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A New Trend in Equality Jurisprudence?

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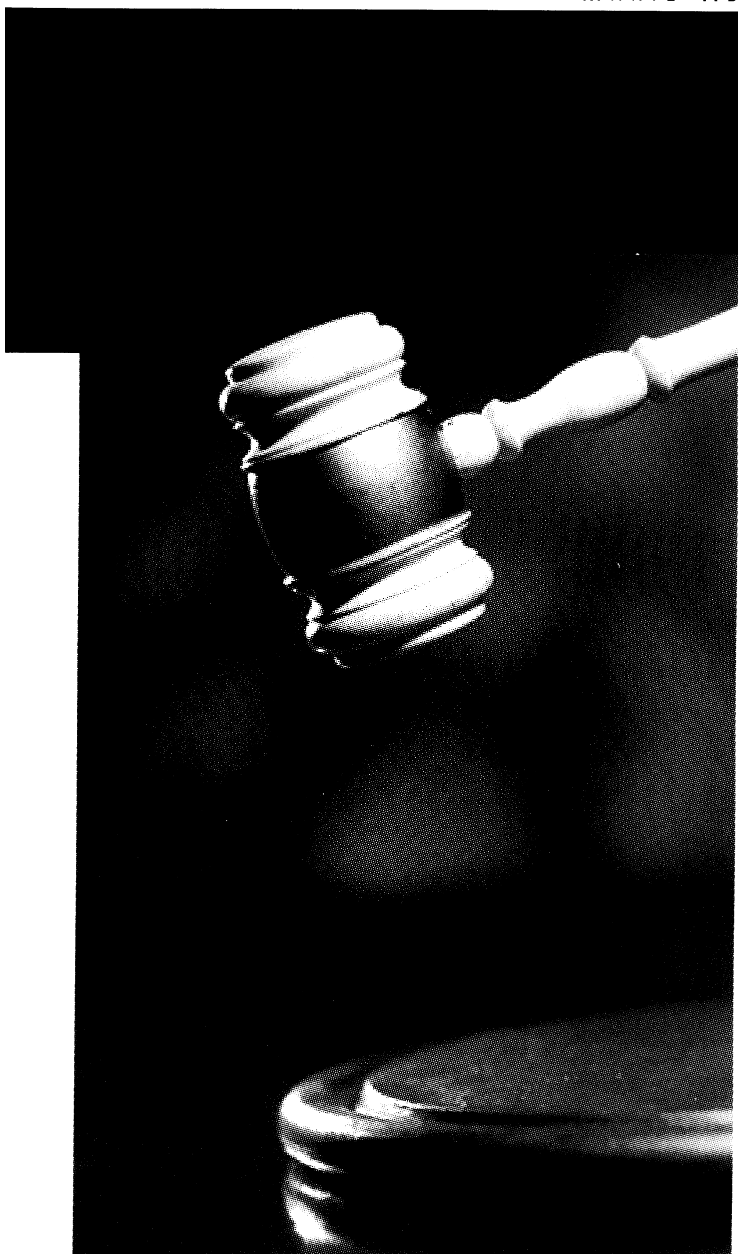
The equality rights protected by section 15(1) of The Canadian Charter of Rights and Freedoms[1] are among the most fundamental rights possessed by Canadians. Equality is so important because it defines our understanding of humanity and how people interact with one another. Although one can innately understand the higher meaning and ideals that equality embodies, the task of articulating a practical and effective test to decide when a person's equality rights have been violated is a very difficult one.

Since section 15 has been in effect, the judicial approach to equality rights has, unsurprisingly, altered over time. The Supreme Court of Canada's early interpretation of section 15(1) in *Andrews* v. *Law Society of British Columbia*[2] and *R.* v. *Turpin*[3] set out the "enumerated" and "analogous grounds" approach. This approach was considered to be the correct test (subject to minor variations in its application) until the 1995 "trilogy" of equality cases: *Egan* v. *Canada*,[4] *Miron* v. *Trudel*[5] and *Thibaudeau* v. *Canada*.[6] These cases dramatically shifted the understanding of section 15. The Supreme Court became badly fractured over the correct interpretation of section 15(1). As will be seen, some members of the Court adopted a much more restrictive interpretation of equality. Each Justice seemed fairly resolved in his or her position and this division was maintained until 1997.

Somewhat surprising to those interested in constitutional law were the Supreme Court's three unanimous equality decisions in 1997: *Benner* v. *Canada (Secretary of State)*[7], *Eaton* v. *Brant County Board of Education*[8] and *Eldridge* v. *British Columbia (Attorney General)*.[9] In 1998, the Supreme Court rendered its judgment in *Vriend* v. *Alberta*.[10] While the Court in *Vriend* was not unanimous,[11] the decision indicated a great deal more consensus on how to interpret section 15(1) than there had been in 1995.

In this paper, I will suggest that these four recent cases reflect a new trend in equality rights jurisprudence. This trend is marked by a return to the Court's early section 15(1) approach, which possessed a broad understanding of the equality rights. This paper will focus primarily on three factors that I believe characterize this more generous interpretation:[12] first, an expansive definition of discrimination; second, a renewed emphasis on the

1 Being Schedule B to The Constitution Act, 1982, enacted by The Canada Act 1982, U.K. Stats. 1982, c. 11; herinafter referred to as "the Charter."
2 [1989] 1 Supreme Court Reports 143, 56 Dominion Law Reports (4th) 1; herinafter cited to Dominion Law Reports as "*Andrews*."
3 [1989] 1 Supreme Court Reports 1296, 48 Canadian Criminal Cases (3d) 8; herinafter referred to as "*Turpin*," cited to Canadian Criminal Cases.
4 [1995] 2 Supreme Court Reports 513, 124 Dominion Law Reports (4th) 609; herinafter referred to as "*Egan*," cited to the Dominion Law Reports.
5 [1995] 2 Supreme Court Reports 418, 124 Dominion Law Reports (4th) 693; herinafter referred to as "*Miron*," cited to the Dominion Law Reports.
6 [1995] 2 Supreme Court Reports 627, 124 Dominion Law Reports (4th) 449; herinafter referred to as "*Thibaudeau*," cited to the Dominion Law Reports.
7 [1997] 1 Supreme Court Reports 358, 143 Dominion Law Reports (4th) 577; herinafter referred to as "*Benner*," cited to the Dominion Law Reports.
8 [1997] 1 Supreme Court Reports 241, 142 Dominion Law Reports (4th) 385; herinafter referred to as "*Eaton*," cited to the Dominion Law Reports.



importance of examining the broader context in which the rights claim takes place; and third, by the vigour of the effects-based analysis in which the Court engages.

Despite these trends, this paper will show that certain aspects of the trilogy's division remain. I will examine how the relevance factor (which relates to how one characterizes the purpose of the legislation) is treated in the recent cases. In addition, the Court does not seem to have resolved what should be predominant in the section 15(1) analysis: the notion of analogous grounds or the effects of the legislation on the group in question. Consequently, one may wonder whether the Court's unanimity in the three 1997 cases merely masks a deeper conceptual difference.

The *Andrews-Turpin* Enumerated and Analogous Grounds Approach

In 1982, the Charter — which guarantees certain fundamental rights and freedoms to

9 [1997] 3 Supreme Court Reports 624, 151 Dominion Law Reports (4th) 577; herinafter referred to as "*Eldridge*," cited to the Dominion Law Reports.

10 *Vriend* v. *Alberta*, [1998] Supreme Court Reports 493, 156 Dominion Law Reports (4th) 385; herinafter referred to as "*Vriend*," cited to the Dominion Law Reports.

11 The Court split 8-1 delivering three opinions.

12 This paper's focus is on the interpretation of section 15(1), consequently it does not examine the relationship of section 15(1) and section 1 of the Charter. However, it should be noted that as the Court's interpretation of the equality rights has evolved, so has its application of the section 1 justification test.

