

# ADDING A THIRD DIMENSION: THE CANADIAN APPROACH TO CONSTITUTIONAL EQUALITY GUARANTEES

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## I

### INTRODUCTION

The problem that has most vexed judicial decisionmakers and academic writers about constitutional equality guarantees is how to measure equality in deciding when equality rights have been violated. This article suggests that an analysis in three dimensions provides valuable direction toward a solution.

In its early decisions under section 15 of the Canadian Charter of Rights and Freedoms,<sup>1</sup> the Supreme Court of Canada has addressed equality in a ground-breaking and creative way.<sup>2</sup> At the core of its approach to equality rights in these decisions is the kind of simple yet profound insight that the concept of “equity” exemplifies in the law of remedies. The insight—embodied in what I refer to as the “equality principle”—is that equality rights are constitutionally guaranteed in order to counterbalance certain types of inequalities between people. They are not primarily designed to address “inequality” in a generic or abstract sense.<sup>3</sup> The wording and context of the Canadian constitutional equality guarantees determine the kinds of inequalities that must be addressed and the possible ways of addressing them. The equality rights are aimed at the alleviation of particular disadvantages, such as those between women and men, racial or religious minorities and the dominant group, persons with handicapping conditions and those of average abilities, the elderly or the very young and the rest of the population, and

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1. Can Const (Constitution Act, 1982) pt I (Canadian Charter of Rights and Freedoms).

2. Three cases, taken together, state the Supreme Court's views about the scope and application of § 15, the main equality rights guarantee in the Charter: *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 (holding that a citizenship requirement for entry into the British Columbia bar violates § 15); *R. v Turpin*, [1989] 1 SCR 1296 (upholding certain provisions of the Criminal Code that allow residents of Alberta to choose a trial by judge alone and deny the same choice to residents of the other provinces); *Reference Re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 1 SCR 922 (dismissing a claim that workers' compensation legislation precluding court action by persons covered by the Act was contrary to § 15). See also the discussion of these cases in notes 42 and 56.

3. *Andrews*, [1989] 1 SCR at 163-64 (McIntyre dissenting).

other analogous situations. This insight leads to an overarching equality principle that solves some vexing problems with the application of equality guarantees. The equality principle has this capacity because it adds a third dimension to a previously two-dimensional approach. The thesis of this article is that the approach initiated by the Canadian Supreme Court in 1989, which will be discussed below, should be maintained and is worthy of consideration by other courts in appropriate circumstances.<sup>4</sup>

Part II begins with a brief discussion of the traditional problems with "equality" and why they are so vexing, then follows with a description of the Canadian Supreme Court's innovative solution, and concludes with a discussion of the implications of that solution. After speculation about why the Canadian Supreme Court took such a different course from the United States Supreme Court in its equal protection jurisprudence, this article elaborates an argument in favour of the Canadian approach. Part III focuses this argument on the particular issue of sex inequality.

## II

### VEXING PROBLEMS IN TWO DIMENSIONS

#### A. A Description of the Problems

A simple guarantee of "equality" in effect guarantees nothing. In this respect it differs from other constitutional guarantees, even those that also are broad and amorphous (like "freedom of expression"). The classic Aristotelian statement of the equality principle, "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness,"<sup>5</sup> is tautologous<sup>6</sup> (that is, it is always and necessarily true, and from it any other proposition can be derived). Being tautologous, it cannot provide a test for equality. Rather, it provides the equivalent of a mathematical formula, such as "X plus Y equals Y plus X." Such a formula is useful, but only when the variables that will be used have been determined. In the case of the equality principle, the variables are the people who will be counted as alike or unlike, and the treatment that will be considered alike or unlike. Determination of the variables is therefore dispositive of the outcome. And since the formal equality principle provides

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4. While two recent cases from the Supreme Court of Canada could be seen as precursors to an abandonment of this approach, they are explicable in other ways. See *McKinney v University of Guelph*, [1990] 3 SCR 229 (upholding mandatory retirement in a university setting and the exclusion of persons over the age of 65 from protection against age discrimination in provincial human rights legislation); *R. v Hess*; *R. v Nguyen*, [1990] 2 SCR 906 (combined on appeal) (upholding against § 15 challenges a statute making it an offence for males to have sexual intercourse with females under the age of 14). These cases are discussed further at notes 43 and 81, respectively.

5. *Andrews*, [1989] 1 SCR at 166.

6. For elaboration of this point, see Peter Westen, *The Empty Idea of Equality*, 95 Harv L Rev 537, 544-48 (1982).

no assistance in identifying the variables, it provides no solutions to the problems.<sup>7</sup>

Even when the elaboration on the equality principle by Joseph Tussman and Jacobus tenBroek<sup>8</sup> has been added (so that the variables are to be identified in the light of the purpose of the legislation or measure under attack), the solution to the great majority of problems remains indeterminate. The elaborated principle may be referred to as the “similarly situated test,” and its weaknesses are serious.<sup>9</sup> First, it rarely provides an answer in a specific case. Instead, the answer will depend upon conclusions external to the “test”—in particular, conclusions about which comparisons to make, about the degree of similarity or difference between the persons being compared, and about the degree of similarity or difference between the treatment they are afforded. Those conclusions are indeterminate because, when desired, it is always possible to find either a similarity or a difference. For example, apples and oranges are both fruits, and a cabbage and a king are both carbon-based organisms. I am unlike my colleague down the hall because she has taken two sabbatical leaves, while I have taken one. Identical twins are different because one was born five minutes later than the other and was in an automobile accident when he was six. Endless examples could be given, but the point is clear that similarities and differences are in the eye of the beholder.

In addition, even when the variables have been determined, that is, the comparators have been selected and the similarities or differences have been assigned to the persons and to the treatment, the formal equality principle does not provide answers to some important questions that Aristotle probably did not consider. Specifically, what should be done with cases where there are obvious differences between persons, but those who are identified as “unlike” resist both the conclusion that the difference warrants worse treatment and that the equality principle is satisfied by identical treatment that fails to produce equality of results for them? (It is not wholly immaterial that the people whom Aristotle would have considered like himself would have been free men—not slaves, and not women.) As an example, consider cases involving biological differences between the sexes. Two observations can be made: (1) the implicit standard for measurement of likeness is the dominant group (in this case, males); and (2) the “similarly situated test” fails to suggest what, if any, action should be taken in a given case after a finding of “unlikeness.” That is, unlikeness can be seen as warranting worse treatment, identical treatment whether or not it produces equality of results, or

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7. For elaboration of this point, see Lynn Smith, *A New Paradigm for Equality Rights*, in Lynn Smith, et al, eds, *Righting the Balance: Canada's New Equality Rights* 351 (Can Human Rts Rptr, 1986). See also William Black & Lynn Smith, *The Equality Rights*, in Gerald-A. Beaudoin & Ed Ratushny, eds, *The Canadian Charter of Rights and Freedoms* 557, 562-63 (Carswell, 2d ed 1989) (“*The Equality Rights*”).

8. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of Laws*, 37 Cal L Rev 341, 346 (1949) (“A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.”).

9. See *Andrews*, [1989] 1 SCR at 165-68.

differential treatment designed to produce such equality. In both the United States and Canada, cases involving pregnant women in the workforce illustrate this point.<sup>10</sup> *Bliss v. Canada (Attorney General)*, the Canadian Supreme Court case, has been overruled,<sup>11</sup> but its reasoning illustrates the indeterminacy of the "similarly situated test." During a certain stage of pregnancy and delivery, women were made ineligible for standard unemployment insurance benefits, whether or not they were ready, willing, and able to work. The Canadian Supreme Court held, in a challenge based upon the "equality before the law" guarantee in the Canadian Bill of Rights,<sup>12</sup> that the inequality was created by "nature," not the statute, and that all non-pregnant persons (male or female) were treated alike, as were all pregnant persons. The "similarly situated test," though it did not demand this result, nevertheless was satisfied by it.

