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## A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination

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Carl F. Stychin\*

A Postmodern Constitutionalism:  
Equality Rights, Identity Politics,  
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Imagination

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In the 1990s, “identity” has become the centrepiece of theoretical work in a variety of disciplines. We now know that, in the conditions of late modern (or postmodern) society, identity is complex—it is fragmented, intersected, subject to alteration, socially constructed and it exhibits only a partial fixity at any moment. Most important, identities are to be valued, respected, and understood on their own terms. However, we also have relearned (if we ever forgot) that identities can be dangerous and fatal, especially when they coalesce in the form of nationalism. In this article, I will explore the intersection of nationalism and identity in the Canadian context and will use as an example to explore these broad issues, the constitutional recognition of sexual orientation as a prohibited ground of discrimination.

My reasons for focusing on sexual orientation are two-fold. First, it is interesting because of the relatively recent fairly broad acceptance within legal discourse of sexual orientation as a protected category under the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> I will argue that the *Charter* itself, and particularly section 15, ensures the protection and development of newly emerging identities. The *Charter* can be viewed through the lens of postmodernism, and specifically, postmodern notions of identity. Sexual orientation represents an identity which has come to be legally recognized despite the fact that it is not an explicitly listed ground under section 15. Second, I focus on sexual orientation because, as an amalgam of identities, it presents a study in the transgressive power of “new” identities to shift the frontiers and borders of citizenship and nationalism. If the Western nation has been defined and maintained by the creation of a devalued “other” placed outside the boundaries of the state,

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1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

then one such expulsion traditionally has been the “homosexual.” Once sexual orientation is accepted as an illegitimate basis of discrimination and recognized as a legal, political, and cultural identity worthy of protection, then the definition of citizenship (and correspondingly the composition of the nation) broadens and deepens along sexual lines.

I also will argue that Canada may be particularly situated to accomplish the postmodern political agenda of facilitating democratic dialogue across an ever expanding range of identities. This is because Canadian nationalism itself is signified in part by our own “otherness”—an absence of essential definition that creates space for identities which are articulated from the vantage point of social groups. Indeed, such group identities can come to be defined in nationalistic terms. Thus, “Canadian” becomes an identity open to resignification and intersection through an ever increasing variety of perspectives engaged in a dialogue guaranteed by the *Charter*.

In the end, this openness of the Canadian identity leaves it a source of both great potential and peril. Ultimately, the issue is whether Canada can survive given its awareness of a lack of essence. In other words, is a sense of oneself as multiplicitous and provisional sufficient to provide the centripetal force to prevent complete fragmentation along the lines of the various identities of which the state is composed? The postmodern option of democratic dialogue, I will argue in conclusion, may provide the only alternative to the violence of rupture that today is so readily associated with the disintegration of states in the name of national aspiration.

### I. *A Postmodern Identity Politics*

Throughout this article, I focus upon an identity politics which I label “postmodern.” In so doing, I synthesize a cluster of ideas concerning identities, politics and rights which increasingly is applied within legal discourse.<sup>2</sup> The premise is that the process of identity formation is continually engaged by the individual subject and moreover is politically charged. Thus, there is a politics of identity that centres upon the plurality of subject positions in which each individual is constituted. Identity

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2. For an introduction to this emerging literature on identity, see, e.g., J. Rutherford, ed., *Identity: Community, Culture, Difference* (London: Lawrence & Wishart, 1990); “The Identity in Question: A Special Issue” (1992) 61 October; I.M. Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990); S. Lash & J. Friedman, eds., *Modernity and Identity* (Cambridge, Mass.: Blackwell, 1992). Of course, “identity politics” emerged, not from a vacuum, but from a history of minority practices and theory which highlighted the political implications of oppressed identities.

politics examines “the fields in which power is thought to operate, and critically analyzes in terms of domination the various universal identities now associated with modernism.”<sup>3</sup> The universal standpoint is rejected in favour of the multiplicity of viewpoints and intersections of difference that better reflect the conflictory nature of identity and “highlight . . . that each person is embedded in a matrix of social and psychological factors that interact in different contexts.”<sup>4</sup> Identity necessarily is contingent, shifting, open to revision, unstable, and dependent upon the relationship of current and future political allegiances. Identity politics also is identified with the “project of building new political groupings with categories neglected in previous modern politics . . . identity politics attempts to mobilize a politics based on the construction of political and cultural identities through political struggle and commitment.”<sup>5</sup> Law and the legal discourse of equality rights provides a forum where that political struggle involving newly emerging identities and social movements can occur.<sup>6</sup>

Much of the theoretical grounding for this postmodern explication of identity and subjecthood has been undertaken by Laclau and Mouffe.<sup>7</sup> They argue not only that identities are formed by the exercise of power in oppressive ways, but also that the formation of new identities can be undertaken by oppressed groups. If subjecthood is plural—a point of merging of a variety of subject positions which come to be articulated through discourse—then it is only through the conditions of political struggle that identities are established in any particular configuration. Crucially, Laclau and Mouffe argue that the political system never achieves a total closure that prevents the development of new and politically resistant identities articulated in the social arena.

The analysis has implications for a progressive political project, the goal of which becomes the establishment of a precarious and constructed unity amongst the constantly emerging partial identities of social subjects.<sup>8</sup> This approach claims an anti-essentialist stance in its articulation of the “precarious character of every identity and the impossibility of

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3. M. Smiley, “Gender Justice Without Foundations” (1991) 89 Mich. L. Rev. 1574 at 1579.

4. J.C. Williams, “Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory” (1991) Duke L.J. 296 at 307.

5. S. Best & D. Kellner, *Postmodern Theory: Critical Interrogations* (New York: Guilford Press, 1991) at 205.

6. On the relationship of equality rights in Canada and the new social movements, see D. Herman, “Beyond the Rights Debate” (1993) 2 Soc. & Leg. Stud. 25.

