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EQUALITY JURISPRUDENCE IN CANADA

*Sheilah L Martin**

The following is the text of the Robin Cooke Lecture, delivered by the Honourable Justice Sheilah L Martin at the Faculty of Law, Victoria University of Wellington, on 28 November 2018.

I INTRODUCTION

Tēnā koutou katoa.

It is a great honour to be invited to give the 2018 Robin Cooke Lecture. I thank you all for your spectacular welcome. I am very happy to be with you today in this vibrant law school and stunning city to pay homage to Sir Robin Cooke and the vast intellectual tradition he represents.

I feel very comfortable here as New Zealand and Canada have much in common. As prior British colonies, we share some inherited common law and a number of English Acts. We are both interested in the division and distribution of power within our systems of governance. Most importantly, we have a shared commitment to the same values: democracy and the rule of law; respect for human rights; the protection of minorities; and equality.

In modern constitutional democracies like ours, these values are often enshrined in constitutional documents. Expressing some scepticism about the remedial power of constitutional documents that protect human rights, Lord Cooke once commented that while "fashionable", they are "all too often ... more castles in the air than realities on the ground."¹ Now, I do not mean to suggest that Lord Cooke was opposed to the constitutionalisation of rights. Indeed, from my reading of your jurisprudence, Lord Cooke played an active role in developing an interpretation of the New Zealand Bill of Rights Act that would guard against it becoming a "castle in the air".² However, his views

* Justice of the Supreme Court of Canada.

1 Lord Cooke "The Judge in an Evolving Society" (1998) 28 VUWLR 467 at 471.

2 A role, I may add, that has not escaped the pen of critics: see James Allan "The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand" in Tom Campbell, KD Ewing and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 375 at 379–382.

underscore how the fulfillment of the objectives of constitutional provisions is inherently a collective effort.³

History and experience tell us that the success of constitutions depends on the robust commitment on the part of the legislative, executive and judicial branches of government and the acceptance of the people. In this way, then, constitutional documents are the most successful when they play not only an instrumental role – in the sense that they can be relied on as mechanisms of receiving redress – but also when they play a reflective role – in the sense that they constitute a manifestation of shared principles and values between the different branches of government and the community writ large.

The Canadian experience with entrenched rights through our Charter of Rights and Freedoms would provide an intriguing case study for Lord Cooke. Our Canadian Charter is constitutionally entrenched and is supreme over all other laws and government actions.⁴ There is no exaggeration in saying that, since its inception, the Charter has played a significant role in shaping the contours of Canadian law.⁵ One of the most important rights guaranteed in the Charter is the right to equality (s 15). It is about this right and the role that equality has played in Canadian jurisprudence that I want to speak to you today.

Specifically, I want to provide you with an aerial view of three separate, but related, topics:

- First, I would like to briefly address how Canadian courts have interpreted and applied s 15 of the Charter in cases involving claims that s 15 has been breached. These cases illustrate the direct, or instrumental, application of s 15.
- Secondly, I will explain how s 15 has informed courts' thinking about other sections of the Charter in cases that do *not* involve claims that s 15 has been breached. Here, I will describe how s 15 has become a kind of interpretive aid or countervailing consideration when interpreting other Charter rights.
- Thirdly, I will explore a rather unanticipated phenomenon: the equality right influencing almost all aspects of the judicial enterprise, across virtually all subject areas of Canadian law. Here, I aim to illustrate the reflective role that the equality right plays beyond Charter litigation.

3 This understanding accords with the rights-based conception of legal order, as opposed to the conception predicated on the idea that majority rule provides an absolute ability to act or legislate without any regard to the rights of individuals. For more details on the distinction between the two models, see Martin Loughlin "Rights, Democracy, and Law" in Tom Campbell, KD Ewing and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 41 at 42–43.

4 Constitution Act 1982, being sch B to the Canada Act 1982 (UK) [Constitution Act 1982], s 52.

5 For a brief consideration of the issues that arise in this context, see Judy Fudge "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Tom Campbell, KD Ewing and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 335 at 335–339.

As you will see, in Canada, direct claims under s 15 have proven to be harder to make out than originally anticipated. Claimants are rarely successful in invalidating legislation or government action on the basis that it unjustifiably infringes our constitutionally-entrenched equality guarantee. However, equality rights, and the kind of analysis s 15 teaches, have had a profound impact on other Charter rights and almost all areas of the law. This is the surprise of s 15 and allows us to speak not only of equality's domain, but its dominion – and perhaps even equality's empire. That is, our equality guarantee has played a powerful reflective role. Section 15 has had a meaningful indirect impact outside of s 15 claims in informing our thinking about other Charter rights as well as the law more broadly. The achievement of equality in Canada is thus not only, or primarily, a matter of s 15 per se; rather, equality has been substantially furthered through other legal mechanisms and methodologies that are inspired by, but not entirely dependent upon, the equality right in s 15.

II THE INTERPRETATION AND APPLICATION OF SECTION 15

To situate s 15, it is helpful to recognise that the Charter contains other rights and provisions that advance equality. In addition to guaranteeing rights to individuals (such as in s 15), the Charter protects certain group-based rights, such as collective language and Aboriginal rights.⁶ The Charter also contains an interpretive principle stipulating that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", as well as an affirmation that, "[n]otwithstanding anything [else] in [the] Charter," its rights and freedoms "are guaranteed equally to male and female persons."⁷ These group rights aim to level the playing field by providing equality protections to groups that have been historically disadvantaged.

The distinct and separate guarantee of the right to equality, however, is contained in s 15(1) of the Charter. It reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2), which rounds out s 15, allows the government to implement "affirmative action" programmes designed to ameliorate the position of marginalised groups, and expressly states that these do not violate s 15(1). It reads:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

6 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, above n 4, ss 23 and 25.

7 Sections 27 and 28.

The journey to ensuring that s 15 took its current form was not an easy one. The debate was both general and specific. It was general in the sense that there was a great deal of discussion and dispute over the patriation of the Canadian Constitution and the entrenchment of a bill of rights that would give the judiciary express power to invalidate government action.⁸ It was specific in the sense that many people fought hard for the precise wording of s 15. For example, persons with disabilities had to persuade the legislature to include disability as an enumerated ground upon which discrimination is prohibited, and women had to advocate for the additional guarantee of gender-based equality contained in s 28.⁹

Given some of the pushback to an entrenched Charter with a robust s 15, one might have expected for the Charter, and s 15 specifically, to be received with reluctance and read with restraint. However, once entrenched in the Charter, rights began to receive generous treatment. Against the backdrop of the virtually non-existent protections in the unentrenched Canadian Bill of Rights,¹⁰ judges demonstrated an openness to meaningful, even transformative, rights in the Charter.¹¹

The promise of s 15 was profound. It was designed to eliminate discrimination and redress the asymmetrical distribution of benefits and burdens in Canadian society. Some believed that constitutionalised equality rights would also promote proactive, much-needed social change. Section 15 was a clarion call to scrutinise and decode existing social standards, to check for oppression and exploitation. Section 15 was aspirational: it described not what existed, but what was needed. And while s 15 was worded as an individual right, it also promised to build community; it would enable all people to experience full membership and equal participation in society.