If measurement of equality in terms of similarities and differences can be characterized as two-dimensional, then equality problems involving a third dimension will often not be understandable, let alone soluble.<sup>13</sup> Recognition of social subordination or hierarchy can be seen as adding the equivalent of a third dimension to the perception of the problem.<sup>14</sup> The well-known contrast between the majority decisions in *Plessy v. Ferguson*<sup>15</sup> and *Brown v. Board of Education*<sup>16</sup> is a case in point. Whether disingenuously or not, the majority in *Plessy* failed to recognize the problem with "separate but equal" facilities. The problem became visible in *Brown* when the Court recognized the overall social subordination of which the "separate but equal" school systems formed a part.

## B. The Supreme Court of Canada's Innovative Solution

To explain why the Canadian Supreme Court's approach is innovative, some discussion of the U.S. jurisprudence is warranted, not only because of

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10. See *General Electric Co. v Gilbert*, 429 US 125 (1976); *Geduldig v Aiello*, 417 US 484 (1974); *Bliss v Canada (Attorney General)*, [1979] 1 SCR 183 (all three of which upheld measures denying employment benefits to pregnant women.)

11. *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219.

12. Revised Stat Can (RSC) 1985, App III, § 1(b) (1960). The Canadian Bill of Rights, which is still in effect, is a federal statute of quasi-constitutional status. It came into effect in 1960 and contained the only general guarantees of rights and freedoms permitting review of federal legislation until the Canadian Charter of Rights and Freedoms came into effect in 1982.

13. For a parable about the difficulties in understanding a three-dimensional world when seen in two dimensions, see Edwin A. Abbott, *Flatland: A Romance of Many Dimensions* (Dover Publications, 6th ed, revised 1952).

14. Note that it was not the particular notion of "separate but equal" that was necessarily problematic, but the role that it played in the social subordination of African-Americans. A strong argument can be made, for example, in favour of facilities for women where women want and need them and where such facilities assist in alleviating their social subordination. See, for example, *Tomen v F.W.T.A.O.*, 61 DLR (4th) 565 (Ont Ct App 1989)(concerning a teachers' association for women only).

15. 163 US 537 (1896).

16. 347 US 483 (1954).

the context in which this article is published, but because that standard of comparison is often implicit in Canadian discussion.<sup>17</sup>

As the *Brown*<sup>18</sup> case shows, the recognition of social subordination is not new. In fact, it seems to form an important part of U.S. equal protection jurisprudence, which effectively began with the *Carolene Products* footnote.<sup>19</sup> While recognition seems clearer in cases involving race (reflecting the fact that the paradigmatic case for the equal protection clause has been race discrimination<sup>20</sup>), it is also possible to find acknowledgement of the realities of subordination of women to men in some of the sex-based cases under Title VII of the Civil Rights Act of 1964<sup>21</sup> (for example, the relatively recent decisions in the *Price Waterhouse*,<sup>22</sup> *Meritor*,<sup>23</sup> and *California Federal*<sup>24</sup> cases).

Various U.S. commentators, including Professors Owen Fiss,<sup>25</sup> Catharine MacKinnon,<sup>26</sup> Christine Littleton,<sup>27</sup> and Sylvia Law,<sup>28</sup> have argued for an approach in which recognition of social subordination or hierarchy would be explicit and central in determining whether there has been a violation of the equal protection guarantee. For example, Professor Fiss wrote:

One purpose of this essay is to underscore the fact that the antidiscrimination principle is not the Equal Protection Clause, that it is nothing more than a mediating principle. I want to bring to an end the identification of the Clause with the antidiscrimination principle. But I also have larger ambitions. I want to suggest that the antidiscrimination principle embodies a very limited conception of equality, one

17. This discussion is made with great diffidence. The author acknowledges that what follows is the merest sketch of one aspect of a huge and complex body of law.

18. 347 US 483.

19. *United States v Carolene Products Co.*, 304 US 144, 152-53 n4 (1938) (recognizing that "prejudice against discrete and insular minorities . . . may call for a . . . more searching judicial inquiry").

20. For support of this view, see Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum L Rev 1023, 1028-32 (1979); Owen M. Fiss, *Groups and the Equal Protection Clause*, in Marshall Cohen, Thomas Nagel & Thomas Scanlon, eds, *Equality and Preferential Treatment* (Princeton U Press, 1977) ("*Groups and the Equal Protection Clause*"); Catharine MacKinnon, *Sexual Harassment of Working Women: A Case Study of Sex Discrimination* 127-28 (Yale U Press, 1979).

21. Codified at 42 USC § 2000e-2 (1988).

22. In *Price Waterhouse v Hopkins*, 490 US 228 (1989), the Court upheld a finding that Price Waterhouse had discriminated against Ms. Hopkins on the basis of sex by consciously giving credence to views that resulted from sex stereotyping in assessing her for partnership. (Under the rubric of "interpersonal skills," the partners had commented unfavourably on the respondent's "unfeminine" behaviour. To enhance her chances for partnership, she was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id* at 235.) After that decision, the matter went back to U.S. District Judge Gerhard Gesell for a determination under a lower standard of proof. He found liability and ordered the firm to make Hopkins a partner. The U.S. Court of Appeals for the District of Columbia affirmed the remedy—full partnership retroactive to 1982, with \$371,000 in back pay. *Hopkins v Price Waterhouse*, 920 F2d 967 (DC Cir 1990). The case may still not be over. See *New Title VII Remedy: Price Waterhouse ordered to admit woman plaintiff to partnership*, 77 ABA J 24 (Feb 1991).

23. *Meritor Savings Bank v Vinson*, 477 US 57 (1986) (holding that sexual harassment is a form of sex discrimination under Title VII).

24. *California Federal Savings & Loan v Guerra*, 479 US 272 (1986) (upholding state law requiring unpaid pregnancy leave against Title VII challenge).

25. See Fiss, *Groups and the Equal Protection Clause* at 84 (cited in note 20).

26. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 215 (Harvard U Press, 1989).

27. See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal L Rev 1279 (1987).

28. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U Pa L Rev 955 (1984).

that is highly individualistic and confined to assessing the rationality of means. I also want to outline another mediating principle—the group-disadvantaging principle—one that has as good, if not better, claim to represent the ideal of equality, one that takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in equal protection cases.<sup>29</sup>

Professor MacKinnon presented the issue in the following way:

The analytical point of departure and return of sex discrimination law is thus the liberal one of gender differences, understood rationally or irrationally to create gender inequalities. The feminist issue, by contrast, is gender hierarchy, which not only produces inequalities but shapes the social meaning, hence legal relevance, of the sex difference. To the extent that the biology of one sex is a social disadvantage, while the biology of the other is not, or is a social advantage, the sexes are equally different but not equally powerful. The issue becomes the social meaning of biology, not any facticity or object quality of biology itself.<sup>30</sup>

Professor Law has advocated a somewhat similar approach, limited to the context of laws governing reproductive biology:

If we are persuaded that the fourteenth amendment's equality guarantee constrains legislative authority to regulate reproductive biology and that such laws raise issues different from those raised by laws that classify explicitly on the basis of sex, we must then consider what standard is appropriate for evaluating such laws. I propose that laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose.<sup>31</sup>

