Section 15, Benefits Programs and Other Benefits at Law: the interpretation of Section 15 of the Charter since Andrews

by Helena Orton[1]

IT IS NOW WELL RECOGNIZED that equality is a Canadian goal, but it is not yet a reality. Women, disabled people, racial and ethnic groups, and others continue to be disadvantaged from enjoying the valued social interests such as dignity, respect, access to resources, physical security, membership in community and power, available to the powerful and advantaged. However, governments have taken steps to eliminate this disadvantage and achieve equality through enacting various social programs, including anti-discrimination legislation, and by entrenching the constitutional right to equality, against which these and other laws are to be measured.

All acts of government impose burdens and create benefits so as to shape society. With the development of the "social security net" and other such programs over the last century, Canadian governments recognized that not everyone has benefitted from the existing social organization, and that government has a role, at least in some instances, in remedying that. The beneficiaries of these government programs have included those traditionally considered the subject of discrimination, as well as those who are not. Some of these social programs are clearly aimed at changing an unequal aspect of society, such as pay equity and human rights legislation. Many others are aimed at relieving against disadvantage stemming from systemic discrimination, such as the "Mother's Allowance" programs under provincial welfare legislation. Still other programs are designed to address the needs of diverse groups, such as injured workers, who share a contextual disadvantage.

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All of these programs have been significant societal developments. They are very important to disadvantaged groups, for whom they promote to varying degrees a greater enjoyment of society's resources, and as such, equality. Not surprisingly, however, the patchwork of "benefits programs" that exists today has inevitably been the product of our unequal society. As a result, some aspects of such equality promoting programs are, just as other laws providing a benefit, discriminatory.

Underinclusiveness in its various forms is the basis of most allegations of discrimination concerning benefits programs (or more broadly, laws providing a benefit) by equality-seeking groups:

1) Eligibility criteria may be too restrictive, denying the benefit of a law, program or activity despite comparable need on the part of a disadvantaged group; *e.g.* the lack of human rights protection on the grounds of sexual orientation in some jurisdictions, and the ineligibility of divorced and never married people under the federal Spouse's Allowance program;

2) Other criteria may impose burdens that function to deny disadvantaged groups full benefit of a law or program; *e.g.* the requirement that sole support mothers "live as a single person" in order to receive welfare;

3) Programs may not be designed to meet the needs of disadvantaged groups; *e.g.* the failure of Worker's Compensation programs to compensate for injuries caused by racial or sexual harassment occurring in the course of employment, or the refusal to consider child care as a deductible business expense under the *Income Tax Act* in the context of limited societal support for child care.

With the coming into force of section 15 of the *Canadian Charter of Rights and Freedoms*, the Courts were given a new role in ensuring that laws and legal practices meet constitutional equality standards. The first five years of equality litigation concerning underinclusive laws has addressed two related and pivotal issues. What is the nature of the guarantee of equality, and as such, what treatment at law violates section 15? What is the appropriate judicial response to a finding that a "benefits program" is underinclusive in a discriminatory manner?

In the last year a number of important decisions have begun to provide some answers. This paper focuses on what these decisions tell us about the first question, and their implications for the second.

I. THE EQUALITY JURISPRUDENCE

a) Andrews v. The Law Society of British Columbia

The first decision of the Supreme Court of Canada to consider section 15 of the *Charter* was *Andrews v. The Law Society of British Columbia*,[2] released in February of 1989. That decision is as important for the understanding of equality it rejected as for the approach adopted by the majority of the Court.[3] In particular, the Court rejected the similarly situated test that had been almost uniformly adopted, with various modifications, by Canadian courts below, and advocated by governments.[4] As a result, the section 15 jurisprudence before *Andrews* is now most useful in demonstrating the ineffectiveness of the similarly situated test for achieving equality.[5]

In *Andrews*, the Supreme Court of Canada adopted a purposive approach to the equality guarantee, looking to the values section 15 sought to promote and building on human rights developments over the last fifty years. Justice McIntyre, speaking for the majority as to the proper approach to section 15, wrote that the promotion of equality under section 15,

> entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.[6]

Further, he finds that "the essence of equality" is the "accommodation of differences" for which, he notes, it will frequently be necessary to make distinctions.[7]

Based on this understanding of equality, what treatment at law violates section 15? Justice McIntyre holds that it is discriminatory treat-

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2 *Andrews v. The Law Society of British Columbia*, [1989] 1 S.C.R. 143.