Having set out the context within which s 15 is situated, as well as its purpose and promise, I turn to examining its performance. I divide my discussion in this part into the following four areas, which paint a general picture of s 15:

-
- 8 See A Wayne MacKay "Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for the *Charter of Rights*" (1983) 21 Osgoode Hall LJ 55; Douglas A Schmeiser "The Entrenchment of a Bill of Rights" (1981) 19 Alta L Rev 375; and Province of British Columbia *British Columbia's Constitutional Proposals: A Bill of Rights and the Constitution of Canada* (September 1978) at 12–17.
 - 9 See Adam M Dodek (ed) *The Charter Debates: The Special Joint Committee on the Constitution, 1980–81, and the Making of the Canadian Charter of Rights and Freedoms* (University of Toronto Press, Toronto, 2018) at ch 10; and Mary Dawson "The Making of Section 15 of the *Charter*" (2006) 5 J L & Equal 25 at 31.
 - 10 See MacKay, above n 8, at 59–60; Berend Hovius "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter" (1982) 28 McGill LJ 31; and *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 170.
 - 11 See Peter Hogg (ed) *Constitutional Law of Canada* (5th ed, looseleaf ed, Carswell, updated to 2015) vol 2 at 35–11.

- (a) the conceptual difficulty of s 15 and the jurisprudential waves that the section has experienced;
- (b) the bedrock principles of s 15 that have remained constant despite variations in the jurisprudence;
- (c) some substantive outcomes that have arisen from our s 15 jurisprudence; and
- (d) some future challenges for s 15.

A Conceptual Difficulty and Jurisprudential Waves of Section 15

Equality is a recognised cornerstone of democracy, justice and fairness. There is no doubt that equality underpins many existing legal standards, including, perhaps, the rule of law itself. However, the right to equality is not easily accessible or readily understood. Indeed, the Supreme Court has stated that s 15 is "elusive" and "perhaps the Charter's most conceptually difficult provision".¹²

It is conceptually difficult because the right to equality rests on comparisons, competing characterisations and larger social, political, historical and economic contexts.¹³ The right also engages layers of identity because, while the right to equality is enjoyed by individuals, these individuals are tied to groups and collectivities. In this way, equality analysis requires attention to both individual and group considerations. The ambit of the right is also daunting, as "[v]irtually all legislation distinguishes and makes categories".¹⁴ Further, equality claims clearly challenge the otherwise sovereign government's ability to pursue its policies in particular ways. The right to equality is more directly tied to social change than most other rights, and the objectives that it seeks to achieve frequently fall within the realm of redistributive justice – an arena that often makes the judiciary and the public uncomfortable. As courts become more active supervisors of the distribution of benefits and burdens, issues of judicial legitimacy and the proper role of, and relationship between, governments and courts inevitably arise.¹⁵

Such a tension, however, has not stopped courts from considering s 15 claims. Indeed, there have been over one hundred cases at the Supreme Court of Canada addressing claims that s 15 equality rights have not been respected. As will be seen below, however, the outcomes in these cases have

12 *Andrews v Law Society of British Columbia*, above n 10, at 164; and *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at 507. See also Beverley McLachlin "Equality: The Most Difficult Right" (2001) 14 SCLR (2d) 17.

13 As the Rt Hon Beverley McLachlin, former Chief Justice of Canada, aptly observed, "underlying the question of how far to go in changing things [with s 15] is the fact that the Canadian equality guarantee, like the equality guarantees of most modern democracies, has been superimposed on a system that espouses a market economy and the importance of open competition": McLachlin, above n 12, at 20.

14 *Quebec (Attorney General) v A* 2013 SCC 5, [2013] 1 SCR 61 at [141].

15 See generally Kent Roach *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (revised ed, Irwin Law, Toronto, 2016).

been mixed and, often, they are hard to reconcile with each other. One explanation for this variation is that the legal test for s 15 has significantly evolved and changed over time.

Let me start by setting out the current jurisprudential test for assessing a s 15(1) claim:

- (1) Does the law or governmental action create a distinction based on an enumerated or analogous ground?¹⁶
- (2) Is the distinction discriminatory? That is, does it impose burdens or deny benefits in a way that reinforces, perpetuates or exacerbates disadvantage?¹⁷

It is the claimant's burden to establish these two elements. At the same time, the state may attempt to argue the distinction or difference in treatment alleged by the claimant qualifies under s 15(2) as a measure designed to ameliorate the conditions of a historically disadvantaged group. If the claimant succeeds on the two-part test, the court will find a violation of s 15(1). The question then becomes whether the violation is justified under s 1 of the Charter, which states:¹⁸

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

It is the government's burden to satisfy the demands of s 1, as the government is in the best position to explain and justify its legislation or action.¹⁹

I have provided you with the current statement of the s 15 test, but, as I mentioned, this test has undergone meaningful fluctuation in the 30 years since the Supreme Court's first s 15 judgment in 1989, *Andrews v Law Society of British Columbia*.²⁰ Thus far, there have been four main stages or

16 An "analogous ground" is a ground akin to those enumerated in s 15. A personal characteristic will qualify as an analogous ground if it is immutable (unchangeable) or constructively immutable (only changeable at an unacceptable cost to one's personal identity): *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 at [13]. For example, the Supreme Court of Canada has found the following grounds to be analogous: non-citizenship (*Andrews v Law Society of British Columbia*, above n 10); marital status (*Miron v Trudel* [1995] 2 SCR 418); sexual orientation (*Egan v Canada* [1995] 2 SCR 513); and aboriginality-residence (*Corbiere v Canada*, above). It is not necessary to prove an analogous ground on a continuing basis. Once a ground is recognised as being analogous, it stands as a marker of discrimination in the future.

17 *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux* 2018 SCC 17, [2018] 1 SCR 464 at [25]. See also *Kahkewistahaw First Nation v Taypotat* 2015 SCC 30, [2015] 2 SCR 548 at [20].

18 An in-depth discussion of s 1 is beyond the scope of this lecture. For the governing test under s 1, see *R v Oakes* [1986] 1 SCR 103.

19 I note in passing that it remains a matter of dispute whether the analytical work is appropriately assigned and balanced as between s 15 and s 1: see for example Lynn Smith and William Black "The Equality Rights" (2013) 62 SCLR (2d) 301 at 369–376.

20 *Andrews v Law Society of British Columbia*, above n 10.

"jurisprudential waves" to our s 15 jurisprudence. The main area of change has revolved around the meaning of discrimination. The Supreme Court of Canada has always placed a burden on claimants to show that the challenged law or government action is discriminatory, but the nature of this burden has varied over the years and has caused much judicial debate. In the present forum, it is simply not possible to canvass these debates in detail. I will, however, give you a bird's-eye view of s 15's jurisprudential journey.²¹

The first stage began, of course, with *Andrews*. This decision established the bedrock principles of s 15, which I discuss in more detail in the next section. Briefly, these principles included a focus on substantive equality (and a corresponding rejection of formal equality); a concern with both discriminatory intent and discriminatory effects; and a conceptualisation of equality as a comparative concept.

The meaning of discrimination put forth in *Andrews* was somewhat vague. This led to a second stage in the s 15 jurisprudence in the early 1990s, which witnessed the Supreme Court splitting into two broad camps.²² One camp was of the view that there is no discrimination when the "functional values underlying the law" justify treating different groups differently. In other words, discrimination would only arise when the distinction was not relevant to the aims or functioning of the law or government action. The other camp was of the view that discrimination would only arise where the distinction violated the purpose of s 15, namely the protection of human dignity.