Canadians — was proclaimed to be part of the Constitution. Its equality provision, section 15, did not come into effect for five years in order to allow the federal and provincial governments to amend their legislation to ensure it complied. Section 15(1), over which there was great debate during its drafting, states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[13]

A law infringing a Charter right may be permissible under section 1 if the government can show that the infringement is demonstrably justified in a free and democratic society.

The Supreme Court's first opportunity to interpret section 15(1) arose in two 1989 cases: *Andrews*[14] and *Turpin*.[15] In these two cases, the Supreme Court adopts the enumerated and analogous grounds test since it "most closely accords with the purposes of s. 15 and the definition of discrimination ... and leaves questions of justification to s. 1."[16] Justice McIntyre takes a broad approach to equality in *Andrews*.[17] He determines that both the enumerated grounds and possible analogous grounds must be interpreted in a "broad and generous manner reflecting the fact that they are constitutional provisions."[18]

In *Turpin*, Supreme Court Justice Wilson emphasizes that in order to ascertain if legislation is discriminatory, one must consider the group in question and its place in the broader social context. Since this contextual analysis forms part of the basis for the transformation of section 15(1) jurisprudence, it is worth quoting at length:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. ... Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.[19]

David Lepofsky articulates what I believe Justice Wilson attempts to suggest. An inquiry that does not consider the larger context "fails to recognize that there are certain insular groups in society who traditionally suffer disadvantage, and whom equality rights are intended to serve."[20] Furthermore, Wilson noted that "[i]f the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation."[21]

The Court's generous approach to interpretation is also suggested by Justice McIntyre's statement, in *Andrews*, that not every legislative distinction will result in inequality; rather, "identical treatment may frequently produce serious inequality."[22] Thus, Justice McIntyre recognizes the difference between equal treatment and equal result. He insists that equal treatment is insufficient. When assessing a section 15(1) violation, a court must look at the result of the treatment on the rights claimant. He states: "To approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned."[23]

13 Section 15(2) of the Charter ensures that affirmative action will not contravene section 15(1).
14 *Andrews* involved a challenge to British Columbia's Barristers and Solicitors Act, which prevented Andrews from practicing law in British Columbia until he became a Canadian citizen.
15 In *Turpin*, the accused was charged with first degree murder. The equality argument was based on the fact that accused persons in a similar position in Alberta, but not in any other province, could elect to be tried by a judge alone.
16 *Andrews*, see note 2 at 23. The *Andrews-Turpin* test is a two-step one: First, did the legislation create a distinction? Second, was this distinction discriminatory? This second step entails an inquiry into whether the legislation imposed a benefit or a burden, and whether it did so based on an enumerated or analogous ground.
17 Justice McIntyre was in the minority with respect to the application of section 1. However, the majority endorsed his approach to section 15(1).
18 See above at 19.
19 See note 3 at 34.
20 M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities After 10 Years — What Progress? What Prospects?" (1997) 7 National Journal of Constitutional Law 263 at 276.
21 See note 3 at 35.
22 See note 2 at 10.
23 See above at 11.

This understanding of equality is very important. It recognizes that one cannot merely accept formal equality (treating similar people similarly); one must instead examine the impact of a legislative distinction in order to determine if it operates to confer a discriminatory burden or advantage. The Supreme Court in *Andrews* identifies that a law appearing to treat everyone similarly may, in effect, create greater hardships or advantages for some. Consequently, it crafted discrimination to include both direct discrimination and adverse effects discrimination, although it did not explicitly use this language.

The Court's generous approach to equality in its early decisions is also reflected by its refusal to permit justificatory factors to be considered in the section 15(1) analysis. In *Turpin*, Justice Wilson writes: "In defining the scope of the four basic equality rights, it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under s. 1 of the Charter."[24] Wilson rejects the Ontario Court of Appeal's test in *Turpin* of whether a distinction was "unreasonable," "invidious," "unfair," or "irrational" on the basis that importing these limitations into section 15 is unwarranted.[25] Wilson continues: "Balancing legislative purposes against the effects of legislation within the rights sections themselves is fundamentally at odds with this court's approach to the interpretation of Charter rights."[26] This is important because it can be argued that the factor of relevance developed in the trilogy can be equated with the justificatory factors identified and rejected in both *Andrews* and *Turpin*.

As Peter Hogg observes, the Court's early decisions do not provide much guidance for what constitutes an analogous ground.[27] In *Andrews*, McIntyre states:

> A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.[28]

Thus, it would appear that the main factor is whether the distinction imputes group characteristics to an individual without any inquiry into her or his particular attributes. Justice McIntyre, according to some critics, does not define "what constitutes a personal characteristic, except to classify citizenship as one."[29]

In addition to agreeing with McIntyre that a rule barring an entire class on the basis of a personal characteristic violates section 15(1), Justice Wilson, in *Andrews,* places greater emphasis on the "context of the place of the group in the entire social, political and legal fabric of our society."[30] She finds that non-citizens are a group lacking in political power similar to a "discrete and insular minority."[31]

It is more difficult to ascertain what Supreme Court Justice La Forest intends by his comments in *Andrews*. He states:

> I am in substantial agreement with the views of my colleagues. I hasten to add that the relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague [McIntyre] has defined it, *i.e.*, on the basis of "irrelevant personal differences" such as those listed in s. 15 and, traditionally, in human rights legislation.[32]

Is this an early expression of the relevance test, as La Forest and Gonthier later assert in the

24 See note 3 at 30.
25 See above at 32.
26 See above.
27 Peter Hogg, *Constitutional Law of Canada*, 4th ed., (Scarborough: Carswell, 1997) at 1255.
28 See note 2 at 24.
29 William Black and Lynn Smith, "The Equality Rights" in Gerald-A. Beaudoin and Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed., (Scarborough: Carswell, 1996) at 14-61.
30 See note 2 at 32.
31 See above. The "discrete and insular minority" criteria is borrowed from American constitutional law, which requires a person claiming equality to be part of such a group.
32 See above at 37.

trilogy, or does it show Justice La Forest accepting the enumerated and analogous grounds approach, with relevance pertaining more to the situation where a distinction may indeed be relevant to a person's actual capabilities (for example, the fact that a blind person will do poorly in a written test because she or he cannot see)? I am inclined to believe it is the latter, since La Forest does not engage in a discussion of the functional values underlying the British Columbia legislation. Furthermore, in subsequent cases such as *R.* v. *Swain*[33] and *Weatherall* v. *Canada (Attorney General)*[34] there is no discussion of relevance.

The *Andrews-Turpin* approach to section 15(1) is therefore characterized by a refusal to embrace formal equality. Rather, one must examine the effects of the legislation at issue. In addition, the Court in these early cases stresses the importance of a contextual examination to an equality-right violation. It recognizes that in order to effectively assess whether a distinction results in greater disadvantage to an individual or group, the historical, social, and political context in which that individual and that group are situated must form part of the section 15(1) analysis. William Black and Lynn Smith note that "having rejected identical treatment as the measure of equality, the courts have adopted a measure that assesses the impact of a law or conduct in relation to this broader context."[35] Finally, the Court refuses to restrict the meaning of equality by looking at justificatory factors at the section 15(1) stage.

In subsequent cases, the Supreme Court justices seemed largely in agreement that the test from *Andrews-Turpin* is the correct approach to section 15(1). This is not to say that the decisions were always unanimous. There was disagreement on the correct application of this test; however, the principles upon which it is premised were not questioned.[36]

A Court Divided: The 1995 Trilogy

1995 marks a turning point in section 15(1) jurisprudence. The Supreme Court's disagreement in *Egan, Miron,* and *Thibaudeau* does not represent a simple difference as to the application of an established section 15(1) test.[37] Rather, the Court was to become fundamentally divided as to the meaning of equality and the test for ascertaining a violation.

