Section 15 and the *Oakes* Test: The Slippery Slope of Contextual Analysis

CLAIRE TRUESDALE*

This article explores the relationship between the *R v Oakes* test and discrimination claims under section 15 of the *Canadian Charter of Rights and Freedoms*. Building on Ryder et al's "What's *Law* Good For? An Empirical Overview of Charter Rights Decisions," this paper examines decisions by the Supreme Court of Canada over the last 25 years and appellate courts over the last 10 years that engaged in equality analyses under section 15. The empirical analysis and qualitative analysis of select Supreme Court of Canada cases lends support to the criticism of equality jurisprudence that considerations more familiar to the justification analysis of section 1 are falling into consideration under the contextual factors of section 15. The article explores the implications of the Court's current approach to context under section 15 for rights claimants and social movements more generally. Ultimately, it concludes that unless section 15 and section 1 are kept analytically distinct, and the *Oakes* test is restored to a place of importance in the adjudication of equality claims, there will likely be significant negative consequences for claims based in deep systemic inequalities. There will also be negative consequences for social justice movements looking to harness the communicative power of the law for political purposes.

Dans cet article, on explore la relation entre le critère élaboré dans l'arrêt *R c Oakes* et les plaintes pour discrimination en vertu de l'article 15 de la *Charte canadienne des droits et libertés*. En se fondant en partie sur le texte de Ryder et al's intitulé « What's *Law* Good For? An Empirical Overview of Charter Rights Decisions », l'auteur analyse les décisions rendues par la Cour suprême du Canada au cours des 25 dernières années et des cours d'appel durant les 10 dernières années à l'égard de questions d'équité fondées sur l'article 15. L'analyse empirique et l'analyse qualitative de certaines affaires jugées par la Cour suprême du Canada viennent étayer la critique relative à la jurisprudence sur l'égalité selon laquelle des considérations plus couramment explorées en rapport avec l'analyse de la justification de l'article 1 s'inscrivent dans le cadre de l'analyse des facteurs contextuels de l'article 15. Cet article explore les conséquences de l'approche actuellement suivie par la Cour vis-à-vis du contexte fondée sur l'article 15 pour les requérants de droits et les mouvements sociaux en général. En dernier lieu, il conclut que, à moins que l'on analyse l'article 15 et l'article 1 de façon distincte et que l'on redonne au critère établi dans *Oakes* la place importante qu'il revêt dans les décisions relatives aux revendications à l'égalité, il y aura sans doute de graves et néfastes conséquences pour les revendications fondées sur de profondes inégalités systémiques. Il pourrait également y avoir des conséquences négatives pour les mouvements de justice sociale désireux de mettre à profit le pouvoir communicatif du droit à des fins politiques.

* Claire Truesdale has a JD with a Concentration in Environmental Law and Sustainability from the University of Victoria. This paper was written in the final year of her JD program. Her primary interests are in Aboriginal, environmental and constitutional law. She would like to thank Professor Hester Lessard for her insightful comments, guidance and encouragement to seek publication. She would also like to thank Linden Dales and the other editors at the *Ottawa Law Review* for their significant contribution to the quality of this work.

Table of Contents

Section 15 and the *Oakes* Test: The Slippery Slope of Contextual Analysis

CLAIRE TRUESDALE

"The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."[1]

I. INTRODUCTION

In its 25 years in existence, the analysis by the Supreme Court of Canada (the Supreme Court or the Court) under the *Oakes* test has undergone many subtle but important changes. However, as it is inextricably linked to the other provisions of the *Canadian Charter of Rights and Freedoms*,[2] the *Oakes* test is just as affected by changes outside of its own logic as it is by changes within. Many commentators have remarked on the weakening of section 1[3] in equality claim jurisprudence as a result of the increasing use of contextual analysis under section 15.[4] However, it wasn't until 2004 that a wide empirical study of section 15 jurisprudence addressed this issue, among others.[5] As section 15 jurisprudence and the analytical framework for equality claims is

1 *R v Oakes*, [1986] 1 SCR 103 at 136, 26 DLR (4th) 200 [*Oakes* cited to SCR].

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

3 *Ibid*, s 1. Section 1 places a limit on the rights outlined in the rest of the Charter. It states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

4 *Ibid*, s 15. Section 15 is the "Equality Rights" section of the *Charter*. It states: "(1) 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. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

5 Bruce Ryder, Cidalia C Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of *Charter* Equality Rights Decisions" (2004) 24 Sup Ct L Rev (2d) 103 [Ryder et al]. Ryder et al's paper includes an empirical examination of section 15 jurisprudence that addresses many issues raised in the literature, whereas this paper focuses on an empirical and qualitative analysis, specifically on the issue of potential for overlap between the section 1 and section 15 analyses and the possible implications of such an overlap.

constantly evolving, this paper builds on that research by updating it and focusing more specifically on the implications of the section 15 and section 1 overlap. The empirical and qualitative analyses of recent cases bear out the academic criticisms that the boundary between section 15 and section 1 is increasingly permeable, with contextual factors sliding back and forth between them. This trend increases the role of section 15 and weakens the role of section 1 by allowing greater consideration of state objectives and perspectives to take place under the section 15 stage of analysis. Furthermore, it has significant consequences for claims based in deeply rooted systemic inequality and for social movements attempting to engage in human rights discourse through *Charter* rights litigation. As the influence of section 1 is weakened, the rigorous standard to which governments are to be held in upholding *Charter* rights is diminished, compromising the integrity of the *Charter* as a shield against the hegemonic state. The increased use of contextual analysis in section 15 has not led to a greater judicial understanding of systemic inequality. Instead, the potential for progressive and transformative change through the law is fading away under the shadow of state authority, which is present now more than ever in the shaping of the right itself.

II. CONTEXTUAL ANALYSIS: THE NEXUS BETWEEN SECTION 15 AND SECTION 1

The question of the relationship between section 15 and section 1 is at its core about the role of context in determining equality litigation. It is about the appropriate doctrinal iteration of a contextual approach to identifying and remedying discrimination. Commentators like Colleen Sheppard have identified contextualism as critical to the analysis of discrimination.[6] If a vision of substantive equality is to be pursued, the substantive effects of discrimination and the exclusionary processes that uphold it must be examined.[7] For Sheppard, this requires a systematic contextual approach that assesses the micro-level (personal stories), meso-level (institutional structures) and macro-level (historic, social and systemic patterns) of contextualism.[8]

Sheppard's taxonomy of levels is meant to assist in naming and identifying effects and processes of inequality and discrimination. The micro-level looks at the social locations and experiential knowledge of individuals without power in society. The meso-level looks at institutional relations of inequality. In other words, the informal norms of workplaces, corporations, educational institutions, families, religious organizations and communities and their relationship with legal norms. The macro-level situates legal questions and controversies in the larger social, economic, political and familial contexts. These contexts may undermine and impede institutional transformation; examination of them is essential to broaden the analysis.

---

6 Colleen Sheppard, Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada (Montreal: McGill-Queen's University Press, 2010).

7 *Ibid* at 9.

8 *Ibid* at 9-10.

As discussed in the following paragraphs, the Supreme Court has adopted a broad contextual approach and addresses all three levels (although not explicitly) in the jurisprudence, to varying degrees of success. The Court appears to have struggled with consistently applying a broad contextual approach within the legal doctrine of *Charter* rights, where the kind of explicit delineation of the levels of inequality that Sheppard outlines is lacking, specifically since *Charter* rights assessment requires a multi-stage approach. In the *Charter* context, slotting the right contextual factors into the right stages of analysis can be particularly problematic when one stage of analysis (in this case section 15) has only more recently required explicit "purposive" and "contextual" analysis under a particular framework.[9] The result that many commentators have identified is significant overlap between section 1 and the contextual factors considered under section 15, against the backdrop of the Court struggling to articulate a consistent approach.[10]

The *Oakes* test itself is an inherently contextual exercise: it asks the government to demonstrate the context that motivated the rights-infringing legislation in order to justify the infringement. The government must prove that the law: has an objective that is pressing and substantial; is rationally connected to that objective; minimally impairs the right infringed; and is proportional in an overall balancing of salutary and deleterious effects.[11] This necessitates an inquiry into whatever social, economic and political factors might be relevant to the creation and effects of the legislation in question. Furthermore, as the Court stated in *Oakes*, this inquiry takes place in the shadow of the broader context of "the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society."[12] Some commentators observe that the Court has struggled with undertaking a vigorous contextual analysis under section 1 without second-guessing the legislature as it addresses complex social problems.[13]

Problems negotiating contextual analyses are not unique to section 1. The roots of a contextual approach to *Charter* interpretation can be traced to Madame Justice Wilson's judgment in *Edmonton Journal v Alberta (Attorney General)*.[14] She distinguished between a "contextual" and an "abstract" approach to the interpretation of *Charter* rights, explaining that "a right or freedom can have different meanings in different contexts" and a contextual approach is "more sensitive to the reality of

---

9 A contextual approach to s 15 was not explicitly affirmed until the case of *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR].

