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# Now it's my rights versus yours:

## Equality in tension with other fundamental rights and freedoms

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## Introduction

Legal claims pitting individual human rights against one another are increasingly at issue before Canadian courts and tribunals.

In the past, these kinds of cases have required courts to adjudicate complicated contests between, for example:

- a sexual assault victim's right to privacy in medical and counseling records and an accused's right to full answer and defence;
- a child's right to life, liberty and security of the person and her parents' right to freedom of religion; and
- a woman's religious right to wear a niqab while testifying in court and an accused's right to a fair trial.

Among the most challenging of the "rights contests" cases are those that involve the right to equality under section 15 of the Charter.

This research considered how the existing framework for addressing competing constitutional rights, which requires judges to "reconcile" or "harmonize" the rights in issue without preferring one over the other, poses specific risks to equality-based claims.

It considered how the reconciliation framework operates to the detriment of equality interests with specific reference to cases where the equality rights of GLBTQ individuals are pitted against the religious rights of others.

### Honourable Justice Frank Iacobucci

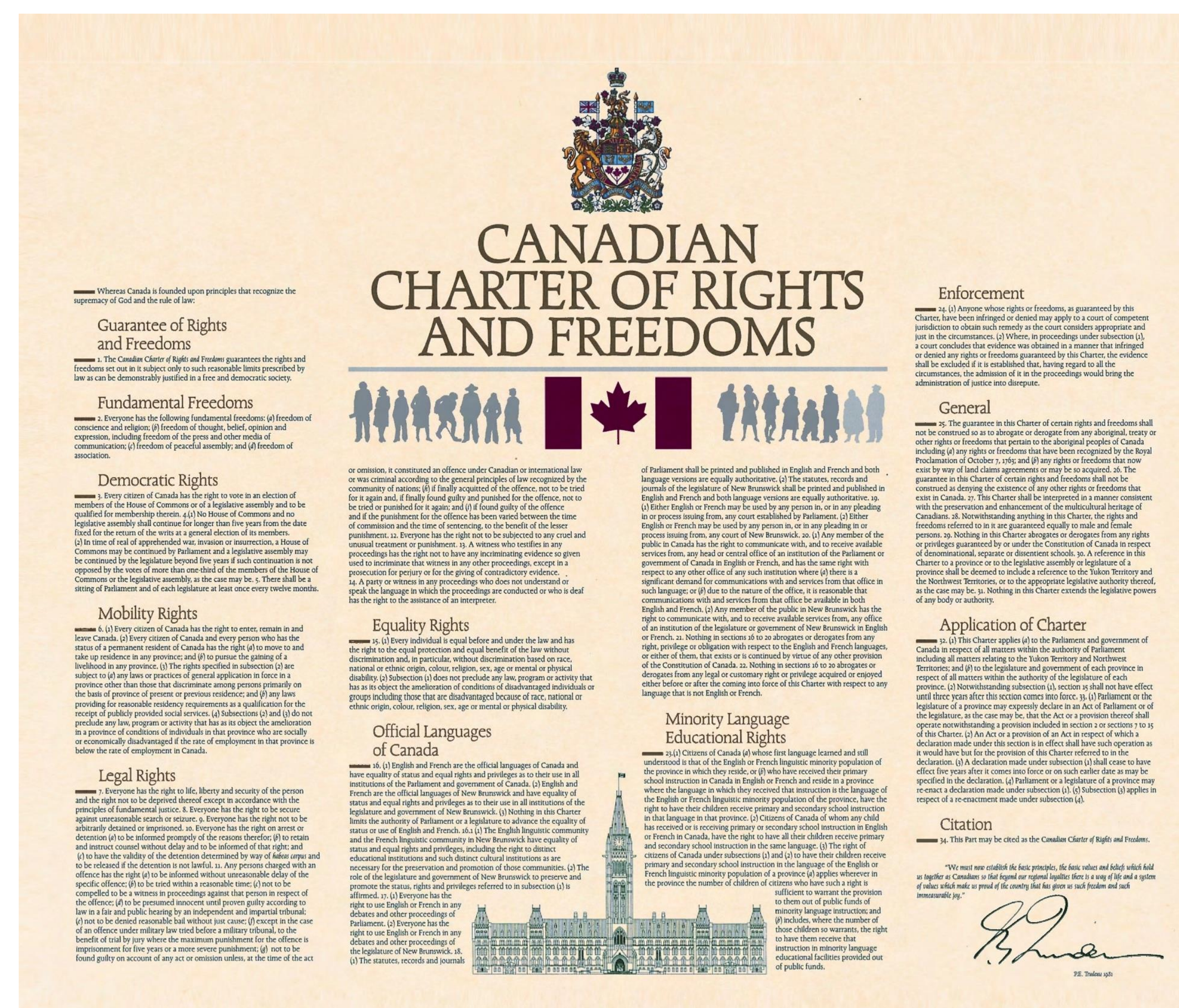
Justice Iacobucci's article "Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) inspired much of this research.

In his article Iacobucci discussed the difficulties inherent in reconciling competing *Charter* rights and examined how the Supreme Court of Canada had addressed that conflict in a highly contextual manner.

My research was interested in examining case law from the Supreme Court of Canada that dealt with conflicting *Charter* rights following the publication of Iacobucci's article.



## Canadian Charter of Rights and Freedoms



### Section 15(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.

Analogous grounds included in s. 15(1) are immutable personal characteristics that have been recognized by the courts. This includes sexual orientation, off-reserve Aboriginal status and citizenship.

## Methods

The research was limited to Supreme Court Cases between January 1<sup>st</sup>, 2004-February 28<sup>th</sup>, 2014.

I researched secondary sources that pertained to the issue of reconciling *Charter* rights in order to identify relevant cases.