7. See generally E. Laclau & C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985).

8. See *ibid.* at 87: “The political meaning of a local community movement, of an ecological struggle, of a sexual minority movement, is not given from the beginning: it crucially depends upon its hegemonic articulation with other struggles and demands.”

fixing the sense of the 'elements' in any ultimate literality."<sup>9</sup> At the same time, articulation of identities itself organizes and constitutes social relations "as a means for refusing the acceptability of any pre-existing notion of the social totality."<sup>10</sup>

Under a postmodern interrogation, then, identity ceases to hold any "naturalness" or essence: "the appearance of a new identity is not inevitable or determined, not something that was always there simply waiting to be expressed, not something that will always exist in the form it was given in a particular political movement or at a particular historical moment."<sup>11</sup> The subject also is capable of intervention in the process through self-definition and articulation. As Judith Butler has recognized, the "subject is neither a ground nor a product, but the permanent possibility of a certain resignifying process."<sup>12</sup> This openness to resignification is explained in terms of the necessity of a devalued "other" against which identities are constituted and continually maintained, and the "other" in turn may subvert the identity through its own articulation.<sup>13</sup> This relationship of mutual dependence results in instability.

## II. *Canada: The First Postmodern State?*

Having examined the construction of individual and group identities within the conditions of postmodernity, I turn to the construction of the national identity. Specifically, I examine why it may be appropriate to draw upon postmodern theories of identity within the context of the *Canadian* identity. What is particular about Canada that might facilitate the articulation of identities and the development of Laclau's and Mouffe's radical democratic pluralism? The answer might be found in the construction of the *national* identity. To the extent that a Canadian national identity is recognized as socially constructed, contingent and transformable, Canadian society may assume an openness to new identities. In other words, if the Canadian identity has been less than successful in fixing upon an "other," there may be a greater openness to the articulation of many conflicting identities defined by membership in the Canadian

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9. *Ibid.* at 96.

10. A. Woodiwiss, *Social Theory After Postmodernism* (Winchester, Mass.: Pluto Press, 1990) at 65.

11. J.W. Scott, "Experience" in J. Butler & J.W. Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992) 22 at 33.

12. J. Butler, "Contingent Foundations: Feminism and the Question of 'Postmodernism'" in Butler & Scott, eds., *ibid.*, 3 at 13.

13. See *ibid.* at 15–16: "Identity categories are never merely descriptions, but are always normative, and as such, exclusionary. . . . [T]he very term becomes a site of permanent openness and resignifiability."

community. Identity thus becomes an open site for the contestation over the national imaginary.

Like all processes of identity formation, the construction of a national identity has been dependent upon the constitution of the coherent national subject. That subject must be continually recreated to prevent the erosion of its essential appearance. Its construction is dependent upon the “other” and yet, because the construction of identity is never total, national identity also is under constant threat from the appearance of the “other” within its own borders.<sup>14</sup> Yet, there is no single element against which nationality is defined.<sup>15</sup> The maintenance of national identity demands an obsessive focus upon the essence of nation.<sup>16</sup> It requires the creation of national boundaries against which one may be inside or out depending upon the location of an identity within the grid of nationalism. Through the narrative trope of nationalism, a disembodied and abstract national subject is maintained with varying degrees of success.<sup>17</sup> Those “others” within the physical borders of the nation, but defined as outside its social

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14. See A. Parker *et al.*, “Introduction” in A. Parker *et al.*, eds., *Nationalisms and Sexualities* (New York: Routledge, 1992) 1 at 5:

nationality is a relational term whose identity derives from its inherence in a system of differences. In the same way that “man” and “woman” define themselves reciprocally (though never symmetrically), national identity is determined not on the basis of its own intrinsic properties but as a function of what it (presumably) is not. Implying “some element of alterity for its definition,” a nation is ineluctably “shaped by what it opposes.” But the very fact that such identities depend constitutively on difference means that nations are forever haunted by their various definitional others.

15. See E. Sedgwick, “The Age of Wilde” in Parker *et al.*, eds., *ibid.*, 235 at 241:

The “other” of the nation in a given political or historical setting may be the pre-national monarchy, the local ethnicity, the diaspora, the trans-national corporate, ideological, religious, or ethnic unity, the sub-national locale or the ex-colonial, often contiguous unit; the colony may become national vis-à-vis the homeland, or the homeland become national vis-à-vis the nationalism of its colonies; the nationalism of the homeland may be coextensive with or oppositional to its imperialism; and so forth. Far beyond the pressure of crisis or exception, it may be that there exists for nations, as for genders, simply no normal way to partake of the categorical definitiveness of the national, no single kind of “other” of what a nation is to which all can by the same structuration be definitively opposed.

16. See H.K. Bhabha, “DissemiNation” in H.K. Bhabha, ed., *Nation and Narration* (New York: Routledge, 1992) 291 at 296: “the demand for a holistic, representative vision of society could only be represented in a discourse that was *at the same time* obsessively fixed upon, and uncertain of, the boundaries of society, and the margins of the text.”

17. See D.E. Pease, “National Identities, Postmodern Artifacts, and Postnational Narratives” (1992) 19:1 *Bound.* 1 at 3: “The national narrative produced national identities by way of a social symbolic order that systematically separated an abstract, disembodied subject from resistant materialities, such as race, class, and gender. . . . [T]he socially disenfranchised figures within emancipatory political movements understand that the universality of the national identity depends on their externality for its integrity.”

construction, thus are alien to the nation and disenfranchised from the national identity. As Donald Pease has argued, the success of the construction of nationhood depends upon the ability to take on this essentialist tone:

When understood from within the context of the construction of an imagined national community, the negative class, race, and gender categories of these subject peoples were not a historical aberration but a structural necessity for the construction of a national narrative whose coherence depended upon the internal opposition between Nature's Nation and peoples understood to be constructed of a "different nature."<sup>18</sup>

Of course, the boundaries of nationality and citizenship retain a measure of openness to the incorporation of new citizens. The nation thus is in a "process of hybridity" by which new peoples are integrated while the nation maintains an essential appearance.<sup>19</sup> The frontiers of nationhood are capable of fluctuation as new identities are allowed space within the narrative of nationalism.