10 See e.g. Ryder et al, *supra* note 5; Christopher D Bredt, "The Right to Equality and Oakes: Time for Change" (2009) 27 NJCL 59; Hart Schwartz "Making Sense of Section 15 of the *Charter*" (2011) 29 NJCL 201; Peter W Hogg, *Constitutional Law of Canada*, 2009 student ed (Toronto: Carswell, 2009); Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27:1 Queen's LJ 299. See also Part III below for more on this topic.

11 *Oakes*, *supra* note 1 at 138-39.

12 *Ibid* 1 at 136.

13 See e.g. Bredt, *supra* note 10; Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 Sup Ct L Rev (2d) 501.

14 [1989] 2 SCR 1326, [1990] 103 AR 321 [*Edmonton Journal* cited to SCR].

the dilemma posed by particular facts…."[15] Presciently, she also anticipated that contextual analysis at the rights determination stage might affect justification under section 1, specifically in terms of the value placed on the right in the balancing stage.[16]

Law[17] confirmed the importance of contextual analysis in section 15 equality cases, articulating the general principle that "a purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach."[18] The Court in *Law* significantly restructured the section 15 analysis, explicitly opening the door to more contextual considerations. The test changed from the two-step inquiry of *Andrews v Law Society of British Columbia*[19] to a three-step analysis. First, a court must consider whether a law or provision draws a formal distinction based on the claimant's personal characteristics or fails to take into account the claimant's disadvantaged position as a result of personal characteristics, resulting in differential treatment. Second, the court examines whether this distinction is on an enumerated or analogous ground. At the third stage, context is critical–the court examines whether the distinction amounts to an affront to the claimant's dignity by looking at four contextual factors: pre-existing disadvantage; the correspondence between the grounds on which the claim is based and the claimant's actual needs or circumstances; the ameliorative purpose or effects of the legislation; and the nature of the interest affected.[20] It is under the second contextual factor where context figures most prominently in the analysis, as part of a court's examination involves looking at whether the *legislation* accords with the needs or circumstances of the claimant. If so, it will be more difficult to make out discrimination.[21] It is this evaluation of the legislation's correspondence to the needs of the claimant that has been the site of the most contention around use of context.

Despite a significant rearticulating of the equality analysis in subsequent cases (most notably *R v Kapp*,[22] which ostensibly eliminated the dignity analysis and–returning to the *Andrews* two-step approach–emphasized an inquiry into substantive discrimination), the recent case of *Withler v Canada (Attorney General)*[23] confirms that the broadly contextual approach is here to stay, stating: "The Court's s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry…must consider *all* context relevant to the claim at hand."[24] When the doors to contextual factors are

---

15 *Ibid* at 1356.
16 *Ibid*.
17 *Supra* note 9.
18 *Ibid* at para 88.
19 [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews* cited to SCR].
20 *Law*, *supra* note 9 at paras 62-75.
21 *Ibid* at para 88.
22 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].
23 2011 SCC 12, [2011] 1 SCR 396 [*Withler*]. See Part IV below, for further discussion on the effect of *Withler*.
24 *Ibid* at para 43 [emphasis added].

thrown wide open, where and how such context is used has a real impact on equality advocacy and the development of equality jurisprudence. As many critics have noted, by expanding the use of context in section 15 analyses, the Court has brought section 15 into greater proximity to section 1.[25]

III. ACADEMIC CRITICISMS OF SECTION 15 AND SECTION 1 CONVERGENCE

A number of authors have noted the Court's struggle with assigning contextual factors between section 15 and section 1. Bredt suggests that section 15 has changed markedly since the *Charter* was born, but section 1 and the *Oakes* test have only been slightly tinkered with since their inception.[26] This, he argues, has led to a weakening of the *Oake*s test's influence, sometimes to the point of irrelevance, in the justification of discrimination. Similarly, Hogg notes that the assessment of a legislative provision's reasonableness is confusingly divided between section 15 and section 1.[27] He argues that *Law*'s contextual factors leave little–if any–work for section 1 in equality claims.[28] Both Bredt and Hogg advocate for the exclusion of *Law*'s contextual factors from the section 15 analysis.[29] Others, such as Greschner, acknowledge the importance of these concerns, but resist the exclusion of *Law*'s contextual factors from the section 15 analysis altogether. She argues that this would run contrary to substantive equality by putting a formal notion of "sameness" at the centre of the discrimination analysis.[30]

Law's correspondence factor has been identified in the literature as an area of particular concern when it comes to the slide of section 1 considerations into the section 15 analysis.[31] In fact, Hogg concludes that the correspondence factor is nothing but "a loose form"of the justificatory inquiry under *Oakes*.[32] Schwartz argues more specifically that since the correspondence factor looks at whether there is a sufficient relationship between the purpose of a benefit program and the actual needs and situation of the claimant, this is "really the same as asking whether there is a 'rational connection' between the purpose of the program and the means employed to achieve its objectives."[33] Despite this discrepancy of opinion over whether section 15 subsumes *some* or *all* of *Oakes*, these authors agree that it incorporates contextual considerations that more rightly belong under section 1. This

---

25 See e.g. Part III below for further discussion of this topic.
26 Bredt, *supra* note 10.
27 Hogg, *supra* note 10 at 1203-04.
28 *Ibid*.
29 See Bredt, *supra* note 10; Hogg, *supra* note 10.
30 Greschner, *supra* note 10 at 309.
31 See Hogg, *supra* note 10 at 1203,1226; Bredt, *supra* note 10 at 69; Schwartz, *supra* note 10 at 227; Ryder et al, *supra* note 5 at 103.
32 Hogg, *supra* note 10 at 1226.
33 Schwartz, *supra* note 10 at 227.

article's concern aligns with that of Hogg and Schwartz in finding that the correspondence factor too closely mirrors the *Oakes* analysis. As a result, instead of looking at actual correspondence from the claimant's point of view, it may be a stage at which the government's view of the claimant's needs (the purpose of the legislation) becomes more privileged than the claimant's articulation of her or his own needs. It is important to recall that correspondence relates to whether the impugned legislation corresponds with the *actual* needs of the claimant,[34] not the needs as perceived by the legislating government.[35]

These same critics identify a number of potential problems with this interpretive approach, including: the weakening and degrading of section 15 rights;[36] the increased burden on the claimant to show that a law does not correspond with their needs, instead of a burden on the government to justify the legislative distinction;[37] and the lowering of the bar for justification if the correspondence factor mirrors only the rational connection part of *Oakes* and not the other steps in the section 1 analysis.[38] As *Withler* resurrects *Law*'s contextual factors to assess whether there is substantive discrimination, concerns over the correspondence factor remain relevant.[39]

IV. JUDICIAL DISCORD ON CONTEXTUAL ANALYSIS AND THE SECTION 15–SECTION 1 DIVIDE

In the Court's gradual expansion of the contextual approach since *Andrews*, it has clearly struggled with the appropriate division of contextual analysis between section 15 and section 1. The Court's uncertainty in dealing with this allocation is evident injudgments where the Court has addressed it, such as *Lavoie v Canada*[40] and *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*.[41] The opposite positions taken by the majority and minority in each case illustrate the disparity of opinion and lack of coherence within the Court in this matter.

In *Lavoie*, the Court clearly struggled with the use of *Law*'s 'human dignity' analysis in a claim of discrimination arising from the *Public Service Employment Act*'s[42] hiring preference for Canadian citizens. In finding that the citizenship preference violated section 15 but would be upheld under section 1, the majority judgment by Justice Bastarache identified the problem of the placement of contextual factors. He advocated for an approach that kept the claimant's perspective in the section 15 analysis separate from the state's perspective, which he argued belonged in section 1.

