CHAPTER 2

Women's Equality: The Normative Commitment

Introduction

The commitment of Canadians to equality values has been made express in various human rights instruments — international, constitutional, and statutory. These commitments to equality for women must be understood to encompass the goal of redressing the social and economic inequality of women, not just inequality in the form of laws.

At some level this seems an incredibly obvious claim. Why is it even necessary to argue that the commitment to women's equality includes the social and economic dimensions of women's inequality? The answer to this lies, in part at least, in the relative newness of the acknowledgement that inequality has systemic, group dimensions, and in the persistence of formal equality thinking.

Formal equality is an old idea, rooted in the notion of the rule of law, an early incarnation of equality rights. The rule of law, which holds simply that everyone shall be subject to law, was a reaction against a hierarchical social order in which laws did not apply to everyone. Some people, like kings, were above the law; others, like women, were below it. Formal equality and the rule of law are closely linked. The rule of law requires that everyone should be equally subject to the law, and formal equality requires that the law treat all like persons alike. When French and U.S. revolutionaries proclaimed that “all men [*sic*] are born equal” and are “free and equal in respect of rights,” they were endorsing the ideas inherent in the rule of law.

Although contemporary understandings of equality have far surpassed this early version, key tenets of formal equality thinking live on as ideology in the political memory of the culture. Because of its lingering hold, it is important to examine the elements of formal equality theory.

In formal equality theory it is assumed that equality is achieved if the law treats likes alike. An absence of different treatment of men and women in the form of the law (gender neutrality), together with neutral application of the law, is thought to make men and women equal. Certainly, there are times when like treatment is exactly what women want. The fights for the vote and for admission to professions were fights by women to be treated the same as men. In circumstances where women and men are identically situated with respect to the opportunity or right sought, the model of formal equality works. However, when women and men are not identically situated, which is most of the time, the formal equality model is no help; in fact, it perpetuates discrimination, because it cannot address real inequality in conditions.

There are problems for women at the heart of formal equality. To begin with, equality is considered a matter of sameness and difference, and there is an insistence on narrow comparability. This can be seen in the test that is applied in formal equality theory, the “similarly situated test.” This test holds that an equality violation consists of different treatment of similarly situated individuals. To

satisfy this test a woman is required to show that she is just like men who are treated more favourably by a given law, policy, or practice. Advantaged groups establish the norms for comparison. Women can fail the similarly situated test by having a characteristic that is unique, or by being designated as "different" simply because they are relatively disadvantaged. To the extent that women are not like men, because they are biologically different from men or because society has assigned them a subordinate status, they cannot achieve equality through the application of formal equality. The persistent social and economic inequality of women is obscured when equality is defined as a matter of difference in the form of the law. Disadvantage in real conditions is made invisible.

Also, formal equality does not compel an inquiry into the discriminatory effects that a seemingly neutral rule may have. For example, if equality analysis of the *Budget Implementation Act (BIA)* that created the CHST were restricted solely to the language of the legislation, ignoring its effects on women, the sex equality issue would disappear.

Closer examination of the formal equality model reveals that it is a package of interlocking components, which function to both conceal and legitimate the oppression of marginalized groups in the society. Formal equality is characterized by:

- acceptance of the highly formalistic similarly situated test, which derives from the Aristotelian formulation that things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness;
- a refusal to see that inequality is a question of dominance and subordination between groups in the society;
- a refusal to see that relations of inequality between groups are sustained by government inaction as well as by government action;
- a propensity to place many forms of inequality in a realm, such as the family or the market, that is categorized as "private," beyond the reach and responsibility of government;
- a policy of blindness to personal characteristics thought to be out of the control of the individual, such as genitalia and skin colour;
- resistance to dealing with discrimination relating to a category of stigmatization concerning which there may be a significant element of choice, such as being lesbian, or which, like poverty, is not readily reduced to personal characteristics analogous to skin colour;
- an incapacity to appreciate the adverse effects of facially neutral laws;
- an understanding of discrimination, not as systemic, but rather as consisting of individualized, intentional differential treatment;
- a tendency to individualize everything so that patterns of group-based oppression and subordination are rendered invisible;

- a conception of government as always a threat to individual liberty, and not as a significant actor in creating the conditions necessary for human flourishing; and
- a false polarization of liberty and equality.

The neo-liberal restructuring agenda has recently given some renewed life to formal equality, because formal equality tends to idealize market freedom and demonize state intervention to ameliorate extreme disparities in wealth and social power. It supports social Darwinism by asserting that as long as laws and policies are facially neutral, everyone has the same opportunities, and those who flourish do so because of their fitness. Formal equality is thus an ideological underpinning of the restructuring agenda of recent years, and it is therefore popular within governments and the media.

However, formal equality can never solve the real problems of inequality. To embrace it as a sole model is, in effect, to refuse to fulfil social commitments to equality. This highly individualistic version of equality, which refuses to deal with the disadvantage of groups, which also accepts that the right to equality applies only to the form of laws, and not to social and economic inequality, and which precludes a role for the state in promoting equality among groups, cannot adequately serve the interests of women. It also provides an inadequate theoretical base upon which to build interpretations of legal equality rights guarantees.

Fortunately, equality thinking has moved well beyond this narrow interpretation over the last 50 years. The meaning of equality has changed and expanded dramatically. There is wide acknowledgement now that inequality affects groups, and that it has historic roots and structural dimensions. The "normal" functioning of central institutions causes and perpetuates the inequality of some groups, and remedying that inequality requires changing how those institutions function. The trend in analysis is away from an approach that sees only the individual and only an individual remedy, and towards a more broadly focused, socially comprehensive one that recognizes there are complex, historically engendered hierarchies of relationships among groups, and that some groups experience compounded forms of disadvantage and multiple violations of human rights. It is widely understood now that women as a group are disadvantaged, and that equality measures must address the economic, social, legal, and political dimensions of that group disadvantage.

In legal literature, this newer and broader understanding is referred to as substantive equality, to reflect its concern about content, rather than form. Substantive equality, by contrast to formal equality, posits that:

- equality is not a matter of sameness and difference, but rather a matter of dominance, subordination, and material disparities between groups;
- the effects of laws, policies, and practices, not the absence or presence of facial neutrality, determine whether laws or actions are discriminatory;
- remedying inequality between groups requires government action;
- the so-called "private" realms of the family and the marketplace cannot be set outside the boundaries of equality inquiry or obligation, because they are key sites of

inequality;

- neither liberty nor equality for individuals can be achieved unless equality is achieved for disadvantaged groups;
- it is essential to be conscious of patterns of advantage and disadvantage associated with group membership; and
- the test of equality is not whether an individual is like the members of a group that is treated more favourably by a law, policy, or practice; rather, the test is whether the members of a group that has historically been disadvantaged enjoy equality in real conditions, including economic conditions.

Substantive equality thinking has fundamentally altered social, political, and legal understandings of what discrimination is and how it occurs. It has made the equality framework both more expansive and more attuned to the need for legislation and legal reasoning grounded in the social realities of disadvantaged groups. The history of international human rights commitments, Canadian human rights law, and the Constitution all reveal an enlarged post–World War II understanding of equality that is concerned with redressing group disadvantage, including the economic dimensions of group disadvantage, and that acknowledges that government action is essential to creating equality of condition.

International Human Rights Commitments

The Covenants

Canada is a signatory to all of the central international human rights treaties. Together they form a body of international human rights law by which Canada has agreed to be bound. In these treaties, Canada has made commitments to substantive equality for women.

The 1948 *Universal Declaration of Human Rights (UDHR*), the *International Covenant on Civil and Political Rights (ICCPR*), the International Covenant on Economic, Social and Cultural Rights (*ICESCR*), and the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* all commit governments to taking positive steps to promote legal, social, and economic equality.

The *UDHR* laid the foundation for post–World War II thinking on human rights. It is a declaration — not a binding treaty to which governments agree to become signatories. However, the *UDHR* has great moral authority, setting out a common standard of achievement for all peoples and all nations,[1] and it is the root document from which the international human rights treaties have grown.

The *UDHR* presents an integrated vision of what is necessary to make human beings secure and free. It declares that everyone has civil and political rights, such as the right to life, liberty, and security of the person; to freedom from slavery; to freedom from torture or cruel, inhuman, or degrading treatment; and to freedom from arbitrary arrest, detention, or exile. It also declares the right of everyone to freedom of thought, conscience, and religion, and freedom of expression, peaceful assembly, and association with others. It sets out the democratic rights to take part in the conduct of

public affairs, to vote, and to be elected at genuine periodic elections. These are the kinds of civil and political rights commonly associated with eighteenth and nineteenth century understandings of human rights.

The *UDHR* also recognizes social and economic rights, rights more typical of later stages of human rights development. Notably, it declares that everyone has a right to an adequate standard of living,[2] to social security, to realization of the economic, social, and cultural rights indispensable to dignity,[3] and to a social and international order in which these rights can be fully implemented.[4] Thus, the *UDHR* embodies in one scheme an integrated conception of human rights, including both civil and political rights and social and economic rights.

The two central Covenants, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights,* which are binding international treaties for the governments that have ratified them,[5] grew out of this Declaration. The *ICCPR* obliges States Parties to guarantee in law the same civil and political rights that appear in the *UDHR* and to provide the means of fully enforcing them. The *ICESCR* obliges States Parties to progressively realize social and economic rights, including the right of everyone to gain a living by work that is freely chosen;[6] to social security, including social insurance;[7] to an adequate standard of living, including adequate food, clothing, and housing, and to the continuous improvement of living conditions;[8] to the enjoyment of the highest attainable standard of physical and mental health;[9] and to education.[10] Canada ratified both Covenants, with the consent of the provinces, in 1976.

While the rights that appear together in the *UDHR* were divided into the two Covenants, the Preamble to the *ICCPR* expressly asserts the indivisibility of civil and political freedoms from economic, social, and cultural rights. The Preamble to the *ICCPR* states: "… the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy … economic, social and cultural rights."

