THE APPROACH TAKEN BY THE DEPARTMENT OF JUSTICE IN EXAMINING EQUALITY ISSUES

The discussion paper on equality issues in federal law presents a number of issues raised by section 15 of the Charter where consultation is considered necessary before making difficult policy choices. Essentially the choice of issues presented is a consequence of the approach taken by the Department of Justice when reviewing federal legislation to assess conformity with the Charter equality guarantees. This paper briefly sets out the approach taken.

Process

The Department of Justice was given the lead responsibility to review all of the Federal legislation and report to the government on any lack of conformity with the Canadian Charter of Rights and Freedoms. To facilitate this review the legal service units of the Department of Justice in each government department were asked to review, in consultation with officials of their client department, all of the legislation administered by that department. This approach was adopted because the department which administers the legislation is most familiar with how the legislation functions and the problems which may arise from it.

These legal service units were requested to determine if any distinctions were made on the basis of the grounds listed in section 15 of the Charter, in Canadian Human Rights legislation

as in international Covenants to which Canada is a signatory. This broad approach was adopted upon the assumption that the list of grounds in section 15 was open-ended both because of the particular wording of section 15 of the Charter and the statements made concerning this point by government witnesses before the 1981 Special Joint Parliamentary Committee on the Constitution.

Also as as part of this initial review the legal service units were asked to indentify any possible policy rationales that might justify the distinctions identified. Without the underlying rationale for these distinctions it would be very difficult to make an assessment of the legal risk that such distinctions present with respect to the Charter guarantees.

When all of the legislation was examined these reports were sent to the Human Rights Law Section of the Department of Justice. Upon an analysis of these reports it became apparent that some of the distinctions identified existed in more than one piece of legislation, had an impact on a substantial number of people in a wide range of factual circumstances and raised complex social and economic issues. One example is mandatory retirement rules which make a distinction on the basis of age. Not only do these distinctions raise questions of concern to the federal authorities but also to the provincial authorities because many of these distinctions also exist in provincial laws. As a consequence, it is very difficult to make a clear assessment of the legal risk of non-compliance with section 15 of the Charter

without knowing all of the social and economic impacts of many of these laws.

On the other hand some of the distinctions identified were clearly in conflict with the Charter equality guarantees and did not have broad ranging impacts. For example section 69(3) of the Bankruptcy Act provides that a settlement made on or for the wife or children of the settlor are not void against a trustee in bankruptcy. This distinction on the basis of sex had no rationale beyond stereotypic notions of dependency relationships in the Canadian family. No complex social or economic concerns would be raised by a proposal for change because the impact of amending the legislation would not be substantial nor would it undermine any of the objectives of bankruptcy legislation. As a consequence this sex-based distinction could be removed by legislative amendment which has been proposed in Bill C-27.

Substance

(a) The Meaning Of Equality

One of the initial hurdles in conducting the review was to decide on the meaning of equality in the Canadian context, a task that is not easy because there is no universally accepted definition of equality. Equality requires the recognition of the equal dignity and worth of all individuals. We accepted for the purposes of our review that equality at least means that no one should be denied opportunities for reasons unrelated to abilities

such as their sex or their race. It does not mean, however, treating everyone the same for all purposes. Sometimes equality means treating a person differently because of his or her differences. For example to treat a blind person and a sighted person the same for all purposes would not constitute equality. Secondly laws could not function without making distinctions. The concern must be for the nature of the distinction and the justification for it. For example it would be much easier to accept a distinction for tax purposes on the basis of income earned than one made on the basis of race. Equality must also be real not pro forma. This means that all forms of discrimination must be eliminated irrespective of whether they exist on the face of legislation, in its administration or arise from the impact of the legislation. For example a law which requires a person to be 5' 10" tall for employment as a police officer is neutral on its face. It can also be applied equally to all applicants. However its impact is to exclude a large proportion of women and minorities whose average height is less than 5' 10".

The present accepted goal in Canada appears to be the pursuit of meaningful equality which will permit access to society's benefits and full development of individual potential without denial on the basis of distinctions that are not acceptable (such as race) nor relevant to the benefits or opportunities sought. Distinctions which are considered unacceptable have been developed as society progressed. For example while distinctions based on race may have been acceptable at an earlier point in history they are now considered unacceptable. Equality, however,

does not simply mean eradicating discrimination. It also requires looking at the disadvantages suffered by individuals and groups in the past and assessing how these can be overcome to facilitate meaningful equality. An equality which permits individuals to choose their life style, employment, etc., without being inhibited by reference to characteristics such as race or sex. In reviewing laws and the distinctions made in them this was always a primary focus.

