TRANSFORMING WOMEN'S FUTURE

A 2004 GUIDE TO EQUALITY RIGHTS THEORY AND LAW

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Contents

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Introduction

Transforming Women's Future: A Guide to Equality Rights Theory and Action was published by the West Coast Legal Education and Action Fund (West Coast LEAF) in 2001. It is the result of a conference held in 1999 that brought together equality rights advocates, activists and theorists to reflect on the progress women's equality-seeking groups have made, and to look ahead to the future of employing law-related strategies (litigation, law reform and public legal education) to achieve equality. *Transforming Women's Future* provides a background overview of the legal sources of equality rights and how they operate in Canada. It is divided into four parts that describe the major issues in the struggle for women's equality, the actual legal sources of our equality rights in Canada, a description of the legal tools available to us in our efforts to achieve substantive equality, and a number of strategies for implementing those tools.

Transforming Women's Future is still current and serves as a resource for individuals and organizations that are or will be using law related strategies to advance equality in general, and women's equality in particular.

This *2004 Guide* builds upon the foundation of *Transforming Women's Future* and discusses legal developments since its publication. In particular, it focuses on two unanimous Supreme Court of Canada decisions of that same year: *Law v. Canada (Minister of Employment and Immigration)*, a constitutional equality rights case under the *Charter*; and *B.C. v. BCGSEU* (otherwise known as *Meiorin* or the 'Firefighters Case'), a provincial human rights case. *Law* and *Meiorin* have re-shaped the legal landscape on equality rights issues and are likely to continue to do so for some time to come. In addition, this update provides an overview of some of the obstacles and opportunities currently facing individuals and groups who are considering using law-related strategies in the pursuit of substantive equality.

Part 1 of this *2004 Guide* describes the nature of the objective of achieving women's equality. It introduces some of the key concepts that provide the overall framework for legal strategies. The focus here is on (1) understanding the difference between substantive and formal equality and (2) making the link between substantive equality and social transformation. Legal language is often technical and can be difficult to understand. In order to assist the reader, key equality concepts and terms are bolded throughout, and defined in a **Glossary** at page 42.

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Part 2 sets out the general legal framework for equality rights cases. It provides an overview of recent developments in the tests developed by the courts under both the *Charter* and human rights laws. These tests tell us what is required to prove that a right to equality has been violated. The underlying principles involved in this important litigation can be used to advance women's substantive equality in other contexts such as law reform work, public policy development and public legal education. A list of the cases referred to throughout this paper is available at page 39 so that readers can look them up and read more about them.

The idea of substantive or real equality integrates two important features: (1) the recognition that there are groups within our society that have historically been treated unequally and, (2) that the purpose of section 15 of the Charter and human rights legislation is to end their inequality...

Part 3 is a discussion of some of the more specific issues that are at the forefront of the legal struggle for substantive equality for women in Canada. It describes some aspects of the legal and political environment that have had a particularly important impact on women's equality. This part also highlights some of the key legal issues that have not yet been before the courts, but can be analysed and advanced through the lens of women's substantive equality. Flowing from these discussions, a short concluding section highlights some of the priorities for those engaged in completing the "unfinished business" of achieving women's equality in Canada.

PART 1

The "Unfinished Business" of Substantive Equality

Canadian courts have confirmed and reaffirmed that **substantive equality** is at the heart of equality rights provisions in the *Charter*. The idea of *substantive* or *real* equality integrates two important features: (1) the recognition that there are groups within our society that have historically been treated unequally and, (2) that the purpose of section 15 of the *Charter* and human rights legislation is to end their inequality and to help members of these groups overcome the results of their mistreatment. It can be contrasted with the outdated notion of **formal equality** a more limited concept that requires only that people who are **similarly situated** receive the same treatment. Formal equality allows lawmakers and the courts to justify unequal treatment where there are differences between people. It also allows them to ignore, rather than to take into account, the important differences in how people experience life in our society.

For example, in the *Bliss* case in 1979, formal equality thinking led the Supreme Court of Canada to justify discrimination against pregnant women because the unemployment benefits scheme treated all non-pregnant people the same way (whether male or female), and conversely treated all pregnant women the same way. This reasoning ignores the obvious facts that only women can become pregnant and that the possibility of pregnancy is one aspect of the experience of being female. Since the 1980s, the courts have consistently rejected mere formal equality, or 'treating likes alike,' as the purpose of equality rights protection. In 1989, the Supreme Court repudiated *Bliss* in the *Brooks* case (again, references for these cases appear in **References**). A full decade later, the Court finally acknowledged that discrimination on the basis of pregnancy was sex discrimination. The different result in the two cases was because in *Brooks* the Court employed a substantive equality analysis and paid attention to the larger social context of childbearing and women's inequality.

Formal equality allows lawmakers and the courts to justify unequal treatment where there are differences between people. It also allows them to ignore, rather than to take into account, the important differences in how people experience life in our society.

Substantive equality demands the redress of existing inequality and the institution of real and effective equality in the social, political, and economic conditions of different groups in society. It requires a focus on systemic inequality and encompasses the right to have one's differences acknowledged both by law and by relevant social and institutional policies and practices. Despite progress and some superficial successes, achieving substantive equality for women both in law and within Canadian society can still be considered as largely "unfinished business".

An understanding of the nature of women's inequality is essential to a full appreciation of the continuing challenge of achieving substantive equality. Women's inequality is the result of **systemic discrimination:** that is, caused by practices embedded within society, institutional policies and operations that disadvantage women both as individuals and as a group. Systemic discrimination operates throughout businesses and institutions, as well as across broader systems such as the economy, health care, or the workplace. It encompasses both **direct discrimination** and **adverse impact discrimination.**

Direct discrimination refers to attitudes and behaviour that result in the detrimental treatment of a woman or women because they are women. An example of direct discrimination would be prohibiting women from applying for a certain job or providing a benefit to men only. These actions or omissions can be deliberate and conscious, or unintentional and unconscious. They can even be taken in the belief that they are in the best interest of the individual (such as refusing

housing to a single woman because the landlord is worried for her safety), however, regardless of the intent, the impact is negative differential treatment. Adverse impact discrimination is caused by rules, practices, and systems that — while gender neutral on their face and applied equally to everyone — have a disproportionately negative impact on women. For example, height and weight requirements for a job can have an adverse impact on women who are on average shorter and lighter than men. In law, it doesn't matter what type of discrimination is at work. The different categories of discrimination serve an important purpose of helping us to understand the various ways in which inequality operates. Whether it is a case of direct, adverse impact or systemic discrimination the emphasis within a legal approach to equality is on the discriminatory impact on the **claimant** and not on the motives behind the action, omission, policy or practice.

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Despite the fact that the concept of systemic discrimination has been recognized in Canadian law for some time, it is not necessarily well understood within Canadian society or consistently applied by our courts and human rights tribunals. Addressing systemic discrimination requires a sophisticated understanding of how inequalities are created and recreated within society. The legal recognition of the right to equality in our constitution, human rights legislation and in international human rights agreements is only the beginning. There is a long journey between recognition of the right on paper and ensuring that everyone's right to equality is protected and promoted in actual fact. It requires us to investigate how existing policies and practices are based on assumptions about what is normal, and how that definition of normal reflects the experience of dominant groups in society such as men or western Europeans. These **dominant norms** have a negative impact on individuals who are "different" by ignoring or actively excluding the experience of anyone who is different than that dominant group. The elimination of systemic discrimination requires an ongoing change process in which previously hidden forms of discrimination are uncovered and addressed.

The most pervasive forms of injustice are difficult to overcome because their existence is deeply embedded in structures of power and privilege. For example, male dominance of legal and political systems, and decision-making in all sectors of society, is so pervasive that it is still treated by much of society as natural, despite important inroads made by the feminist and human rights movements. These structures are compounded by other patterns of domination based on characteristics such as sexual orientation, race, Indigenous status, age and class.

Established patterns are very difficult to challenge effectively, especially by those at the margins of society given their lower social or economic status. They are difficult to reform in fundamental respects and the interests of those in our society with privilege, including many members of the legal system, are generally aligned with the established order and its implicit assumptions about superiority and inferiority. Part of what we are trying to do in equality rights work is to make these invisible underlying assumptions and problematic practices visible. This is the first step toward transforming them.

All of these obstacles underscore the transformative nature of the goal of achieving substantive equality for women. Calling this work transformative highlights the degree, breadth and number of changes that are required to achieve women's substantive equality. It is not enough to accept existing legal and social institutions as they are and only work toward ensuring that opportunities within society are equally available to all; the institutions themselves have to be transformed. Substantive equality entails changes at all levels of society: individual behaviour, perceptions and attitudes; ideas and ideology; community and culture; institutions and institutional practices; and, deeper structures of social and economic power. Thinking about social transformation helps us to understand that discrimination is not merely about isolated incidents but also about the patterns of violations of the right to equality.

In law, it doesn't matter what type of discrimination is at work. The different categories of discrimination serve an important purpose of helping us to understand the various ways in which inequality operates. Whether it is a case of direct, adverse impact or systemic discrimination the emphasis within a legal approach to equality is on the discriminatory impact on the claimant and not on the motives behind the action, omission, policy or practice.

Given the depth and breadth of the change required, it is important that we see litigation as only one strategy that can be employed in seeking substantive equality. Some people question whether litigation strategies can contribute to transformative change because in their view, the legal system is designed to maintain social relations not change them. Others believe that litigation has a role to play, but that it is important to keep in mind that litigation strategies can only be part of the solution. Law reform, political action and education programs are also important strategies to ensure the promise of equality in our laws has real meaning for women and marginalized communities in our society.

Litigation strategies — using the court system — can contribute to social transformation because they have the capacity to alter the actions of individuals, governments and other organizations. In addition, through litigation we can further develop our understanding of what substantive equality means. These legal principles can then play a role in informal settings so that they can influence day-to-day interactions between people and government policy-making processes. At

the same time, ideas about equality developed through other social processes can have an important impact on the way that law understands and deals with inequality and promotes equality.

For example, the experience of sexual harassment was first named and brought to public attention through a political and social action led by feminists. It then came to be seen as a legal issue for which legal remedies could be sought.