---

34 *Law*, *supra* note 9 at paras 69-70.
35 This concern is further discussed in parts V and VI, below.
36 Bredt, *supra* note 10 at 71.
37 Ryder et al, *supra* note 5 at 109; Schwartz, *supra* note 10 at 227.
38 *Ibid*.
39 The effect of *Withler*, *supra* note 23 is further discussed in Part IV, below.
40 2002 SCC 23, [2002] 1 SCR 769 [*Lavoie*].
41 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*].
42 *Public Service Employment Act*, RSC 1985, c P-33, s 16(4)(c).

He stated that it was "crucial not to elide the distinction between the claimant's onus to establish a *prima facie* s. 15(1) violation and the state's onus to justify such a violation under s.1."[43] This distinction is important because "the exigencies of public policy do not undermine the *prima facie* legitimacy of an equality claim. A law is not 'non-discriminatory' simply because it pursues a pressing objective or impairs equality rights as little as possible."[44] This approach is rooted in the "need for a flexible approach to s. 1" and the "recognition that any balancing between individual rights and societal needs occurs in s. 1 not s. 15(1)."[45] Any blurring of the section 15 and section 1 analyses, he worried, would create a hierarchy of rights within section 15, where policy considerations may defeat cases based on some grounds but not others. Thus, in this case, the majority articulated a vision of contextual analysis where lines are distinctly drawn: the section 15 analysis explores context from the claimant's perspective while the state's objectives are reserved for the section 1 analysis.

The dissent of Justice Arbour also identified the problem of where to place contextual considerations between section 15 and section 1, but argued that the effect on human dignity cannot be assessed without attention to the intentions and purposes of the legislature. She emphasized the importance of the discrimination analysis as a gatekeeper for distinctions that, even when based on a prohibited or analogous ground, do not constitute discrimination. She reasoned that it is necessary to take into account the state's perspective in the section 15 inquiry because granting rights to one group necessarily involves limiting the rights of another. She found that only a balancing approach could recognize this "essentially bilateral character of rights."[46] She worried that following the majority's approach would lead to an "equality guarantee that is far-reaching but wafer-thin, an expansive but insubstantial shield with which to fend off state incursions on our dignity and freedom."[47]

It is clear that Bastarache's approach focused on the effects on the claimant, while Arbour favoured concerns related to the claimant's relationship with the state and other rights holders. These approaches take very different stances on what would be best for the jurisprudence and on the Court's relationship with wider society. This case is a curious one, as in most cases since *Lavoie* the majority of the Court has aligned with the broad incorporation of context advocated for by Justice Arbour, with the dissent expressing concerns about importing contextual considerations into section 15 from section 1. This more typical positioning, and the fuel for academic criticism by those such as Hogg and Schwartz, is demonstrated in *Canadian Foundation*.

In *Canadian Foundation*, a challenge was brought to section 43 of the *Criminal Code*, which provides a defence to assault for school teachers, parents and people

---

43 *Lavoie*, *supra* note 40 at para 47.
44 *Ibid* at para 48.
45 *Ibid* at para 49.
46 *Ibid* at para 88.
47 *Ibid* at para 86.

standing in for parents using force by way of correction that is "reasonable under the circumstances."[48] Both the majority, written by Chief Justice McLachlin, and dissent, written by Justice Binnie, acknowledged that considerations that would typically appear under section 1 may be mirrored under section 15; however, they took very different positions on whether this matters. The case also illustrates how these considerations can be shoehorned into either section 15 or section 1, depending on the analytical approach.

Under the correspondence step of the analysis, the majority considered the negative impact of criminalizing corrective force, such as potential family breakup. The majority also considered the purposes of the law, the need for parents and teachers to be free to use corporal punishment to educate a child, a child's need for guidance and the value of a stable and secure family and school setting.[49] Further, the majority pointed to the blunt violence of the criminal law as a tool for guiding social behaviour.[50] Responding to Justice Binnie's criticism of their analysis, the majority argued that although there may be some overlap between section 15 and section 1, to exclude these considerations from section 15 would be to "truncate" the section 15 analysis.[51]

Justice Binnie, on the other hand, argued that by incorporating such considerations into the equality analysis the majority inappropriately narrowed section 15(1)'s protection. He argued that the majority's concerns about the intervention of the criminal law into family and school relationships are "arguments that say that in light of broader social considerations related to the values of privacy and family life, and *despite* the infringements of the child's equality rights, a degree of parental immunity is nevertheless a reasonable limit demonstrably justified in a free and democratic society."[52] That is, they are concerns that belong under the section 1 stage of analysis. He found a breach of section 15(1) equality rights, but found the breach justified under section 1 as it relates to parents but not teachers. In doing so, he pointed to many of the same considerations the majority used under the section 15 analysis, including: the blunt intervention of criminal law into the home, the importance of family and the connection between parental well-being and the well-being of the child.[53] However, he saw the provision as being ameliorative for parents and teachers, rather than for children. The important distinction is that in the majority judgment, perspectives of those other than the claimant (parents, teachers and society) were brought into the section 15 analysis to determine what is reasonable. The majority did this not only under the correspondence factor, but also in the selection of the 'reasonable caregiver' as the perspective for assessing human

48 *Criminal Code*, RSC 1985, c C-46 s 43.
49 *Canadian Foundation*, *supra* note 41 at paras 58-59.
50 *Ibid* at para 60.
51 *Ibid* at para 66.
52 *Ibid* at para 74 [emphasis in original].
53 *Ibid* at paras 113-14.

dignity, rather than the reasonable child. In the dissenting judgment, the section 15 analysis focused on the perspective of the child, leaving the caregiver, societal and state perspectives to section 1. The influx of non-claimant voices into the section 15 analysis in the majority's judgment has negative consequences for certain forms of equality claims, as will be discussed later.

Justice Binnie's dissent also raises a number of concerns that have been identified in the academic literature. He was concerned about adding an additional evidentiary burden on rights claimants to provide proof of matters that should be justified by the government under section 1.[54] He also expressed unease with the use of the correspondence factor. He worried that the correspondence factor had become a "Trojan horse," used to bring into section 15(1) matters that belong under section 1.[55] In doing so, he felt it came dangerously close to reviving the relevance factor from *Miron v Trudel*,[56] where some members of the Court felt that if the ground of complaint was relevant to a legitimate legislative objective then discrimination was not made out.[57] Instead, he viewed the purpose of the correspondence step as identifying whether a legislative distinction actually shows equal consideration for people, even if it results in unequal treatment, by being tailored to a group's specific needs. Essentially, he saw the purpose of the correspondence step to be showing that there is a lack of substantive discrimination, despite the appearance of formal discrimination. This case demonstrates the lack of consensus within the Court as to the proper approach. The rights incursion in this case was serious: the violation of the bodily integrity of a group of vulnerable people free from criminal sanction because of their membership in that particular group. Yet, under the Court's analysis, it could be justified under section 15 without ever requiring the government to justify the incursion under section 1.

In *Canadian Foundation*, the site of controversy was the human dignity analysis that has been eliminated by *Kapp*. However, the Court's recent judgment in *Withler* suggests that the issue of sliding between section 15 and section 1 considerations has not yet been exiled from the jurisprudence. *Withler* once again reformulated the section 15 analysis. It confirmed the characterization of the test in *Kapp* as entailing two parts: first, whether a distinction is made on an enumerated or analogous ground; and second, whether that distinction creates a disadvantage by perpetuating prejudice or stereotyping the claimant.[58] Under the second step, the Court reinvigorated *Law*'s contextual factors. The Court stated that in assessing the perpetuation of disadvantage or prejudice, historical disadvantage and the nature of the interest affected would be considered. When assessing whether the law stereotypes the claimant, the Court stated it would look at the *Law* factors of correspondence

---

54 *Ibid* at para 85.
55 *Ibid* at para 97.
56 [1995] 2 SCR 418, 181 NR 253 [*Miron*].
57 *Canadian Foundation*, *supra* note 41 at para 98, citing *Miron*, *supra* note 56 at para 15.
58 *Withler*, *supra* note 23 at para 30.

and the ameliorative effect of the law on others.[59] Thus, it revived concerns, such as Justice Binnie's under *Law*, about the human dignity analysis and the correspondence factor. Furthermore, the Court emphasized that "perfect correspondence" between the law and the claimant's actual needs and circumstances was not necessary, further lessening the justificatory burden on the government.[60]

