Gay Rights and the *Charter*

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Introduction

The object of this article is to develop an argument for an interpretation of s.15(1) of the *Charter of Rights and Freedoms*[1] that would strike down laws or applications of laws that discriminate on the basis of sexual orientation.

S.15(1) states:

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

(Subs. (2) preserves affirmative action programs designed to ameliorate "conditions of disadvantaged individuals or groups.")

By the provisions of s.32(2), s.15 does not come into force until 17 April 1985. There have, therefore, at the time of writing, been no judicial interpretations of its provisions, and the arguments to be developed here are speculative.

The argument will proceed upon the following propositions, each to be developed in a separate section of this paper:

1) The structure of s.15, with its inclusive rather than exhaustive list of prohibited classifications for discrimination, indicates that other classifications apart from those listed will be subject to judicial protection.

2) The history of the *Charter* indicates that a deliberate decision was made to allow for the development of prohibited classifications beyond those listed in s.15; while the framers chose not to include sexual orientation in the list of prohibited classifications, despite the lobbying efforts of the gay community and others, the shift from the earlier, exhaustive list to the final, inclusive list signals that courts will be expected to entertain arguments aimed at eliminating discrimination based on additional classifications.

3) S.32 of the *Charter* makes its provisions applicable to governments and their activities. The operation of s.15 is specifically tied to the workings of the law. Thus, protection of homosexuals under s.15 will be limited in scope to protection from unequal operation or application of laws. Under this analysis, subject to a

1. Constitution Act, 1982.

reasonable limits inquiry under s.1 of the *Charter*, a regulation which specifically discriminates against homosexuals *per se* could be held to violate the *Charter*. Whether a private individual's discriminatory acts could be caught by the *Charter* is debatable; it has been suggested that s.15 could be applied to provincial human rights codes so as to provide protection against private discrimination in the same terms as it is provided against discrimination in the operation of laws.[2] Whether such a "back door" to human rights legislation has or has not been created by the *Charter*, I will argue that the strongest case for recognizing a right against discrimination on the basis of sexual orientation lies in a challenge to a discriminatory law or regulation.

4) The existence of a list of prohibited classifications combined with an open-ended prohibition against discrimination raises questions about the model of judicial review to be applied in cases involving listed classifications as opposed to unlisted classifications. I will argue that our courts should avoid the American model of strict or minimal scrutiny as inappropriate to the Canadian situation. Rather, I suggest that discrimination based on one of the enumerated grounds should trigger a s.1 inquiry, while a complaint based on some other ground should first require a showing that the complainant has been subjected to unequal treatment due to membership in a group defined by a particular characteristic.

Upon further demonstration that the classification used ought to be regarded as *prima facie* invalid, the court should proceed to a s.1 inquiry, with the onus shifting to the Crown (or other respondent) to demonstrate that the inequality is justified. Classifications are invalid, it is submitted, if they are irrelevant, reflect a failure to consider individuals on their own merits, reveal a historical pattern of discrimination, are based on immutable personal characteristics or are based on individuals' exercise of *Charter* rights.

5) Homosexuals are a group identifiable by the shared characteristic of sexual attraction to others of the same sex. They have historically been subjected to discriminatory treatment in a broad range of areas, both public and private, including the application and protection of criminal law, eligibility for military service, administrative recognition of domestic arrangements in order to receive government benefits, public-service hiring, private-sector hiring, accommodation, and child custody matters. Such discrimination is either based upon bias or antipathy toward homosexuals or homosexuality, or upon assumptions which impute to homosexuals characteristics other than mere sexual preference (e.g., that homosexuals are a security risk). Thus it is submitted that legal discrimination based on sexual orientation, once shown, should be struck down under s.15 unless justified under s.1. I will argue further that valid legislative purpose or rational connection between the classification and the end to be achieved by the discriminatory law should not be enough to satisfy the justification requirement; the court should also require a showing that the

2. See, for example, Swinton, "Application of the *Canadian Charter of Rights and Freedoms*" in Tarnopolsky and Beaudoin, *Canadian Charter of Rights and Freedoms – Commentary*, 1982, 396, for an analysis rejecting the suggestion, and *contra*, Gibson, "*The Charter of Rights* and the Private Sector" (1982), 12 Man. L.J. 213.

means chosen to achieve the purpose involve the least possible intrusion on rights. 7) Given the above analysis, I will argue that the *Charter of Rights* can be used against those who deny eligibility for military service to homosexuals, by demonstrating that homosexuality as a classification ought to be regarded by the court as *prima facie* invalid for unequal treatment by law, based upon my criteria set out in (4).

I will further argue that such unequal treatment cannot be justified under s.1 because the purposes cited to justify the exclusion could be achieved without discrimination on the basis of sexual orientation. The military example is chosen because it represents one of the clearest cases of unequal treatment in law of a class defined by the shared characteristic of homosexuality, and thus provides a powerful argument for mandating *Charter* protection against unequal application of the law on the basis of sexual orientation.

It may be possible to argue that discrimination against homosexuals violates the right to freedom of expression or association, or contravenes an implied right to privacy in the *Charter* (if such a right can be found). I do not propose to examine those arguments, as I have limited the scope of this paper to what seems the most powerful case for judicial intervention to strike down anti-gay laws. If and when the courts find that clear-cut discrimination on the basis of sexual orientation violates the *Charter*, it will then be possible to extend that principle in other areas.