The legal recognition of the right to equality in our constitution, human rights legislation and in international human rights agreements is only the beginning. There is a long journey between recognition of the right on paper and ensuring that everyone's right to equality is protected and promoted in actual fact.

Progress toward the "unfinished business" of women's substantive equality will happen through dialogue and learning between legal, political, educational and social strategies. One of the objectives of this 2004 Guide is to outline the issues facing legal strategies aimed at transforming society, and to contribute to this important dialogue.

PART 2
The Current Framework of Equality Analysis in the Law

This section sets out the general framework for legal equality analysis in Canadian law at this time and is divided into three sections. The first section sets out the legal approach to equality rights litigation under the *Canadian Charter of Rights and Freedoms*, which is usually referred to simply as "the *Charter*" and applies to governments and other public actors. The second section describes the legal tests used in the human rights context, under provincial or federal human rights codes. These Codes apply to private and government actors. Although there are important differences between *Charter* and human rights litigation, there is also a lot of overlap between the two. The third section talks about other types of litigation in which equality rights analysis can be used.

A. Working Within the Charter Context

The *Charter* is part of Canada's constitution, which is the foundation of our legal and political system in this country. The *Charter* was added to our constitution in 1982 and articulates our rights as citizens in relation to our governments. Because it defines how government is supposed to function, it only applies to the actions of government; it does not apply to private individuals or organizations outside of the government. Any law that is inconsistent with the *Charter* is invalid.

Equality rights are protected by **section 15** (s.15) of the *Charter* which says:

> *15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> *(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

The Supreme Court of Canada's approach to interpreting s.15 of the *Charter* has evolved over the past fourteen years, but has not changed in any dramatic way since the initial decision in a 1989 case called *Andrews v. the Law Society of British Columbia*. However, in 1999 the Supreme Court made a decision in a case called *Law v. Canada (Minster of Employment and Immigration)* that restated its approach to interpreting section 15; the decision provided more explicit and thorough directions about the contextual factors that a court should consider when deciding whether or not a law or policy is discriminatory.

Nancy Law was a young widow under the age of 35 and she was challenging the Canada Pension Plan policy of not allowing widows under 35 to collect pension benefits upon the death of their spouse. The case was about age not sex discrimination, but the Court took the opportunity to clarify how section 15 should be applied in the future. The Court decided that the fact that the Canadian Pension Plan treated widows under the age of 35 differently from older widows did not amount to discrimination on the basis of age.

The reason that this case is so important is because in it the Supreme Court of Canada provides a comprehensive statement of what a court

needs to think about in deciding s.15 cases. This in turn tells anyone making a claim of discrimination what they have to prove in making that claim. Experience with this new legal framework (called "the Law test") to date suggests that while it is an advance over some of the fragmented approaches to equality taken by the Court in the mid-1990s, it is far from being problem-free in its application.

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Law affirms that an equality rights analysis involves a dual focus, both on the purpose of s.15, and the full context of the equality rights claim (the surrounding reality). In focusing on these two things, the purpose of s. 15 and the context of the experience, it is also important to keep in mind the strong **remedial objective** of this *Charter* provision that is achieving equality for all. The purpose of s.15 is twofold: firstly to prevent the violation of human dignity and freedom that results from disadvantage, stereotyping, or political or social prejudice; and, secondly to promote a society in which all persons enjoy equal recognition in the law as members of Canadian society, equally deserving of concern, respect and consideration.

In *Law*, the Court set out the three broad questions that together help the court to determine whether a situation in which the law actually treats people differently is discrimination in the substantive sense intended by s.15. The judges used these words to describe the inquiries that a court should make in assessing every equality rights claim under the *Charter*:

A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

B. Is the claimant subject to differential treatment based on one or more of the **enumerated and analogous grounds?**

C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

This decision can be restated in plain language terms:

A. Does the law or policy treat people differently because of a personal characteristic? Or, does it fail to take into account the needs of an already disadvantaged group of people?

B. Is that personal characteristic or form of group disadvantage a ground listed in s.15 of the *Charter* or one that is like the ones listed?

C. Does the differential treatment result in substantive discrimination? Does it harm the claimant's human dignity? For example, does it impose a burden or withhold a benefit on the basis of a harmful stereotype or in a way that promotes the view that that person is less worthy of value or recognition?

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When addressing each of these three issues, a court must keep in mind two principles. First, the analysis must be a **purposive** one that is the court must take into account the "large remedial component" of s.15 and its goal in fighting the evil of discrimination. Second, the court's approach must be "contextualized" meaning that it must take into account the full social, political and legal context of the equality rights claim and the **claimant**. The contextual factors that determine whether a law has had the effect of demeaning a claimant's dignity must be examined from both subjective and objective perspectives. That means that the issues should be looked at both from the claimant's perspective, and from the perspective of a reasonable person who is not involved in the claim but has an informed understanding of it.

In *Law*, the Court recognizes that there are a variety of factors that may demonstrate that the law or policy at issue in the case demeans the claimant's dignity, that is whether or not it amounts to substantive discrimination. The list of factors is not closed but rather serves as "points of reference". Four important factors are identified by the Court:

1. pre-existing disadvantage (is there something about the claimant that puts them at a disadvantage in society, such as their race or gender?);

2. correspondence or lack thereof between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant and others (if the claim is that they were discriminated against because they are disabled, is their need or issue actually related to their

disability? Or is it because of some other circumstance or personal characteristic?);

3. the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society (is the law or policy at issue there in order to address the inequality of another group in society? A group that is faced with more disadvantage than the claimant?); and

4. the nature and scope of interests affected by the law or policy that is the subject of the litigation (is the substance of the law or policy something really important? Or is it something that doesn't affect the claimant that seriously?).

While the Court said that the *Law* test "is not a fixed and limited formula", a review of post-Law cases suggests that it is actually being applied quite strictly, and across a broad range of equality claims, even where the test is unnecessary or not easily applicable.

The Court also describes the nature of the burden on a claimant to prove a violation of his or her dignity or freedom. The claimant is not required to provide data, or other social science evidence not available to the general public. Although the Court recognizes that this may be of great assistance, it is not required. The claimant does not need to prove any matters that cannot reasonably be expected to be within his or her knowledge. A court may often rely on **judicial notice** and logical reasoning alone.

While the Court said that the *Law* test "is not a fixed and limited formula", a review of post-*Law* cases suggests that it is actually being applied quite strictly, and across a broad range of equality claims, even where the test is unnecessary or not easily applicable. For example, the test was set out to deal with equality rights challenges to legislation and it does not work as well for challenges to the way legislation is applied by officials. It also works better in cases where a law had made a formal distinction between the claimant and others, rather than where the claim is founded on a "failure to take into account" the claimant's already disadvantaged position within Canadian society. In other words, the test is much easier to apply when the law states something like "this law applies to men", but is much harder to apply where the law says something like "this applies to anyone who has never been pregnant".

In several cases, courts have also incorporated this test into complaints under human rights legislation. This expansion into the human rights context is problematic because it replaces the existing simpler test for proving that discrimination has occurred; it makes it harder for a claimant to prove her case.

The legal simplicity of the Law test makes it seductive for courts

and lawyers and lends itself to mechanical application rather than thoughtful analysis. It is a formula that is superficially simple (in legal terms) and suggests that you can just follow the steps and come up with the right answer. In practice, though, the *Law* test lends itself to a formal equality analysis rather than a substantive one, and often leads to complicated and convoluted decisions.

Equality rights theorists have raised a number of concerns about the *Law* analysis. Four of these concerns are discussed here in relation to some of the post-*Law* decisions made by the Supreme Court of Canada and provincial courts of appeal. These issues provide some guidance about what obstacles we need to look out for and what positive trends should be further exploited.

Courts felt most comfortable when an individual picked one category or ground and built their case on this basis. However, this approach often made it difficult to show the true nature of discrimination — trying to fit into one category made it hard for an equality rights claimant to tell her whole story.

1. GROUNDS AND COMPARATOR GROUPS

One of the advances made in *Law* was the explicit recognition that s.15 claims could be brought on the basis of **multiple discrimination** and overlapping grounds. Before this, the courts had trouble applying an understanding that people experience discrimination in a number of ways not fitting neatly into a ground listed in the *Charter*. A woman can experience discrimination on the basis of her sex, or her race, or her age, or due to a combination of all of them, but Courts felt most comfortable when an individual picked one category or ground and built their case on this basis. However, this approach often made it difficult to show the true nature of discrimination — trying to fit into one category made it hard for an equality rights claimant to tell her whole story.

For example, the *Law* decision was followed very closely by a case called *Corbiere v. Canada (Minister of Indian and Northern Affairs)*. In that case, the Supreme Court of Canada recognized that "Aboriginal residency" was a ground of discrimination on its own and was therefore an analogous ground upon which a s.15 claim could be based. The claimant in *Corbiere* did not have to fit his experience of discrimination into the issue of race alone, but the interaction between race, aboriginal ancestry, and place of residence (on or off reserve). This more sensitive, multi-dimensional approach to defining grounds is important because it helps the courts recognize some of the complex ways in which people experience discrimination, and helps facilitate the definition of the appropriate **comparator groups** that are central to the legal approach to equality.

Section 15 is a comparative analysis at heart. A claimant must show that she has been treated differently in comparison to another group,

not simply that she has been treated badly. In most sex discrimination cases, this means showing that women are treated differently from men. At the same time, the comparative analysis is an obstacle to many equality rights claims because courts can take a rigid approach that hides rather than reveals the discriminatory impact. This is especially a problem when a law has a gendered impact, but it does not have a negative impact on all women and does have a negative impact on some men. For example, in the case *Thibaudeau v. Canada*, the way spousal support is dealt with under the *Income Tax Act* was found not be an issue of sex discrimination because there are men who receive spousal support and are therefore effected by it, even though there was very clear evidence that the vast majority of recipients of spousal support are women.

The legal approach has to be responsive and adaptive to the specific claim of discrimination in a given case. Courts can't rely on a rigid step-by-step framework or they are likely to fall back into the formal equality ways of thinking.

