

Section 15 of the *Canadian Charter of Rights and Freedoms*

Section 15 of the *Canadian Charter of Rights and Freedoms* states:

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

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

A. Introduction

Section 15(1):

Section 15(1) of the *Canadian Charter of Rights and Freedoms* says that every individual has a right to equal treatment before the law. This section prohibits certain forms of discrimination from being perpetrated by the government of Canada. Therefore, if a government action results in discrimination towards an individual or a group of people, this government action could be the subject of a section 15 challenge.

Section 15(2):

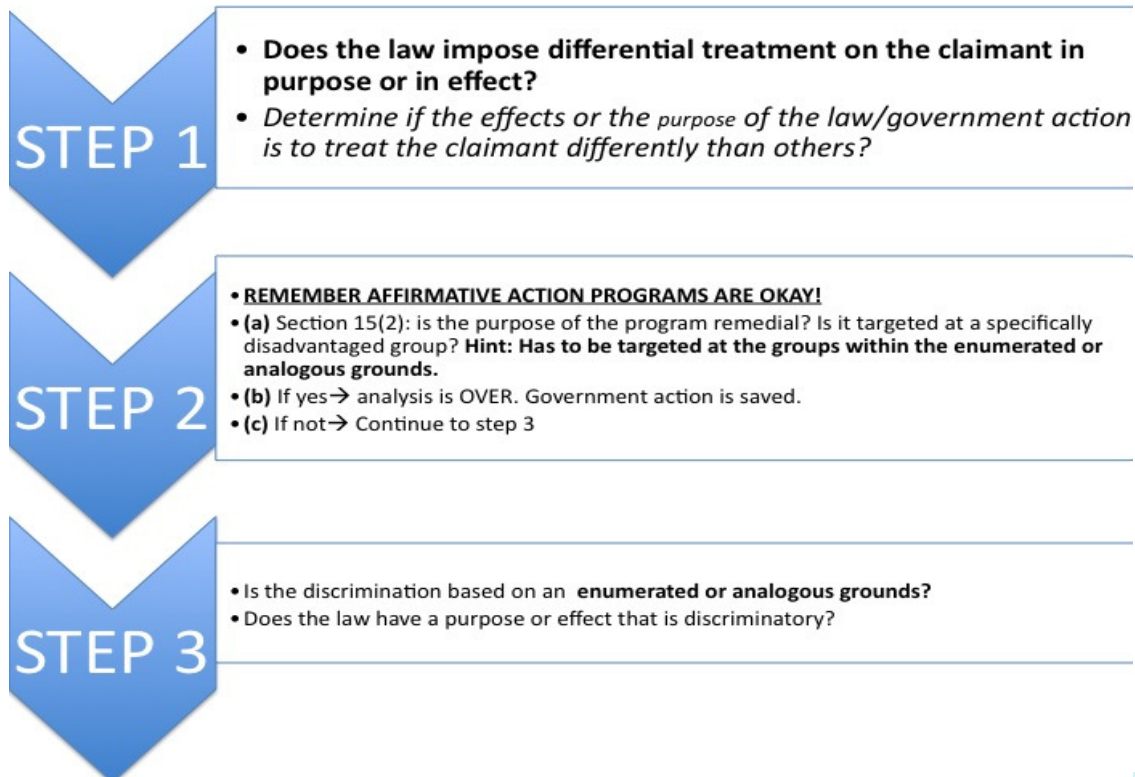
The purpose of this section is to ensure that there can be exceptions to s. 15(1). These exceptions are known as “ameliorative programs,” or “Affirmative Action Programs.” These are programs that are designed by the government to elevate historically disadvantaged groups. These programs necessarily treat groups of people differently. They also, by definition, are inclusive of some groups of people and exclusive of others. Despite this differential treatment, section 15(2) says that these programs are “safe” from *Charter* challenge.

Why?

The reason for this exception is that some groups have experienced historical disadvantages. In order to correct these inequalities, the government enacts programs to help them to recover from this disadvantage.

B. Test for Section 15

3-STAGED ANALYSIS



Steps 2 + 3 Enumerated or Analogous Grounds:

- Section 15 does not require that all people be treated in the same way regardless of the circumstances. First, you must first show that the government or the law is treating you differently. Then, you have to show that the discrimination is based on an enumerated or analogous ground.
- The Supreme Court has said that the central purpose of section 15 is to promote “substantive equality” by fighting discrimination. Therefore, courts will focus on whether the law or government action is discriminatory in creating a disadvantage by perpetuating prejudice or stereotyping against the group or person.
- Section 15 prohibits discrimination on the following enumerated grounds: race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability.
- Section 15 also prohibits discrimination on “analogous grounds”-meaning comparable grounds that are not specifically listed in section 15. The courts have held that something is analogous if it is a personal characteristic that you cannot change at all, or that you cannot change without great personal cost or difficulty.