These approaches have not yet found their way into equal protection decisions of the U.S. Supreme Court, however. Instead, the dominant approach could be termed "assimilationist." In sex discrimination cases, this approach requires that laws that promote or perpetuate stereotypical views about or prejudices against either gender be struck down. The result of the male-based standard inherent in this approach is that women are entitled, at a maximum, to identical treatment to men to the extent that they are the same as men.<sup>32</sup> Similarly, in race discrimination cases, even when the existence of social subordination is acknowledged (as in *Brown*), such recognition is within a context of justifying identical treatment. Recognition of social subordination plays a role in identifying stereotypes and prejudices and understanding what makes them invidious. But as Professor MacKinnon argues:

To stereotype is to impose a trait or characterization that may be true of some members of a group upon all in the group. As an account of the injury of discrimination, this notion of misrepresentation by generalization is limited and can even be perverse. What if the stereotype—such as women enjoy rape—is not really true of anyone? What if, to the extent a stereotype is accurate, it is a product of abuse, like passivity, or a survival strategy, like manipulateness? What if, to the degree it is real, it signals an imposed reality that needs to be changed, like a woman's place is in the home? What if the stereotype is ideologically injurious but materially helpful, like maternal preference in child custody cases? What if a stereotype is injurious as a basis

29. Fiss, *Groups and the Equal Protection Clause* at 85 (cited in note 20).

30. MacKinnon, *Toward a Feminist Theory of the State* at 232 (cited in note 26).

31. Law, 132 U Pa L Rev at 1008-09 (cited in note 28).

32. An example of an exception is *Guerra*, 479 US 272 (upholding legislation requiring employers to provide unpaid maternity leave to employees).

for policy whether or not accurate, such as the view that women are not interested in jobs with higher salaries? Further, why is it an injury to be considered a member of a group of which one is, in fact, a member? Is the injury perhaps more how that group is actually treated?<sup>33</sup>

The dominant approach in cases involving other “real differences,” such as religious practices, or physical or mental handicapping conditions, also could be termed “assimilationist.” Professor Martha Minow has described the “dilemma of difference” and argued that

trying to take seriously the point of view of people labeled “different” is a way to move beyond current difficulties in the treatment of differences in our society. This last statement . . . is addressed to people in positions of sufficient power to label others “different” and to make choices about how to treat difference. If you have such power, you may realize the dilemma of difference: by taking another person’s difference into account in awarding goods or distributing burdens, you risk reiterating the significance of that difference and, potentially, its stigma and stereotyping consequences. But if you do not take another person’s difference into account—in a world that has made that difference matter—you may also recreate and reestablish both the difference and its negative implications.<sup>34</sup>

People labeled “different” because of race, national or ethnic origin, physical or mental disability, age, religion, or sex frequently are on the bottom of a hierarchy. The angle of their vision is as important as the substance of what they see. With respect to certain inequality problems, people at the bottom of a hierarchy may conclude that they need identical treatment to those at the top. Quite often, however, those who see inequality problems from that angle, especially persons with disabilities, women, and members of ethnic, racial, or religious groups who desire to maintain their identity, will conclude that something else is needed to remedy the situation. The “something else” will vary with the particulars of the inequality problem. It will be whatever is necessary to alleviate the disadvantage, that is, to make the difference costless.<sup>35</sup>

Much of the debate in Canada prior to the first word from the Supreme Court (which came in *Andrews*,<sup>36</sup> almost four years after the equality guarantees became effective on April 17, 1985) centred on the extent to which Canadian courts, in construing section 15 of the Charter,<sup>37</sup> should deviate

33. Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 Yale L J 1281, 1292-93 (1991).

34. Martha Minow, *Foreword: Justice Engendered*, 101 Harv L Rev 10, 71 (1987).

35. This is Professor Littleton’s expression; see Littleton, 75 Cal L Rev at 1285 (cited in note 27).

36. [1989] 1 SCR 143. The issue in the case was whether provincial legislation prohibiting non-citizens from practising law contravened § 15 of the Charter. The Court held that it did, and that it did not constitute a “reasonable limit” within the meaning of § 1 of the Charter, which reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Therefore, the legislation was struck down pursuant to § 52(1) of the Constitution Act of 1982, which reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

37. The text of § 15 is as follows:

from the path broken by the U.S. Supreme Court in its equal protection jurisprudence.

However, the U.S. jurisprudence on equal protection has not proven to be very influential in Canada. Instead, the most direct and important influence seems to have come from the Canadian jurisprudence under provincial and federal human rights legislation. That legislation concerns discrimination in employment, housing, services, and facilities customarily available to the public, where the discrimination is based on factors such as race, sex, religion, age, or disability. In human rights decisions in the 1980s, the Court developed a definition of "discrimination" that extends to unintended effects of neutral rules or practices,<sup>38</sup> that looks to the effect of a law on groups as well as on individuals,<sup>39</sup> that requires employers to accommodate employee needs unless the employer thereby suffers undue hardship,<sup>40</sup> and that stems from an understanding of the realities of gender inequality in the workplace.<sup>41</sup> The Court built upon that foundation in its first decisions under section 15 construing the constitutional equality guarantee.<sup>42</sup>

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(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.

(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.

38. *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR 536, 547, where the Court said:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

39. *Canadian National Railway Co. v Canada (Canadian Human Rights Commission); Action Travail des Femmes*, [1987] 1 SCR 1114, 1138-39 (combined on appeal), where the Court quoted with approval this definition of discrimination from the Report of the Royal Commission on Equality in Employment:

Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. . . .

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

40. *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, 517 (holding that an employer must attempt to accommodate, to the point of undue hardship, the religious beliefs of an employee who is adversely affected by the employer's policies).

41. *Action Travail des Femmes*, [1987] 1 SCR 1114 (approving an affirmative action remedy for proven systemic discrimination); *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 (finding an employer vicariously responsible for sexual harassment); *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219 (holding that discrimination on the basis of pregnancy is sex discrimination); *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 (holding that sexual harassment is a form of sex discrimination).

42. The decisions in *Brooks* and *Janzen* were both subsequent to *Andrews*. However, it seems fair to view them as part of the same series of human rights decisions as those cited. In fact, they



In *Andrews*, which concerned provincial legislation imposing a citizenship requirement for the practice of law, the Court wholly rejected the “similarly situated test.”<sup>43</sup> As a result of taking a purposive approach to the interpretation of section 15<sup>44</sup> (consistent with its approach to the interpretation of other parts of the Charter), the Court added a third dimension—the existence of comparative disadvantage.

Justice McIntyre (for the majority in this section of his opinion, although he dissented as to the result in *Andrews*) concluded that the language of section 15 was deliberately chosen to remedy some of the perceived defects of the right to equality in the predecessor Canadian Bill of Rights,<sup>45</sup> such as the conclusion in *Bliss*<sup>46</sup> that discrimination on the basis of pregnancy, a sex-specific characteristic, did not contravene the guarantee of “equality before the law . . . without discrimination based on sex.” Justice McIntyre continued:

It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of discrimination. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do “not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . . .”<sup>47</sup>

Justice McIntyre proceeded to define “discrimination”:

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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge

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illustrate the close connection between constitutional equality jurisprudence and human rights jurisprudence. *Andrews* develops a definition of discrimination to be used in interpreting the constitutional equality guarantee in large measure through examining the human rights experience. The *Andrews* definition is then used in *Brooks* and *Janzen* to re-assess the meaning of sex discrimination under human rights legislation.