This rigid approach can be contrasted with the "flexible comparator approach" taken by the Ontario Court of Appeal in a case called *Falkiner* in deciding whether or not certain welfare regulations, known as the "spouse in the house" rules were discriminatory. ("Spouse in the house" refers to welfare rules that assume someone living with a member of the opposite sex is in a dependent relationship with them, and therefore is forced to accept lower welfare rates). The Court found that the Ontario government discriminated on the basis of an interlocking set of multiple characteristics: sex, receipt of social assistance and marital status. In the Court's view, multiple comparator groups are needed to bring into focus the multiple kinds of different treatment the claimant is alleging to have experienced.

This approach is very adept at developing a full picture of the context and the nature of the discrimination. It helps to reveal the layers of discrimination and how they interact, which is much closer to a true reflection of the experience. While it would have been possible to come to the same conclusion just by comparing the impact of the welfare regulation on women and men, the multiple comparator approach made it impossible to ignore the discrimination in this case.

Justice Claire L'Heureux-Dubé recently retired as a Supreme Court judge, but throughout her time on the bench she consistently emphasized the need for flexibility in the Court's equality analysis throughout her decisions. She has stated that:

> *It is not the "ground of distinction" which is determinative, rather it is the social context of the distinction that matters. The "ground of distinction" is an abstract method to achieve a goal, which could be achieved more simply and truthfully by asking the direct question: "Does this distinction discriminate against this group of people?*

The *Law* test has a tendency to move us away from this contextualized approach and toward a more formal way of thinking in terms of categories. It is important to encourage the courts to move away from focusing on the grounds of discrimination in the abstract and towards a comparative approach that is based on the claimant's perspective. The legal approach has to be responsive and adaptive to the specific claim of discrimination in a given case. Courts can't rely on a rigid step-by-step framework or they are likely to fall back into the formal equality ways of thinking.

An approach that is based foremost on the idea that discrimination is about stereotypes and assumptions ignores the ways in which inequality is created through relations of power, and re-created through problematic patterns, practices and norms.

2. FOCUS ON STEREOTYPES

One of the emerging trends in equality cases that is problematic is the focus on stereotypical thinking as the main determinant of a finding of whether or not the different treatment complained of amounts to discrimination. While stereotypes play an important role in assisting us in understanding the impact of different treatment, they are not the only evidence of discrimination. An approach that is based foremost on the idea that discrimination is about stereotypes and assumptions ignores the ways in which inequality is created through relations of power, and re-created through problematic patterns, practices and norms. It is therefore a limited idea about what equality is about that does not require the courts to focus on the nature of systemic discrimination and its impact on individuals. Too great a focus on stereotyping is inconsistent with a full substantive equality analysis.

The problematic nature of this focus on stereotypes is exemplified in a comparison of the majority and dissenting reasoning in the Supreme Court of Canada's decision in *Gosselin*. In this case Louise Gosselin made a claim that a Quebec welfare regulation, that set the base amount of welfare for adults between the ages of 18 and 30 at roughly one third of the base amount for those over 30, infringed the **section 7** and s.15 *Charter* rights of young adults affected by the regulation. The **dissenting judges** found that the regulation perpetuated a stereotype that young people reliant on social assistance are lazy and able to obtain employment when they are sufficiently motivated to seek it. However, the majority found that the regulation was tailored to the needs of young adults, thereby accepting the stereotypical thinking that underlies the regulation. When not all judges agree, the decision of the majority becomes the law.

Gosselin vividly demonstrates the double-edged sword of an analysis based solely on stereotypes: while it can help to illuminate the exis-

tence of discrimination, it can also be used to show how a group is different and thereby justify the discrimination. In this case, the government used a stereotype about lazy youth to justify its actions, claiming that young people have no barriers to finding work, even though evidence as to jobless rates suggested otherwise. Five of the judges accepted this explanation as an acceptable reason for lowering welfare rates for young adults. But the four dissenting judges felt that the lower welfare rates discriminated against young people because it was based on that very same stereotype.

One of the central challenges in bringing equality claims in the future will be to broaden the courts' contextual analysis of the whole situation surrounding the claimant so that it can understand and take into account the full range of elements that contribute to the experience of inequality, not just the operation of stereotypes.

While human dignity, and the related emphasis on equal concern, respect and consideration, is undoubtedly an important aspect of human rights theory, like stereotypes, it too may result in a fairly limited concept of equality. In particular, it appears to be a highly individualistic concept, one that glosses over the collective nature of inequality and equality. In addition, it may not adequately convey the material and structural aspects of inequality. This is a very important issue because cases that have been decided since *Law* have shown that this is the most difficult hurdle that equality rights claimants have to cross.

3. HUMAN DIGNITY AND SUBSTANTIVE DISCRIMINATION

A third obstacle in the *Law* test is the focus on finding an infringement of human dignity as the deciding factor of whether or not differential treatment amounts to substantive discrimination. The third step of the *Law* test asks whether or not the different treatment harms the claimant's human dignity. While human dignity, and the related emphasis on equal concern, respect and consideration, is undoubtedly an important aspect of human rights theory, like stereotypes, it too may result in a fairly limited concept of equality. In particular, it appears to be a highly individualistic concept, one that glosses over the collective nature of inequality and equality. In addition, it may not adequately convey the material and structural aspects of inequality. This is a very important issue because cases that have been decided since *Law* have shown that this is the most difficult hurdle that equality rights claimants have to cross.

In an effort to identify which forms of different treatment should be considered discrimination, the Court introduced this concept of human dignity into the third step of the equality analysis. However, it is unclear whether "human dignity" provides enough guidance in serving as this standard. It is also unclear how stringent this standard should be. By this stage in the analysis, the claimant has already proved that she was treated differently on one of the enumerated or analogous grounds. The Supreme Court of Canada has said more than once that distinctions made on protected grounds will rarely escape a finding of discrimination.

It is often true that when a court finds that a law or policy differentiates on one of the grounds protected by s.15, they are very likely to find that it infringed human dignity. For example, in the case of *Gwinner v. Alberta (Human Resources and Employment)*, the Court had to decide whether or not the fact that widow's pensions were provided only to women who were married at the time of their spouse's death, and not to divorced or separated women, amounted to substantive discrimination.[1] In finding that it did, the judge decided that a distinction on the basis of marital status was found to touch human dignity because it fundamentally concerns personal autonomy, and the cherished freedom to form and maintain personal relationships, or not. In other words, the very definition of marital status included basic human dignity, therefore the 'dignity inquiry' did not add to the analysis since the deciding factor was that the different treatment was based on marital status.

For now it appears that equality rights advocates have a strategic choice to make in deciding how to deal with the 'dignity inquiry' part of the third step. One approach is to try to build up the concept of human dignity so that it becomes a concept rich with substantive equality meaning. For example, one priority may be on gaining broad acceptance that human dignity includes an economic component so that the courts begin to acknowledge the role poverty and class have on the experience of discrimination. The Supreme Court of Canada has done just that in a very recent case, *Martin and Laseur*, which is discussed in greater detail in the section on economic and social rights later in this *Guide*. A second approach might be to try to work around the 'dignity inquiry' by getting the courts to recognize that there may be other standards that could assist them in deciding whether different treatment discriminates in a substantive sense.

A third potential approach is to argue that the main purpose of the dignity inquiry is not to limit the types of different treatment that are considered discriminatory, rather, it should act as a shield to protect the right of government to institute programs that assist in ending inequality. In other words, the definition of discrimination should not include situations designed to end discrimination and s. 15(2) explicitly states that programs or laws designed to **ameliorate** inequality are acceptable. Affirmative action programs then, while differentiating between employees based on personal characteristics such as race or sex, would

1 This was a human rights case, but the Court decided to apply the Law three-step analysis to the facts in the case.

be acceptable because they enhance the human dignity of those identified in the policy or program. In this way, the purpose of the dignity inquiry would be seen as protecting advantageous provisions so that they don't have to be justified as a reasonable limit under Section 1 of the *Charter* (see below), but it would not be used to discount forms of discrimination as is currently in the case under the *Law* framework.

One of the problems with the Law test is that it has a tendency to encourage the courts to bring some of these s.1 considerations into the analysis under s.15. This is a problem because it makes it harder for an equality rights claimant to prove her case. Instead of presenting evidence about the experience of discrimination, then forcing the government to prove they were justified in discriminating, the claimant now has to establish what the governments intentions were before it can even be considered discrimination.

4. OVERLAP OF S.15 AND S.1 ANALYSES

Once a claimant has proven that there has been a violation of her equality right under s.15 by meeting all three parts of the *Law* test, the government has the opportunity to defend the violation. **Section 1** of the *Charter* allows limits on most *Charter* rights where the government proves that the violation is "a reasonable limit, prescribed by law that is justifiable in a free and democratic society". The courts look at a three factors in deciding whether or not a limit is reasonable:

(1) the government must have a pressing and substantial objective that it is trying to meet through the law, policy or action (must have a very important reason for the law, such as keeping citizens safe from violence);

(2) there has to be a rational connection between the objective and the limit on the *Charter* right (for example, it might be acceptable to limit freedom of expression in a law that prohibits people from shouting anti-semitic comments outside synagogues, but it might not be acceptable to have a law limiting the right of participants in a peace march to shout anti-war slogans); and,

(3) the law, policy or action must impair the right at the little as possible (minimal impairment).

One of the problems with the *Law* test is that it has a tendency to encourage the courts to bring some of these s.1 considerations into the analysis under s.15. This is a problem because it makes it harder for an equality rights claimant to prove her case. Instead of presenting evidence about the experience of discrimination, then forcing the government to prove they were justified in discriminating, the claimant now has to establish what the government's intentions were before it can even be considered discrimination. It shifts some of the burden of proof away from the government and onto the claimant. This tendency to blur the two arises because the contextual factors listed as "points of reference" in *Law* focus too heavily on the type of

law under consideration and what the government intended to do, rather than on the claimant's reality and experience. As a result, this inquiry has a tendency to focus more on the purpose of the legislation rather than on the effects it has had on the claimant.