The third stage involved an attempt to synthesise and stabilise the s 15 jurisprudence. In the 1999 decision of *Law v Canada (Minister of Employment and Immigration)*,²³ a unanimous Supreme Court attempted to reconcile the two camps by holding that human dignity forms the foundational core of the analysis. The Court held that there will be a violation of s 15(1) when there is conflict between the furtherance of human dignity and the purpose or effect of the impugned law or government action. To determine whether the impugned law or action demeans the claimant's dignity, the Court put forth four "contextual factors": the claimant's association with an historically more advantaged or disadvantaged group; the correspondence or lack thereof between the ground upon which the claim is based and the actual need, capacity or circumstances of the claimant or others; the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group; and the nature or scope of interest affected by the impugned law.²⁴ As equality is a comparative concept, the claimant

21 For another overview of the "jurisprudential waves" of s 15, and a critique of the current approach, see Jennifer Koshan and Jonnette Watson Hamilton "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19. See also *Quebec (Attorney General) v A*, above n 14, at [142]–[206].

22 See in particular the "1995 trilogy": *Miron v Trudel*, above n 16; *Egan v Canada*, above n 16; and *Thibault v Canada* [1995] 2 SCR 627.

23 *Law v Canada (Minister of Employment and Immigration)*, above n 12.

24 In *Law* itself, Ms Law, a widow, challenged the law preventing her from receiving immediate surviving spouse benefits under the Canada Pension Plan. Under the law, she was ineligible to receive the benefits as she was

was required to conduct the analysis by comparing their treatment with that of a person or group constituting an appropriately-situated comparator. The understanding of discrimination in *Law* and the legal test put forth were so complex that the summary of the legal framework ran for five pages.²⁵

Given the *Law* framework's many moving parts, and its emphasis on the elusive concept of "dignity", it is no surprise that few s 15 claimants succeeded in establishing discrimination under s 15(1). As a result, many government choices that were challenged under s 15 escaped close scrutiny by the courts; recall that the government is not required to justify its conduct under s 1 of the *Charter* until a violation of s 15(1) has been found.

The complexity that arose from the third stage of s 15's evolution eventually led to the current stage,²⁶ in which the Supreme Court articulated the simplified two-element test for discrimination set out above. The analysis no longer hinges on dignity, contextual factors, or comparators. However, some bedrock principles from the early s 15 jurisprudence persist. I turn to these.

B Bedrock Principles

Even though the Supreme Court has shown a remarkable ability to reshape and adapt the meaning of discrimination, certain principles from the Court's first s 15 decision in *Andrews* have withstood the various jurisprudential waves. Indeed, these principles are continuously repeated and reinforced in the Supreme Court's s 15 jurisprudence.

The first, and perhaps the most important, principle is that the right to equality is *substantive*.²⁷ In *Andrews*, the Supreme Court held that s 15 ought to be given a purposive, broad, liberal and remedial interpretation.²⁸ As a result, the Court disavowed the Aristotelian notion of formal equality that rests

under 35 years old, able-bodied and had no dependents. Her claim that the law violated s 15 on the basis of age discrimination failed. While Ms Law could prove that the law treated her differently because of her age, the law did not "perpetuate the view that people in this class are less capable or less worthy of recognition or value as human beings or as members of Canadian society". The difference in treatment was not a result of stereotype, but a response to "the actual situation of individuals it affects. By being young, [Ms Law] ha[d] greater prospect of long-term incoming replacement" (at [102]). In other words, Ms Law's equality right was not infringed because the law was based on the legislature's view of her need, as compared to the needs of others. After *Law*, it proved difficult to challenge the state's allocation of benefits to defined categories of eligible recipients. Generally speaking, s 15 is much more successfully leveraged in combatting state-imposed burdens than in seeking an equitable redistribution of benefits.

25 *Law v Canada (Minister of Employment and Immigration)*, above n 12, at [88].

26 This current stage began with *R v Kapp* 2008 SCC 411, [2008] 2 SCR 483 (in particular [14]–[25]), and was cemented in *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396.

27 See Catherine A MacKinnon "Substantive Equality Past and Future: The Canadian Charter Experience" in Richard Albert and David R Cameron (eds) *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press, New York, 2017) 227.

28 *Andrews v Law Society of British Columbia*, above n 10, at 169.

on simply treating likes alike, as this conception of equality enabled problematic laws and practices such as segregation in the United States of America. Instead of this kind of categorical, formal equality, the Court in *Andrews* embraced a substantive equality – an equality of both opportunity and results that focuses on the real life consequences of state action on people who are differently situated. While sometimes identical treatment will be sufficient to redress inequality (think, for instance, of the uniform rule of one person, one vote), the reality of historic and systemic discrimination requires that, sometimes, people be treated differently to level the playing field. Substantive equality recognises that one law will not always have the same impact on all people.²⁹

This brings me to a second core principle espoused in *Andrews*: that, in addition to concerning itself with intentional discrimination, equality must address *discriminatory effects*. The focus of s 15 is on equality of outcome, with a view to the discriminatory impact of state action on different people. Section 15, therefore, asks whether a given law or governmental action makes a distinction, or has a differential impact, on members of a disadvantaged group.³⁰

A third bedrock principle from *Andrews*, which has evolved over the years, is the idea that equality is an inherently *comparative* concept. A person cannot show that they are experiencing a detrimental or disproportionate result without positioning themselves in relation to others. However, the role of comparison in s 15 has significantly fluctuated over the years. At times, ill-conceived comparisons have distorted the analysis. Although not a Charter case (as it predated the Charter), *Bliss v Attorney General of Canada* is particularly illustrative.³¹ In that case, the Supreme Court essentially held that pregnancy-based discrimination was not discrimination on the basis of sex as there are both men and women in the category of non-pregnant people. By comparing the claimant's treatment with the treatment of *all* non-pregnant people, the decision utterly erased and ignored the gendered nature of pregnancy. A malfunctioning comparative lens can also be seen in the dissenting reasons in *M v H*.³² Those reasons held that benefits were not being withheld from same-sex couples to discriminate against their sexual orientation; rather, they were being withheld because same-sex couples were not married and did not really have the kind of relationship that heterosexual married couples have. In so ruling, the dissent overlooked the critical fact that, at the time, same-sex couples were prohibited from marrying.

29 Note that this conception of equality is shared, in one form or another, between s 15 and the various human rights statutes across Canada.

30 This being said, some have argued that the s 15 jurisprudence has failed to live up to *Andrews*' promise of combatting discriminatory effects (in addition to direct discrimination): see Jonnette Watson Hamilton and Jennifer Koshan "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19 Rev Const Stud 191.

31 *Bliss v Attorney General of Canada* [1979] 1 SCR 183.

32 *M v H* [1999] 2 SCR 3.