3 Any uncertainty that the majority in *Andrews* rejected the similarly situated test was eliminated in *Turpin v. The Queen*, [1989] 1 S.C.R. 1296, at 1332.

4 The similarly situated test has been roundly criticized for its inability to achieve equality because it does not challenge the status quo. By the similarly situated test the disadvantaged can only obtain the social interests the advantaged have enjoyed to the extent that they are the same as or perceived to be the same as the advantaged, whose characteristics have historically defined the criteria for entitlement. Further, the approach will not contribute to the reorganization of social institutions to meet the needs of the disadvantaged to the extent that their needs are different from the advantaged, because the advantaged have no comparable need.

5 See for example *Karen Andrews v. Minister of Health* (1988), 64 O.R. (2d) 258, *Re Phillips and Lynch et al.* (1986), 27 D.L.R. (4th) 156.

6 *Supra* note 1, at 171.

7 *Supra* note 1, at 169.

ment, epitomizing the denial of equality against which section 15 guarantees. He defines discrimination as,

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individuals or groups not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.[8]

Justice McIntyre goes on to decide that section 15 is concerned with the imposition of group based distinctions which disadvantage individuals and groups. The enumerated grounds of prohibited discrimination reflect the "most common and probably the most destructive and historically practiced bases of discrimination".[9] While not exhaustive, the prohibited grounds of discrimination are also not open-ended. They are limited to grounds analogous to them, *i.e.* groups socially, politically and legally disadvantaged in our society. Of note is Justice Wilson's comment that,

> the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances...It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today.[10]

Justice McIntyre describes this approach to section 15 as the "enumerated or analogous grounds" approach, where the nature of the equality guarantee is understood through the enumerated grounds. Equality is therefore not about same treatment, although the guarantee will sometimes require it. Instead, equality is concerned with the distribution of burdens and benefits in society. Treatment that is forbidden by section 15 is that "which involves prejudice or disadvantage",[11] denying the equal enjoyment of social and political benefits on enumerated or analogous grounds.

According to the majority decision in *Andrews*, as it has been distilled in subsequent cases, for a complainant to establish a violation of section 15, he or she must establish:

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8 *Supra* note 1, at 174.
9 *Supra* note 1, at 175.
10 *Supra* note 1, at 152-153.
11 *Supra* note 1, at 181.

1. that he or she has been denied equal treatment before or under the law, or the law has had a differential impact on him or her in the protection or benefit accorded by the law; and,

2. that the equality right was denied with discrimination, *i.e.* that he or she has suffered burdens or lost access to opportunities or benefits available to other members of society on an enumerated or analogous ground.

Any justification for or consideration of the reasonableness of the law would then take place under section 1, where the onus is on the defender of the law.

b) Section 15 Jurisprudence Since Andrews

Since *Andrews* there has been a multiplicity of decisions where the courts have closed the door to section 15 claims by individuals or groups because they have not been brought on the basis of an enumerated or analogous ground, including the three Supreme Court of Canada decisions addressing section 15 claims.

The unanimous decision of the Supreme Court of Canada in *Turpin v. The Queen*[12] provides further insight into the nature of the equality guarantee. The section 15 claim in that appeal addressed whether section 430 of the *Criminal Code*, which gives accused persons in Alberta but not in any other province an election to be tried before a judge alone, violates the equality rights of an Ontario accused who wished trial by judge alone. Justice Wilson, writing for the Court, only found it necessary to address the allegation of denial of equality before the law. She wrote that,

The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.[13]

Wilson J. found that those charged with an offence such as the accused outside Alberta are treated more harshly, violating the right to equality before the law. However, the treatment was not discriminatory so as to violate section 15.