For example, the majority in *Gosselin* accepted the government's view of the purpose of their welfare legislation, which the government described as an incentive to get young people off welfare and integrate them into the workforce. In deciding this case, the court accepted this assertion instead of focusing on the experience of the claimants. If the majority of the court had focused on the claimant, the government would then have been required to explain its actions in the context of s.1. The majority in *Gosselin* allowed the Quebec government to incorporate its defence directly into the definition of discrimination.

In summary, the equality rights framework of analysis established by the Supreme Court of Canada in *Law* appears to have made it harder for equality rights claimants to succeed. One of the biggest problems is that it has a tendency to encourage the courts to think in formal equality terms. However, it will be possible for equality rights advocates to work toward improving this framework by getting the courts to re-focus on substantive equality and the nature of systemic discrimination against women. Developments in the human rights context are much more promising in this regard. It is to these developments that we now turn.

Equality rights in Canada are not only protected under the Charter, but also under provincial and federal human rights legislation. These human rights codes apply to specific situations such as employment, the provision of public services, and rental accommodation. They apply to private individuals, businesses, other organizations, and in some situations, governments.

B. Working Within the Human Rights Context

Equality rights in Canada are not only protected under the Charter, but also under provincial and federal human rights legislation. These human rights codes apply to specific situations such as employment, the provision of public services, and rental accommodation. They apply to private individuals, businesses, other organizations, and in some situations, governments. People bring claims under human rights codes to specialized bodies called human rights commissions and human rights tribunals. In some cases, human rights tribunal decisions can be reviewed by the courts.

Just as *Law* was a landmark decision that sets the framework for deciding *Charter* equality rights cases, the Supreme Court of Canada's decision in the case called *Meiorin* (formally known as *British Columbia (Public Service Employee Relations Commission) v. BCGSEU)* sets the legal framework in the human rights context. The specific issue in

Meiorin was whether or not a running test, that was shown to discriminate against women, was a justifiable job requirement for forest firefighters. Tawney Meiorin had been a forest firefighter for a number of years and had received positive performance appraisals. When a new mandatory fitness requirement was introduced, she was able to pass all of the job-specific requirements (relating for example to upper body strength) but could not pass a running test that served as a general indicator of physical fitness. Evidence showed that the running test was not specifically job-related and that it had a disproportionately negative impact on women because a much smaller percentage of women could pass it by comparison with men.

In particular, it was noted that under the conventional analysis used prior to *Meiorin*, if a standard was classified as being "neutral" at the initial stage of the inquiry, its legitimacy was never questioned.

In deciding the case, the Supreme Court of Canada concluded that the running test was not justifiable and in its reasoning revolutionized the analysis for **accommodation** under human rights legislation. The Court did so with a clear recognition that the changes were needed in order to ensure that human rights law fulfills "the promise of substantive equality."

The Court noted the problems that had developed in human rights case law about the different ways employers could show that an employment standard, while discriminatory on its face, was nevertheless justifiable in that specific work environment. Given the overwhelming critique that had built up over the years, the Court took this opportunity to develop a new analysis. In particular, it was noted that under the conventional analysis used prior to *Meiorin*, if a standard was classified as being "neutral" at the initial stage of the inquiry, its legitimacy was never questioned. In *Meiorin* for example, the fitness test was neutral on the surface in that it did not overtly require male anatomy. Under the existing analysis of the time, this would have been accepted therefore as not discriminatory in general. The focus then shifted to whether the individual claimant could be accommodated, and the formal standard itself always remained intact. This analysis thus shifted attention away from the dominant norms underlying the standard, to how "different" individuals can fit into the "mainstream"; even though the fitness test discriminated against women, it would have been considered acceptable as a standard.

In *Meiorin*, this would have meant that the employers had to "accommodate" Tawney Meiorin by, for example, exempting her from the running test or substituting another physical fitness test. However, the employers could have kept the test as it was without having to look into whether it was really job-related or whether there was an alternative way of measuring fitness that would have less of an adverse effect

on women. Every female firefighter who couldn't pass the test would have had to seek an exemption and there would be no overall change to the system. The Supreme Court declared that while this approach might satisfy the requirements of formal equality, it was inconsistent with substantive equality central to Canadian equality rights law.

The Court elaborated on a three-step test for determining whether a discriminatory standard was nevertheless justifiable because it is a *bona fide occupational requirement (bfor)*. An employer has to justify the standard that is the subject of the complaint by establishing that:

(1) the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing **undue hardship** upon the employer.

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build equality conceptions into workplace standards.

The Court went further than simply reformulating this legal test; it also provided general guidance on the nature of the employer's positive obligation under human rights law to build equality into the workplace. It used these strong words:

> *Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build equality conceptions into workplace standards.*

These statements greatly expand the nature and extent of the employer's **duty to accommodate.** This obligation has both *procedural* and *substantive* dimensions. On a procedural level, employers must demonstrate that they have undertaken a good-faith process in considering how workplace rules or policies have an adverse impact on a group of employees and how these discriminatory effects could be reduced or eliminated. They should be "innovative, yet practical" in fulfilling this obligation. This process should be an inclusive one as employers, employees and unions have a shared role in meeting this obligation. Courts will also review whether or not the employer has fully met substantive legal obligation, that is, whether or not they have

been successful in redesigning rules and policies to accord with substantive equality principles.

The Court went on to illustrate the nature of the duty to accommodate by listing some of the important questions that a tribunal or court may ask in the course of the reviewing whether or not a workplace standard is justified:

(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? (For example, the empoyee herself and/or a union).

Meiorin introduced profound changes in the legal conception of accommodation and what has been called a "comprehensive accommodation analysis". Before this decision, employers had only to consider accommodation of an individual by assisting those who did not fit the existing standard.

Meiorin introduced profound changes in the legal conception of accommodation and what has been called a "comprehensive accommodation analysis". Before this decision, employers had only to consider accommodation of an individual by assisting those who did not fit the existing standard. Now the duty is two-fold. First, an employer must consider whether the standard itself can be changed so as to be more inclusive and promote substantive equality in the workplace. Second, if this is not possible or if the standard is fully justifiable under the new higher legal threshold, then substantial efforts toward individual accommodation are still required.

Still in 1999, but a few months later, the Supreme Court of Canada confirmed that this new approach to justification and accommodation applied in all cases, not only in the employment context, in a case called *Grismer*. The Court confirmed that everyone governed by human rights legislation is required

> *to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics.*

In the case, the government was found to have discriminated against people with a vision impairment because its policy constituted a blanket policy that made this group ineligible for driver's licences rather than individually testing them to see whether or not they could in fact drive safely despite their disability.

Furthermore, the Court clarified that in order to prove that its standard is "reasonably necessary", the respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether or not that hardship takes the form of impossibility, serious risk or excessive cost. The idea of "undue hardship" is still relatively undeveloped in Canadian law. It involves a balancing of the harm caused by discrimination against the costs imposed on the employer or other respondent by accommodation.

***Meiorin* has had an immediate, profound and ongoing effect in the workplace because many employers voluntarily changed their standards following this decision or have been forced to through workplace grievance processes.**

Meiorin has had an immediate, profound and ongoing effect in the workplace because many employers voluntarily changed their standards following this decision or have been forced to through workplace grievance processes. Many women and other equality-seeking groups have been able to use the decision to lobby for change inside organizations. In addition, human rights tribunals and the courts are there to ensure that these principles are fully applied in a manner consistent with the positive obligation to create equality in the workplace. Everyone agrees that the extent of the duty to accommodate is high. With only a few exceptions, tribunals and courts have been unwilling to defer to employers or others by simply accepting their claim that they tried to accommodate differences. Tribunals and courts are requiring evidence of the steps taken to accommodate both at the systemic level by changing the standard itself and at the individual level where it is impossible to change the standard. Where no steps have been taken to accommodate, the discriminatory standard will not be considered as justified. Similarly, where the tribunal has not undertaken a substantive and comprehensive analysis, their decisions are likely to be overturned by a court that has the power to review and change the tribunal decision.

A few tribunals and courts have rejected the *Meiorin* test as being

inapplicable in a given case. For example, in *Robb*, a case dealing with whether or not a school had discriminated against a child with a learning disability, the human rights tribunal decided that because the complainants alleged a series of discriminatory actions rather than a discriminatory policy or standard, the three-part analysis is difficult to apply. Here, the tribunal effectively applied the relevant principles from *Meiorin*, even though it did not strictly follow the three-step analysis.

The fact that accommodation will cost money is not in itself enough of a reason to justify discrimination. An important factor has been evidence of what types of accommodation have been undertaken by other comparable organizations.

Meiorin did not provide guidance on the issue of what constitutes undue hardship. The post-*Meiorin* cases make it very clear that the respondent must have taken some steps to ascertain whether accommodation was possible, both on a systemic and an individual basis. A defence of undue hardship requires more than impressionistic evidence. Where the issue is the cost of accommodation, tribunals have been willing to weigh this as a factor relative to the ability of respondent to pay and the evidence of actual harm. However, the fact that accommodation will cost money is not in itself enough of a reason to justify discrimination. An important factor has been evidence of what types of accommodation have been undertaken by other comparable organizations.

C. Substantive Equality in other Legal Arenas

Substantive equality analysis has an important role in many legal areas outside of cases involving s.15 of the *Charter* and human rights codes. As Chief Justice McLachlin has written in another context: "The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it."

In reviewing the record of the Supreme Court of Canada with respect to women's right to equality, it is clear that the impact of the principle of equality has been dramatic in non-constitutional cases, through developments in **civil law.** Civil law includes any area of law that is a dispute or legal relationship between two parties such as small claims court, motor vehicle cases, real estate or family law. While one of the parties may be the government, for example where the government owns property, generally it includes situations that would be considered private disputes.

The following cases are illustrations of the Court applying equality principles where the Charter did not apply, and it was not a human rights case:

- *Norberg* where the Court wove an understanding of the nature of inequality between a male physician and his female patient into

its application of the **tort** of battery;

- *Moge* where the Court wove an understanding of the complex nature of women's economic inequality into its consideration of the law of spousal support; and,
- *Lavallee* where expert evidence of the psychological experiences of battered women was used to inform the standard of reasonableness to be applied when self-defence is invoked by women who have been victims of domestic violence.