The Structure of S.15

Walter Tarnopolsky[3] has described subs.15(1) as having "taken the form of the camel that a committee charged with designing a horse achieves."[4] The four routes used to guarantee equality (before, under, protection, and benefit) "make it abundantly evident that the drafters intended to cover every conceivable operation of the law and to require that, in its operation, 'every individual' be treated 'without discrimination,' particularly with respect to a number of specifically recognized categories."[5]

The simplest and likeliest interpretation of the "in particular" phrasing is that the enumerated classifications which follow are to be read as inclusive rather than exhaustive. This is certainly Peter Hogg's view: he says the wording of s.15 "makes it clear that these grounds are not exhaustive, so that laws discriminating on other inadmissible grounds (for example, height, sexual preference) would also be in violation of s.15."[6]

There is an observation in the dissenting judgment of Dickson, J. (as he then was) in the Supreme Court of Canada's decision in *Gay Alliance Toward Equality* v. *The Vancouver Sun*[7] which indirectly supports this conclusion. Dickson, J. was commenting on the effect of a provision in the former *B.C. Human Rights Code*[8]

3. Now Justice Tarnopolsky of the Ontario Court of Appeal.
4. Walter S. Tarnopolsky, "The Equality Rights," in Tarnopolsky and Beaudoin, *op. cit.*, 396.
5. *Ibid.*
6. Peter Hogg, *Charter of Rights (Annotated)*, 1982, 51.
7. [1979] 2 S.C.R. 435; 97 D.L.R. (3d) 577; 10 B.C.L.R. 257; 2 N.R. 117.
8. 1973 (B.C.) (2nd Sess.) c.119; substantially amended by S.B.C. 1984, c.22.

forbidding discrimination in the provision, *inter alia*, of any accommodation, service or facility customarily available to the public. The former code forbade discrimination in the provision of such services "unless reasonable cause exists," and in a later subsection, specifically excluded certain grounds of discrimination from the definition of "reasonable cause."

As Dickson, J. observed:

> The *British Columbia Code* is silent as to "sexual orientation," but it is precisely because the *British Columbia Code* goes well beyond its counterparts in other provinces that the present case got before the board of inquiry. The absence of sexual orientation from the list of specifically proscribed forms of discrimination may indicate a lesser degree of protection in the weighing of reasonable cause, but it must be emphasized that there is no necessary limitation upon "reasonable cause" to be read into the statute by the mere absence of reference to sexual orientation.[9]

It is submitted that those comments, applied to a statute forbidding discrimination without reasonable cause, apply equally to the *Charter's* prohibition against discrimination, subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Assuming that the listed characteristics in s.15 are to be taken as inclusive rather than exhaustive, and that the courts are expected to recognize other classifications as violating s.15, a further question arises: Why were some classifications included, and what is the effect of inclusion or exclusion of a particular classification? Inclusion of a particular classification may demand a stricter standard of scrutiny than that applied to classifications not included, or it may be intended to give the court some guidance as to what to look for in other classifications, to determine whether they should trigger s.15.

Another explanation that may be suggested is that deliberate exclusion of certain grounds from the enumerated classifications should be taken as a signal that those classifications ought not to trigger the protection of s.15. There was intensive lobbying over the categories to be included in the list,[10] and it might be argued that a conscious decision by the framers not to include something must mean that they did not want to extend protection in that direction.

The flaw in that proposition is that it is impossible to know precisely what classifications the framers of the *Charter* considered and rejected for inclusion in the list. Did they consider height? Weight? Left-handedness? Just because we know that someone asked for the inclusion of sexual orientation and failed to get it should not lead to the conclusion that it is forever excluded; that would amount to punishment for the lobbying effort. Under that theory, to lobby and lose is to lose forever; to remain silent and hope for the best is to at least maintain the possibility of judicial protection later on.

The "lobby-and-lose" argument would have more strength if the list of proscribed classifications were exhaustive. Its inclusive nature suggests, on the

9. GATE, *supra*, note 7, 461 S.C.R.
10. See, for example, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada* (1980–81), Supply and Services Canada, 1981.

other hand, that while the politicians who framed the *Charter* were satisfied that certain classifications ought to be protected, they decided to give the courts the task of deciding whether other classifications should be included, as each case came up for a ruling. The gay community did not "lobby and lose;" the framers simply chose to leave the question open. The structure of s.15 recognizes the impossibility of foreseeing every type of unacceptable discrimination. By providing an open-ended list of proscribed classifications, the framers have provided some guidance as to the kinds of characteristics to be protected, as well as avoiding the politically awkward question of whether to extend protection on the basis of sexual orientation.

Finally, I would argue that in the absence of any clear indication in the *Charter* that a given classification should not fall within s.15, it is dangerous to impute any intention to the framers to exclude such a classification from its operation. The framers of the *Charter* were a disparate group of politicians and officials who presumably differed on what any given section would achieve. Some may have wanted to deny protection on the basis of sexual orientation; others may have believed that an inclusive list of classifications would lead to precisely such protection. The ambiguity of s.15 tells us only that there was no meeting of the minds with respect to sexual orientation; the framers have left that decision to the courts. The "lobby-and-lose" argument tells us nothing more than that the question remains open.

Drafting History

The *Charter* went through seven different drafts[11] before it finally became part of the Constitution. As Robin Elliot indicates,[12] examination of earlier drafts can assist in interpreting the final version of the *Charter*, since the alterations may reveal both the nature of the political decisions taken during the drafting process and the interpretations the drafters wished to avoid or to ensure.

Section 15(1) went through four versions. Between the first and second drafts, the only change was to insert the word "the" before "equal protection." The explanatory note accompanying this second draft, put together by the federal government, simply identified the source of the equality rights as s.1 of the Canadian Bill of Rights, and noted that ethnic origin and age had been added as proscribed grounds of discrimination.

The second version of s.15(1) thus read as follows: "Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex."