In the lived experience of women and men, economic, social, and cultural rights cannot be easily separated from civil and political rights. People who are hungry will not be active participants in the political life of their societies. Likewise, people who do not enjoy freedom of expression cannot effectively struggle for social and economic fairness.[11] The Economic Commission for Latin America and the Caribbean (ECLAC) describes the interaction between economic, social and cultural rights, and civil and political rights in this way:

> Without progress in economic and social rights, civil and political rights … tend to become a dead letter for the sectors with least resources and lowest levels of education and information. Today it is abundantly clear that these sectors have much greater difficulty in gaining access to justice and opportunities for defending themselves against abuse by third parties or the State. Poverty and the non-exercise of citizenship very often go hand in hand. Changing this situation is a fundamental necessity in order to … achieve genuinely universal citizenship.[12]

Recently Canada reaffirmed its commitment to the indivisibility of civil, political, economic,

social, and cultural rights by supporting a 1997 resolution of the United Nations General Assembly which states: “All human rights and fundamental freedoms are indivisible and interdependent.” The resolution also recognizes that the “full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”[13] Canada voted in favour of the resolution, notwithstanding that the United Kingdom, the United States, and several other industrial democracies abstained. The resolution was adopted by the United Nations General Assembly.

When thinking about the indivisibility of rights, it is important to understand that the international instruments recognize an integral relationship between civil and political rights, social and economic rights, and equality rights. Indeed, it is useful to think of equality as the bridge between these two sets of rights. Both the *ICCPR* and the *ICESCR* guarantee that the rights in each Covenant will be available to all without discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[14] Further, in Article 3 of both Covenants, “States Parties undertake to ensure the equal right of men and women to the enjoyment of all … rights set forth in the … Covenant.”[15] Article 26 of the *ICCPR* makes an additional guarantee of equality that goes beyond the four corners of that Covenant. Article 26 requires States Parties to make broad guarantees of equality in law and to provide effective protection against discrimination wherever it arises.[16]

The Covenants guarantee the right of everyone to enjoy equally civil and political rights, and economic, social, and cultural rights. But there is more. Together, the *ICESCR* and the *ICCPR* delineate the multiple dimensions of equality. To enjoy equality, a woman must be able to enjoy fully all her rights. Equality is a bridging and an encompassing value, whose realization requires the full realization of both civil and political rights, and economic, social, and cultural rights.

It is also important to note that the *ICESCR* requires positive action by governments to realize economic, social, and cultural rights. The *ICCPR* projects a more classical liberal conception of the relationship between the individual and the state, with the state envisioned principally as the main perpetrator of rights violations,[17] and liberty, defined as freedom from government interference, as the dominant value. The *ICESCR*, however, views governments as key implementers of rights, actors who can give rights practical meaning. The general obligation of each State Party to this Covenant[18] is “to take steps, … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including … the adoption of legislative measures.”[19]

The *ICESCR* is important to women's equality because its subject matter is practical, material conditions, and because it articulates the responsibility of governments for making those conditions adequate. As Barbara Stark points out, it recognizes “the right of every human being to be nurtured — to be housed, fed, clothed, healed and educated.”[20] These rights, she argues, describe women's work. Caregiving work is constructed as female and therefore as undeserving of adequate compensation; and this is a major factor in women's poverty. Stark says the importance of the *ICESCR* lies in the fact that it “shifts the responsibility from women to the State for some nurturing work.” [21]

***Convention on the Elimination of All Forms of Discrimination Against Women* (*CEDAW*)**

CEDAW[22] was developed as a new treaty in 1979 after the *ICCPR* and the *ICESCR* had already come into force. It contains elements of both civil and political rights, and economic, social, and cultural rights, knitting the two together in a women's rights instrument.

CEDAW is significant precisely because it is a convention about women, and a convention that commits signatories to eliminating *all* forms of discrimination against women. It recognizes that women are a subordinated group in all societies, and that governments must make conscious, concerted efforts to change this fact.

Various provisions of *CEDAW* make it clear that this is a document concerned with women's substantive right to equality. At the outset, the Preamble to the Convention recognizes that formal guarantees of equality are not enough. It recognizes that despite the existence of various treaties guaranteeing equal rights to women, "extensive discrimination against women continues to exist."[23] The explicit purpose of the Convention is to ensure that measures are adopted that will "[eliminate] such discrimination in all its forms and manifestations."[24]

CEDAW requires States Parties, or signatories to the Convention, to enact legal guarantees of equality and to provide the means of fully enforcing them. It also requires much more. First, the Convention obliges States Parties to guarantee women the "exercise and enjoyment" of these legal rights.[25] "Exercise of the rights" connotes access to the use of them, by making adjudicative procedures for vindicating rights accessible, affordable, and known. "Enjoyment of the rights" means actually experiencing the benefit of the right, having the content of the right made real in one's life.[26]

The Convention's definition of discrimination reinforces this concern with women's enjoyment of their rights. According to the Convention, discrimination includes "any distinction, exclusion or restriction … which has the purpose or effect of impairing or nullifying the … enjoyment … by women … of human rights and fundamental freedoms. …" The Convention, then, prohibits both acts and omissions that impair women's ability to enjoy, in their actual conditions, the substantive content of human rights and fundamental freedoms.

The Convention also requires States Parties not just to state, in legal documents, that they are committed to the principle of equality for women, but also to "ensure, through law and other appropriate means, the practical realization of this principle."

Thus, the scope of *CEDAW*'s concerns is broad. The goal of the Convention is the elimination of all forms of discrimination against women "in all fields, including the political, economic, social, and cultural fields."[27] This language precludes a reading of *CEDAW* that would permit signatories to address only the forms of discrimination which appear on the face of laws or policies, and thus to ignore the structural subordination of women. It also indicates that the Convention's application is not limited in any way, and that economic, social, and cultural forms of inequality are of particular concern. This concern with social and economic inequality is reinforced by the detailed Articles of Part III of *CEDAW* which require specific measures to overcome inequality in women's economic conditions, and in relation to access to work, remuneration for work, social security, pregnancy and maternity, education, health care, and living conditions.[28]

CEDAW obliges States Parties to pursue the goals of the treaty by "all appropriate means" or by taking "all appropriate measures." Most of the specific Articles in the Convention state that States Parties shall "take all appropriate measures" (to eliminate discrimination against women in education, public life, etc.). Legislation may be required, but legislation is not the complete solution. All appropriate measures are required and those may include designing and implementing programs, or allocating resources. The obligation is a positive one. Governments are required to act, not just to refrain from discriminating.

CEDAW also repudiates the split between public and private spheres, and the tendency of formal equality to designate the family and the market as private and therefore off limits. It does so by obliging States Parties to eliminate discrimination against women by "any person, or organization or enterprise." This distinction is crucial for women, because if discrimination in the "private" spheres of the family and the marketplace are not matters of state obligation, significant sites of women's subordination are set outside the boundary of equality commitments. Acknowledging this fact, *CEDAW* places obligations on States Parties to eliminate discrimination against women not just in the acts of government, but also in the conduct of non-governmental actors, whether they are individuals, organizations, or enterprises.[29]

CEDAW explicitly addresses two different ways in which women as a group are subordinated: through the social construction of stereotyped and subservient roles[30] and through the commodification of their sexuality.[31] These provisions demonstrate that the Convention's vision is not a rigidly individualistic one. Rather, it comprehends systemic, structural, and group-based forms of oppression.

The Convention also recognizes the need for governments and other actors to implement affirmative measures to overcome the historical disadvantage of women.[32] This reveals the underlying principle of the Convention, and clarifies that its goal is *de facto* equality. The general rule of the Convention is that women should be treated in a way that will bring the subordination of women to an end and produce equality in the real conditions of women's lives, regardless of whether that treatment is the same as, or different from, the treatment of men. The affirmative action clause reinforces the Convention's interest in real, material equality for women by repudiating a formal version of equality that would automatically deem measures discriminatory if they involve treating women differently from men.

Report of the Fourth World Conference on Women

The Beijing *Platform for Action*[33] provides further evidence that Canada has committed itself to substantive equality for women. The *Platform for Action* was adopted by participating governments, including Canada, in September 1995 at the Fourth World Conference on Women. It is the newest statement on the conditions of women's inequality around the world. It is also the latest effort by governments, negotiating together, to articulate in detail the concrete steps that are necessary if women are to advance. Notably, the *Platform* does not confine its focus to the forms of laws, or to the "public" sphere. Rather, the *Platform* is wide-ranging, dealing with the multiple facets of women's inequality, and setting out a long list of corrective actions that governments need to take.

The *Platform for Action* is not just important in itself. It is also an aid to understanding the meaning of *CEDAW*. The *Platform for Action* and *CEDAW* are complementary documents. Since 1975 there have been four United Nations-sponsored women's conferences, an International Women's Year (1975), and a Decade for Women (1976–1985). Through these events, strategies for advancing the equality of women have been developed, including the *Forward-looking Strategies* adopted in 1985 at the Third World Conference on Women, and the *Declaration on Violence Against Women* adopted in 1993.[34] These documents and the *Platform for Action* should be regarded as basic interpretive aids to *CEDAW*. *CEDAW* cannot be given a static, or time-fixed, reading. The *Platform for Action* provides a 1995 statement of the specific commitments of participating governments to advancing the equality of women. It is also, therefore, the most up-to-date guide to interpreting what *CEDAW* commitments mean now.

There are two parts of the *Platform for Action* that deal directly with economic issues: one addresses the issue of poverty; the other addresses the issues of women's inequality in economic structures and policies, in particular those related to remunerated and unremunerated work.

The *Platform* recognizes that "[i]n the past decade the number of women living in poverty has increased disproportionately to the number of men";[35] that there is "a persistent and increasing burden of poverty on women";[36] and that women's poverty has been deepened by globalization, economic restructuring, and structural adjustment programs.[37] The *Platform* commits governments to reviewing and modifying macro-economic and social policies that impede the advancement of women, or reinforce their inequality.

