A DISCRETE AND INSULAR RIGHT TO EQUALITY: COMMENT ON *ANDREWS* v. *LAW SOCIETY OF BRITISH COLUMBIA*

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I. INTRODUCTION

In *Andrews* v. *The Law Society of British Columbia*,[1] the Supreme Court of Canada makes its first significant statement concerning the right to equality in subsection 15(1) of the *Canadian Charter of Rights and Freedoms*.[2] The Court holds, by a margin of 4 to 2, that the provision in the British Columbia *Barristers and Solicitors Act*,[3] which made citizenship a requirement for membership in the Law Society, violates subsection 15(1) of the *Charter* and cannot be justified under the terms of section 1. In reaching this conclusion, the Court adopts a broad approach to subsection 15(1) which focusses on the effect or impact of particular laws on disadvantaged groups within the community.

Although Mr Justice McIntyre dissents from the result reached by the majority of the Court, his judgment represents the Court's view of the proper approach to judicial review in support of the right to equality. The majority of the Court disagrees with Mr Justice McIntyre's application of section 1 to the facts of the case, but adopts his interpretation of subsection 15(1) and his understanding of the relationship between subsection 15(1) and section 1.[4]

The division within the Court on the application of subsection 15(1) and section 1 to the citizenship requirement indicates the indeterminacy of the test the Court adopts to decide whether a state act is discriminatory. In part, this is due to the vague character of the Court's first statement of a test which may become clearer in future cases as

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[1] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

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

[3] R.S.B.C. 1979, c. 26, s. 42, *as rep. Legal Profession Act*, S.B.C. 1987, c. 25, s. 101.

[4] There are three judgments in the *Andrews* case: (i) Wilson J. (Dickson C.J. and L'Heureux-Dubé J. concurring); (ii) La Forest J. (concurring); (iii) McIntyre J. (dissenting, Lamer J. concurring in dissent).

the Court works out the specifics.[5] More significantly, though, the disagreement among the Judges concerning the application of the test to the citizenship requirement may also reflect the inevitable fluidity of a judicially enforced right to equality of result. The effort to protect systemic equality through the adjudicative process requires the courts to rely on vague and general standards which reflect an unstable compromise between, on the one hand, concern for equality of result in the community and, on the other hand, the institutional position and competence of the courts.[6] The result is a conception of equality which at times appears to be concerned with distributive justice (achieving a balanced distribution of benefits and burdens in the community) and, at other times, with corrective justice (correcting wrongful state acts).

II. WHAT DISCRIMINATION DOES NOT MEAN

In the course of his judgment, McIntyre J. considers and rejects three different interpretations of the prohibition of discrimination.

First, McIntyre J. dismisses quickly and effectively the view that the term "discrimination" in section 15 is used in a neutral or non-pejorative sense, so that the section is understood to prohibit all forms of distinction or classification in law. On this view, once a law is found to "discriminate" (distinguish), the onus shifts to the state under section 1 to show that the classification used is reasonable and demonstrably justified.[7]

As McIntyre J. points out, such an interpretation of subsection 15(1) is both overinclusive and underinclusive. It is overinclusive because it treats every law that distinguishes in some way between two or more different groups of people as a violation of a fundamental human right. If such a law is to stand it must be justified under the terms of section 1. Yet, most laws, or at least a large number of laws, draw some sort of distinction. Must the state put forward a compelling reason to justify every such law? There is a significant difference between legislation which extends certain benefits or advantages to butter producers but not to margarine producers, and a law which distributes benefits and burdens on the basis of race or gender. In the case of a classification based on agricultural production, the distinction would, no doubt, be upheld if some sensible (but not necessarily compelling) reason could be demonstrated to explain its use. However,

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[5] *See, e.g., Turpin* v. *R.*, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8 [hereinafter *Turpin* cited to S.C.R.].

[6] R. Moon, *Discrimination and Its Justification: Coping With Equality Rights Under the Charter* (1988) 26 OSGOODE HALL L.J. 673 tries to develop this claim. Similar concerns and a proposed solution are discussed in A. Brudner, *What Are Reasonable Limits to Equality Rights?* (1986) 64 CAN. BAR REV. 469.

[7] P. Hogg, CONSTITUTIONAL LAW OF CANADA, 2d ed. (Toronto: Carswell, 1985) at 800.

in the case of a law which uses a racial classification, the courts are certain to be more demanding under section 1 because they will suspect that the classification has been adopted for improper reasons or because they will recognize that such a classification may have unfair consequences, such as reinforcing the subordinate position of a particular racial group. The courts will apply different standards under section 1 to each law because the constitutional wrong under subsection 15(1) is not simply the use of a legislative classification — a wrong which must be outweighed by a competing value or interest.

In practice, the "neutral" interpretation of section 15 shifts the focus of judicial review from section 15 to section 1. It requires the courts to develop and apply a more substantial theory of equality (and discrimination) at the limitation stage under section 1. It requires a theory which explains why some laws are of greater concern to the courts than others, and in particular why some intentions are illegitimate or some effects unacceptable. The controversy about the meaning of equality and discrimination is simply hidden behind the general language of section 1.