(b) Interpreting Section 15

After discussing theories of equality we had to look at the guarantees in section 15. For the purpose of our review, we decided to adopt an expansive interpretation of the equality guarantees to ensure that all distinctions would be considered in the light of the broadest interpretation that the words in section 15 could reasonably bear. Section 15 guarantees of equality are very broad and go beyond those contained in the Canadian Bill of Rights. While there appear to be several statements it seems that there is only one broad guarantee of equality. The use of specific references was meant only to ensure that the equality guarantees are interpreted broadly. That is equality must exist in all of the range of activities relating to laws including on the face of the legislation, in its administration, in its impact and also where it is providing benefits. Support for this position can be found in the briefs presented to the 1981 Special Joint Parliamentary Committee on the Constitution and in the expansion of the section 15 guarantee

from the original proposals to its present form. Because the guarantees in the Canadian Bill of Rights had been given a narrow interpretation, many groups urged this broader wording to ensure that the guarantee would be interpreted generously.

(i) The Meaning Of Discrimination

The next question which arises is the effect of the clause without discrimination. For example, mandatory retirement is a distinction premised upon age but is it discrimination? We will use mandatory retirement as an example of the questions that arise and how we dealt with them in the process of interpreting section 15.

In past Canadian jurisprudence discrimination has primarily been discussed in the context of Human Rights Codes which are aimed generally at discriminatory practices in employment, accommodation and services. The focus of Human Rights Codes seems to be acts or policies of partiality or prejudice in treatment relating to members of groups defined by reference to actual or perceived characteristics. It is clear that the prohibition in Human Rights legislation was not against all distinctions but against those which are based on unjustifiable grounds.

Under Human Rights laws when a policy appeared to be discriminatory several further issues arose. These were whether discrimination encompassed both differential treatment and

disparate impact; and whether intention to discriminate is required to succeed in a claim of discrimination. Differential treatment is used to describe the situation where an individual or group is treated differently by reference to a trait such as race or sex and this appears on the face of the legislation or in its administration. Whereas disparate impact, as we outlined in our example of height and weight restrictions, is used to describe the situation where the law is both facially neutral and neutral in its administration but it has a disproportionately adverse impact on one group.

When interpreting Human Rights Codes intention to discriminate has not been required when it is treatment that is in question. Where the issue has been of concern is with respect to discrimination which results from disparate impact. There are now two cases (Re Ontario Human Rights Commission and Simpson Sears, (1982) 138 D.L.R. (3d) 611 (Ont. C.A.) and Re Canadian National Railway and Canadian Human Rights Commission, 147 D.L.R. (3d) 312 (Fed. C.A.)) before the Supreme Court of Canada which raise this issue as it pertains to Human Rights legislation.

While the Human Rights jurisprudence is helpful it cannot be totally applied to the Charter. The question of whether discriminatory intention is required arises as a matter of statutory interpretation of the wording in the Codes. Secondly under the Canadian Human Rights Act and the provincial Codes a finding of discrimination depends upon a conclusion that no

justification exists for the distinction. In essence if the treatment or impact is on the basis of a prohibited ground it will be discrimination. Under the Charter, there is a question as to whether a distinction can be justified under the wording of section 15, operating as a self-contained provision, without resorting to section 1 of the Charter, or whether any such justification can only be accepted under section 1. For the purposes of our review we did not consider it necessary to ultimately determine that point. We were aware that the Supreme Court of Canada has adopted a very cautious approach in resorting to section 1 when interpreting other rights in the Charter. And therefore, we were aware of the need, out of respect for the Charter, to adopt an approach which would permit the broadest interpretation of section 15 without reaching a conclusion on whether limitations would have to be justified under section 15 or section 1 in any given situation.

As a consequence, for the purposes of our review, we adopted the view that discrimination generally means adverse treatment or effects on the basis of grounds that have been recognized in the Charter or other Human Rights intruments as a source of unjustifiable differentiation.

Also to ensure the most generous interpretation for review purposes we decided not to look for intention where distinctions were identified which prima facie appeared to be discriminatory.