The actions to be taken by governments to eliminate women's poverty include the following:[38]

- Review and modify, with the full and equal participation of women, macro-economic and social policies with a view to achieving the objectives of the *Platform for Action*;
- Analyze, from a gender perspective, policies and programs — including those related to macro-economic stability, structural adjustment, external debt problems, taxation, investments, employment, markets and all relevant sectors of the economy — with respect to their impact on poverty, on inequality and particularly on women; assess their impact on family well-being and conditions, and adjust them, as appropriate, to promote more equitable distribution of productive assets, wealth, opportunities, income and services;
- Pursue and implement sound and stable macro-economic and sectoral policies that are designed and monitored with the full and equal participation of women, encourage broad-based sustained economic growth, address the structural causes of poverty and are geared towards eradicating poverty and reducing gender-based inequality within the overall framework of achieving people-centred sustainable development;
- Restructure and target the allocation of public expenditures to promote

women's economic opportunities and equal access to productive resources and to address the basic social, educational and health needs of women, particularly those living in poverty;

- Provide adequate safety nets and strengthen state-based and community-based support systems, as an integral part of social policy, in order to enable women living in poverty to withstand adverse economic environments and preserve their livelihood, assets and revenues in times of crisis;
- Formulate and implement, when necessary, specific economic, social, agricultural and related policies in support of female-headed households;
- Introduce measures for the empowerment of women migrants and internally displaced women through the easing of stringent and restrictive migration policies, recognition of qualifications and skills of documented immigrants and their full integration into the labour force, and the undertaking of other measures necessary for the full realization of the human rights of internally displaced persons;
- Enable women to obtain affordable housing and access to land by, among other things, removing all obstacles to access, with special emphasis on meeting the needs of women, especially those living in poverty and female heads of households;
- Create social security systems wherever they do not exist, or review them with a view to placing individual women and men on an equal footing, at every stage of their lives;
- Ensure access to free or low-cost legal services, including legal literacy, especially designed to reach women living in poverty;
- Take particular measures to promote and strengthen policies and programs for indigenous women with their full participation and respect for their cultural diversity, so that they have opportunities and the possibility of choice in the development process in order to eradicate the poverty that affects them.

The *Platform for Action* also addresses women's "inequality in economic structures and policies, in all forms of productive activities and in access to resources."[39] The *Platform* is targeted at women's lack of economic autonomy, the disparity between their incomes and wealth and those of men, and the ways in which discrimination in employment, and the devaluation of women's paid and unpaid work contribute to this inequality.[40]

To address the negative impact on women of economic structures and policies, the actions to be taken by governments include the following:

- Enact and enforce legislation to guarantee the rights of women and men to equal pay for … work of equal value;

- Devise mechanisms and take positive action to enable women to gain access to full and equal participation in the formulation of policies and definition of structures through such bodies as ministries of finance and trade, national economic commissions, economic research institutes and other key agencies, as well as through their participation in appropriate international bodies;
- Conduct reviews of national income and inheritance tax and social security systems to eliminate any existing bias against women;
- Seek to ensure that national policies related to international and regional trade agreements do not adversely impact women's new and traditional economic activities;
- Ensure that all corporations, including transnational corporations, comply with national laws and codes, social security regulations, applicable international agreements, instruments and conventions, including those related to the environment, and other relevant laws;
- Enact and enforce equal opportunity laws, take positive action and ensure compliance by the public and private sectors through various means;
- Use gender-impact analysis in the development of macro- and micro-economic and social policies in order to monitor such impact and restructure policies in cases where harmful impact occurs …[41]

The fact that Canada is a signatory to *CEDAW*, and that it has indicated it fully intends to satisfy the terms of the *Platform for Action*, confirms that Canada's commitment to the equality of women includes a commitment to eradicating women's economic inequality.

Taken together, the international treaties to which Canada is a signatory, as well as other UN declarations and documents, make it clear that substantive equality for women is part of the explicit commitment of our nation.

Domestic Human Rights Commitments

Canada's Human Rights Statutes

The commitment of Canadians to equality is also expressed in domestic human rights legislation at the federal, provincial, and territorial levels.

Some early anti-discrimination initiatives in Canada included British Columbia's 1931 *Unemployment Relief Act*, Ontario's 1932 *Insurance Act*, Manitoba's 1934 *Libel Act*, British Columbia's 1945 *Social Assistance Act*, and Saskatchewan's 1947 *Bill of Rights*.[42]

However, Canada's domestic human rights legislation, like the international human rights treaties, really developed during the post–World War II period. After World War II, there was a dramatic increase in human rights activity. In Canada the lesson of the Holocaust led to the gradual repeal of

discriminatory laws and a reduction in blatantly racist practices. Restrictive covenants forbidding the sale of property in certain areas to “Jews and persons of other objectionable nationality” were revoked. Segregated schools for Blacks and Aboriginal peoples gradually disappeared, as did segregated swimming pools and separate sections in theatres and restaurants for non-whites. Bars on the entry of Jews and non-whites into certain professions were dropped. Japanese-Canadians, Inuit, Indo-Canadians, Doukhobours, and finally status Indians were given the vote for the first time in Canada during this post-war period.

Human rights legislation appeared, prohibiting discrimination in employment and accommodation and public services. More complex human rights laws have since been developed in every jurisdiction. These laws are administered by human rights commissions, with specialized tribunals to hear and decide on allegations of discrimination brought before them.

The history of human rights legislation in Canada is a history of growing commitment to advancing the equality of disadvantaged groups in the society. At first human rights legislation prohibited discrimination only on the grounds of race, religion, colour, ethnic, or national origin. But in response to an expanding understanding of discrimination and to the demands of other groups, including women, other grounds of discrimination have been added gradually, extending coverage to include sex, physical and mental disability, marital status, family status, age, and, in some jurisdictions, political belief, criminal record, and sexual orientation.[43] A few human rights statutes now recognize social assistance recipients as a group entitled to protection from discrimination,[44] reflecting a commitment to dealing with economic inequality as a human rights issue.

As well, faced with new laws and with the particularities and complexities of real discrimination cases, tribunals and courts have been required to consider the status of human rights law in relation to other laws, and to expand and deepen their conception of discrimination.

Since 1982 the Supreme Court of Canada has made a number of pronouncements about the nature of human rights law and its place in the hierarchy of laws. The Court has concluded that human rights legislation is of a special nature because of the importance of the values it endeavours to buttress and protect. It is quasi-constitutional; that is, not quite constitutional, but more important than all other laws. No one can contract out of human rights legislation, nor can it be suspended, repealed, or altered except by clear legislative pronouncement.[45] Because of its important purpose and because it is remedial in nature, the Court has said that human rights legislation should not be interpreted restrictively, but rather in such a way as to give the rights their full recognition and effect.[46]

These conclusions reached about the nature of human rights legislation have led logically to the development of other human rights principles. One of these principles is that discrimination must be identified by its effects on the victim, not by the intent of the perpetrator. In 1985 the Supreme Court of Canada ruled in the case of *Ontario (Human Rights Commission) and O'Malley* v. *Simpsons Sears*[47] that discrimination need not be intentional to violate human rights protections. Theresa O'Malley disputed a requirement that all employees of Simpsons Sears work Friday evenings and Saturdays on a rotation basis. Ms. O'Malley was a Seventh Day Adventist and her religion required strict observance of the Sabbath from sundown Friday to sundown Saturday. Clearly this employment requirement was not

imposed with the intention of discriminating against Ms. O'Malley as a Seventh Day Adventist. Nonetheless, the rule had a discriminatory effect, forcing her to choose between her employment and her religion.

Although the discrimination was unintentional, the Supreme Court of Canada found that Ms. O'Malley was discriminated against. Further, the Court ruled that policies or practices that appear neutral on their face, but which have an adverse effect on a protected group, contravene the law. Because human rights legislation is remedial in nature and must be given an interpretation that will fulfil the broad aim of eliminating discrimination, the Court concluded that it is not necessary to prove intent in order to establish that discrimination has occurred, and that discrimination must be identified by its effects.

When discrimination is identified by its effects, it is also clear that treatment is not determinative. In some cases, as in *O'Malley,* identical treatment causes discrimination, and asymmetrical treatment may be necessary to create equality. The assumption, inherent in a formal equality approach, that same treatment is good and different treatment is bad, has exploded when tribunals and courts have had to apply the law to the realities of discrimination in Canada. The repudiation of same treatment as a formula for equality began early in human rights adjudication. In cases such as *Tharp* v. *Lornex Mining Corp. Ltd*.,[48] *Singh* v. *Security and Investigation Services Ltd*.,[49] and *Colfer* v. *Ottawa Police Commission*,[50] Boards of Inquiry found that same treatment caused discrimination. In *Tharp*, a British Columbia Board of Inquiry ruled that Jean Tharp was denied company-provided room and board at a mining site because of her sex, contrary to her right to be free from discrimination. The Board of Inquiry rejected the company's argument that it had offered her the "equality" of sharing the men's bunk house, shower, and washroom facilities.[51] In *Singh*, the Board of Inquiry found that the complainant was discriminated against by a rule that required all employees to be clean-shaven and to wear caps. Mr. Singh was a practising Sikh, and the tenets of his religion forbade him from shaving and required him to wear a turban. In *Colfer*, the Board of Inquiry found that Ann Colfer was discriminated against by a rule that required all Ottawa police officers to meet standard height and weight requirements. Because the standards were based on a male norm, they had the effect of screening out a disproportionate number of women. Had the adjudicators in these cases applied a same treatment model of equality, findings of discrimination could not have been made.