43. This was done essentially because of the inadequacies described earlier. See text at Part IIA. See also *Andrews*, [1989] 1 SCR at 165-68 (opinion of McIntyre); *McKinney*, [1990] 3 SCR at 391-92 (Wilson dissenting). Writing for the *McKinney* plurality, Justice La Forest opined:

The second argument was that the similarly situated test is still the governing test, provided it is not applied mechanically. Simply put, I do not believe that the similarly situated test can be applied other than mechanically, and I do not believe that it survived *Andrews v Law Society of British Columbia*.

Id at 279.

44. The purposive approach requires that the court look to “the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and . . . to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.” *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 344.

45. RSC 1985, App III, § 1(b).

46. [1979] 1 SCR 183.

47. *Andrews*, [1989] 1 SCR at 171.

of discrimination, while those based on an individual's merits and capacities will rarely be so classed.<sup>48</sup>

The Court concluded that section 15 is focused on claims that involve either the human characteristics listed in section 15 (race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability) or characteristics analogous to those. In *Andrews* itself the claim was brought by a non-citizen who was prevented for that reason from practising law in the province of British Columbia. This was seen as an analogous characteristic. Other analogous grounds are likely to be found in areas covered by human rights legislation or by Canada's commitments under international law, such as marital status, sexual orientation, or political belief.<sup>49</sup> Claims outside these areas (for example, claims by manufacturers of certain products that governmental regulation affects them in ways not touching their competitors) are not cognizable under section 15. "Generic" claims were disallowed because of the Court's conclusion that the purpose of section 15 is the alleviation of the kinds of disadvantage exemplified by the listed grounds.<sup>50</sup>

Unfortunately, the catch-phrase "discrete and insular minority" has been used on occasion by the Canadian Supreme Court in attempts to describe the focus of section 15.<sup>51</sup> This phrase carries the baggage of its own origins in the

48. *Id.* at 174-75.

49. See, for example, *Knodel v British Columbia (Medical Services Commission)*, 58 Brit Col L Rep (2d) 356 (SC 1991) (provincial legislation denying same-sex couples the same medical insurance coverage as heterosexual couples held to infringe § 15(1) of the Charter). See also *Leroux v Co-operators General Insurance Co.*, 4 Ont Rep (3d) 609 (CA 1991) (marital status held not to be an analogous ground to those delineated in § 15 of the Charter. Thus automobile insurance legislation treating unmarried and married couples differently was upheld).

50. See *Andrews*, [1989] 1 SCR at 182 (opinion of McIntyre) (stating that the "enumerated and analogous grounds" approach most closely accords with the purposes of § 15). For a discussion of why it might be necessary to exclude claims brought by the non-disadvantaged and by those who are persistently disadvantaged for idiosyncratic reasons, in order to permit the purpose of § 15 to be fulfilled, see Black & Smith, *The Equality Rights* 557 (cited in note 7).

51. See, for example, the Reasons in *Rudolph Wolff & Co. v Canada*, [1990] 1 SCR 695, 702 (opinion of Cory):

The impugned legislation granting the Federal Court exclusive jurisdiction over claims against the Crown in right of Canada does not distinguish between classes of individuals on the basis of any of the grounds enumerated in s. 15(1) nor on any analogous grounds. Certainly, it cannot be said that individuals claiming relief against the Federal Crown are, in the words of Wilson J. in *R. v Turpin* . . . "a discrete and insular minority" or "a disadvantaged group in Canadian society within the contemplation of s. 15." Rather, they are a disparate group with the sole common interest of seeking to bring a claim against the Crown before a court.

Justice Cory certainly is not making "discrete and insular minority" the sole touchstone, since there is the alternative reference to "a disadvantaged group in Canadian society within the contemplation of s. 15." But there is the danger that this phrase will become a misleading shorthand invocation of the concept.

For an example of a lower court drastically misled by the "discrete and insular minority" catch-phrase, see *Gould v Yukon Order of Pioneers*, 14 Can Human Rts Rptr D/176 (Sept 1991), wherein the issue was whether a woman was denied services offered or provided to the public because of her sex, contrary to the Human Rights Act, S Y 1987, ch 3, when she was refused membership in an all-male organisation. Justice Wachowich quoted the Supreme Court's decision in *Turpin*, saying:

But if discrimination in s. 15 of the *Charter* is to be defined in terms of "minorities," then it is less readily apparent that it is available to combat allegedly discriminatory behaviour against all women. In my view women, as a group, are not what is commonly understood to be a "minority" in Canadian society. The intervener stated that a recent Yukon census

*Carolene Products* footnote and of the “representation-reinforcing” theory of equal protection law advocated by U.S. commentators such as John Hart Ely.<sup>52</sup> The baggage and the phrase itself seem inconsistent with the Canadian approach to equality, which derives from a significantly different history and political culture. Further, the phrase is inconsistent with the very wording of section 15. Inequalities based on sex, age, disability, religion, race, and national or ethnic origin all share equally in the *raison d’être* of section 15; race-based discrimination, from which the “discrete and insular minority” formulation was derived, is not given primacy. While it is tempting to try to find a single common thread running through the named grounds in order to derive a principle to analogize them to other grounds, it is not necessary to succeed in this search to provide a coherent meaning for the section. There can be several threads, such that all of the grounds share in some of them even though no single thread is shared by all. If there is a single overall thread, it is power imbalance—the listed grounds characterize groups that historically have suffered disempowerment in Canadian society. Other features common to most of the grounds include: relative permanency of the characteristic; a history of animosity or bias toward those who possess it; lack of control over it; and its importance to the individual’s sense of worth and identity.<sup>53</sup> The “discrete and insular minority” concept captures some of those features, but certainly not all. Thus, it cannot be used as a *sine qua non* test for analogous grounds.

Read in context, however, the “discrete and insular minority” concept does form only part of the test. Justice Wilson said in *Andrews*:

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. For example, Stone, J. writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s. 15, the framers of the Charter embraced those concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. 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>54</sup>

Justice Wilson also pointed out that the determination of whether or not a categorization is analogous to those enumerated in section 15 “is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the

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showed that 53.1 percent of the population was male, while 46.9 percent was female.

Whether this constitutes a minority that can be discriminated against is in doubt.

Id at D/190.

52. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U Press, 1980). This theory finds justification for judicial review of legislative action only where there is a basis for concluding that the democratic process is inadequate—for example, with respect to a discrete and insular minority such as African-Americans.

53. For fuller discussion of this point, see Black & Smith, *The Equality Rights* at 586 (cited in note 7).

54. [1989] 1 SCR at 152-53.

entire social, political and legal fabric of our society.”<sup>55</sup> In *Regina v. Turpin*,<sup>56</sup> a case decided shortly after *Andrews*, the Court reaffirmed that the dimension of disadvantage should be determined externally to the legislation. The importance of this point cannot be overstated. Invariably, where the decision to litigate is at least minimally rational, legislation that someone sees fit to litigate disadvantages the party complaining. But how does the party complaining fit into overall patterns of societal disadvantage? And, if the claim succeeds, will it alleviate the patterns of disadvantage identified by the grounds in section 15 or those analogous to them? Or will the claim, if successful, reinforce those patterns?

It may also follow from *Turpin* that discrimination claims, even if based on traits named in section 15, will fail unless the outcome would substantively alleviate disadvantage.<sup>57</sup> As was stated by the *Turpin* Court:

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context. McIntyre J. emphasized in *Andrews* (at p. 167): “For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.”

Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

If the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation. A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge, is likely, in my view, to result in the same kind of circularity which characterized the similarly situated similarly treated test clearly rejected by this Court in *Andrews*.<sup>58</sup>

The Court therefore escaped formalism by rejecting the “similarly situated” test and adding the dimension of “disadvantage” to the measurement of equality. In determining whether or not to uphold allegedly discriminatory legislation, Canadian courts no longer limit their analysis to whether the claimant and the treatment are sufficiently similar to or different

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55. *Id.* at 152.

