation to the criteria set out in chapter two are discussed briefly in section 3.2.

However, there were signs in some of the post trilogy cases that the Court was moving back to the substantive direction it originally set out in *Andrews*.¹³⁷ In *Eldridge*, which is one of three unanimous decisions in 1997,¹³⁸ Justice La Forest held that the failure

¹³⁶*Egan*, *supra* note 105 at 555.

¹³⁷An exception to this statement is the Court’s decision in *Eaton*, which was decided in 1997. The case involved an appeal of the decision of the Ontario Special Education Tribunal that Emily Eaton, a school student with cerebral palsy, should be placed in a special education class on the basis that it contravened section 15(1) of the Charter. Justice Sopinka, writing for the majority, ruled that it is not a violation of a student’s equality rights to place her in a special education class to accommodate her disability. For a critique of the Court’s 1997 decision in *Eaton*, refer to David Lepofsky, *supra* note 8 at 407.

¹³⁸The three unanimous decisions involved claims of discrimination on the ground of sex in *Benner*, and disability in both *Eaton* and *Eldridge*. *Benner* involved a challenge to the federal *Canadian Citizenship Act*, which placed different standards for citizenship on claimants with mothers who were citizens of Canada in comparison with claimants whose fathers were citizens of Canada.

of the British Columbia Medical Services Commission and hospitals to provide sign language interpretation where it was necessary for effective communication violated the equality rights of deaf persons, which could not be saved by the section 1.¹³⁹ In its decision in *Vriend*, decided after *Eldridge*, the Supreme Court found that the exclusion of sexual orientation as an enumerated ground of protection under Alberta's *Individual Rights Protection Act*¹⁴⁰ violated section 15(1) of the Charter and remedied the infringement by reading sexual orientation protection into the legislation. Justice Cory, writing for the majority,¹⁴¹ spoke at length about the profound discriminatory impact of the IRPA's omission on lesbian and gay lives. In his words,

[t]he exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation . . . This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada's society.¹⁴²

The commentary on these cases from proponents of substantive equality is, for the most part, positive. In terms of general trends, Marie-Adrienne Irvine argues that these cases incorporate a "renewed emphasis" on examining broader context and a "vigorous" effects-

¹³⁹*Supra* note 70 at 682.

¹⁴⁰R.S.A. 1980, c. I-2 [hereinafter, *IRPA*].

¹⁴¹Justices Cory and Iacobucci jointly wrote the majority opinion of the Court (Justice Cory on the application of section 15 and Justice Cory with respect to section 15(1) and the appropriate remedy). Justice Major, at 585, wrote a separate opinion dissenting on the remedial issue, while agreeing with the majority on the section 15(1) analysis. Madam Justice L'Heureux-Dubé, at 580, wrote a separate opinion concurring in result. In her concurring judgement, Madam Justice L'Heureux-Dubé again articulated the analysis she outlined in the trilogy, reaffirming how she disagrees with the centrality of the grounds approach and instead focuses on the nature of the group and interests adversely affected.

¹⁴²*Supra* note 70 at 551.

based analysis.¹⁴³ Other Charter and feminist scholars make similar remarks. For example, Anna Pellatt maintains that the decision in *Vriend* is “an exceedingly thorough repudiation of the Alberta government’s decision to deny lesbians and gay men human rights coverage” and a “strong, unequivocally positive decision”.¹⁴⁴ Martha Jackman writes that the *Eldridge* and *Vriend* decisions signal “a positive step toward ‘giving real effect to equality in Canada’”.¹⁴⁵ Errol Mendes argues that the decision in *Eldridge* is “potentially revolutionary” insofar as it implies that governments will be required, at least at the section 15(1) stage, to take positive measures to ensure that oppressed groups are able to benefit equally from government services provided to the general public.¹⁴⁶ Even Dianne Pothier, who was once sending out section 15 distress signals, comments that the effect of *Eldridge* is a monumental step forward, “giving real meaning to the entrenchment of equality rights for persons with disabilities”.¹⁴⁷

Arguably, in these two post-trilogy cases, the Supreme Court reinforced and applied core equality principles that, in preceding years, had largely been deprived of their normative content. *Eldridge* and *Vriend* both involved facially neutral legislation (i.e., no explicit distinction) and in writing its opinions the Court looked beyond the words of the legislation

¹⁴³Marie-Adrienne Irvine, “A New Trend in Equality Jurisprudence,” *Appeal*, 5 (1999), 54 at 54-55.

¹⁴⁴Anna S. Pellatt, *supra* note 50 at 142.

¹⁴⁵Martha Jackman, “‘Giving Real Effect to Equality’: *Eldridge v. British Columbia (Attorney General)* and *Vriend v. Alberta*,” *Review of Constitutional Studies*, IV (1998), 352 at 353.

¹⁴⁶Errol P. Mendes, “Taking Equality Into the 21st Century: Establishing the Concept of Equal Human Dignity,” *National Journal of Constitutional Law*, 12 (2000), 3 at 10.

¹⁴⁷Dianne Pothier, “*Eldridge v. British Columbia (Attorney General)*: How the Deaf Were Heard in the Supreme Court of Canada,” *National Journal of Constitutional Law*, 9 (1998), 263 at 275-276.

and inquired into the contextualized effects of the legislation.¹⁴⁸ These two cases are examples of judgements where the Court focused on situating the individual in the larger context of society and hence articulated a forceful effects-based and contextual analysis.¹⁴⁹ Also important, at least in *Eldridge*, is that the Court set out more grounding for an inequality-based approach by holding that the purpose of section 15 was to rectify and prevent discrimination against particular groups in society suffering social, political and legal disadvantage.¹⁵⁰

Unfortunately, in none of the five post-trilogy decisions prior to *Law*¹⁵¹ did the Court comment on how the different tests for discrimination endorsed by the members of the Court should be resolved or applied in other cases. Justices La Forest and Cory in *Eldridge* and *Vriend*, respectively, explicitly refrained from selecting among the various interpretative approaches since, in their views, any differences in the approach to section 15(1) would not affect the result.¹⁵²

3.2 Reflections on the Supreme Court's Equality Jurisprudence Pre-*Law*

In reflecting on the period from 1989 to 1998, a “rollercoaster” analogy coined by David Lepofsky comes to mind. In his observations on the period from 1960 to 1990, David

¹⁴⁸Margot Young, “Change at the Margins: *Eldridge v. British Columbia (A.G.)* and *Vriend v. Alberta*,” *Canadian Journal of Women and the Law*, 11 (1998), 244 at 253.

¹⁴⁹For commentaries that discuss the substantive nature of the Court's decisions in *Eldridge* and *Vriend*, please refer to Marie-Adrienne Irvine, *supra* note 143, Martha Jackman, *supra* note 145, and Dianne Pothier, *supra* note 147.

¹⁵⁰*Eldridge*, *supra* note 70 at 671-678.

¹⁵¹See *supra* note 69 at 379 for a list of the six cases.

¹⁵²*Vriend*, *supra* note 70 at 539.

Lepofsky characterized the judicial approach of the courts in the equality rights field “as akin to a fast-moving, accelerating rollercoaster”, “typified by ups and downs, and by twists and turns”.¹⁵³ As evidenced in the many multiple judgements and varied approaches to section 15(1), it is clear that his “rollercoaster” analogy is indeed applicable to the Supreme Court’s first decade of equality jurisprudence. To continue with the rollercoaster analogy, the decision in *Andrews*, despite some of its shortcomings, can be characterized as a turn upward in the road to equality, reaching “promising heights” in the recognition of the nature of inequality and discrimination.¹⁵⁴ Although there were signs of a move downward in the early post-*Andrews* decisions, the trilogy of decisions in 1995 marked a major downward plunge. The post-trilogy cases seem to indicate that, for the most part, the Court was climbing back up and re-grouping.

At the beginning of this chapter, I indicated that the decisions of the Supreme Court of Canada from 1989 to 1998 helped shape its recent analysis in *Law* and, accordingly, provide an important context from which to assess the Court’s recent articulation in *Law* of what it considers to be the “proper approach” to resolving section 15(1) challenges. In reflecting over this “rollercoaster” period then, what “context” can be taken from the pre-*Law* jurisprudence? What issues must be addressed or resolved by the Court to maximize the full potential of its approach to addressing equality challenges?