The issue of the adequacy of same treatment as the formula for equality reached the higher courts in the 1980s. In 1985 the Saskatchewan Court of Appeal handed down its decision in *Huck* v. *Canadian Odeon Theatres*.[52] (A subsequent application for leave to appeal to the Supreme Court of Canada was refused.) In this case, the Court was called upon to decide whether Canadian Odeon Theatres had discriminated against Michael Huck because of his physical disability. Mr. Huck, who had muscular dystrophy and used a motorized wheelchair, was refused service at the new Canadian Odeon Theatre in Regina unless he agreed to sit in front of the front row of seats. The theatre argued that Mr. Huck had been offered the same service as every other patron: a ticket for the movie and a seat to watch it from. If Mr. Huck could not enjoy the service in the same way as everyone else, the problem was caused by his disability, not by the theatre, it was contended. The Saskatchewan Court of Appeal rejected this analysis in forceful terms:

> If that interpretation of the meaning of discrimination … is correct then the right not to be discriminated for physical disability … is meaningless. If that interpretation is correct, I can conceive of no situation in which a disabled person could be discriminated against in the use of accommodation, services or facilities which are offered to the public. If that interpretation is correct, the owner of a public facility, who offers washroom facilities of the same kind offered to the public generally to a disabled person or offers any other service notwithstanding that it can't be used by a wheelchair reliant person, will then be found to have discharged his obligation under the Code. A physically reliant person does not, in my opinion, acquire an equal opportunity to utilize facilities or services which are of no use to him or her. Identical treatment does not necessarily mean equal treatment or lack of discrimination.[53]

The Court further stated:

> The treatment of a person differently from others may or may not amount to discrimination just as treating people equally is not determinative of the issue. If the effect of the treatment has adverse consequences which are incompatible with the objects of the legislation by restricting or excluding a right of full and equal recognition and exercise of those rights it will be discriminatory.[54]

The Supreme Court of Canada's decision in *Brooks* v. *Canada Safeway*[55] also added important nuances to the understanding of equality. In this decision, the Supreme Court of Canada ruled that Canada Safeway's disability plan discriminated against pregnant employees, and that discrimination because of pregnancy is discrimination because of sex within the meaning of the *Manitoba Human Rights Act*.[56] The Canada Safeway disability plan provided 26 weeks of benefits to any worker who had worked for Safeway for three months and who had to be absent from work for health reasons. However, it denied benefits to pregnant employees during a 17-week period commencing 10 weeks before childbirth and extending six weeks after it. Benefits were denied during this period no matter whether women were unable to work because of pregnancy-related complications or non-pregnancy-related illnesses. Unemployment Insurance maternity benefits provided an imperfect substitute for the disability benefits because they provided less money for a shorter time. The Court's decision in *Brooks* repudiated *Bliss* v. *Canada (A.G.)*,[57] a ruling made 10 years earlier under the *Canadian Bill of Rights*.

In *Bliss*, the Supreme Court of Canada ruled in 1979 that the *Unemployment Insurance Act*, which had a provision similar to the Canada Safeway disability plan, did not discriminate on the basis of sex. Stella Bliss challenged the *Act* when she was denied unemployment insurance benefits because she was pregnant. Even though she had worked the requisite number of weeks to qualify for them, Ms. Bliss could not claim regular unemployment benefits because the *Act* barred a pregnant woman from claiming regular unemployment insurance benefits in the 15 weeks immediately surrounding the birth of her child.

Denied regular benefits, Ms. Bliss could not qualify for unemployment insurance pregnancy benefits either. The *Unemployment Insurance Act* required a woman to have been employed for a longer period to be eligible for these benefits. Because she was not eligible under this rule, Bliss could not get any benefits. She was refused pregnancy benefits because she did not qualify and refused regular benefits

because she was pregnant. In both ways, Ms. Bliss was discriminated against because of her sex.

However, the Court ruled that there was no discrimination based on sex, "since the distinction being made is not between male and female persons, but between pregnant and non-pregnant persons."[58] The Court adopted the view that because not all women become pregnant, the distinction is not one based on sex. It overlooked the fact that only women become pregnant and that laws that discriminate against those who are pregnant discriminate against women exclusively.

The Court expressed agreement with Justice Pratte of the Federal Court of Appeal who said:

> Assuming the respondent to have been "discriminated against," it would not have been by reason of her sex. Section 46 applies to women, and has no application to women who are not pregnant, and it has no application, of course to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant not because they are women.[59]

In other words, by treating all non-pregnant persons the same (whether male or female), the *Act* satisfied the requirement of neutrality, that is, of treating likes alike.

The *Bliss* Court also distinguished penalties from benefits, contending that there should be a difference in the way that equality analysis thinks about penalizing legislation, such as a criminal law provision, that treats one section of the population more harshly than others, and legislation providing "additional benefits to one class of women." Contrasting the case of *Drybones*, which dealt with a *Criminal Code* provision that made it an offence for an Indian to be intoxicated, the Court said:

> There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *Regina v. Drybones*, and legislation providing additional benefits to one class of women, specifying conditions which entitle a claimant to such benefits and defining a period during which no benefits are available.[60]

Looking back at *Bliss*, it can be seen as an early blueprint for derailing challenges to laws and policies that contribute to the economic inequality of women. In *Bliss* the Court shifted responsibility for the inequality complained of by Stella Bliss away from the legislative scheme, finding the cause of the inequality did not reside in the legislation but rather was created by nature. The Court said that "[these provisions] are concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation but by nature."[61]

Because of that reasoning, it was important that 10 years later in *Brooks*, the Court repudiated *Bliss*. Unlike *Bliss*, which made the social disadvantage associated with pregnancy disappear, the *Brooks* decision makes disadvantage visible. In *Brooks* the Court found that burdening women with a disproportionate share of the cost of procreation is discriminatory. The Court anchored its analysis in the purpose of human rights legislation, saying:

> … one of the purposes of anti-discrimination legislation … 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. … Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation.[62]

Women experience a tangible and serious disadvantage when they are penalized because of childbearing or childbearing capacity. This is a social consequence of biology that men will never experience. Unlike *Bliss*, the *Brooks* decision makes women's disadvantage visible precisely because it admits that women are negatively affected by pregnancy-related discrimination in a way that men are not. In *Brooks* the Court found that the social disadvantages that are uniquely linked to women's gender are issues of sex discrimination.

It is notable in the *Brooks* decision that the Court pays attention to a larger social context of childbearing and the inequality of women. The Court does not focus solely on the narrow question of the legitimacy of the Safeway disability plan, but considers also the broader question of what is necessary for women to be able to function equally in society. The pervasiveness of discrimination based on pregnancy and the unfair disadvantage to women created by this are recognized and taken into account in determining that discrimination has occurred.

As in the decision in *Brooks*, in *Janzen* v. *Platy Enterprises Ltd*.[63] the Supreme Court of Canada adopted an inclusive, effects-based approach to the ground of sex discrimination that prioritizes the perspective of women, and assesses the significance of the challenged law or practice in the context of the social, historical, economic, and political realities of discrimination. In this case, this approach led the Supreme Court of Canada to conclude that sexual harassment is sex discrimination. Had the Court followed the reasoning of *Bliss*, or the reasoning of the lower courts, sexual harassment would have been dismissed as a matter of an individual man's sexual attraction to a particular woman. Instead, the Court recognized that sexual harassment is experienced by women predominantly, and that sexual harassment is an acting out of power relations between dominant men and subordinate women. As such, it is a form of sex discrimination.

The acceptance of effects as the test of discrimination has led not only to an expanded and more complicated understanding of how discrimination occurs, but also to the recognition of systemic discrimination. In addition to the fact that systemic discrimination can be recognized by its effects, it can also be recognized by the fact that it affects whole groups of people. Canadian adjudicators have moved beyond the notion that discrimination is a smattering of isolated events, unconnected to history or social context, which occur between individuals. Although individual instances of discrimination occur and require individual remedies, there is also discrimination that affects whole groups of people because of their sex, race, disability, or sexual orientation. That a rule or practice has an impact on a whole group is a key element of what is meant by systemic discrimination.

Systemic discrimination was identified in *Action Travail des Femmes*,[64] a case initiated and carried forward by Action Travail des Femmes, a Montreal women's organization. In that case, the Supreme Court said that "[t]he complaint was not that of a single complainant or even of a series of individual complainants; it was a complaint of systemic discrimination practised against an identifiable group."[65] The Court held that, in a case of systemic discrimination, a systemic remedy is appropriate.

The evidence in the case of *Action Travail des Femmes* revealed that women were being systematically discriminated against with respect to employment in blue-collar jobs with the Canadian National Railway. Women were discriminated against at the time they applied for jobs. They were also required to take discriminatory tests, required to have unnecessary qualifications, and harassed on the job if they were hired. Some of the discrimination was overt in form; for example, there was sex-based harassment on the job. Some of it occurred through the discriminatory operation of seemingly neutral requirements; for example, tests were used that screened out a disproportionate number of women and were not job related. The result was a pattern of exclusion of women from blue-collar jobs. At the end of 1981, there were only 57 women in blue-collar jobs in the St. Lawrence region of Canadian National Railway. These 57 women were 0.7 percent of Canadian National's blue-collar labour force in the region.

In the circumstances, the Tribunal that originally heard the complaint considered it necessary to order that a number of steps be taken to rectify the situation. It ordered Canadian National to cease using discriminatory tests and requiring women to take physical tests that were not given to men; to change its recruitment and interviewing practices; to stop its supervisory personnel from discriminating when hiring; and to take steps to prevent women from being sexually harassed on the job. In addition, it ordered Canadian National to hire one woman in every four new hires until the representation of women in blue-collar jobs in the St. Lawrence region reached 13 percent.

Canadian National disputed the part of the remedial order that set the hiring quota. At the Supreme Court level the question was whether the Tribunal had erred in fashioning such a remedy. The Court concluded that it had not, and described the operation of the remedy in this way:

> An employment equity programme … is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a programme renders further discrimination pointless. To the extent that some intentional discrimination may be present, for example in the case of a foreman who controls hiring and who simply does not want women in the unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.
>
> Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping. For example, if women are seen to be doing the job of "brakeman" or heavy cleaner or signaller at Canadian National, it is no longer possible to see women as capable of fulfilling only certain traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.

> Thirdly, an employment equity programme helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of "tokenism"; it is no longer the case that one or two women, for example, will be seen to "represent" all women. … Moreover, women will not be so easily placed on the periphery of management concern. The "critical mass" also effectively remedies systemic inequities in the process of hiring … once a "critical mass" of the previously excluded group has been created in the work force, there is a significant chance for the continuing self-correction of the system.[66]

The Court concluded:

> To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programmes is always to improve the situation of the target group in the future. … Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals … are a rational attempt to impose a systemic remedy on a systemic problem.[67]

At virtually the same time as the Supreme Court of Canada's decision in *Action Travail des Femmes*, the Court issued another decision underlining its position on the remedial character of human rights legislation. In *Canada (Treasury Board)* v. *Robichaud*,[68] the Court was asked to decide whether the Department of National Defence (DND) was liable for an employee's sexual harassment by her supervisor, Dennis Brennan. Drawing on its earlier decisions, the Supreme Court of Canada found that DND was liable for the harassment because only the employer could provide an effective remedy.