McIntyre J. also recognizes that this "neutral" interpretation of discrimination is underinclusive. Given the very different circumstances of individuals in the community, a law which makes no distinctions and is therefore "neutral" on its face is almost certain to have a different impact on different groups within the community. As McIntyre J. recognizes, "the accommodation of differences . . . is the essence of true equality";[8] "identical treatment may frequently produce serious inequality".[9] With this, he rejects the formal idea of equality as the identical treatment of all persons and he points the way to a more substantial understanding of the right to equality.

Second, McIntyre J. rejects the view that the prohibition of discrimination in subsection 15(1) is expressed in the requirement that "those who are similarly situated should be similarly treated" or, in its more classic form, that the state ought to "treat like cases alike".[10] This principle involves a recognition of the fact that human beings are different, that they have different needs, abilities and aspirations.

However, Mr Justice McIntyre points out that a law which provides a benefit to one racial group and denies it to another might be seen as satisfying this test. The two groups could be considered differently situated, or unalike, because they are racially different. According to McIntyre J.:

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[8] *Andrews, supra*, note 1 at 169.

[9] *Ibid.* at 164.

[10] *See Re Andrews and Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600, 2 B.C.L.R. (2d) 305 (C.A.) [hereinafter *Re Andrews* cited to D.L.R.]. This principle was adopted in the decision of McLachlin J.A. (as she then was) speaking for the B.C. Court of Appeal. In J. Tussman & J. tenBroek, *The Equal Protection of the Laws* (1949) 37 CAL. L. REV. 341 this principle is seen as the basis of the Equal Protection Clause of the American Constitution.

> The [similarly situated] test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. The similarly situated test would [also] have justified the formalistic separate but equal doctrine of *Plessy* v. *Ferguson*. . . .[11]

I suspect, however, that those who put forward this precept as the test for discrimination do not think it should be applied in the formal way it is presented by McIntyre J.[12] For them, the test is given substance by a normative theory about the moral equivalence of the members of the human community. Once it is recognized that the moral worth of persons does not vary according to their race or gender, for example, it cannot be claimed that two people or two groups of people are differently situated or unalike simply because they are of a different race or gender. Nonetheless, McIntyre J. is probably right to reject this standard as the measure of equality or non-discrimination. Its moral content is not explicit, and in the past it has been applied "formally" to explain or permit offensive legislative distinctions.

Third, McIntyre J. declines to follow the American courts' approach to the Fourteenth Amendment which regards discrimination as a purposive or intentional wrong. Instead of focussing exclusively on the intention or purpose underlying the state act, McIntyre J. sets out a broader, more encompassing, standard of equality which emphasizes the impact or effect of a law:

> Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within . . . a fixed and limited formula.[13]

With this broad approach to subsection 15(1), Mr Justice McIntyre, no doubt, hopes to avoid many of the problems that have arisen for the American courts in applying their intention-based account of discrimination. The American courts have been plagued with the problem of discovering intention (the need to rely on objective circumstances) and the more fundamental problem of defining intention (a clear and conscious effort to disadvantage a particular group or the unreflective adoption of a generalization about a particular group or a

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[11] *Andrews*, *supra*, note 1 at 166.

[12] *See, e.g.*, *Re Andrews*, *supra*, note 10 at 610. McLachlin J.A. adopts this standard but gives it a very flexible application: "The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are reasonable or unfair."

[13] *Andrews*, *supra*, note 1 at 168.

general insensitivity to the needs of a particular group). Generally, American courts have been able to avoid a careful consideration of the meaning of "intention" because, almost invariably, they have had to construct wrongful intention from objective circumstances.

The American courts have often been caught up in the distinctions and categories of the complex doctrinal structure they have erected to aid in the discovery of improper legislative and administrative intentions. They have often lost sight of the point of the enterprise. Sometimes they have said that the Constitution is "colour blind" and that any use of a racial classification is wrongful, even in an affirmative action program. At other times, it appears that they have applied the doctrine expansively because they have been uneasy with the narrowness of an equality right which is concerned with reasons for legislative or administrative action and not with the substantive fairness of legislation.

By adopting an interpretation of section 15 which focusses on impact or effect, McIntyre J. seeks to avoid the problems faced by the American courts in discovering and defining discriminatory intention. However, in doing so, he may be adopting an approach which raises a set of problems that will be no less troublesome.

III. Effects Discrimination

The interpretation of the right to equality in section 15 which Mr Justice McIntyre adopts is concerned with the disadvantaging impact or effect of laws and other state acts. According to McIntyre J., if a law has a disparate impact on a group that is "discrete and insular", it will violate subsection 15(1), and the onus will shift to the state (or to the party seeking to uphold the law) to show that this discriminatory effect is justified under the terms of section 1:

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.[14]

McIntyre J. draws on the interpretation the Court has given to the term "discrimination" in human rights legislation. He takes the

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[14] *Ibid.* at 165.

following definition from the Court's decision in *Ontario Human Rights Commission* v. *Simpson-Sears Ltd*:

> [Discrimination] arises where an employer . . . adopts a rule or standard . . . which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on the other members of the work force.[15]

> It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.[16]

At one point in his judgment, though, McIntyre J. seems to shift the focus of concern from the impact of the law to the character of the distinction drawn in the particular law:

> I would say then that discrimination may be described 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.[17]

This paragraph may indicate what is objectionable about the citizenship requirement in the *Barristers and Solicitors Act*: the *Act* uses a characteristic or distinction which does not seem to be rationally related to a legitimate state objective, and it has a disparate impact on the members of the group which share that particular characteristic.