These three decisions are all well grounded in the reality of the day-to-day experiences of women. They use equality principles to bring about a re-evaluation of some basic assumptions embedded in a particular area of law that leads to reformulation of the legal principle itself.

These three decisions are all well grounded in the reality of the day-to-day experiences of women. They use equality principles to bring about a re-evaluation of some basic assumptions embedded in a particular area of law that leads to reformulation of the legal principle itself. They all involve a conscious and reflective scrutiny of the underlying assumptions and dominant norms that the old legal principles had been based on, to uncover the ways in which they flow from or reinforce stereotyping about women. The importance of these cases is how they illustrate the Court's ability to take a very broad approach to equality when they are not hindered by the language and interpretation of s.15.

Incorporating a substantive equality analysis into all areas of the law requires creative lawyering but is essential to the provision of good legal advice for a couple of reasons. First, the formal equality model is used in many legal contexts and is not in the interests of women or marginalized groups in society.

For example, in the family law context, the claims of 'father's rights' activists are, in fact, based on simple formal equality principles and 'reverse discrimination' arguments. These arguments minimize or take away from the legal protections of women and other groups who have suffered disadvantage. The Supreme Court of Canada's reasoning in a recent case called *Trociuk* further illustrates this point; while this was a s.15 challenge, it is a good example of the potential harm that can result when a substantive equality analysis is not undertaken. British Columbia had legislation that provided a mother with absolute discretion to not acknowledge a biological father on birth registration forms and to not include the surname of the father in the child's surname. The Court struck down these legislative provisions because it discriminated against fathers on the basis of sex. What is most troublesome about *Trociuk* is its almost complete disregard for the interests of the mother, and whether the law should balance men's property rights over children with women's freedom to live free from dependency on

and attachment to men. There is no evidence that women's equality rights were considered in this decision.

Second, equality rights analysis can be integrated in all legal proceedings involving government officials, not simply where the claim is that a law violates s.15. The case of *Baker v. Canada (Minister of Citizenship and Immigration)* is an immigration case in which a woman was going to be deported. In its decision, the Supreme Court of Canada reaffirmed that there is a proactive duty to respect and promote rights, a duty that extends to administrative acts and decisions, not just a written law. The equality rights norms found in the *Charter* and in international treaties and laws can be used to interpret legal provisions and common law principles to ensure that they fulfill the promise of substantive equality. In *Baker*, the court held that immigration officials had to take into account the international provisions concerning the rights of children in making a decision about whether or not to deport the children's mother.

The equality rights norms found in the *Charter* and in International treaties and laws can be used to interpret legal provisions and common law principles to ensure that they fulfill the promise of substantive equality.

Another example is the *Jane Doe* case in which a police force was found to have violated the equality rights of a woman in the negligent way that they had investigated a serial rape case.

A third critical area is the development of **torts of discrimination.** For a number of years, this avenue appeared to be closed by the Supreme Court of Canada's decision in *Bhadauria*. The decision in that case held that human rights codes were comprehensive enough to cover any time a person claimed they had been discriminated against. As their thinking went, holding someone liable for damage experienced because of discrimination should be done by existing human rights tribunals and commissions, because that is the purpose for which they were created. This decision has been widely criticized as preventing equal access to justice in that someone who experiences damage for another reason - if one is hurt in a car accident for example, she is free to sue the perpetrator for financial compensation. Human rights systems generally are quite limited in their financial compensation limits. If we accept discrimination as unacceptable in our society, than we should ensure people proper compensation if they experience loss as a result.

Canadian courts have demonstrated a willingness to move away from this blanket prohibition recently, by, for example, hearing sexual harassment cases as a civil litigation matter rather than as a human rights complaint. These legal developments, coupled with the clear problems in accessing human rights tribunals, suggest that this is another important avenue for pursuing women's substantive equality.

PART 3

Current Challenges and Opportunities

The quest for substantive equality for all women in Canada is influenced not only by legal developments but also by more general trends in the legal and political environment. Our current age is marked by a global trend away from state involvement in the social needs of its citizens. Policy development is dominated by economic modes of thinking that focus on concepts like 'supply and demand' and 'fiscal restraint' in the face of a more competitive world economy. In general terms this political agenda favours liberalization of the economy, privatization of ownership, a minimal regulatory role for government, a stress on the most efficient return on capital and a conviction that poverty, social distress and even environmental deterioration are best addressed through the invisible hand of rapid economic growth and the philanthropy of the private sector.

As a result governments throughout the world are downsizing to eliminate 'inefficiencies' and marginalizing their role in providing for such basic human needs as health, education, environmental protection and culture.

Globalization also has positive sides, including a trend toward greater democratization of state-society relations, the refinement of human rights standards at the international level, enhanced international scrutiny through UN reporting and the emergence of a stronger international civil society. In some cases, the dynamics of globalization seem to be pushing transnational corporations in equally unexpected directions toward compliance with human rights and environmental standards. However, the flourishing of the politics of human rights should not be confused with a regime of effective implementation of human rights. In addition, there are still concerns regarding continued primacy of civil and political rights over economic and social ones - the latter is the area in which women's human rights needs most often fall - and the inability or unwillingness to integrate Indigenous perspectives and rights into the international framework.

The focus on economic growth, which is one of the results of globalization, operates at the expense of social policies. While a commitment to economic growth can and does improve the aggregate well being of people, it also accentuates inequalities, making the rich richer and the

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poor poorer. Women as a group suffer distinct and disproportionate negative impacts from this agenda as a group because they experience poverty at higher rates than men, and are more likely to be in need of social programs and assistance. These gendered effects are global and have seriously eroded the significant gains and advances made by Canadian women. The following sections briefly discuss four specific challenges and opportunities that flow from these global conditions: the Canadian and B.C. context, barriers to access to justice, litigating women's social and economic rights and remedies.

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A. THE CANADIAN AND B.C. CONTEXT

These global trends of finance-based policymaking within civil society are fully reflected within Canada, particularly in the social policies of governments in Ontario, Alberta and British Columbia. Many of these neo-liberal concepts have informed federal policy making as well. An understanding of the current context of policy and legal changes, including drastic cuts in government funding for social and community services, is crucial to the shape of equality rights legal strategies. On the one hand, these developments give rise to serious rights infringements and on the other, they have a restraining effect on the ability to frame substantive equality arguments, engage in political dialogue on this basis and have these claims fully heard by the courts.

In 1999, women's rights activists, academics and legal theorists at the Transforming Women's Future conference identified some of the outstanding priorities for the future of women's equality rights in Canada. The central themes were:

1. the continued impact of colonialism and racism on Aboriginal women;
2. violence against women;
3. women's poverty and barriers to women's participation in the economy; and,
4. the multiple and overlapping forms of discrimination experienced by women with disabilities, women of colour, immigrant and refugee women, lesbians, older and younger women, and women in conflict with the law.

Not much has changed in the intervening years. An overview of some of the obstacles to women's substantive equality can be found in the 2003 United Nation's review of Canada's progress in meeting its international legal obligations under the *Convention to Eliminate All*

Forms of Discrimination Against Women (CEDAW). Some of the major concerns noted by the UN Committee responsible for this review include:

- the lack of national standards for social welfare due to changes in transfer arrangements between the federal and provincial governments;
- the lack of consistent gender-based impact analysis of all legal and programme efforts;
- the lack of sufficient legal aid for civil, family and poverty matters and for equality test cases;
- the high percentage of women living in poverty, particularly elder women living alone, female lone parents, Aboriginal women, women of colour, women with disabilities, and immigrant women, all exacerbated by resource cuts;
- the lack of women's equality in the labour market including the fact that more women work in part time jobs, marginal jobs or in self employment arrangements which often do not carry adequate social benefits;
- the specific forms of discrimination experienced by Aboriginal women, live in caregivers, and immigrant and refugee women within Canada.

In addition to these overarching concerns, the UN Committee singled out B.C. for recent legal and program changes that had an unprecedented negative impact on women's equality. The dire situation had been described in the submission of the B.C. CEDAW Working Group to the UN Committee, *British Columbia Moves Backwards on Women's Equality*. The following changes were among those noted in the Report as having a particularly serious impact on women:

- sweeping changes to the social assistance system including lower rates of income assistance, and new restrictions on eligibility for income assistance;
- elimination of the Ministry of Women's Equality, and replacing it with a junior Minister of State for Women's Services, under the Ministry of Community, Aboriginal and Women's Services;
- cuts to one hundred percent of the provincial core funding for women's centres in British Columbia by 2004;
- proposed changes to the prosecution of domestic violence and cuts to support programs for victims of violence;

- drastic cuts to childcare subsidies;
- changes to employment rules and standards that eliminate worker protections.

As noted by the B.C. CEDAW Working Group, all of these government actions on their own have serious and significant effects on the ability of individual women in B.C. to achieve full equality in the political, economic, social, cultural and civic fields. There is also a collective or cumulative impact that must be kept in mind; these changes are also having the effect of limiting women's ability to express their needs and differences in the public arena.

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In contrast, Quebec society has developed an alternative approach in the economic growth/social equity debate, one that has more in common with the European "Third Way" than with the approaches taken in other provinces and in the US. Some of the notable successes have included full-time kindergarten, affordable childcare, and an acceptance that efforts toward achieving "zero deficits", or embarking on an effort to control public spending, must be matched with a similar commitment to "zero poverty", or a society in which our most vulnerable citizens can get the help they need. The effectiveness of some of these strategies is unclear and a recent change in government means that some of these advances are under threat. Nevertheless, they are examples of the commitment of the Quebec government and society to social equity, the possibility of an alternative view of the state's potential role in assuring social welfare and of the potential of public dialogue.

B. BARRIERS TO ACCESS TO JUSTICE

Within B.C., a second set of major changes is having a harsh impact on women's pursuit of substantive equality. These are recent legislative and policy changes that create additional barriers to equal access to justice. These include: the elimination of the human rights commission, severe cuts to legal aid and other drastic changes to the administrative system (including withdrawing of appeal mechanisms under several administrative schemes, and the elimination of administrative tribunals power to respond to *Charter* questions). These government actions have made it increasingly difficult for women and members of marginalized communities to assert their rights. Equality seekers now have to worry about being able to utilize legal strategies at all, let alone whether or not they will succeed.