The case also more generally reinforced that the discrimination analysis is not a narrow examination but a broadly contextual one, examining "all context relevant to the claim at hand."[61] The judgment demonstrates the continued potential for the slipping of section 1 considerations into section 15. In deciding the case, the Court looked primarily at both the legislation's effectiveness in meeting the needs of the claimant (a natural consideration under section 15) and the important goals of the legislation in relation to others (a consideration that arguably belongs under section 1). The unanimous judgment repeatedly emphasized the importance of the actual effect of the law on the claimant group,[62] but looked also to other factors that would appear to fit more appropriately under *Oakes*, such as the purpose of the legislation,[63] the allocation of resources and the legislature's particular policy goals.[64] Despite *Withler*'s repeated reference to *Andrews*, it neglected to follow that decision in one crucial respect: the stated importance of keeping section 15 and section 1 analytically distinct.[65]

V. EMPIRICAL ANALYSIS OF THE JURISPRUDENCE

Although academics and the judiciary alike have recognized the difficulties inherent in the current relationship between section 15 and section 1, little empirical analysis has been done to assess whether commentators' observations about the weakening relevance of the *Oakes* test in equality cases have statistical support. In 2004, Bruce Ryder, Cidalia Faria and Emily Lawrence completed an empirical analysis of judicial decisions on equality rights to gauge the impact of the *Law* decision.[66] Building on that analysis and incorporating their empirical research, this paper examines the relationship between section 15 and section 1 by looking at the basis on which equality cases were decided at the Supreme Court in the 30 years of the *Charter*'s

---

59 *Ibid* at para 38.

60 *Ibid* at para 67.

61 *Ibid* at para 43.

62 *Ibid* at paras 39, 51.

63 *Ibid* at para 54.

64 *Ibid* at para 67.

65 *Ibid* at para 40.

66 See Ryder et al, *supra* note 5 at 112-18. Ryder et al compiled a database of 43 Supreme Court rulings and 323 lower court rulings between *Andrews*, *supra* note 19 on February 2, 1989 and five years after *Law*, *supra* note 9 was decided on March 25, 1999. This sample included all lower court decisions on section 15 claims that were available from the *Dominion Law Reports*, *Federal Court Reports* and QuickLaw's federal court judgments database or provincial judgment databases for the Prairie and Atlantic Provinces. They also categorized cases where section 15 claims failed according to the stage of failure and assessed the determination made by the Court on each of the contextual factors in SCC cases in the five years post-*Law*.

history, beginning with the seminal section 15 decision in *Andrews* in 1989. This paper also assesses equality claims at Courts of Appeal across Canada in the last 10 years to see if some of the trends observed at the Supreme Court are mirrored at that level. Overall, the results tend to support academic observations about the decreasing impact of the *Oakes* analysis and the centrality of the correspondence factor in disposing of equality claims.

A. Methodology

The LexisNexis Quicklaw database of court cases was searched using the terms "section 15 + equality + charter," restricted by court to Supreme Court of Canada results or Court of Appeal results and restricted by the time periods indicated in the tables that follow (2001-2011 for Court of Appeal cases and 2004-2011 for Supreme Court cases). The decisions were examined to determine the holding and on which part of the analysis the holding was based.

Not all cases that raised a section 15 claim were included in the statistical analysis. Cases where legislation was saved under section 15(2) were excluded because they did not undergo a full section 15(1) analysis. At the Supreme Court, these included *Kapp*[67] and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*.[68] Also excluded were cases that did not meet the threshold for a section 15 analysis; for example, where the distinction was not made by law or where the law did not convey a benefit or penalty. The Court's approach in *Withler*[69] may signify another shift in the Court's analytical structure and reasoning under section 15, so it and any cases following it were not included. It is beyond the scope of this paper to consider what the effect of these post-*Withler* cases might be.

B. Determinative Section of the Decision

The empirical data confirmed that relatively few equality cases have proceeded to a section 1 analysis. Ryder et al's data shows that in the *Andrews* decade, between 1989 and the *Law* case of 1999, only 37% of equality cases were decided at the section 1 stage. Combining Ryder et al's data from 1999-2004 with data from 2004-2011, it is clear that the proportion of cases making it to a section 1 analysis have decreased even further to 33.3% in the 12 years since *Law*. The Court's use of contextual analysis, far from increasing the success of equality claims, has actually decreased the number of claims that are characterized as discrimination. The seven years since Ryder et al's analysis paint an even more uneven picture, with only 27.3% of claims making it to the *Oakes* analysis. At the Court of Appeal level the gap is even wider, with only 23.3% of cases making it to the section 1 stage of analysis.

---

67 *Supra* note 22.
68 2011 SCC 37, [2011] 2 SCR 670 at para 3.
69 *Supra* note 23.

The following table shows the cases examined at the Court of Appeal level and indicates whether they were decided at the section 15 or section 1 stage of the analysis.

TABLE 1: Section 15 Cases in Canadian Courts of Appeal, 2001-2011

Case Name	Year	Section 15(1) discrimination?	Section1 limit?
Trociuk v British Columbia (Attorney General)[70]	2001	No	n/a
Greater Vancouver Regional District Employees' Union v Greater Vancouver Regional District[71]	2001	Yes	No
Nishri v Canada[72]	2001	No	n/a
Krock v Canada (Attorney General)[73]	2001	No	n/a
Liebmann v Canada (Minister of National Defence)[74]	2001	Yes	No
Irshad (Litigation guardian of) v Ontario (Minister of Health)[75]	2001	No	n/a
Lalonde v Ontario (Commission de restructuration des services de santé)[76]	2001	No	n/a
Rombaut et al v New Brunswick (Minister of Health and Community Services) et al[77]	2001	No	n/a
Bauman et al v Nova Scotia (Attorney General)[78]	2001	No	n/a
Ferguson v Armbrust[79]	2001	Yes	No
United Taxi Drivers' Fellowship of Southern Alberta et al v Calgary (City)[80]	2002	No	n/a
BC Government and Service Employees' Union v British Columbia (Public Service Employee Relations Committee)[81]	2002	No	n/a
Auton (Guardian ad litem of) v British Columbia (Attorney General)[82]	2002	Yes	No
Collins v Canada[83]	2002	Yes	Yes

70 2001 BCCA 368, 200 DLR (4th) 685.
71 2001 BCCA 435, 206 DLR (4th) 220.
72 2001 FCA 115, 269 NR 346.
73 2001 FCA 188, 273 NR 228.
74 2001 FCA 243, [2002] 1 FCR 29.
75 (2001), 55 OR (3d) 43, 197 DLR (4th) 103 (Ont CA).
76 (2001), 56 OR (3d) 505, 208 DLR (4th) 577 (Ont CA).
77 2001 NBCA 75, 240 NBR (2d) 258.
78 2001 NSCA 51, 192 NSR (2d) 236.
79 2001 SKCA 122, 208 DLR (4th) 250.
80 2002 ABCA 131, 303 AR 249.
81 2002 BCCA 476, 216 DLR (4th) 322.
82 2002 BCCA 538, 220 DLR (4th) 411.
83 2002 FCA 82, [2002] 3 FCR 320.

Canadian Foundation for Children,Youth and the Law v Canada (Attorney General)[84]	2002	Yes	Yes
Brebric v Niksic[85]	2002	No	n/a
Hodge v Canada (Minister of Human Resources Development)[86]	2002	Yes	No
Deol v Canada (Minister of Citizenship and Immigration)[87]	2002	No	n/a
Miller v Canada (Attorney General)[88]	2002	No	n/a
Chippewas of Nawash First Nation v Canada (Minister of Fisheries and Oceans)[89]	2002	No	n/a
Newfoundland (Treasury Board) v Newfoundland Association of Public Employees[90]	2002	Yes	Yes
Falkiner v Ontario (Ministry of Community and Social Services)[91]	2002	Yes	No
MacKay v British Columbia (Ministry of Social Development and Economic Security)[92]	2003	No	n/a
EGALE Canada Inc v Canada (Attorney General)[93]	2003	Yes	No
Burnett v British Columbia (Workers' Compensation Board)[94]	2003	No	n/a
Reference re: Bill C-7 respecting the criminal justice system for young persons[95]	2003	No	n/a
Halpern v Canada (Attorney General)[96]	2003	Yes	No
Canada (Attorney General) v Lesiuk[97]	2003	No	n/a
Roy v Canada[98]	2003	Yes	Yes
Bear v Canada (Attorney General)[99]	2003	No	n/a
Ardoch Algonquin First Nation v Canada (Attorney General)[100]	2003	Yes	No
Périgny v Canada (Attorney General)[101]	2003	No	n/a
Power et al v Canada (Attorney General)[102]	2003	No	n/a