56. [1989] 1 SCR 1296, 1333 (“discrete and insular minority” classification described as “merely one of the analytical tools which are of assistance in determining whether the interest advanced by a particular claimant is the kind of interest s. 15 of the Charter is designed to protect. It is a means of ensuring that equality rights are given the same kind of broad, purposive interpretation accorded to other Charter rights . . .”). See also *Reference Re Workers’ Compensation Act, 1983 (Newfoundland)*, [1989] 1 SCR 922. In both cases, the categories chosen by the legislatures (in *Turpin*, province of trial; in *Reference*, membership in the workforce and personal injury or death suffered on the job) were held not to constitute analogous grounds under § 15.

57. For a more detailed discussion of the way in which courts can interpret § 15 to prevent its use to erode equality-producing legislation (for example, its use by men to strike down legislation that benefits women in ways that will reduce women’s disadvantage), see Black & Smith, *The Equality Rights* at 628-46 (cited in note 7).

58. [1989] 1 SCR at 1331-32.

from selected comparators. Instead, the Court will consider whether the claimant is a member of a group which has experienced persistent disadvantage on the basis of a personal characteristic, such as those named in section 15, and whether the questioned classification continues or worsens that disadvantage.

It is this approach that allowed the Court to hold that section 15 extended not only to direct or intentional discrimination, but also to adverse impact discrimination,<sup>59</sup> that is, discrimination that arises from the adverse impact of a facially neutral rule on a particular group, whether or not this adverse impact is intended. It may well be that, had the Court not limited the use of section 15 to exclude "generic" claims,<sup>60</sup> it would not have been able to find that section 15 encompassed indirect or adverse impact discrimination.<sup>61</sup> Thus, by interpreting the Charter's equality guarantees to include adverse impact discrimination, and by relying on the same concepts as those developed in the human rights jurisprudence, the Court dramatically departed from the United States model, where there are divergent approaches between equal protection cases, which require proof of an intent to discriminate, and Title VII cases, which do not.<sup>62</sup>

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59. See *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR at 551, for the Court's definition of this concept. In this case, the Court held that there was a breach of human rights legislation prohibiting discrimination in employment based on religion where an employer required an employee who observed the Sabbath on Saturdays to work on those days. For cases referring to adverse impact discrimination and the Charter, see *McKinney*, [1990] 3 SCR at 279 (opinion of La Forest) and *Tetreault-Gadoury v Canada (Employment & Immigration Commission)*, 81 DLR (4th) 358, 370 (SCC 1991) (holding that the former provisions of the Unemployment Insurance Act that disentitled unemployed persons over the age of 65 from benefits contravened section 15(1)). It should be noted that although both the *McKinney* and *Tetreault-Gadoury* courts characterized their respective issues as "adverse impact" discrimination, the issue in both cases was instead direct and intentional discrimination (express differential treatment of persons over the age of 65). In any event, the Court has now made it perfectly clear that it will interpret section 15 in a way that does not require proof of intention.

The context in which the issue arose in both *McKinney* and *Tetreault-Gadoury* is illustrated by this comment in the *Tetreault-Gadoury* case:

As in *McKinney*, it was argued here that the policy is not motivated by stereotypical assumptions, but is based upon "administrative, institutional and socio-economic" considerations. In *McKinney*, however, I concluded (at p. 647) that "[t]his is all irrelevant, since as *Andrews v Law Society of British Columbia* made clear . . . not only does the Charter protect from direct or intentional discrimination, it also protects from adverse impact discrimination, which is what is in issue here.

81 DLR (4th) at 370 (opinion of La Forest).

Thus the Court is rejecting (albeit somewhat obliquely) the argument that somehow "administrative, institutional and socio-economic" considerations could place legislation in a special category, immune from § 15 review.

60. See note 50 and accompanying text.

61. Professor William Black and I have argued previously that coverage of adverse impact discrimination was instrumental to satisfying the purpose of § 15 and that in itself should be a consideration in deciding whether to limit § 15's scope. See Black & Smith, *The Equality Rights* 557 (cited in note 7).

62. See *Washington v Davis*, 426 US 229, 238-48 (1976) (holding that a police test that blacks disproportionately failed did not violate the equal protection clause without proof that the police department had a discriminatory purpose in administering the exam; if the test had been challenged under Title VII, a discriminatory purpose would not have been necessary); *Village of Arlington Heights v Metro Housing Development Corp.*, 429 US 252, 264-71 (1977) (holding that, although the Village's denial of the zoning necessary for Metro to build racially integrated multiple-housing had a racially

### C. Implications of the Solution in the Canadian Context

If, as the landmark cases suggest, the purpose of section 15 is to ameliorate discrimination based upon the classifications listed in section 15 and their analogues, then the section must be understood, by courts and governments, in a way that provides meaningful protection *against those kinds of discrimination, and thus promotes equality for the groups in question*. It is a very different matter to provide meaningful protection against discrimination and to promote equality for women or for First Nations people, for example, than to do so on the basis of some abstract "generic" concept of discrimination and equality. The understanding of equality and nondiscrimination must be contextual. In *Edmonton Journal v. Alberta (Attorney General)*,<sup>63</sup> Justice Wilson discussed a contextual approach to Charter interpretation:

I ask myself therefore whether a contextual approach in balancing the right to privacy against freedom of the press under s. 1 is not more appropriate than an approach which assesses the relative importance of the competing values in the abstract or at large.

...

One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

Thus, the nature and effects of discrimination may be different depending on the context. For example, discrimination against disabled persons has certain unique features and requires certain kinds of remedial action. Conversely, discrimination against the aged raises issues that do not arise in other contexts. Finally, gendered social roles, as well as the biological differences between men and women, differentiate sex discrimination from other forms of discrimination. A reading of section 15 aimed only at the lowest common denominator, or a reading that adopts just one kind of discrimination as the paradigm, would be inconsistent with the history, wording, and purpose of the equality guarantees.

An important part of the Canadian context is its human rights jurisprudence. In some respects, Canada's human rights jurisprudence goes no further than that of the United States under Title VII of the Civil Rights Act of 1964 (for example, in recognizing disparate impact discrimination, a duty to accommodate, and systemic discrimination requiring systemic remedies). However, incorporating the human rights notion of discrimination

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discriminatory effect, the Village could not be held in violation of the equal protection clause without proof of a racially discriminatory purpose); *Personnel Administrator of Mass. v. Feeney*, 442 US 256, 274-78 (1979) (holding that a Massachusetts veterans preference statute that appointed veterans over non-veterans to civil service positions, although affecting women disproportionately, did not violate the equal protection clause in the absence of a discriminatory purpose).

63. [1989] 2 SCR 1326, 1353-56.

into the interpretation of the constitutional equality guarantee should have far-reaching consequences. The Court's decision that the concepts of equality and discrimination should be the same in human rights and constitutional jurisprudence therefore was crucial.

The overall Canadian social and political context is also relevant. It has been suggested that Canadian political culture is less liberal-individualistic and more hospitable to notions of group rights and social rights than is that of the United States.<sup>64</sup> Evidence may be found not only in the Charter's group rights guarantees (such as the language rights in sections 16 through 22, the aboriginal rights in section 25 and in section 35 of the Constitution Act, 1982, the requirement to interpret in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians in section 27, and the protection for denominational schools in section 29), but also in Canadian political practices (such as the provision of universal government-funded medical care and the federal programs to promote bilingualism). The inclusion of section 15(2) in the Charter, specifically permitting affirmative action programs, not only ensures that Canada will not replicate the debate in the U.S. regarding the use of such programs, but also supports the view that

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64. Professor Charles Fried represented the liberal U.S. position in the opening sentence to his *Comment: Metro Broadcasting, Inc. v FCC: Two Concepts of Equality*, 104 Harv L Rev 107 (1990): "Except for the shameful and discredited 'separate but equal' doctrine of *Plessy v Ferguson*, the Supreme Court has always adhered to a liberal, individualistic view of the equal protection guarantee."