In the trilogy, the Court divides into three factions. The McLachlin, Cory, Iacobucci, and Sopinka group retains the analysis most resembling that developed in *Andrews*. Supreme Court Justices Cory and McLachlin outline this approach in *Egan* and *Miron,* respectively.[38] Both Cory and McLachlin emphasize that equality means recognizing the innate human dignity of every individual. Considering the individual's human dignity in a section 15(1) analysis assists in ensuring that the Court uses the right claimant's perspective. This subjective point of view lets the Court properly determine if the individual's dignity has been violated.

When deciding whether sexual orientation and marital status are analogous grounds, Cory and McLachlin examine the broader context of the group as outlined in *Turpin*. Justice Cory notes the historic disadvantage suffered by gay people, the physical and verbal harassment they endure, as well as the isolating and stigmatizing existence homosexuals may be forced to survive.[39] Similarly, in *Miron*, Justice McLachlin examines society's

33 [1991] 1 Supreme Court Reports 933, 63 Canadian Criminal Cases (3d) 481.
34 [1993] 2 Supreme Court Reports 872, 105 Dominion Law Reports (4th) 210.
35 Black and Smith, see note 29, at 14-24.
36 However, in *R.* v. *Hess* [1990] 2 Supreme Court Reports 906, 59 Canadian Criminal Cases (3d) 161, Justice Wilson seems to have slipped into reliance on biological characteristics. The two accused were charged under a provision of the Criminal Code which made it a crime for a male to have intercourse with a female under 14 years of age. The accused challenged this legislation on the grounds that it violated equality based on sex. Wilson does not engage in an examination of whether the distinction based on the biological capacity to commit the act of penetration constitutes a burden or a benefit, as is required by the second step of the *Andrews-Turpin* approach.
37 *Egan* involved a challenge by a homosexual couple to the definition of spouse (as a person of the opposite sex) in the federal Old Age Security Act. *Miron* also involved a challenge to the definition of spouse (since it excluded common-law couples) in the Ontario Insurance Act. *Thibaudeau* concerned a challenge to s. 56(1)(b) of the federal Income Tax Act which permitted a non-custodial parent to deduct his or her child maintenance payments when calculating personal income tax but required the custodial parent to include this amount in his or her tax assessment. Thus, *Egan*, *Miron* and *Thibaudeau* all involved section 15(1) challenges based on analogous grounds.
38 In *Thibaudeau*, this group split on the application of this approach. I will not be discussing *Thibaudeau* in detail because the new approaches are expressed in *Egan* and *Miron*. As well, the Court maintained the three separate approaches but split on its application.
39 See note 4 at 673-674.

treatment of unmarried partners as a group. She notes the historical disadvantage and social ostracism where the unmarried partner is regarded as being less worthy than the married partner.[40]

Supreme Court Justice L'Heureux-Dubé sets out a new variation of the approach to section 15(1) in the trilogy.[41] L'Heureux-Dubé believes that the Court has become too caught up in focusing on the grounds of discrimination (i.e., whether the ground is analogous), rather than viewing the grounds themselves as instruments for determining whether the effect of the legislation is discriminatory.[42] The Court has, in her opinion, misplaced the focus of the section 15(1) inquiry.

L'Heureux-Dubé adopts by far the greatest focus on the group as opposed to the individual. She states:

> A person or group of persons has been discriminated against within the meaning of s. 15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.[43]

Justice L'Heureux-Dubé rightly points out that "groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable."[44]

It is curious that in the trilogy, none of the other eight justices comments on L'Heureux-Dubé's approach. Perhaps the Court does not see her interpretation as involving a fundamental change of course from the equality jurisprudence to date. It is possible that given the fact that she is writing only for herself, her approach may simply be considered less important given that the disagreement in the trilogy is largely focused on the two main positions of Cory-McLachlin and La Forest-Gonthier.[45]

Justice L'Heureux-Dubé is not alone in setting out a new approach to section 15(1) in the trilogy. Supreme Court Justice Gonthier outlines the La Forest-Gonthier coalition's new test in *Miron*.[46] Justice Gonthier attempts to justify the criterion of relevance by stating that it has been part of the Court's equality jurisprudence all along. He cites a passage from *Andrews* where Justices McIntyre and La Forest mention that the characteristic must be irrelevant. With all due respect to Justice Gonthier, I believe it is fallacious to suggest that this factor has formed part of the section 15(1) from the beginning. As Laura Fraser notes, Justice McIntyre probably did not intend so much emphasis to be placed on one utterance of relevance made in passing.[47]

Furthermore, McIntyre's only mention of relevance in *Andrews* was under his discussion regarding the concept of equality. It was not discussed under his section on discrimination, which would seem more appropriate if it, in effect, negates a finding of discrimination. Perhaps the most telling factor is that neither Wilson, La Forest nor Justice McIntyre himself applied any consideration of relevance when assessing whether citizenship was an analogous ground. Further, relevance did not surface as a criterion in any of the Court's other section 15(1) jurisprudence until the trilogy.

40 See note 5 at 749.
41 L'Heureux-Dubé proposes a new test considering: first, whether a legislative distinction exists; second, the nature of the group adversely affected by the distinction; and third, the nature of the interest adversely affected by the distinction.
42 See note 4 at 635.
43 See above at 632.
44 See above at 639.
45 Ironically, in the most recent section 15(1) case, *Vriend*, the rift between these two main factions has lessened and the Court is divided because Justice L'Heureux-Dubé maintains her unique interpretation.
46 The test consists of three steps: first, whether the law has drawn a distinction between the claimant and others; second, whether the distinction results in disadvantage; and third, whether the distinction is based on an irrelevant personal characteristic which is either enumerated or analogous. Justice Gonthier further elaborates on this third step, holding that, when assessing relevancy, one must consider the nature of the personal characteristic and its relevancy to the functional values underlying the legislation. Thus, if a characteristic is relevant to the underlying functional values this in effect negates the finding of discrimination.
47 Laura Fraser, "Rights Without Meaning: Failing to Give Effect to the Purpose of Section 15(1)" (1997) 6 Dalhousie Journal of Legal Studies 347 at 356.

The relevance criterion has been roundly criticized on primarily two grounds.[48] First, both L'Heureux-Dubé and McLachlin point out that a relevance inquiry does not address the problem of discriminatory effects. In this regard, it would seem to be a shift away from the substantive *Andrews-Turpin* approach, back to a more formal understanding of equality. The fact that relevance does not adequately address discriminatory effects is seen in both *Egan* and *Miron*, where neither La Forest nor Gonthier consider the impact of the legislation on homosexuals or common-law couples.

Secondly, on a conceptual level relevance does not fit well with the relationship between section 15(1) and section 1. "Irrelevancy" is closely aligned with other factors that would limit the breadth of section 15(1), such as unreasonableness or lack of justification. This sort of factor was explicitly and repeatedly rejected by the Supreme Court in *Andrews* and *Turpin*. As Brad Berg writes:

> Front-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*.[49]

In addition to the issue of relevance, the La Forest-Gonthier approach presents a further difficulty in how one characterizes the purpose of the legislation. In both *Egan* and *Miron*, the characterization of the legislation as given by La Forest and Gonthier is rather unusual. Does Justice La Forest's examination of the legislative purpose in *Egan* constitute a contextual analysis? The purpose of a contextual analysis in equality jurisprudence is to identify the reality in which the rights claimant lives by looking at historical, economic, and societal treatment. Justice La Forest's examination is a contextual analysis, but not of the proper context. It is even more problematic because La Forest seems to derive the legislative purpose out of thin air.[50] Thus not only does he engage in a contextual examination of the wrong issue but he is also reading into the legislation a different context than was intended by the government at the time.[51] As Berg states:

> The problem is that the Gonthier/La Forest framework allows the wholesale importation of undefined and unarticulated considerations into section 15(1). Without evidence, and citing none, La Forest J. read in the capacity to procreate and raise children as a necessary condition for spousal allowance eligibility. This condition is not apparent in the Act itself.[52]

This has led several academic commentators to suggest that the Court was guided more by the judges' political and moral philosophies than by considerations of equality.[53]

The La Forest-Gonthier approach further diverges from the *Andrews-Turpin* approach since little consideration is given to the broader context of the group. Although Justice Gonthier mentions the importance of context in order to prevent a sterile inquiry, this was likely no more than "an obligatory nod to past jurisprudential warnings about the aridity of a decontextualized analysis."[54] Both Justices Gonthier and La Forest focus on the larger context surrounding the legislation when attempting to ascertain its purpose and functional values. However, as mentioned above, this is an examination of the incorrect context and there is little to no discussion of the position of homosexuals or unmarried couples in a

48 Relevance has also been criticized on the basis that it places the burden on the rights claimant to adduce evidence as to the legislation's purpose which it claims is irrelevant to the impugned distinction. The government is in a superior position to adduce evidence as to the purpose of its own legislation.