In relation to the criteria set out in chapter two, the Supreme Court over the past nine years has applied a contextualized and inequality-based approach, at best, unevenly, in

¹⁵³M. David Lepofsky (1992), *supra* note 104.

¹⁵⁴*Ibid.*, at 358.

equality cases. Moreover, with the exception of the analysis of Justice L'Heureux-Dubé in the 1995 trilogy as well as in *Vriend*, which I elaborate on briefly below, the Court has not displayed a willingness to move beyond the limitations of its grounds-based approach to equality or incorporate the tool of intersectionality into its equality analysis.¹⁵⁵ In hindsight, the subtle inconsistencies that were interwoven throughout the original analytical framework in *Andrews*, opened the door for threads of relevance and abstract individualism to enter the Court's equality analysis over the ensuing years. These subtle inconsistencies in the *Andrews* approach magnified over time and were manifested most noticeably in the 1995 trilogy of decisions in *Egan*, *Miron* and *Thibaudeau* with the introduction, by judges on the top court, of three separate analytical frameworks for addressing equality violations.

With her emphasis on the “nature” of the group adversely affected and her express disagreement with the Court's continued focus on the “grounds” approach, the analysis of Justice L'Heureux-Dubé in the trilogy, and hers alone, displayed signs of moving forcefully in the direction of a contextual, inequality-based and intersectional approach to equality.¹⁵⁶ The other two frameworks, that of Justices McLachlin and Cory as well as Justices La Forest and Gonthier, each incorporated elements that ran, to varying degrees, counter to a

¹⁵⁵In *Vriend*, for example, LEAF made arguments about the limitations of a “watertight compartment” interpretative approach to lesbian human rights, but the Court did not address their analysis in the judgement. See, Anna S. Pellatt, *supra* note 50, for an analysis of the inroads made by LEAF in the Supreme Court's decision in *Vriend*.

¹⁵⁶In her critique, in *Egan*, of the enumerated and analogous grounds approach adopted by the Court in *Andrews*, Justice L'Heureux-Dubé explained that, “[b]y looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences.” *Supra* note 105 at 552. Although not expressly discussing multiple forms of discrimination, the analysis of Justice L'Heureux-Dubé, in recognizing the limits of using categories to address discrimination, called for more fluid ways to respond to discrimination faced by oppressed groups, which is the purpose of an intersectional analysis.

contextual, inequality-based and intersectional approach to section 15. The analysis of Justices La Forest and Gonthier, with its emphasis on relevance and “functional values” in the third step of the equality framework, and a focus on immutability as an indicator of analogous grounds, more blatantly displayed these signs.¹⁵⁷ The approach of Justices McLachlin and Cory contained the same subtle weaknesses as *Andrews*, with more emphasis on individual stereotypes.¹⁵⁸

Although the post trilogy cases, with three unanimous decisions, as well as more forceful substantive analyses, suggested that the Court was trying to regroup, the uncertainty in terms of what approach would be employed by the Court to resolve future and more complex equality cases remained. This is why, in part, the framework set out in *Law* is so important. In the next chapter, I examine whether or not the Court has resolved the weaknesses in *Andrews* and post-*Andrews* jurisprudence. Moreover, does *Law* not only provide the basis for a contextual, inequality-based and intersectional approach, but does it require it in the resolution of equality challenges? The latter is more fundamentally important in remedying the inequality experience differently and in multiple ways by women and other members of oppressed groups.

¹⁵⁷Hester Lessard et al., for example, argues that the focus in the approach by Justices Gonthier and La Forest is not on the “context of the group with which the individual claimant is aligned” or on the “exacerbation of pre-existing contextual disadvantage by the legislative distinction at issue”. *Supra* note 98 at 93. Essentialist critiques of immutability are discussed in chapter four.

¹⁵⁸I found the trilogy commentary of Hester Lessard et al., *Ibid.*, at 90-95, of immense help in pointing out some of the weaknesses in the various approaches presented in *Egan* and *Miron*.

Chapter 4

The Supreme Court of Canada's Equality Analysis in *Law and Corbiere*

To provide context for an assessment of the Supreme Court of Canada's analysis of the constitutional equality guarantee, chapter two set out key components of an interpretive approach to section 15(1) that, from a feminist perspective, are necessary if the equality guarantee is to have any possibility of effecting positive change. Chapter three surveyed the path taken by the Supreme Court from 1989 to 1998 and assessed the jurisprudence generally in relation to whether it advanced a substantive approach to equality. It is against this backdrop that this chapter examines the analytical framework for assessing equality claims articulated by the Supreme Court in *Law* and *Corbiere*. Given the previous history of split decisions and varied, even contradictory, approaches to equality displayed by the top court in the country over the past nine years, the decision in *Law* is indeed noteworthy because the Supreme Court set forth, on a unanimous basis, what it believes to be the "proper approach" to analyzing a section 15(1) equality claim. The decision in *Corbiere*, which was released shortly after *Law*, directly raises the question of the Court's ability to apply an intersectional analysis and was hence chosen as a case to test the Court's application of the *Law* framework.

The chapter is divided into two main sections. Section 4.1 describes the framework for evaluating equality claims articulated by the Supreme Court in *Law* and assesses this framework in terms of whether it embraces contextualization and recognizes inequality and the need for intersectionality. It also reflects on where *Law* stands in relation to the

approaches taken by the Court to section 15(1) in its previous jurisprudence. Section 4.2 critically evaluates how the approach adopted in *Law* is applied in *Corbiere*.

4.1. The Supreme Court's Approach in *Law*:

In this case, the claimant, Nancy Law, applied to receive survivor's benefits under the *Canada Pension Plan*.¹⁵⁹ A survivor's pension is paid to a surviving spouse who, among other factors, meets the eligibility criteria specified in section 44(1)(d) of the *CPP*, namely: an age threshold, or responsibility for dependent children, or disability. Nancy Law's application for survivor's pension was refused because at the time of her husband's death she was under the age of 35, able-bodied and without dependent children. Following a stream of unsuccessful appeals,¹⁶⁰ Nancy Law appealed to the Supreme Court of Canada. The constitutional questions considered by the Court were whether sections 44(1)(d) and 58¹⁶¹ of the *CPP* discriminated against widows or widowers under the ages of 45 on the basis of age, contrary to section 15(1) of the Charter and, if so, whether the infringement could be demonstrably justified under section 1 of the Charter.¹⁶² The Court ruled that the impugned provisions of the *CPP* did not violate section 15(1) and as a result did not enter into a justificatory analysis.

¹⁵⁹R.S.C. 1985, c. C-8 [hereinafter, *CPP*].

¹⁶⁰Nancy Law appealed to the Minister National Health and Welfare, the Pension Plan Review Tribunal, the Pension Appeals Board, [1995] C.E.B. 8574, and the Federal Court of Appeal, [1996] 135 D.L.R. (4th) 293.

¹⁶¹Section 58 of the *CPP* prorates the entitlement of able-bodied surviving spouses without dependent children between the ages of 35 and 45.

¹⁶²*Supra* note 12 at 515.

The unanimous decision of the Court was delivered by Mr. Justice Iacobucci. In his reasons, Justice Iacobucci explained that although the purpose of the constitutional equality guarantee has been “variously expressed”¹⁶³ by various members of the Court, the previous expressions share several “key elements”.¹⁶⁴ On the basis of these key elements, and recognizing that no single phrase could fully describe the content of the equality guarantee, he described the purpose of section 15(1), in general terms, as:

[t]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹⁶⁵

At many points in the decision, Mr. Justice Iacobucci emphasized that the focus of the equality guarantee is properly placed on the goal of assuring human dignity by the remedying of discriminatory treatment. The term “human dignity”, as it relates to the equality provision, is described by the Court as referring to the self-respect and integrity of an individual or group and as being concerned with “physical and psychological empowerment and integrity”.¹⁶⁶ According to Mr. Justice Iacobucci, human dignity is harmed when individuals and groups are ignored, marginalized, devalued or treated unfairly

¹⁶³ *Ibid.* at 527.