In a section of her Reasons in *McKinney*, [1990] 3 SCR at 343, Justice Wilson compared the U.S. and Canadian constitutional traditions:

The doctrine of constitutionalism was a driving force behind the creation of the American constitution. The American Bill of Rights was in large measure the product of a revolution. Unhappy with the injustices the Americans perceived were perpetrated against them by the British, the American people were left with a deep distrust of powerful states. The United States Constitution enshrines the belief of the American people that unless the state is strictly controlled it poses a great danger to individual liberty. Its primary focus, articulated in the bulk of its provisions, is against "state action." Canada does not share this history.

In Robin Elliot, *The Supreme Court of Canada and Section 1—The Erosion of the Common Front*, 12 Queen's L J 277, 282-83 (1987), Elliot commented that there is a strong liberal tradition in Canada, but pointed to a number of other aspects of the Charter that suggested otherwise:

The fact that the Charter reflects the collectivist view of the relationship between the individual and the state and of the role of the state is hardly surprising to anyone familiar with Canadian political traditions. Liberalism has never held the exalted position in Canada that it has in the United States. The United Empire Loyalists who came north at the time of the American Revolution brought with them a "tory touch" that has always been, and remains to this day, a significant feature of our political culture.

The ability of socialist parties to establish themselves as a viable political force in Canada is another reflection of the collectivist tradition in our political culture. Different from toyism in many important respects, socialism nevertheless shares with it the belief that society is more than a collection of rugged, self-interested individuals. It also, of course, allows for a significant role for the state . . . .

See also the interesting discussion of these aspects of Canadian political culture in Martha Jackman, *The Protection of Welfare Rights Under the Charter*, 20 Ottawa L Rev 257, 257-67 (1988) (Under article 7 of the Charter, which guarantees that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," freedom means not only freedom from government restriction, but also the ability to benefit equally from opportunities provided by the government.).

the purpose of section 15 is to promote equality, not just prevent discrimination.

The equality guarantees have also shaped the Supreme Court of Canada's interpretation of other parts of the Charter. In *Regina v. Keegstra*,<sup>65</sup> for example, the Court addressed the constitutional validity of the Criminal Code sections prohibiting hate propaganda. The Court held that the legislation violated the guarantee of freedom of expression. However, after concluding that the purpose of the Criminal Code sections was connected with furthering the equality and multiculturalism guarantees in the Charter, it upheld the legislation as a reasonable limit to freedom of expression.<sup>66</sup> The Court stated its agreement with this proposition from an intervener's brief:

Government sponsored hatred on group grounds would violate section 15 of the Charter. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the Charter, deserves special constitutional consideration under section 15.<sup>67</sup>

Another example is provided by the Supreme Court decision in *Reference Re Electoral Boundaries Commission Act (Saskatchewan)*,<sup>68</sup> where the Court held that the purpose of the electoral rights guaranteed by section 3 of the Charter is "effective representation," not the rigid formal equality that one-person one-vote represents. Although section 15 was not referred to, the Court's approach was consistent with, and probably shaped by, the equality jurisprudence.

In applying the Charter's equality guarantees, problems have arisen due to the amount of latitude given by courts to legislatures when courts assess, pursuant to section 1,<sup>69</sup> whether the discriminating legislation constitutes a "reasonable limit . . . demonstrably justified in a free and democratic society" (in which case the legislation stands).<sup>70</sup> Thus, the latitude given to legislatures under section 1 could undermine the strength of the protections guaranteed in section 15.<sup>71</sup>

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65. [1990] 3 SCR 697.

66. *Id.* at 755-56 (opinion of Dickson).

67. *Id.* at 756 (quoting brief of intervener Women's Legal Education and Action Fund).

68. 81 DLR (4th) 16, 35-38 (SCC 1991) (also referred to as *Carter v Saskatchewan (Attorney General)*).

69. An analysis of the jurisprudence under § 1 is well beyond the scope of this article. To summarize, however, recent decisions have upheld legislation, pursuant to § 1, so long as the court concludes that the government had pressing and substantial objectives rationally connected with the legislation, and that the government had a reasonable basis for concluding that the legislation impaired the rights as little as possible given the objectives sought to be achieved. *McKinney*, [1990] 3 SCR at 288-89, following *Irwin Toy Ltd. v Quebec (Attorney-General)*, [1989] 1 SCR 927, 994.

70. The full text of § 1 is set out in note 36.

71. *Tetreault-Gadoury*, 81 DLR (4th) at 374, does, however, show that at least some legislation will fail the current § 1 test.



## III

SEX-BASED INEQUALITY<sup>72</sup>

There are three aspects of the Canadian context that must be considered to understand the Canadian Supreme Court's approach to sex equality cases.

The first aspect is that Canada is a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination against Women.<sup>73</sup> According to the preamble to the Convention, despite various international resolutions, declarations, and recommendations, "extensive discrimination against women continues to exist." The preamble goes on to recite particular examples, such as: "in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs . . . ." The preamble also notes the extent to which women are penalized for their role in procreation:

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole . . . .<sup>74</sup>

Canada has thus signed an international instrument that identifies the problem as "discrimination against women" (not generic "sex discrimination") and contemplates the provision of positive social benefits as appropriate measures to remedy such discrimination.<sup>75</sup>

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72. I will pay special attention to this area for two reasons. First, it is the one with which I am most familiar. Second, of the listed grounds in § 15 it is the one with respect to which there has been the most judicial activity. (However, there have still been comparatively few cases based upon any of the enumerated grounds, including sex.) Therefore, it provides some opportunity to test the application of the approach to equality rights developed in *Andrews*.

73. In force for Canada in 1982.

74. Among other matters, the Convention requires, in Article 11:

2. In order to prevent discrimination against women on the grounds of marriage or maternity, and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

75. Consistent with its obligations, the Canadian government does provide unemployment insurance benefits to women who require maternity leave, as well as parental leave benefits to either member of a couple with a newborn or adopted child. Canadian jurisdictions have maternity leave provisions with protection against dismissal or change in conditions of employment. For example,

The Charter is seen as one of the mechanisms by which the Canadian government is working to fulfil its obligations under the Convention. This is exemplified by Canada's second report to the United Nations Committee under the Convention, which referred to section 15 of the Charter and to Canadian human rights legislation as the "primary means of implementing the Convention in Canada."<sup>76</sup> Read in the light of the Convention, section 15 is not designed to provide a means for men to attack legislative or governmental measures that women require, such as maternity benefits or Family Allowance payments, just as it is not designed to provide a means for the able-bodied to complain about services provided to the disabled,<sup>77</sup> nor to prohibit affirmative action programs to ameliorate the disadvantage of racial minorities.<sup>78</sup> It would be wholly inconsistent with the purpose of the equality guarantees (the purpose being, in the words of the Supreme Court of Canada, "the removal of unfair disadvantages which have been imposed on individuals or groups in society"<sup>79</sup>) to permit individuals to use them to remove positive beneficial measures for disadvantaged persons or groups. Thus, a purposive interpretation of section 15 leads to the conclusion that either it must have very limited application in claims brought by those who are comparatively advantaged, or it cannot permit remedies that result in removing positive benefits from the comparatively disadvantaged.<sup>80</sup>

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the British Columbia Employment Standards Act (Maternity Leave), ch 10, pt 7, 5 SBC § 51(i)(1980) provides that

[a]n employee, on her written request supported by a certificate of a medical practitioner stating that the employee is pregnant and estimating the probable date of birth of the child, is entitled to a leave of absence from work, without pay, for a period of 18 consecutive weeks or a shorter period the employee requests, commencing 11 weeks immediately before the estimated date of birth or a later time the employee requests.