Postmodern theory has responded to this construction of national boundaries. Instead of fixed borders through which new identities may be permitted to enter and assume the badge of nationalism, postmoderns seek to reveal the national identity as a permanent site of contestation over content. The nation thus is exposed as provisional and subject to redefinition:

the national subjects, who had previously derived their sense of identity from incomplete identification with the meta-social subject of the national narrative, could become dislocated from this structure and could rediscover national identity itself as a permanent instability, an endless antagonism between figures integrated within ever changing social imaginaries and singularities forever external to them.<sup>20</sup>

The nation becomes a site of potential antagonism between competing social imaginaries emerging from the "cultural difference and the heterogeneous histories of contending peoples, antagonistic authorities, and tense cultural locations."<sup>21</sup> Under this pluralistic approach, narratives from new, previously unheard voices appear, articulating "[c]ounter-narratives of the nation that continually evoke and erase its totalizing boundaries—both actual and conceptual—[and] disturb those ideological manoeuvres through which 'imagined communities' are given essentialist identities."<sup>22</sup> The borderland between the national self and the other

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18. *Ibid.* at 4.

19. H.K. Bhabha, "Introduction: Narrating the Nation" in Bhabha, ed., *supra* note 16, 1 at 4.

20. Pease, *supra* note 17 at 6.

21. Bhabha, "DissemiNation," *supra* note 16 at 299.

22. *Ibid.* at 300.

thus is wrenched open, undermining the essence of nationhood.<sup>23</sup> The narratives of nationalism that emerge, for example, from some new social movements may challenge the unitary and totalizing voice of “the people.” Within the conditions of late modern society, a shift may be experienced away from the homogeneity of the discourse of nationalism towards a politics open to non-assimilationist claims of difference. These claims redefine the national subject itself, as the nation becomes a performative space for the articulation of competing visions.<sup>24</sup>

A postmodern nationalism, then, is cognizant of its social construction and the contingency of its identity. The rigidity of the borders between the “self” of nation and its “others” is relaxed. The focus shifts from the inside/outside dichotomy to the relationship of social subjects articulating different visions in an ongoing dialogic relationship. Cultural specificity thus is not surrendered through assimilation.<sup>25</sup> From this reworking of nationalism emerges a new vision of citizenship which is not dependent upon the exclusive identification of the subject with the nation. Instead, a shared notion of citizenship could develop based upon the articulation of competing identities.

Postmodern national identity has a particular relevance to Canadian nationalism. The success of Canada as a postmodern state is tied to its failure as a “modern” nation. If a nation is ineluctably shaped by what it opposes, then, for example, English Canadian identity now may be shaped most strongly in opposition to the American national identity. However, English speaking Canadians are aware of themselves as “other” to what appears a stable, totalizing American nationalism. At the

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23. Bhabha describes this in terms of the power of cultural difference; see *ibid.* at 312–13: “The aim of cultural difference is to re-articulate the sum of knowledge from the perspective of the signifying *singularity* of the ‘other’ that resists totalization. . . . [which] serves to disturb the calculation of power and knowledge.” The significance of cultural difference lies in its potential for “the establishment of new forms of meaning, and strategies of identification, through processes of negotiation where no discursive authority can be established without revealing the difference of itself.”

24. See H.K. Bhabha, “The Third Space” in Rutherford, ed., *supra* note 2, 207 at 212–13: “It is only by losing the sovereignty of the self that you can gain the freedom of a politics that is open to the non-assimilationist claims of cultural difference. The critical feature of this new awareness is that it doesn’t need to totalise in order to legitimate political action or cultural practice.”

25. Indeed, it has been argued that the “New Europe” may provide a forum for the incorporation of many of these ideas from postmodernism; see A. Huyssen, “The Inevitability of Nation” in October, *supra* note 2, 65 at 71: “what may be desirable as a first modest step might be a broad public debate about an alternative notion of nation, one that emphasizes negotiated heterogeneity rather than homogeneity imposed from above, federalism rather than centralism, regionalism as indeed an important layer of national identity rather than its alleged opposite.” Surely, these words could be transposed to the context of modern Canadian federalism!



same time, the relationship of English and Québécois identity depends upon each as “other.” Thus, it is difficult to speak of a Canadian national identity if it is composed of at least two different *national* imaginaries. Quebec, as the focus of a Francophone identity, understandably has a more fixed political identity given the clearer contrast to an “other”—namely, English speaking Canada.

From this provisionality in the Canadian identity there may be found within the fabric of Canadian life a greater willingness to incorporate new social movements and identities in terms of national citizenship. The signifier “Canadian” displays a greater openness to reworking as a result of an awareness that it is highly contingent and socially constructed. I fully accept that Canadian history is replete with examples of the oppression of identities that have been defined as outside the Canadian national community. The aboriginal peoples provide a stark example of how the rights of citizenship in both a formal and substantive sense have been denied. My claim, however, is that the Canadian national imaginary displays an instability which leaves it particularly open to contestation. The contingency of the national sign facilitates the articulation of competing identities deploying the language of nationalism. The use of the term “First Nations,” the existence of a Quebec national identity, or other regional/provincial identities which come to be articulated in nationalistic terms, exemplifies this phenomenon. Nationalism thus can be appropriated and is never essentially fixed. This is the symptom of politics in late modern society, “a politics in which no political subjects are privileged, identities are never essentially fixed (or fixed by any essence), and the signifiers mobilized to achieve recognition have no intrinsically progressive or reactionary character.”<sup>26</sup> No nation can ever completely close its borders and achieve a “holistic, representative vision of society”<sup>27</sup> by denying the incorporation of new people into the field of citizenship. Yet, there appears to be a “difference” within the Canadian context. As Rosemary Coombe has argued, it is from “[t]he original ‘lack’ (of meaning), which underpins the identity ‘Canadian’ [that] is the source and the site for hegemonic articulations.”<sup>28</sup> Identity not only is defined by an “otherness,” but more generally by an absence. Thus, while there may be an obsession with national boundaries within the Canadian psyche, it stems from a self-reflexive awareness of the provisionality of national identity within our cultural and political conditions.

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26. R.J. Coombe, “Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies” (1993) 21 *Pol. Theory* 411 at 412.