49 Brad Berg, "Fumbling Towards Equality: Promise and Peril in *Egan*" (1995) 5 National Journal of Constitutional Law 262 at 272.

50 When this legislation was first enacted, Minister of National Health and Welfare, Marc Lalonde, identified the legislation's objective as ensuring that once one member of a married couple retired they would continue to have an adequate income.

51 Although the Court does not treat legislative intent as decisive, it can nonetheless sometimes be of assistance.

52 See note 49 at 274.

53 David Beatty, "The Canadian Conception of Equality" (1996), 46 University of Toronto Law Journal 349 at 373 and Berg, see note 49 at 275.

54 Hester Lessard, Bruce Ryder, David Schneiderman and Margot Young, "Developments in Constitutional Law: The 1994-95 Term" (1996) 7 (2nd Series) The Supreme Court Law Review 81 at 91.

historical, political and social context. Lessard, Ryder, Schneiderman and Young write:

> The test adopted by Gonthier and La Forest in *Miron* and *Egan,* respectively, and concurred in by Lamer and Major in both cases, is clearest in its rejection of a substantive approach to equality doctrine and the accompanying contextualized understanding of the individual.[55]

The trilogy clearly shows that the Supreme Court is fundamentally split over the weight to be given to an examination of the larger context and the effects of the legislation in the application of section 15(1). The equality analysis is further complicated by the disagreement over the characterization of the purpose of the legislation as well as the addition of the factor of relevancy and whether or not it is appropriate.

Three Unanimous Decisions in 1997

In 1997, the Court delivered three unanimous decisions. Many wondered whether this new-found unanimity meant that the Court had resolved the issue of relevance or the factors to be considered in assessing a section 15(1) claim. The three decisions all involved grounds enumerated in section 15(1)[56]: sex discrimination in *Benner*[57] and discrimination against the disabled in *Eaton*[58] and *Eldridge*.[59]

In *Benner*, when deciding whether a legislative distinction based on parenthood constituted discrimination under section 15(1) of the Charter, Supreme Court Justice Iacobucci begins by outlining the three approaches taken by the Court in the trilogy. Justice Iacobucci affirms his support for Cory and McLachlin's test. However, before applying it, he goes on to briefly apply the other two tests to the facts of the case in order to demonstrate that each approach results in the same answer, that the legislation discriminates on the basis of sex. Justice Iacobucci's application of each test indicates that the judges have given up their differing approaches. The fact that these judges did not write separately suggests that the Court is beginning to agree on certain aspects of the approach to equality rights, such as how to characterize the legislation, a substantive interpretation of section 15(1), and a vigorous adverse effects analysis.[60] Justice Iacobucci looks at the effect of the Act's distinction between Canadian mothers and fathers and he engages in a contextual examination of sex discrimination. He states:

> This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen. In fact, it suggests that children of Canadian mothers may be more dangerous than those of Canadian fathers, since only the latter are required to undergo an oath and security check.[61]

The second unanimous equality rights decision was *Eaton v. Brant County Board of Education*. In *Eaton*, Supreme Court Justice Sopinka fashions an expansive definition of discrimination, although his application of it to the facts leaves something to be desired. Justice Sopinka begins by noting that: "While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the *Charter*, I believe that the issue in this case can be resolved on the basis of principles in respect of which there is no disagreement."[62] He finds that there is general agreement among the justices that the claimant must establish that the impugned provision creates a

55 See above at 90.
56 As the Supreme Court's decision in *Vriend* subsequently illustrated, this fact eased the Court's path to unanimity.
57 *Benner* involved a challenge to the federal Canadian Citizenship Act, which provided automatic citizenship to a child born outside Canada prior to 1977 only if she or he had a Canadian father or an unmarried Canadian mother.
58 *Eaton* was an appeal by the parents of a child with cerebral palsy from a decision of the Ontario Special Education Tribunal that Emily Eaton should be placed in a special education class.
59 In *Eldridge*, three deaf individuals sought a declaration that the failure to provide funding for sign language interpreters under the British Columbia Medical Services Plan violated section 15(1) of the Charter on the grounds of disability.
60 At the preliminary stage of whether Benner had standing, Justice Iacobucci adopts a generous approach. He rejects the respondents' argument that Benner's mother is the primary target of the sex discrimination and that Benner is attempting to rely on a violation of her rights. Iacobucci's broad approach to standing is also based on his examination of the effects that would result from finding that Benner could not make his own sex discrimination arguments. The effect would be to insulate legislation from Charter review simply because the legislation was geared at the applicant's parent.
61 See note 7 at 608.
62 See note 8 at 404.

distinction, based on an enumerated or analogous ground, that denies an advantage or imposes a burden upon the claimant.[63] It is interesting that, like Justice Iacobucci, Justice Sopinka outlines both the Cory-McLachlin and the La Forest-Gonthier approaches. However, we are left in suspense as to whether he would have applied the relevance step since he does not reach that stage of the analysis.

Justice Sopinka explains two of the interpretations from the trilogy, but neglects to mention or describe Justice L'Heureux-Dubé's analysis. It is interesting that her approach to section 15(1) is likewise absent in Justice La Forest's decision in *Eldridge*. I am not altogether sure why this is so. It might be taken as evidence that Justice L'Heureux-Dubé's approach was not conceptually distinct from that of *Andrews-Turpin*. Alternately, it might suggest that Justice L'Heureux-Dubé's approach only differs from the Cory-McLachlin approach when the matter is one involving analogous grounds and how they should be ascertained.

Justice Sopinka adopts a very broad understanding of equality rights. He accepts Justice McIntyre's statement in *Andrews* that equality requires the accommodation of differences, but he also moves beyond this:

> This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.[64]

Justice Sopinka indicates that in order to ensure there are no invidious differences between people, the disabled must be assured not equality of treatment (since that would not recognize their true characteristics) but equality of result.

Sopinka maintains his broad, substantive interpretation of section 15(1) by looking at how the disabled have been affected by mainstream society. He finds that "[e]xclusion from mainstream society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access."[65] This is an important interpretation of disability since it defines disability as being socially constructed rather than as being caused by the particular characteristic of the disabled person.[66] Justice Sopinka expresses this, writing that "it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."[67] As Lepofsky writes:

> This is a seminal repudiation of any attempt by a government facing a *Charter* claim, or business facing a human-rights complaint, to rebuff efforts by persons with disabilities to participate fully in society's mainstream by contending that people with disabilities must take that mainstream setting just as they find it.[68]

Justice Sopinka observes that with respect to discrimination on the basis of disability, an inquiry into stereotypical attributions is inappropriate. Instead, he finds that it is "recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."[69] Thus, Justice Sopinka elevates the section 15(1) inquiry to a more substantive form of equality by combining the

63 See above.
64 See above at 405.
65 See above at 405-406.
66 The disability itself is therefore not the cause of a disabled person's exclusion from society, rather it is caused by society's inability to move beyond able-ist norms and mainstream attributes.
67 See note 8 at 406.
68 Lepofsky, see note 20 at 409-410.
69 See note 8 at 406.

importance of a contextual inquiry with a focus on the importance of assessing the individual's particular characteristics in order to decipher disability-based discrimination.