The third version included several changes. "Everyone" became "every individual," with an explanatory note indicating that this was to "make it clear that this right would apply to natural persons only." The statement of a right to equality before the law became an assertion of a state of affairs: "Every individual

11. Most of the information on drafting history is drawn from Robin Elliot, "Interpreting the *Charter* - Use of the Earlier Versions as an Aid" (1982), U.B.C. Law Rev. (Charter Edition) 11.
12. "Interpreting the *Charter*," *supra*, note 11.

equal ... " (emphasis added). The words "and under" were added to equality before the law, and the accompanying notes indicated that this wording change would ensure that the right to equality would apply in respect of the substance as well as the administration of the law."[13]

Similarly, the words "and equal benefit" were added after "protection," to "extend the right to ensure that people enjoy equality of benefits as well as the protection of the law."[14]

Most importantly for this paper, the third draft contained the shift from the closed list of proscribed grounds to an open-ended list. Thus, the new version read:

> 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 or age (emphasis added).

The accompanying notes explained: "Certain proscribed grounds of discrimination would be listed in the section. However, those grounds would not be exhaustive."[15]

The fourth version of s.15(1) simply added mental or physical disability to the list of proscribed grounds of discrimination, and the section remained in that form through the final three drafts.

The third draft of the *Charter*, with its open-ended prohibition against discrimination in the operation of law, was submitted to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada by then Justice Minister Jean Chrétien, following several weeks of hearings by the committee. By the time this new draft was tabled, the committee had already heard testimony from Canadian Human Rights Commission chairman Gordon Fairweather,[16] who called for either a general anti-discrimination clause standing alone or a general clause followed by a list of specific groups who have historically suffered discrimination.

The committee also heard from the Canadian Association of Lesbians and Gay Men,[17] which favoured the second of Fairweather's options, that is, a general prohibition followed by a list of historically disadvantaged groups, identified by the characteristics upon which discrimination was based.

Not surprisingly, the CALGM delegation sought inclusion of sexual orientation in the list following the general prohibition, as did Fairweather. While the justice minister's new draft did not go so far, it did adopt the idea of a generalized prohibition followed by a list of more or less traditional grounds. Following the special committee's report,[18] Chrétien tabled a fourth draft in the Commons,

13. *Ibid.*, 38.
14. *Ibid.*
15. *Ibid.*
16. *Minutes of Proceedings*, *supra*, note 10, Issue 5, 6.
17. *Ibid.*, Issue 24, 22.
18. *Ibid.*, Issue 57, 4.

adopting the same form of s.15(1) but adding mental and physical disability as proscribed grounds.

The only acceptable explanation for the drafting change is that its purpose was to open the door for judicial addition of other characteristics giving rise to the operation of s.15 in protecting against discrimination. The section should be read as saying that the framers recognized that discrimination based on the enumerated grounds was unacceptable, but they also foresaw unacceptable discrimination on other grounds, and they did not wish to close the door on judicial protection against such discrimination.

Application of S.15

Section 32 of the *Charter* reads:

> (1) This *Charter* applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories: and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
>
> (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

There could be no clearer statement that the *Charter* is intended to restrict the authority of both levels of government. Whether the *Charter* will also be extended to the private sphere is a question generally answered in the negative,[19] although it will be interesting to see how broadly the courts interpret "all matters within the authority of Parliament ... (and) the legislature in each province."

The wording of s.15(1) provides protection, not against discrimination *per se*, but against discrimination by law or in the application of law. There are at least two possible ways that this could be extended to discrimination in the private sphere. The first involves whether the courts will enforce a contract which calls for discrimination which would, if it appeared in public law, offend the *Charter*. For the court to enforce such a provision of private law would make the court party to the discrimination. The U.S. Supreme Court refused to do so in *Shelley v. Kraemer*[20], rejecting respondents' reliance on a restrictive covenant forbidding property sale to Blacks.

The second possibility is that the *Charter*, in its application to provincial legislation, will alter the effect of human rights codes. The argument has been made that, to comply with the *Charter*, human rights codes should extend at least as much protection in their terms as does the *Charter*.[20a] The success of such an

19. See, e.g., Swinton, *op. cit. supra*, note 2, and James MacPherson, "The *Charter of Rights*: Its Impact on Human Rights Commissions"; unpublished, paper presented to the 1982 CASHRA Annual Conference; my thanks to Peter Hogg for providing a copy of MacPherson's paper.

20. (1948), 334 U.S. 1, 68 S. Ct. 836.

20a. See *supra*, note 2.

argument would substantially change most human rights codes in Canada; most do not have open-ended lists of proscribed classifications, and most do not include the classification of mental disability, which appears in s.15.

The outcome of that debate will clearly have major significance for gays, since it could conceivably provide them with the protection against private-sphere discrimination that they have failed to win from provincial legislatures (with the exception of Québec[21]). It is suggested, however, that the prospect of winning such protection in the courts would be improved if the principal barrier – judicial recognition of sexual orientation as a proscribed classification – can be cleared in a case which presents that sole issue to the court in the most straightforward manner possible. A clear-cut case of a law which discriminates on the basis of sexual orientation would place the issue squarely before the court, without any complicating questions about whether s.15 can be extended to the private sphere through some sort of "back door" to human rights codes. If and when that hurdle can be overcome, there will be further opportunities to extend the protection, but this article will direct its arguments toward overcoming that initial barrier.

Identifying Discrimination

Black's Law Dictionary (rev. 4th ed.) defines discrimination as "in general, a failure to treat all equally; favouritism." (There is also a highly technical common-law definition derived from an American case and based on American constitutional doctrine, which refers to "the effect of a statute which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favoured no reasonable distinction can be found.")