However, the emphasis in this paragraph on the distinction drawn ("discrimination may be described as a distinction. . .") and the unfair attribution of characteristics to the members of a group does not seem to fit with what McIntyre J. says earlier in his judgment. Near the beginning of his judgment he indicates that the basis of the wrong is

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[15] [1985] 2 S.C.R. 536 at 551, 23 D.L.R. (4th) 321 at 332 [hereinafter *Simpson-Sears* cited to S.C.R.]. In *Andrews*, *ibid.* at 175, McIntyre J. indicates that: "In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the differences between the *Charter* and the Human Rights Acts must, however, be considered."

[16] *Simpson-Sears*, *ibid.* at 547.

[17] *Andrews*, *supra*, note 1 at 174-75 [emphasis added].

the disparate impact of the law on a "discrete and insular" group. While a law may draw a distinction on the basis of race, for example, so that the law has a disparate impact on a particular racial group, the occurrence of an impact-based wrong depends neither on the drawing of a distinction nor on the attribution of characteristics. As McIntyre J. points out, the disparate impact of a facially neutral law may amount to discrimination under subsection 15(1). A requirement that all employees work on Saturdays may have a disparate impact on the members of a particular group, even though it involves neither the unfair attribution of a characteristic to the members of a group nor the drawing of a distinction.

This exceptional paragraph may reflect Mr Justice McIntyre's reluctance to recognize the deep egalitarian implications of his impact-based analysis of subsection 15(1). Some commentators, such as Judge Abella in her report on employment equity,[18] have tried to portray the prohibition of effects discrimination as a form of equality of opportunity, which requires the removal of arbitrary barriers to the full social and economic participation of disadvantaged groups in the community and an end to unfair racial or sexual stereotyping. They argue that effects discrimination is concerned with fair process rather than equal outcome, and with the elimination of arbitrary or unjust state interference with an individual's opportunities rather than with the redistribution of societal wealth.

However, review for effects discrimination is concerned with more than the removal of arbitrary barriers in the competition for benefits and an end to unfair stereotyping. Any requirement (barrier), even a sensible or coherent one, which limits the opportunity of a "discrete and insular" group of individuals to develop and to participate in society's benefits should be removed unless necessary to an important (compelling?) social goal. Review for effects discrimination is concerned not simply with rules of social competition which are neutral towards outcome. It is concerned with effects and seeks to structure the competition so that it results in a fairer and more balanced distribution of social benefits in the community — a more equitable outcome. It permits state actors to pursue various ends but requires that they show some concern for the relative position of different groups in the community. The state must be sensitive to the needs and circumstances of different groups and it should endeavour to accommodate these in its pursuit of legitimate ends. The state must not pursue its goals without taking into account the effect of its actions on the disadvantaged in the community. In other words, effects discrimination involves not simply the unfair attribution of characteristics

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[18] EQUALITY IN EMPLOYMENT (Ottawa: Minister of Supply and Services Canada, 1984) is referred to by McIntyre J. in *Andrews*, *ibid.* at 174.

to the members of a particular group, but also the failure by a decision-maker to take into account the *actual* circumstances and characteristics of different groups.[19]

With only this minor lapse, Mr Justice McIntyre recognizes the egalitarian character of his interpretation of the prohibition on discrimination. Near the beginning of his judgment, he describes equality as a "comparative concept".[20] He considers that inequality is a matter of the condition of an individual or group in comparison with "others in the social and political setting".[21] It is not enough that the law has a differential impact on a particular individual; in addition, it must be shown "that the legislative impact of the law is discriminatory".[22] A law will discriminate and violate subsection 15(1) only when it has a disparate impact on a "discrete and insular" group. The focus under section 15, then, is on groups that are "discrete and insular" — in other words, groups that are "lacking in political power and as such vulnerable to having their interests overlooked".[23] In her judgment, Mme Justice Wilson indicates that a "discrete and insular" group is one that is in a disadvantaged position relative to the rest of the community. In her view, the question of whether or not a group is "discrete and insular" and the focus of review for disparate impact under subsection 15(1) should be:

> [A] determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.[24]

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[19] A requirement that all employees wear hardhats or work on Saturdays may be very sensible but may have a disparate impact on a particular group because of the actual characteristics of the group's members. As McIntyre J. states in *Andrews*, *ibid.* at 169: "[T]he accommodation of differences . . . is the essence of true equality."

[20] *Ibid.* at 164.

[21] *Ibid.*

[22] *Ibid.* at 182. *See also* the judgment of Wilson J. in *Turpin*, *supra*, note 5 at 1331-32:

> [I]t is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not in all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

[23] *Andrews*, *ibid.* at 152, *per* Wilson J.

[24] *Ibid.*

IV. State Action

According to Mr Justice McIntyre, although section 15 is concerned with systemic equality — the relative social, economic and political position of different groups within the community — the section does not create a "general guarantee of equality":

> [I]t does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.[25]

McIntyre J. states clearly that section 15 is simply a right against *acts* of discrimination by the *state*. The section does not constitutionalize a full-blown right to equality of result in the general community. It places no obligations upon private (non-state) actors to treat others fairly and equally or to make efforts to equalize the social position of disadvantaged individuals or groups within the community. Nor does it require the state to take positive action to correct inequality in the community. According to McIntyre J., section 15 only restricts state discrimination. The section is concerned with equality of result but its force is limited to a prohibition of state acts which contribute to systemic inequality or, more particularly, to the disadvantaged position of a "discrete and insular" group in the community.