Firing an employee or changing the employee's condition of employment because of the employee's pregnancy or because of an absence authorized by part 7 is prohibited. Under § 55, the burden of proving cause of termination or change in condition is on the employer. Under § 51(2), the maternity leave is not to end before six weeks after the actual date of the birth of the child, no matter when the leave began. Under § 51(3), the employee may request a shorter period.

76. Convention on the Elimination of all Forms of Discrimination against Women: Second Report of Canada 2 (Ministry of Supply and Services, 1988).

77. The wording of § 15 precludes such complaints—§ 15 provides for equality before and under the law, and equal protection and equal benefit of the law without discrimination based on mental or physical *disability*.

78. Charter § 15(2).

79. *Brooks*, [1989] 1 SCR at 1238.

80. For more extensive discussion of this issue, see Black & Smith, *The Equality Rights* at 633-37 (cited in note 7). U.S. courts have developed the remedy of extension, which can be used to avoid striking down legislation that is underinclusive. For a case in which the availability of this remedy is being litigated in Canada, see *Schachter v Canada*, 52 DLR (4th) 525 (Fed TD 1988), *aff'd*, 66 DLR (4th) 635 (Fed CA 1990). The Federal Court of Appeal held:

In my view, s. 24 does empower a court to extend benefits to groups aggrieved by an exclusion of benefits. Such an extension of benefits appears to be the only remedy which respects the purposive nature of the Charter while at the same time giving effect to the equality rights enshrined in s. 15 of the Charter.

*Schachter*, 66 DLR (4th) at 652. Note that *Schachter* is on appeal to the Supreme Court of Canada.

For a thoughtful comment on *Schachter*, see Nitya Duclos & Kent Roach, *Constitutional Remedies as 'Constitutional Hints': A Comment on R. v. Schachter*, 36 McGill LJ 1 (1991). For academic commentary on this aspect of remedies, see Dale Gibson, *Non-Destructive Charter Response to Legislative Inequalities*, 27 Alta L Rev 181, 183 (1989) (due to § 26 of the Charter, judges are under an obligation, when

The second aspect of the Canadian context is section 28 of the Charter, which provides that, “notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Although section 28 has not explicitly played a major role in the decisions to date, its spirit has influenced the approach taken by the Court in some cases, such as *Regina v. Morgentaler*.<sup>81</sup>

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enforcing charter rights, to employ methods that “will derogate from existing rights to the least extent possible”); Dale Gibson, *The Law of the Charter: Equality Rights* 339-50 (Carswell, 1990) (when offering an aggrieved party a remedy under § 24(1) of the Charter for an equal protection violation, a court must minimize any resulting derogation of other rights (for example, peripheral damage)). See also Richard Gold, *From Right to Remedy: Putting Equality to Work*, 14 Queen’s L.J. 213, 233-241 (1989) (general discussion of available remedies for underinclusive programs).

81. Explicit discussion of § 28 does appear in *R. v. Hess*; *R. v. Nguyen*, [1990] 2 SCR 906. In *Hess*, the Court addressed the validity of the “statutory rape” provision of the Criminal Code (§ 146(1)), which made it an indictable offence for a male person to have sexual intercourse with a female person who was under the age of 14 years and who was not his wife, irrespective of his belief about her age. (By the time the Court decided *Hess*, § 146(1) had been repealed and replaced with a section that was not gender-specific and that allowed for a defence of due diligence.) The majority (Chief Justice Lamer, Justices La Forest, Wilson and L’Heureux-Dube, per Justice Wilson) held that the section violated the Charter’s § 7 guarantee of life, liberty, and security of the person, which were not to be deprived without complying with the principles of fundamental justice.

Although only men could be charged under the provision, and only females were protected by the section, the Court also held, in dicta, that the provision did not infringe § 15 of the Charter. Justice Wilson wrote for the majority:

But if the impugned provision creates an offence that involves acts which, as a matter of fact, can only be committed by one sex, then it is not obvious that s. 15(1) of the Charter is infringed. In such a case there may well be a reason related to sex for creating an offence that can only be committed by one sex. I am, of course, fully aware of the dangers inherent in arguments that seek to justify particular distinctions on the basis of alleged sex-related factors. . . .

Nevertheless, there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences. In my view, the fact that the legislature has defined an offence in relation to these realities will not necessarily trigger s. 15(1) of the Charter. I think few would venture to suggest that a provision proscribing self-induced abortion could be characterized as discriminatory because it did not apply to men. Such an argument would be absurd. In my view, s. 15(1) does not prevent the creation of an offence which, as a matter of biological fact, can only be committed by one of the sexes because of the unique nature of the acts that are proscribed.

Id at 928-29. This dictum, however, is problematic because it is inconsistent with the understanding of equality developed by the Court in several cases decided shortly before *Hess*: *Andrews*, [1989] 1 SCR 143, *Turpin*, [1989] 1 SCR 1296, and *Brooks*, [1989] 1 SCR 1219. The *Hess* dictum suggests that there is no need to look at the social, political, or legal contexts in which the distinction is drawn if it reflects a “biological reality” (contrary to *Andrews* and *Turpin*), and that equality problems cannot arise when legal distinctions are drawn to match “biological realities” (contrary to *Brooks*). It is possible, however, that Justice Wilson intended to indicate that an offence directed at one sex only does not automatically violate § 15, a position consistent with the other cases. Unless the *Hess* decision is to represent a total, and unacknowledged, about-face on the prescribed treatment of sex-specific equality issues mapped out in *Andrews* and *Brooks*, it must be read in this limited way.

The reference to § 28 (that the provisions of the Charter “are guaranteed equally to male and female persons”) by the majority reinforces this point. According to Justice Wilson, “this provision does not prevent the legislature from creating an offence that as a matter of biological fact can only be committed by one sex.” Id at 932. The dissent, written by Justice McLachlin for herself and Justice Gonthier, however, refers to § 28 in the context of the argument that men, as a group, are not disadvantaged within the meaning of the *Turpin* test for the application of § 15. Justice McLachlin wrote:

In my view, these arguments take the interpretation of the language in *Turpin* further than is justified. There is no suggestion in that language that men should be excluded from protection under s. 15 because they do not constitute a “discrete and insular minority”

The third aspect is the Supreme Court's occasional willingness to question the assumptions underlying positive law or legal theory and to revise doctrines or approaches where these assumptions seem to reflect predominantly male experience or male-centred norms, thus operating to the disadvantage of women. The following examples will elucidate this point.

In *Morgentaler*,<sup>82</sup> the Supreme Court struck down the former Criminal Code abortion legislation based on its violation of the section 7 guarantee of security of the person. According to section 7, "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Justice Wilson's concurrence, in which she discussed the concept of liberty, was the first clear indication that a member of the Court was willing to question laws because of their underlying assumptions. Referring to the individual woman's decision about whether or not to carry a pregnancy to term, Wilson stated: "It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person."<sup>83</sup>

Justice Wilson then went on to question the assumptions behind the concept of "liberty":

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out . . . the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. . . . It has *not* been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and

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disadvantaged independently of the legislation under consideration. The Court must be taken to have had in mind s. 28 of the Charter, which provides that notwithstanding any other provisions, the rights and freedoms referred to in the Charter are guaranteed equally to male and female persons.