¹⁶⁴ *Ibid.* at 529. At the outset of his reasons, Justice Iacobucci, at 508-509, noted that although there have been differences of opinion on the interpretation of section 15(1), there has been consensus, generally, on the “basic principles” relating to the purpose of the section and the “proper approach” to equality analysis. For Justice Iacobucci to have claimed that the Court has attained “general” consensus on equality principles appears, to me, to be somewhat of an overstatement, particularly given the number of split decisions in pre-*Law* jurisprudence. As will be discussed later in the chapter, the “synthesis” of the previous and various articulations of judges in pre-*Law* jurisprudence to form a unanimous approach in *Law* has many weaknesses.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* at 530.

on the basis of personal traits or circumstances that do not “relate to individual needs, capacities, or merits”.¹⁶⁷ In contrast, laws that are sensitive to the “needs, capacities and merits” of claimants, and that consider the context underlying their differences, will enhance the human dignity of an individual or group.¹⁶⁸

With respect to general guidelines for the interpretation of the Charter’s equality provision, Justice Iacobucci explained that the “proper approach” to analyzing a claim of discrimination under section 15(1) involves a “synthesis” of certain previous articulations by the Court,¹⁶⁹ particularly its judgements in *Andrews*, *Egan* and *Miron*. The approach established by the Court in *Law* consists of “three broad inquiries”,¹⁷⁰ which Justice Iacobucci summarized as follows:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? . . . Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping and historical disadvantage?¹⁷¹

Simply put, the object of a section 15(1) analysis is to determine whether legislation creates differential treatment on the basis of an enumerated or analogous ground, which

¹⁶⁷*Ibid.*

¹⁶⁸*Ibid.*

¹⁶⁹*Ibid.* at 523-524.

¹⁷⁰*Ibid.* at 524.

¹⁷¹*Ibid.*

results in discrimination.¹⁷² By focusing on whether the distinction is based on an enumerated or analogous ground, the second inquiry looks to the nature of the distinction, whereas the third inquiry pertains to the discriminatory effect of the legislative distinction. In relation to this third step, Justice Iacobucci elaborated on four key contextual factors that would demonstrate discriminatory effects; in other words, whether the distinction violates the essential human dignity of the claimant. The first factor is the existence of pre-existing disadvantage, stereotyping, vulnerability or prejudice experienced by the individual or group at issue.¹⁷³ Justice Iacobucci held that this factor is one of the most “compelling” factors favouring a conclusion that differential treatment is discriminatory in a substantive sense.¹⁷⁴ Although the claimant’s association with a historically more disadvantaged group is not determinative of an infringement, when differential treatment has been established, the existence of these pre-existing factors will favor a finding that section 15(1) has been violated.¹⁷⁵ Justice Iacobucci also elaborated on the need for the courts to take “judicial notice” of certain forms of disadvantage and prejudice, cautioning, however, that judges should not invent stereotypes or other social phenomenon that may not “truly exist”.¹⁷⁶

The second contextual factor relates to the relationship between the ground upon

¹⁷²*Ibid.* at 531.

¹⁷³*Ibid.* at 534.

¹⁷⁴*Ibid.*

¹⁷⁵*Ibid.* at 535-536.

¹⁷⁶*Ibid.* at 543.

which the claim is based and the “nature of the differential treatment”.¹⁷⁷ In his relatively brief explanation of this contextual factor, Justice Iacobucci held that to determine if discrimination has been established, relying on this contextual factor requires a ‘purposive’ analysis of the ground upon which the equality claim is based.¹⁷⁸ In this respect, to the extent that impugned legislation fails to take into account a claimant’s actual situation, it will be easier to establish discrimination, whereas it will be more difficult to establish discrimination if the legislation properly accommodates the claimant’s “needs, capacities, and circumstances”.¹⁷⁹ The enumerated grounds of disability, age and sex are examples the Court cited where the avoidance of discrimination may require distinctions to be made that take into account the “actual needs, capacity or circumstances” of the claimant in a manner that respects their value as human beings.¹⁸⁰

The third factor is the “ameliorative purpose or effect” of the impugned law upon “a more disadvantaged person or group in society”.¹⁸¹ According to Justice Iacobucci, this factor will likely be applicable in circumstances where the person excluded from the scope of the ameliorative law is more advantaged “in a relative sense”.¹⁸² Lastly, the fourth contextual factor considers the “nature and scope of the interest affected by the

¹⁷⁷*Ibid.* at 537.

¹⁷⁸*Ibid.* at 538.

¹⁷⁹*Ibid.*

¹⁸⁰*Ibid.*

¹⁸¹*Ibid.* at 539.

¹⁸²*Ibid.*

legislation”.¹⁸³ In explaining this contextual factor, the Court relied primarily on the minority opinion of Justice L’Heureux-Dubé in *Egan* and reaffirmed that differential treatment cannot be understood in the absence of evaluating the significance (i.e., economic, constitutional and social impact) attributed to the interest(s) adversely affected by the legislation in question.¹⁸⁴

Justice Iacobucci explained that the list of contextual factors is open and others can be found in the previous jurisprudence of the Court. He emphasized that equality is a “comparative concept”, and that choosing the appropriate comparator requires a full “appreciation of context”.¹⁸⁵ In addition, Justice Iacobucci held that contextual factors should be examined from the perspective of the claimant, noting, however, that the focus of inquiry is to be both “subjective and objective”.¹⁸⁶ In this respect, the “relevant point of view” is that of the “reasonable person, in circumstances similar to those of the claimant”, who takes into account the claimant’s history, individual or group traits and circumstances.¹⁸⁷

Applying the new approach, the Court ruled that the impugned provisions of the *CPP* did not violate section 15(1). In this respect, although sections 44(1)(d) and 58 were held to make a distinction between claimants over and under age 35 and 45 on the basis of the enumerated ground of age, the distinction, “when considered in the social, political and legal

¹⁸³*Ibid.* at 540.

¹⁸⁴*Ibid.*

¹⁸⁵*Ibid.* at 531.

¹⁸⁶*Ibid.* at 532-533.

¹⁸⁷*Ibid.*

context of the claim, did not constitute discrimination”.¹⁸⁸ In this sense, “relatively speaking,” individuals under the age of 45 have not “consistently” experienced the sorts of discrimination faced by some of Canada’s “discrete and insular minorities”.¹⁸⁹ Justice Iacobucci ruled that the impugned law functioned not by stereotype, but by distinctions that corresponded to the actual situation of individuals affected.¹⁹⁰ Accordingly, in the view of the full Court, the distinctions drawn by the *CPP* did not “perpetuate the view that surviving spouses under age 45 are less deserving of concern, respect or consideration than any others”; nor did the *CPP* distinctions withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which Nancy Law was a member.¹⁹¹

¹⁸⁸*Ibid.* at 553.

¹⁸⁹*Ibid.* at 555.

¹⁹⁰*Ibid.* at 559.

¹⁹¹*Ibid.*

4.1.1. Watershed or Fragile Patchwork: An Assessment of Supreme Court's Approach in *Law*:

The significance of *Law* rests, in part, in the articulation of a unanimous approach to the interpretation of the constitutional equality guarantee, particularly given the Court's history of split decisions on section 15(1) cases. In some of the case commentary on *Law*, it has been suggested that the decision is reminiscent of *Andrews* insofar as it makes a number of substantive statements regarding the purposive and contextual nature of equality rights.¹⁹² Craig Bavis, for example, maintains that the analysis in *Law* is "a renewal of the Court's commitment to substantive equality as first articulated in *Andrews*".¹⁹³ As discussed in chapter three, the Court laid out the beginnings of a foundation for substantive equality with its decision in *Andrews*, which many hoped would be built upon and given the full force of the Court's endorsement in subsequent cases. Unfortunately, for the most part, the foundation established in *Andrews* was weakened by subsequent decisions and the substantive principles of equality were largely deprived of their normative content.¹⁹⁴

This section of the thesis assesses the decision in *Law* and reflects upon where it stands in relation to the previous equality jurisprudence of the Court. In other words, is *Law*, quite simply, *Andrews* revisited, or does it set out a new direction in equality analysis, or build upon the analysis originally put forward in *Andrews*, or does it further erode the

¹⁹²See, Craig D. Bavis, "*Vriend v. Alberta, Law v. Canada, Ontario v. M. and H.: The Latest Steps on the Winding Path to Substantive Equality*," *Alberta Law Review*, 37 (1999), 683, and Graeme G. Mitchell, "Developments in Constitutional Law: The 1998-1999 Term: State Craft and Status Quo," *Supreme Court Law Review*, 11 (2000) (2d), 166.

¹⁹³*Supra* note 12 at 683.