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates a right to equality

12 *Supra* note 2.
13 *Supra* note 2, at 1329.

but also the larger social, political and legal context...[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 not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.[14]

On the facts before the Court, Justice Wilson found no "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice".[15] While a person's province of residence or place of trial could in some circumstances be a non-enumerated ground of discrimination, here, such a finding would not "advance the purposes of section 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage".[16]

Subsequently, in *Reference Re Worker's Compensation, 1983 (Nfld.)* the Supreme Court of Canada held that injured workers and their dependents were not analogous to those listed in section 15 (1) in the context of the denial of their right to sue.[17] Similarly, the dissenting Justices in *Edmonton Journal v. Alberta (Attorney-General)*, who reached section 15 unlike the majority of the Court, came to the same conclusion in the context of a claim that legislation which limits the information that can be published by the print media in Alberta regarding matrimonial proceedings violates section 15 by discriminating against print media and between newspapers in general circulation and professional journals.[18]

Lower courts, relying on these Supreme Court decisions, have rejected section 15 challenges because the law did not draw a distinction on a ground analogous to those enumerated in section 15 in the context of: employment and labour laws that treat some groups of employees different than others,[19] shorter limitation periods in proceedings

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14 *Supra* note 2, at 1331-1332.
15 *Supra* note 2, at 1333.
16 *Supra* note 2, at 1333.
17 [1989] 1 S.C.R. 922.
18 *Edmonton Journal v. Alberta (Attorney-General)*, [1990] 1 W.W.R. 577 (S.C.C.)
19 See for example *Municipal Contracting Ltd. v. IUOE, Local 721* (N.S.C.A.; May 17, 1989) re differential treatment of construction workers; *Smith v. Nova Scotia (Attorney- General)* (N.B.S. Ct. T.D.; May 4, 1989) re differential job classification of teachers based on date of employment; *Rural Route Mail Carriers of Canada, Local 1801 v. Canada (Attorney-General)* (Fed. Ct. T.D.; August 3, 1989) re inability of rural

against a public authority,[20] differential treatment of unlawful activity based on geographic location or other grounds,[21] and differential treatment of accused and victim.[22] However, keeping in mind the words of Justice Wilson in *Turpin*, in other contexts some of these distinctions could be considered discriminatory. Similarly, the same legislation could be discriminatory on another basis.

The concept of discrimination adopted by the Court in *Andrews* will also have implications for who benefits from the enumerated grounds in section 15. While some enumerated grounds of discrimination indicate clearly the type of disadvantage to be addressed by the equality guarantee, such as mental handicap, other terms, such as race and sex, do not distinguish those who have been historically disadvantaged and those who have traditionally been members of the dominant group. The *Andrews* purposive approach will likely require a court, when faced with an all-encompassing term, to determine who is disadvantaged.

The first case to directly address this issue is *R.* v. *M. (W.A.)*, in which the Saskatchewan Court of Appeal considered a claim by a male accused that the old statutory rape provision of the *Criminal Code*, section 146 (1), which made it an offence for adult males to have sexual intercourse with a female under the age of 14, violated section 15.[23] Justice Bayda, writing for the Court, found that the accused was denied the right to equality before the law because former section 146 (1) imposed sanctions on males but not on females. However, he went on to find that the provision did not violate section 15 because the distinction on the basis of sex was not discriminatory. In going beyond the particular distinction being challenged to examine the "larger social, political and legal context" Justice Bayda,

> ...quickly concludes that to characterize adult males generally, or more specifically, adult males who are potential accused under section 146 (1) (whichever is the applicable group in these circumstances) as a "discrete and insular minority", a disadvan-

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route mail carriers to bargain collectively; *Barke v. Calgary* (Alta. Q.B.; August 2, 1989) re inability of city employees to run for municipal office.

20 See *Wittman v. Emmott* (B.C. S.C.; June 8, 1989); *Mirhadizadeh v. The Queen* (1989), 69 O.R. (2d) 422; *Keuhl v. Beachburg* (Ont. H. Ct.; March 13, 1989).

21 See for example *R. v. Finta* (1989), 69 O.R. (2d) 557 (Ont. H.C.); *Heidekamp v. Heidekamp* (1989), 69 O.R. (2d) 607 (U.F. Ct.; *Law Society of Manitoba v. Lawrie*, [1989] 5 W.W.R. 229 (Man. Q.B.); *R. v. Moisonier* (Man. C.A.; September 15, 1989).

