The Supreme Court's new equality test: A critique

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In *Law v. Minister of Human Resources Development*,[2] Mr. Justice Iacobucci, writing for a unanimous Supreme Court, articulated the principles for analysis under s. 15(1) of the Charter. The unanimity of the court is important, as in prior decisions such as *Miron v. Trudel*[3] and *Egan v. Canada*,[4] the court was divided in its views on the appropriate approach to s. 15(1). However, in its quest to achieve a common approach, the court has articulated a test that gives rise to the following problems: (1) the new test relies heavily on "context," is overly complex, and accordingly, is difficult for trial judges to apply; and (2) it effectively eviscerates s. 1 of the Charter. We review below the test articulated by the court in *Law*, briefly analyze the problems with the *Law* test, and finally, propose an alternative approach.

THE LAW EQUALITY TEST

The court summarizes the test in *Law* as follows:

> The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:
> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment;
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.[5]

The court then discusses in detail each of these steps.

Differential treatment: The court expresses the first step of the test as follows:

> Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

Distinction based on enumerated or analogous grounds: The enumerated grounds under s. 15(1) are clear. The court, however, gives guidance on analogous grounds as follows:

> An analogous ground may be shown by the fundamental nature of the characteristic . . . [which] is important to [the claimant's] identity, personhood or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground.[6]

The court further states that the fundamental consideration for recognition of a new analogous ground is whether such recognition would further the purposes of s. 15.

Discrimination: The final step is to ask whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The court elaborates the third part of the test in the following terms:

> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

SECTION 1

Once a violation of s. 15(1) has been found, a court must consider whether the impugned legislation is saved by s. 1. As with its s. 15(1) jurisprudence, the court has refined the s. 1 test in re-

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cent decisions such as *Egan v. Canada*[7] and *Vriend v. Alberta*.[8] The court has emphasized that analysis under s. 1 must be undertaken with close attention paid to the context of the impugned law. The objective of a law can be determined only by canvassing the social problem that it addresses. The importance of that objective will also turn on contextual factors. The proportionality of the means employed, and whether they justify the violation of a right, require reference to the factual context of the law. Accordingly, "context is the indispensable handmaiden" of an analysis under s. 1.[9]

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CRITIQUE OF THE LAW TEST

The *Law* test is unduly complex, contextual, and difficult for trial judges to apply. Further, the *Law* test unnecessarily overlaps the analysis of breach under s. 15(1) and the analysis under s. 1, in a manner that effectively eviscerates s. 1.

If the s. 1 analysis is included, a trial judge must now consider as many as 14 different factors in order to determine whether there has been a breach of the Charter's equality guarantees. The trial judge's task is made more difficult by the use of terms such as "essential human dignity," which, while a noble sentiment, do not provide a practical standard to be applied. The subjectivity of the test is further augmented by the court's repetitive resort to "contextual" analysis. This inevitably leads to results that turn on the individual viewpoints of the judges—a modern day equivalent of the "length of the Chancellor's foot." While some subjectivity is inevitable, the *Law* test provides minimal constraints.

The complexity of the test is compounded by the obvious overlap between the s. 15(1) analysis, and the traditional s. 1 analysis. A trial judge is now required to consider the purpose of the legislation both under s. 15(1) and under s. 1. As well, the test articulated by the court for the determination of "discrimination" under s. 15(1) contains many of the same elements found in the proportionality part of the s. 1 analysis. Finally, the heavy reliance on "context" in s. 15(1) is matched by the court's insistence on "context" in the application of the s. 1 test. The net effect of this overlap between the s. 15(1) analysis and the s. 1 analysis is to create a repetitive test, which, in its application, tends to strip s. 1 of any meaningful role.

In order to create an approach that is more straightforward and easier to apply, the underlying factors relevant to an analysis of equality issues should be considered. Once the relevant factors have been identified, the final section of this article examines the issue whether these factors are more appropriately considered under s. 15(1) or under s. 1.

RELEVANT FACTORS IN EQUALITY ANALYSIS

There are three basic factors that underpin any analysis of equality rights:[10]

1. **The purpose of the legislation:** The essence of legislating is often to create distinctions or classifications. Analysis of the purpose of the legislation is thus an important first step in the equality analysis. What is the problem that the legislation was designed to address? Analytically distinct from the purpose of the legislation is its effect: legislation can create classifications not only directly, but also indirectly through its effect. For example, a requirement that police officers be at least 6 feet tall and weigh 200 pounds creates classifications based upon height and weight that in turn have adverse effects on women. The effect of the legislation should be considered as part of the analysis of the classification in question.

2. **The classification in question:** As noted above, legislation can create classifications either directly, or through adverse effects. Common sense tells us that certain classifications are more "suspect" than others. For example, a law that classifies persons on the basis of race is generally more suspect than a law that classifies persons based on income level. Some weight should be given to the text of s. 15(1), which specifically enumerates a number of suspect types of classifications.