¹⁹⁴For an account of the Supreme Court's failures in this regard, see, Andrea York, *supra* note 69 at 340, and M. David Lepofsky, *supra* note 8 at 262.

Andrews approach? Further, have the *Andrews* and post-*Andrews* problems or uncertainties been resolved or addressed? Indeed, I have struggled with the question of how to characterize the Supreme Court of Canada's decision in *Law*. I will first set out the positive aspects of the analysis in *Law* and then, why, despite the many substantive principles in the decision, I continue to struggle with certain aspects of the analytical framework set out in *Law*.

After my first reading of the case, I, like a number of the commentators on *Law*,¹⁹⁵ quite optimistically viewed the approach to equality as a renewal of the Court's commitment to substantive equality, which flowed quite consistently with the substantive flavour of the Court's decisions in *Eldridge* and *Vriend*. Indeed, there are many compelling statements in the decision in *Law* to support such a claim. The Court, for example, characterized the recognition of adverse effects discrimination and the role of context in identifying discrimination, as important developments in equality rights jurisprudence.¹⁹⁶ In addition, in the first stage of the *Law* inquiry, the Court expressly acknowledged that differential treatment can be brought about either by a formal legislative distinction or, alternatively, by a failure to consider the claimant's already disadvantaged position within Canadian society.¹⁹⁷ It also held that to accommodate differences, distinctions may be necessary, and called for a contextual approach to section 15(1) to permit the realization of its "strong

¹⁹⁵See Craig D. Bavis and Graeme G. Mitchell, *supra* note 192.

¹⁹⁶*Supra* note 12 at 509.

¹⁹⁷*Ibid.* at 524.

remedial purpose”.¹⁹⁸ These statements are strong substantive equality principles that must be recognized and applied if the Charter is to have any potential to remedy systemic oppression.

In relation to the specific criteria outlined in chapter two, many parts of Justice Iacobucci’s analysis support a contextual, inequality-based and intersectional approach to the interpretation of the constitutional equality guarantee. Unlike *Andrews* and post-*Andrews* jurisprudence, the unanimous¹⁹⁹ Court, in *Law*, expressly discussed the issue of intersecting axes of discrimination. While the Court reaffirmed its earlier pronouncement that a breach of section 15 requires discrimination based on an enumerated or analogous ground, Justice Iacobucci also held that, flowing from the contextual nature of the equality analysis, a claimant can articulate a discrimination claim under more than one of the enumerated grounds and that recognizing a ground as analogous can involve the intersection of grounds.²⁰⁰ Although the Court did not elaborate on the indicia of analogous intersecting grounds, it held that recognizing a “confluence of grounds” as analogous serves to advance the fundamental purpose of section 15.²⁰¹ However, it is not clear in this judgement the extent to which the Court will be able to recognize and respond appropriately to intersecting oppressions.

¹⁹⁸*Ibid.* at 548.

¹⁹⁹In her dissenting opinions in *Egan*, *supra* note 105, and in *Mossop*, *supra* note 41, Justice L’Heureux-Dubé critiqued the Court’s reliance on grounds. In *Mossop*, she briefly discussed the importance of an intersectional analysis in the Court’s approach to equality. However, in these cases, her views did not garner the support of other judges.

²⁰⁰*Supra* note 12 at 555.

²⁰¹*Ibid.*

The use of “contextual factors” to demonstrate an equality infringement under the third stage of *Law* is demonstrative that the Court requires the use of the method of contextualization to resolve section 15(1) cases. With the three-step inquiry in *Law*, the Court employs an approach that conceptually distinguishes between differential treatment, and the “discriminatory quality” of that differential treatment.²⁰² Justice Iacobucci is clear that legislative distinctions drawn on the basis of an enumerated or analogous ground will not necessarily result in discrimination in the substantive sense; a court must employ contextual factors to demonstrate discriminatory effect.²⁰³ The finding that the impugned provisions of the *CPP* did not violate the equality rights of Nancy Law is an example cited by the Court where differential treatment is not discriminatory in light of the legal, political and social context of the claim.²⁰⁴ A strong endorsement for the use of contextualization at all stages of the *Law* inquiry is found in the words of Justice Iacobucci noted below:

[t]he determination of whether legislation fails to take into account existing disadvantage, or whether a claimant falls within one or more of the enumerated and analogous grounds, or whether differential treatment may be said to constitute discrimination within the meaning of section 15(1), must all be undertaken in a purposive and *contextual* manner. [Emphasis added]²⁰⁵

There are also compelling statements in *Law* that provide the basis for an inequality-based approach to section 15 of the Charter. In his reasons, Justice Iacobucci stated that one of the purposes of section 15 is to ameliorate the position of groups who have suffered

²⁰²*Ibid.* at 547.

²⁰³*Ibid.* at 519.

²⁰⁴*Ibid.* at 562.

²⁰⁵*Ibid.* at 525.

disadvantage by exclusion from mainstream society.²⁰⁶ He reaffirmed this purpose in his summary of the guidelines for resolving a section 15 case; Justice Iacobucci held that the important role that section 15 plays in protecting “individuals or groups” who are disadvantaged, vulnerable, or members of “discrete and insular minorities” should always be “a central consideration”.²⁰⁷ Also important, from the perspective of an inequality-based approach, are the first and the third contextual factors, that is, pre-existing disadvantage and the ameliorative purpose or effect of the legislation. On the latter factor, Mr. Justice Iacobucci held that:

an ameliorative purpose or effect which accords with the purpose of s.15 of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of those more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.²⁰⁸

The message by the Court, in this respect, is that different treatment may be justified in order to improve the position of oppressed groups, which is a position that is consistent with an inequality-based approach. With the inclusion of this contextual factor, it appears that the Court is recognizing that section 15 of the Charter should not be used to lessen the gains made by members of oppressed groups.

Also, the second (i.e., relationship between grounds and circumstances) and fourth (i.e., nature of interests adversely affected) factors may also contain the grounding for an inequality-based approach. However, I found that Justice Iacobucci’s discussion of the

²⁰⁶*Ibid.* at 539.

²⁰⁷*Ibid.* at 550.

²⁰⁸*Ibid.* at 539.

second contextual factor to be somewhat confusing. He prefaced his discussion of this factor by asking what factors other than “pre-existing disadvantage” can support a claim of discrimination or violation of essential human dignity, which perhaps suggests a retreat from an inequality-based approach. To further compound the confusion, the examples he provided regarding the correspondence between a ground and the nature of the differential treatment are illustrative of ways to justify what might otherwise be considered differential or preferential treatment. In other words, rather than providing examples of factors other than pre-existing disadvantage that would help a claimant demonstrate discriminatory effect, the Court discussed the contextual factor in relation to what types of distinctions are permissible. In the Court’s view, permissible distinctions are those that consider the actual differences in needs, merits or capacities between individuals, taking into account the context underlying their differences in a manner that respects and values their dignity and difference.²⁰⁹

In terms of the fourth contextual factor, because Justice Iacobucci’s discussion only refers to the “nature” of the interests adversely affected, and not the “nature” of the group adversely affected, it is not clear whether the focus on impact is neutral with respect to whether a claimant is in a position of subordination or dominance. However, viewed in conjunction with the first contextual factor, members of the Court appear to place equality rights claims along a “continuum of discrimination”²¹⁰ in the sense that “the more socially vulnerable the group, the more likely its members are to experience the effects of

²⁰⁹*Ibid.* at 529. Some additional concerns with this contextual factor are touched upon later in the chapter.

²¹⁰This phraseology is employed by Andrea York, *supra* note 69 at 365, in her assessment of Justice L’Heureux-Dubé’s dissenting opinion in *Egan*.

discrimination”.²¹¹ While not focused exclusively on inequality, this continuum approach would not preclude an inequality-based analysis.

In light of these positive pronouncements, why am I struggling with how to characterize the Court’s approach in *Law*? As I read the case more closely and several more times, I realized that a number of the weaknesses of *Andrews* and post-*Andrews* jurisprudence were incorporated into parts of the approach in *Law*. I will comment on three of these weaknesses: the Court’s reliance on stereotypes and concepts such as “merit” and “capacity”; the potential importation of a relevancy requirement into the section 15(1) analysis; and a tension between a focus on what has been termed “abstract individualism”²¹² and a focus on contextual systemic inequality.

