

## **Women and the Equality Guarantee of the *Canadian Charter of Rights and Freedoms*: A Recap and Critique**

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In 1982 Canada enacted the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> a key section of which sets out a guarantee of equality rights. Section 15, this equality rights provision, came into force three years later—a time lag tailored to allow governments time to put their legislative house in equality order. Since April 17, 1985, then, Canadian courts have struggled with a constitutional commitment to equality. Over the space of 24 years the Canadian Supreme Court has seen consensus emerge and disappear repeatedly. Equality has become, in the words of the current Chief Justice of the Canadian Supreme Court Beverly McLachlin, “the most difficult right.”<sup>2</sup>

### Women and Section 15

Hopes were high among equality-seeking activists that the entrenchment of equality rights in the Constitution would effect meaningful change and transformation of Canadian society. The drafting process around section 15 was lengthy and marked by clear recognition of the inadequacy of legislative protection provided by the *Canadian Bill of Rights*<sup>3</sup> and the experience south of the border with the Equal Protection Clause of the American *Bill of Rights*. The process was also remarkable for the involvement of various women’s groups in the politics of drafting. From the start, the Canadian women’s movement had an investment in the success of section 15 as a tool for advancing women’s equality in Canada. The Women’s Legal Education and Action Fund (LEAF) was formed in 1985 with the purpose of shepherding the interpretation of section 15 in a feminist direction. LEAF has been a major presence in equality litigation, influential on a number of key issues.

The path hewn by litigation under section 15, however, has been tortuous and far from clearly favourable to Canadian women’s equality aspirations. The Supreme Court has had difficulty articulating a doctrinal test that sticks. Feminist scholarship critical of the Supreme Court’s handling of section 15 is legion and successful sex discrimination claims are rare.

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>2</sup> Hon. Beverley McLachlin, “Equality, The Most Difficult Right” (2001) 14 S.C.L.R. (2d) 17.

<sup>3</sup> Section 1(b), S.C. 1960, c.44.

*Andrews*<sup>4</sup> was the first constitutional equality case considered at the Supreme Court of Canada. The case involved a challenge by a white, male lawyer of South African citizenship to the requirement of Canadian citizenship for admission to the practice of law in the province of British Columbia. *Andrews* set in place a number of important features of the template for equality challenges. First, *Andrews* rejected the “similar-situated” test and explicitly stated that the equality guaranteed by section 15 was “substantive” equality. Second, *Andrews* stated that the test for discrimination was effects-based and that, consequently, intent to discriminate need not be shown. Finally, *Andrews* established a test that distinguishes different treatment from discriminatory treatment and that highlighted a grounds-based approach to discrimination:

...discrimination may be described as a distinction...based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.<sup>5</sup>

The unanimity of *Andrews* soon dissolved and the Court fractured three ways in a series of equality decisions released in 1995.<sup>6</sup> It was not until 1999, in a case called *Law v. Canada*,<sup>7</sup> that a united court reemerged. *Law*, an age discrimination case, resulted in an elaborate framework for section 15. The framework emphasized recognition of essential dignity as the purpose underlying protection of equality and set out four contextual factors critical to finding discrimination.

The *Law* test has resulted in tremendous criticism. Its complexity, the too general and individualistic nature of essential dignity, and the overlap between the contextual factors and what is already considered in section 1 (the justificatory provision of the Canadian *Charter*) are among the faults commentators discuss. It has not gone unnoticed, as well, that discrimination claims under the *Law* test tended much more often than not to be unsuccessful. The promise a constitutional guarantee of equality once held out seemed mired in doctrinal intricacies, judicial verbiage, and neo-liberal ideology.

Last year, in explicit response to these criticisms, the Supreme Court issued a new formulation under section 15. *R. v. Kapp*<sup>8</sup> is a case involving challenge to an aboriginal specific communal fishing licence. In this case, the Supreme Court reinstated the *Andrews*’ template, summarizing

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<sup>4</sup> *Andrews v. Law Society (British Columbia)*, [1985] 1 S.C.R. 143 (*Andrews*).

<sup>5</sup> *Andrews*, at 174.

<sup>6</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.