84 (2002), 57 OR (3d) 511, 207 DLR (4th) 632 (Ont CA).
85 (2002), 60 OR (3d) 630, 215 DLR (4th) 643 (Ont CA).
86 2002 FCA 243, [2003] 1 FCR 271.
87 2002 FCA 271, [2003] 1 FCR 301.
88 2002 FCA 370, 220 DLR (4th) 149.
89 2002 FCA 485, [2003] 3 FCR 233.
90 2002 NLCA 72, 220 Nfld & PEIR 1.
91 (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (Ont CA).
92 2003 BCCA 137, [2003] 4 WWR 434.
93 2003 BCCA 251, 225 DLR (4th) 472.
94 2003 BCCA 394, 228 DLR (4th) 551.
95 [2003] RJQ 1118, 228 DLR (4th) 63 (Qc CA).
96 (2003), 65 OR (3d) 161, 225 DLR (4th) 529 (Ont CA).
97 2003 FCA 3, [2003] 2 FCR 697.
98 2003 FCA 320, [2004] 1 FCR 243.
99 2003 FCA 40, [2003] 3 FC 456.
100 2003 FCA 473, [2004] 2 FCR 108.
101 2003 FCA 94 (available on QL).
102 2003 NLCA 17, 224 Nfld & PEIR 332.

Ferraiuolo Estate v Olson[103]	2004	Yes	No
XeniGwet'in First Nations Government v Riverside Forest Products Ltd[104]	2004	No	n/a
Arishenkoff v British Columbia[105]	2004	No	n/a
Health Services and Support Facilities Subsector Bargaining Assn v British Columbia[106]	2004	No	n/a
Hislop v Canada (Attorney General)[107]	2004	Yes	No
Simser v Canada[108]	2004	No	n/a
R v MacKenzie[109]	2004	No	n/a
R v Schneider[110]	2004	No	n/a
Bigsby v Human Rights and Citizenship Commission (Alta)[111]	2005	Yes	n/a–no attempt made to justify
R v JSM[112]	2005	No	n/a
Ontario Nurses' Assn v Mount Sinai Hospital[113]	2005	Yes	No
R v Hy and Zel's Inc[114]	2005	No	n/a
Manoli v Canada (Employment Insurance Commission)[115]	2005	No	n/a
Bailey v Canada[116]	2005	No	n/a
Clyke v Nova Scotia (Minister of Community Services)[117]	2005	No	n/a
Baier et al v Alberta[118]	2006	No	n/a
R v Kapp[119]	2006	No	n/a
Stewart v Freeland[120]	2006	No	n/a
Wynberg v Ontario[121]	2006	No	n/a
Wetzel v Canada[122]	2006	No	n/a

103 2004 ABCA 281, 357 AR 68.
104 2004 BCCA 106, 237 DLR (4th) 754.
105 2004 BCCA 299, 241 DLR (4th) 385.
106 2004 BCCA 377, 243 DLR (4th) 175.
107 (2004), 73 OR (3d) 641, 251 DLR (4th) 712 (Ont CA).
108 2004 FCA 414, [2006] 1 FCR 253.
109 2004 NSCA 10, 221 NSR (2d) 51.
110 2004 NSCA 151, 228 NSR (2d) 344.
111 2005 ABCA 52, 363 AR 162.
112 2005 BCCA 417, 31 CR (6th) 366.
113 (2005), 75 OR (3d) 245, 255 DLR (4th) 195.
114 (2005), 77 OR (3d) 656, 257 DLR (4th) 651.
115 2005 FCA 178, [2005] 4 FCR 657.
116 2005 FCA 25, 248 DLR (4th) 401.
117 2005 NSCA 3, 229 NSR (2d) 209.
118 2006 ABCA 137, 384 AR 237.
119 2006 BCCA 277, 271 DLR (4th) 70.
120 (2006), 276 DLR (4th) 585, 218 OAC 27 (Ont CA).
121 (2006), 82 OR (3d) 561, 269 DLR (4th) 435 (Ont CA).
122 2006 FCA 103, 266 DLR (4th) 753.

Moresby Explorers Ltd v Canada (Attorney General)[123]	2006	No	n/a
Ermineskin Indian Band and Nation v Canada[124]	2006	Yes	Yes
Howe v Canada (Attorney General)[125]	2007	No	n/a
Zhang v Canada (Minister of Citizenship and Immigration)[126]	2007	No	n/a
Veffer v Canada (Minister of Foreign Affairs)[127]	2007	No	n/a
Tomasson v Canada (Attorney General)[128]	2007	No	n/a
Director of Child and Family Services v AC et al[129]	2007	No	n/a
Laronde v Workplace Health, Safety and Compensation Commission (NB) et al[130]	2007	No	n/a
Doe v Canada (Attorney General)[131]	2007	No	n/a
R v Banks[132]	2007	No	n/a
Infant Number 10968 v Ontario[133]	2007	No	n/a
Longley v Canada (Attorney General)[134]	2007	No	n/a
Association des policiers provinciaux du Québec v Sûreté du Québec[135]	2007	No	n/a
Withler v Canada (Attorney General)[136]	2008	No	n/a
Ali et al v The Queen[137]	2008	No	n/a
R v Creekside Hideaway Motel Ltd[138]	2008	No	n/a
Downey v Workers' Compensation Appeals Tribunal (NS) et al[139]	2008	No	n/a
R v Alrifai (A)[140]	2008	No	n/a
Fraser v Ontario (Attorney General)[141]	2008	No	n/a
Ross v Charlottetown (City)[142]	2008	No	n/a
Morrow et al v Zhang et al[143]	2009	No	n/a

123 2007 FCA 273, [2008] 2 FCR 341.
124 2006 FCA 415, [2007] 3 FCR 245.
125 2007 BCCA 314, [2007] 11 WWR 684.
126 2007 FC 593, [2008] 1 FCR 716.
127 2007 FCA 247, [2008] 1 FCR 641.
128 2007 FCA 265, 284 DLR (4th) 440.
129 2007 MBCA 9, 212 Man R (2d) 163.
130 2007 NBCA 10, 312 NBR (2d) 173.
131 2007 ONCA 11, 84 OR (3d) 81.
132 2007 ONCA 19, 84 OR (3d) 1.
133 2007 ONCA 787, 88 OR (3d) 600.
134 2007 ONCA 852, 88 OR (3d) 408.
135 2007 QCCA 1087, [2007] RJQ 1773.
136 2008 BCCA 539, 302 DLR (4th) 193.
137 2008 FCA 190, [2008] 4 CTC 245.
138 2008 MBCA 28, 290 DLR (4th) 475.
139 2008 NSCA 65, 267 NSR (2d) 364.
140 2008 ONCA 564, 242 OAC 88.
141 2008 ONCA 760, 92 OR (3d) 481 [*Fraser*].
142 2008 PESCAD 6, 276 Nfld & PEIR 162.
143 2009 ABCA 215, 454 AR 221.