*Hess*, [1990] 2 SCR at 943-44.

There is insufficient space to discuss these comments here; for a detailed argument suggesting a way to determine disadvantage, see generally Black & Smith, *The Equality Rights* (cited in note 7). A brief response is that without categorically excluding men from the protection of § 15, depending upon the context, the relative advantage of men and women must be considered in assessing the merits of a § 15 claim. If this is not possible, § 15 could lead, ironically, to a poorer situation for women than if it had not been enacted since it could provide a means to strike down hard-won legislative gains designed to remedy social inequality for women.

Although Justice McLachlin held that the statutory rape provision violated § 15, she concluded that it was saved by § 1 as a "reasonable limit," basing her conclusion in this regard upon the kind of assessment of the social context (the risk of exploitation of young girls by older men, the risk of pregnancy, the social evil of juvenile prostitution) that was also implicit in Justice Wilson's conclusion that there was no violation in the first place. For an insightful case comment on *Hess*, see William Black & Isabel Grant, *Equality and Biological Differences*, 79 CR (3d) 372 (1990).

82. [1988] 1 SCR 30.

83. *Id.* at 171 (Wilson concurring).

aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being.<sup>84</sup>

Justice Wilson's opinion implicitly asserts that Charter rights must be understood so as to account for the fact that women are now fully human in the eyes of the law. Historically, courts have not interpreted the rights of citizenship or human rights in such a manner. Rather, courts have tended to understand these rights "generically." However, because such "generic" interpretations tend to derive primarily from male life experiences, they are generic only on the surface.<sup>85</sup>

Although *Morgentaler* never mentioned section 28 of the Charter, this section arguably mandated the Court's conclusion. For the rights of liberty and security of the person to be guaranteed equally to male and female persons, as section 28 requires, courts must construe "persons" in the feminine as well as the masculine, and "liberty" and "security of the person" to be guaranteed for women *as women*, as opposed to being meaningful only in situations where women's and men's experiences coincide.

In *Regina v. Lavallee*,<sup>86</sup> the Supreme Court reevaluated the criminal law of self-defence in cases of battered women who kill their common-law spouses. The Court concluded that the person pleading self-defence does not always need to establish an apprehension of imminent danger at the moment of the act. "Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality."<sup>87</sup> The Criminal Code justifies the use of force in repelling an assault where the accused acted "under reasonable apprehension of death or grievous bodily harm."<sup>88</sup> The Court stated that "[t]he definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man,'"<sup>89</sup> such as the circumstances of a woman trapped in an abusive relationship.

Although there was no allegation that the Code infringed a Charter right in *Lavallee*, the decision illustrates the manner in which the existence of Charter rights influences the interpretations of statutes and judge-made law. The Supreme Court has referred to this role for the Charter, discussing the "question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values

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84. *Id* at 171-72.

85. Considering the following questions illuminates this point: If the notion of "liberty" had been developed by women, or by women and men together, would it be the notion we are familiar with in classic liberal theory? How likely is it that a woman's need to resist state interference with her reproductive autonomy, at the instigation of the state itself or of men claiming an interest in her reproductive capacity, would only recently have been seen as connected with "liberty"?

86. 76 CR (3d) 329 (1990).

87. *Id* at 350-51.

88. Defense of Person, Criminal Code, ch C-46, RSC § 34(2)(a) (1985).

89. 76 CR (3d) at 346.

enshrined in the Constitution.”<sup>90</sup> The language of sections 28 and 15 makes it clear that gender equality is one of those fundamental values. It therefore follows that the impact of the Charter guarantees may be felt as much in non-Charter cases as in actual constitutional disputes.

Perhaps the most far-reaching example is *Brooks v. Canada Safeway Ltd.*,<sup>91</sup> in which a group of pregnant employees filed a complaint under the Manitoba Human Rights Act claiming that the employer’s sickness and accident benefits plan discriminated on the basis of sex. The plan excluded pregnant women from coverage during a seventeen-week period around their expected delivery dates. The Human Rights tribunal and lower courts rejected the plaintiffs’ complaint, in part because of the 1978 *Bliss* decision.<sup>92</sup> As well as relying on *Bliss*, the employer argued that pregnancy is neither an accident nor an illness, but a voluntary act. In rejecting the plan as discriminatory, the unanimous Court held:

It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed its importance makes description difficult. To equate pregnancy with, for instance, a decision to undergo medical treatment for cosmetic surgery—which sort of comparison the respondent’s argument implicitly makes—is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the work place.

Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose . . . is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. . . . Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers that purpose.<sup>93</sup>

As in *Morgentaler*, where the Court reevaluated the concepts of security of the person and liberty, and *Lavallee*, where the Court reevaluated the concept of justifiable self-defence, the *Brooks* court reevaluated the concept of discrimination itself. In its decision, the Court saw equality rights as three dimensional. The women employees were similar to their male counterparts in many ways, but very different in another—pregnancy. Under the traditional similarly situated test, the difference of pregnancy would not have

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90. *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 603. See also *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, 1078; *Hills v Canada (Attorney General)*, [1988] 1 SCR 513, 558.

91. [1989] 1 SCR 1219.

92. [1979] 1 SCR 183.

93. *Brooks*, [1989] 1 SCR at 1237-38.

given rise to an equality issue, thus resulting in the perpetuation of inequality through different and inferior treatment of women. On the other hand, to conclude that the difference of pregnancy could never justify different treatment for women would mean the end of maternity benefits and other like measures and again result in the perpetuation of inequality for women.

It is only when the dimension of disadvantage is added that the solution becomes evident. It is not biological fiat or "nature" that disadvantages pregnant women in the workplace, but rather the social and economic arrangements we have chosen to make, arrangements that tend to force all of the costs of procreation onto pregnant women. Bearing the major costs of procreation puts women at a considerable disadvantage in the workforce. Because social and economic arrangements can be altered, this disadvantage can be alleviated. *Brooks* illustrates one situation in which the law does just that. It should also follow from *Brooks* that, where measures are positive and are designed to reduce the costs of procreation for women, a court should not reject them as discriminatory, since the measures neither worsen nor perpetuate disadvantage. Thus, as the above examples illustrate, gender equality in the Canadian context is not limited to same treatment. Rather, the concept is result-oriented. Further, because of the *Andrews* and *Turpin* approach, which takes into account disadvantage, gender equality is understood to be aimed at improving the situation of women, consistent with Canada's international obligations, rather than at assimilating women to male norms.

#### IV

#### CONCLUSION

I have argued that the Canadian Supreme Court's approach to constitutional equality rights can be seen as three-dimensional, seeing and taking into account not only comparisons between persons and treatment, but also the comparative disadvantage experienced by particular groups in society. This approach is necessary because of the inequality problems experienced by women, the aged, persons with disabilities, racial minorities, religious minorities, and other comparable groups. While difficult cases will arise under any approach, this one has the potential to provide solutions in a coherent and rational way, and in a way that should not run counter to the purpose of the legislation.

Although the experience of Supreme Court review of legislation or governmental activity under section 15 has been limited to three years and about twenty cases, there has been enough equality jurisprudence under this section and under human rights legislation to conclude that the Court has opened up a new path, one that heads in a promising direction. It remains to be seen whether, after another decade and numerous cases, the jurisprudence will live up to its initial promise, and whether, if it does, the Canadian approach to equality rights will influence the approaches taken in other jurisdictions.