Seeing the error in a formalistic approach to comparison, the Supreme Court of Canada, in the 2011 case of *Withler v Canada (Attorney General)*, provided some refreshed guidance on the role of comparison and "comparator groups" in s 15. The Court held that the claimant should be afforded great latitude in articulating the relevant comparison (although final say in shaping appropriate comparisons would rest with the court). Ultimately, however, the focus must remain on discrimination and substantive equality, not on technical comparisons. As the Court observed, "[c]onfining the analysis to a rigid comparison between the claimant and a group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination."³³

C Outcomes under Section 15: Mixed Success

Having set out the core principles of s 15, let me provide you with a brief glimpse into the mixed outcomes the right has yielded.³⁴ As will become evident, mixed outcomes result not only from successful and dismissed s 15 claims, but also from courts disposing of s 15 cases on other grounds. Further, academic studies of s 15 jurisprudence have shown that not only is it very difficult for equality claimants to succeed under s 15 before the Supreme Court, but these claimants are unlikely to be granted leave to argue their cases before the Supreme Court in the first place.³⁵

In the realm of disability rights, *Eldridge v British Columbia (Attorney General)* is an important case.³⁶ Here, the Supreme Court held that the lack of provision of sign language interpreters to deaf patients in hospitals violates s 15 of the Charter in a manner that cannot be justified in a free and democratic society. This case was a significant win for persons with disabilities. Yet, it might be said that it was an isolated win: five years after *Eldridge*, in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*,³⁷ families of children with autism brought a claim against the government alleging that its failure to fund a particular autism therapy violated s 15 of the Charter. The Supreme Court held that s 15 was not violated because the legislation's standard was not to provide all medically necessary services for all residents. Rather, the government could allocate health funding as it saw fit. The fact that one particular therapy was not a benefit provided by law did not mean that the claimants suffered differential treatment.

³³ *Withler v Canada (Attorney General)*, above n 26, at [58].

³⁴ For an overview of s 15 cases decided by the Supreme Court of Canada from the mid-1980s to the early 2000s, see Ian Greene *The Charter of Rights and Freedoms: 30+ Years of Decisions that Shape Canadian Life* (James Lorimer, Toronto, 2014) at 267–318.

³⁵ Bruce Ryder and Taufiq Hashmani "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989–2010" (2010) 51 SCLR (2d) 505.

³⁶ *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624.

³⁷ *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78, [2004] 3 SCR 657.

There have also been a number of successes for the LGBTQ+ community under s 15. For example, in *Vriend v Alberta*,³⁸ the Supreme Court held that the failure of a human rights statute to include protection against discrimination on the basis of sexual orientation violated s 15 of the Charter and the violation could not be justified in a free and democratic society. Mr Vriend was a lab coordinator at an Alberta college. He was asked about his sexual orientation and, upon disclosing that he was gay, was asked to resign because his homosexuality contravened a policy adopted by the college. He refused to resign and was terminated. Because the Charter only applies to government action and the college was not a government entity, the Charter was not directly engaged. Ordinarily, Mr Vriend could have sought recourse under Alberta's human rights statute, as provincial human rights legislation applies to private institutions such as colleges, but this statute did not recognise sexual orientation as a ground of discrimination. He challenged the human rights statute for failing to recognise sexual orientation and succeeded. Even though sexual orientation was not an enumerated ground in s 15, it was an analogous ground. In fact, sexual orientation merited not only recognition as an analogous ground, but a "reading in" to s 15. The Alberta statute's omission of sexual orientation violated s 15 by discriminating against homosexual people on the basis of an analogous or read-in ground, and there was no justification for this discrimination. The reading-in of sexual orientation as a prohibited ground of discrimination under s 15 provided monumental success for the LGBTQ+ community.³⁹

Another success for the LGBTQ+ community arose in the realm of spousal support. The leading case on this issue is *M v H*.⁴⁰ At issue in this case was the constitutionality of the definition of spouse in a family law statute. The statute defined spouses as people who were married or a man and a woman who had cohabited with each other for at least three years. People engaged in such relationships were able to rely on the statute in order to obtain spousal support after the dissolution of their relationships. Of course, the implication of the definition was that same sex couples who had cohabited with each other did not qualify to apply for spousal support upon relationship breakdown. The definition did not survive scrutiny at the Supreme Court, which held that the exclusion of same sex couples from the ability to obtain spousal support violated s 15 of the Charter in a manner that could not be justified in a free and democratic society.⁴¹

38 *Vriend v Alberta* [1998] 1 SCR 493.

39 Following *Vriend*, several Canadian courts found that the prohibition on same-sex couples marrying violated s 15: see *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 at [41]. In this *Reference*, the Government of Canada asked the Supreme Court of Canada to opine on the constitutionality of proposed legislation that would extend the right to marry to same-sex couples.

40 *M v H*, above n 32.

41 At [152].

Despite these wins, LGBTQ+ claimants have not been successful in many of the claims that they have pursued under s 15.⁴² For example, a majority of the Supreme Court in *Egan v Canada* held that a statute that excluded individuals involved in same-sex relationships from receiving publicly funded old age security violated s 15, but the violation could be justified in a free and democratic society.⁴³ The decisive distinction between this case and *M v H* was the source of the financial support; whereas *M v H* involved support from another private party, *Egan* involved support from the state.

Another area worth briefly exploring is age discrimination. In *Gosselin v Québec (Attorney General)*,⁴⁴ the claimant challenged the constitutionality of a public welfare scheme that provided a higher amount of money to individuals over the age of 30. If persons under the age of 30 were enrolled in qualifying educational programmes, they were entitled to an amount closer to that given to individuals over 30. Ms Gosselin had been enrolled in a qualifying programme, but had left it for personal reasons. She challenged her lesser entitlement to welfare. A majority of the Supreme Court held that the distinction made on the basis of age did not infringe the right to equality under s 15 of the Charter. Ms. Gosselin failed to show that the welfare programme demeaned her dignity. The payment of higher benefits to those participating in the qualifying education programmes was designed to integrate young adults into the workforce and young adults were not seen as an undervalued population in society.

In the context of distinctions based on marital status, Charter claimants have been largely unsuccessful at the Supreme Court. In *Nova Scotia (Attorney General) v Walsh*,⁴⁵ the Supreme Court rejected the claim that s 15 was violated by a family law statute that did not provide non-married cohabiting partners with the ability to rely on the presumption of equal division of matrimonial property. Similarly, in *Hodge v Canada (Minister of Human Resources Development)*,⁴⁶ the Supreme Court held that s 15 was not violated by a statute that made a distinction between married spouses and non-married cohabiting spouses by requiring the latter to have lived together within the year preceding the death of one spouse in order for the other to qualify for a spousal death benefit. Most recently, a majority of the Supreme Court held, in *Quebec (Attorney General) v A*,⁴⁷ that providing statutory equalisation mechanisms to married individuals upon dissolution of their marriage without extending those mechanisms to non-married cohabiting individuals does not violate s 15 of the Charter.

42 Although some have argued that the LGBTQ+ community is among the groups that have most benefitted from s 15: see for example Fudge, above n 5, at 341.

43 *Egan v Canada*, above n 16.

44 *Gosselin v Québec (Attorney General)* 2002 SCC 84, [2002] 4 SCR 429.

45 *Nova Scotia (Attorney General) v Walsh* 2002 SCC 83, [2002] 4 SCR 325.

46 *Hodge v Canada (Minister of Human Resources Development)* 2004 SCC 65, [2004] 3 SCR 357.

47 *Quebec (Attorney General) v A*, above n 14.

The cases I have reviewed thus far involved s 15 claims actually decided under s 15. In other circumstances, the Supreme Court has decided equality cases on other constitutional grounds, holding that it is unnecessary to address the s 15 issue.⁴⁸ *R v Morgentaler* is a good example.⁴⁹ In this case, the Supreme Court held that the prohibition against abortion in the Criminal Code violated women's right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s 7 of the Charter). Even though s 15 was argued, the Supreme Court decided not to address the equality issues surrounding women's bodily autonomy and reproductive health.