However, when assessing Emily Eaton's actual characteristics, Isabel Grant and Judith Mosoff suggest that Sopinka "failed to take into account the socially constructed evaluative dimension to the range of differences [between Emily and her more 'able' peers]."[70] Unfortunately, the Court's inquiry into whether segregated education constituted a burden or a benefit to Emily is also problematic. Sopinka finds that the Tribunal's recommendation of special class placement cannot be considered a burden imposed upon Emily.[71] Lepofsky believes that the benefit/burden discussion was unnecessary to the case's disposition. He thinks the Court could have upheld the Tribunal's factual findings under section 1 and therefore the Court "need not have treated this as a section 15 issue."[72] Furthermore, he argues that the Supreme Court inappropriately placed the burden of proof under section 15(1) on Emily's family, requiring them to establish that segregation constituted a disadvantage to her before a breach of her section 15(1) rights could be shown.[73]

The last decision of 1997, and perhaps most generous interpretation of section 15(1), is *Eldridge*. Unlike his *Egan* decision, in *Eldridge* Justice La Forest engages in an examination of the proper context in order to be able to determine whether the legislative omission is discriminatory. When examining the broader context, Justice La Forest finds:

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions....[74]

Upon analyzing the position of deaf people in particular, Justice La Forest notes that they "have not escaped this general predicament."[75] He recognizes that society is based on able-ist norms such that it is organized as though all can hear.[76] He writes: "Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population."[77]

With respect to the appropriate definition to be given to equality, the Supreme Court takes a much more generous approach than did the British Columbia Court of Appeal. The Court of Appeal judgment accepts that section 15(1) does not "oblige governments to implement programs to alleviate disadvantages that exist independently of state action."[78] This is an expression of the "natural forces" view of disability — that is, the disadvantage results from biological differences inherent in the individual. The Supreme Court explicitly rejects the "natural forces" argument and strongly reaffirms that the correct understanding of disability is that of the social construct. *Eldridge* reflects a move toward a more substantive understanding of equality and away from the more narrow, formal equality.

Justice La Forest observes that although the Court has not adopted a uniform approach to section 15(1), he believes there is "broad agreement on the general analytic framework."[79] He outlines the approach of Justices Cory and McLachlin and goes on to state that some members of the Court have held the distinction must also be shown to be based

70 Isabel Grant and Judith Mosoff, "Hearing Claims of Inequality: *Eldridge* v. *British Columbia (A.G.)*" (1998) 10 Canadian Journal of Women and the Law (No.1) 229 at 235. This article also provides interesting insights into why the Court reached a different conclusion in *Eldridge*.
71 See note 8 at 409.
72 See note 20 at 423.
73 See above.
74 See note 9 at 613
75 See above.
76 See above.
77 See above at 614.
78 See above at 620.
79 See above at 614.

on an irrelevant personal characteristic. Justice La Forest finds that regardless of which test is applied the same result is attained. He briefly states that "[t]here is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system."[80] The relevance analysis in all three cases from 1997 is very compact and much less involved than that in the trilogy.[81]

Having defined the test for section 15(1), Justice La Forest goes on to examine the effect of the legislation on deaf persons. This is a striking difference from his approach in *Egan*, where the effect of the legislation on homosexuals was never considered. In *Eldridge*, the Court rejects the formal equality argument that deaf people were not discriminated against on the face of the legislation, and endorses a fairly generous adverse-effects approach. The Supreme Court agrees unreservedly that for cases of discrimination on the basis of disability, one must examine the effects of the legislation.[82] By adopting the disadvantaged person's perspective, the Court is saying that simply providing medical services to everyone is not enough. The consideration must be that everyone subjectively receive the same level of medical services. This provides much greater scope to section 15(1)'s guarantee of equality.

The respondents had argued that the government was providing the same medical services to everyone. Justice La Forest rejects their position as "bespeak[ing] a thin and impoverished vision of s. 15(1)."[83] La Forest provides a much more substantive vision of section 15(1), where he states: "This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."[84] The Supreme Court could have held that the State was granting the same medical services to everyone; instead it takes a more generous approach and holds that everyone must *receive* the same level of medical services. Consequently, Justice La Forest writes:

> In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons ... Moreover, it has been suggested that, in taking this sort of positive action, the government should not be the source of further inequality.[85]

If one takes the Court's decision in *Eldridge* seriously, this could have very broad implications. The Court can now be seen as imposing a positive requirement on the State to remedy disadvantage that would prevent someone from enjoying a benefit equally. Governments now have a constitutional duty to "change the world, which was and is frequently designed on the false and unfair premise that persons with disabilities have no place in it."[86] This duty is significant since merely treating the disabled the same as the larger population will not be sufficient to pass a section 15(1) challenge. The obligation of positive action will require the government to dismantle barriers to equality so that there is equality of result; otherwise section 15(1) may be infringed.

If, in the course of subsequent cases, the Court does not retreat from this idea, it may be entering an era of a much more generous approach to section 15. This generous approach is reflected by the Court's endorsement of a more substantive understanding of equality, one where there must be equality of result not simply equal treatment. The

80 See above at 614-615.
81 The possible reasons for this will be discussed below.
82 See note 9 at 617.
83 See above at 621.
84 See above.
85 See above.
86 See note 20 at 409-410.
87 See note 9 at 623. Although Justice La Forest uses conditional language ("if we accept") an examination of the decision indicates that he accepts the concept of adverse effects discrimination and treats section 15(1) as though the Court does not have a choice in whether to employ such an analysis or not.
88 See above at 624.
89 In both *Eldridge* and *Vriend*, the Supreme Court's broad approach to equality is translated into a generous interpretation of section 32 of the Charter. In *Eldridge*, the Court finds that hospitals and the Medical Services Commission are part of "government" and thus the Charter applies to them. In *Vriend*, the Court finds that a legislative omission constitutes government action. For a more detailed discussion of the interaction between section 15(1) and section 32 see Margot Young, "Change at the Margins: *Eldridge* v. *British Columbia (A.G.)* and *Vriend* v. *Alberta*" (1998), 10 Canadian Journal of Women and the Law (No. 1) 224.
90 *Vriend*, see note 10. *Vriend* involves a challenge to the Alberta Individual's Rights Protection Act (IRPA), since the human-rights act did not include sexual orientation as a protected ground.

language of the judgment would certainly provide a basis for a more expansive interpretation. For example, Justice La Forest states:

> If we accept the concept of adverse effects discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.[87]

The Supreme Court translates this positive duty into the human-rights principle of reasonable accommodation. Justice La Forest held that "[r]easonable accommodation, in this context, is generally equivalent to the concept of 'reasonable limits.' It should not be employed to restrict the ambit of s. 15(1)."[88] It is particularly interesting that Justice La Forest finds that this should be a component of the section 1 test, rather than considering it within the section 15(1) analysis, since it could be used to justify the government's conduct. The similarities to relevance are not insignificant, yet in the trilogy Justice La Forest allows relevance to be employed to restrict the ambit of section 15(1).[89]

Concurring Judgments with respect to section 15(1) in *Vriend*

In April 1998, the Supreme Court delivered its eagerly anticipated decision in *Vriend* v. *Alberta*.[90] Although the Court agreed that the omission of sexual orientation in Alberta's Individual's Rights Protection Act (IRPA) violated section 15(1), the complete unanimity from the 1997 decisions had disappeared.[91]

In *Vriend*, Justice Cory first addresses two preliminary issues: standing and the Charter's application.[92] As with the three 1997 decisions, Justice Cory outlines both his approach in *Egan* and Justice McLachlin's approach in *Miron*.[93] Interestingly, Cory does not cite either Justices Gonthier's or La Forest's description of the relevance inquiry from the trilogy. Instead, he refers to Justice Iacobucci's formulation of it in *Benner*. Justice Cory finds that the relevance approach is "to a certain extent, compatible with the notion that discrimination commonly involves the attribution of stereotypical characteristics to members of an enumerated or analogous group."[94] He thus seems to indicate that relevance can be reconciled with the more individualistic understanding of equality that focuses on stereotyping individuals based on shared characteristics. However, Justice Cory glosses over how it is compatible with the Cory-McLachlin test for equality from the trilogy. This is quite a shift from the trilogy, where Justices Cory, McLachlin, and L'Heureux-Dubé seemed vehemently opposed to relevance. They, and many commentators, thought that relevance was conceptually out of line with the section 15(1) test as developed in *Andrews* and *Turpin*.