I utilized legal data bases such as QuickLaw, WestLaw and CanLii to search for Supreme Court Cases that touched on s. 15 of the *Charter* as well as other cases where *Charter* rights came into conflict.

Once I had identified relevant cases, I examined how the SCC addressed reconciling rights, if it did at all.

## Results to date

From January 1, 2004 to February 28, 2014 there were very few cases at the Supreme Court level that directly addressed reconciling *Charter* rights, particularly those addressing s. 15.

*Reference re Same-Sex Marriage*, [2004] 3 SCR 698 and *Saskatchewan v Whatcott*, [2013] 1 SCR 467 were the two most relevant cases that I found for this research. In these case sexual orientation was being reconciled with the freedom of religion and freedom of expression, respectively.

In the first case the SCC found that "the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another." (Para 46)

In the second case the SCC found that "People are free to debate or speak out against the rights or characteristics of vulnerable groups, but not in a manner which is objectively seen to expose them to hatred and its harmful effects." (Para 145)

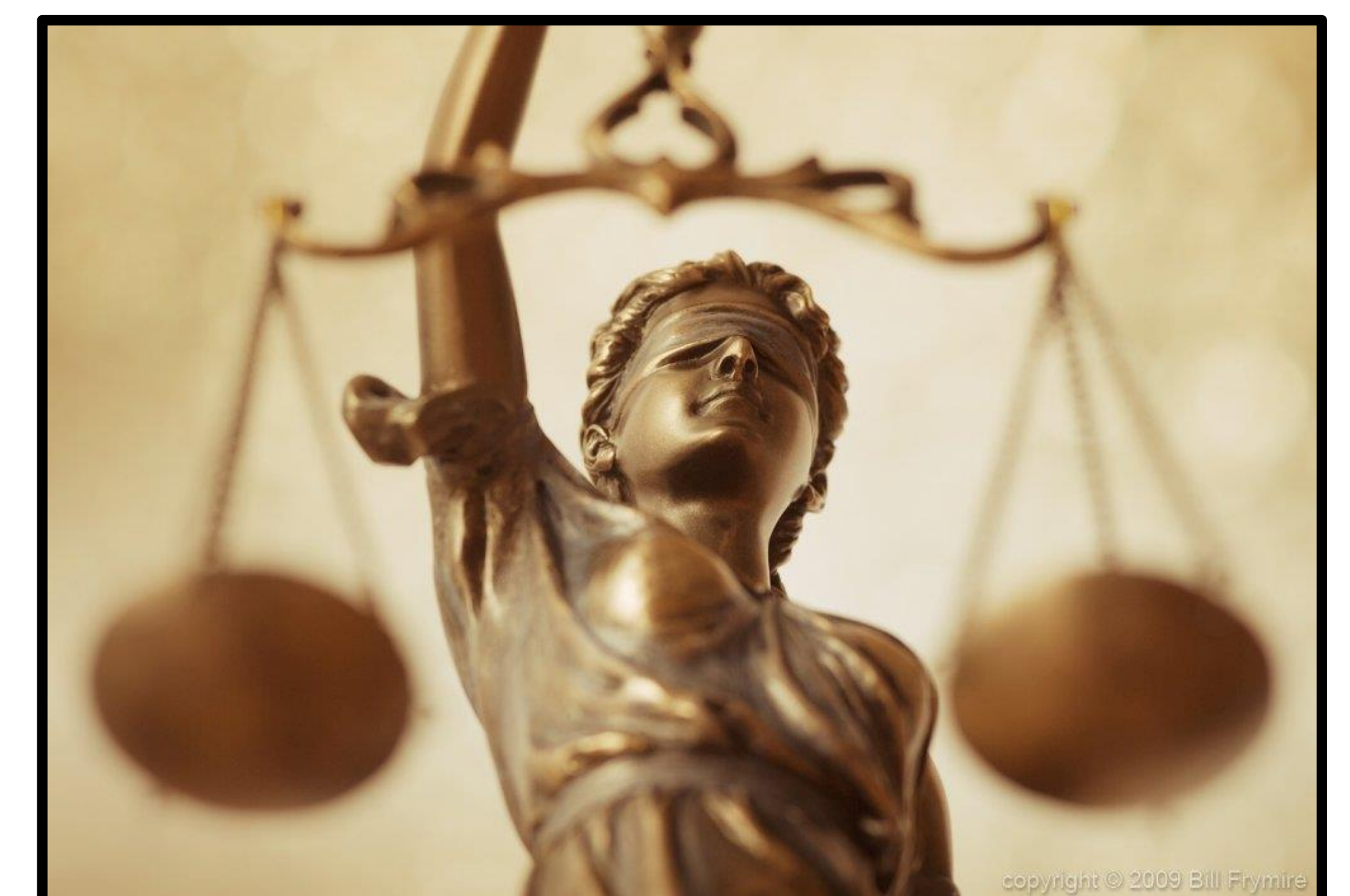
The Supreme Court of Canada often dealt with s. 15 cases by applying a s. 1 *Oakes* analysis to balance the equality with other contested rights or values.

Often, if there was an opportunity to address a different *Charter* right such as s. 7 it seems that the court was more likely to address that right and decline to analyze s. 15.

What was interesting to note in this research was the number of cases that there was an opportunity for a section 15 analysis to be used in a Supreme Court Case, but it was not addressed.

## Conclusion

Though I have not completed my research, results to date suggest that the Supreme Court of Canada has difficulty in addressing cases involving s. 15. Equality's elusive definition may be a factor in the court's difficulties.



## Bibliography

1. *Reference re Same-Sex Marriage*, [2004] 3 SCR 698
2. *Saskatchewan v Whatcott*, [2013] 1 SCR 467

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