Similar to the analysis in *Andrews*, and much of the post *Andrews* jurisprudence, the Court in *Law* emphasized the role of stereotyping²¹³ in determining a violation of the equality provision. Terms such as “merit” and “capacity” are also interwoven in various parts of the decision. “Stereotypes”, “merits” and “capacities” are discussed in relation to contextual factors one and two as well as in the Court’s discussion of human dignity generally. Under the discussion of “pre-existing disadvantage”, for example, Justice Iacobucci stated that the most “prevalent” reason that a given legislative provision may be found to infringe section 15(1) is that it reflects and reinforces existing “inaccurate” understandings of the “merits,

²¹¹*Ibid.*

²¹²Hester Lessard et al., *supra* note 98, at 87-99.

²¹³Justice Iacobucci defined the term stereotype as “a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess”. *Ibid.* at 535.

capabilities and worth of a particular person or group within Canadian society resulting in further stigmatization”.²¹⁴ The Court’s emphasis on the concept of stereotyping, and in particular, the accuracy of stereotyping, as well as its discussions of concepts such as “merit” and “capacity” have been problematized by feminist and Charter scholars in the past.²¹⁵ Reliance on the concept of stereotyping when asserted by Mr. Justice McIntyre in *Andrews*, was subject to criticism on the basis that the Court failed to recognize that concepts such as “capacity” and “merit” have consistently been used to exclude members of oppressed groups.²¹⁶ Indeed, many legislative distinctions now viewed as discriminatory once conformed with dominant conceptions of merit, worth or circumstances.²¹⁷ In addition, as Diana Majury argues,

[s]tereotyping is much more complex than simply its accuracy on either a group or individual basis. The problem of stereotyping is at least as much of the devaluing of characteristics traditionally assumed to belong to an oppressed group as it is the accuracy of that stereotype with respect to the group as a whole or to individual members of that group.²¹⁸

The Court in *Law* has continued along this path with its discussion of pre-existing disadvantage and the contextual factor of correspondence, in particular. In this respect, the Court needs to be exceedingly careful in corresponding a ground with a need, capacity or circumstance for that is where stereotypes can dangerously and unconsciously, but easily

²¹⁴*Ibid.* at 535.

²¹⁵See, M. David Lepofsky (1997), *supra* note 8 at 377; Hester Lessard et al., *supra* note 98 at 97; Diana Majury (1991), *supra* note 9 at 427; Andrea York, *supra* note 69 at 360-361.

²¹⁶Diana Majury, *Ibid.*

²¹⁷Hester Lessard et al., *supra* note 98 at 97-98.

²¹⁸See Diana Majury, *supra* note 9 at 427.

come into play. Justice L'Heureux-Dubé in *Egan*, for example, cautioned the Court that by focusing on categories of discrimination, the Court risks relying on stereotypes and conventions about individuals within these categories that themselves further entrench the discriminatory status quo.²¹⁹

Also of concern is that in many parts of the decision, the Court may have unwittingly imported relevance factors into the equality analysis. Although the Court made no mention of the “relevance” approach of Justices Gonthier and La Forest in *Egan* and *Miron*, respectively, the importation of what should be a section 1 analysis into section 15 potentially happens in a number of areas in the judgement, particularly with respect to contextual factor two, correspondence. Correspondence is discussed in relation to the Charter’s purpose as well as the second and third contextual factors. It is also relied upon in the Court’s analysis of section 15(1) as it relates to the situation of Nancy Law. For example, in articulating the decision of the Court, Justice Iacobucci questioned whether age is “properly included among factors which determine eligibility for survivor’s benefits”.²²⁰ Justice Iacobucci also held that discrimination will likely be found “where the law draws a formal distinction in treatment on the basis of enumerated or analogous grounds, because the use of these grounds frequently does not correspond with need, capacity or merit”.²²¹ Are these not ways of asking, indirectly, whether an enumerated ground is a relevant factor? As explained in chapter three, importing relevance into a section 15 analysis is worrisome as it

²¹⁹*Egan*, *supra* note 105 at 552.

²²⁰*Supra* note 12 at 554.

²²¹*Ibid.* at 545.

gives judges the discretion to characterize the law's purpose as they see fit, and then to use reasoning to conclude whether the impugned legislation's use of a Charter-protected personal characteristic is relevant or irrelevant to that purpose.²²² It is also important that issues of pervasive and systemic oppression are not transformed into problems of reasonable classification.

The third area of concern that I will touch upon is a subtle tension between the "abstract" individual and the "contextual" individual that is interwoven within the discussion of the purpose of the equality provision as well as in the contextual factors. The Court clearly articulated and unanimously agreed upon the purpose of the constitutional equality guarantee as the prevention of the violation of essential human dignity and freedom. Indeed, it is certainly difficult to argue against a purpose that respects the essential human dignity of individuals. However, from a feminist perspective, the primary question is whether the purpose enunciated by the Court is consistent with the expectations articulated by many feminist scholars regarding the objective of section 15(1), namely: to eradicate the substantive conditions of inequality experienced by women and other oppressed groups that are subject to systemic discrimination.²²³ Moreover, does the articulated purpose reflect an inequality-based approach, or does it introduce abstraction or ambiguity into the section 15(1) analysis?

Although conceptualizing equality in terms of demeaning essential human dignity

²²²See M. David Lepofsky (1997), *supra* note 8 at 378.

²²³Errol P. Mendes, for example, argues that "equal human dignity demands that systemic discrimination, adverse impacts by government actions and under-inclusivity be rooted out and eliminated . . .". *Supra* note 146 at 22.

does not necessarily preclude an inequality-based approach, nonetheless, in my opinion, such a conceptualization adds an additional level of abstraction to a concept, which the Court has admitted is already elusive and abstract.²²⁴ It also appears to be more of an individual concept. In his discussion of human dignity, for example, Justice Iacobucci explained that the term does not relate to the “status or position of an individual per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.”²²⁵ Read in isolation, this statement is completely neutral with respect to whether a particular claimant is in a position of dominance or subordination and therefore runs counter to both a contextual and inequality-based approach. Based on the above description of human dignity, it can be easily argued that a person who was not given a job on the basis of a law that promotes hiring for members of oppressed groups, would “legitimately” feel that his or her human dignity has been violated. References to human dignity are also made in relation to unfair treatment “premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits”.²²⁶ As will be explained below, these terms are very individual concepts.

However, in all fairness, Justice Iacobucci did go on to say that a claimant has to demonstrate negative effects upon human dignity through use of contextual factors. He also held that the central concern in determining a section 15(1) infringement is whether a violation of human dignity has been established, “in light of the historical, social, political

²²⁴*Supra* note 12 at 507 and again at 529.

²²⁵*Ibid.* at 530.

²²⁶*Ibid.*

and legal context of the claim”.²²⁷ It can be argued that, when the decision is read as a whole, the focus of the Court is on a “contextualized” individual. In the application of the *Law* framework to the case at bar, the Court appeared to provide an analysis that focused on the individual, Nancy Law, situated within a broader social context.²²⁸ Justice Iacobucci did allow the larger social and historical patterns of Canadian society to enter his analysis.

However, I have some discomfort that the Court indirectly, rather than expressly, focused on issues of vulnerability and powerlessness. Even the discussion of pre-existing disadvantage contains a subtle tension. Although briefly mentioning the vulnerability of a claimant, for the most part, Justice Iacobucci talked about pre-existing disadvantage in the context of exacerbating an “existing prejudicial stereotype”.²²⁹ In this respect, a focus on stereotyping promotes a more abstract and individualized understanding of section 15(1) insofar as it seems to suggest that distinctions consistent with assumptions about matters such as individual merit and worth will be acceptable. As Hester Lessard et al., point out, stereotypes may place undue emphasis on requirements of individual relevancy, in the absence of group context, which is not a strong endorsement of a contextual and inequality-based approach to equality.²³⁰ Although it is important to eliminate false (untrue or unreal)

²²⁷*Supra* note 11 at 545. In the context of human dignity, the Court asked, at 530, “does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?”.

²²⁸However, the application of the equality analysis to the situation of Nancy Law was by no means rigorous. In a sixty-six page judgement, only 12 pages were dedicated to the application of the approach to the situation of Nancy Law.

²²⁹*Ibid.* at 535.