The Court stated:

> Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.[69]

> … the Act is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.[70]

> … if the Act is concerned with the *effects* of discrimination rather than its *causes* (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy — a healthy work environment. The

> legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective. … if the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.[71]

All these decisions, taken together, mean that in the 1990s there is a much more complex foundation for equality analysis. Neither sameness nor difference of treatment is determinative. Discrimination has a group-based dimension; identifying and eliminating it requires focusing on the broader social context and on the conditions of the group in question. Effects of discrimination, not intentions, are the concern of human rights protections; the goal is not to punish the perpetrator but to change the circumstances of the victims.

Charter Equality Rights Guarantees

In 1982, when Canada's Constitution was repatriated from Britain, a *Charter of Rights and Freedoms* that includes equality guarantees was added. Those constitutional guarantees of equality, now in section 15 of the *Charter,* are part of the trend of the past several decades in Canada to enact and expand human rights protections that will reduce inequality. However, it was because of the danger posed by decisions such as *Bliss,* which were rendered by courts under the *Canadian Bill of Rights,* that women mounted a massive lobby to influence the wording of the *Charter*. Important amendments to the text of the *Charter* were made, which can be directly traced to representations by women's organizations concerning the inadequacy of *Bill of Rights* jurisprudence.

Section 15 underwent a transformation from a clause guaranteeing “equality before the law” and “equal protection of the law” to a guarantee of these rights together with “equality under the law” and “equal benefit of the law.” The additions were intended to give s. 15 substantive content and to ensure that the guarantee is applied to benefits, not just penalties. Section 28, a specific sex equality guarantee, was added to ensure that women would receive the equal benefit of all the rights guaranteed in the *Charter*.

One of the strongest supports for the view that s. 15 is intended to promote conditions of equality for historically disadvantaged groups is provided by s. 15(2) of the *Charter*. Section 15(2) authorizes laws, programs, or activities designed to ameliorate “conditions” of disadvantage for members of disadvantaged groups. Section 15(2) clarifies the meaning of *Charter* equality rights by ruling out the idea that treating someone differently is, by definition, discriminatory.[72]

It was a logical next step in the evolution of equality law when the Supreme Court of Canada in *Andrews* v. *Law Society (British Columbia),*[73] its first decision interpreting the equality guarantees, swept into s. 15 the human rights principles that it had shaped over the previous decade. “In general,” the Court said, “the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1).”[74]

Viewed against the backdrop of *Bliss* and other *Bill of Rights* equality cases,[75] the 1989 decision of the Supreme Court of Canada in *Andrews* was a watershed development.[76] The facts of the case — a challenge by a British subject to a citizenship requirement for practising law in British Columbia — were not particularly important to women, but because it was the first *Charter* equality rights case to reach the Supreme Court of Canada, the interpretive issues were critical. The question at the time of *Andrews* was whether the Court would simply entrench formal equality or begin to develop a contemporary Canadian theory of constitutional equality rights that could address the persistent, substantive inequality of women, people of colour, Aboriginal people, and people with disabilities.

In *Andrews* the Court endorsed a concept of discrimination that focused on adverse effects, made group disadvantage central to its analysis, and jettisoned any requirement for proof of intent to discriminate.

Regarding the content of s. 15, the Court said:

> The principle of equality before the law has long been recognized as a feature of our constitutional tradition and found statutory recognition in the *Canadian Bill of Rights*. However, unlike the *Canadian Bill of Rights*, which spoke only of equality before the law, s. 15 (1) of the *Charter* provides much broader protection. Section 15 spells out four basic rights (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law. The inclusion of these additional rights in s. 15 of the *Charter* was an attempt to remedy some of the shortcomings of the right to equality under the *Canadian Bill of Rights*.[77]

Concerning *Bill of Rights* case law such as *Bliss*, the Court said: "It is readily apparent that the language of s. 15 was chosen to remedy some of the perceived defects under the *Canadian Bill of Rights*."[78]

In *Turpin*,[79] a subsequent *Charter* equality rights decision, the Supreme Court of Canada elaborated further on the approach articulated in *Andrews*, emphasizing the importance of a finding of disadvantage that exists apart from the particular legal distinction being challenged. On behalf of a unanimous Court, Wilson J. recognized that a purpose of s. 15 is "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[80] The Court's holding in *Turpin* was consistent with a conception of s. 15 as primarily concerned with the remediation of the inequality of disadvantaged groups.

Since *Andrews*, various members of the Court have at various times confirmed their agreement with its overall approach.[81] They have also repudiated the similarly situated test;[82] acknowledged the inadequacies of a same treatment theory of equality;[83] recognized the importance of discriminatory effects and adverse effects analysis;[84] affirmed that discrimination may be unintentional;[85] emphasized the crucial role of context;[86] endorsed a purposive interpretive approach to s. 15;[87] and identified as purposes of s. 15 the protection of human dignity and the prevention of distinctions that may worsen the circumstances of those who have already suffered marginalization or historical

disadvantage in our society.[88]

The Supreme Court of Canada has expressly recognized that *Charter* equality rights have positive content. In *Schachter* v. *Canada*, a case concerning the right of fathers to parental leave, Lamer C.J. stated:

> The right which was determined to be violated here is a positive right: the right to equal *benefit* of the law. … Other rights will be more in the nature of "negative rights" which merely restrict government … the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive benefits.[89]

Schachter was applied by the Ontario Court of Appeal in the case of *Haig* v. *Canada*, wherein it was held that s. 15 requires the extension of human rights protections to gays and lesbians. Adopting a purposive approach that places disadvantaged groups at the forefront of the analysis, Krever J.A. stated:

> [T]he remedy chosen must not only respect the role of the legislature but it must also promote the purposes of the *Charter*. In choosing the remedy one must look to the values and objectives of the *Charter*, because an appreciation of the *Charter*'s deeper social purposes is central to the determination of remedy, especially when the impugned legislation confers a benefit on disadvantaged groups.[90]

These interpretive developments all reflect Canada's commitments to substantive equality.

Social Programs and Other Domestic Legislation

Canada's commitment to equality is expressed not just in those instruments that declare human rights as their subject matter. It is expressed in other laws and in social programs as well. In particular, it can be found in the laws and programs that constitute Canada's social safety net, including unemployment insurance (now employment insurance), social assistance, public pensions, and health care. These programs involve government in redistribution, regulation, and planning. Canada's social safety net, along with workers' compensation schemes, labour standards legislation, health and safety regulations, environmental laws, and other such interventions, all reflect a recognition of the inability of nineteenth century laissez-faire capitalism or formal equality to provide fairness and equality.

Family law reforms, equal pay laws, employment equity legislation, and workplace anti-harassment policies also reflect a trend in Canadian law and policy to dismantle social hierarchies that are premised on the economic and social subordination of women.

Section 36 of the Constitution

Also significant, as evidence that the normative content of equality is not necessarily fulfilled by the absence of government intervention, is s. 36 of the Constitution which commits the federal

government and the provinces together to “promoting equal opportunities for the well-being of all Canadians”; “furthering economic development to reduce disparities in opportunities”; and “providing essential public services of reasonable quality to all Canadians.”

The history of constitutional debates leading up to the enactment of s. 36 discloses a sensitivity to the reality that the goal of individual equality is inextricably linked to the availability of an adequate social safety net, and to the capacity of government to redistribute income in favour of disadvantaged groups and regions. Moreover, it is clear that successive generations of Canadian political leaders have recognized that the goals of economic equality and basic security for all Canadians are so fundamental as to surpass regional interests.

These fundamental objectives were recognized by former Prime Minister Lester Pearson, who asserted in a paper presented to the Federal/Provincial First Ministers' Conference held in Ottawa, on 5–7 February 1968:

> The economic prospects of Canadians of certain regions remain more limited than those of people in other regions. … Only through that sense of equality — equality in the opportunities open to all Canadians, whatever their language or cultural heritage, and wherever they may choose to live or move — can we give a purpose to Canada that will meet the proper expectations of our people. And only through measures that will carry this conviction — that we intend to make equality of opportunity an achievement as well as a goal — can we preserve the unity of the country. … Caring for the less privileged, and the disadvantaged, no longer is a matter for the local community alone; for haphazard municipal or charitable relief. … [A] loose association of political units … would jeopardize the ability of the federal government to contribute to rising living standards for the people of Canada. … We believe that the Government of Canada must have the power to redistribute income, between persons and between provinces, if it is to equalize opportunity across the country. This would involve, as it does now, the rights to make payments to individuals, for the purpose of supporting their income levels — old age security pensions, unemployment insurance, family allowances — and the right to make payments to provinces, for the purpose of equalizing the level of provincial government services. It must involve, too, the powers of taxation which would enable the federal government to tax those best able to contribute to those equalization measures. Only in this way can the national government contribute to the equalization of opportunity in Canada, and thus supplement and support provincial measures to this end.[91]

Similarly, former Prime Minister Pierre Trudeau wrote:

> There is no room in our society for great or widening disparities — disparities as between the opportunities available to individual Canadians, or disparities in the opportunities or the public services available in the several regions of the country. … [The federal government] must have the power to redistribute income and to maintain reasonable levels of livelihood for individual Canadians, if the effects of regional disparities on individual citizens are to be minimized. The provincial governments … must be able to

provide an adequate standard of public services to their citizens and to support the incomes of those who are in need.[92]

Conclusion

Canada has made commitments to equality at every level — internationally, constitutionally, in quasi-constitutional human rights statutes in every jurisdiction, and through related laws, social programs, and other forms of social regulation. These various levels of commitments are not disconnected from each other; they are components of a larger equality framework. Each instrument can be given its full meaning only when it is seen as part of this framework, and not in isolation.

There is widespread consensus in Canada that equality is a central and fundamental value, and that women are entitled to it. Although the idea of formal equality still has power and is being reasserted now by corporate and political forces, it is clear that Canada's human rights treaty commitments, domestic human rights legislation, the *Charter*'s equality guarantees, the social safety net and related legislation, as well as s. 36 of the Constitution, are commitments to a vision of social equality that goes well beyond what is offered by formal equality.