<sup>7</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

<sup>8</sup> *R. v. Kapp*, [2008] 2 S.C.R. 483.

it as a two step test: (1) does the law create a distinction based on an enumerated or analogous ground?; (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The status of the *Law* test is unclear. Essential dignity is supplanted as the primary purpose of section 15 but it is not clear what stands in its stead.

Cases following *Kapp* provide no further elaboration of what claimants under section 15 must show. Clearly the newly stated *Andrews* test is central. Worth noting, however, is that the *Law* test and factors appear, in practice, to have been tossed out. They are simply no longer referred to in the post-*Kapp* Supreme Court cases. But what fully replaces them is unclear.

It is clear that Canadian constitutional equality jurisprudence is again at a crossroads. While the pathway is not yet set out, the barriers past cases throw up are obvious. The rest of this note briefly details some of these.

### Key Jurisprudential Issues for Women's Equality

#### 1. Substantive Equality

In *Andrews*, the Supreme Court of Canada embraced the ideal of “substantive” equality as the animating concept underlying section 15. This commitment has been repeated in almost every section 15 case that follows. Yet, the results of these cases are often far from what feminist scholars understand to be required by substantive equality. The Court has been particularly weak on embracing social and economic dimensions to equality and the impact material deprivation can have on individual dignity. The recent case of *Kapp* described above hints ominously that state obligations under the general anti-discrimination provision of section 15(1) may be merely negative and not affirmative:

Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping.<sup>9</sup>

Were the Court to confirm this in subsequent cases, this would be at significant odds with a commitment to substantive equality. It will be important for the Court to remind itself of what substantive equality involves by way of state action and a deep appreciation of material context.

#### 2. Claimant and Comparator Groups

A critical task under equality analysis has been the choosing of the attributes or differentiating features that are relevant to the equality claim at issue. Equality is treated as an unavoidably comparative concept and thus requires the court to choose both the parameters of the

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<sup>9</sup> *Kapp*, para. 25 (emphasis in original).

claimant that matter to the claim and the characteristics of the group to which the claimant is contrasted in looking for differential and, ultimately, discriminatory treatment. The Supreme Court has stated that the claimant can generally choose the comparator groups but that the Court may “refine the comparison presented by the claimant where warranted.”<sup>10</sup> Three connected challenges arise in relation to this part of an equality argument.

First, how the claimant and comparator groups are cast, and thus the contrast their comparison sets up, can render visible or invisible the discrimination harm of which the claimant complains. Thus in the case of *Gosselin*<sup>11</sup> the claimant’s sex and social assistance recipient status were read out of the equality analysis. The case was understood as simply a claim of age discrimination and the gender specific harms, for example, experienced by young women limited to \$170 a month social assistance payments were ignored by the majority decision. The result was that the contextual factors considered in the discrimination complaint were “thinner” and less reflective of the actual harms at issue.

Second, Supreme Court section 15 jurisprudence has always required that discrimination be along a ground enumerated in the text of section 15 or a ground analogous to an enumerated ground. Yet, the Court has not always shown insight into how treatment along an enumerated or analogous ground can be difficult to discern. For example, the manifestation of gender in Canadian society is often subtle and frequently is revealed only through rigorous challenging of accepted truths. Sex equality advances often have come through recognition that traits or distinctions not traditionally thought of as gender-based are, in fact, expressions of gender. It took time, for example, for Canadian law to recognize that discrimination based on pregnancy is really sex discrimination.<sup>12</sup> The Court’s section 15 decision in *Trociuk*<sup>13</sup> repeats a failure to understand the complex playing out of gender relations (this time in relation to familial relations) as part of the picture at the centre of the complaint.

Third, as Patricia Williams writes, equality analysis risks recasting “the general group experience [of the marginal] as a fragmented series of specific, isolated events rather than a pervasive social phenomenon....”<sup>14</sup> The further away from the mainstream, or the privileged norm, a claimant is, the more difficult it has been for the Court to see that it is the norm, not the claimant, in which the fault for inequality lies. In part, this is because the most marginalized will be least likely to find a convincing comparator group against whom their equality harms show up. Simply put, the equality guarantee has been at its most powerful and liberatory when the issue involves the different treatment of the (mostly) same. The more different a claimant is, the more justified their different and disadvantaging treatment seems.