3. **Reasonableness of the classification:** The reasonableness of the classification in question requires an examination of the classification in the context of the purpose of the legislation.[11] When one examines the problem that legislation is designed to address, typically the argument is made that the classification created does not include all of the people who are affected by the problem and accordingly is "under-inclusive"; or, alternatively, the argument is made that the classification created includes people who are not affected by the problem, and accordingly is "over-inclusive." Legislation that is "under-inclusive" is often sustainable on the basis that the legislation may proceed "one-step-at-a-time" to ameliorate the condition of at least some persons affected by the problem. Legislation that is "over-inclusive" is often more problematic.[12]

When one compares these basic factors with the three central issues that the court identified in the *Law* decision, it is evident that there is a high degree of similarity. The problem is not so much with the court's identification of the central issues, but with the layering on top of these issues of "contextual" analysis,

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and in the failure to allocate to s. 1 an appropriate role. We suggest below an alternative approach that addresses these problems.

SIMPLIFYING THE EQUALITY TEST

Equality analysis can be greatly simplified by considering the above factors, and by returning s. 1 to a meaningful role in the analysis. An essential element of the simplification process is to allocate the analysis of the three factors identified to either s. 15 or s. 1, but not to both. Two fundamental changes to the *Law* test are necessary to accomplish this result.

First, where the classification is made on the basis of an enumerated ground, discrimination should be presumed. The text of s. 15(1) must be given some meaning, and the classifications that are specifically enumerated should be presumed to be "suspect." In these cases, once a presumption of discrimination is made, the court should proceed directly to the s. 1 analysis. There is nothing to be gained by conducting what is, in effect, a s. 1 analysis only to repeat that analysis once it has been determined that a law is discriminatory. The real battle should be waged within s. 1. The s. 1 test should focus on the three factors identified above: the purpose of the law, the classification in question, and the reasonableness of the classification.

Second, the focus of the s. 15(1) analysis should be limited to two issues: analogous grounds and classification by adverse effect. Where discrimination is alleged on the basis of an analogous ground, the court should, as part of the s. 15(1) analysis, determine whether the classification in question is in fact analogous to the enumerated grounds. In this regard, the court's existing analysis of this issue is appropriate. The second area of analysis reserved for s. 15(1) is the question of whether legislation has created an enumerated or analogous classification not directly, but by adverse effect. This inquiry should be primarily factual in nature so as to avoid trenching on the ground that has been left to s. 1. Once a classification has been deemed to be analogous, or an adverse effect on an enumerated or analogous classification found, the court should move directly to the s. 1 analysis in the same manner suggested above.

CONCLUSION

In the *Law* decision, the Supreme Court of Canada attempted to reconcile the different approaches to an equality analysis that had previously divided the court. However, the unification of the court has been accomplished at the expense of clarity and simplicity. By simplifying the test in the manner suggested, and by according s. 1 an appropriate role, we believe that trial courts will have an easier time conducting an equality analysis. 🍁

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1 The authors wish to thank Professor Jamie Cameron for her helpful comments.

2 [1999] 1 S.C.R. 497. The court applied the *Law* test in two subsequent decisions, *Corbiere v. Canada*, [1999] 2 S.C.R. 203 and *M. v. H.*, [1999] 2 S.C.R. 3.

3 [1995] 2 S.C.R. 418.

4 [1995] 2 S.C.R. 513.

5 *Law*, above note 2, at 548.

6 *Corbiere*, above note 2, at 251-52.

7 Above note 4.

8 [1998] 1 S.C.R. 493.

9 *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, per Bastarache J.

10 See, generally, Tussman and tenBroek, "The Equal Protection of the Laws" (1949), 37 *Calif. L.R.* 341.

11 Tussman and tenBroek, *ibid.*, at 346 and 366.

12 *Ibid.*, at 351.

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violate the guarantee of freedom of expression in the Charter, but the province protected the new law from challenge by inserting a s. 33 notwithstanding clause into the law. The Quebec legislature recognized that it was offending the freedom of expression of its Anglophone citizens, but concluded that the enhancement of the French language in the province was important enough to override the Charter value.

In considering the debate about the legitimacy of judicial review, it is helpful to think of judicial review as part of a "dialogue" between the judges and the legislatures.

When the Supreme Court of Canada held that Alberta's human rights legislation violated the guarantee of equality by not providing protection for discrimination on the ground of sexual orientation (*Vriend*, 1998), there was much debate in the province about reenacting the law in its old form under the protection of a s. 33 notwithstanding clause. In the end, the government of Alberta decided to live with the decision of the court. But it was clear that this outcome was not forced on the government, but was the government's own choice based on, among other things, what the court had said about the equality guarantee in the Charter.