Another more recent example of the Supreme Court sidestepping s 15 is *Carter v Canada (Attorney General)*.⁵⁰ At issue was the constitutionality of the criminal prohibition against physician-assisted dying. This issue has been quite controversial in Canada. At the time of *Carter*, there was precedent from the Supreme Court holding that the criminalisation of assisted dying violates the right to equality under s 15 of the Charter, but that the violation is justified in a free and democratic society.⁵¹ In deciding *Carter*, the Supreme Court avoided s 15 altogether by relying on s 7 of the Charter, which protects the right to life, liberty and security of the person and the right not to be deprived of these except in accordance with the principles of fundamental justice. Yet, it was, and remains, clear that those who are most likely to rely on access to assisted death are those who are physically unable to effect their own death without assistance.

Cases such as *Morgentaler* and *Carter* demonstrate how the promotion and achievement of equality in Canada can be more a product of other legal mechanisms than of s 15 itself.⁵² I return to this point in parts III and IV.

D Future Challenges

Our s 15 jurisprudence has clearly not reached a saturation point and will continue to evolve and develop. In particular, I wish to briefly highlight two areas that are likely to pose future challenges for equality law.⁵³

48 The rationale for doing so is judicial restraint. Ordinarily, a court will not address more issues than necessary to dispose of the case, as courts are intended to resolve disputes, not to engage in theoretical or academic analysis.

49 *R v Morgentaler* [1988] 1 SCR 30.

50 *Carter v Canada (Attorney General)* 2015 SCC 5, [2015] 1 SCR 331.

51 *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519.

52 For a brief overview of the difficulties courts have faced in interpreting the section, see MacKinnon, above n 27, at 227–228.

53 I note that others share my view that these areas will require attention in future s 15 jurisprudence: see for example Margot Young "Social Justice and the Charter: Comparison and Choice" (2013) 50 Osgoode Hall LJ 669.

The first area relates to claims involving *overlapping grounds of discrimination*. Our jurisprudence has tended to approach claims of discrimination through the lens of only one ground of discrimination at a time.⁵⁴ Yet, it goes without saying that equality claimants are not one-dimensional in real life. A s 15 claimant can experience a difference in treatment rooted jointly in gender, race and religion, for instance. The intersectionality of these different aspects of identity will continue to challenge and shape our future equality jurisprudence.

Secondly, our equality rights jurisprudence will undoubtedly continue to grapple with the relationship between *personal choice* and legislative choice. The tension between the two has manifested itself most clearly in cases involving the legislative provision of benefits to those whose personal lives look a certain way (for instance, legislative schemes that provide benefits to those who are legally married, but not to those who are simply cohabiting together). Such cases raise the question of whether discrimination can exist where, at least in the Court's view, the individuals alleging discrimination have made choices that result in their differential treatment. In the past, questions engaging the tension between personal and legislative choice have deeply divided the Supreme Court.⁵⁵

III SECTION 15 AS AN INTERPRETIVE AID OR COUNTERVAILING CONSIDERATION INSIDE THE CHARTER

While s 15 may not have produced a great number of victories for equality claimants, equality rights have nevertheless had a profound impact on Canadian jurisprudence. This is because equality is not a neatly compartmentalised concept that arises only in direct constitutional challenges under s 15. Instead, equality permeates and shape the contours of our entire legal system.

In this part, I explore how our s 15 conception of equality has informed our analysis of other Charter rights or served as an interpretive aid or countervailing consideration *inside* the Charter. In the next (and final) part, I turn to equality's influence *outside* the Charter. In both parts, I hope to show how s 15, and equality more broadly, plays a reflective role in Canadian jurisprudence beyond the instrumental role it plays for s 15 claimants.

In Charter cases based on rights other than s 15, I observe that equality rights have been invoked in three principal ways. Equality has:

- (a) served as a guiding principle or value informing other rights, whether overtly or not;
- (b) been balanced against other Charter rights in determining the scope of those rights; and

54 See for example *Gosselin v Québec (Attorney General)*, above n 44, in which the Supreme Court focused on Ms Gosselin's age largely to the exclusion of her gender and disability.

55 See for example *Quebec (Attorney General) v A*, above n 14.

- (c) entered the analysis as a consideration in the s 1 justification stage after a Charter violation has been found.

A Equality as a Guiding Principle in Charter Analysis

There are several ways that equality serves as a guiding principle in Charter analyses beyond s 15. One way that our constitutional analysis pays homage to equality is quite subtle – by reaching conclusions that are consistent with substantive equality, sometimes without addressing equality explicitly.

An illustrative example is *Canada (Attorney General) v PHS Community Services Society*.⁵⁶ The claimants in this case operated a facility where drug users could administer their substances in a safe environment under the supervision of nurses. In the years preceding the case, the Minister of Health had granted exemptions to the health practitioners who operated the facility, as well as its patrons, to shield them from the penalties associated with possession of prohibited substances. When the Minister refused to exercise his discretion to renew the exemptions, PHS Community Services brought a constitutional claim under s 7 of the Charter. Again, this section provides protection to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

On its face, s 7 deals with individual rights to life, liberty and security of the person and the courts have not yet fully recognised substantive equality as a principle of fundamental justice.⁵⁷ Yet McLachlin CJ (as she then was), writing for the unanimous Supreme Court, was clearly alive to the equality considerations at play in the case. In opening her reasons, she observed that the community in which the facility was located was "home to some of the poorest and most vulnerable people in Canada", and that many of the patrons of the facility had "histories of physical and sexual abuse as children, family histories of drug abuse, early exposure to serious drug use, and mental illness".⁵⁸ For these individuals, the Chief Justice said, "[e]xistence is bleak".⁵⁹ The reasons make no mention of equality at all.⁶⁰ Nonetheless, the outcome of the case showcased equality of outcome; it aimed to ensure that those who suffer from poverty and addiction are not exposed to a higher risk of health issues or death as a result of the operation of the criminal law.

56 *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44, [2011] 3 SCR 134.

57 Some academics have argued that the principles of fundamental justice ought to include substantive equality: see for example Kerri A Froc "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42 Ottawa L Rev 411.

58 *Canada (Attorney General) v PHS Community Services Society*, above n 56, at [4] and [7].

59 At [8].

60 Rather, the case was resolved on the basis that the Minister's refusal to renew the exemptions was contrary to the principles of fundamental justice that denounce arbitrariness, gross disproportionality, and overbreadth.

The approach that achieves substantive equality without explicitly engaging in an equality analysis can also be observed in some of the labour and freedom of association cases that have come before the Supreme Court. In Canada, freedom of association is guaranteed as a fundamental freedom under s 2(d) of the Charter. The Supreme Court's jurisprudence in the 1980s and 1990s was quite restrictive regarding the scope of s 2(d).⁶¹ However, beginning in the 2000s, the Supreme Court's understanding of freedom of association began to expand.