There can be no question, looking at the larger framework of Canada's equality commitments and all its components, that it encompasses a commitment to the elimination of women's social and economic inequality. The question now is: Will Canada live up to this commitment?

Endnotes for Chapter 2

[1] See Preamble to the *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res. 217A (III), UN Doc. A/810 (19 [hereinafter *UDHR*].

[2] *Ibid.* Article 25.

[3] *Ibid.* Article 22.

[4] *Ibid.* Article 28.

[5] These countries are referred to as States Parties to a particular Covenant or Convention.

[6] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976), GA Res. 2200A (XXI), UN Doc. A/6316 (1966), Article 6, 993 U.N.T.S. 3, reprinted in 6 I.L.M. 360 (1967) [hereinafter *ICESCR*].

[7] *Ibid.* Article 9.

[8] *Ibid.* Article 11.

[9] *Ibid.* Article 12.

[10] *Ibid.* Article 13.

[11] For a discussion of the indivisibility of rights in the *UDHR, supra* note 1, and their subsequent division in the drafting of the two Covenants, see Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141:1 *University of Pennsylvania Law Review* 1 at 85–114.

[12] Economic Commission for Latin America and the Caribbean, "Human Rights in Latin America and the Caribbean: Growth with Equi in Richard Reoch, ed., *Human Rights: The New Consensus* (London: Regency House (Humanity) 1994) at 143–44.

[13] GA Res. 32/130 (1997), supported by Canada; see also the decision of MacGuigan J. of the Federal Court of Appeal in *International Fund for Animal Welfare* v. *Canada*, [1989] 1 F.C. 335, (1988), 83 N.R. 303, 45 C.C.C. (3d) 457, 35 C.R.R. 359. In this decision, which is discussed in H. Echenberg and B. Porter, "Poverty Stops Equality, Equality Stops Poverty: The Case for Social and Economic Rights" in Ryszard Cholewinsky, ed., *Human Rights in Canada: Into the 1990s and Beyond* (Ottawa: Human R Research and Education Centre, 1990) 1, MacGuigan J. cites international rights provisions and decides that civil rights entrenched in the *Charter* cannot be considered apart from social and economic rights as set out in the *ICESCR*.

[14] See the *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16) 52, UN Doc. A/6316 (1966), Article 2(1) [hereinafter *ICCPR*], and *ICESCR, supra* note 6 Article 2(2).

[15] See *ICCPR, ibid.* Article 3, and *ICESCR, ibid.* Article 3.

[16] Article 26 of the *ICCPR* states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This Article, in our view, does not permit Canada, or any jurisdiction in Canada, to treat the enactment of human rights legislation as though it were a matter of government choice, as the Alberta and Ontario governments argued recently in the

Supreme Court of Canada in the appeal of *Vriend* v. *Alberta (A.G.)* (1996), 132 D.L.R. (4th) 595, 5 W.W.R. 617, 37 Alta. L.R. (3d) 364, 181 A.R. 16, 18 C.C.E.L. (2d) 1 (Alta C.A.). In this case, Delwin Vriend and others argued that the omission of sexual orientation from the list of protected grounds in Alberta human rights legislation contravenes their right to equality guaranteed in s. 15 of the *Charter*. The Attorneys General of Alberta and Ontario argued that they are not required to have human rights legislation at all, or to legislate the inclusion of any particular ground. Considering the commitment Canada has made in Article 26 of the *ICCPR*, this argument appears to be wrong. We are confirmed in this interpretation by a recent address entitled "International Standards on Non-Discrimination" given by Elizabeth Evatt, Rapporteur of the UN Human Rights Committee at the Conference on Hong Kong Equal Opportunities Law in International and Comparative Perspective, 10 November 1997. Elizabeth Eva stated clearly that Hong Kong, as a signatory to the *ICCPR*, is required to have anti-discrimination legislation that protects residents effectively from the forms of discrimination that they are actually experiencing.

[17] Craig Scott and Patrick Macklem, *supra* note 11, point out, however, that the characterization of civil and political rights as "negative" rights, which prevent government from interfering in the lives of citizens, does not accurately describe the requirements that Canadian and European courts have placed on governments in response to actual claims. In a number of cases adjudicating what are considered to be "negative" rights claims, courts have required governments to make costly programmatic changes. Where civil and political rights have been at issue, the judicial response is not always to order the government to cease an offending act; sometimes court orders require the state to take corrective action, including actions that have implications for government expenditure. For example in *R.* v. *Askov*, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 74 D.L.R. (4th) 355, 113 N.R. 241, 42 O.A.C. 81, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, 49 C.R.R. 1, and *Singh* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1, 12 Admin. L.R. 137, 14 C.R.R. 13, two cases dealing with procedural fairness and undue delay, Canadian courts made orders that required a costly reorganization of adjudicative procedures. In *Askov* the issue was a delay of two years between the committal date for trial and the trial itself; this delay was found to violate Askov's right to be tried within a reasonable time pursuant to s. 10 of the *Charter*. The Supreme Court of Canada ruling resulted in a major review of the court system, and in many other cases being thrown out because they were already older than the two-year limit set by the Court. In *Singh*, the Supreme Court of Canada found that immigration hearings did not comply with the requirements of procedural fairness; this required the government to adopt new administrative procedures to correct the problem. In both cases, governments were required to act, and in both cases there were significant financial implications. Indeed, in these cases, the Court made orders that required governments to actively undertake major reorganizing in Canada's justice system.

[18] *ICESCR*, *supra* note 6 Article 2(1).

[19] *Ibid.*

[20] Barbara Stark, "International Human Rights Law, Feminist Jurisprudence, and Neitzsche's `Eternal Return': Turning the Wheel" (1996) *Harvard Women's Law Journal* 169 at 178–79.

[21] *Ibid.* at 179.

[22] *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180, UN GAOR, 34th Sess. (Supp. Nc 19 I.L.M. 33, Can. T.S. 1982 No. 31, (concluded 18 December 1979; in force for Canada 9 January 1982) [hereinafter *CEDAW*].

[23] The preamble refers to the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the two International Covenants, and the international Conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality for women and in preambular paragraph 5 expresses concern that "despite these various instruments extensive discrimination continues to exist."

[24] See *CEDAW*, *supra* note 22 preambular paragraph 14.

[25] Article 3 is one of six central Articles in Part I of *CEDAW* which provide the general core commitments and general interpretive aids to reading the whole Convention. They are these:

Article 1
For the purpose of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2
States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3
States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4
1) Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2) Adoption by States Parties of special measures, including those measures contained in the present Convention aimed at protecting maternity shall not be considered discriminatory.

Article 5
States Parties shall take all appropriate measures:

a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; …

Article 6
States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

[26] For a discussion of this point and related developments in international human rights case law, see Rebecca J. Cook, "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) at 230–39.

[27] See *CEDAW*, *supra* note 22, Article 3.

[28] Part III provides that States Parties shall "take all appropriate measures":

> **Article 10**
> … to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education …
>
> **Article 11**
> … to eliminate discrimination against women in the field of employment in order to ensure … in particular:
>
> (a) The right to work as an inalienable right of all human beings;
>
> (b) The right to the same employment opportunities, …;
>
> (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and … recurrent training;
>
> (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, …;
>
> (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
>
> (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
>
> (g) … and [protection from] discrimination … on the grounds of marriage and maternity …
>
> **Article 12**
> … to eliminate discrimination against women in the field of health care …
>
> **Article 13**
> … to eliminate discrimination against women in other areas of economic and social life …

[29] That the Convention applies to non-governmental action has also been confirmed by the *CEDAW* Committee. In General Recommendation No. 19 on gender-based violence, the Committee states that the Convention applies to violence perpetrated by public authorities, but that States Parties "may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation." See General Recommendation No. 19, UN Doc. A/47/38 (1992) paragraph 19. The Recommendation describes in detail the forms of public and private-actor violence that States Parties should prevent, and concludes by recommending "that States Parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act." See *ibid.* paragraph 24(a).

[30] *CEDAW*, *supra* note 22 Article 5(a).

[31] *Ibid.* Article 6.

[32] *Ibid.* Article 4.

[33] *Report of the Fourth World Conference on Women*, Beijing, China, 4–15 September 1995, A/CONF.177/20, 17 October 1995 [hereinafter *Platform for Action*].

[34] This history is cited in the *Platform for Action*, *ibid.* at Chapter II paragraph 26.

[35] See *ibid.* at Chapter IV, section A paragraph 50.

[36] *Ibid.*

[37] *Ibid.* at Chapter IV, section A paragraph 47. Further, the *Platform for Action* states:

> Poverty has various manifestations, including lack of income and productive resources sufficient to ensure a sustainable livelihood; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increasing morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterized by lack of participation in decision-making and in civil, social and cultural life. It occurs in all countries — as mass poverty in many developing countries and as pockets of poverty amidst wealth in developed countries. Poverty may be caused by an economic recession that results in loss of livelihood or by disaster or conflict. There is also the poverty of low-wage workers and the utter destitution of people who fall outside family support systems, social institutions and safety nets . . . In order to eradicate poverty and achieve sustainable development, women and men must participate fully and equally in the formulation of macro-economic and social policies and strategies for the eradication of poverty. The eradication of poverty cannot be accomplished through anti-poverty programs alone but will require democratic participation and changes in economic structures in order to ensure access for all women to resources, opportunities and public services.

[38] *Ibid.* paragraph 58.

[39] *Ibid.* at Chapter IV, section F.

[40] *Ibid.* at Chapter IV, section F paragraph 157. The *Platform for Action* notes that:

> Discrimination in education and training, hiring and remuneration, promotion and horizontal mobility practices, as well as inflexible working conditions, lack of access to productive resources and inadequate sharing of family responsibilities, combined with a lack of or insufficient services such as child care, continue to restrict employment, economic, professional and other opportunities and mobility for women and make their involvement stressful. *Ibid.* at Chapter IV, section F paragraph 152.
>
> [W]omen have been particularly affected by the economic situation and restructuring processes, which have changed the nature of employment and, in some cases, have led to a loss of jobs, even for professional and skilled women. In addition, many women have entered the informal sector due to the lack of other opportunities. *Ibid.* at Chapter IV, section F paragraph 151.
>
> [W]omen still also perform the great majority of unremunerated domestic work and community work, such as caring for children and older persons, preparing food for the family, protecting the environment and providing voluntary assistance to vulnerable and disadvantaged individuals and groups. *Ibid.* at Chapter IV, section F paragraph 156.
>
> Insufficient attention to gender analysis has meant that women's contributions and concerns remain too often ignored in economic structures, such as financial markets and institutions, labour markets, economics as an academic discipline, economic and social infrastructure, taxation and social security systems, as well as in

families and households. *Ibid.* at Chapter IV, section F paragraph 155.