27. *Ibid.* at 419.

28. *Ibid.*

### III. *Rethinking Canadian Equality Law*

In this section, I apply the postmodern framework to the interpretation of the equality provisions of the *Charter*. Canadian equality law is specifically aimed at those groups who have suffered historical or social disadvantage. Indeed, I submit that the focus is on those defined as “other” to the universal subject. What do the political conditions of postmodernity imply then about how we conceive of a right to equality within Canada? I argue that it provides a political and cultural explanation for why Canadian equality rights are interpreted in an open-ended fashion, and it provides the basis for a broader understanding of equality in terms of the contestation of identities. A recognition that all identities, including the national identity itself, are socially constructed suggests a conscious openness to the interpretation of rights within the Canadian constitutional framework. As Nitya Iyer has argued, “quests for essences and identity, for simple, universal rules, for tidy labels and determinate definitions (of equality or feminism or Canada) grounded in a fixed and finite (constitutional) set of ideals must be relinquished.”<sup>29</sup> If there is relatively little closure of the Canadian national identity, so too there can be no essential determinate definition of what constitutes equality, no universal rules that are applicable devoid of context. The “grand narrative” of equality or nationhood gives way to the ongoing revision of the national identity through numerous (and sometimes antagonistic) local discourses of what constitutes Canada.<sup>30</sup>

By way of background, it is important that the equality guarantees within the *Charter* have facilitated an open-ended interpretation by which individuals, as members of groups not explicitly recognized within the Constitution, can claim rights to equality before and under the law. The wording of section 15 allows for this interpretation.<sup>31</sup> From the

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29. N. Duclos [now Iyer], “Lessons of Difference: Feminist Theory on Cultural Diversity” (1990) 38 Buffalo L. Rev. 325 at 380–81.

30. I do not deny the utopianism of this approach, nor do I wish to underestimate the existence of historical and current practices of exclusion which deny to many Canadians the benefits of full citizenship. My aim simply is to develop a model of full citizenship to which Canada might be particularly well suited to aspire.

31. Section 15 of the *Charter* reads as follows:

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.

15 (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.

outset, the Supreme Court of Canada has interpreted the equality guarantees in a “purposive” fashion. In *Andrews v. Law Society of British Columbia*,<sup>32</sup> the first case in which s.15 was interpreted, Mr. Justice McIntyre, for the Court, elaborated upon the meaning of “discrimination” for the purposes of *Charter* interpretation:

I would say then that discrimination may be described as a distinction, whether intentional or not but 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.<sup>33</sup>

From this definition of discrimination, the Supreme Court developed an approach to s. 15 that turns on whether the claim rests upon grounds either enumerated within s. 15 or analogous to those enumerated grounds (race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability). Thus, an analogy must be drawn between the enumerated ground and the unenumerated basis in terms of the historical or social disadvantage due to discriminatory treatment which has been suffered by individuals because of membership in the group.

The focus on analogous grounds leaves open the expansion of the bases upon which unconstitutional discriminatory treatment may be found. This was explicitly recognized by Madam Justice Wilson, writing in the *Andrews* case:

I believe also that it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. . . . It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the “unremitting protection” of equality rights in the years to come.<sup>34</sup>

As Madam Justice Wilson described, the question of whether a group qualifies as analogous depends upon “the context of the place of the group in the entire social, political and legal fabric of our society.”<sup>35</sup> Thus, disadvantaged groups, whose basis of identification is not explicitly recognized in s. 15, may still have recourse through the courts.

For example, the question whether sexual orientation constitutes a recognized basis of discrimination for the purposes of s. 15 provides a clear case of some courts’ willingness to expand the range of protected

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32. (1989), 56 DLR (4th) 1.

33. *Ibid.* at 18.

34. *Ibid.* at 33.

35. *Ibid.* at 32.

grounds pursuant to which governmental discrimination is unconstitutional. After some initial hesitation, the uncontroverted trend in the law has been to hold that “sexual orientation” provides an analogous ground included within the rubric of s.15. It should be noted, however, that the Supreme Court of Canada has yet to rule directly on this issue. In *Haig v. Canada (Minister of Justice)*,<sup>36</sup> the Ontario Court of Appeal considered whether the absence of sexual orientation from the list of proscribed grounds of discrimination in s. 3 of the *Canadian Human Rights Act* was discriminatory as contrary to s. 15. The factual context of the case concerned the dismissal of a Canadian Armed Forces officer on the basis of his sexual orientation. The Ontario Court of Appeal held, first, that the requisite degree of social disadvantage to justify inclusion within s. 15 was met by the category of sexual orientation:

The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice towards them. It also includes the enlightened evolution of human rights social and legislative policy in Canada, since the end of the Second World War, both provincially and federally. The failure to provide an avenue of redress for prejudicial treatment of homosexual members of society and the possible inference from the omission that such treatment is acceptable create the effect of discrimination offending s. 15(1) of the *Charter*.<sup>37</sup>

The Court held that the *Canadian Human Rights Act* must “be interpreted, applied and administered as though it contained ‘sexual orientation’ as a prohibited ground of discrimination.”<sup>38</sup> Thus, by virtue of the analogous grounds approach, sexual orientation comes to be “read in” as a prohibited ground of discrimination under federal human rights law.

The general approach adopted by the courts and its specific application to discrimination on the basis of sexual orientation suggests a willingness to recognize emergent identities within constitutional discourse and to protect those who so identify themselves through the equality guarantees of the *Charter*. While not all judges are sympathetic to this approach, significant legal advances have been made. As Madam Justice Wilson suggested in *Andrews*, the adaptability of what constitutes a “discrete and insular minority” leaves s. 15 open as an avenue of action for some new social movements as they coalesce and articulate demands. However, within the interpretation of s. 15, a tension exists between the capacity for growth and development of grounds for discrimination and a fixity or “immutability” demanded of the group. That is, the “personal character-

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36. (1992), 9 O.R. (3d) 495 (Ont. C.A.).

37. *Ibid.* at 503.