22 *R. v. Harbin* (N.S.T.D.; May 4, 1989) re availability of a publication ban to victims of sexual assault but not to accused.

23 Unreported decision of the Saskatchewan Court of Appeal released November 15, 1989. For a different result based on different reasoning see *R.V.S. (B.R.)* (N.S.T.-D.; May 24, 1989).

taged group in need of society's protection or nurture borders on the alarming if not the preposterous.[24]

The decision in *R. v. M. (W.A.)* does not suggest that there is no context in which men are disadvantaged and therefore entitled to benefit from the section 15 guarantee of sex equality. It does recognize that in the context of sexual assault, males or male accused are not as a group disadvantaged. More generally, the decision suggests that the dicta of Justice Wilson in *Turpin* concerning non-enumerated grounds, requiring proof of social inequality as well as the disadvantage caused by the impugned legislation, is as relevant particularly where a claim alleges discrimination against the advantaged group in an all encompassing enumerated ground.

Although the majority of decided cases following *Andrews* have not involved equality issues raised by enumerated or analogous disadvantaged groups, a number of lower courts have found a denial of full benefit of a "benefits program" contrary to section 15.

Veysey v. Correctional Service of Canada involved a successful challenge by a gay prison inmate to the exclusion of gay partners from the Private Family Visiting Program, a benefit available to other inmates.[25] Dube J. determined that sexual orientation is an analogous ground of discrimination after considering provincial and territorial human rights legislation and other aspects of Canadian society.

Most of the grounds enumerated in section 15 of the *Charter* as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One's religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability. Another characteristic common to the enumerated grounds is that the individuals or groups involved have been victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation, or more precisely to those who have deviated from accepted norms, at least in the eyes of the majority.[26]

In *Symes v. Minister of National Revenue* a woman lawyer challenged the refusal of the Minister of National Revenue to consider child care

24 *Supra* note 20, at 8.
25 *Veysey v. Correctional Services Canada* (1989), 29 F.T.R. 74 (Fed.Ct., Trial Div.); upheld on other grounds (1990), 109 N.R. 300 (Fed. C.A.).
26 *Supra* note 24, at 6-7.

expenses as a business deduction under the *Income Tax Act*.[27] The Plaintiff argued that this treatment disadvantaged her on the basis of sex and parental status because it is women entering the workforce with child care responsibilities who are negatively affected. After examining evidence of the status of parents and women in particular, the Court accepted the Plaintiff's arguments and concluded that,

> ...in light of *Andrews*, an interpretation of the *Income Tax Act* which ignores the realities that women bear a major responsibility for child rearing and that the costs of child rearing are a major barrier to women's participation, would itself violate section 15 of the *Charter*.[28]

Marital status has also been found to be an analogous ground of discrimination prohibited by section 15.[29] This finding, along with those in *Veysey* and *Symes*, suggests that analogous grounds will, at a minimum, include prohibited grounds of discrimination under human rights legislation.

Other cases have addressed underinclusive laws, in the sense of eligibility or the benefits provided, where the treatment burdened clearly disadvantaged groups. *Fenton v. Forensic Psychiatric Services Commission* deals with the exemption of disabled employees in certain charitable work contexts from the minimum wage protections in the B.C. *Employment Standards Act*.[30] Davies J. found that the exempting regulation denied the Plaintiff, a mentally disabled worker, equal benefit and protection of the *Employment Standards Act*, disadvantaging him on the basis of mental disability contrary to section 15.

In *Jane Doe v. Board of Police Commissioners for the Municipality of Metropolitan Toronto*, on a motion to dismiss the claim as disclosing no cause of action, Henry J. ruled that police practices in investigating sexual assault may be the subject of a cause of action addressing a denial of equal benefit and protection of the law with discrimination based on sex.[31] The case involves allegations that the police did not dedicate ade-

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27 *Symes v. Minister of National Revenue* (1989), 25 F.T.R. 306 (Fed.Ct., Trial Div.).
28 *Supra* note 26, at 19.
29 *Cowling v. Brown* (1989), 14 A.C.W.S. (3d) 248 (B.C. Co. Ct.).
30 *Fenton v. Forensic Psychiatric Services Commission* (1989), 29 C.C.E.L. 168 (B.C.S.C.).
31 *Jane Doe v. Board of Police Commissioners for the Municipality of Metropolitan Toronto* (1990), 74 O.R. (2d) 225; upheld by the Divisional Court in an unreported decision released August 30, 1990; leave to appeal to the Ontario Court of Appeal sought September 12, 1990.

quate resources to investigating sexual offenses against women and engaged in practices based on stereotype.