The *Shorter Oxford English Dictionary* (3rd ed.) defines discrimination as: "1) The action of discriminating or distinguishing; a distinction (made with the mind or in action ...). 2) Something that discriminates or distinguishes; a distinction; a distinguishing mark. 3) The faculty of discriminating; the power of observing differences accurately."

The same dictionary defines "discriminate" as: "1) To make or constitute a difference in or between; to differentiate. 2) To perceive or note the difference in or between; to distinguish. 3) To make a distinction."

The broadest meaning that might be given to discrimination, then, might be "differentiation" or "differential treatment." But surely that definition cannot suffice for *Charter* adjudication. Differential treatment is unavoidable, in the operation of the law as elsewhere. Young offenders are dealt with under a different statute than adult offenders, with different results; people with high incomes are subject to higher taxes than people with low incomes; politicians are required to comply with conflict-of-interest provisions which restrict their private business activities in ways not applicable to private citizens; Indians are given special status under the Constitution. Must the courts entertain *Charter* challenges to all these situations of differential treatment? Must the Crown be

21. S.Q. 1977, c.6.

required to justify every one of them under a s.1 inquiry? The last example, that of the special status of Indians, suggests not; the *Charter* cannot be used to challenge the constitutionality of a provision of the Constitution itself.

There are indications within s.15 that not all situations of differential treatment will give rise to a *Charter* challenge. The section provides a list of classifications specifically prohibited as grounds for differential treatment, yet at the same time the section prohibits discrimination in the operation of law generally. One way of giving the list meaning is to examine it for clues as to the definition that ought to be adopted for discrimination as the term is used in s.15. Guidance may also be available in case-law under s.1 of the Canadian Bill of Rights[22] and under the former *B.C. Human Rights Code*.

One thing common to each of the enumerated classifications is that they all identify groups in society that have been disadvantaged by virtue of the very characteristic which identifies them as a class. This coincides with one of the three considerations identified by Marc Gold from American doctrine which have been used to determine whether a classification has been applied so as to violate the equal-protection clause of the U.S. Constitution.[23] The first of Gold's considerations is relevancy: "It has been noted that some bases of classification are virtually never relevant to legitimate governmental purposes, whereas others are."[24] (Those that are never relevant, such as race, give rise to "strict scrutiny" under American doctrine, and are almost invariably struck down.) Gold's second consideration is "the presence or absence of a historical pattern of discrimination directed at the group in question."[25] This coincides with the common thread in the proscribed classifications listed in s.15. Finally, Gold refers to

> ... the possibility that the political process might disregard the interests of particular groups. Where a group is politically powerless – especially where that is a function of a historical pattern of discrimination – it may signal that its interests have been overlooked in the legislative calculus.[26]

Another common thread to be found in the s.15 list, related to that of disadvantage based on identifying characteristics, is that each classification identifies a group about which assumptions or generalizations have been used as the basis for unequal treatment. Such generalizations – such as the notion that people of one race are inferior or superior to those of another, or that women are somehow less suited to a breadwinning role than they are to a homemaking role – are rejected because they fail to treat individuals on their own merits. "At the core of human rights legislation is the belief that people should be treated on

22. R.S.C. 1970 Appendix III.
23. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry," [1982] 4 S.C.L.R. 131.
24. *Ibid.*, 144.
25. *Ibid.*
26. *Ibid.*, 145.

their own merits and not by a categorization process that bears no relationship to the ... decision at hand."[27]

This notion of failure to treat individuals on their own merits is reflected in some decisions rendered under the former *B.C. Human Rights Code*'s prohibition against discrimination without reasonable cause. In *Bremer* v. *Board of School Trustees, District 62* (1977),[28] the Board of Inquiry said:

> (T)he reasonable cause concept is intended to protect classes or categories from prejudicial conduct related to the differentiating group characteristic which distinguishes the class or category from others in society .... (T)he list of prohibited considerations is never closed ... in every contravention the respondent's reasons for the prohibited conduct are related to the failure of the respondent to make an individual assessment of the person discriminated against. The reasonable cause standard requires a consideration of the individual in relation to the ... protected opportunity ... free of any reference to the individual's "differentiating characteristic."

In an earlier case, *H.W.* v. *Kroff* (1976),[29] the board said:

> The evil at which the Code is aimed is making decisions about individuals based on classes or categories rather than upon individual performance. Our society now believes that individuals should be evaluated on individual merit and not on the category into which they fall, unless the category is related functionally to the evaluation.

The equality clause of the Canadian Bill of Rights was worded somewhat differently from that in the *Charter*, providing as follows:

> 1) It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely ... b) the right of the individual to equality before the law and the protection of the law ....

In *R.* v. *Drybones*,[30] Ritchie, J., speaking for the majority, held that s.1(b) "means at least that no individual or group of individuals is to be treated more harshly than another under that law ...." However, he was at pains to limit his judgment to the facts of that case, and the broad principle he enunciated in *Drybones* was severely watered down in later Supreme Court decisions.

Two years later, in *Curr* v. *The Queen*,[31] Laskin, J. (as he then was) considered whether the protection of s.1(b) was limited to prohibition against the types of discrimination listed in the opening paragraph, and held that it was not.

> In considering the reach of ... s.1(b) ... I do not read it as making the existence of any of the forms of prohibited discrimination a *sine qua non* of its operation. Rather, the

27. Board of Inquiry (B.C.), *Gibbs* v. *Bowman* (1978), 12; quoted in Tarnopolsky, *Discrimination and the Law* (Richard DeBoo, 1982), 318.
28. See Tarnopolsky, *op. cit.*, note 27, 318.
29. *Ibid.*, 317.
30. [1970] S.C.R. 282.
31. [1972] S.C.R. 889.