To use our example, mandatory retirement is a distinction based upon age - a ground that is considered inappropriate under section 15. When these laws are examined to assess their effect it is apparent that they have adverse consequences for individuals who are compelled to retire at a specific age because of a general societal assumption relating to age and not upon the basis of individual merit. As a consequence this raises a prima facie case of discrimination.

(ii) Justification

Once a distinction appeared to be discriminatory, further considerations arose. These were whether a valid justification existed for the distinction which seem to result in inequality. To make that assessment we adopted a test similar to that put forward by Mr. Justice McIntyre in MacKay v. The Queen [1980] 2 S.C.R. 370 where he said in discussing what would be an acceptable departure from the general principle of equal application of the law:

> I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any 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 attaintment of some necessary and desirable social objective.

This approach involves the consideration of the aim or objective of the relevant distinctions and the assessment of the means

employed by the law to achieve that objective. In essence there is a relationship between the object of the distinctions and the need to employ the particular grounds that are used to achieve that object. It is likely that the use of some grounds such as age will be more readily justifiable than, for example, race. For example requiring a youth to be 16 to drive an automobile is likely an acceptable means to achieve the protection of both the youth and others on the roads. However using race or sex would be totally unjustifiable.

While we adopted Mr. Justice McIntyre's approach we did not necessarily accept that Mr. Justice McIntyre's formulation itself would be totally adopted under the Charter. However, his test provided a very useful mechanism to assess the validity of distinctions which appeared to be discriminatory. Using this analysis and our example of mandatory retirement laws the problems can be exemplified. It was suggested from studies and input from departments that mandatory retirement laws may have more than one objective. A number of these suggested objectives have been presented in the discussion paper. From these suggestions raised it is apparent that there is a need to have more social and economic facts. For example to determine if provision of jobs for young people is an objective of mandatory retirement and if it is, whether it is a valid one, information is needed concerning the correlation between retirement and job openings for young people.

Even if this objective or any of the other suggested ones can be accepted as valid for mandatory retirement laws there is concern about the use of a prescribed age of mandatory retirement as the mechanism to accomplish them since there may be no actual correlation between the age and the physical or mental capacity of the individual to perform the job in a fully productive manner. In such a case compulsory retirement may unduly restrict the right of individuals to be treated on the basis of merit. There may be other alternatives that are less restrictive of individual rights. However, it is difficult in the absence of more information to determine alternatives which may be more acceptable to both the spirit and the letter of the Charter equality guarantees. If all alternatives can be identified through a consultation and information gathering process then a better assessment of legal risk can be make.

Some suggestions have been put forward such as incentives for early retirement which would permit retirement decisions to be made on an individual basis. A second suggestion put forward was to have personal evaluation systems for all employees. These have been presented in the discussion paper.

Although not necessary to an analysis of mandatory retirement, the example which we have used to discuss our approach to section 15, we were aware that section 28 may have an impact on the assessment of distinctions made on the basis of sex. Views differ on the interpretation of section 28 ranging from it being merely an interpretive guide to stating that it does not permit

a[illegible] distinctions on the basis of sex. Rather than adopt a specific approach we accepted that sex distinctions may only be acceptable where there are important objectives and using sex as classification is the only means to achieve this.

Also section 15(2) was used in our process to determine of a distinction could be justified on the basis that it was an affirmative action program. However, the review did not result in suggestions for the creation of any affirmative action programs nor an assessment of the validity of existing ones since its purpose was to assess conformity of legislation.

Finally sections 25 and 27 which pertain to native and multicultural guarantees were considered in determining whether distinctions were justified. For example the Indian Act makes a distinction on the basis of race. Yet this is likely justifiable because of the guarantees in section 25 and the special history of aboriginal peoples in Canada.

Not all issues were put in the discussion paper. Most of the issues in the discussion paper are those where a similar process of assessment resulted in reaching the point where complex social and economic concerns made it difficult to determine whether provisions were in compliance with both the spirit and the law of the Charter. Also they are generally issues which affect more than one department and which involved broad principles which may extend beyond their immediate application in existing laws. We also assumed that with appropriate information and consultation

distinctions, which have not identified in the paper, could be more readily assesses with a view to deciding whether they could be justified under the Charter.

As such then, I would say that this Committee is not being asked to provide legal opinions on these issues raised. Rather you are being asked to examine all of the social and economic information relating to these issues through a process of consultation and to recommend alternatives where this is feasible.