However, it is difficult to see how the state-action doctrine is to constrain the right to equality in subsection 15(1) and to prevent it from becoming a full-blown right to equality of result that would guarantee to all individuals and groups a fair and equal share of the benefits and burdens of the community. Mr Justice McIntyre's view that the state-action doctrine represents an important limit on the scope of the constitutional right to equality seems to rest on a mistaken assumption that private activity (the market) is somehow natural and pre-political and is thus regulated, but not created, by state action.

If McIntyre J. had followed the American courts and interpreted the right to equality as a prohibition on intentional or purposive discrimination, then the state-action doctrine might have been coherently applied to limit the scope of judicial review.[26] The state would

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[25] *Ibid.* at 163-64.

[26] I do not mean to suggest that there would be no difficulties in applying the state-action doctrine. The integrity of the state-action doctrine rests upon the courts' ability to separate what the state does from what private actors do. But this becomes difficult once it is recognized that 'private' power is founded on state laws. There are two points of stress in the state-action doctrine: (i) Who is a state actor? State actors and private actors both get their power from laws. (ii) What acts can be attributed to the state? The legislature is in some sense responsible for all 'legal' actions. For a discussion of these concerns in the context of freedom of expression, *see generally* R. Moon, *Access to Public and Private Property Under Freedom of Expression* (1988) 20 Ottawa L. Rev. 339.

violate the right to equality if it enacted a law, or if it acted in some other way, for improper or illegitimate reasons. But if a private (non-state) actor acted for reasons of prejudice (discriminated) — for example, if that actor excluded someone from his or her property because of their skin colour — that act would not violate the constitutional right to equality because it would not be an act of the state. The state may have supported the private owner's act of discrimination through trespass and other laws, but, provided that the state law empowering private owners to exclude others from their property was not enacted for improper purposes, it would not amount to an act of state discrimination and thus would not violate the right to equality.

However, McIntyre J. does not see discrimination as a discrete intentional wrong. In his view, the right to equality is concerned not with the reasons for legislative action but rather with the effect of such action on the comparative position of different members of the community. A violation of the right to equality occurs when a state act contributes to the general position of inequality or disadvantage of a group in the community. Comparative social disadvantage is central to the wrong of discrimination since a law violates the section only when it adds to this condition of inequality.

However, if subsection 15(1) is concerned with comparative inequality in socio-economic standing, it is difficult to see how the state-action doctrine can be a significant limit on review by the courts. Specifically, it is difficult to see how the right to equality under subsection 15(1) does not amount to a "general guarantee of equality". In some sense, all inequality (whatever may be regarded as a condition of inequality) is the result of a particular law or, more often, a combination of laws or the entire legal order — for example, the laws which create and protect private property and the market system.[27]

The distinction between state action and state inaction (or the distinction between, on the one hand, the obligation of the state not to act in a way that contributes to socio-economic inequality and, on the other hand, a positive obligation on the state to correct inequality) loses significance once it is recognized that all inequality in the community can be traced to state action. As well, once the focus of review is on the systemic effects rather than on the purpose of a particular law, the distinction between private and public spheres of action underlying the state-action doctrine begins to dissolve. Although the action of the private property owner may not be subject to judicial review, the state act which gives that owner power may come under review since it can be seen as contributing to inequality in the

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[27] M. Cohen, *Property and Sovereignty* in C.B. MacPherson, ed., PROPERTY — MAINSTREAM AND CRITICAL POSITIONS (Toronto: University of Toronto Press, 1978) at 155.

community. Social and economic inequality which is manifested in private power and re-created by private power ultimately derives from state action.

V. The Complexity of Equality and the Limits of Judicial Review

The requirements of equality are complex. The right to equality is not satisfied by the distribution of the same package of goods to every individual. As Mr Justice McIntyre recognizes, individuals have different needs, abilities and interests. This means that some goods and opportunities will be more valuable to some individuals than to others. The right to equality is only satisfied when individuals are given both a fair opportunity to develop as fully as they are able and a fair share of the benefits, opportunities and burdens of the community.

Equality of result is complex because it is, in a sense, a secondary principle. The principle of equality requires a theory of the good for its substance. Human beings are valuable individually and equally because they share certain capacities. It follows that the state should encourage the development of these capacities. The principle of equality simply adds that what is valuable in one is valuable in all, and that the state must try to advance the interests of each and every individual without favouring some individuals at the expense of others.

Some individuals may have special needs (health care, for example) and the right to equality does not preclude — indeed it may require — the satisfaction of such needs. Similarly, some individuals may have special interests or abilities, and the right to equality does not preclude the state from providing for these (higher education, for example), even though not all individuals may be able to take advantage of such a provision. However, the right does preclude the state from devoting all of its resources to certain interests or projects if this means that the interests of some members of the community are completely ignored.

In any community there will be controversy about the fairest accommodation of different goals and interests. Collective decisions about the amount of social resources to be devoted to health care rather than education will reflect the community's values and priorities.[28] As well, there will be debate about the fairest and most efficient way to achieve a balanced distribution of benefits and burdens. The pursuit of systemic equality requires speculation about the possible

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[28] McIntyre J. recognizes this, *supra*, note 1 at 185: "When making distinctions between groups and individuals to achieve desirable social goals, it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly the wrong one."

effects of different laws as well as experimentation and adjustment in the legal system.