²³⁰Lessard et al., *supra* note 98 at 97.

generalizations, it would have been preferable, in my view, if Justice Iacobucci employed the analysis of Madam Justice L’Heureux-Dubé in *Egan* to explain this “contextual” factor. In that decision, Justice L’Heureux-Dubé held that by examining the “nature of the group adversely affected”, the courts would be better able to understand why legislation may be discriminatory in its impact on one group, yet not upon another.²³¹ In her reasons in *Egan*, Justice L’Heureux-Dubé explained that:

[i]t is important to ask ourselves questions such as “Is the adversely affected group already a victim of historical disadvantage?”; “Is this distinction reasonably capable of aggravating or perpetuating that disadvantage?”; “Are group members currently socially vulnerable to stereotyping, social prejudice and/or marginalization?”; and “Does this distinction expose them to the reasonable possibility of future social vulnerability to stereotyping, social prejudice or marginalization?”. Membership in a “discrete and insular minority,” lacking in political power and thus susceptible to having its interests overlooked, is yet another consideration that may be taken into account”.²³²

Consistent with an inequality-based analysis, this approach frames questions in relation to the disempowerment and oppression of the group to which a claimant belongs. Although this type of analysis may underlie Justice Iacobucci’s discussion of the contextual factor of pre-existing disadvantage, the emphasis on the nature of the group adversely affected does not come out strongly. Rather, in his explanation of this contextual factor, Justice Iacobucci focused on stereotype-based exclusion.

Similarly, in many parts of the decision, the Court, in *Law*, rather than framing issues directly in terms of oppression and inequality (e.g., purpose of section 15), chose a more

²³¹*Egan*, *supra* note 105 at 553.

²³²*Ibid.* at 554-555.

indirect means of recognizing inequality, through for example, contextual factors one, two and three. In addition, the emphasis on pre-existing disadvantage is tempered by the Court expressly stating that members of a more advantaged group or groups in society are “clearly” entitled to bring an equality claim to the courts.²³³ However, the Court is not clear as to what types of circumstances would result in members of advantaged groups succeeding in an equality claim. Perhaps, the use of contextual factor four, relating to the nature of the interests adversely affected, is relevant on this point.

In assessing where *Law* stands in relation to the previous equality jurisprudence of the Court, the decision is positive to the extent that it represents a commitment back to the substantive analysis adopted in *Andrews*. The Court, in *Law*, reaffirmed the ameliorative purpose of the provision and the importance of context, impact, and effect in interpreting section 15(1) of the Charter. Also positive, is that in relation to the criteria discussed in chapter two, the approach in *Law* requires the use of contextualization and recognizes the possibility of intersectional analysis.

However, a cause for cautious optimism, or worrisome discomfort, is that the section 15(1) analysis is not explicitly framed by the Court in terms of inequality. Rather, Justice Iacobucci incorporated into the analytical framework, the Court’s previous emphasis on equality as a comparative concept and discussions of pre-existing disadvantage in terms of inaccurate stereotypes. Also cause for concern, from a feminist perspective, is that there is at times a subtle tension between a focus on the abstract individual and a focus on systemic and pervasive inequality. This tension reminds me of the remarks of Lessard et al., in their

²³³*Supra* note 12 at 536.

commentary on the Supreme Court decision in *Andrews*. In their words:

McIntyre J.'s judgement . . . is, perhaps, most remarkable for its ability to be anything to anyone. At different moments, McIntyre J. rejected the similarly situated test, implicitly adopted the relevancy test which is the hallmark of the similarly situated test and endorsed a contextual analysis²³⁴

Justice Iacobucci's analysis in *Law* displays this very same propensity, and it is this propensity that leads to the fragility of the approach in *Law*. In this respect, because the "proper approach" in *Law* involves a "synthesis" of various previous approaches, it bears many of the same weaknesses of its predecessors, including *Andrews*. For these reasons, the approach to section 15(1) should not be characterized as a watershed, but rather a fragile patchwork of previous articulations that, for the time being, has garnered the support of the full bench. It is not surprising that, like the situation in *Andrews*, the Court selected a case that is not classified as a "hard" case, to clarify its unanimous approach to section 15(1). My fear in this respect, which I elaborate on briefly in my concluding comments, is that the approach in *Law* may break down as the Court considers more complex cases of inequality.

Indeed, the true test of the analytical framework is in its application, a lesson well learned following the progressive weakening of the standard set by the Court in *Andrews*. The meaningfulness of the approach in *Law* will be ascertained based on how it is applied in practice. In the next section I assess the application of the approach to *Corbiere*, which is a case that involves an inquiry into whether a ground is analogous to those enumerated on the basis of a combination of grounds and also considers "intra-group" distinctions where the group generally is disadvantaged.

²³⁴Hester Lessard et al., *supra* note 98 at 88. [footnotes omitted].

4.2. Application of the Supreme Court's Analytical Framework in *Corbiere*

In *Corbiere*, the Supreme Court of Canada considered whether section 77(1) of the *Indian Act*,²³⁵ which requires that band members be “ordinarily resident” on the reserve in order to vote in band elections, violated section 15(1) of the Charter, either generally or with respect to members of the Band in question.²³⁶ The claim was brought against the Batchewana Indian Band by John Corbiere on behalf of himself and all non-resident members of the Batchewana Indian Band. The Court was unanimous in striking down the impugned provision on the ground that it discriminated against the claimants on the basis of the analogous ground of “Aboriginality-residence” contrary to section 15(1) of the Charter and could not be justified under section 1.²³⁷ The Court declared the words “and is ordinarily resident on the reserve” of section 77(1) invalid but suspended the declaration of invalidity for 18 months.

The majority decision was delivered jointly by Justices McLachlin and Bastarache on behalf of Chief Justice Lamer and Justices Cory and Major, while Justice L’Heureux-Dubé wrote the concurring opinion on behalf of Justices Gonthier, Iacobucci and Binnie. Justices McLachlin and Bastarache, as well as Justice L’Heureux-Dubé, applied the approach set out in *Law* and reached the same conclusions. However, the question of whether the equality rights of off-reserve members of the Batchewana band had been violated was

²³⁵R.S.C. 1985, c. I-5.

²³⁶*Supra* note 16 at 227.

²³⁷Both the Federal Court, Trial Division, and the Federal Court of Appeal found that in terms of the disposition of reserve lands or Indian monies held for the band as a whole, section 77(1) infringed section 15(1) and that the infringement was not justified under section 1 of the Charter. [1994] 1 F.C. 394, and [1997] 1 F.C. 689, respectively.

resolved by Justices McLachlin and Bastarache, in their words, “on much simpler grounds” than those employed by Justice L’Heureux-Dubé.²³⁸

Both the majority and concurring opinions held that the first stage of the *Law* inquiry was “easily satisfied”; the impugned legislation drew a distinction between on-reserve and off-reserve band members that denied equal benefit of the law.²³⁹ With respect to the second stage of the equality analysis set out in *Law*, namely, whether differential treatment is based on an enumerated or analogous ground, the three judges held that the exclusion was based on the newly postulated analogous ground of “Aboriginality-residence”. However, the recognition of the ground as analogous was reached on the basis of different interpretations of the second stage of the *Law* inquiry.

Justices McLachlin and Bastarache, as well as Justice L’Heureux-Dubé, cited similar factors that a court could look to in assessing whether a ground is analogous, including whether the characteristic is immutable, or constructively immutable, and whether those defined by the characteristics are lacking in political power, disadvantaged or vulnerable to having their interests overlooked.²⁴⁰ Justice L’Heureux-Dubé placed more emphasis on the fundamental nature of the characteristic, that is, “whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging”.²⁴¹ In contrast, Justices McLachlin and Bastarache held that the immutable or

²³⁸*Supra* note 16 at 215.

²³⁹*Ibid.* at 216, per Justices McLachlin and Bastarache, and at 250, per Justice L’Heureux-Dubé.

²⁴⁰*Ibid.* at 219-220, per Justices McLachlin and Bastarache; and at 252, per Justice L’Heureux-Dubé.

²⁴¹*Ibid.* at 252.

constructively immutable nature of the characteristic is “central” to the analogous inquiry.²⁴² However, the main difference in interpretation of the principles in *Law* was that Justice L’Heureux-Dubé added a contextual dependency to the search for analogousness, whereas Justices McLachlin and Bastarache affirmed a context free inquiry into whether a distinction is based on a ground analogous to those enumerated under section 15(1). The choice of test for determining analogous grounds is significant in terms of the Court’s ability to deal with complex experiences of discrimination.