Veysey, Symes, Fenton and *Jane Doe* were all appealed by the Defendant government or government actors. Nevertheless, it is striking to compare these decisions with the bulk of successful section 15 cases pre-dating *Andrews*. Consistent with *Andrews*, the claimants are all members of groups that are socially unequal in Canada. Further, the treatment challenged reflects a variety of the ways in which disadvantaged groups are excluded, explicitly or systemically, from the benefit of existing laws, programs or activities. Fundamentally, these cases reflect that inequality concerns the exclusion of disadvantaged groups from the social and economic resources society has to offer.

c) *Brooks* v. *Canada Safeway Limited*

With these few lower court exceptions, the focus of most cases since *Andrews* has been on the grounds of discrimination under section 15, with less attention directed to the nature of the inequality. Although not a constitutional case, the recent decision of the Supreme Court of Canada in *Brooks v. Canada Safeway Limited* is significant for the way it deals with the discriminatory denial, of a non-governmental benefit program under human rights legislation.[32] This is particularly so in light of McIntyre J.'s comment in *Andrews* that "the principles which have been applied under the *Human Rights Act* are equally applicable in considering questions of discrimination under section 15 (1)".[33]

In *Brooks*, the Respondent employer provided a group insurance plan covering loss of pay due to accident or sickness. The plan covered pregnant employees subject to an exclusion from coverage shortly prior to and following the expected date of delivery, regardless of the reason for absence from work. The Court held that the plan discriminated on the basis of pregnancy and sex. The decision is most known for its historic finding that pregnancy discrimination is a form of sex discrimination. Only women have the capacity to become pregnant. The fact that the plan did not discriminate against all women, and therefore only affected part of an identifiable group, did not make the impugned distinction any less discriminating. Also, the Court reasoned that "those who bear children and benefit society as a whole should not be economically or socially disadvantaged".[34]

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32 [1989] 1 S.C.R. 1219.
33 *Supra* note 1, at 175.
34 *Supra* note 31, at 1243.

As important as the Court's approach to the basis of discrimination is its understanding of the nature of inequality. Having established the health related purpose of the benefits plan and that pregnant women's health related needs are as valid if not always the same as those covered, the Court concluded that the exclusion of pregnant women from the plan constituted discrimination. "Removal of such unfair impositions [imposing a disproportionate amount of the cost of pregnancy] upon women and other groups in society is a key purpose of anti-discrimination legislation".[35] In response to the employer's argument that the plan merely sought to insure, or target, some risks rather than others, the Court wrote that, "Underinclusion may simply be a backhanded way of permitting discrimination...Once an employer decides to provide an employee benefit package, *exclusions* from such schemes may not be made in a discriminatory fashion" (emphasis added).[36]

II. IMPLICATIONS OF THE EQUALITY JURISPRUDENCE FOR BENEFITS PROGRAMS AND OTHER BENEFITS AT LAW

A REVIEW of these early post-*Andrews* decisions reflects the new direction that the Supreme Court of Canada has set for equality jurisprudence under the *Charter*, as well as how well entrenched the similarly situation approach had so rapidly become. Most litigation before *Andrews* dealt with allegations of discrimination on the basis of distinctions which it is now clear do not violate section 15. The shift in focus to disadvantage has given equality-seeking groups reason for cautious optimism. The discouraging legal and political results of early litigation, in *Re Phillips and Lynch et al.*[37] and *Silano v. R. in Right of British Columbia*[38] respectively, might now be different.