Justice Cory in *Vriend* states that the Cory-McLachlin approach is the correct one for section 15(1). In addition, unlike in *Benner* and *Eldridge*, Justice Cory does not engage in a summary relevance inquiry. Does this suggest that relevance no longer constitutes a third step? Most likely not, Cory writes: "In this case, as in *Eaton*, *Benner* and *Eldridge*, any differences that may exist in the approach to s.15(1) would not affect the result, and it is therefore not necessary to address those differences."[95] This would seem to imply that differences do remain and thus relevance must not have disappeared altogether.

91 Justices Cory and Iacobucci wrote the majority decision (for seven judges). Justice L'Heureux-Dubé agreed in the result but wrote separately. Supreme Court Justice Major was the only judge to dissent. He agreed that the exclusion of sexual orientation violated section 15(1) and was not justified under section 1, but he dissented on the appropriate choice of remedy.

92 The Supreme Court's recent broad approach to equality rights is reflected in its approach to standing. In the past, the Court had articulated a more narrow conception of standing, whereby the appellant had to be the person most affected by a legislative provision or the Court would decline to give him or her standing on the grounds that there could be someone more directly affected (see, for example, *Canadian Council of Churches* v. *Canada*, [1992] 1 Supreme Court Reports 236, 88 Dominion Law Reports (4th) 193). However, in *Vriend*, Justice Cory states that waiting for someone to be directly affected by each individual provision would be wasteful of judicial resources and would be unfair since it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved. The majority's renewed enthusiasm for equality rights seems to have spilled over into a less restrictive approach to standing in order to facilitate appellants' ability to challenge legislation. The second preliminary issue is the Charter's applicability under section 32. Again, the majority refuses to adopt a narrow understanding. It holds that the language in section 32 is broad enough to encompass legislative omissions.

93 He notes that this approach stems from the two-step test expressed in *Andrews* and *Turpin*.

94 See note 10 at 418.

95 See above at 419.

Furthermore, Justice Cory's belief that relevance is reconcilable with the Cory-McLachlin understanding of equality suggests that it has not been completely discarded. Instead, it appears that the Supreme Court has redefined its understanding of relevance and the conceptual place it holds in equality rights jurisprudence.

The Court's substantive vision of equality is reinforced by its refusal to accept that the IRPA does not discriminate since it makes no distinction between homosexuals and heterosexuals. Justice Cory indicates that this understanding of equality would be "based on that 'thin and impoverished' notion of equality referred to in *Eldridge*."[96] He affirms the Court's rigorous effects-based analysis by refusing to allow the particular manner in which the exclusion is drafted to disguise the real effect of that exclusion.[97]

Justice Cory addresses the issue of which shared characteristic must be included in the IRPA. The respondents had argued that homosexuals were not discriminated against as they could seek redress on other protected grounds (i.e. sex or race).[98] However, Justice Cory essentially finds that lesbians and gay men share a characteristic, their particular sexual orientation. Cory finds that the protection afforded to homosexuals based on their other shared characteristics is not sufficient since "[l]esbian and gay individuals are still denied protection under the ground that may be the most significant for them, discrimination on the basis of sexual orientation."[99]

The Supreme Court's move along the spectrum of equality rights to an increasingly rich understanding is reflected in Justice Cory's opinion. He finds that the IRPA's underinclusiveness creates two distinctions. The first is the distinction between homosexuals and other disadvantaged groups that are protected by the IRPA. He notes that "[g]ays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not."[100] Thus, the Court recognizes that homosexuals are not afforded even the more minimal protection of formal equality. The second distinction created by the IRPA is between homosexuals and heterosexuals. Cory notes that neither sexual orientation is explicitly protected by the IRPA, but by engaging in an examination of the context and effects of this omission, he recognizes that it has a disproportionate impact on gays and lesbians because heterosexuals do not (or very rarely) find themselves discriminated against on the basis of their sexual orientation.[101] Consequently, Justice Cory holds that "the IRPA in its underinclusive state denies substantive equality to the former group."[102] Cory places *Vriend* in the context of the Court's equality jurisprudence stating: "This case is similar in some respects to the recent case of *Eldridge* ... There the Charter's requirement of substantive, not merely formal, equality was unanimously affirmed."[103]

Finally, the Court once again rejects a natural forces argument. The respondents had argued that discrimination against homosexuals exists independently of the IRPA. Justice Cory notes that "[t]his reasoning has been emphatically rejected" by the Court, most recently in *Eldridge*.[104]

Turning to the question of whether these distinctions are discriminatory, the Court

96 See above.
97 See above.
98 In other words, the characteristics they share with other groups that are covered by the IRPA were protected, therefore there was no discrimination based on sexual orientation.
99 See note 10, at 420. I think it is difficult (and possibly undesirable) to attempt to rank which of an individual's characteristics are of greatest significance to them. People have multiple characteristics and different aspects are dominant in different contexts; which attribute is dominant in any given situation is not a stable category (except when the individual is being discriminated against based on that characteristic). In addition, many people conceive of themselves as the larger whole of their characteristics — unable to separate being a Christian from being a homosexual, for example. However, Justice Cory is quite correct that when one is discriminated against based on a particular characteristic, that characteristic attains an emotional significance whereby the redress from discrimination must also be based on that characteristic. Otherwise, one's dignity will not be made whole.
100 See above at 421.
101 See above.
102 See above.
103 See above at 422.
104 See above at 423.

finds that they are. Justice Cory comes to this conclusion based upon the Court's examination in *Egan*[105] of the social, historical, and political context and the economic disadvantage experienced by homosexuals. Cory does not spend a great deal of time recounting the larger context in which discrimination against homosexuals exists. This is most likely due to the fact that the Court had already unanimously agreed in *Egan* that sexual orientation was an analogous ground. Cory notes that this would be sufficient to establish a violation of section 15(1). However, he goes further than strictly necessary in order to demonstrate the particularly invidious nature of the discrimination by engaging in a rigorous effects-based analysis, as the Court did in the 1997 cases, whereupon he finds that "the discriminatory effects of the legislation are sufficient in themselves to establish that there is discrimination in this case."[106]

Justice Cory notes that in order to be able to identify the effects of the exclusion of sexual orientation from the IRPA, the Court must examine not only the social context but also the context of the legislation.[107] Justice Cory finds that the IRPA is meant to be a comprehensive Act affirming and giving effect to "the principle that all persons are equal in dignity and rights."[108] Cory identifies two principal effects stemming from the exclusion of homosexuals from this comprehensive protection afforded to others. First, homosexuals are denied recourse to the mechanisms established in order to make a formal complaint of discrimination and seek a legal remedy.[109] Second, Justice Cory goes beyond an examination of the legal effects to a consideration of the effect of this omission on society at large. He finds that the omission in the IRPA may encourage a belief that anti-gay discrimination is "not as serious or as deserving of condemnation as other forms of discrimination."[110] Justice Cory also discusses the impact of this exclusion from the subjective point of view of the homosexuals affected. He notes the psychological harm, loss of confidence, and lower self-esteem that results from fear of discrimination.[111] The Supreme Court thus finds that the omission of sexual orientation from the IRPA constitutes discrimination on the analogous ground of sexual orientation.