One of the precursor cases to this expansion was *Dunmore v Ontario (Attorney General)*.⁶² *Dunmore* held that the exclusion of agricultural workers from a collective bargaining statute, which resulted in workers being prohibited from forming labour associations for the purpose of collective bargaining, violated s 2(d). Of course, this case was of monumental importance to agricultural workers who were often involved in precarious work and faced significant disparities in bargaining power with their employers. This case is also significant because it held that the violation of s 2(d) stemmed from the under-inclusiveness of the labour relations statute.⁶³

Fundamentally, the finding that under-inclusiveness was the malady is indicative that the Supreme Court was concerned about equality of outcome for the various workers who sought to unionise. The effect of the decision is to prohibit the government from discriminating on the basis of occupation unless such discrimination can be justified. Interestingly, even though the majority of the Supreme Court reached a conclusion that is in line with equality of outcome, or substantive equality, the majority chose not to address the equality issue directly. Instead, the majority held that, since the case could be resolved under s 2(d), there was no need to conduct an explicit equality analysis.⁶⁴

Another technique employed by Canadian courts to ensure that substantive equality is achieved is reliance on the doctrine that Charter values ought to be taken into consideration whenever a section of the Charter is subject to interpretation. An early form of this technique can be observed in *R v Tran*,⁶⁵ in which the Court made specific reference to s 15 (as well as s 25 (Aboriginal rights) and s 27 (multicultural heritage)) in deciding the protective scope of s 14 of the Charter, which grants a party or witness the right to an interpreter. The Court emphasised that s 14 must be interpreted bearing in mind that "a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system."⁶⁶

61 See for example *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313.

62 *Dunmore v Ontario (Attorney General)* 2001 SCC 94, [2001] 3 SCR 1016.

63 At [23]–[31] and [43]–[48].

64 At [70].

65 *R v Tran* [1994] 2 SCR 951.

66 At 976–977.

A more explicit use of this technique can be seen in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*,⁶⁷ which built upon *Dunmore*. In what is an important labour case, the Supreme Court held that workers have a right to collective bargaining under s 2(d) of the Charter and the government cannot interfere with meaningful collective bargaining unless it can prove a justification for doing so. Like in *Dunmore*, the Court's conclusion was anchored in equality of outcome. However, the Supreme Court went farther than simply reaching a conclusion that is consistent with equality. For the Supreme Court in *Health Services*, one of the factors that had to be taken into consideration in discerning the protective scope of a Charter right was the influence of Charter values, including equality.⁶⁸ Subsequently, when the Supreme Court was called upon to decide whether the protective scope of s 2(d) encompassed the right to strike, the Court, once again, relied on equality as a Charter value to reach the conclusion that achieving equality between employers and employees necessitated that freedom of association protect workers' right to strike.⁶⁹

B Equality as Balanced Against Competing Rights

In the decisions I have just reviewed, equality was not a competing or countervailing consideration. Rather, it was a complementary consideration that harmonised with the central analysis. However, equality also plays a role in informing the interpretation of rights that can appear to be in tension with equality.

Two issues that arise in the context of sexual assault cases are illustrative: the disclosure and production of records to the accused and restrictions on the admissibility of evidence. These issues engage an accused's right to make full answer and defence, which is guaranteed by s 7 of the Charter (as part of the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice). As well, the issue engages the complainant's right to privacy, which is reflected in s 8 of the Charter. Recognising that these rights can come into tension with each other in the sexual assault context, the Supreme Court in *R v Mills* held that they must be defined in light of each other, as well as in light of the principle of equality.⁷⁰

In *Mills*, the Supreme Court was called upon to decide the constitutionality of new Criminal Code provisions enacted by Parliament that placed conditions on the accused's access to records in which the complainant has a reasonable expectation of privacy. These provisions represented a departure from the common law, which, generally speaking, favoured the accused's access to all relevant materials, including the personal records of the complainant. In finding the provisions constitutional,

67 *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia* 2007 SCC 27, [2007] 2 SCR 391.

68 At [80].

69 *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, [2015] 1 SCR 245 at [53]–[56].

70 *R v Mills* [1999] 3 SCR 668 at [21].

the majority relied on "equality concerns" as an interpretive tool. The relevant equality concerns included "an appreciation of myths and stereotypes in the context of sexual violence".⁷¹ This appreciation was "essential to delineate properly the boundaries of full answer and defence".⁷² Stated differently, the Supreme Court held in the most explicit manner that accused persons cannot rely on their right to full answer and defence as a justification for reliance on myths and stereotypes that pertain to, for example, the complainant's consent and credibility.

Further, the Supreme Court held that equality concerns highlight the importance of the complainant's privacy interest. The Court stated that the failure to protect the complainant's confidential doctor/patient communications from automatic disclosure would perpetuate "the disadvantage felt by victims of sexual assault, often women", as they may be reluctant to report or may become "doubly victimised".⁷³ Such an outcome, the Supreme Court held, would not provide the equal benefit of the law to victims of sexual offences, especially when compared to victims of non-sexual offences.⁷⁴ In short, even though the new legislative provisions were not challenged on the basis of s 15 of the Charter, s 15 considerations had a prominent pull on the analysis.

Equality similarly served as a countervailing consideration in *R v Darrach*,⁷⁵ in which the Supreme Court considered the constitutionality of s 276 of the Criminal Code, which places conditions on an accused's ability to introduce evidence regarding the complainant's prior sexual history. Informed by the equality-based reasoning in *Mills*, the Court in *Darrach* held that the conditions contained within s 276 strike the right balance between the competing rights and interests at stake as they guard against the "twin myths" infiltrating the fact-finding process at trial.⁷⁶ These twin myths are that a complainant's sexual history speak to whether she is (i) worthy of belief and/or (ii) more likely to have consented.

C Equality as a Section 1 Consideration

In addition to lending its weight to the interpretation of Charter rights, equality plays a role in discerning whether a found violation of a Charter right can be justified under s 1 of the Charter. At this stage, equality factors into whether the state is able to demonstrate a pressing and substantial objective to justify its Charter-infringing action.

71 At [90].

72 At [90].

73 At [91], citing *M (A) v Ryan* [1997] 1 SCR 157 at [30].

74 *R v Mills*, above n 70, at [91], citing *M (A) v Ryan*, above n 73, at [30].

75 *R v Darrach* 2000 SCC 46, [2000] 2 SCR 443.

76 At [33], [37] and [71].

A series of cases involving hate speech are illustrative. In these cases, the Supreme Court has found legal prohibitions on hate speech to violate the right to freedom of expression (s 2(b) of the Charter), but has upheld the validity of these prohibitions in part by invoking the principle of substantive equality. Put differently, the Supreme Court has held that the equality interests of certain groups justify restrictions on the freedom of expression of others.

In the first of these cases, *R v Keegstra*,⁷⁷ a high school teacher was charged under the Criminal Code for the wilful promotion of hatred because he was communicating anti-Semitic remarks to his students. In dismissing Mr Keegstra's claim that the Criminal Code provision was unconstitutional, Dickson CJ held that the criminalisation of hate speech was justified because of the harm that hate speech inflicts on both the targeted group and society writ large: such conduct can give rise to intolerance, loss of dignity, marginalisation, prejudice and violence. Such outcomes, Dickson CJ held, undermine the achievement of equality or multiculturalism. As a result, there was a pressing and substantial objective motivating the criminalisation of hate speech.⁷⁸ The Chief Justice echoed his statements from *Keegstra* in *Canada (Human Rights Commission) v Taylor*.⁷⁹ This decision upheld the constitutionality of a provision of the Canadian Human Rights Act prohibiting hate speech.⁸⁰ In *Taylor*, the Chief Justice described the equality and multiculturalism principles enshrined in ss 15 and 27 of the Charter as "linchpin Charter principles" to be taken into account at the s 1 stage of the analysis.⁸¹

The third hate speech case is *Saskatchewan (Human Rights Commission) v Whatcott*.⁸² Complaints were made to the Saskatchewan Human Rights Commission about flyers distributed by Mr Whatcott that denounced homosexuality. In response, Mr Whatcott challenged the prohibition on hate speech in the Saskatchewan Human Rights Code, arguing that it was a violation of his Charter rights to freedom of expression and religion. Writing for the Supreme Court, Rothstein J found the provision to infringe both rights, but in a manner demonstrably justifiable in a free and democratic society. In his reasons, he emphasised the importance of the Human Rights Code's equality-seeking purpose.⁸³ He observed that hate speech:⁸⁴

77 *R v Keegstra* [1990] 3 SCR 697.