38. *Ibid.* at 508.

istic” to which equality rights attach sometimes is explained and justified on the basis of the difficulty of altering the characteristic. For example, in *Veysey v. Canada (Correctional Service)*,<sup>39</sup> a case which involved an application by an inmate of a correctional facility to participate in a family visitation program with a same sex partner, the Federal Court Trial Division held that sexual orientation satisfied the test of “analogous grounds.” The Court relied in part upon the fact that sexual orientation was found sufficiently *immutable* to constitute a characteristic analogous to the enumerated bases of discrimination.<sup>40</sup> Thus, while the categories of discrimination are never closed, they might be limited to the extent that the characteristic must be found unalterable. It may be that the analogous grounds test demands that a characteristic cannot be described as assumed “at will.” Rather, the fact that sexual orientation, in the eyes of the judiciary, appears unalterable, fixed and central to identity, likely is foundational to the willingness to accept it as a prohibited ground of discrimination.<sup>41</sup>

Furthermore, courts have been impressed with arguments relating to a historical pattern of discrimination. For example, in *Veysey* the Court reasoned that a history of prejudice was of particular relevance:

Another characteristic common to the enumerated grounds is that the individuals or groups involved have been victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation or, more precisely, to those who have deviated from accepted sexual norms, at least in the eyes of the majority.<sup>42</sup>

This appeal to history may provide a further limitation upon the availability of the protection of the equality guarantees. A focus on historical disadvantage obviously demands that the characteristic has some historical grounding. In other words, if one is dealing with a “new” social

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39. (1989) 44 C.R.R. 364 (Fed. T.D.), aff'd 109 N.R. 300 (Fed. C.A.).

40. *Ibid.* at 370–71.

41. This approach can be contrasted to the American Equal Protection jurisprudence, in which Courts in general have been reluctant to find governmental classifications based upon sexual orientation to be subject to heightened judicial scrutiny, reasoning that the characteristic is not immutable. See, e.g., *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied (sub nom. *Ben-Shalom v. Stone*) 494 U.S. 1004 (1990). Very recently, some courts have found that governmental classifications based upon sexual orientation fail “rational basis” review; see, e.g., *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), judgment vacated (7 January 1994), rehearing in banc granted; *Selland v. Aspin*, 832 F.Supp. 12 (D.D.C. 1993); *Dahl v. Secretary of the United States Navy*, 830 F.Supp. 1319 (E.D. Cal. 1993); *Cammeyer v. Aspin*, 1994 WL 238154 (W.D. Wash. 1994); *Meinhold v. United States Department of Defense*, 808 F.Supp. 1455 (C.D. Cal. 1993).

42. *Veysey*, supra note 39 at 371.

movement, the reasoning suggests that the characteristic must have some historical recognition as a feature central to identity formation and that it has been socially disadvantaged. In terms of the postmodern focus on the provisionality and contingency of identities, the emphasis upon both history and immutability is problematic. It seems to demand a transhistorical and unalterable essence.

Despite these tensions, in my view the postmodern conception of identities can assist in understanding the goals of equality rights in Canada. This reexamination of equality through the lens of postmodernism leads to an understanding of rights that focuses on dialogue and the articulation of shifting and emerging identities. That dialogue dispels, to some extent, the dichotomy of self/other which is the basis upon which identities have been maintained. Through a communicative ethics that demands a responsibility to the “other,” a politics of difference and multiplicity may replace a vision of rights that is reproduced from a “universal” standpoint. The emphasis of equality rights, then, is on the expression of identities defined in terms of difference. Moreover, a community can envision rights as a means to nourish the development of newly emergent group identities. A common communal identity thereby comes to be centred on differences within and amongst the membership—on the multiplicity of subject positions that make up the community and the individuals within it.<sup>43</sup>

This relationship of identities has ramifications for our understanding of a sexual identity. In particular, the debate between social construction-

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43. This interpretation of equality rights to some extent is given credence in *Native Women's Assn. of Canada v. Canada* (1992), 95 D.L.R. (4th) 106 (Fed. C.A.) [in according the advocates of male-dominated aboriginal self-governments a preferred position in constitutional negotiations, the government took action which has the effect of restricting the freedom of expression of aboriginal women in a manner offensive to ss. 2(b) and 28 of the *Charter*]. Although the case ultimately is decided on the basis of the guarantee of freedom of expression, it might be interpreted as coming close to endorsing a dialogic right through the combination of the constitutional guarantees of free expression and equality. In addition, the case is interesting for the Court's explicit recognition of the multiplicity and intersection of identities along different axes of oppression and for its readiness to define the right in issue in positive terms—a requirement of fairness in government funding between groups.

ist and essentialist theories of sexuality can be addressed.<sup>44</sup> The focus on difference, contingency and redefinition suggests that a sexual identity, like all other identities, has a constructedness that is open to alteration. “Homosexuality” as an identity concept thus can be taken “into the realm of social and discursive formations.”<sup>45</sup> Many theorists of sexuality have argued that the “homosexual” identity is a product of a particular historical period and its coherence is undercut by the postmodern challenge to the stability of all identity categories.<sup>46</sup> Indeed, we have entered a period in which a gay identity increasingly is given articulation and is open to expression in new forms. A gay identity becomes unstable and provisional, and it may well prove to be the paradigmatic postmodern identity:

Framing gay identity as an emerging sociohistorical event, as an unstable contestable institutional/discursive production and strategy, provided gays with a rationale to begin seeing themselves as having multiple identities, recognizing multiple, sometimes contradictory positions of social power and oppression, and seeing their own fight for sexual/social

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44. For an introduction to the debate, see E. Stein, ed., *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (New York: Routledge, 1992). The terms of the debate have been summarized by S. Epstein, “Gay Politics, Ethnic Identity: The Limits of Social Constructionism” in Stein, ed., *ibid.*, 239 at 250–51:

Where essentialism took for granted that all societies consist of people who are either heterosexuals or homosexuals (with perhaps some bisexuals), constructionists demonstrated that the notion of “the homosexual” is a sociohistorical product, not universally applicable, and worthy of explanation in its own right. And where essentialism would treat the self-attribution of a “homosexual identity” as unproblematic—as simply the conscious recognition of a true, underlying “orientation”—constructionism focused attention on identity as a complex developmental outcome, the consequence of an interactive process of social labeling and self-identification.