> prohibited discrimination is an additional lever to which federal legislation must respond .... (F)ederal legislation which does not offend s.1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s.1 if it is violative of what is specified in any of the clauses (a) to (f) of s.1 ... It is, therefore, not an answer to reliance ... upon ... s.1(b) of the Canadian Bill of Rights that (a law) does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether (such a law) can be construed and applied without abrogating, abridging or infringing the rights of the individual listed in ... s.1(b).

Although neither of the passages quoted from *Dryhones* and *Curr* ever really took hold in subsequent Bill of Rights adjudication, it is submitted that the wording of the *Charter* demands the interpretation suggested in those passages. Tarnopolsky, writing about the Bill of Rights,[32] suggested that the test for equality be whether the impugned distinction was "reasonably justifiable," and an expanded version of that test explicitly appears in s.1 of the *Charter*.

This raises the question of the relationship between s.15 and s.1, since any attempt to develop a test for classifications triggering the protection of s.15 ought to reflect the fact that only after s.15 comes into play will the question of reasonableness be considered.

American courts, faced with an equal-protection provision containing no enumerated grounds[33] and without a "reasonable limitation" clause to modify its impact, have adopted a doctrine of equal protection with built-in limitations. (Whether a limitation is acceptable or not depends, in part, in U.S. law, on whether the impugned classification is "inherently suspect," giving rise to "strict scrutiny," or whether the classification can be upheld under "minimal scrutiny" if it is not inherently suspect; a third intermediate level of scrutiny has recently been added.[34]) If Canadian courts are to avoid treating every situation of differential treatment as a potential *Charter* violation, they will have to develop a test with some limitations for operating s.15; would a s.1 reasonableness inquiry then become redundant? Perhaps not in a case involving one of the enumerated classifications, when a s.1 inquiry would be necessary if one is to avoid striking down provisions such as drinking-age laws. But for classifications not listed in s.15, it might appear that the reasonable-limits inquiry would take place before s.1 ever came into play.

The unfortunate result of such an interpretation would be that the onus would never shift from the plaintiff or applicant to the opposing party, which would seem to defeat part of the purpose of s.1.

But if a test other than reasonableness can be developed for operating s.15, it would preserve a role for s.1. Such a test could then produce a procedural method of dealing with cases of discrimination based either upon one of the enumerated grounds or upon some other classification.

In order to make out a case of discrimination which violates s.15, plaintiffs

32. Tarnopolsky, *The Canadian Bill of Rights* (2nd rev. ed.) (Toronto: McClelland & Stewart, 1975).
33. Constitution of the United States, Amendment XIV.
34. See Tarnopolsky, "The Equality Rights", *supra*, note 4, 401-7.

should satisfy the court that: 1) they are members of a group identifiable by some classification; 2) they are subjected to differential operation of the law based upon that classification; 3) the classification is *prima facie* invalid as a basis for differential treatment, and amounts to discrimination.

Where the classification matches one of the enumerated grounds, the third element of the plaintiff's case is automatically satisfied; assuming the first two elements are also satisfied, the onus then shifts to the respondent (generally the Crown) to justify the discrimination under s.1.[35]

Where the classification does not appear in the enumerated grounds of s.15, the plaintiff or applicant must persuade the court that the impugned classification is invalid and amounts to discrimination. Only upon that showing should the court then turn to the s.1 inquiry.

(This model is similar to one suggested by Gold[36] in his attempt to answer the question of the relevance of s.1 to the equal-rights provision.)

The enumerated grounds in s.15 thus serve two functions: they eliminate the need to decide first whether differential treatment based upon those classifications should be regarded as *prima facie* discriminatory, and they provide some guidance (albeit vague) for determining what other classifications should be treated as invalid.

All of this of course leaves the question of what classifications will arouse the courts' suspicions sufficiently to trigger a s.1 inquiry. I suggest that the authorities cited earlier in this section provide at least a partial list of considerations for the courts to use in determining the validity of a classification.

1) *Relevance.* Where the classification used as the basis for differential treatment appears to be irrelevant to the provision under attack, it should trigger the operation of s.1. For example, a provision imposing heavier penalties for offences committed by left-handed persons would be open to attack, since left-handedness is irrelevant to the principles of sentencing.

2) *Assumptions based upon identifying characteristics.* Where a provision treats all members of a group differently from the rest of the population without regard to individual merit, its reasonableness should be tested under s.1. For example, the denial of driving privileges to fifteen-year-olds reflects certain assumptions about fifteen-year-olds as a class, without regard to individual abilities. Such provisions would probably survive the s.1 inquiry, but a law giving women preference in child-custody disputes, on the assumption that women are better at child rearing, would not.

3) *Historical disadvantage.* Where there is evidence that a certain class of persons has historically been subjected to discrimination or disadvantaged in some way, it will suggest that the class needs the protection of the *Charter*. A historical pattern of discrimination will generally be a clue that unwarranted assumptions or irrelevant considerations are involved.

4) *Exercise of Charter rights.* I would tentatively suggest that the equality provision

35. This onus shift was confirmed by Dickson, J. (as he then was) in *Hunter et al.* v. *Southam Inc.* (1984), 14 C.C.C. (3d) 97, 116.

36. *Op. cit., supra*, note 23.

could be used to protect individuals from unequal treatment based upon their exercise of constitutionally guaranteed rights, such as freedom of religion (reflected in the enumerated grounds) or freedom of opinion, expression or association. The guaranteed rights and freedoms would be of little value unless individuals could be assured that they would not suffer unequal treatment in law based upon their exercise of those rights.

5) *Immutability.* Where the identifying characteristic is one over which the applicant challenging the unequal treatment has no control (as is the case with most of the enumerated classifications in s.15), it is submitted that unequal treatment based upon such characteristics is likely to be unfair unless justifiable under s.1.