In the opinion of the majority, enumerated and analogous grounds function as “legislative markers of suspect grounds associated with stereotypical, discriminatory decision-making”.²⁴³ In contrast to the opinion of Justice L’Heureux-Dubé, the majority articulated that grounds of discrimination, whether enumerated or analogous, are constant jurisprudential markers, rather than contextual or fact-based conclusions that might vary from case to case.²⁴⁴ Accordingly, it is not the ground that varies from case to case, but the determination of whether a distinction on the basis of a ground is discriminatory. In this respect, for example, sex will always be a ground, although sex-based legislative distinctions may not always be discriminatory.²⁴⁵ In the view of Justices McLachlin and Bastarache, the contextual and fact-based inquiry commences at the third stage, which determines whether

²⁴²*Ibid.* at 219.

²⁴³*Ibid.* at 216-217.

²⁴⁴*Ibid.* at 216.

²⁴⁵*Ibid.* at 217.

the distinction amounts to discrimination in the context of the particular case.²⁴⁶ Yet, in its reasons for recognizing “Aboriginality-residence” as an analogous ground, the majority held that reserve status, which involves profound decisions that Aboriginal band members make to live on or off reserves, should not be confused with the ordinary “residence” decisions faced by the average Canadian.²⁴⁷ This discussion, although not represented as such, is a contextual analysis that takes into perspective the history of oppression of Aboriginal Canadians and places a contextual dependency on residence.²⁴⁸

Alternatively, Justice L’Heureux-Dubé held that the focus of the inquiry into an equality infringement, at all three stages, is purposive and contextual, including the inquiry into whether a ground is analogous.²⁴⁹ In her opinion, if the ground of distinction is not enumerated or already recognized as analogous,²⁵⁰ it is fundamental that the judiciary considers whether recognizing the ground as analogous would further the purposes of section 15(1). Justice L’Heureux-Dubé affirmed that the analysis at the second stage involves considering whether differential treatment defined by traits or a combination of traits has the potential to violate human dignity in the sense underlying the equality provision. Of particular interest in Justice L’Heureux-Dubé’s analysis are her comments relating to

²⁴⁶*Ibid.* at 217-219.

²⁴⁷*Ibid.* at 220.

²⁴⁸For an elaboration on the relationship between “residence” and “Aboriginal-residence”, please see, Patricia Hughes, “Case Comment *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,” *National Journal of Constitutional Law*, 12 (2000), 69 at 74-79.

²⁴⁹*Supra* note 16 at 250.

²⁵⁰Analogous grounds already recognized by the Supreme Court of Canada include, citizenship in *Andrews*, sexual orientation in *Egan*, and marital status in *Miron*.

intersecting grounds of discrimination. In her words,

The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership and place of residence in this case) and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.²⁵¹

The application of the analytical framework set out in *Law*, in *Corbiere*, by Justice L'Heureux-Dubé, particularly its second stage, embraces the contextual, inequality-based and intersectional approach to equality endorsed by feminists. It does so by offering a less neutral understanding of enumerated and analogous grounds of discrimination and by recognizing the need for intersectional analysis. In this respect, Justice L'Heureux-Dubé has been consistent in her critiques of the 'enumerated and analogous grounds' approach to equality as too limited and limiting and she has incorporated some of her nuanced reasons from previous equality judgements into her analysis in the *Corbiere* case. Writing for the minority in *Mossop*, for example, Justice L'Heureux-Dubé discussed the notion of intersectionality in her criticisms of the majority's treatment of the grounds of family status and sexual orientation as mutually exclusive. In her words,

[i]t is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination ... misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, is not really meaningful to assert that it is one or the other. It may be more realistic to

²⁵¹*Supra* note 16 at 253.

recognize that both forms of discrimination may be present and intersect.²⁵²

Although Justice L'Heureux-Dubé did not expressly repudiate the categorical approach to discrimination in *Corbiere*, her analysis at the second stage is more tailored to address and recognize complex forms of discrimination experienced by groups. Her approach promotes a more expansive and anti-essentialist approach to equality rights than has been articulated by the majority of the Court in *Andrews* and post-*Andrews* jurisprudence, including in *Law*.

In contrast, the interpretation of the second stage of the *Law* inquiry by Justices McLachlin and Bastarache is more susceptible to critiques of essentialism and may be less capable of addressing situations involving complex forms of discrimination and inequality experienced on the basis of intersecting grounds. The opinion of Justices McLachlin and Bastarache imports the Court's previous emphasis on immutability as the "barometer"²⁵³ for determining whether the basis for a distinction qualifies as an analogous ground of discrimination. In critiques of *Andrews* and post-*Andrews* decisions, the concept of immutability as a justification for the categories enumerated in section 15 and as a basis for determining analogous grounds has been problematized on the basis of the relationship between immutability and essentialism.²⁵⁴ The concept of immutability encompasses a view of personal characteristics as "essential, neutral, and historically continuous", rather than as "historically specific, culturally changeable, and the outcome of a particular pattern of social

²⁵²*Ibid.* at 645-646 [footnotes omitted].

²⁵³I have borrowed this term from Graeme G. Mitchell's case commentary on *Corbiere*. *Supra* note, 192 at 168.

²⁵⁴See, Nitya Iyer (1993), *supra* note 39 at 179; Douglas Kropp, "'Categorical' Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject," *Queen's Law Journal*, 23 (1997), 201 at 224; Carl F. Stychin, *supra* note 43 at 49.

relations based upon oppression”.²⁵⁵ The analysis of Madam Justice L’Heureux-Dubé, by focusing on intersecting grounds, and “changing social phenomenon”, much better responds to this critique and allows for the foundation of the kind of analysis that Nitya Iyer and others are calling for.

Preceding to the third stage of the *Law* analysis, both the majority and concurring opinions apply the *Law* contextual factors of pre-existing disadvantage, correspondence and the importance of the affected interest and reached the same conclusion – that the distinction amounted to discrimination. In this respect, denying the right to vote to off-reserve band members perpetuates their historical disadvantage and treats them as less deserving members of the band, which engages the dignity aspect of the section 15 analysis.²⁵⁶ Turning to the justification inquiry under section 1, the full Court held that the impugned provision could not be saved. Although the restriction on voting was rationally connected to the intent of the legislation, which was identified as providing a voice in the affairs of the reserve to persons most directly affected by the decisions of the band council, section 77(1) did not minimally impair the section 15 right.²⁵⁷

An important aspect of the case is that the Court held that an analogous ground, such as Aboriginality-residence, can be limited to a subset of the population.²⁵⁸ Also, the Court

²⁵⁵Carl F. Stychin, *ibid.* at 56.

²⁵⁶*Supra* note 16 at 221-223, per Justice McLachlin and Bastarache, and at 269-272, per Justice L’Heureux-Dubé.

²⁵⁷*Ibid.* at 224-225, per Justice McLachlin and Bastarache, and at 275-278, per Justice L’Heureux-Dubé.

²⁵⁸*Ibid.* at 220.

considered discrimination between two groups who have generally experienced “pre-existing disadvantage, vulnerability, stereotyping, or prejudice”.²⁵⁹ In this case, it was on-reserve and off-reserve band members. The majority, under its discussion of enumerated and analogous grounds, referred to this possibility as “embedded” analogous grounds and recognized that such grounds “may be necessary to permit meaningful consideration of intra-group discrimination”.²⁶⁰ Other than recognizing that it is possible for a ground to be limited to a subset of the Canadian population, the majority did not go any further on elaborating on the concept of “embedded” analogous grounds.

Again, Justice L’Heureux-Dubé in her discussion of discriminatory impact, elaborated more meaningfully and contextually on how to resolve equality claims between groups who have experienced pre-existing disadvantage. In keeping with her avoidance on focusing on discrimination on the basis of grounds, Justice L’Heureux-Dubé discussed the issue in relation to the subjective-objective perspective. She held that in determining whether a piece of legislation violates section 15(1), the Court must examine the legislation in the “context in which it applies, with attention to the interests it affects, and the situation and history in Canadian society of those who are treated differently by it”.²⁶¹ In her view, when legislation impacts on various groups, the subjective-objective perspective must take into account the needs and particular experiences of all those groups, particularly if the

²⁵⁹*Ibid.* at 256.