45. D. Fuss, *Essentially Speaking* (New York: Routledge, 1989) at 109.

46. In particular, see *ibid.* at 104: “identity itself is contingent. . . . [S]uch a view of identity as unstable and potentially disruptive, as alien and incoherent, could in the end produce a more mature identity politics by militating against the tendency to erase differences and inconsistencies in the production of stable political subjects.”

empowerment as connected to struggles around gender, race, ethnicity, class, and so on.<sup>47</sup>

Through a focus on contingency, one can avoid the “totalizing” of sexuality and sexual practices as identity categories. As Steven Epstein has argued, “deviant identities are particularly likely to assume totalizing dimensions: *all* behavior of persons so categorized becomes interpreted by others through the prism of the perceived difference.”<sup>48</sup> In other words, a social constructionist understanding of sexuality contests its singularity as an identity category. This is closely related to the postmodern focus on identity as multiplicitous, constructed and a product of discourse.

If this framework demands that “[w]e must be able to speak of sexually based group identities without assuming *either* that the group has some mystical or biological unity, *or* that the ‘group’ doesn’t exist,”<sup>49</sup> then a focus on immutability in the analysis of sexual orientation is theoretically misplaced. On the other hand, the willingness of social actors to accept discrimination on the basis of sexual orientation as illegitimate in part results from the acceptance of essentialist arguments concerning the “nature” of “homosexuality.” Specifically, lesbians and gay men “deserve” legal protection because of the immutability of the identity category (*i.e.*, “we can’t help who we are”) and the history of prejudice and discrimination (*i.e.*, “homosexuals have been persecuted”). While I fully accept and experience the continued existence of prejudice against lesbians and gay men at all levels of society, a focus on history reinforces the category of “the homosexual” as unchanging, static and historically and culturally invariant. In other words, it reproduces a modernist, totalizing, and essentialist conception of identity.

At the same time, the use of essentialist arguments continues to have a resonance and persuasiveness. Moreover, reliance upon essentialist

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47. S. Seidman, “Postmodern Anxiety: The Politics of Epistemology” (1991) 9:2 *Sociol. Theory* 180 at 183. See also C.S. Vance, “Social Construction Theory: Problems in the History of Sexuality” in H. Crowley & S. Himmelweit, eds., *Knowing Women: Feminism and Knowledge* (Cambridge, Mass.: Polity Press, 1992) 132 at 134:

At minimum, all social construction approaches adopt the view that physically identical sexual acts may have varying social significance and subjective meaning depending on how they are defined and understood in different cultures and historical periods. Because a sexual act does not carry with it a universal social meaning, it follows that the relationship between sexual acts and sexual identities is not a fixed one, and it is projected from the observer’s time and place to others at great peril. Cultures provide widely different categories, schemata and labels for framing sexual and affective experiences. The relationship of sexual act and identity to sexual community is equally variable and complex.

48. Epstein, *supra* note 44 at 269–70.

49. *Ibid.* at 289.



claims of sexuality may lead to legal advances. Carole Vance has identified this phenomenon in the American legal and political context:

gay politicians and lobbyists find it helpful in the short run to respond with assertions about gays through the ages, to assert a claim to a natural group status, and to insist that being gay is an essential, inborn trait about which there is no choice. . . . By dint of repetition, ideas about gay essentialism were reinforced in the contemporary gay movement (though they were hardly unknown in American culture) and, more importantly, linked to group advancement, success and self-affirmation.<sup>50</sup>

The tension between constructionist and essentialist understandings of sexuality in legal discourse is understandable. By articulating a group identity—a “difference” from society as a whole—a partial fixity in the category is necessary to provide coherence. At the same time, postmodern theory suggests that identities are inherently unstable. Yet, as a strategic matter, it may be advantageous to describe identities in essentialist terms.<sup>51</sup> Epstein has referred to this conundrum as the “paradox of identity politics”<sup>52</sup> because of the difficulty of asserting an identity without assuming a “‘totalizing’ sameness *within* the group.”<sup>53</sup>

That tendency towards totalization is problematic, because it replicates the boundaries through which a dichotomy of inside/outside is structured around the identity concept. One of the focal points of identity theory is the way in which the universal subject position has been constructed through the erection of boundaries. For example, the establishment of a universal sexual subject was dependent upon the denial of sexual subjectivity to lesbians and gay men. To prevent the erosion of the stable heterosexual subject, the creation of a negative image of the outsider must be attached to “the homosexual.”<sup>54</sup> The need to maintain boundaries is not unique to the sexual subject. The individual associates herself with numerous identity categories. She therefore may be located

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50. Vance, *supra* note 47 at 142.

51. Indeed, in the American context, difficulty in achieving protection for lesbians and gay men under the Equal Protection clause of the Constitution in part can be traced to the failure of essentialist notions of the immutability of one’s sexual orientation; see *supra* note 41.

52. Epstein, *supra* note 44 at 291.

53. *Ibid.*

54. On this point, see D. Fuss, “Inside/Out” in D. Fuss, ed., *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) 1 at 3:

To protect against the recognition of the lack within the self, the self erects and defends its borders against an other which is made to represent or to become that selfsame lack. But borders are notoriously unstable, and sexual identities rarely secure. . . . [T]hose inhabiting the inside . . . can only comprehend the outside through the incorporation of a negative image. This process of negative interiorization involves turning homosexuality inside out, exposing not the homosexual’s abject insides but the homosexual as the abject, as the contaminated and expurgated insides of the heterosexual subject.

both at positions of privilege and “otherness,” which in turn may be subject to change over time. Subject locations compete within this framework for status, revealing the provisionality of a subject position. The emptiness of the signifiers of identity means that they can be “essentialized” by the construction of a subject position in contradistinction to an “other.” However, it is “more than a simple boundary marking the outer limits of the centred term because it functions as a supplement, marking what the centre lacks but also what it needs in order to define fully and confirm its identity.”<sup>55</sup>