The Women's Legal Education and Action Fund, for example, has been able to make an impact on equality rights law by intervening in

cases already before the courts. By making it so difficult to even begin a legal case and to raise the experience of discrimination at tribunals and in courtrooms, the government has made it more difficult for those who are already vulnerable to the impact of inequality in our society. They also make it more difficult for public interest arguments, like LEAF's, to be a part of the legal dialogue. This is not in the spirit of the *Charter* and the promise of equality it was meant to represent.

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For example, the human rights system in B.C. has been reduced to a complaint adjudication system only, and complaints have become a private matter between complainants and respondents. The system has been reduced to the provision of legal advice and legal representation for complainants and respondents through legal clinics, and a limited capacity for systemic cases. Without a human rights commission, there is no independent public body with a mandate to protect the public interest in the elimination of discrimination, or to undertake preventive strategies. There is no independent public body with a mandate to provide education, conduct public hearings, make special reports to the Legislature, deal with systemic discrimination, initiate complaints, or investigate complaints. The elimination of the Commission is in conflict with the legislative purpose of the B.C. *Human Rights Code* and contravenes international human rights agreements that provide for effective mechanisms for the protection and promotion of human rights.

The government of British Columbia has cut funding for legal aid by more than a third. It has also specified how the once independent Legal Services Society is to use the remaining funds. Legal aid coverage is now provided only for criminal law matters, *Youth Criminal Justice Act* matters, mental health reviews, restraining orders, and child apprehensions — those areas of the law that have been constitutionally mandated by the courts. No services are provided for family maintenance or custody disputes, except where there is evidence that violence is involved and even then it is only available for eight hours to assist in getting a restraining order. Direct services for poverty law matters, that is for landlord/tenant, employment insurance, employment standards, welfare, and disability pension claims or appeals, have been eliminated. The legal aid cuts have had a disproportionate impact on women, including increasing their risk of losing custody of their children, or abandoning their legal rights in order to avoid complex litigation.

The B.C. government has also passed legislation limiting the ability of administrative tribunals to consider *Charter*-based arguments.

Tribunals are generally meant to provide more affordable and accessible dispute resolution, but by forcing parties to sever any *Charter* issue and begin a parallel action in the expensive and complex B.C. Supreme Court the government has drastically reduced the open discussion of *Charter* values in our justice system.

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These barriers to accessing justice mean that legal rights themselves cannot be enjoyed and in many cases become meaningless. The adverse impact on women raises serious questions about the right to equal protection and benefit of the law. Overcoming these barriers can be seen as the first order of business for those seeking equality through legal strategies. Numerous legal arguments are available to resist these barriers, including those based on s. 7 of the *Charter* (the right to life, liberty and security of the person), the right to equality, principles of fairness and procedural justice and the rule of law. However, mounting these types of constitutional challenges is a complex, time and resource-consuming task — often too much for most non-governmental organizations.

C. AT THE FRONTIER: LITIGATING WOMEN'S SOCIAL AND ECONOMIC RIGHTS

Transforming Women's Future identified social and economic rights as being one of the frontier issues in the struggle for women's substantive equality. Indeed, the global trend away from socially activist governments is an implicit rejection of many of the international standards of human rights that bind Canada. In the current legal and political environment, human rights are narrowed to the point where only civil and political rights are affirmed. Civil and political rights include things such as the right to vote, the right to a fair trial before being incarcerated, freedom of expression, and the right to participate in the political process. Social and economic rights, on the other hand, are things like the right to housing, food and income.

Given the current political rejection of economic and social rights as human rights, legal strategies are required to affirm the existence of these rights, and to make them effective in shaping government decision-making. So what has happened since 1999? While the majority decision in *Gosselin* discussed earlier is a major concern, several lower court decisions provide some cautious grounds for optimism.

The good news is that there have been a number of strong cases that acknowledge that exclusions under social benefit or welfare legislation — or the adverse impact of cuts to welfare and social service programs

on women and/or specific groups of women — is undermining women's equality and therefore prohibited by the Constitution. For example, there has been some success in striking down benefits provisions that distinguish between married and common law spouses *(Hodge)* and between married and divorced or separated widows *(Gwinner)*. Even though these cases were argued on the basis of marital status rather than sex discrimination, the outcomes should help to alleviate women's poverty because the unconstitutional provisions disproportionately affected women. There is a strong relationship between discrimination on the basis of marital status and gender discrimination.

There is a similar interrelationship between family status and sex inequality that was recognized in the Employment Insurance case called *Lesiuk*. In this case, an Umpire established under the *Canada Employment Insurance Act* held that the differential impact of the definition of "major work force attachment" in the *Act* contravened s.15 of the *Charter* in that is constituted discrimination on the grounds of sex and parental status. In reaching this decision, the Umpire found that "in order to avoid the risk of being unable to qualify for benefits, the part-time working mother with children under school age must pursue a work pattern traditionally adopted by men at the expense of her family responsibilities." In reaching this conclusion, the Umpire set out his reasons through a step-by-step application of *Law* as pleaded by the claimant. He accepted expert evidence about the long-term penalties felt by women who participate in the workforce on a part time basis, particularly as they contribute to women's poverty. Women do not make a simple "choice" to work part time. Rather this decision is "sculpted in particular by prevailing gender roles, the market and a variety of socio-historical influences". The detailed facts about Ms.Lesiuk's work and family life also informed the decision in a meaningful way.

The bad news is that these cases are often overturned on appeal. For example, the Federal Court of Appeal overturned the decision in *Lesiuk* taking a very different view of the evidence presented. The Supreme Court of Canada refused to hear a further appeal, so the Federal Court gets the final say. While the Federal Court did agree that there was discrimination in *Hodge*, the Supreme Court of Canada has allowed an appeal of that decision to go forward. So, the saga continues with that case which was heard in the spring of 2004.

Equally worrisome is the Supreme Court's decision in *Walsh*, where it decided that the fact that common law spouses in a long-term relationship did not have access to the benefits of matrimonial law provisions

Civil and political rights include things such as the right to vote, the right to a fair trial before being incarcerated, freedom of expression, and the right to participate in the political process. Social and economic rights, on the other hand, are things like the right to housing, food and income.

with respect to division of property was not discrimination because people "choose" whether or not to get married. Again this case was argued on the basis of marital status and the Court's approach ignores the systemic discrimination on the basis of sex that underlies it. For example, the majority did not take into account the fact that women do not always have a real "choice" or control over whether they marry their spouses and the realities of poverty that often face women upon relationship breakdown.

Judicial deference to the legislatures tends to be very high in cases dealing with social and economic rights. The question then, is how much can be accomplished by litigation. At a minimum, constitutional and human rights litigation can provide some important parameters for the government's responsibility to work toward full substantive equality for women.

In their work on poverty and human rights, Gwen Brodsky and Shelagh Day have emphasized the importance of understanding 'human dignity' as having an economic component. The Ontario case called *Falkiner* involved the 'spouse in the house' rule, whereby anyone living with someone was presumed to be financially dependent on them, and therefore the individual's income assistance rates were cut. This policy had an adverse impact on women, in particular poor single mothers. The Ontario Court of Appeal found that economic disadvantage often co-exists with other forms of disadvantage, and that benefits should reflect their actual economic position (relative to other social assistance recipients). The claimant's interest that the Court found to have been adversely affected in *Falkiner* was not merely financial but extended to the claimant's human dignity.

Even more importantly, in its latest s.15 decision, the Supreme Court of Canada also acknowledged this connection between economic interests and human dignity. In two cases decided together, *Martin* and *Laseur*, the Court had to decide whether or not the exclusion of workers who suffered chronic pain as a result of workplace accidents from workers' compensation amounted to substantive discrimination. The Court found that this exclusion was discriminatory and could not be justified by s.1. In reaching this conclusion, the Court made the following remarks:

> *While a s. 15 claim relating to an economic interest should generally be accompanied by an explanation as to how the dignity of the person is engaged, claimants need not rebut a presumption that economic disadvantage is unrelated to human dignity. In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely-held negative attitudes towards the claimants and thus reinforce the assault on their dignity.*

The Court also reaffirmed the important connection between employment and human dignity.

It is encouraging to see the courts accepting the connection between material deprivation and substantive equality. This trend provides an

opening for further equality rights work. At the same time, it is difficult to envision addressing the justice claims of the poor and economically disadvantaged without a political process that results in the social reempowerment of the state. Indeed, judicial deference to the legislatures tends to be very high in cases dealing with social and economic rights. The question then, is how much can be accomplished by litigation. At a minimum, constitutional and human rights litigation can provide some important parameters for the government's responsibility to work toward full substantive equality for women.

A simple declaration that a provision or act violates the *Charter* may not go far enough toward creating substantive equality. Legal strategies need to incorporate careful thought about remedies that will serve this ultimate objective. Winning the case on legal principles is not usually enough.

D. REMEDYING INEQUALITY

In addition providing governments with a clear idea of the constitutional standards that should shape all legislative and policy-making activities, equality rights litigation can also be the vehicle for directly remedying inequality. One of the continuing issues in achieving substantive equality is how to craft legal remedies that actually contribute to the eradication of inequality and the creation of equality. Criticisms that the courts are being too "activist" often focus on the remedy ordered by the court. In the context of *Charter* litigation, the courts have favoured granting declaratory relief in very broad terms that provide governments with a large degree of latitude to formulate a specific response.

This means that courts will declare that a law is unconstitutional and leave it up to the governments to decide how to fix it. This approach is generally seen to be an appropriate and balanced approach with the court elaborating the constitutional standard and leaving the government with the responsibility of making the necessary changes. However, a simple declaration that a provision or act violates the Charter may not go far enough toward creating substantive equality. Legal strategies need to incorporate careful thought about remedies that will serve this ultimate objective. Winning the case on legal principles is not usually enough.