These considerations clearly overlap in many instances, and others may appear to trigger the protection of s.15. What I suggest is that when any one of the above elements has been demonstrated, the court should require a demonstration that the impugned provision can be justified under s.1.

Homosexuality as an Invalid Classification

There should be no dispute that homosexuals have historically been discriminated against; it is entirely possible that a court would be willing to take judicial notice of that history, but it may be necessary to present evidence.

Anti-homosexual bias goes back at least to Old Testament times; ancient Jewish law forbade homosexual relations, and the term sodomy ("An unnatural form of sexual intercourse, especially that of one male with another." (*Shorter O.E.D.*)) derives from the name of one of the cities destroyed by God. In medieval times, homosexuals were burned at the stake; the term "faggot," a pejorative slang word meaning homosexual, comes from the true meaning of faggot, which was a bundle of sticks used to burn victims at the stake.[36a]

In Nazi Germany, homosexuals were interned in concentration camps and many died; they were forced to wear pink triangles to identify them as homosexuals, and the pink triangle has become the modern symbol of the gay liberation movement. In modern Iran, homosexuals are executed.

The anti-homosexual prejudice in modern Canadian culture is reflected in the long list of pejorative terms used to imply homosexuality (queer, pansy, fairy, fruit, gearbox and so on). Assaults on gays in Toronto became so numerous a few years ago that the gay community formed its own street patrol and launched self-defence courses. A group calling itself Positive Parents distributed a pamphlet in Toronto not long ago proclaiming: "Queers don't produce; they seduce."

In 1978, the Coalition for Gay Rights in Ontario produced a brief for presentation to Ontario MPPs pressing for inclusion of sexual orientation as a prohibited ground of discrimination in the *Ontario Human Rights Code*.[37] The document cites

36a. See Gifford Loda, "Homosexual Conduct in the Military: No Faggots in Military Woodpiles" [1983], Ariz. St. L.J. 79.

37. R.S.O. 1980 c.340.

incidents of anti-gay discrimination in employment, housing, and services offered to the public.[38]

Until 1969, homosexual acts, identified as buggery or gross indecency, were classified as criminal in Canada.[39] The amendments to the *Criminal Code* did not remove the prohibition sections, but added an exception legalizing buggery and gross indecency where committed between consenting adults (twenty-one or over) in private.[40] Thus, it is still illegal for two males to have anal intercourse where one or both is under twenty-one, while the age of consent for heterosexual intercourse can range as low as fourteen under the same statute.[41]

Homosexuals are banned from military service in Canada. The Royal Canadian Mounted Police security service kept secret files on homosexuals. Civil servants discovered to be homosexual risk losing their security clearances. The list goes on and on.

Whether homosexuality is an immutable characteristic is debatable. Psychiatric efforts to find a "cure" have been largely unsuccessful, while recent research into acquired immune deficiency syndrome has suggested that gays may be physiologically different from heterosexuals. While certain religious groups suggest that homosexuality is a matter of choice, common sense makes one wonder why anyone would choose to adopt a life style traditionally abhorred and widely reviled.

Whether or not homosexuality is accepted as a characteristic over which the individual has no control, it can also be argued that the right to a homosexual existence is protected under the freedom of thought, belief, opinion and expression, and freedom of association.

It has been suggested that the basis and justification for adverse treatment of homosexuals lies in public morality. One U.S. commentator, Catherine Blackburn, writes:

> Morality and decency are concepts that defy precise definition. They are dependent upon human perceptions of 'right' and 'wrong' and are often rooted in theology ... The moral order of society is denigrated, not served, by the elevation of the beliefs of some individuals that homosexuality is immoral over the commitment to human rights and freedoms embodied in the Constitution.[42]

Not only are morality and decency difficult to pin down, they are in constant flux. Attitudes toward homosexuality are far from uniform; the CGRO brief cites opinion polls suggesting that most Canadians would favour anti-discrimination protection for sexual orientation.[43] Only Québec has adopted such a provision,

38. *Discrimination and the Gay Minority* (A brief to members of the Ontario Legislature); Coalition for Gay Rights in Ontario; Pink Triangle Press, March, 1978.
39. *Criminal Code*, R.S.C. 1970 chap. C-34, ss. 155 and 157.
40. *Code*, s.158 (S.C. 1968-69, c.38, s.7).
41. *Code*, s.146.
42. Blackburn, "Human Rights in an International Context: Recognizing the Right of Intimate Association" (1982), 43 Ohio St. L.J. 143, 149.
43. CGRO, *op. cit.*, *supra*, note 38, 14.

although other human rights commissions, including those in Ontario and Ottawa, have recommended it.[44]

John Ely considers and rejects conventional morality or consensus as a basis for judicial review. He argues that, first, in hard cases there is no consensus for the court to discover, and that even if a consensus did exist, it would be difficult or impossible for the court to discover it. Certainly the courts are no better equipped to identify a consensus than the legislature that passed the legislation under attack.[45]

It is submitted, therefore, that under any but the most restrictive test for invalid classifications under s.15, homosexuality would qualify upon a dispassionate analysis. Homosexuals are a class identifiable by a shared characteristic who have suffered sustained discrimination. In many cases the characteristic can be shown to be irrelevant to the benefit denied or other protected opportunity, or the discrimination can be shown to be based on generalizations about homosexuals that ignore individual merit. It seems unlikely that sexual orientation is a matter of choice (although that has yet to be proven).

Discrimination on the basis of sexual orientation was considered by the Supreme Court of Canada in *Gay Alliance Toward Equality* v. *The Vancouver Sun*[46] (the GATE case). The alliance had submitted a classified advertisement to the *Sun*, offering subscriptions to its newsletter. The *Sun* rejected the advertisement, and was subsequently ordered by a Board of Inquiry under the former *B.C. Human Rights Code* to accept it.