Peavine Métis Settlement et al v Alberta (Minister of Aboriginal Affairs and Northern Development) et al[144]	2009	Yes	No
McIvor v Canada (Indian and Northern Affairs, Registrar)[145]	2009	Yes	No
Plesner v British Columbia Hyrdo and Power Authority[146]	2009	Yes	No
Harris v Canada (Minister of Human Resources and Skills Development)[147]	2009	No	n/a
Reference Re Marine Transportation Security Regulations[148]	2009	No	n/a
Pilette v Canada[149]	2009	No	n/a
Micmac Nation of Gespeg v Canada (Minister of Indian Affairs and Northern Development)[150]	2009	No	n/a
Gill et al v Canada[151]	2009	No	n/a
Hartling et al v Nova Scotia (Attorney General) et al[152]	2009	No	n/a
Boulter et al v Nova Scotia Power Inc et al[153]	2009	No	n/a
Marshall Estate Re[154]	2009	No	n/a
Legroulx v Pitre[155]	2009	No	n/a
R v Quenneville (D) et al[156]	2010	No	n/a
JA v Société de l'assurance automobile du Québec[157]	2010	No	n/a
A c B[158]	2010	No	n/a
Reference re: Marriage Commissioners appointed under The Marriage Act, 1995 (Sask)[159]	2011	Yes	No

C. The Dominance of the Correspondence Factor

Arguably, the data above does not illustrate on its own that a greater weight of contextual analysis under section 15 is behind the decrease in cases proceeding to section 1. For example, creative *Charter* litigation may have increased in the *Law* age. As advocates became more comfortable with the use of the *Charter* as a strategic tool in pursuing human rights, they may have tried to push the boundaries with claims that did not put forth previously recognized grounds and were dismissed even before

144 2009 ABCA 239, 457 AR 297.
145 2009 BCCA 153, 306 DLR (4th) 193.
146 2009 BCCA 188, 308 DLR (4th) 624.
147 2009 FCA 22, [2009] 4 FCR 330.
148 2009 FCA 234, 395 NR 1.
149 2009 FCA 367, 319 DLR (4th) 369.
150 2009 FCA 377, 402 NR 313.
151 2009 FCA 56, 387 NR 166.
152 2009 NSCA 130, 286 NSR (2d) 219.
153 2009 NSCA 17, 275 NSR (2d) 214.
154 2009 NSCA 25, 275 NSR (2d) 383.
155 2009 ONCA 760, 200 CRR (2d) 254.
156 2010 ONCA 223, 207 CRR (2d) 360.
157 2010 QCCA 1328, [2010] RJQ 1592.
158 2010 QCCA 1132 (available on CanLII).
159 2011 SKCA 3, 327 DLR (4th) 669.

the contextual analysis began. Acknowledging that this empirical analysis does not constitute proof of the previously identified academic theories, it does appear to support rather than contradict them.

In addition, using Ryder et al's analysis up until 2004 and this article's post-2004 analysis, the data shows that the majority of failed cases flounder at the substantive discrimination stage (the third stage of the *Law* test, or the second stage of the testpost-*Kapp*)[160]: the stage that incorporates contextual analysis.

The following chart, which followsthe format used in Ryder et al's article, shows the percentage of cases at the Supreme Court that failed at each stage of analysis in a section 15 claim: the differential treatment stage, the prohibited ground stage, the discrimination stage and the section 1 justification. The figure above each percentage represents the same information by showing the number of cases that failed at that stage out of the total number of cases during that time period.

TABLE 2: Cases at the Supreme Court that failed at each stage of the section 15 analysis

	Andrews (1989-1999)– failure where?				*Law, Kapp and Withler* (1999-2011)–failure where?			
	Stage 1	Stage 2	Stage 3	Section 1	Stage 1	Stage 2	Stage 3	Section 1
Expressed as a number out of the total number of cases in the era	3/16	6/16	4/16	3/16	2/22	6/22	12/22	2/22
Expressed as a percentage of the total number of cases in the era	18.75%	37.5%	25%	18.75%	9.1%	27.3%	54.5%	9.1%

Stage 1 = differential treatment
Stage 2 = prohibited ground[161]
Stage 3 = discrimination stage (under *Law* "human dignity" or post-*Kapp* "substantive discrimination")[162]
Section 1 = a violation under section 15 is upheld under section 1

160 As was discussed earlier, although *Kapp*, *supra* note 22 ostensibly eliminated the human dignity analysis, *Withler*, supra note 23 reincorporated the contextual factors from *Law*, *supra* note 9 into the assessment of substantive discrimination.

161 Note under *Andrews*, *supra* note 19 and *Kapp*, *supra* note 22 stages 1 and 2 were rolled into one. They were separated for ease of analysis by Ryder et al, *supra* note 5 and the same is done here. Also, note the cases where the legislation was saved by section 15(2) are not included because they automatically move to section 15(2) after distinction on prohibited grounds is established.

162 For simplicity's sake this will be referred to as the third step of analysis since the majority of the cases studied operated under the *Law*, *supra* note 9 framework. Post-*Kapp*, *supra* note 22 this is now the second step, and steps identified as 1 and 2 in this paper are now combined into the first step.

These statistics are consistent with the qualitative observations that greater emphasis is being placed on the third stage of analysis, the stage at which *Law* introduced contextual considerations. As Ryder et al argue, this also aligns with commentators' supposition that the third stage poses a significant hurdle for equality rights claimants.[163]

To further assess the influence of the correspondence factor, analysis of the relevant Supreme Court cases was undertaken. Despite the Court's retooling of the *Law* factors in the last 22 years, in *every single* Supreme Court case since 1989, the finding on correspondence between the object of the legislation and the circumstances of the claimant aligned with the result of the discrimination finding, as the following table illustrates.[164]

TABLE 3: Contextual Factors Aligned with Outcome in Section 15 Cases at the Supreme Court, 2004-2011

Case Name	Year	Section 15(1) discrimination?	Contextual factors aligned with finding	Section 1 limit?
Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)[165]	2004	No	C	n/a
Newfoundland (Treasury Board) v NAPE[166]	2004	Yes	all	Yes
Hodge v Canada (Minister of Human Resources Development)[167]	2004	No	n/a – no differential treatment	n/a
Auton (Guardian ad litem of) v British Columbia (Attorney General)[168]	2004	No	n/a – not provided by law	n/a
Charkaoui v Canada (Citizenship and Immigration)[169]	2007	Yes	C	No
Canada (Attorney General) v Hislop[170]	2007	Yes	C	No
Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia[171]	2007	No	n/a – no prohibited ground	n/a

163 *Supra* note 5 at 116.
164 This excludes *Fraser*, *supra* note 141, where a lack of stereotyping or discrimination was found without looking at each contextual factor.
165 *Supra* note 41.
166 2004 SCC 66, [2004] 3 SCR 381.
167 2004 SCC 65, [2004] 3 SCR 357.
168 2004 SCC 78, [2004] 3 SCR 657 [*Auton*].
169 2007 SCC 9, [2007] 1 SCR 350.
170 2007 SCC 10, [2007] 1 SCR 429
171 2007 SCC 27, [2007] 2 SCR 391.

Baier v Alberta[172]	2007	No	n/a – no prohibited ground	n/a
AC v Manitoba (Director of Child and Family Services)[173]	2009	No	n/a – no prohibited ground	n/a
Alberta v Hutterian Brethren of Wilson Colony[174]	2009	No	C	n/a
Ontario (Attorney General) v Fraser[175]	2011	No	unclear – based on lack of stereotyping or prejudice	n/a

C = correspondence factor

This result is consistent with the academic argument that the correspondence factor is critical to the outcome of discrimination cases and shows the potentially great power of this particular aspect of the analysis. This is typified by the *Canadian Foundation* case, in which every other contextual factor pointed in the opposite direction and the Court rested its finding against the claimant solely basedon the correspondence factor.[176] These empirical findings as a whole, although not conclusive, appear to show that this factor has a stronger influence on the outcome of decisions than the other factors. This brings more urgency to the concern that both the judiciary and academic commentators have previously identified: the sliding of section 1 contextual considerations into section 15 analysis, particularly through the conduit of the correspondence factor.

As was discussed earlier in relation to the problems identified by the academic literature, the problem is not the existence or influence of the correspondence factor in and of itself. The danger, rather, is in applying the correspondence factor from the perspective of the legislator or the judiciary, rather than from the perspective of the claimant in the context of the claimant's articulation of her or his needs. Consideration of the purposes of legislation under this factor is certainly required to some extent to assess what the benefit is and how the claimants are excluded from that benefit, but the intention of the legislation should not be an overriding consideration at this stage.[177]

Ryder et al's analysis also calculated overall success rates of section 15 claims. Acknowledging, as Ryder et al do, that claims that 'failed' in court may not necessarily be a failure in progressing equality rights (for example claims made by non-marginalized groups that fail), and some 'successful' claims may articulate

172 2007 SCC 31, [2007] 2 SCR 673.
173 2009 SCC 30, [2009] 2 SCR 181.
174 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*].
175 2011 SCC 20, [2011] 2 SCR 3.
176 *Supra* note 41 at 56.
177 See the discussion of *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*], below in Part VI: "Implications–Drowning Out the Voices of Systemic Inequality and Diminishing the Law's Communicative Power" as an example of this concern playing out.

regressive visions of equality rights, these measures of success, although crude, can still be useful. Ryder et al found that section 15 claims had a success rate at the Supreme Court of 27.9%; significantly lower than average success rates for other *Charter* claims.[178] In this paper, the comparison between success rates under *Andrews* and *Law* is more of interest. In comparing the period of 1986-89 (*Andrews*) and 1989-2004 (*Law*), Ryder et al found that success rates had actually increased under *Law*; however, after adding in Supreme Court cases from 2004-11, success rates were identical at 25.9%. At the Court of Appeal level, in the last 10 years, success rates were even lower at only 17.8% Canada-wide.[179] Greater success at the Supreme Court is not surprising as its Justices can control which cases they hear. This data might also raise the question that if overall success rates have not changed at the Supreme Court, what are the consequences of the lessening influence of section 1? Overall success rates, however, do not tell the whole story; there are many potential consequences of the Court's current equality reasoning beyond the raw number of 'successful' and 'failed' cases.