It is through a partial fixity of identity that new social movements emerge and make claims to “rights.” The acceptance of these claims expands the frontiers of the universal subject position as the group is accommodated. For example, a claim to rights for a minority sexual identity does not simply expand the realm of the universal sexual subject, it also “decentres the dominant discourses and identities that have suppressed it.”<sup>56</sup> Sexual subjectivity is redefined in the process.<sup>57</sup> Indeed, subject positions inevitably are open to decentring by the “other” against which they have been constituted.<sup>58</sup> Consequently, the articulation of a newly emergent identity must be made with an awareness of its own provisionality. As Joan Scott argues, “the project of history is not to reify identity but to understand its production as an ongoing process of differentiation, relentless in its repetition, but also . . . subject to redefinition, resistance, and change.”<sup>59</sup>

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55. J. Rutherford, “A Place Called Home: Identity and the Cultural Politics of Difference” in Rutherford, ed., *supra* note 2, 9 at 22.

56. *Ibid.* at 23.

57. As Elizabeth Spelman has argued, this capacity to rework existing identity structures can have positive effects on disadvantaged groups; see E. Spelman, *Inessential Woman* (Boston: Beacon Press, 1988) at 152:

if we think about identities and points of similarity and difference as things that are always being negotiated and challenged, we may think more about ways in which these categories depend upon the particular purposes of those who create and maintain them. . . . It often seems as if none of us created these categories but all of us help to maintain them. But insofar as we feel moved to do battle over them, we exhibit both a sense of being subject to them against our will and a sense of being able to do something about the power they have over the articulation of our identities and thus over our social and political positions to the extent that they depend on those identities.

58. See C. Mouffe, “Feminism, Citizenship, and Radical Democratic Politics” in Butler & Scott, eds., *supra* note 11, 369 at 372–73: “Even though there is no necessary link between different subject positions, in the field of politics there are always discourses that try to provide an articulation from different standpoints. For that reason every subject position is constituted within an essentially unstable discursive structure since it is submitted to a variety of articulatory practices that constantly subvert and transform it.”

59. J. Scott, “Multiculturalism and the Politics of Identity” in October, *supra* note 2, 12 at 19.

This contingency in our conception both of equality and of nationhood can provide fresh insights into a consideration of Canadian equality jurisprudence dealing with "sexual orientation" as an analogous ground of discrimination. In particular, the decision in *Haig* assumes a new significance. The facts concerned the application of the Canadian Armed Forces' policy directive relating to "homosexuals" in the Forces. Haig was told, upon informing his commanding officer of his homosexuality, that he would "cease to be eligible for promotions, postings or further military career training."<sup>60</sup> While the legal question was the constitutionality of the absence of protection against discrimination on the basis of sexual orientation in the *Canadian Human Rights Act*, the substance of the case raised the issue of lesbians and gay men in the military. Subsequently, the government lifted the policy as a result of a settlement reached in litigation brought by a member of the Armed Forces, Michelle Douglas, who had been released because of her sexual orientation.<sup>61</sup> The decision of the government speaks not only to identity in relation to sexual orientation, but also is relevant to how the Canadian national identity is imagined. While the power of law to shape the national imaginary at best is partial, the presence of openly lesbian or gay members in the armed services is significant. The military is an important signifier of national identity in many states. It is linked to the boundaries of national identity, for it is charged with protecting the literal, physical boundaries by providing protection against invasion by the "outsider." Thus, the military is a powerful, central signifier of nationalism and can be expected to reflect the national identity. The relative readiness of the Canadian government and society to open up this national sign to resignification (albeit with some dissent) along the lines of sexual orientation consequently is noteworthy and can be contrasted to the American experience. In the United States, the courts in the past have rejected the substance of the claim that the ban on lesbians and gay men in the American forces is contrary to the Equal Protection clause of the United States Constitution.<sup>62</sup> This can be explained in part by the importance that America attaches to the maintenance of the separation of a military identity from a gay identity.<sup>63</sup> In one case, for example, the

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60. *Supra* note 36 at 497.

61. See *Douglas v. Canada* (1992), 12 C.R.R. (2d) 284 (Fed. T.D.).

62. See, e.g., *Ben-Shalom v. Marsh*, *supra* note 41; *Steffan v. Cheney*, 780 F.Supp. 1 (D.D.C. 1991). Recently, this trend appears to be changing; see *Meinhold v. Department of Defense*, *supra* note 41; *Steffan v. Aspin*, *supra* note 41; *Cammermeyer v. Aspin*, *supra* note 41; *Dahl v. Secretary of the United States Navy*, *supra* note 41; *Selland v. Aspin*, *supra* note 41; *Able v. United States*, No. CV 94-0974 (D.C. E.N.Y. 1994).

63. See C. Stychin, "Inside and Out of the Military" (1993) 3 *Law & Sexuality: Rev. Lesbian & Gay Legal Issues* 27.

judgment repeatedly draws upon images of boundary crossing and the Court finds itself compelled to police the boundaries of the military by inscribing a gay identity with an “otherness” to the heterosexual military American subject.<sup>64</sup> It attempts to restore the naturalness and essence of the signifier of the American military machine by expelling gay soldiers and preventing them from rearticulating the sign in a new, unauthorized manner.<sup>65</sup>

In the Canadian context, however, the military has served neither the same literal function of constant safeguarding of the national borders, nor does it appear to serve the same metaphoric function of border patrol. Indeed, the military simply may be a weak signifier of national identity, which in itself is noteworthy. The Canadian Armed Forces can accommodate lesbian and gay identities, which, in turn, may redefine the military subject. The national imaginary thus has an openness to difference and the Armed Forces have become a site for the contestation of images of national identity. In other words, the fact that the national identity is socially constructed and defined by the articulation of numerous, shifting identities, facilitates the expression of a gay identity within *national* institutions. In the course of the ongoing dialogue over equality rights, the Canadian military comes to be reworked. In this respect, it may be significant that today the primary role of the Canadian Armed Forces is in peacekeeping operations abroad. One of the goals of the intervention of peacekeeping troops is to facilitate dialogue and *rapprochement* between opposed parties, rather than to police the boundaries of the *Canadian* nation.<sup>66</sup> Finally, the fact that a gay identity can be articulated in military terms serves to redefine the meaning of that identity as well, demonstrating once again its social construction.