78 At 746–749. See also at 755–758.

79 *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892.

80 Canadian Human Rights Act RSC 1985 c H-6, s 13(1).

81 *Canada (Human Rights Commission) v Taylor*, above n 79, at 920–921.

82 *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11, [2013] 1 SCR 467.

83 At [71]–[75].

84 At [74].

... rises beyond causing emotional distress to individual group members. It can have a societal impact. If a group of people are considered inferior, subhuman, or lawless, it is easier to justify denying the group and its members equal rights or status.

The danger of hate speech, he said, is that it "lays the groundwork for later, broad attacks on vulnerable groups, [which] can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide".⁸⁵

Equality's role in the s 1 analysis is also apparent in the jurisprudence addressing the crime of distributing obscene material. The leading case is *R v Butler*.⁸⁶ In this case, a majority of the Supreme Court held that the criminalisation of the distribution of obscene material constituted a violation of freedom of expression, but that this violation was justified in a free and democratic society because of the harm that obscene material inflicts on women. According to the majority, obscene materials which objectify and degrade women hinder the achievement of gender equality in our society. To use Sopinka J's words:⁸⁷

... if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on the individual's sense of self-worth and acceptance.

I hope this part has made clear that substantive equality plays a fundamental reflective role in our constitutional law. In addition to the direct role it plays in s 15 claims, it performs an indirect – but important – role in other Charter claims.⁸⁸ As such, s 15 gives credence to La Forest J's apt observation in *R v Lyons* that "the rights and freedoms protected by the Charter are not insular and discrete".⁸⁹

IV EQUALITY'S REFLECTIVE ROLE BEYOND THE CHARTER

Perhaps the most unexpected consequence of equality rights has been their influence on the way in which legislators, courts, lawyers and the public think about equality generally. The import and impact of equality rights beyond Charter analysis has been significant. Here, the origin, constitutional status and structure of the equality right is less important than the desire to ensure equal justice for all. The equality thinking to which I am referring has permeated almost all areas of Canadian law, illustrating that the "Empire of Equality" is really the entire *corpus juris*.

85 At [74].

86 *R v Butler* [1992] 1 SCR 452.

87 At 497.

88 Smith and Black make a similar observation in their article "The Equality Rights", above n 19, at 376–377.

89 *R v Lyons* [1987] 2 SCR 309 at 326.

Equality can thus be seen as a process of reasoning or a methodology. Equality provides a frame for thinking about difference, disparity, disadvantage, disproportion and domination. It asks decision-makers and observers of the law to take into account the impact of legal choices on all the differently-situated people who will be touched by them. Equality thinking forces us away from assumed norms, and asks us to consider how actions or choices will work on the ground for everyone, including those who are vulnerable, poor, addicted, disenfranchised, racialised, rejected or marginalised. It insists that legal issues be placed in a larger social context. This is because equality places the focus on the social situation of groups and the people in them. Equality-based methodology requires decision-makers to turn their minds to the wider social, historical, political and economic contexts. The methodology is based in critical reasoning, through which hidden assumptions and preferences are uncovered and scrutinised. The process of equality requires a stripping away and a re-thinking.

The kind of "equality thinking" or "equality methodology" I am describing is readily apparent in various aspects of the law, including substantive law, procedural practice and rules of evidence. It is manifest across subject matters as diverse as criminal law, family law and tort law, to name just a few. Equality thinking is also an important aspect of the professional competence of lawyers and judges alike. The following examples, drawn primarily from the criminal law, demonstrate the power and potential of an "equality audit" on legal decision-making and reasoning.

A The Concept of "Threatening to Cause Serious Bodily Harm"

In *R v McCraw*,⁹⁰ the accused sent letters to cheerleaders in a football team stating that he was going to have sexual relations with them regardless of whether they consented or not. There was debate in the lower courts about whether the threat of sexual assault against these women constituted a threat to cause serious bodily harm. Cory J, writing for a unanimous Supreme Court, put an end to the judicial debate. He held that the concept of threatening to cause serious bodily harm must be understood from the perspective of women and their lived experiences of sexual assault. In describing the effects of sexual assault on women and the lens through which such effects must be understood, Cory J said:⁹¹

It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman.

90 *R v McCraw* [1991] 3 SCR 72.

91 At 83.

B Self-Defence and "Battered Women Syndrome"

In *R v Lavallee*,⁹² the Supreme Court applied a similar gender equality lens in deciding whether a woman who had been abused by her intimate partner could claim self-defence after causing his death in circumstances that were not considered exigent under the existing standard. Retaliating pre-emptively against her abusive partner, Ms Lavallee shot him in the back as he was leaving the room. When *Lavallee* reached the Supreme Court, the Criminal Code restricted the availability of the defence of self-defence to an accused who could show that:⁹³

- (a) he cause[d] it [i.e. death or grievous bodily harm] under reasonable apprehension of death or grievous bodily harm ..., and
- (b) he believe[d] on reasonable and probable grounds, that he [could not] otherwise preserve himself from death or grievous bodily harm.

Substantive equality shines through the *Lavallee* decision in two ways. First, Wilson J, who wrote the majority judgment, made it clear that expert evidence on "battered women syndrome" is admissible to assist lay people in understanding why it is that a "battered woman" does not flee an abusive relationship or react in self-defence as soon as the violence begins. Without such expert evidence, Wilson J reasoned it would be impossible for some to overcome the age-old stereotypes and myths about women who report domestic violence, including that they would have left their relationships if they were beaten as badly as they claimed, or that they enjoyed their partners dominating them as women are submissive.

Secondly, Wilson J clarified that, despite the masculine references in the Criminal Code, the "reasonableness" analysis must take into consideration the experiences of women:⁹⁴

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".

Thus, *Lavallee* held that the self-defence provision must accommodate a more nuanced understanding of self-defence than the "bar room fight" model on which the existing legal norm was based. Courts needed to keep a more open mind about when an abused woman might perceive a legitimate threat of imminent danger from her abusive partner.

⁹² *R v Lavallee* [1990] 1 SCR 852.

⁹³ Criminal Code RSC 1985 c C-46, s 34(2).

⁹⁴ *R v Lavallee*, above n 92, at 874.

In response to *Lavallee*, Parliament amended the self-defence provision of the Criminal Code.⁹⁵ For instance, the provision (s 34(2)(f.1)) now allows courts to take into consideration "any history of interaction or communication between the parties to the incident". Together, the Court's decision and Parliament's response to it demonstrate the powerful reflective role of equality.

My last two examples have demonstrated gender-based equality thinking in the Supreme Court. Equally noteworthy, however, are examples of the judiciary applying a race- or origin-based equality lens. I offer two.

C The Sentencing of Indigenous Offenders

One of the cardinal principles in our law of sentencing is that any punishment imposed on an offender must be proportionate to the gravity of the offence and the circumstances of the offender.⁹⁶ This approach to sentencing is in and of itself premised on the idea of substantive equality; an approach that punished offenders uniformly, without regard to their circumstances, would impose inequitable burdens on offenders in harsher circumstances. Accordingly, our sentencing regime is concerned with equity; every offender must receive an equally proportionate sentence in the context of their own circumstances and the gravity of the offence they committed.