The complexity of equality means that there is no one distribution of benefits and burdens and no particular combination of laws which will produce equality of result and satisfy the right. There is simply a general point at which the distribution of benefits and burdens favours some individuals or groups over others so that it becomes clear that the state has not given equal consideration to the interests of certain persons in the community.

The pursuit of a full-blown equality of result is not a task the courts are well-suited to perform. The realization of equality might well require a general restructuring of our complex system of laws, and this would leave little scope for legislative judgment. However, perhaps more importantly, the adjudicative model is designed to deal with issues of corrective justice and limits the courts' ability to engage in the kind of systemic review and correction called for by this idea of equality.

The courts must pursue equality awkwardly and crudely through the review of particular laws, examined in isolation from the background of other laws in the system. Courts are limited in their ability to judge the legal system's conformity with the complex goal of systemic equality, to assess the various legal alternatives the state might choose to advance the common good and to decide which alternative might be the most effective and the most equitable. As well, they are limited in their ability to effect the changes necessary to bring the legal order closer to the ideal of equality of result. The courts are unable to assess the give and take of different laws and to make the systemic adjustments that best advance the goal of equality while respecting other values and concerns.

The recognition of systemic equality does not require that other goals and interests be discarded. A law which does not extend benefits to all individuals may be quite consistent with the right to equality. If some individuals cannot benefit from certain goods, there is no reason for those goods to be denied to the rest of the population. Exclusion from the benefit of one law can be made up for by an alternative or substitute provision. However, the justification of disparate impact before the courts is complicated because the pursuit of equality is constrained by the adjudicative model. Since the focus of review is on particular laws and not on the entire system of laws and the distribution it generates, the courts are not free to structure the system as they see fit, and thus cannot ensure that important rights and goals are pursued in the most fair and equal manner. A court must look at the law before it and decide whether that law should be struck down. Equality is pursued interstitially, and so, in general, the only way the courts can recognize and provide for values and interests other than equality is to uphold the law under review and permit some disadvantageous effect. Although the courts may on occasion make positive orders (extending the benefit of a particular law to a larger group), it is unlikely that

they will be in a position to uphold a law and order compensatory benefits for those who are excluded from that law's distribution.[29]

The courts can and should play only a limited role in advancing equality of result in the community, given the complexity of equality, and given the limited ability of the courts to identify systemic inequality and to ensure that the state respects the needs and interests of different groups as it seeks to advance the common good. But if the state-action doctrine will not limit the depth of the courts' intervention into the systemic distribution of benefits and burdens in the community, then the depth of judicial intervention must depend on the tests that the courts apply in determining whether a law amounts to effects discrimination. Judicial review in support of equality of result will be more manageable and less disruptive of genuine legislative efforts to advance the common good (intervention into the socio-economic order will be contained), if the courts set a fairly high threshold for the joint requirements of disparate impact and disadvantaged group status, or if they set a low threshold for justification under section 1.

VI. A Discrete and Insular Group

Not just any group of individuals may claim that a law violates section 15 because it affects them in a disparate way. According to Mr Justice McIntyre, a law will discriminate only if it has a disparate impact on a "discrete and insular" group. However, McIntyre J. says little about how to identify the "discrete and insular" groups which are to be the focus of review.

All the members of the Court agree that non-citizens are a discrete and insular group and that the law under review has a disparate impact on non-citizens. According to Wilson J.:

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending': see J.H. Ely, Democracy and Distrust . . . . Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in Book III of Considerations on Representative Government that 'in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked . . .'. I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15.[30]

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[29] It is one thing to order that the benefit of the law be extended to an excluded group. It is another thing to recognize the necessity of the exclusion but order some sort of compensation for the excluded persons in the way of substituted benefits. For example, the blind are forbidden to drive. Could the courts order the state to provide them with special transportation facilities? What about a cash payment to individuals or to the Canadian National Institute for the Blind?

[30] *Supra*, note 1 at 152.

The phrase "discrete and insular" is borrowed from the jurisprudence of the American Equal Protection clause, and more particularly from the famous footnote 4 of the *Carolene Products* case.[31] As Mme Justice Wilson notes, the phrase is understood in the United States to suggest political exclusion. This emphasis on political powerlessness reflects the view that the right to equality (the Equal Protection Clause of the Fourteenth Amendment) is concerned with correcting the government's failure to represent the interests of all the members of the community — a matter of the process rather than the substance of legislative action.[32]

The problems with this interpretation of the Equal Protection Clause in the American Bill of Rights have been pointed out by many commentators.[33] How are the courts to determine whether there has been a failure of the representative process? If the members of a particular group have a right to vote, which they exercised, how can it be said that the representative process has failed? The failure is not simply that certain persons have been denied input into the political process. Rather, the failure is that the government has treated some members of the community unequally. In deciding whether the right to equality has been breached, the courts must have a theory about what counts as a just distribution of benefits and burdens in the community (what counts as socio-economic disadvantage) — a theory which turns on something other than the process of legislative decision-making.