VI. IMPLICATIONS: DROWNING OUT THE VOICES OF SYSTEMIC INEQUALITY AND DIMINISHING THE LAW'S COMMUNICATIVE POWER

A number of critics of the Court's use of contextual factors in the section 15 analysis have identified the immediate and practical implications of the minimization of the importance of section 1 in the disposition of equality claims.[180] One such implication is the shift in evidentiary burden that occurs when the justification for legislation that makes a distinction on an enumerated ground is considered under section 15. As Bredt articulates, "The party alleging the violation is forced to attempt to adduce evidence of the legislature's purpose and argue about the proportionality of means to ends, when the government (or other responding party) is clearly in a better position to make these kinds of submissions and adduce evidence relevant to these factors."[181] He sees three troubling results of this shift: it creates an added drain on the often limited resources of claimants; equality rights themselves are "weakened and degraded" by incorporating balancing tests in defining the scope of the right; and the party defending the legislation is allowed to escape a high standard of justification.[182] Ryder et al argue that cases where the correspondence factor is allowed to trump the other contextual considerations, such as in *Canadian Foundation*[183] and

178 *Supra* note 5 at 112.
179 Success rates at the Appeal level could not be appropriately compared with Ryder et al's data as that study looked at lower courts and did not cover all of Canada.
180 See e.g. Bredt, *supra* note 10; Hogg, *supra* note 10; Schwartz, *supra* note 10; Ryder et al, *supra* note 5.
181 Bredt, *supra* note 10 at 70-71.
182 *Ibid* at 71.
183 *Supra* note 41.
184 2003 SCC 3, [2003] 1 SCR 6.

Siemens v Manitoba (Attorney General),[184] "too readily [forgive] the exacerbation of substantive inequality" provided there is a "rational basis" for the law.[185]

In addition, there are related potential impacts that affect social movements more broadly. Although more research is needed to empirically assess the complex relationship between social movements and the law, particularly the consequences that may flow from the Court's current direction in section 15 analyses, some likely impacts can be raised. The shrinking impact of section 1 and the increasing consideration of governmental interests in section 15 may affect social movements in two ways that have not been fully explored in the literature: first, in the kind of equality claims that the Court is likely to recognize and second, in the value of litigation as a strategy for social movements to galvanize political support through human rights discourse.

Discrimination claims based on systemic inequalities face the greatest hurdle under the Court's current pattern of reasoning. Since the claimant's disadvantage is always viewed in immediate juxtaposition with state purposes based on majority values, the Court is less likely to recognize claims regarding systemic inequalities that are most deeply rooted in the institutions and ideals of Canadian society. Although an 'objective' approach to whether a law perpetuates disadvantage or stereotypes claims to consider the effect of the law on the claimant, the analysis clearly remains centred on the correspondence between the legislation's goals and the claimant's perceived needs, as evidenced by both empirical and qualitative analysis. These needs are deemed 'perceived' because by examining the claimant's needs and circumstances in *light* of the purposes of the discriminating legislation, the claimant's perspective is viewed through the lens of mainstream notions of how to remedy disadvantage.

Broadly, the incursion into section 15 of contextual considerations such as legislative purpose and resource allocation concerns further marginalizes and downplays the voices of claimants themselves. As part of her argument for "inclusive equality," Sheppard clearly articulates the importance of these voices in finding remedies to inequality:

> The experiential knowledge of those without power must be given a predominant role in developing strategies for change. It is unlikely that those who have enjoyed power and privilege based on the historical institutional status quo will be capable of imagining the kinds of transformations needed to implement human rights norms. *To them, exclusionary norms and practices often appear necessary, despite their unfortunate effects on those who have been denied equality rights*.[186]

185 Ryder et al, *supra* note 5 at 124-25.

186 Sheppard, supra note 6 at 68 [emphasis added].

Thus, under the correspondence factor the court may too easily see government policy as well-intentioned and necessarily discriminatory, despite its actual effect on the claimant. The determination that the distinction corresponds to the claimants needs may be clouded by the Court's natural affinity for the values of the status quo. Keeping the claimant's and state's views under separate section 15 and section 1 analyses might allow the Court to better evaluate each perspective distinctly rather than conflating the two.

Litigation, although far from the most accessible venue, is an important one for voicing the views of the marginalized. Further downplaying the experiences of the marginalized by measuring them against the best intentions of legislators will only weaken the power of the *Charter* to remedy inequalities, particularly for progressive claims based on discrimination that is broadly systemic and ingrained in the operation of mainstream institutions and ideals. Fraser has distinguished between two types of equality claims of particular relevance here. Recognition claims are for an acknowledgement or even construction of difference and an affirmation of value in that difference. Redistribution claims, on the other hand, call for erasure of difference in economic arrangements.[187] There are claims under both elements of Fraser's framework that are at particular risk of failure under the current interpretive scheme: recognition claims by groups whose values are particularly divergent from the mainstream (and therefore more difficult to properly evaluate in light of majority views) and redistribution claims by some of the most marginalized Canadians.

Recognition claims of minorities that are particularly divergent from the majority of Canadian society are disadvantaged by the conflation of section 15 and section 1 considerations for the simple reason that their values are so different from those of the majority. Viewed in light of what appear to be convincing state objectives, a minority's principles may be undervalued. This is evident in the recent case of *Alberta v Hutterian Brethren of Wilson Colony*.[188] In this case, the Alberta government terminated a special exemption for Hutterites from having their photographs taken for a driver's licence. This exemption existed because their religion does not permit them to consent to being photographed. A community of Hutterites, the Wilson Colony, challenged the cancellation of the exemption. The Court chose to focus on freedom of religion instead of section 15 and, with almost no analysis, dismissed the equality claim on the ground that the law "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice."[189] The disadvantage created by the inability to get a driver's licence and the far from neutral *effects* of the legislation are not even addressed under section 15. The majority view that a photo requirement for a driver's licence is reasonable is *assumed* to be "neutral" because it appears to beso on its face, despite its disparate impact.

---

187 Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age" in Kevin Olsen, ed, *Adding Insult to Injury: Nancy Fraser Debates her Critics* (London, UK: Verso, 2008), at 73-74.

188 *Hutterian Brethren*, *supra* note 174.

189 *Ibid* at para 108.

Meanwhile, the Hutterites' very closely held religious objection to being photographed is framed under the section 2(a) analysis as a "choice" and the claimants must accept the costs of their decision.[190] The inability of the Court to grapple with deeply held values so divergent from the majority perspective is painfully evident. Under a terse section 15 analysis, immediately accepting the law as "neutral" paints the claimants as a disruptive other and does little to carefully examine the effects of the legislation simply because it has an apparently rational basis. Claims from other small or particularly marginalized groups who exist far outside the mainstream face the risk that their section 15 claims will be similarly dismissed when their perspective is overshadowed by the 'rationality' and 'neutrality' of the state's machinery.

Redistribution claims by Canada's most vulnerable citizens also face a greater risk of failure under the current section 15 and section 1 interpretive framework. As Ryder et al argue, "The Court is manifestly uncomfortable with equality rights claims that directly target the ways in which governments raise and distribute material resources in areas such as income tax, pension or social assistance policy."[191] They argue that these claims have a more difficult time succeeding, and the Court's reasoning suffers in these cases as it tries not to tread on the legislature's toes. Further quantitative research to gauge the success rate of these particular claims under the various section 15 frameworks that have emerged over time would be useful. However, observations from cases such as *Gosselin*[192] and *Auton*[193] bear out the assertion that under the current framework, the Court generally refuses to recognize those claims that would be categorized as redistribution.[194] In *Auton*, the Court stated that "the legislature is under no obligation to create a particular benefit" but rather, the concern of section 15 is whether social programs are conferred in a discriminatory manner.[195]

The Court's ruling in *Gosselin* focused on the intention of the law to benefit people under 30 by encouraging them to undergo job training and find gainful employment. The legislation was based on unproven assumptions that people under 30 were more employable and had lesser needs than those over 30. These good intentions, and the presumptions behind them, somehow overshadowed the

---

190 *Ibid* at para 95.