One example of a case in which a specific remedy was sought and awarded was in *Auton*. In this case, the B.C. lower court found that the lack of treatment for autistic children infringed their right to equality and ordered that the appropriate remedy should be for the government to begin providing a specific type of treatment to them. This case also incorporated a financial award directly to the litigants, another step in the so far undeveloped law on the possibility of *Charter* damage claims. The B.C. Court of Appeal upheld this order, but it is also being appealed to the Supreme Court of Canada and was argued in the spring of 2004.

In the human rights context, tribunals have large remedial powers to order that the discrimination cease, that steps be taken to ensure that the same or similar contravention is not repeated, and to take other steps to ameliorate the effects of the discriminatory practice. The only limitation placed on the remedial powers of the human rights tribunal comes from a series of cases that assert human rights remedies are meant to compensate the person discriminated against, not punish the perpetrator.

Tribunals have held that the government's right to allocate resources cannot override human rights legislation, although tribunals will not tell the government how to pay for costs involved in meeting their orders.

In the leading case of *Action Travail*, the Canadian Human Rights Tribunal ordered the employer to implement specific programs or measures, with obvious cost implications, in order to resolve patterns of discrimination. Programs can require continuing consultation between the respondent and a human rights commission (although not in B.C. now that there is no human rights commission) or the issuing of "Ministry-wide systemic directives" in order to achieve compliance with human rights legislation. Tribunals have held that the government's right to allocate resources cannot override human rights legislation, although tribunals will not tell the government how to pay for costs involved in meeting their orders. Recent cases of note include, *Sparkes*, which ordered the government to get rid of waitlists for treatment of autistic children in Newfoundland and *Gwinner*, extending widow's pensions to women who were divorced or separated at the time of their former spouse's death in Alberta.

Another important development is the willingness of judges to retain jurisdiction and therefore control over issues that arise in implementing a remedy. This has occurred in a number of *Charter* language rights cases and in at least one s.15 case, *Auton*. In the recent language rights case, *Doucet-Boudreau v. Nova Scotia*, the Supreme Court of Canada affirmed that judges do have a supervisory role in the remedial stage. These decisions help to ensure that the steps governments take to fix discriminatory laws and policies are fully consistent with *Charter* equality rights.

CONCLUSION

Substantive Equality as Transformation

This *2004 Guide to Equality Rights Theory* has provided an overview of legal developments that shape the framework that we use to work on the unfinished business of women's equality. The setbacks in women's equality over the past decade underscore the transformative nature of the project of achieving substantive equality for women. One of the lessons to be drawn is the need to renew the focus on substantive equality as a transformation of society as a whole.

On the legal front, *Meiorin* is an important recognition of the transformative nature of the equality project. On the other hand, the *Law* analysis seems to pull us in another direction, to a more limited constrained concept of equality understood in individual rather than systemic terms. A renewed and conscious focus on substantive equality in all s.15 claims can help to overcome this tendency. The Supreme Court has recognized that the correct approach to s.15 is a flexible and nuanced analysis, not a rigid test. Courts need to directly and reflectively address the limitations of the formal equality framework. Given the pervasiveness of this antiquated approach, courts need to make this a conscious step in their equality analysis. Equality rights advocates should consider putting forward arguments that show what would satisfy a formal equality analysis and then go on to explicitly work out what substantive equality demands in the situation. For example, it could be argued that a welfare policy which treated men and women in a similar fashion could satisfy the requirements of formal equality but not the fuller standard of substantive equality if it did not take into account the specific needs of women in that context.

Equality is a central value within Canadian society. Equality operates both as a legal right and as a principle that informs social practices. Equality as a transformative practice requires us to think in terms of creating equality, rather than only remedying inequality. Equality is created and re-created on a daily basis, in the same way that inequalities are created and re-created. This understanding suggests the need to be creative about the use of forums in which to pursue substantive equality. The goal is to infuse substantive equality thinking into both the governmental and public ethos.

Equality is created and re-created on a daily basis, in the same way that inequalities are created and re-created. This understanding suggests the need to be creative about the use of forums in which to pursue substantive equality. The goal is to infuse substantive equality thinking into both the governmental and public ethos.

One mechanism toward this end is to work toward inclusion of human rights standards in both formal and informal structures. This involves institutionalizing responsibility for human rights by leaders and all in positions of authority including those in the public sector, leading to a new form of politics in which governments are motivated by *Charter* values rather than narrowly conceived economic interests. It extends beyond formal legal channels and to informal channels that contribute to an ethos of participation and consultation that lies at the very core of an effort to build a human rights culture. *Meiorin* provides an important beginning for this part of the substantive equality project by framing a comprehensive accommodation analysis that enables all of us to participate in the process of building equality in the workplace.

The effectiveness of Charter guarantees depends on governments, public bodies and others in positions of power to act in ways that recognize and enhance substantive equality. In the current context, the "unfinished business" of women's equality requires us to work hard in achieving progress at each of these levels.

The dynamics of human rights can be envisioned as encompassing three steps: (1) formal agreement to human rights substantive standards in legal documents such as the *Charter*, human rights codes and international human rights agreements; (2) implementation of effective procedures of enforcement for all of these standards; and, (3) normative bonding, that is when individuals and organizations adhere to these standards spontaneously rather than because they are forced to by law. All of these stages are ongoing as we continually refine and deepen our understanding of equality and develop the best methods of enforcement. The ultimate goal though is to move toward voluntary compliance. The effectiveness of *Charter* guarantees depends on governments, public bodies and others in positions of power to act in ways that recognize and enhance substantive equality. In the current context, the "unfinished business" of women's equality requires us to work hard in achieving progress at each of these levels.

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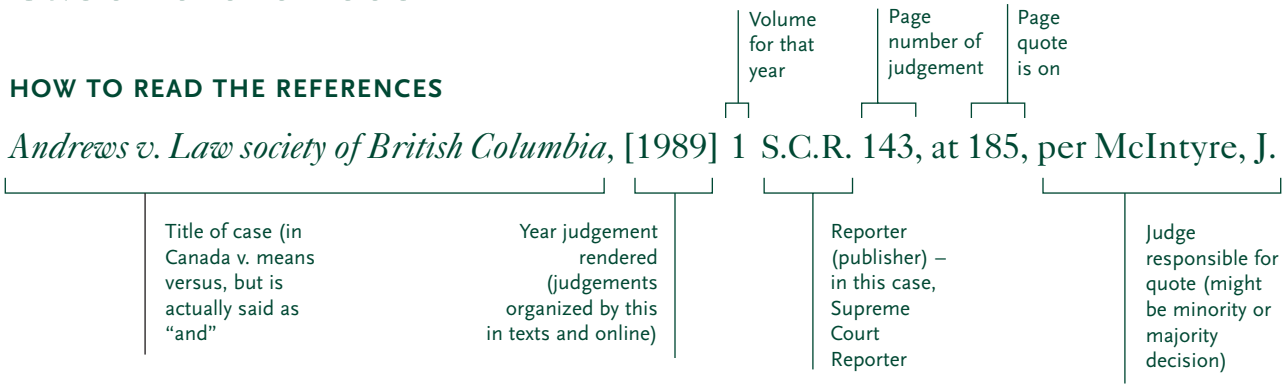

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Glossary

Equality terminology, principles and concepts

AMELIORATE The act of making better or improving the lot of an individual or group. Used to describe a law, policy or program that is intended to improve the position of vulnerable groups. The equality rights in the *Charter* are meant to put an obligation on governments to develop laws and programs that *ameliorate* the historical disadvantage that women and other marginalized groups have experienced.

ANALOGOUS GROUNDS See Grounds of Discrimination

CIVIL LAW There are two things meant when lawyers talk about civil law. One is the legal system inspired by old Roman Law, the primary feature of which is that laws are written into a collection and not determined, as in common law, by judges. The principle of civil law is to provide all citizens with an accessible and written collection of the laws which apply to them and which judges must follow. In Canada, Quebec follows a civil law system, whereas the rest of Canada follows a common law system. The second concept referred to as civil law is any area of law outside of criminal or constitutional law – so any contract, motor vehicle, real estate or other area of law.

CLAIMANT The person who is making the legal claim, who is asserting that they have been discriminated against in the case of human rights law. The opposing party is called the respondent.

COMMON LAW Commonly known as judge-made law or case law. Law which exists and applies to a group on past cases and legal principles developed over hundreds of years. Judges seek these principles out when trying a case, and apply the principles to the facts to come up with a judgment.

COMPARATOR GROUPS The courts use a comparative analysis to determine whether or not a law or policy is discriminatory. A claimant has to show that she has been treated differently in comparison with another group. The comparator groups used by the courts are related to the *grounds of discrimination* on which a claim is based. For example, where a woman is claiming that she was discriminated against on the basis of sex, the courts will usually compare the way the law or policy affects women as compared to men. In this example, women and men are the *comparator group*.

CONTEXTUALIZED APPROACH In order to change inequality in our society, you must first identify the nature and extent of the disadvantage. This is done in part through an examination of the whole *context*, that is the social, political and economic conditions in which the individual and groups live, both historically and at the present time. The Supreme Court of Canada has set out some of the important *contextual* factors which will influence the determination of whether an equality right has been infringed. These factors include, but are not limited to: pre-existing disadvantage, stereotyping, prejudice, and the vulnerability experienced by the individual or group making an equality claim.

DOMINANT NORMS These are the standards that dominant groups in society consider normal. For example, men may generally consider it normal for women to be less sexual than men, and to require persuasion to engage is sexual behaviour. This leads to an assumption that it is okay for men to push women into unwanted sexual activity, and therefore that men don't have to accept the principle that no means no. Because men are lawmakers and elected officials far more often than women, this idea of what is normal, this 'dominant norm' can define law and public policy on the subject (which it did until the case of *Ewanchuck*).

DUTY TO ACCOMMODATE Human rights legislation is founded on the principle that there is a *duty to accommodate* the needs of individuals from historically disadvantaged groups. Recently, the Supreme Court of Canada has expanded the concept of the *duty to accommodate* to make it clear that employees and

policymakers must show that that they have undertaken a process to review whether and how the person might be accommodated. The obligation is a stringent one. Before an employer only had to show that she had made "reasonable" attempts at accommodation, now she must prove that accommodation is "impossible". The *duty to accommodate* places a responsibility on employers, for example, to minimize the adverse impact that arises from their practices. Efforts to accommodate particular groups transform institutional policies, practices and standards to take into account previously excluded groups and to include their needs within the rules, standards and practices that shape the workplace. The *duty to accommodate* is not unlimited. Employers only have a duty to accommodate to the point of *undue hardship*. See Undue Hardship.