Nationalisms and sexualities thus meet and, in the Canadian context, a sexual identity is openly allowed to cross into the borders of the national imaginary, which in turn redefines the scope of citizenship. The consequences of a new identity within the national discourse are unpredictable. While I would hope that the emergence of a gay identity within Canadian national institutions might give the signifiers of nationality a new “queer” inflection, such a result cannot be predicted.<sup>67</sup> Moreover, given the ability

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64. *Steffan v. Cheney*, *supra* note 62, rev'd (*sub nom. Steffan v. Aspin*) *supra* note 41.

65. *Ibid.*

66. I am indebted to Professor Kathie Brock for this insight.

67. I choose not to define what I mean here by the use of “queer,” as I utilize it as a term that has come to denote, in some sexual subcultures, the transgressive power of numerous minority sexualities. A queer identity also might redefine and subvert the articulated identities of lesbians and gay men.

of the Canadian national identity to incorporate subjects defined in diverse nationalist terms, Canadian social and political discourse might be conducive to the articulation of *new* sexual identities, such as Queer Nationalism.<sup>68</sup> Coinciding with the aims of Queer Nationals, Canada might be a space where “the boundaries between what constitutes individual and what constitutes national space are explicitly blurred.”<sup>69</sup> This process is facilitated by the emergence of new voices articulating demands for inclusion in the national imaginary in the name of equality rights.

#### IV. *Conclusion: The Future of a Postmodern National Identity*

The characterization of Canada as a postmodern state begs the question of whether such a nation ultimately can survive. If a postmodern national identity is one in which its citizens are aware of the contingency of nation and the multiplicity of their own identities, to what extent can national identity alone bind the members together? How are the various identities with which citizens identify prevented from redefining themselves in nationalistic terms to the exclusion of a Canadian national identity? This raises whether there is an inevitable process of disintegration and fragmentation of the nation in the conditions of postmodernity. Thus, if Canada is the first postmodern state, will it also be one of the first to dissolve in this current political situation?

Of course, the answers to these questions are beyond the scope of this article. However, an awareness of the constructed character of nationhood may render more problematic the maintenance of the bonds of citizenship through which the integration of a nation is maintained. The openness of the signifiers of Canada suggests that emotional appeals to nationhood may prove unsuccessful. The sentimental deployment of nationalism is futile if the mysteries and essentialism of the nation are stripped away. While demands of undivided loyalty to the state are

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68. In general, see L. Berlant & E. Freeman, “Queer Nationality” (1992) 19:1 *Bound.* 149. Berlant and Freeman argue that the phenomenon of “queer nationality” has “taken up the project of coordinating a new nationality. Its relation to nationhood is multiple and ambiguous, however, taking as much from the insurgent nationalisms of oppressed peoples as from the revolutionary idealism of the United States” (*ibid.* at 151). As a primarily American phenomenon, it is difficult to graft such a movement into a Canadian context. However, it is possible that the goals of Queer Nation which include the attempt to cross the boundaries between individual and national space and to radically reconstitute notions of citizenship, might be more readily incorporated within a national discourse that is substantially more open to new nationalist articulations of identity. On the other hand, that fact alone might rob Queer Nationals of their radicalism.

69. *Ibid.* at 161.

incompatible with the multiplicity of identifications of the citizen, some conception of loyalty might still prove necessary to prevent the rupture of the nation into its various component parts. Loyalty, however, must be broadened to encompass the loyalty of the subject to a variety of communities and subcultures. It may well be that loyalty now only can be expected and only will be forthcoming in those circumstances where the individual is convinced that through membership in the postmodern state, the right to identify variously and to express her identities will best be secured. Loyalty thus stems precisely from the values which underpin the equality guarantees of the *Charter*. A commitment to equality of participation within a dialogic community is a precondition to loyalty to the state. In other words, it is only through a commitment to the security and flourishing of difference that loyalty will be received.

The self-reflexivity of the individual leads to an awareness that the alternatives facing the social order when confronted with difference are dialogue between and among those different identities and the violence (metaphoric and literal) of separation and disintegration. An irreconcilable tension necessarily exists between these two forces, which cannot be transcended. Loyalty to the dialogic community in principle and in operation thus depends upon the success of the state in controlling the impulse towards complete fragmentation and its accompanying psychic and physical pain. This definition of loyalty never claims to be totalizing for it emerges out of the complexity of allegiances of citizens, rather than from the essentialism of a totalizing and homogeneous nation. Finally, it is through a dialogic relationship that moments of crisis, communal and personal, can be resolved through communication. These moments emerge when identities conflict and loyalties collide. These crises must be dampened by the larger community to control the instinct towards exit from the state.

Thus, in conclusion, I have argued that through a postmodern understanding of identity and a postmodern identity politics we can deepen and broaden our conception of equality within Canadian law and society. I advocate an anti-essentialist approach that reflects the fragmentation of the Canadian national identity. The recognition of sexual orientation as a prohibited ground of discrimination exemplifies this vision, which centres upon an ideal of equality based on the right to articulate an identity in the public sphere. It represents a different interpretation of equality rights in which the protection of newly emergent identities is ensured and participation in a democratic dialogue of rights is guaranteed. This approach ultimately demands a rethinking of rights such that they no longer depend upon a universal standpoint which has denied to some the articulation of subjecthood. Instead, in the place of universality, there

emerges a focus on difference and a communal and national identity forged from difference. In so doing, an attempt is made to minimize the exclusionary power of communities as an appropriate model of equality rights in Canada. The national identity thus is revealed as a permanent site of contestation over the meaning of nationhood. The nation comes to have a heightened capacity for redefinition and thus is explicitly constructed through an ongoing dialogue involving competing social imaginaries. Such a vision of nation may be more open to the intersection of different identities and facilitates the development of a liberatory imagination of rights based on a multiplicity of identities as an alternative to universal rights and a totalized, one dimensional subjectivity.