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Paradise Postponed

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Opinion

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The decision of the Supreme Court of Canada in **Andrews v. Law Society of British Columbia** has been greeted with considerable rejoicing. Many commentators have given the distinct impression that just over the judicial horizon lies the promised land of a truly egalitarian society. Presented with the right kinds of cases, the courts can now usher the have-nots into the privileged ranks of the haves. Catherine MacKinnon, for example, has called the decision "superb", claiming that it "offers the possibility of addressing some of the deepest roots of social inequality of the sexes". While this is a tantalizing prospect, unfortunately it is far from realistic.

The **Andrews** case concerned the right of non-citizens to practise law in British Columbia. A majority of the Court held that the Charter gave them this right. The importance of the decision, however, lies in its pronouncements on equality.

Although the Charter lists clearly the rights to which people are entitled, their meaning is far from clear. Charter rights, like those to equality, are characterized by their indeterminacy: they mean different things to different people at different times. They are like empty sacks that cannot stand up until they are filled with political content.

Some in society want to fill the equality sack with a formal vision of equality that demands that all individuals be treated equally. Others urge a substantive vision of equality that looks to ensure that all individuals are made equal in their condition. These alternative visions are not only distinct, but potentially contradictory. How can the disadvantaged be made equal in condition to the advantaged if both groups must be treated alike? Thus while women's rights groups invoke a substantive vision of equality to support special programs for women, men's rights groups invoke a formal vision of equality to attack special programs for women.

The strength of the Supreme Court's decision is that it recognized the open-ended nature of equality rights and took steps to limit the use of those rights by corporations and other powerful interests. However, in Charter matters, it remains the case that behind every silver lining there lurks a cloud.

Speaking for the Court, Justice McIntyre set out a three-step approach to equality claims:

* First, complainants must show that legislation treats them differently or affects them adversely. Yet not every difference in treatment qualifies for Charter protection. Protection is limited to differences relating to an enumerated Charter ground -- "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" -- or to analogous grounds, like citizenship, "which involve prejudice or disadvantage".

* Second, complainants must show that the distinction or adverse effect is "discriminatory": that it imposes burdens or withholds benefits based on grounds relating to personal characteristics of an individual or group. "Distinctions based upon 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."

* Third, a discriminatory law will survive Charter scrutiny if it represents a "reasonable limit" on equality rights within the meaning of section 1. The onus for satisfying this standard rests with those seeking to uphold the law, usually governments.

What does all of this amount to? In particular, what does it mean for the disadvantaged? The restriction of equality rights to enumerated and analogous grounds of discrimination is undoubtedly a positive development. Corporations and others are unlikely to be able to bring equality claims attacking all manner of regulatory distinctions. But the remainder of the decision is so strewn with uncertainties and contradictions that, like the concept of equality itself, it can be made to stand for virtually any proposition that one wants.

For example, some have interpreted the second requirement as restricting the benefit of equality rights to members of

socially disadvantaged groups. According to this interpretation, men would be unable to invoke gender equality to challenge special programs for women; whites would be unable to rely upon racial equality to attack legislation favouring natives. Yet it is not clear that this is what the Court is saying. To be sure, there is plenty of rhetoric about "disadvantage". However, the actual definition of discrimination adopted by McIntyre J. suggests that real disadvantage need not be shown in order to bring an equality rights claim. A formal disadvantage flowing from a legislative distinction may be enough.

Underlying this ambiguity is the fact that, while McIntyre J. purports to reject an Aristotlean conception of equality (one that requires that likes be treated alike and unalikes be treated differently), the division he embraces between "distinctions based upon personal characteristics" and those based upon "merits and capacities" is little more than a vacuous restatement of Aristotle's formula. Indeed, it was Aristotle who argued that equality requires "that awards should be 'according to merit' ".

The confusion is further heightened by a disagreement within the Court concerning the application of section 1. While Justice McIntyre was prepared to uphold the citizenship requirement as a "reasonable limit" on equality rights, the majority of judges were not. They struck the requirement down.

In short, while the case is helpful in limiting the scope of equality rights, it is singularly unhelpful in defining what those rights mean. On this key issue, the decision is a masterpiece of obfuscation. Equality means whatever future judges want it to mean.

On at least one point, however, the Court is all too clear. Although ignored by most commentators, it is a point whose painful effects the disadvantaged and underprivileged will recognize and continue to experience. The Court's decision is premised on the assumption that the Charter is concerned only with inequalities that can be linked to some legislative source.

Justice McIntyre insists that "discriminatory measures having the force of law" constitute the "evil" against which the Charter's equality guarantee is directed. The Charter "does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment of others".

In other words, oppression and inequality that flow from private conduct or from the seemingly natural operation of the market economy, lie beyond the scope of the Charter's remedies. By implication, the Charter places no obligation on governments to take positive measures to redress such inequalities. The underlying disparities in wealth and power that are the root cause of social inequality and the systemic practices that reinforce them remain safely hidden from Charter scrutiny.

At best, the courts will grapple with the symptoms, but not the causes, of widespread inequality in Canada. But how could it be any different? The courts have served too long as the guardians of our private property regime to be transformed into the instigators of its reform. Moreover, the operation and legitimacy of the judicial system is itself predicated on an assumption of formal equality. What kind of equality guarantee should we expect from a system that requires one to spend hundreds of thousands of dollars just to have one's equality claim decided by courts?

Measured against these realities, the decision of the Supreme Court is not nearly as disheartening as the reaction to it. The fact that the media and legal observers can hail as a victory for the disadvantaged an ambiguous judicial ruling allowing an American to practice law in Canada offers a sad commentary on the state of contemporary political sensibilites. At best, the decision will serve as a weak judicial shield against blatant attacks on progressive and egalitarian-minded legislation -- legislation that is only susceptible to challenge in the first place because of the Charter.

The homeless and disadvantaged will not be part of such celebrations. They will have to remain on the outside looking in for some time yet. If they are invited to share in the festivities, it is unlikely to be by the courts. Besides, even if a judicial invitation were issued, who among them could afford to attend?

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