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<sup>10</sup> *Law*, at para. 57.

<sup>11</sup> *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429.

<sup>12</sup> *Brooks v. Canada Safeway Ltd.*, [1989], 1 S.C.R. 1219.

<sup>13</sup> *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835.

<sup>14</sup> Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard: Harvard University Press, 1991) at 13.

*Hodge*<sup>15</sup> is a recent Supreme Court case involving a challenge to federal legislation that denies provision of a survivor pensions to former common law spouses. Because the claimant and other ex-common law spouses had no straightforward comparator among married individuals, the Court failed to acknowledge the specific harm of which the claimant complained. The uniqueness of the situation the claimant found herself in meant that there was no obvious comparison available. The case of *Auton*<sup>16</sup> also involves a uniquely situated claimant group. Here a challenge of behalf of preschool-aged autistic children based on the province's failure to provide funding for emergent treatment is defeated by casting the claimant group as so exceptional that there is no differential treatment.

### 3. They Know It When They See It: The Delphic Approach

Case law since *Kapp*—while slim—is remarkable for the sparseness of discussion of equality claims. The Court has left the one extreme of the *Law* test—with its multi-staged and lengthy equality analyses—for equality discussions that are brief and in some cases merely conclusory. In a very recent Supreme Court decision, *A.C.*, that dealt with a state-ordered blood transfusion against the wishes of a minor, Chief Justice McLachlin in a concurring judgment succinctly dismissed the equality claim as follows:

In the present case, however, *A.C.*'s claim must fail because the distinction drawn by the Act between minors under 16 and those 16 and over is ameliorative, not invidious. First, it aims at protecting the interests of minors as a vulnerable group. Second, it protects the members of the targeted group — children under 16 — in a way that gives the individual child a degree of input into the ultimate decision on treatment. In my view, this is sufficient to demonstrate that the distinction drawn by the Act, while based on an enumerated ground, is not discriminatory within the meaning of s. 15.<sup>17</sup>

No other justifications of or reasons for this conclusion about the section 15 claim are given. The challenge, then, of this new stage in Canadian constitutional equality analysis is to push the Court to reach beyond individual judges' preconceptions of appropriate social and economic ordering. Doctrinal elaborations cannot guarantee that this happens. But they can force more self-conscious reasoning, with the glimmer of possibility for transformative insight that leads a judge beyond her own experience and common sense understanding of the world.

### Conclusion

In conclusion, then, three features of past and current equality jurisprudence are worrisome. First, the density and variance of sex in our lived experiences too often lies unexplored and unacknowledged. Second, the most marginalized and denied have yet to be recognized as

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<sup>15</sup> *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357.

<sup>16</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2003] 3 S.C.R. 657.

<sup>17</sup> *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, para. 152, per McLachlin C.J.

central to what ought to count as “normal” and such continued exclusion is achieved in equality doctrine significantly by the device of establishing comparator groups. Finally, despite repeated reformulations of the test to be deployed under section 15 of the Canadian *Charter*, it appears that the Court’s own ideological blinkers continue to be the most powerful predictor of success. Judges pull on underlying assumptions about key notions and norms such as choice, consent, liberty, the private, the natural, agency, merit (to name a few) to shape equality decisions. This prevents the kind of critical challenge to current distribution of symbolic and material power that a truly transformative sex equality analysis demands.

## **Appendix 1**

### Equality before and under law and equal protection and benefit of law

**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.

### Affirmative action programs

(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.

## **Appendix 2**

### **The *Law Test*.**

- 1) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
- 2) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? And
- 3) Does the differential treatment discrimination by imposing a burden upon, or withholding a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or

that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Harm to human dignity is determined by examining four contextual factors:

1. pre-existing disadvantage;
2. correspondence between the grounds and the claimants' actual needs, capacities, and circumstances;
3. ameliorative purposes or effects;
4. the nature and scope of the interest affected by the impugned law.

In *Law*, the Supreme Court states that this is an open list. However, no new contextual factors have yet been added to this list in subsequent cases.