Interestingly, in contrast to the 1997 cases, Justice L'Heureux-Dubé chose to write separately in *Vriend*. She remarks that she is in general agreement with the outcome reached by Justices Cory and Iacobucci, but "wish[es] to reiterate the position which [she has] maintained throughout with respect to the approach to be taken to s. 15(1)."[112] L'Heureux-Dubé then proceeds to outline her group-based approach from the trilogy. She states: "I do not agree with the centrality of enumerated and analogous grounds in Cory J.'s approach to s. 15(1).... Of greatest significance to a finding of discrimination is the effect of the legislative distinction on that individual or group."[113] However, the Cory-McLachlin approach, as with any good equality analysis, examines the effect on the complainant because this is necessary in order to give meaning to equality. Thus, it is unclear why Justice L'Heureux-Dubé believes a distinct approach is necessary.

Justice L'Heureux-Dubé also disagrees with Cory's reliance on sexual orientation being a deeply personal characteristic, changeable only at an unacceptable personal cost.[114] She

105 See above at 424.
106 See above at 425.
107 Justice Cory's examination of the context of the IRPA is not problematic, as was Justice La Forest's in *Egan*, since this examination is in addition to (not instead of) an analysis of the larger context in which the rights claimant is situated.
108 See note 10 at 425.
109 See above at 426.
110 See above at 427-428.
111 See above at 428.
112 See above at 449.
113 See above at 450.
114 See above at 451.

finds that this is much too narrow an approach to defining analogous grounds and that the Court has endorsed a more comprehensive approach in the past by considering the group's historical position and treatment by society, whether the group constituted a discrete and insular minority, stereotyping, and immutable characteristics.[115]

It is difficult to know what Justice L'Heureux-Dubé means when she says that she has consistently maintained the same position throughout her equality rights jurisprudence. This statement lends credence to the idea that she concurred in the 1997 judgments since they focused significantly on the position of the particular group in the larger context, and articulated a forceful effects-based analysis — the two key factors of Justice L'Heureux-Dubé's approach. It is true that in *Vriend*, Justice Cory adopts a more individual focused analysis. He only discusses the larger societal treatment of homosexuals superficially, citing *Egan*.[116]

Is there a new trend in section 15(1) jurisprudence?

This is a difficult question to answer. The answer seems to be yes and no. The Court does seem to have adopted a more generous interpretation of equality rights in the recent cases. This is illustrated by the broad definition of discrimination; the greater emphasis placed on situating the rights claim in the larger social, historical, and political context; and also by the rigorous effects-based analysis. However, the Court does not seem to have resolved the precise test for section 15(1) and the significance of the relevance inquiry remains unknown for future litigants.

The new trend is characterized by an expansive definition of discrimination. In *Benner* and *Vriend* this interpretation spills over into a less restrictive approach to standing. In *Benner*, the Court refuses to be dissuaded from the fact that it was not Benner's own gender that was the source of the discrimination. It would have been perfectly plausible for the Court to have maintained a strict approach to standing and to have found that Benner's rights were not directly infringed. Likewise, in *Vriend*, the Court could have restricted its analysis solely to the employment provisions of the IRPA. This approach makes sense: if one wants to provide a more substantive understanding of equality, one must ensure that appellants are able to pass the preliminary stage of standing in order to challenge potentially discriminatory legislation.

Similarly, the Court's broad definition of discrimination is reflected in *Eaton* and *Eldridge*. There, the Court could have accepted that it was the disability itself that caused the burden rather than society creating a disadvantage. The Court's new understanding may have broad implications if legislation cannot be upheld because the disadvantage was "inherent to the disabled person." Possibly even more important is what this says to the disabled. The Court has now recognized that it is society that caused the hardship endured by disabled people. It is important that the Court has recognized that the ultimate goal should be a society that is no longer organized on able-bodied norms. The result is an enhanced understanding of the breadth of equality rights and the meaning of discrimination.

115 See above.
116 As noted above, one can understand this to be due to the Court's having already established that sexual orientation is an analogous ground.

One can only surmise why the Court has opted to define equality rights more broadly. It is possible that the Court feels more comfortable taking an expansive view of the enumerated grounds. The judges might consider this to be less of an impingement on the legislative role (i.e., less like "judicial legislation") than deciding what constitutes an analogous ground. This could explain the 1995 and 1997 results. However, some of the Court's earlier generous interpretations pertained to analogous grounds.[117] Furthermore, it cannot explain the Court's strong protection for the analogous ground of sexual orientation in *Vriend*. As much as one may resist mingling law and politics, the difference would seem to be due to the more conservative judicial appointments of the Mulroney Government. Interestingly, the Mulroney Court seems to have come full circle to a more activist approach and a more generous interpretation.

The new trend also seems to be characterized by an examination of the broader context in which a rights claim is situated. This is significant since it enables the Court to understand the rights claimant's perspective by acknowledging the historical, economic and societal treatment that people with this particular shared attribute have encountered. The broader context allows a court to appreciate more fully the precise impact that legislation has on a particular group since all people's reactions are based upon their personal experiences. Those who have been disadvantaged historically will experience legislation differently than those who have not been similarly disadvantaged. Analyzing the larger context ensures that a court engages in a meaningful section 15(1) inquiry. Without looking at the broader context, it becomes much more difficult to assess a claim of discrimination. Furthermore, a court would be more susceptible to revert to a formalistic inquiry, which accepts that there is no discrimination, provided that individuals do not appear to be treated differently.

The Court's renewed focus on the effects of legislation is reflected in all three of the 1997 cases and in *Vriend*. The Supreme Court's willingness to engage in a broad adverse-effects approach enriches the guarantee of equality. While the Court has been willing to consider whether the effects were discriminatory in the past, Justice La Forest's clear statement in *Eldridge* that the examination of adverse effects must be from the rights claimant's perspective will be applauded by all equality seeking groups. This will ensure that the Court does not make La Forest's mistake in *Egan* where the gay population's perspective was completely absent from his considerations. Equality has little meaning if it does not include an inquiry into whether the rights claimants felt they were discriminated against. The Court's shift is nicely illustrated in *Vriend*, where Cory goes beyond what was necessary to establish discrimination in order to outline the discriminatory impact of the IRPA's omission. Furthermore, he discusses both the legal effects on homosexuals and the emotional effects on how society and homosexuals perceive themselves as a result. Thus, Justice Cory gives effect to Justice La Forest's statement that it is the perspective of the rights claimant that must be employed. As with an examination of the larger context, a meaningful effects analysis will route the Court away from the formal equality lure.

Thus, there does seem to be a new trend in the recent cases as to which factors should

117 See, for example, *Andrews* and *Turpin*.

be considered in an equality rights claim. However, there remains some confusion surrounding the considerations involved in assessing whether a particular characteristic constitutes an analogous ground. This does not seem to be a fundamental disagreement between Justices L'Heureux-Dubé and Cory.[118] With great respect, Justice L'Heureux-Dubé is most likely mistaken when she asserts that Cory is adopting a more narrow test for establishing analogous grounds. It would be quite surprising if he were adopting a new approach that relied primarily on this factor and relinquished the use of factors like historic treatment, since in *Egan*, Cory based his finding mostly on the historical and societal disadvantages and hardships suffered by gay men and lesbians. It is more likely that Cory referred to immutability as simply another indicator that sexual orientation constitutes an analogous ground. Justice Cory's statement resembles Justice Iacobucci's reference to immutability in *Benner*. Iacobucci stated that the citizenship of one's parent was of a highly personal nature, being something "so intimately connected to and so completely beyond the control of an applicant."[119] It seems inconsistent for Justice L'Heureux-Dubé to object in *Vriend* but not in *Benner*. However, the fact that Justice L'Heureux-Dubé felt the need to write individually indicates that the Court continues to be uncertain as to exactly which factors should be employed as indicators of analogous grounds, as well as the larger question of exactly how much to focus on whether a characteristic is an analogous ground. The three 1997 decisions, since they pertained to enumerated grounds, masked this disagreement on the Court.