[41] These are excerpts from *Platform for Action, ibid.* at Chapter IV section F paragraph 167.

[42] These statutes are: *An Act Respecting Unemployment Relief*, S.B.C. 1931, c. 65, schedule A, s. 8; *An Act to Amend the Libel Act*, S.M. 1934, c. 23, s. 1; *An Act to Protect Certain Civil Rights*, S.S. 1947, c. 35; *An Act to Provide Social Assistance*, R.S.B.C. 1948, c. 310, s. 8; *The Insurance Act*, S.O. 1932, c. 24, s. 4.

[43] Discrimination is prohibited based on "political convictions" in Quebec, (R.S.Q. 1977, c. C-12, s. 10); on "political belief" in Prince Edward Island and Nova Scotia, (R.S.P.E.I. 1988, c. H-12, s. 1(1)(d) and R.S.N.S. 1989, c. 214, s. 5(1)(u)); and on "political opinion" in Newfoundland, (R.S.N. 1990, c H-14, ss. 6(1), 7(1), 8, 9(1), (2), (3), (4), 12, 13). Discrimination based on sexual orientation is prohibited in federal jurisdiction (R.S.C. 1985, c. H-6, s. 3(1)); New Brunswick (R.S.N.B. 1973, c. H-11, ss. 3(1),(2),(3),(4), 4(1),(2),(3), 5(1), 6(1), 7(1); Nova Scotia (R.S.N.S. 1989, c. 214, s. 5(1)(n); Quebec (R.S.Q. 1977, c. C-12, s.10; Ontario (R.S.O. 1990, c. H.19, ss. 1, 2(1), 3, 6; Manitoba (C.C.S.M., c. H175, s. 9(2)(h); Saskatchewan (S.S. 1979, c. S-24.1, ss. 9, 10(1), 11(1), 12(1), 13(1), 14(1), 15(1); British Columbia (R.S.B.C. 1996, c. 210, ss. 7(1), 8(1), 9, 10(1), 11, 13(1), 14; and Yukon Territory (R.S.Y. 1986 (Suppl.), c. 11, s. 6(g)). Discrimination is prohibited based on a criminal conviction for which a pardon has been granted in federal jurisdiction (R.S.C. 1985, c. H-6, s. 3(1)) and in the Northwest Territories (R.S.N.W.T. 1988, c. F-2, s. 3(1), (3), 4(1), 4(2), 5(1). In British Columbia, discrimination in employment is prohibited because of a "criminal or summary conviction offence that is unrelated to the employment or intended employment of a person," (R.S.B.C. 1996, c. 210, ss. 13(1), 14. Quebec also prohibits discrimination based on language (R.S.Q. 1977, c. C-12, s.10).

[44] See *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, s.7(1) ("source of income"); *Human Rights Code*, C.C.S.M., c. H175, s.9(2)(j) ("source of income"); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 2(1) ("receipt of social assistance"); *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 10 ("social condition"); *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 16(1) ("receipt of assistance"); *The Human Rights Code*, R.S.N. 1990, c. H-14, ss. 6(1), 7(1), 8, 9(1), (2), (3), (4), 10(3), 14(1) ("social origin").

[45] *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 S.C.R. 150, 21 D.L.R. (4th) 1, 61 N.R. 241, 6 W.W.R. 166, 38 Man.R. (2d) 1, Admin. L.R. 177, 8 C.C.E.L. 105, 85 C.L.L.C. 17,020, 6 C.H.R.R. D/3104.

[46] *Canadian National Railway Co.* v. *Canada (Human Rights Commission*), [1987] 1 S.C.R. 1114 at 1134, 40 D.L.R. (4th) 193, 76 N 161, 27 Admin. L.R. 172, 87 C.L.L.C. 17,022 [hereinafter *Action Travail des Femmes* cited to S.C.R.].

[47] [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, 9 C.C.E.L. 185, 52 O.R. (2d) 799, 17 Admin. L.R. 89, 86 C.L.L.C. 17,002, 64 N.R. 161, C.H.R.R. D/3102,12 O.A.C. 241 [hereinafter *O'Malley*].

[48] *Tharp* v. *Lornex Mining Corp. Ltd.* (1975), Dec. No. 57 (B.C. Bd. of Inq.) [unreported] [hereinafter *Tharp*].

[49] *Singh* v. *Security and Investigation Services Ltd. (1977)*, (Ont. Bd. of Inq.) [unreported] [hereinafter *Singh*].

[50] *Colfer* v. *Ottawa Police Commission* (1979), (Ont. Bd. of Inq.) [unreported] [hereinafter *Colfer*].

[51] The Board of Inquiry in *Tharp, supra* note 48, wrote:

> The position of Lornex from the outset was that it could not be discriminating against Jean Tharp because it was offering her precisely the same accommodation that it offered every other employee at the campsite. In other words it was contended that there can be no discrimination where everyone receives identical treatment. We reject that contention. It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination. We would add only that the circumstances of this complaint graphically illustrate the truth of this important notion.

[52] *Huck* v. *Canadian Odeon Theatres Ltd.*, (1985), 18 D.L.R. (4th) 93, [1985] 3 W.W.R. 717, 39 Sask. R. 81 6 C.H.R.R. D/2682 (Sask. C.A.); leave to appeal to S.C.C. refused (1985), 18 D.L.R. (4th) 93 (note).

[53] *Ibid.*(1985) 6 C.H.R.R. D/2682 at D/2688.

[54] *Ibid.* at D/2689.

[55] *Brooks* v. *Canada Safeway*, [1989] 1 S.C.R. 1219, C.E.B. & P.G.R. 8126, 26 C.C.E.L. 1, 4 W.W.R. 93, 89 C.L.L.C. 17,012, 94 N.R. 373, 58 Man. R. (2d) 161, 10 C.H.R.R. D/6183, 59 D.L.R. (4th) 321, 45 C.R.R. 115 [hereinafter *Brooks* cited to S.C.R.].

[56] Some human rights statutes, for example, the *Ontario Human Rights Code*, now state that the right to freedom from discrimination based on sex includes the right to freedom from discrimination based on pregnancy or the capacity to become pregnant. The *Manitoba Human Rights Act* at the time of *Brooks* contained no explicit reference to pregnancy; it simply prohibited discrimination based on sex.

[57] *Bliss* v. *Canada (A.G.)*, [1979] 1 S.C.R. 183 at 191, [1978] 6 W.W.R. 711, 92 D.L.R. (3d) 417, 23 N.R. 527, 78 C.L.L.C. 14,175 [hereinafter *Bliss* cited to S.C.R.].

[58] *Ibid.* at 190–91.

[59] *Ibid.*

[60] *Ibid.*

[61] *Ibid.* at 190.

[62] *Brooks*, *supra* note 55 at 1238.

[63] *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352, 25 C.C.E.L. 1, [1989] 4 W.W.R. 39, 10 C.H.R.R. D/6205, 58 Man. R. (2d) 1, 47 C.R.R. 274 [hereinafter *Janzen* cited to S.C.R.].

[64] *Action Travail des Femmes*, *supra* note 46.

[65] *Ibid.* at 1118.

[66] *Ibid.* at 1143–44.

[67] *Ibid.* at 1145.

[68] [1987] 2 S.C.R. 84, 40 D.L.R. (4th) 577, 75 N.R. 303, 8 C.H.R.R. D/4326, 87 C.L.L.C. 17,025.

[69] *Ibid.* at 90.

[70] *Ibid.* at 92.

[71] *Ibid.* at 94.

[72] Additional support for the observation that the *Charter* supports group aspirations to equality can be found in ss. 2 and 29, which accord rights to religious minorities; ss. 14, 16, and 23, which entrench language rights and require the use of public funds for minority language educational facilities; ss. 14 and 27, which recognize Canada's multicultural make-up; ss. 25 and 35 of the *Constitution Act, 1982*, which recognize the constitutional rights of Aboriginal people.

[73] *Andrews* v. *Law Society (British Columbia)*, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289, 25 C.C.E.L. 255, 91 N.R. 255, 34 B.C.L.R (2d) 273, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

[74] *Ibid.* at 175.

[75] *Canada (A.G.)* v. *Lavell*, [1974] S.C.R. 1349, (1973) 38 D.L.R. (3d) 481, 7 C.N.L.C. 236, 23 C.R.N.S. 197, 11 R.F.L. 333 was another notorious women's equality case decided under the *Bill of Rights*. The Court upheld s. 12(1)(b) of the *Indian Act*, which deprived women, but not men, of their membership in Indian Bands if they married non-Indians. The provision was held not to violate equality before the law although it might, the Court said, violate equality under the law if such were protected.

[76] *Andrews*, *supra* note 73.

[77] *Ibid.* at 170.

[78] *Ibid.*

[79] *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8, 96 N.R. 115, 34 O.A.C. 115, 39 C.R.R. 306 [hereinafter *Turpin* cited to S.C.R.].

[80] *Ibid.* at 1333.