The majority Supreme Court judgment, written by Martland, J., upheld the B.C. Court of Appeal's ruling overturning the board's order. That decision has been sharply criticized in at least two comments,[47] but what is particularly interesting to note here is that the court did not decide that homosexuality amounts to reasonable cause for discrimination. Instead, Martland, J. based his decision on freedom of the press considerations, upholding the newspaper's right to accept or reject material for publication according to its own policies.

Martland, J. also held that the rejection of the advertisement was not based on the homosexuality of the persons tendering the material for publication, but on the contents of the advertisement itself. GATE, he implied, was not being discriminated against because it was made up of homosexuals; it was being denied access to the classified columns because it wanted to advertise a homosexual journal.

Thus the majority decision in GATE cannot provide any guidance as to whether sexual orientation might be held to be a protected classification under s.15 of the *Charter*, since it did not go so far as to hold that homosexuality satisfied the "reasonable cause" exception in the former *B.C. Code*.

The European Court of Human Rights has recognized the rights of homosexuals under the European Convention on Human Rights' privacy pro-

44. *Life Together*, Report of the Ontario Human Rights Commission to the Ontario Government, July, 1977; see also Mr. Fairweather's submission to the Special Joint Committee, *supra*, note 16.

45. Ely, *Democracy and Distrust*, 1980.

46. *Supra*, note 7.

47. Richard Goreham, "Comment" (1981), 59 Can. Bar Rev. 165; Jeff Richstone and J. Stuart Russell, "Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada" (1981), 22 McGill L.J. 92.

visions. In *Dudgeon* v. *United Kingdom*[48] the court ruled that Northern Ireland's sodomy law violated the convention's right to private life. If a right to privacy could be found in the Canadian *Charter*, it would support an argument that exercise of that right should not give rise to unequal treatment; s.15 should preserve equality for those exercising the right to privacy. Even without attempting to develop a right to privacy in the *Charter*, *Dudgeon* is helpful as a demonstration that other jurisdictions have recognized sexual orientation as a status deserving protection under human rights provisions.

In the U.S., privacy has been used in an effort to win constitutional protection for homosexuals, but so far with little success. Ronald Dworkin has written a stinging criticism of one of the most recent decisions,[49] *Dronenburg* v. *Zech et. al*,[50] in which the D.C. Circuit Federal Court of Appeals rejected the proposition that homosexuals had any constitutional right to protection against discrimination in eligibility for military service.

Dworkin's attack on the decision rests mainly on the court's refusal to consider the scope of the right to privacy recognized by the U.S. Supreme Court in a line of cases culminating with *Roe* v. *Wade*.[51] He raises the question of whether the privacy cases presuppose a principle ranging over sexual choice generally, or whether those cases could be limited to areas already within privacy's ambit (contraception, marriage, and abortion). "It seems doubtful that they can (be so limited)," he writes. "(I)t is difficult to form an acceptable general principle that justifies freedom of choice in some aspects of sex, like contraception and abortion, but not in others equally important to the people affected."[52] He goes on to reject the contention that the military has a "compelling state interest" justifying dismissal of homosexuals.

Assuming that a Canadian court could be persuaded to accept sexual orientation as a classification triggering the protection of s.15, there remains the question of the "reasonable limits" inquiry under s.1. Under the Canadian Bill of Rights, one test that developed for evaluating inequality was that of a "valid federal objective." In *MacKay* v. *R.*,[53] McIntyre, J. offered a detailed description of what the courts should look for in deciding whether to allow an impugned inequality to stand.

> (A)s a minimum it would be necessary to inquiry whether an inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and whether it is a *necessary* departure from the general principle of universal application of the law for the attainment of some *necessary* and desirable social objective (emphasis added).[54]

48. 1981 Y.B. Eur. Conv. on Human Rights.
49. Dworkin, "Reagan's Justice," The New York Review of Books Vol. XXXI No. 17 (8 November 1984), 27.
50. U.S. Court of Appeals, DC circuit, decided 17 August 1984.
51. 410 U.S. 113 (1973).
52. *Op. cit.*, 27.
53. [1980] 2 S.C.R. 370.
54. *Ibid.*, 423.

This test, praised by both Gold and Tarnopolsky, may provide the basis for s.1 scrutiny of unequal treatment by law. Not only does McIntyre, J. demand a rational and constitutionally valid legislative objective, but he requires that the objective be necessary and desirable, and that the inequality created in order to achieve that objective be rational, not arbitrary, and a necessary departure from the principle of equality in order to achieve the objective. His test appears to demand necessity of both means and ends; if some other means is available to achieve the objective, without the same degree of inequality, this test would appear to demand its adoption in place of the impugned provision. Such a test would, I suggest, provide a greater degree of protection that the U.S. doctrine of minimal scrutiny, which requires only that a rational connection be shown between the means used and the desired goal, and which never seems to result in the overthrow of impugned inequalities.

A similar test was adopted by Deschenes, C.J. in *Quebec Association of Protestant School Boards* v. *A.-G. Quebec*.[55] After determining that the provincial language-of-education law was directed to a valid government purpose, he asked himself whether: 1) the clause was necessary to achieve the province's legitimate aim, and 2) the rigour of the clause was not disproportionate to that purpose. In effect, the court considered the validity of the purpose and then asked whether the means employed to achieve it was over- or under-inclusive. The case was decided under the language rights provisions of the *Charter*, but the test applied to the s.1 inquiry could well be applied in s.15 cases.