As the judgments of both McIntyre J. and Wilson J. indicate, the discreteness and insularity of a group is a matter not simply of its political powerlessness but, more significantly, of its position of disadvantage relative to other groups in the community. The Court emphasizes this in the recent decision in *Turpin* which holds that the purpose of section 15 is to remedy or prevent "discrimination against groups suffering social, political and legal disadvantage in our society".[34]

Disadvantage is usually generalized in some way and so the Court seeks to identify and remedy disadvantage by examining the relative position of groups in the community and preventing the state from aggravating the position of disadvantaged groups. As well, the courts are not in a position to make the adjustments necessary to bring about

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[31] *United States* v. *Carolene Products Co.*, 304 U.S. 144 at 152, 82 L. ed. 1234 at 1241-42 (1937).

[32] *See* J.H. Ely, DEMOCRACY AND DISTRUST (Cambridge, Mass.: Harvard University Press, 1980) in which the author puts this forward as a general theory of judicial review for the American Bill of Rights. Note that Wilson J., in the paragraph quoted, makes an approving reference to Ely's book.

[33] *E.g.*, L. Tribe, CONSTITUTIONAL CHOICES (Cambridge, Mass.: Harvard University Press, 1985) at 9-20. *See also* R. Moon, *Process, Community and the Canadian Charter of Rights* (1989) 39 U.T.L.J. 410.

[34] *Supra*, note 5 at 1333.

a complex form of equality of result, ensuring that all individuals are provided with an equal share of the benefits and burdens of the community. Therefore, it is appropriate that the courts take a general approach and focus not on "individual" instances of unequal treatment but rather on groups that have occupied, and continue to occupy, a position of relative disadvantage.

The limited goal of review, then, is the rough equalization of the relative position of different groups in the community rather than the equalization of individual positions. The disadvantaged groups that are the focus of review may have some members who are not disadvantaged in comparison with the general population — for example, the non-citizens who brought the action in this case so that they could become practising lawyers without having to wait three years. At best, the goal of "equality among groups" represents an imperfect form of equality of result.[35] This form of judicial review will be more or less significant depending on the courts' methods for identifying disadvantaged groups.

As McIntyre J. observes, the categories listed in section 15 of the *Charter* illustrate the kinds of groups that should be the focus of review — various racial and religious groups, women, the aged, the handicapped.[36] Because section 15 involves a general prohibition on discrimination and is not limited to the protection of these listed groups, other "analogous" groups (such as non-citizens), which occupy a disadvantaged or subordinate position in the community, will also receive protection under section 15. On the other hand, the courts will

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[35] *See* D.W. Rae *et al.*, EQUALITIES (Cambridge, Mass.: Harvard University Press, 1981) c. 2, where this notion of equality is called "bloc-regarding" equality.

[36] I recognize that s. 15 refers to general types of classification rather than to specific disadvantaged groups. For example, it refers to sex rather than to women. Does this mean that men can make a claim under s. 15? Insofar as s. 15 is concerned with systemic disadvantage, men will not generally be in a position to make a claim. However, s. 15 may apply to forbid all aspects of a system of subordination. Laws which assume that women have the exclusive interest in, and responsibility for, childcare are objectionable. Perhaps laws which draw on the related stereotype that men have no interest in, or responsibility for, childcare should also be struck down as part of a larger system that serves to subordinate women.

In his concurring reasons, *supra*, note 1 at 195, La Forest J. states:

> The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.

If La Forest J. means that only groups defined by immutable traits are the focus of review under s. 15, then he will have difficulty fitting religion into his scheme. Elsewhere in his reasons, though, he emphasizes political exclusion and socio-economic disadvantage.

not be concerned about blue-eyed males who may be affected disparately by a particular law (perhaps even a law that does not seem to pursue an intelligible goal), because their position in the community is not such that it requires the courts to review the legislature's judgment.

The poor may be regarded as a "discrete and insular" group, once it is accepted that the purpose of judicial review is to bring an end to disadvantage and subordination in the community. However, there may be some reluctance to recognize the poor as a protected group because such a recognition would require the courts to engage in an explicit review of the community's socio-economic organization. Although review in support of groups such as the handicapped, women and recent immigrants raises questions concerning the justice of the socio-economic order, the courts' review in support of these groups seems to involve less directly a reassessment of the socio-economic system. These groups have been victims of prejudice and the courts are able to trade on the community's sense that review in support of these groups involves either the correction of (or compensation for) past "wrongs" (understood as discrete acts of prejudice rather than simply a position of socio-economic disadvantage) or, as discussed above, the removal of arbitrary barriers to equal opportunities.[37]

A limited focus on groups that historically have been the victims of prejudice, and a refusal to see the core of the wrong as socio-economic subordination will allow the courts to avoid reviewing the situation of all disadvantaged individuals or groups, and will mean that section 15 is satisfied by a redefinition of the underclass. As long as blacks, women and the handicapped are distributed proportionately among the higher and lower socio-economic classes, "equality" under section 15 will have been achieved. However, if the courts choose to see socio-economic subordination as the wrong with which section 15 is concerned, and to consider the poor to be a disadvantaged group, all social and economic legislation could come under review. The depth of judicial intervention into the socio-economic organization of the community would then depend on the threshold the courts set for disparate impact.