The Supreme Court of Canada has made clear in *Andrews, Turpin* and *Brooks* that in accordance with its purpose, the equality guarantee is concerned with benefitting individuals and groups who have had unequal access to social, economic, political and legal resources, either because of direct discrimination or because of the adverse effects of apparently "neutral" forms of social organization. Section 15 will therefore reject laws and legal practices that reinforce and shape disadvantage,

35 *Supra* note 31, at 1238.
36 *Supra* note 31, at 1240.
37 *Supra* note 4.
38 [1987] 5 W.W.R. 739. In *Silano*, following the decision that the provision of lower welfare benefits to those under age 26 violated section 15, the British Columbia government reduced the benefits of all welfare recipients.

and provide constitutional support for those that promote the equal enjoyment of the valued social interests historically available to the advantaged. On this basis, section 15 will often require remedial treatment, to the extent that disadvantaged groups have not benefitted from the existing social organization. It will also require a re-examination of existing standards, to the extent that social institutions are not designed to meet the needs of those who have been without the power to shape them. In this way, the constitutional right to equality at law may fulfil the goal of achieving equality in society.

This approach to equality recognizes that disadvantaged groups must be the beneficiaries of positive action on the part of government and others. It gives no reason to suggest that such equality-promoting steps are themselves immune from review, the implication of many government defences to challenges to equality promoting programs. An employer's disability plan must not be sex discriminatory. Welfare benefits for sole support mothers must not impose criteria based on sexual stereotype. Section 15 (2) provides that section 15 (1) does not preclude ameliorative programs and as such can be understood as an interpretive guide to section 15 (1); it does not preclude review of ameliorative programs where some aspect is discriminatory.

The recent equality decisions also suggest that where benefits programs are challenged because they deny eligibility on a discriminatory basis, or a program does not address the needs of disadvantaged groups on an equal basis, unless other aspects of the program are defective, the section 15 violation is the *underinclusiveness*. Unlike the similarly situated test where the concern of section 15 was expressed to be same treatment of those who are alike, the Supreme Court's purposive approach is directed at achieving "an equality of benefit and protection and no more of the restrictions, penalties or burdens"[39] for the disadvantaged as compared to the advantaged. Once the government provides a benefit, it cannot exclude disadvantaged groups or fail to recognize their needs on a discriminatory basis.

This understanding of equality will in turn have significant implications for the appropriate judicial response to a finding of a section 15 violation based on underinclusiveness which cannot be justified under section 1. It will have a particular impact where remedying the underinclusiveness would involve "reading into" a statutory scheme eligibility for or provision of a benefit where the scheme could not otherwise bear this interpretation, commonly called the remedy of exten-

39 *Supra* note 1, at 165.

sion. In *Schachter v. The Queen*[40] the Federal Court of Appeal addressed the relationship of sections 15, 24 (1) and 52 in just this circumstance.

In a trial decision pre-dating *Andrews*, Strayer J. held in *Schachter v. The Queen*[41] that the failure to provide child care related benefits to biological parents as was available to adoptive parents under section 32 of the *Unemployment Insurance Act* violated the section 15 guarantee of equality without discrimination based on sex and based on the ground of differences between biological and adoptive parents. The distinctions in the *Act* were rooted in sexual stereotyping of the respective roles of the father and mother generally, and specifically in relation to their biological new-born child. Strayer J. considered that where an aspect of a statute granting social service or income insurance benefits is inconsistent with the *Charter* because it does not extend those benefits far enough, the remedy of invalidating the underinclusive provision would rarely, if ever, be just in accordance with section 24 of the *Charter*. Instead he extended to biological parents the child care benefits available under section 32 of the *Act*.

On appeal, the federal government accepted the trial decision that the underinclusive provision of child care benefits was discriminatory, but argued that the proper interpretation of section 52, 24 and 15 of the *Charter* required the trial judge to declare the provision of child care benefits to be of no force and effect. By contrast, the Respondents Schachter and the Women's Legal Education and Action Fund (LEAF), (the latter intervening as an added party at trial and on Appeal), argued that there was no part of section 32 to invalidate under section 52 of the *Charter*, as the inequality was the underinclusiveness and the trial judge did not find any existing part of the child care benefit to contravene the *Charter*. Instead, the extension of benefits by the trial judge was the appropriate and just remedy under section 24 of the *Charter* having regard to the purpose of the equality guarantee and the nature of the inequality.