MAKE SURE THE CHARTER APPLIES BEFORE YOU TEST S.15! SEE PAGE 1.

Step 1-Show Differential Treatment:

- Step 1 requires that you show that the law of government action has a differential treatment on the claimant as opposed to others.
- Sometimes the differential treatment is often apparent on the face of the challenged law or policy. This is referred to as “direct discrimination.”
- However, on other occasions, no difference in treatment will be apparent on the face of the law-however, differential treatment could result from the effects of the law. When a law that appears neutral has a negative differential impact on the basis of a prohibited ground of discrimination (the effects of the law), the result is referred to as “adverse effects” discrimination.
- Adverse effects discrimination is also prohibited by section 15(1).

Steps 2 + 3 Some Analogous Grounds

Recognized Analogous Groups:

- **Sexual orientation** (*Egan* 1995; *Vriend* 1998; *M v. H* 1999; *Hislop* 2007)
- **Marital status** (*Miron* 1995; *Walsh* 2002; *Hodge* 2004)
 - Married, common law, separated, divorced
- **Citizenship** (*Andrews* 1989; *Lavoie* 2002)
- **Aboriginality-residence** (*Corbiere* 1999)
 - I.e. if live off-reserve or on-reserve court should not treat you differently
- **Receipt of social assistance** (*Falkiner* 2002 Ont CA)
 - Held that in Ontario if you were receiving social assistance could be treated analogous to other grounds

Not recognized analogous groups:

- **Poverty** (*Banks* 2007 Ont CA);
 - Despite *Falkiner*, poverty as a broader ground not accepted as legitimate analogous grounds
- **Province or municipality of residence** (*Haig* 1993; *Siemens* 2003);
- **Recreational marijuana users** (*Malmo-Levine* 2003)
- Occupation (*Delisle* 1999)

Step 3-Is the purpose or effect discriminatory?:

In *Law v Canada*, the SCC ruled that for government action or legislation to be found discriminatory, it must be shown to violate human dignity. In other words, it must harm or devalue an individual’s sense of self-respect or self-worth. Also in that case, the Court considered the following:

- a) Pre-existing disadvantage (did the claimant experience pre-existing disadvantage or vulnerability?)
- b) Correlation between the grounds of the claim and the actual needs, capacities, and circumstances of the claimant (is there a link between the grounds that form the basis of the claim and the harm that forms the substance of the claim?)
- c) Ameliorative purpose or effect of the law on more disadvantaged groups (does the discrimination positively serve an even less advantaged group?)
- d) Nature and scope of interest (the more immediate and intense the effects of the law or action, the more likely it will be found discriminatory).

Notably, not all of these will apply in all cases, and other factors may be more relevant.

C. Case Law

Andrews v The Law Society of British Columbia (1989, SCC):

- **Facts:** In this case, Andrews, a British subject and a permanent resident in Canada was applying for membership to the British Columbia Bar Association. He met all of the requirements for admission to the provincial bar except that he was not a Canadian citizen. Section 42 of the Barristers and Solicitors Act required that all members of the Bar be Canadian citizens. As such, Andrews brought a motion to strike down the requirement for citizenship on the grounds it violated section 15 of the *Charter*.
- **Issue:** The issue before the Supreme Court was whether section 42 of the *Barristers and Solicitors Act* violated section 15 of the *Charter*. If so, could the action be saved by section 1?
- **Held:** The court held that section 42 of Barristers and Solicitors Act violated section 15 and it could not be saved under section 1.

Withlerv Attorney General of Canada (2011, SCC)

- **Facts:** In this case, the appellants were widows whose federal supplementary death benefits were reduced because of their deceased's husband's ages. The appellants claimed that the age-based benefit reduction, which was part of the legislation, violated section 15 of the *Charter*.
- **Issue:** Did the statutory scheme that reduced benefits based on age violate section 15?
- **Held:** No. The court held that section 15 only prohibits substantive discrimination on an enumerated or analogous ground. You can make out substantive discrimination by showing that a law, in purpose or effect, perpetuates prejudice and disadvantage to members of a certain group based on an enumerated or analogous ground or by showing that the law perpetuates a stereotype. The analysis requires you to take a contextual approach. In so doing, the court found that the purpose of the survivor benefit was not to provide a long-term benefit. The scheme was designed to benefit a number of different groups, and the benefit reductions reflected the reality that different groups of survivors have different needs.