VII. Disparate Impact

Any law, when subjected to close scrutiny, might be seen as having a disparate impact on a particular group, even a "disadvantaged" group, in the sense that it might exclude from its benefit a higher percentage of disadvantaged group members than members of the general population. However, should every instance of disparate impact on a disadvantaged group (that is, every law) be considered a violation of subsection 15(1), thus requiring the state to justify the law

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[37] *See* text accompanying note 18.

under the terms of section 1? If 55 percent of a disadvantaged group are excluded from the benefit of a particular law, while only 50 percent of the general population are excluded, should the courts find such a differential sufficient to support a claim of discrimination?

A law is not wrongful (it does not violate the right to equality) simply because it has a disparate impact on a particular group. Not everyone will benefit from programmes of higher education, health care or road construction, but that is not a reason to prohibit such programmes and deny their benefits to others. Disparate impact is not itself objectionable because equality does not demand a levelling of social provision to a common denominator. The right to equality simply requires that the interests of some members of the community not be completely ignored or sacrificed in the general distribution of benefits and burdens.

Of course, under section 15, disparate impact on a group is of concern only when that group is socially or economically disadvantaged. By setting a low threshold of disparate impact (and a high threshold for justification under section 1), the courts could emphasize the legislature's obligation to correct systemic inequality. The legislature would be prevented from advancing a particular goal if doing so would add to the relative disadvantage of a "discrete and insular" group. Before the legislature could enact a law which has a disparate impact, it would have to ensure that the position of the affected group was improved in some way. The legislature's hands would be tied until it acted to end disadvantage and subordination. Such an approach to section 15 would involve a clear recognition that the wrong at issue is not the law under review but rather the subordinate position of certain members of the community. A court's power may be limited to striking down the particular law before it, but its aim is to bring an end to systemic inequality.

It is unlikely, however, that the courts will be prepared to take such a strong position, compelling state redistribution of benefits and burdens. Given the complexity of equality and given the political and institutional restrictions on the courts, it may be appropriate for the courts to set a high threshold for disparate impact and to focus only on those groups that are clearly disadvantaged (whether due to a history of prejudice and discrimination or to some other cause) because they have a smaller share of the benefits of the community and fewer opportunities and options than the rest of the population. A high standard for intervention would mean that the courts strike at only the clearest instances of inequality — at laws that add significantly to the disadvantage of an already disadvantaged group. This approach would allow the courts to advance a crude form of equality of result, without unduly interfering with the judgments and experiments of the legislature and without striking down a law which, when viewed from a wider perspective than is available to the courts, might be seen as advancing an important goal in a way that does not unnecessarily sacrifice the interests of a particular group.

VIII. THE APPLICATION OF SECTION 1

The other members of the Court agree with McIntyre J. that the law under review has a "disparate impact" on a "discrete and insular" group. Because non-citizens are politically excluded and socially and economically disadvantaged, they "fall into an analogous category to those specifically enumerated in section 15". As well, the citizenship requirement has a clear and direct disadvantageous effect on non-citizens:

> The permanent resident must wait for a minimum of three years from the date of establishing permanent residence status before citizenship may be acquired. The distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory.[38]

However, the members of the Court do not agree on the question of the proper standard to be applied under section 1 when a violation of subsection 15(1) has been found. According to Mr Justice McIntyre:

> [The] standard of "pressing and substantial" may be too stringent in all cases. To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation. . . . [T]he first question the Court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights.[39]

He argues that:

> The essence of s. 1 is found in the expression "reasonable". . . . The Legislature in fixing public policy has chosen the citizenship requirement and, unless the Court can find that choice unreasonable, it has no power under the *Charter* to strike it down or, as has been said, no power to invade the legislative field and substitute its views for that of the Legislature.[40]

McIntyre J. seems not simply to apply a relaxed standard under section 1, but rather to defer completely to the Legislature's judgment on the need to sacrifice equality to the pursuit of other ends.

In seeking to justify the citizenship requirement under section 1, the government argued that: 1) citizenship ensures familiarity with

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[38] *Supra*, note 1 at 183.

[39] *Ibid.* at 184.

[40] *Ibid* at 191. McIntyre J.'s real concern seems to be with the legitimacy of judicial review. This concern may be heightened in the context of equality rights because there is no obvious stopping point for judicial intervention into the socio-economic order.

Canadian institutions and customs; 2) citizenship implies commitment to Canadian society; and 3) lawyers play a fundamental role in the Canadian system of democratic government and as such should be citizens.[41] McIntyre J. agrees that lawyers play a "fundamentally important" role in the administration of criminal and civil justice. In his view, the responsibilities given to a lawyer "are such that citizenship with its commitment to the welfare of the whole community is not an unreasonable requirement for the practice of law".[42] He notes also the public function of the lawyer:

> In various aspects of this work [lawyers] are called upon to advise upon legal and constitutional questions which frequently go to the very heart of the governmental role. To discharge these duties, familiarity is required with Canadian history, constitutional law, regional differences and concerns within the country and, in fact, with the whole Canadian governmental and political process. It is entirely reasonable, then, that legislators consider and adopt measures designed to maintain within the legal profession a body of qualified professionals with a commitment to the country and to the fulfilment of the important tasks which fall to it.[43]

In concluding that the requirements of section 1 are satisfied because the citizenship requirement is not unreasonable, and in giving very little content to the reasonableness standard, McIntyre J. appears to reject the significance, if not the substance, of an effects-based conception of the right to equality. The concern under section 15 may be with any law which has a disparate impact on a disadvantaged group, but if such a law is justified as soon as the state puts forward some reasonable (that is, rational rather than substantial) ground for it, then the right to equality may do nothing more than protect a disadvantaged group or individual from arbitrary action. If the right to equality can be overridden provided the legislature acts reasonably, then Mr Justice McIntyre's explication of the tests for determining a breach of section 15 has little point. The legislature is not forbidden to enact laws which have a disparate impact on a discrete and insular group; it is simply forbidden to enact such laws for no reason.

