

# **Adverse Impact: The Supreme Court's Approach To Adverse Effects Discrimination Under Section 15 Of The Charter**

Prepared For: Centre for Constitutional Studies

In association with

Legal Education Society of Alberta

*Constitutional Law Symposium*

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For Presentation In:

Edmonton – October 3, 2014

# ADVERSE IMPACT: THE SUPREME COURT'S APPROACH TO ADVERSE EFFECTS DISCRIMINATION UNDER SECTION 15 OF THE *CHARTER* 1

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## I. INTRODUCTION

This paper is a comprehensive review and critique of the Supreme Court of Canada's adverse effects discrimination jurisprudence.<sup>1</sup> The Court recognized this form of discrimination in its first decision under section 15(1) of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup> In *Andrews v Law Society of British Columbia*,<sup>3</sup> Justice McIntyre accepted that facially neutral laws may be discriminatory, saying that "[i]t must be recognized. . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."<sup>4</sup> Despite this promising start, adverse effects discrimination claims have played a minor role in the Court's subsequent equality jurisprudence. Only two such claims have been successful: *Eldridge v British Columbia (Attorney General)*,<sup>5</sup> decided in 1997, and *Vriend v Alberta*,<sup>6</sup> decided in 1998. The number of section 15(1) adverse effects discrimination claims that the Supreme Court has heard, whether successful or not, is also small — only eight of sixty-five cases by our count.<sup>7</sup> In addition, the Court has described the distinction between direct and adverse effects

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<sup>1</sup> Different terms are used interchangeably by Canadian courts to describe this form of discrimination: "adverse effects," "adverse impact," and "indirect discrimination." We use the term "adverse effects" in this paper as it is the most widely adopted.

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*]. Section 15 provides:

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>3</sup> [1989] 1 SCR 143 [*Andrews*]. *Andrews* involved a successful challenge to the Law Society of British Columbia's requirement that lawyers be Canadian citizens.

<sup>4</sup> *Ibid* at 164.

<sup>5</sup> [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

<sup>6</sup> [1998] 1 SCR 493 [*Vriend*].

<sup>7</sup> See Appendix I for a list of Supreme Court of Canada cases in which claims were made under s 15(1). In addition to *Eldridge*, *supra* note 5 and *Vriend*, *ibid*, the list of the Court's adverse effects discrimination cases includes *Rodriguez v British Columbia*, [1993] 3 SCR 519 [*Rodriguez*]; *Symes v Canada*, [1993] 4 SCR 695 [*Symes*]; *Thibaudeau v Canada*, [1995] 2 SCR 627 [*Thibaudeau*]; *Adler v Ontario*, [1996] 3 S.C.R. 609 [*Adler*]; *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*]; and *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*]. In *McKinney v University of Guelph*, [1990] 3 SCR 229 at 279 a challenge to a mandatory retirement policy that explicitly differentiated among employees based on age was incorrectly characterized by the majority as an issue of adverse impact discrimination. In *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657 at paras 42-43, the court focused on "discrimination by effect" but the adverse impact in that case was not due to a facially neutral law or policy, but rather to the globally under-inclusive nature of a series of targeted, ameliorative health care programs for children with autism. The difficulties of distinguishing between direct and adverse effects discrimination is discussed in Part II.B.2. Cases such as

discrimination as “artificial”<sup>8</sup> and “malleable”<sup>9</sup> in the context of claims made under human rights statutes. Despite the scarcity of successful adverse effects discrimination claims and the indeterminate nature of the concept itself – or perhaps because of these factors – the Court has recently granted leave to appeal to two section 15(1) adverse effects discrimination cases: *Carter v Canada (Attorney General)*<sup>10</sup> and *Taypotat v Taypotat*.<sup>11</sup> As a result, this is an opportune time to review the Court’s treatment of adverse effects discrimination under the *Charter* and the contentious issues within that body of case law.

In Part II we review the Supreme Court’s adverse effects discrimination cases in the context of the three different analytical approaches to section 15(1) that the Court has developed over the years.<sup>12</sup> We also comment on relevant cases from the human rights context and the Court’s doubts about the viability and utility of adverse effects discrimination as a separate concept. Part II concludes with a summary of the contentious issues revealed by our review, including difficulties in recognizing adverse effects discrimination in some cases, often as a result of the size or vulnerability of the group or sub-group making the claim; issues with causal connection, sometimes related to evidentiary concerns and assumptions about choice; problems with locating adverse effects claims within narrow definitions of discrimination; and the Court’s tendency to avoid adverse effects claims under section 15(1) when it can decide cases on other grounds. In Part III we discuss *Carter*, one of the two adverse effects cases which are currently awaiting hearing by the Supreme Court, focusing on how these contentious issues were dealt with by the lower courts and how they might be addressed by the Supreme Court. We conclude with our thoughts on the way forward for adverse effects claims.

## II. HISTORY AND CURRENT FRAMEWORK OF THE COURT’S SECTION 15(1) JURISPRUDENCE

As already noted, Canadian equality rights jurisprudence can be divided into three eras marking three different approaches to section 15(1) *Charter* claims. The first era, 1989 to 1999, was the

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*New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 are not included in Appendix I because s 15(1) was not one of the issues in the Supreme Court; equality principles were instead used to help interpret s 7 in the concurring judgment of L’Heureux-Dubé, McLachlin and Gonthier JJ.

<sup>8</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 27 [*Meiorin*]. Tawney Meiorin, a firefighter with the British Columbia Ministry of Forests for three years, successfully challenged the requirement that all employees pass a particular physical fitness test, as evidence established that, owing to physiological differences, most women have a lower aerobic capacity than most men and, unlike most men, most women could not increase their aerobic capacity enough with training to meet the aerobic standard of the test she failed.

<sup>9</sup> *Ibid* at paras 29 and 30.

<sup>10</sup> 2012 BCSC 886, rev’d 2013 BCCA 435, leave to appeal to SCC granted 2014 CanLII 1206 (SCC) [*Carter*, cited to BCSC].

<sup>11</sup> 2013 FCA 192; leave to appeal to SCC granted 2013 CanLII 83791 (SCC) [*Taypotat*]. This case involves an education requirement in a First Nations election code. The Federal Court of Appeal found that the requirement had discriminatory adverse effects on potential election candidates on the basis of age and Aboriginality-residence. *Taypotat* will not be discussed in this paper.

<sup>12</sup> Jennifer Koshan and Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19 at 19 [“Continual Reinvention”].