DISCRIMINATION *Discrimination* is the detrimental treatment of an individual or group of individuals related to their membership in a defined, protected group. Canadian law recognizes that discrimination can take two main forms: *direct discrimination* and *adverse effects discrimination*. *Direct discrimination* occurs when an individual is treated badly because of her or his group affiliation. The act or omission can be deliberate and conscious or unintentional and unconscious. The perpetrator may even believe that he or she is acting in the best interests of the individual. For example, it is direct discrimination when a women is denied a job in a traditionally male sector of the labour force simply because she is a woman. In the context of gender discrimination, *adverse effects discrimination* is the application of "neutral" rules and procedures, which, while they are applied to everyone, have a disproportionate and negative impact on an individual or group of individuals because of their sex, because fewer women can comply with the rule or requirement. Minimum height standards for certain jobs is an example of *adverse effects discrimination* based on sex, because on average, women are shorter and lighter than men.

DISSENTING JUDGES The Supreme Court of Canada, and the higher courts of appeal in each province, have more than one judge hearing cases. Sometimes the judges do not agree on the interpretation of the law, or the outcome of the case. The *dissenting* judges are the ones who are in the minority in their opinion and decision about the case. In the case of the Supreme Court of Canada there are nine judges in total. If four or less of them have one opinion, and the others all share another opinion, the five judges' decision stands as the law, but the minority judges have an opportunity to give their opinion as well. Sometimes the legal reasoning of the dissenting judges may be used in the future in a different case and ultimately gains approval and common usage.

ENUMERATED GROUNDS See Grounds of Discrimination

FORMAL EQUALITY *Formal equality* asserts that everyone must be treated exactly the same way, regardless of their differences or of existing circumstances. For example – formal equality would have a bathroom designer design men's and women's bathrooms with the exact same specifications, with the same square footage, same number of toilet stalls and so on without examining how men and women use bathrooms differently. This approach fails to address the reality of existing inequality and existing difference, and results in the perpetuation of inequality. It also fails to acknowledge the built-in biases of apparently neutral, universal norms or standards that have in fact been shaped by the needs and experiences of socially privileged groups. Canadian courts have rejected this notion of formal equality, of treating all persons the same regardless of their circumstances, as the purpose of s.15 and other equality rights guarantees. Instead, they have adopted *substantive equality* as the purpose of equality rights. Unfortunately, however, formal equality thinking still influences the thinking of many Canadians, including judges, legislators and policymakers.

GROUNDS OF DISCRIMINATION Section 15 of the *Charter*, human rights codes, and the international equality guarantees all share a similar approach in how they are written, founded on *grounds of discrimination*. All guarantee equality as defined as freedom from discrimination on the basis of certain group identities or characteristics. Examples of the *grounds of discrimination* include: sex, race, colour, national origin, religion, sexual orientation, mental or physical disability and so on. Because of the way these provisions are worded, analysis of an equality claim starts with a discussion of what "*ground*" or basis an individual or group of individuals experienced discrimination. Enumerated grounds are those bases or group identities that are specifically set out in a given equality rights provision. There are differences between the various Canadian and international human rights documents as to which grounds are part of the list and which words are used to describe specific group identities. Lists of grounds can be open-ended or closed. For example, the *Charter* equality provision is an open-ended list because it states that equality is guaranteed in general and then in particular with respect to the enumerated groups. This wording leaves the door open to others groups that are not specifically listed to make equality claims. Analogous grounds are other bases that are not part of the list set out in the provisions but are similar in nature to those on the list. Under the *Charter*, the Supreme Court of Canada has held that sexual orientation is an analogous ground. However, sexual orientation is an enumerated ground in most human rights documents.

JUDICIAL NOTICE Judges are expected to consider their decision based on the information presented to them in the hearing or trial. But they are entitled to assume certain commonly known facts which is described as 'taking judicial notice' of that fact. For example, there is some disagreement about whether or not it is acceptable for a judge to take 'judicial notice' of the presence of racism in our society. Some feel that to assume the presence of racism is actually a bias in favour of people of colour, while others consider it a commonly known reality.

MULTIPLE DISCRIMINATION *Interactive or multiple discrimination* consists of the cumulative and compounding effects of discrimination based on several group characteristics. It is impossible to untangle discrimination based on gender and on one or more other grounds such as race and/or disability. The experience of interactive or multiple discrimination is of a different order than experiences of differential treatment based on one ground of discrimination. In fact, categories, such as sex, colour, and disability, themselves obscure the way discrimination is experienced by women of colour and women with disabilities.

PURPOSIVE When interpreting legislation, the courts have to find a way to approach that interpretation and apply it to any given conflict or issue that arises as a result of that piece of legislation. In the case of human rights cases, and cases under the *Charter* the courts have decided that they must take a *purposive* approach – they must look not just at the words in the legislation, but at the purpose behind the legislation to determine what the government was trying to do when they enacted it. In the case of s.15, they have determined that the purpose was twofold: to limit the government's ability to treat people unequally, and to oblige the government to *ameliorate* inequality.

REMEDIAL OBJECTIVE This is a term used to describe legislation that has a goal of changing a problem. In other words, if a law is written to fix a problem, it is said to have a 'remedial objective' – a goal of remedying an existing problem. For example, a law that says all dogs must have a license would have the remedial objective of keeping stray dogs under control by identifying those dogs who have homes. The Supreme Court of Canada in *Law* made it clear that s. 15 has a remedial objective of ending discrimination and inequality.

SIMILARLY SITUATED This concept is one that has dominated equality rights in the Canadian legal system and is a central piece of the more simplistic formal equality approach in the law. Prior to the *Charter* and LEAF's introduction of the concept of substantive equality, the courts accepted the principle that as long as the law treated people with the same characteristics

in the same way, it was not discriminating. In other words, if a law said that all pregnant women were ineligible for health benefits, this would not be considered discrimination (and wasn't in the case of *Bliss*). The substantive equality approach says that the law and courts must recognize this as discrimination against women in that only women get pregnant and it is in everyone's interest to include pregnant women in the benefits of our society.

SECTION 1 Section 1 of the Charter comes under the heading *Guarantee of Rights and Freedoms*. It states:

> 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 de demonstrably justified in a free and democratic society.

SECTION 7 Section 7 of the *Charter* comes under the heading *Legal Rights*. It states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

SECTION 15 Section 15 of the *Charter* comes under the heading of *Equality Rights*. It states:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

SECTION 28 Section 28 of the *Charter* comes under the *general clauses* and says: Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

SUBSTANTIVE EQUALITY Canadian courts have said that the purpose of s.15 and other equality rights guarantees is to achieve *substantive equality* for all members of Canadian society. *Substantive equality* demands the redress of existing inequality and the institution of genuine, real, effective equality in the social, political and economic conditions of different groups in society. *Substantive equality* requires us to recognize, take into account existing and rectify systemic and group-based inequalities. It encompasses the right to have one's differences acknowledged and accommodated both by the law and by relevant social and institutional policies and practices.

SYSTEMIC DISCRIMINATION *Systemic discrimination* is institutionalized policies or practices that disadvantage individuals who are members of distinct groups. This concept raises the pervasive problems of discrimination embedded within institutional practices and policies. *Systemic discrimination* can encompass both direct and adverse effects discrimination. Direct discrimination can contribute to systemic discrimination if it represents a widespread practice within an institution, such as sometimes occurs with sexual harassment. To the extent that manifestations of direct discrimination are so much a part of the workplace culture as to be accepted as practice, they constitute *systemic discrimination*.

TORT Our legal system is designed, in part, to control actions and behaviours we consider wrong. Some actions are considered so serious they attract criminal sanctions and the state itself will charge and punish those found to have committed criminal offences. Actions that are considered unacceptable, but not so serious they are criminal, make up a series of legal principles that allow one individual to sue another for damages they incurred. These legal principles are called torts. For example, if someone hits another person, it is considered a 'tort of battery' and the injured person can sue the other for financial compensation.

TORT OF DISCRIMINATION Since the growth of society's understanding of human and equality rights, the idea that people should not be discriminated against

has infiltrated our idea of appropriate behaviour. While human rights codes and the *Charter* provide an avenue for someone who experiences discrimination to seek redress, the courts have begun to accept that an individual should be allowed to sue the perpetrator of the discrimination for any financial damages they incurred as a result of the discrimination. That means we now have a tort of discrimination in our common law system.

UNDUE HARDSHIP In order to achieve substantive equality under human rights legislation, employers and policymakers have a duty to accommodate to the point of *undue hardship*. They must demonstrate both that they have taken steps to accommodate and that to do anything more would cause them *undue hardship*. Tribunals and courts are still in the process of expanding what *undue hardship* means. In general, employers try to show that accommodation would be too expensive or create safety risks. The fact that accommodation will impose costs on the employer does not in itself constitute *undue hardship*. In trying to decide whether or not the desired change amounts to *undue hardship*, tribunals and courts will often look to see what other organizations have done to fulfill their duty to accommodate in similar circumstances.

Transforming Women's Future: a 2004 Guide to Equality Rights Theory and Law provides the latest information about the state of equality rights in Canada. As an update of the 2001 book *Transforming Women's Future: A Guide to Equality Rights Theory and Action*, the 2004 Guide focuses in on two central cases, *Law v. Canada*, and what's known as the "Firefighter's Case". These two cases represent the current state of the law regarding Section 15 of the Charter of Rights and Freedoms, and the jurisprudence under Human Rights Codes in Canada.

In addition, the author looks at the impact globalization has had on women's equality, and the ways in which our legal system is being influenced by global concepts of free market ideologies. The project of achieving women's equality in Canada is clearly not complete, and is, in fact, slipping dangerously in the face of a growing reliance on simplistic, formal equality models in the courts and among policy-makers.

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