The majority of the Federal Court of Appeal in *Schachter* held that the courts are not compelled to invalidate an underinclusive discriminatory law under section 52 (1) of the *Charter*. The courts have the jurisdiction in such circumstances to extend the wrongfully denied benefit under section 24 (1), and the extension of benefits by the Trial Judge in *Schachter* was the only appropriate and just remedy in the circum-

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40 *Schachter v. The Queen* (1990), 66 D.L.R. (4th) 653 (Fed. C.A.); leave to appeal to the S.C.C. granted November 15, 1990.

41 (1988), 52 D.L.R. (4th) 524.

stances. The majority accepted that invalidation would only produce sameness, not equality.[42] Justice Heald wrote:

> A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to section 15 (1). That positive right can only be guaranteed by the fashioning of a positive remedy.[43]
> ....
> In my view, underinclusive legislation invites a remedy extending benefits. The right to equality of result enshrined pursuant to section 15 will be meaningless unless positive relief is provided in cases of under-inclusive provisions such as those found in section 32 of the *Unemployment Insurance Act*.[44]

By contrast, Mr. Justice Mahoney in dissent finds that there is no authority under section 24 (1) of the *Charter* to grant the remedy of extension because it would be a "legislative" act involving expenditure of public monies. Although he appears to accept the understanding of the inequality at issue as the failure to go far enough in providing benefits,[45] as did the majority, Mahoney J. still finds that the only proper judicial response to the "inconsistency" with section 15 is a declaration of invalidity.

Given the significant interests at stake, the federal government sought and obtained leave to appeal to the Supreme Court of Canada. However, *Schachter* is certainly not the only section 15 case where a discriminatory law providing a benefit has been successfully challenged for being underinclusive and the Court has, by way of remedy, extended the benefit. In *Andrews, Veysey, Symes* and *Fenton* the court order, directly or indirectly, made the denied benefit available to the Plaintiff without any suggestion of invalidating the law or program involved. The benefit of laws or programs was also extended in cases pre-dating *Andrews*.[46] Perhaps not surprisingly, governments have

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42 *Supra* note 39, at 647.
43 *Supra* note 39, at 644.
44 *Supra* note 39, at 650.
45 *Supra* note 39, at 657.
46 See for examples of Canadian equality cases extending benefits *Addy v. The Queen in Right of Canada* (1985), 22 D.L.R. (4th) 52 (F.C.T.D.), *R. v. Hamilton; R. v. Asselin; R. v. McCullagh* (1986), 57 O.R. (2d) 412 (C.A.). Leave to Appeal to S.C.C. denied (1987), 59 O.R. (2d) 399 *n* (S.C.C.).

Extension is a regular feature of U.S. constitutional equality litigation despite a less compatible understanding of equality. U.S. decisions involving the extension remedy include *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Wescott*, 443

demonstrated most concern about judicial authority and criteria for extending benefits where it would involve a direct expenditure of government funds through a technique other than invalidation.

The potential economic implications of the extension remedy for government has made its availability a focal point for the debate about the proper institutional role of the courts and legislatures in remedying *Charter* violations. At the same time, because underinclusiveness in its various forms is a major equality problem for disadvantaged groups, the availability of the extension remedy has also highlighted the significance of the debate about the nature of the equality guarantee.

The Supreme Court of Canada's approach to the constitutional right to equality, because it is based on remedying disadvantage rather than treating likes alike, means that laws that have not benefitted disadvantaged groups must now do so. The justice system must provide adequate protection against sexual assault and racial violence, women must not be disadvantaged by their reproductive capacity, society must be reorganized to allow full participation of disabled people, even though the advantaged have little or no comparable experience that engages the law.

It is to state the obvious to say that this purposive approach to equality will not be socially or economically neutral. It will also contribute to the change in the customary relationship between the courts and government. Although many of these changes are considered controversial, what we have seen over the last year is the development of a theoretical and jurisdictional framework that has the potential to be used to achieve the constitutional goal of equality as it was intended by its framers.

U.S. 76 (1979); *Heckler v. Mathews*, 465 U.S. 728 (1984); *Welsh v. United States*, 398 U.S. 333 (1970).