The Military Example

Canada's armed forces have a long-standing policy of refusing to enlist homosexuals. In 1977, in separate incidents, the Canadian Forces expelled two women from its ranks after discovering that they were homosexual. The expulsions represented a policy that is still in force: Canadian Forces Administration Order 19-20 states that "service policy does not allow homosexual members ... to be retained in the Canadian Forces."

Homosexuals are released from the Forces under Order 10.01, Item 5(d) of the Queen's Regulations and Orders, which refers to members who have developed personal weaknesses beyond their control which impair their usefulness to the military.

Release under this order is authorized under the National Defence Act,[56] which includes several sections subjecting military personnel to dismissal. For instance, s.119 provides that "(1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment." Subs.(3) of the same section provides that "a contravention of (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces ... is an act, conduct, disorder or neglect to

55. (1982), 140 D.L.R. (3d) 33 (Que. S.C.), aff'd 1 D.L.R. (4th) 573 (C.A.).
56. R.S.C. 1970, chap. N-4.

the prejudice of good order and discipline." Thus, by incorporation by reference in the act of the policy of CFAO 19-20 cited *supra*, homosexuals are barred by law from Canadian military service.

A similar policy exists in the U.S. military, and in January, 1981, the U.S. Department of Defense issued the following justification:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to insure the integrity of the system of rank and command; to facilitate assignment and world-wide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security.[57]

The U.S. Navy, faced with a court challenge to its exclusionary policy, defended it on the following grounds, catalogued by Gifford Loda:[58]

> 1) Hostilities would erupt "between known homosexuals and the great majority of naval personnel who despise/detest homosexuality"; 2) An individual's performance of duties or regard for the proper chain of command could be unduly influenced by emotional relationships with other homosexuals; 3) The Navy recruiting effort will be adversely affected by parents concerned with their children associating with homosexuals; 4) Homosexuals might force their desires in some unwanted way on others; and 5) Homosexuals may generally be less productive than heterosexuals because of fears of criminal prosecution, social stigmatization, or loss of spouse.

It can immediately be seen that the first and third propositions rest on anti-homosexual prejudice. The question of whether prejudice among others is a reasonable basis for limiting a constitutional right is probably best answered with an analogy: Would the same justification stand if it related to an attempt to exclude Jews from the military because of widespread anti-Semitism? As Loda points out, another U.S. court noted that "the hostilities feared by the Navy are presently occurring between members of various racial groups, many of whom may detest and despise each other. Yet this tension does not justify exclusion of such groups."[59]

The concern about emotional relationships interfering with command and discipline may have some basis, but restricting its application to homosexuals ignores the fact that heterosexuals form emotional relationships as well, and

57. Department of Defense (U.S.) Directive 1332.14 (Encl. 8) A (1981). Source: John Heilman, "The Constitutionality of Discharging Homosexual Military Personnel" (1980-81), 12 Columbia Hum. Rts. Law Rev.

58. Loda, *op. cit., supra*, note 36a.

59. *Ibid.*, 106.

there is no reason to expect that gay relationships are any more likely to interfere with the military function than relationships between male and female military personnel.

There is also no evidence that homosexuals are any more likely to "force their desires in some unwanted way on others" than are heterosexuals; sexual assault is far from being a homosexual problem alone.

And finally, where is the evidence that homosexuals are less productive as a group than heterosexuals? Fear of exposure would be eliminated as a factor affecting productivity if criminal and service sanctions did not exist, and the military would be hard-pressed to come up with any empirical evidence that gays are unproductive. The same argument applies to security concerns: the notion that homosexuals are more susceptible to blackmail than others depends on the existence of sanctions causing the homosexual to fear exposure. What sort of argument relies on the detrimental impact of the impugned provisions themselves to justify upholding those very provisions?

In general, the U.S. military's rationale for excluding homosexuals is either over- or under-inclusive; each of the reasons given could as easily apply to other members of the military, and the problems involved can be dealt with on their own terms rather than by denying a whole class of individuals eligibility for military service for reasons which may be wholly inapplicable to individual gay recruits. In John Heilman's words, "Incorrect judgments about homosexuals as a class should not be used to deny employment opportunities to qualified individuals."[60]

The rationale for excluding homosexuals fails under the test used by McIntyre, J. and by Deschenes, C.J. - whatever valid objective is sought to be achieved by the exclusion, the means used to achieve the objective is not necessary, and is out of proportion to the desired objective. It is more likely that the exclusion of homosexuals is based on an "ulterior motive" offensive to the spirit of the *Charter*, that of prejudice against homosexuals as a class. The military justification, assuming it would be similar in Canada to that offered in the U.S., is arbitrary, and it appears to rest on widespread social prejudice to justify the denial of constitutional rights, and reinforces the prejudice used to justify it. To uphold the military policy on such grounds would be to deny the whole point of anti-discrimination protection, which is to shield groups from the effect of such prejudice.

It is submitted, then, that once s.15 comes into force, there will be a potent case for challenging the provisions of CFAO 19-20 as unreasonably violating the right to equality under and before the law and to equal protection and benefit of the law.

Conclusion

In this article I have suggested an interpretation of s.15 of the *Charter* affording protection from discrimination in the operation of law on the basis of sexual

60. Heilman, *op. cit., supra*, note 57, 204.

orientation. The argument is restricted to an attack on a law which differentiates on the basis of homosexuality, without attempting a broader analysis permitting a challenge to human rights codes, or relying upon the existence of a right to privacy in the *Charter*; such arguments can come later.

If the limited interpretation offered here were to be accepted, it would mark the first time Canadian courts have recognized that homosexuals are individuals of equal moral status, entitled to the same protection afforded to other classes in society. That basic recognition would be the first step in dismantling the systematic pattern of discrimination against gays in Canadian society.