[81] See *R.* v. *Nguyen* (*sub nom R.* v. *Hess*), [1990] 2 S.C.R. 906 at 944, [1990] 6 W.W.R. 289, 59 C.C.C. (3d) 161, 50 C.R.R. 71, 119 N.R. 353, 73 Man. R. (2d) 1, 46 O.A.C. 13, 79 C.R. (3d) 332 [hereinafter *Hess* cited to S.C.R.] where McLachlin J. writes, "[i]n my view, the essential requirements for discrimination under s. 15 remain as set forth in *Andrews*." This opinion is concurred in by Sopinka and Gonthier JJ. The majority opinion, authored by Wilson J., also purports to apply *Andrews* [See *Hess*, *ibid.* at 927–28]. See also, *R.* v. *Swain*, [1991] 1 S.C.R. 933 at 990–91, 63 C.C.C. (3d) 481, 5 C.R. (4th) 253, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81 [hereinafter *Swain* cited to S.C.R.] where Lamer C.J. reviews, with apparent approval, the Court's equality doctrine as set out in *Andrews* and *Turpin*. In fact, Lamer C.J. notes that the approach to section 15(1) described by McIntyre J. in *Andrews* was expanded in *Turpin*. Lamer C.J. quotes Justice Wilson on behalf of the court in *Turpin* as stating that "[t]he internal qualification in s. 15 that the differential treatment be `without discrimination' is determinative of whether or not there has been a violation of the section. It is only when one of the four equality rights has been denied with discrimination that the values protected by s. 15 are threatened and the court's legitimate role as the protector of such values comes into play." As well, in *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at 484, 10 M.V.R. (3d) 151, 23 O.R. (3d) 160 (note) [1995] 1 L.R. 1-3185, 13 R.F.L. (4th) 1, 181 N.R. 253, 124 D.L.R. (4th) 693, 81 O.A.C. 253 [hereinafter *Miron* cited to S.C.R.] McLachlin J., writing for the majority, L'Heureux-Dubé J. in a separate concurring opinion, and Gonthier J. in dissent, all acknowledge *Andrews* as supplying the analytical framework for the s. 15 analysis.

[82] La Forest J., writing for the majority in *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 279, 91 C.L.L.C. 17,004, 76 D.L.R. (4th) 545, 118 N.R. 1, 13 C.H.R.R. D/171, 45 O.A.C. 1, 2 O.R. (3d) 319 (note) 2 C.R.R. (2d) 1 [hereinafter *McKinney* cited to S.C.R.], repudiated the similarly situated test as mechanical and stated, "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*."

In *Symes* v. *Canada*, [1993] 4 S.C.R. 695 at 754, 94 D.T.C. 6001, 161 N.R. 243, [1994] 1 C.T.C. 40, 19 C.R.R. (2d) 1, 110 D.L.R. (4th) 470, [1994] W.D.F.L. 171 [hereinafter *Symes* cited to S.C.R.] Iacobucci J., writing for the majority, reaffirmed the Court's discarding of the similarly situated test. Iacobucci J. also noted that in *Andrews* the Court had rejected the view that s. 15 analysis should be governed by the comparison of similarly situated persons.

In *Miron*, *supra* note 81 at 466, L'Heureux-Dubé J. noted that the similarly situated test "was rejected by this Court on the basis that it contemplated only formal, Aristotelian equality, and because it excluded any consideration of the nature of the impugned law itself …" In asserting that the similarly situated test had been rejected, L'Heureux-Dubé J. pointed to *Andrews*, *supra* note 73 at 165–68.

[83] In *Symes*, *ibid.* at 754, the same treatment model of equality was discarded by Iacobucci J., writing for the majority. In that case, Iacobucci J. recognized that s. 15 is more concerned with the impact of an impugned law than its form. He stated that "Section 15(1) guarantees more than formal equality; it guarantees that equality will be mainly concerned with the `impact of the law on the individual or group concerned.'"

[84] In *McKinney*, *supra* note 82 at 279, La Forest J., writing for the majority, acknowledged that s. 15 protects against adverse effects discrimination. He states that, "not only does the *Charter* protect from direct or intentional discrimination, it also protects from adverse impact discrimination." The same acknowledgement was made in *Symes*, *supra* note 82 at 755, by Iacobucci J. who stated that "it is clear that a law may be discriminatory even if it is not directly or expressly discriminatory. In other words, adverse effects discrimination is comprehended by s. 15(1)." Iacobucci J. also referred to the opinion of McIntyre in *O'Malley*, *supra* note 47, holding that discrimination may result from the adverse effects of a facially neutral rule, and a finding of discrimination may be made even if there is no intention to discriminate.

[85] In *Swain*, *supra* note 81 at 990, Lamer C.J. clearly notes that discrimination may be unintentional when he cites the *Andrews* definition of discrimination 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". Lamer C.J. also notes that this definition of "discrimination" was affirmed in *McKinney*.

[86] In *Swain*, *ibid.* at 991, Lamer C.J. looks to Wilson J.'s judgment in *Turpin* and reaffirms the correctness of the view that in determining whether the requirement of discrimination is present in a particular case, it is important to look not only at the impugned legislation which has created a distinction, but also to the "larger social, political and legal context." Thus, Lamer C.J. opines that, "in determining whether an individual or group falls into a category analogous to those specifically enumerated in s. 15, courts must examine `the place of the group in the entire social, political and legal fabric of our society.'"

The need to contextualize is also underlined by Iacobucci J. in *Symes*, *supra* note 82 at 756. Iacobucci J. also looks to Wilson J.'s decision in *Turpin* for the proposition that in determining whether there is discrimination, it is important to look not only at the impugned legislation but also to the larger social, political, and legal context. He notes that "[w]hat is recognized by both *Andrews* and *Turpin* is that the working definition of `discrimination' is not self-applying. Instead, within the analytical parameters established by that definition, this Court must `search for indicia of discrimination.'" (See *Turpin*, *supra* note 79 at 1333 and *Symes*, *ibid.* at 757.)

In her dissent in *Symes*, *ibid.* at 826, L'Heureux-Dubé J. also notes the importance of context. She states: "I believe that it is important to recall the context in which the determination of *Charter* issues must be considered, as was set out by my colleague in reference to Wilson J.'s statement in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, and as I wrote in *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 at 647: `It is my view that the constitutional questions must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis.'"

In a dissenting opinion in *Miron*, *supra* note 81 at 438, Gonthier J. also acknowledges the importance of context. He states that "[t]he larger context importantly informs all stages of the analysis and ensures that it is not narrowly restricted to the `four corners of the impugned legislation'"; Gonthier J. quotes from Wilson J. in *Turpin*, *supra* note 79 at 1332.

[87] In *Egan* v. *Canada*, [1995] 2 S.C.R. 513, 95 C.L.L.C. 210-025, [1995] W.D.F.L. 981, C.E.B. & P.G.R. 8216, 12 R.F.L. (4th) 201, D.L.R. (4th) 609, 182 N.R. 161, 29 C.R.R. (2d) 79, 96 F.T.R 80 (note) [hereinafter *Egan* cited to S.C.R.], an opinion in which there are three major divisions, the interpretive mantra is repeated, with La Forest J. writing for himself and three other members of the Court, emphasizing the importance of contextual analysis. La Forest J. cites Gonthier J. and Wilson J. in *Turpin*, *supra* note 79 at 1331–32, for the proposition that "[the s. 15 analysis] must be linked to an examination of the larger context, and in particular with an understanding that the *Charter* was, in Dickson C.J.'s words, `not enacted in a vacuum,' but must `be placed in its proper linguistic, philosophic and historical contexts' if we are to avoid mechanical and sterile categorization." See *Egan*, *ibid.* at 532. Also in *Egan*, Sopinka J. opines, using a quote from La Forest J. in *McKinney* (see *McKinney*, *supra* note 82 at 318–19) that "[t]he courts should adopt a stance that encourages legislative advances in the protection of human rights." See

Egan, *ibid.* at 574. As will be discussed in the text, Sopinka J. finds that discrimination based on sexual orientation in this case is a reasonable limit on equality rights, pursuant to s. 1 of the *Charter*. However, the point here is to highlight the apparent agreement among the judges as to the goal of s. 15 and the framework for interpreting it.

[88] In *Egan*, *ibid.* at 544, an extended exposition on the purpose of s. 15, written by L'Heureux-Dubé J., in dissent, characterizes s. 15 as both an individual rights guarantee that protects fundamental human dignity and a protection for vulnerable groups against systemic discrimination. She reminds the Court of its previous holdings in *Andrews* and *Turpin* which have held that "an important, though not necessarily exclusive, purpose of s. 15 is the prevention or reduction of distinctions that may worsen the circumstances of those who have already suffered marginalization or historical disadvantage in our society." Cory and Iacobucci JJ. also highlight the s. 15 goal of protecting human dignity. Cory J. writes on behalf of himself and Iacobucci J. that "[s]ection 15(1) of the *Charter* is of fundamental importance to Canadian society. The praiseworthy object of the section is the prevention of discrimination and the promotion of a `society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component': *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171. It has been recognized that the purpose of s. 15(1) is `to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.': *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, at p. 1329. It is this section of the *Charter*, more than any other, which recognizes and cherishes the innate human dignity of every individual. It is this section which recognizes that no legislation should treat individuals unfairly simply on the basis of personal characteristics which bear no relationship to their merit, capacity or need." See *Egan*, *ibid.* at 583–84.

In *Thibaudeau* v. *Canada (M.N.R.)*, [1995] 2 S.C.R. 627 at 701, [1995] W.D.F.L. 957, [1995] 1 C.T.C. 382, 95 D.T.C. 5273, 12 R.F. (4th) 1, 124 D.L.R. (4th) 449, 182 N.R. 1, 29 C.R.R. (2d) 1, Cory and Iacobucci JJ. indicate that the purpose of s. 15(1) is to protect human dignity by ensuring that all individuals are recognized at law as being equally deserving of concern, respect and consideration. This leads them to the conclusion that it is the effect that an impugned distinction has upon a claimant which is the prime concern under s. 15(1).

[89] *Schachter* v. *Canada (Employment & Immigration Commission)*, [1992] 2 S.C.R. 679 at 721, 93 D.L.R. (4th) 1, 139 N.R. 1, 92 C.L.L.C. 14,036, 10 C.R.R. (2d).

[90] *Haig* v. *Canada* (1992) 9 O.R. (3d) 495 at 505, 94 D.L.R. (4th) 1, 57 O.A.C. 272, 92 C.L.L.C. 17,034, 10 C.R.R. (2d) 287.

[91] The Right Honourable Lester B. Pearson, Prime Minister of Canada, *Federalism for the Future: A Statement of Policy by the Government of Canada* (Ottawa: Government of Canada, 1968) at 4, 12, 16, 38.

[92] The Right Honourable Pierre Elliott Trudeau, Prime Minister of Canada, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (Ottawa: Government of Canada, 1969) at 8, 10.