191 Ryder et al, *supra* note 5 at 126.

192 *Supra* note 177.

193 *Supra* note 168.

194 This probably does not mean, however, that the Court is precluded from ever recognizing a redistribution-like claim. Whether something is a characterized as a 'new' benefit or a discriminatory conveyance of an existing benefit can often depend on the level of abstraction used. A shift in the interpretive framework that focuses more on the claimant's perspective under section 15 and more on the government's perspective under section 1, as well as a slightly different characterization of what benefit provided by law is at issue in the case, could allow for redistribution claims to be recognized. Despite the Court's declaration in *Auton*, *ibid*, the claims do not seem to be outright precluded and are still worthy of consideration.

195 *Auton*, *supra* note 168 at para 41.

actual impact on the claimant. The disadvantages that Ms. Gosselin faced: poverty; physical and psychological health problems; lack of employability; substance abuse; and harassment, are termed "personal difficulties"[196] by the majority, which identified these problems without investigating the systemic inequalities that may underlie them. In dissent, Justice Bastarache's cry that "the legislature's intention is much less important at this stage of the *Law* analysis than the real effects on the claimant" appeared to fall on deaf ears. Madame Justice L'Heureux-Dubé's dissent also called for a much more in-depth assessment of the effects on the claimant.[197] She argued that it is not just a matter of assessing the situation of people under 30 generally, but those under 30 that were subject to the regime in question, and the very real harms faced by those in Ms. Gosselin's position caused by inadequate social assistance, such as lack of food, clothing and shelter.[198]

Ms. Gosselin's case failed because, facing a complex claim based in deep systemic inequalities, it is easier under the current section 15 analysis for the Court to point to the government's good intentions, and claim they must stay out of resource allocation in complex benefit schemes, than it is to delve into the complexities of Ms. Gosselin's circumstances. Further, by placing the government's justification in the section 15 analysis rather than section 1, that perspective is allowed to completely overwhelm the marginalized viewpoint rather than assessing the marginalized view as it stands on its own *before* addressing the state perspective under section 1.

When put in direct comparison under section 15, the law's noble purpose appears to supersede a careful evaluation of the actual impact of the law. As Schwartz succinctly puts it, "Just as the road to hell may be paved with good intentions, so too may a well-intentioned law involve an abject disregard for consequences."[199] The current approach to the contextual analysis risks the Court only viewing the marginalized claimant's circumstances in light of the mainstream's perspective, rather than viewing the claimant's disadvantage in light of her or his own experience. Greschner has claimed that the true measure of the success of equality litigation over time is "whether section 15 has improved the social circumstances of the least advantaged groups. For instance, has section 15 jurisprudence helped poor children, or people without homes?"[200] If the weakening of the influence of section 1 equality claims continues, the answer will likely be 'no.'

The Court may feel that to pry into complex benefit schemes is to intrude too far into the political arena; however, this is where the value of justification under section 1 rather than section 15 is important. Findings (negative or positive) under section 1 at least identify the issue as one of Constitutional rights. Even if the court finds the infringement justified, the claimant can walk away with a recognition

196 *Supra* note 177 at para 8.
197 *Ibid* at para 245, Bastarache JA, dissenting.
198 See *supra* note 177 at paras 112, 128-32, 135.
199 Schwartz, *supra* note 10 at 214.
200 Greschner, *supra* note 10 at 318.

that the disadvantage or stereotyping they face *is* discrimination and they can then engage in human rights discourse outside the courtroom. On the other hand, negative findings under section 15 appear to dismiss the rights claim as having no validity whatsoever. This has implications for social movements more broadly, which use litigation strategies in an attempt to gain legitimacy through the communicative power of the law.

Law is a critical component of the normative universe, or nomos, we inhabit, and it is a critical creator, shaper and destroyer of narratives within that universe.[201] How a court hears and then reassembles and restates narratives is crucial to the achievement of equality rights through legal channels. Authors such as Sheppard have expressed concern about the tendency of legal discourse to distort subversive stories of the marginalized, or fail to capture their complexities.[202] However, for rights claimants seeking legitimacy and recognition in the mainstream, law can be an incredibly powerful communicative tool to appropriate for social justice aims.

Sally Engle Merry's work examines "the way state law penetrates and restructures other normative orders through symbols and through direct coercion and, at the same time, the way nonstate [*sic*] normative orders resist and circumvent penetration or even capture and use the symbolic capital of state law."[203] It is not simply a relationship in which the law restructures other normative orders; other normative orders can also capture and use the law. Sheppard, pointing to one of the ways Merry identifies that law and other normative orders interact, notes that "the language and symbols of formal law are used in informal contexts and disputes to strengthen the legitimacy of individual and group claims."[204] Thus, it is not just in the courtroom that legal discourse can contribute to success for equality claims; legal concepts such as *Charter* rights can also have significant hold and influence outside the courtroom, and social movements can capitalize on this.

Legal discourses act to name social wrongs as rights infringements, which may elevate their value in the public eye and help to explain injustice in terms cognizable to those apart from the marginalized group's lived experience. This "rights consciousness raising"[205] can play a role in political mobilization and leveraging against politically powerful opponents.[206] As McCann has noted, a number of social movements have greatly benefitted from being able to couch their claim as a "human right."[207] Furthermore, as McCann explains, outright victory in the courts is not

---

201 Robert M Cover, "The Supreme Court, 1982 Term–Foreword: *Nomos* and Narrative" (1983) 97 Harv L Rev 4.

202 *Supra* note 6 at 69.

203 Sally Engle Merry, "Legal Pluralism" (1988) 22 Law & Soc'y Rev 869 at 881.

204 *Supra* note 6 at 71.

205 Michael McCann, "Law and Social Movements: Contemporary Perspectives" (2006) 2 Annual Review of Law and Social Science 17 at 25.

206 *Ibid* at 29.

207 *Ibid* at 28. For example, women's rights as human rights and female circumcision as violence against women.

required for this legal narrative to be useful to social movements.[208] In the Canadian *Charter* context, even if a claimant fails at section 1, having the claim recognized as a 'right' under section 15 may be enough to rally broader support. Marginalized groups can harness the communicative power of the law through the naming of their disadvantage as a "rights infringement," even if the infringing legislation is ultimately upheld.

The current structuring of the section 15 and section 1 analyses may severely weaken the usefulness of this legal narrative as a communicative tool. Even if overall success rates remain unchanged, if cases do not get past the section 15 stage, claimants do not get their disadvantage recognized as a rights infringement. They are shut out of the *Charter* rights discourse. When it comes to the power of the *Charter* as a galvanizing tool and an opportunity for prompting political debate and social change, an equality analysis that does most of the work under section 15 may greatly reduce the effectiveness of litigation as a strategy. Constitutional rights have a certain unifying power that has the potential to attract broader support and political action. If rights violations are not named as such, because of an interpretive framework that justifies legislation at the section 15 stage, marginalized groups may face added difficulty in getting their claims recognized by the majority outside of the courtroom process.

VII. CONCLUSION

Context is clearly important to the determination of any rights claim if *Charter* rights are to recognize the lived experiences of Canadians rather than focusing only on abstract ideals. However, as the empirical and qualitative analysis in this paper has shown, opening the gates of context too wide, thereby blurring the lines between provisions of the *Charter* that are meant to be analytically distinct, may have significant consequences for equality jurisprudence. Rather than giving judges a greater understanding of the perspectives of the most marginalized, using context as the Court currently does in assessing discrimination claims may in fact open their ears and eyes wider to the majority view. Claims that ask the judicial system to privilege the rights of people whose lives are so different from the lives of those in the rest of the courtroom, and in doing so seriously question dominant norms embedded in state actions, are almost doomed to fail if at each stage they are held up in the light of the state's good intentions. For the *Oakes* test to operate as it was meant to, upholding the values and principles of a free and democratic society, it must be keep analytically distinct from *Charter* rights. If lawyers and judges are to truly give marginalized citizens an opportunity to speak truth to power, we must allow them to do so in the light of their own experiences, away from the glare of the state's good intentions.

---

208 *Ibid* at 29.