In contrast, Mme Justice Wilson (Dickson C.J.C. and L'Heureux-Dubé J. concurring), thinks that section 1 should be applied in the ordinary manner, following the tests set out in *R.* v. *Oakes*.[44] However, because she finds that the citizenship requirement is not rationally connected to any of the legitimate state purposes offered to support the law, it is not necessary for her to consider whether these purposes are compelling or even proportionate to the law's disadvantageous effect on non-citizens.

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[41] *See ibid.* at 198-99, *per* La Forest J.
[42] *Ibid.* at 188.
[43] *Ibid.* at 189.
[44] [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321.

On the justification issue, Wilson J. adopts the reasoning of McLachlin J.A. (as she then was) in the decision of the British Columbia Court of Appeal.[45] Wilson J. agrees that citizenship does not ensure familiarity with Canadian institutions and customs,[46] does not evidence a real attachment to Canada,[47] and does not provide "any guarantee that [lawyers] will honourably and conscientiously carry out their public duties".[48] In her conclusion, Wilson J. adopts the view of McLachlin J.A. that the citizenship requirement "does not appear to relate clearly to those ends, much less to have been carefully designed to achieve them with minimum impairment of individual rights".[49] Along with La Forest J., she concludes that the requirements of section 1 are not satisfied, and that the breach of section 15 is not justified.

If the courts set a high threshold for intervention under subsection 15(1), then it will be appropriate for them to apply section 1 rigorously. It seems fair to impose an obligation on the state to show that it has a compelling purpose when it enacts a law which adds in a significant way to the disadvantage of an already disadvantaged group. The state must be sensitive to the needs of these groups and must endeavour to advance the common good in a way that does not contribute significantly to systemic inequality. Even if the purpose of the law seems reasonably important (something less than compelling), if the law's effect adds to the disadvantaged position of a group that is already significantly disadvantaged relative to the general community, then it should not be upheld by the courts. The legislature should not be permitted to ignore yet again, the needs and interests of a particular group.

On the other hand, if the courts take a flexible view of the requirements of disparate impact and disadvantaged group, then McIntyre J. may be correct that a relaxed standard is appropriate under section 1. It may be too much for the courts to demand that every time a law appears to contribute in some small way to systemic inequality, the legislature must put forward a compelling reason to support the law. Such an approach might tie the legislature's hands too much, preventing it from pursuing important goals. As well, such an approach fails to take into account the possibility that other means may be used to compensate for the disparate impact of a particular law. While the courts may be limited in their choices (to strike down the law or to uphold it), the legislature may enact such a law but at the same time provide other benefits to the disadvantaged group by way of compensation or substitution.

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[45] *Supra*, note 10.
[46] *Supra*, note 1 at 156.
[47] *Ibid.*
[48] *Ibid.* at 157.
[49] *Supra*, note 10 at 617.

The courts cannot assess the systemic distribution of benefits and burdens except in the roughest way, and they cannot make remedial adjustments to the distributive system so that equality can be recognized and protected even as other goals are being pursued. Therefore, section 1 may well have an important role to play in allowing the legislature to advance a variety of important goals. The proper approach to section 1 will depend on the standards the courts set for a violation of section 15.

IX. CONCLUSION

In the end, the Court's disposition of the case seems entirely satisfactory. An unnecessary barrier to the access of non-citizens to the legal profession has been removed. Newcomers to Canada will not have to wait for citizenship before pursuing a legal career. Those who are otherwise eligible for legal practice will be able to enter and participate in the social and economic life of the community without unnecessary delay.

In the reasons of McIntyre J., the Court has made a strong start towards defining the right to equality under subsection 15(1). It has avoided a narrow and mechanical approach to the right and has adopted instead a broad, egalitarian view of the ideal of equality.

However, in taking this view of the right to equality, the Court has set itself a very difficult task. The task is difficult because while the focus of review is on a law which disadvantages a particular group, the foundation of the wrong is the disadvantaged or unequal position of the group in the community. The pursuit of systemic equality is constrained by the adjudicative process and perhaps also by the Court's reluctance to recognize the full implications of the conception of equality underlying the prohibition of effects discrimination. The Court is caught between two views of equality and state obligation: one view emphasizes the correction of harmful state action through the adjudicative process; the other emphasizes distributive justice and places an obligation on the state to correct socio-economic inequality in the community.

The focus in future cases will be on the standards used for determining whether a group is "disadvantaged", whether a law's impact is "disparate" and whether the "limit" on the right under section 1 is "reasonable". The standards adopted by the Court will determine the depth of judicial intervention into the socio-economic organization of society. Future cases may give greater substance and clarity to these tests. However, inasmuch as they represent a compromise between two visions of equality and state obligation, these standards are certain to remain unstable. The scope of the right to equality will remain open, flexible and controversial, with no clear lines or easy tests for fixing the limits of judicial intervention into the social and economic order.