²⁶⁰*Ibid.* at 221.

²⁶¹*Ibid.* at 255.

groups are disadvantaged.²⁶² In the words of Justice L'Heureux-Dubé,

[w]hen analysing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. This is inherent in the nature of the subjective-objective analysis, since a court is required to *consider* the perspective of someone possessed of similar characteristics to the claimant.²⁶³

Justice L'Heureux-Dubé reaffirmed that substantive equality principles require recognizing and affirming differences between groups in a manner that “respects and values their dignity and difference”.²⁶⁴ Her discussion helps explain why identical treatment is not necessarily the answer to a section 15 challenge, and in the context of this particular case, how ensuring equality for off-reserve members, “in accordance with the principles of respect for human dignity”, does not require non-residents to have identical voting rights to those of residents.²⁶⁵

The judgement of the full Court is positive and reflective of the principles of substantive equality. However, the decision of Justice L'Heureux-Dubé shows considerably more understanding of the history of oppression of both on and off-reserve band members, than is displayed in the majority decision that made a point to rule on “simpler grounds”. The strong contextual and effects-based analysis of Justice L'Heureux-Dubé is encouraging, particularly since, unlike pre-*Law* jurisprudence, it garnished the support of three additional judges, including Justice Iacobucci who authored the unanimous decision in *Law*. Its main contribution to equality jurisprudence is that it affirms, with the recognition of

²⁶²*Ibid.* at 255.

²⁶³*Ibid.* at 256.

²⁶⁴*Ibid.* at 272.

²⁶⁵*Supra* note 16 at 272-273.

“Aboriginality-residence” as an analogous ground of discrimination, that intersecting forms of distinction amount to distinct forms of discrimination. On this point, the decision of L’Heureux-Dubé displays more sensitivity to the contingent, contextual identities represented by claimants who experience complex or intersectional discrimination.

Also positive is the concept of the majority of “embedded” analogous grounds, such as “Aboriginality-residence”, which recognizes that an analogous ground may be limited to a subset of the Canadian population. Although not explicitly discussed as such, the recognition of Aboriginality-residence is an example of contextual and inequality-based determinations of a subset of an already disadvantaged group. I take from this case that the Court, to varying degrees, is starting to recognize the heterogeneity among members of various groups and the intersectionality of disadvantage; that there is an interplay of privilege and disadvantage not only between different groups but “intra” group as well. Justice L’Heureux-Dubé’s discussion of analogous grounds, in obtaining the support of three other judges, shows positive signs that some members of the Court are moving away from the narrow constraints imposed by categories, which is an advancement from pre-*Law* jurisprudence. Four judges of the Court were able to carve out jurisprudential space from which to push for more fluid ways of responding to discrimination suffered by oppressed groups. Yet, the majority’s focus on immutability indicates a possible resistance to this approach. The decision also raises the question of whether we are starting to see the Court split again over still a not so “hard” case, although possibly slightly less not-so-hard than *Law*. In other words, are we back to the post-*Andrews* deterioration of the approach to equality. This question is explored in the concluding chapter which follows.

Chapter 5 - Conclusion

Reflections on the Future of Equality Rights in Canada

On the basis of my analysis in this paper, it is possible to provide some commentary as to whether the Supreme Court of Canada is building an approach to resolving section 15 challenges that has the potential, as the provision moves into its second full decade, to address the systemic conditions of inequality experienced by so many oppressed groups in Canada. In my reflections on the future of equality rights in this country, I found the words of Madam Justice L'Heureux-Dubé in her dissenting opinion in *Egan* captured my sense of both the potential and the limitations of the approach to section 15 set out by the Court in *Law*:

[t]he problem, in my mind, lies not with the tools but with the framework within which they have in the past been employed. If the framework is not perfectly suited for the [analytical] tools, then we do not use the tools to their full potential.²⁶⁶

In *Law*, the Supreme Court incorporated into its analytical framework for equality the jurisprudential tools that, from a feminist perspective, are necessary to tackle systemic barriers. In relation to the specific criteria outlined in chapter two, many parts of Justice Iacobucci's analysis support a contextual, inequality-based and intersectional approach to the interpretation of the constitutional equality guarantee. Moreover, the decision in *Law* emphasizes the importance of impact and context in resolving alleged breaches of section 15. The decision in *Corbiere* also shows signs that the Court, or at least four of its judges, is starting to recognize the heterogeneity among members of various groups and the need for

²⁶⁶*Egan*, *supra* note 105 at 545.

intersectional analysis to address inequality experienced in multiple ways.

However, these tools, in my opinion, will not be used to their full potential because interwoven throughout the framework in *Law* are the weaknesses of the *Andrews* and most of the post-*Andrews* jurisprudence, which ultimately led to the deterioration of the largely substantive approach to equality originally set out by the Court in 1989. As the “proper approach” in *Law* involves a “synthesis” of various previous approaches, it is susceptible to the same fractured outcome and, for that reason, I characterize the Court’s approach as fragile. Indeed, the true test of this approach will come when the Supreme Court is presented with more complex experiences of inequality, or with cases that threaten the status quo or that result in a significant reallocation of social resources. Margot Young characterizes such cases as those that cause judicial discomfort,²⁶⁷ and Justice L’Heureux-Dubé in *Egan* has suggested that, in the future, “hard” cases will become the rule rather than the exception.²⁶⁸ It is my fear that with these types of cases the judicial approach in *Law* will most likely fall apart.

Since the *Law* decision, there have been six cases decided at the Supreme Court level that have applied the approach in *Law*.²⁶⁹ A number of these decisions demonstrate the fragility of the *Law* approach. As explained in chapter four, in *Corbiere*, although the Court was unanimous in the disposition of the case, two separate opinions were filed regarding the

²⁶⁷Margot Young, *supra* note 148 at 262.

²⁶⁸*Egan*, *supra* note 105 at 557.

²⁶⁹*Lovelace v. Ontario* [2000] S.C.J. No. 36; *Granovsky v. Canada (Minister of Employment and Immigration)* [2000] 1 S.C.R. 703; *Delisle v. Canada (Deputy Attorney General)* [1999] 2 S.C.R. 989; *Winko v. British Columbia (Forensic Psychiatric Institute)* [1999] 2 S.C.R. 625; *M. v. H.* [1999] 2 S.C.R. 3.

application of the *Law* framework. In the other five cases, the Court was unanimous in two decisions, filed separate but concurring opinions in two cases and was divided in one case, *M. v. H.*

M. v. H. involved a Charter challenge by a lesbian calling for an expansion of the definition of “spouse” in the *Family Law Act*,²⁷⁰ which restricted the term to heterosexual cohabiting partners. The Court ruled that section 29 of the *FLA* violated section 15(1) of the Charter and the infringement was not saved under section 1. Although a positive result, four separate opinions were filed by the Court. The majority opinion was delivered jointly by Justices Cory and Iacobucci on behalf of four other judges. Two separate concurring judgments were filed by Justices Major and Bastarache, while Justice Gonthier was the sole dissenter. The decision in *M. v. H.* lends support to the claim that the more likely the case is to cause “judicial discomfort”, the more susceptible the approach in *Law* is to falling apart. It contains strands that each judge can employ to justify their reasons and results.

In chapter one, I indicated that the purpose of this paper is to contribute to the discussions of the utility of feminists strategizing in Charter equality litigation by assessing one specific, yet important, measure of the ameliorative potential of the constitutional equality provision -- the judicial approach to section 15(1). For reasons I have set out in this paper, the ameliorative potential of the judicial approach in *Law*, although it exists, in my view, is limited and uncertain. Yet, I am leaving this journey with some sense of optimism regarding the use of law as a mechanism for social change. For one reason, Intervenor, such as LEAF, are making conceptual inroads in impacting the reasons of the Court. These

²⁷⁰R.S.O., 1990, c. F.3, s. 29 (hereinafter, *FLA*).

inroads are evidenced in the Court's requirement of contextualization and its recognition of an inequality-based approach. Although these inroads have been incremental, they are indeed significant. In addition, although a substantive claim of inequality may or may not succeed in the courts, the legal arena is an important forum for discussion, for exposing values, for challenging us to think and sometimes for movement forward. For this reason, I believe that, despite its limitations, the law should not be abandoned as a site for struggle.

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