Justice L'Heureux-Dubé's opinion in *Vriend* may reflect a more fundamental division as to the correct approach to section 15(1). It is ironic that when the approaches were being outlined in the trilogy and the 1997 cases, the conflict appeared to be between the Cory-McLachlin approach and that of Justices Gonthier and La Forest.[120] However, in *Vriend* the division with respect to the correct approach is not centred on relevance, but is focused on which factor should be accorded greater emphasis — the notion of analogous grounds or the larger context in which the group is situated and the effects they suffer. In the 1997 cases, it appeared that Justice L'Heureux-Dubé had forsaken her approach in favour of that of Cory-McLachlin, especially where it employed a more group-focused analysis. Apparently she has not done so. It is unclear why L'Heureux-Dubé has chosen to reiterate her approach from the trilogy in *Vriend* but not in the 1997 cases. While it is true that Justice Cory's approach in *Vriend* does focus more on the individual than the group, it is unclear that it is much more individualistic than the 1997 cases. Consequently, one is left with the conclusion that the Court has an easier time achieving consensus when the discrimination involves an enumerated ground. *Vriend* indicates that the unanimity of approach by the Supreme Court Justices in 1997 simply masked remaining underlying differences.

I believe this is further demonstrated by the fact that the three 1997 unanimous judgments do not reflect a broad agreement on the approach to relevance. The relevance factor was summarily applied in all three 1997 cases but was not applied at all in *Vriend*. Due to the hostility expressed by McLachlin, Cory, and L'Heureux-Dubé toward this criteria in the trilogy, I find it extremely unlikely that they have now come to adopt it as a third

118 Justice Cory does not even comment on Justice L'Heureux-Dubé's analysis.
119 See note 7 at 606.
120 The issue of relevance will be discussed below.

step. Since relevance continues to be mentioned, one must assume that Justices Gonthier and La Forest have not rejected its application altogether. The Court does not seem overly concerned about reconciling the Cory-McLachlin approach with the La Forest-Gonthier approach. Unanimity in 1997 was achieved since the law was discriminatory based on either interpretation.[121] The issue is further complicated by the Court's treatment of relevance in *Vriend*. Justice Cory does not engage in even a summary relevance analysis, nor does he suggest that the Court has agreed to dispense with relevance altogether. Rather, he implies that differences still do exist with respect to the proper approach to section 15(1).

The Court's unanimity with respect to relevance stems more from an agreement as to how to characterize the legislation at issue. Since the Court agreed on the purpose of the legislation, it could further agree that the personal characteristic at hand was irrelevant. It is possible that a consideration of relevance that is not as badly manipulated as it was in the trilogy could be reconciled with the Cory-McLachlin approach (as Cory himself mentioned in *Vriend*). The criteria of relevance, properly applied, could be seen as consistent with the idea of preventing stereotyping or attributing characteristics from a group to an individual. Often a stereotype based on a particular characteristic will be quite irrelevant to a legislative distinction. Where it is relevant, as Justice McLachlin wrote in *Miron*:

> Proof that the enumerated or analogous ground founding a denial of equality is relevant to a legislative goal may assist in showing that the case falls into the class of rare cases where such distinctions do not violate the equality guarantees of s. 15(1), serving as an indicator that the legislator has not made the distinction on stereotypical assumptions about group characteristics.[122]

Thus, Justices McLachlin, Cory, and L'Heureux-Dubé seem willing to accept a decision which briefly considers relevance as one factor, provided that the law is characterized in what they consider to be an appropriate manner.[123]

Unfortunately, the Court does not seem to have reached a consensus on how to properly characterize a law. The purpose of the legislation in each of the 1997 cases and in *Vriend* seems fairly clear. However, the legislation in *Egan* and *Miron* also appeared obvious to this observer, yet the La Forest-Gonthier coalition read it differently. It is difficult not to think that the judges in the trilogy were influenced by their political and philosophical leanings when deciding how far to extend section 15(1)'s protection. The judiciary may simply be more comfortable dealing with discrimination based upon more "traditional" (i.e., enumerated) grounds. As a result, I am not convinced that relevance has been entirely laid to rest. It is possible that certain members of the Court may choose to resurrect it should the judges have moral difficulty accepting a particular new ground on which to find discrimination. This may be less likely with the departure of La Forest and Sopinka from the Court. There has been considerable turnover on the bench recently, with the appointments of Supreme Court Justices Bastarache and Binnie, and the imminent retirement of Justice Cory. This shift could fundamentally alter the Court's interpretation of section 15(1), especially since the Court was very closely divided in the trilogy. However, should the Court continue to take an expansive approach with respect to the definition of discrimination, the broader

121 This leads one to ask whether the 1997 cases are so clearly discriminatory that they constitute more of an aberration in the Supreme Court's jurisprudence? I do not think they were so obviously discriminatory since the Supreme Court reversed the Federal Court of Appeal in *Benner*, the British Columbia Court of Appeal in *Eldridge* and the Ontario Court of Appeal in *Eaton*.

122 See note 5 at 741-742.

123 However, this does not resolve the difficulty of considering justificatory factors at the section 15(1) stage which was rejected in *Andrews*, *Turpin* and by Justices Cory, McLachlin and L'Heureux-Dubé in the trilogy.

context, and the effects of a law, a clear consensus may emerge as to how the legislation and group in question should be characterized. This is because the Court will have paid greater heed to all the substantive factors involved in assessing an equality rights claim.

Conclusion

Equality rights are tremendously significant in shaping society as well as in promoting and protecting a sense of individual dignity. Consequently the manner in which they are interpreted is of fundamental importance. The Supreme Court's understanding of section 15(1) has altered over time. The Court began with an approach in *Andrews* and *Turpin* that recognized the importance of assessing the impact of the legislation on the individual as well as stressing the significance of an examination of the historical, economic, and societal context in order to fully appreciate the rights claimant's situation. However, in the 1995 trilogy of cases, certain members of the Court were derailed from this approach and the Court split as to the appropriate meaning of equality as well as to the proper test for establishing a violation of section 15(1). Instead of the *Andrews-Turpin* approach, the La Forest-Gonthier coalition substituted a more formal and less contextual interpretation, and also created a further qualifier on section 15(1) – namely the relevance inquiry.

In 1997, the Supreme Court was able to find enough common ground to produce three unanimous judgments. *Benner*, *Eaton* and *Eldridge* reflect a consensus at the Supreme Court with respect to the meaning of equality. Equality means equality of result, therefore section 15(1) should be interpreted in a substantive manner. The Court's recent understanding of equality is characterized by a broad definition of discrimination as well as a renewed emphasis on a contextual and effects based analysis. The Supreme Court's decision in *Vriend* is the best illustration of the increasing comfort of most of the judges with respect to their more activist role in assuring a substantive interpretation of equality. One can see the Court's confidence in its rigorous section 15(1) analysis increase with the progression of judgments from *Benner* to *Vriend*. Consequently, this jurisprudence does seem to constitute a trend and not simply an activist whim.

However, the Court's new substantive trend is not without difficulties. The Court remains unsure of how and what role relevance is to play in the section 15(1) inquiry. The decision in *Vriend* seems to illustrate that the Court is reconciling relevance with the Cory-McLachlin approach by limiting it to the very rare situation where a personal characteristic is relevant to a legislative distinction (such as having an oral, rather than a written, examination for a blind person). Also, Justice L'Heureux-Dubé reiterated her separate group-based analysis of section 15(1) in *Vriend*. It is unclear why she chose to write separately; however, this indicates that the Court is still divided as to the proper test for determining whether a characteristic is an analogous ground and to the primacy that should be given to the analogous grounds inquiry.

I welcome the Supreme Court of Canada's new section 15(1) trend since the Court has progressed along the spectrum of equality rights to a more substantive understanding of

equality which guarantees equality of result. I hope that this type of interpretation ceases to be a mere trend and becomes the lasting norm.