Such a concern with equality in our sentencing regime is best captured in our jurisprudence dealing with the sentencing of Aboriginal offenders. Section 718.2(e) of the Criminal Code states that:

... all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

In *R v Gladue*,⁹⁷ the Supreme Court held that the serious and disproportionate over-representation of Aboriginal persons in Canadian prisons supported the conclusion that Parliament intended s 718.2(e) to remedy this problem.⁹⁸ The Court noted that this overrepresentation was symptomatic of "bias against aboriginal people and ... an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders".⁹⁹

95 See Don Stuart and Steve Coughlan *Learning Canadian Criminal Law* (13th ed, Carswell, Toronto, 2015) at 905.

96 Criminal Code, above 93, s 718.1.

97 *R v Gladue* [1999] 1 SCR 688. See also *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433, which reaffirmed *Gladue*.

98 *R v Gladue*, above n 97, at [58]–[65]. Notably, the Supreme Court observed that the over-representation of indigenous prisoners had reached a "crisis" level (at [64]).

99 At [65].

Understanding s 718.2(e) to be remedial of this problem, the Supreme Court held that there is an obligation on sentencing judges to consider "the systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts" and to consider the "types of sentencing procedures and sanctions" that might be appropriate given an Aboriginal offender's heritage.¹⁰⁰ Such a consideration involves the analysis of factors that have plagued the Aboriginal community, including the discriminatory treatment of Aboriginal people by our justice system, "[y]ears of dislocation and economic development [that] have translated, for many aboriginal peoples, into low income, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation". These factors exacerbate prison conditions for Aboriginal offenders: "the internment milieu is often culturally inappropriate and regrettably discrimination towards [Aboriginal offenders] is so often rampant in penal institutions".¹⁰¹

While not deciding the issue, the Supreme Court also suggested that the taking into consideration of Aboriginal offenders' circumstances does not amount to reverse discrimination because it does not require the automatic reduction of sentences for Aboriginal offenders. The Court held:¹⁰²

... that the aim of s 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.

Such a concern with difference and impact strikes at the heart of achieving substantive equality. Turning a blind eye to the over-representation and disproportionately harsh treatment of Aboriginal peoples in our prisons would not only be contrary to the statutory scheme established by s 718.2(e), but would also run afoul of achieving equality in our criminal justice system.

D Challenges for Cause in Jury Trials

Another example of our criminal justice system attempting to redress systemic race- or origin-based discrimination can be seen in the jury selection process for criminal trials. In our system, accused persons who are tried by a jury have the right to an impartial jury. In the quest to fulfil this right, our courts have allowed racialised accused persons to question a prospective juror of a different racial background on whether the racial difference between them would affect the juror's partiality. In *R v Spence*, the Supreme Court held that it is possible to question potential jurors about their racial prejudice when their race is different than that of the accused as long as the trial judge finds that: (1)

100 At [66].

101 At [67]–[68].

102 At [87].

a widespread bias towards the race of the accused exists in the community and (2) some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.¹⁰³ In proving the first element, accused persons would ordinarily have to prove the bias through reports and studies, but courts now take judicial notice of the "widespread existence of racism", thus attenuating the evidentiary burden placed on the accused.¹⁰⁴

By allowing racialised accused persons to challenge jurors for racial prejudice, the Court was not introducing race into the equation. Rather, it was trying to *remove* race as an underlying negative factor in the jury's decision-making. Notably, this ability to challenge jurors constitutes a significant exception in our jury selection system, which is premised on the presumption that all potential jurors will perform their duties without bias or partiality.¹⁰⁵ It goes without saying that this exception is geared directly towards the achievement of substantive equality in our criminal justice system: all accused persons have the right to a fair trial and an impartial jury regardless of their race or minority status.

E Fact-Finding at Trial

Our rules of evidence and our approach to evidentiary issues have undergone, and continue to undergo, changes to adapt to our commitment of equality. Increasingly, they attempt to take cultural, social and socio-economic differences seriously. For instance, it is now not uncommon for Aboriginal histories and stories to be accepted as a proper evidentiary basis for Aboriginal claims,¹⁰⁶ or for courts to take judicial notice of the circumstances faced by marginalised members of society.¹⁰⁷

One area of evidence that requires particular attention to equality concerns is the assessment of credibility. Many considerations, both conscious and unconscious, can inform the judge or jury's perception of the witness' trustworthiness, reliability and credibility. Whether a witness' answer to a question is found as a fact, or is considered to be reasonable, probable, probative or relevant, may also

103 *R v Spence* 2005 SCC 71, [2005] 3 SCR 458 at [26].

104 At [5] and [52].

105 At [21].

106 For example, see *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* 2017 SCC 54, [2017] 2 SCR 386.

107 For background and an interesting case study, see *R v S (RD)* [1997] 3 SCR 484. In that case, a white police officer arrested a Black youth, RDS, for interfering with the arrest of another youth. The officer and RDS were the only two witnesses at RDS's trial and gave differing accounts of the incident. The judge, who was also Black, acquitted the accused. At issue was whether the judge had displayed a reasonable apprehension of bias in making generalised comments about police behaviour and attitudes towards Black people. While a majority of the Supreme Court reached the conclusion that the judge did not display a reasonable apprehension of bias in her observation about the existence anti-Black racism, the Supreme Court was divided. Four members of the Court stated that judicial notice may be taken of "the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions" (at [46]).

be influenced, in part, by the social context in which the question is asked of the witness's and the experience and open mindedness of the decision maker.

Canadian courts have been making efforts to grapple with the inherent risk of importing one's biases into credibility assessments, and courts of appeal have consistently cautioned against making negative inferences based on a witness' identity markers and/or demeanour. As Hamilton J of the Nova Scotia Court of Appeal held in *R v SHP-P*:¹⁰⁸

Reasons of intelligence, upbringing, education, race, culture, social status and a host of other factors may adversely affect a witness's demeanour and yet may have little bearing on that person's truthfulness. Consequently, quite apart from that witness's appearance or mood, his or her testimony must be carefully considered for its consistency or inconsistency with all of the other evidence presented at trial before any decision can be made concerning its acceptance, in whole or in part, or the weight to be attached to it.

Stated differently, Canadian evidence law is fundamentally concerned with attempting to get at the truth without any distorting influence that our differences may have.

V CONCLUSION

I hope I have succeeded in showing you that there are many ways to translate aspirational rights like the right to equality into lived reality. Equality rights are so foundational, fundamental and formative, it is no surprise that they have found multiple ways to influence the totality of Canadian law. Whether invoked directly – when raising a constitutional challenge – or indirectly – when balancing rights, justifying government action, drafting new law, interpreting statutes, developing the common law, and making credibility or fact findings – equality permeates our understanding of, and approach to, the law. Thus, while a constitutionally-entrenched "castle in the air" right to equality provides a solid foundation for equality, it is by no means equality's only arena. Far from being the end of the story of equality in Canadian law, s 15 is merely the beginning. In this way, the Canadian experience shows how equality rights, whether constitutionalised or not, may have a meaningful impact.

¹⁰⁸ *R v SHP-P* 2003 NSCA 53, (2003) 216 NSR (2d) 66 at [30].

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