The Changing Face of The Indirect Effects of

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Cet article donne une vue d'ensemble sur les théories féministes autour de l'égalité et affirme que les réformes du ministère de la Justice depuis les cinq dernières années ont des implications négatives sur les balises de la démocratie et donc sur les droits à l'égalité des femmes.

Equality is a subject which has often been the focus of my attention and energies, throughout my career both as a lawyer and as a member of the judiciary. I believe that our collective journey toward equality must strive for full access to justice for all women, indeed for all socially vulnerable groups who struggle to have the injustices they experience recognized and addressed in law.

I am struck by how many cases related to equality issues have faced me as a Justice of the Supreme Court of Canada. Appeals relating to spousal and child support, civil actions seeking damages in sexual assault, access to therapists' and other private records, spousal abuse, and judicial intervention in pregnancy have all come before the Court in recent years. More importantly, while not involving direct equality challenges under the *Canadian Charter of Rights and Freedoms,* the parties and intervenors in these cases have all, nonetheless, challenged the Court to take equality considerations into account in its deliberations. Certainly, such cases have raised the Court's awareness of the changing face of inequality in our society, and more importantly, our law. We have come to appreciate that inequality pervades many areas of the law, through the influence of stereotypical reasoning and the assumption that all members of society conform to norms developed by those in relative positions of power.

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In the decisions in such cases, the indirect effects of the principles of substantive equality as developed in the *Charter* jurisprudence are becoming increasingly evident. Equality is beginning to inform the interpretation and application of legislation and the development of common law principles, even outside the arena of constitutionally-based discrimination claims. Substantive equality principles are proving to be helpful tools for addressing obstacles to full access to justice by women and others in all areas of the law.

The principles of substantive equality

When we speak of equality under the *Charter*, or "substantative" equality, we are actually describing a modern and somewhat revolutionary approach to an ideal which has been with us for thousands of years. The concept of equality has matured significantly over time as we, as a more self-aware society, have become increasingly cognizant of the fact that law and society have not always responded to the values, needs, or realities of those who are disadvantaged or without power.

In a pre-*Charter* Canada, we understood equality in a much more restrictive way. The best example of this can perhaps be seen in the Court's application of the *Canadian Bill of Rights*. Enacted by the Parliament of Canada in 1960, this legislation guaranteed equality before the law and equal protection of the law. In applying the *Bill of Rights*, courts found that if the law treated like people the same, it would not be subject to scrutiny, even where differing social groups were not accorded equal treatment. Cases such as *Attorney General of Canada* v. *Lavell* and *Bliss* v. *Attorney General of Canada* exemplified the inadequacies of this formal approach to equality. First Nations or pregnant women could be singled out for differential, and less advantageous treatment, provided that the treatment was the same for all those in the identified group. For those who were disadvantaged because they were different from society's "norm" of the white able-bodied man, this road to equality was a dead end.

Why did formal equality achieve so little for those crying out for change in the law? The work of John Stuart Mill, one of the first philosophers to recognize the interrelationship between individual human dignity and the good of the community (Proulx), provides a helpful model for understanding this result. He observed that the law assumes that existing relationships of domination and subordination are "natural." Mill argued that the law, in adopting the status quo, then plays an even more insidious role, from an equality perspective, of converting into a legal right a relationship of inequality which was previously a mere physical fact. Once the physical fact has reached the level of a legal right and clothed itself within the legitimacy of the law, it receives the sanction of society (qtd. in

Equality
Section 15 of the Charter

Clark). Mill asks if there is ever domination that does not appear natural to those who possess it (qtd. in Clark). Inequality thus permeates institutions, not the least of which is the law, that we have for centuries thought indispensable and beyond question. Formal equality served only to cover these disparities with the protective cloak of "fairness" and, in so doing, to perpetuate the very real inequalities which were assumed to be right and natural by those in the privileged position of making the law.

In many ways, our present approach to equality, based on the recognition that true equality requires substantive change and accommodation of differences, rather than formalistic egalitarian treatment, was precipitated by the obviously unfair and inequitable results of equality claims determined under the *Bill of Rights*. Policy makers purposely entrenched equality rights in the *Charter* in broader and more carefully chosen terms than those originally used in the *Bill of Rights* (see Pal and Morton). Now, section 15 of the *Charter* ensures that:

> Every individual is equal before *and under* the law and has the right to equal protection *and equal benefit* of the law *without discrimination*. [emphasis added]

Furthermore, now that the *Charter* sets out an open-ended list of nine categories on the basis of which discrimination is prohibited, the courts are able to extend s.15's protection to individuals in groups with characteristics analogous to those specifically enumerated therein. We have clearly gone beyond the stage of requiring that laws be applied equally, for certain groups, to the stage of requiring that the laws, themselves, treat individuals as substantive equals. This, finally, is the language of *substantive* equality.

As Justice McIntyre explained in *Andrews* v. *Law Society of British Columbia,* the first decision of the Supreme Court of Canada to consider s.15:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration. (171)

Some might call this a lofty ideal, yet in that groundbreaking judgment and many which have followed, substantial progress has been made toward this goal. Essential to this progress have been two primordial principles which continue to underpin the Court's substantive equality analysis. The first involves a shift in how the law perceives and responds to difference. The second mandates an appreciation of the impact of the law within its relevant social context. Let us look briefly at each of these general ideas as they operate in the equality jurisprudence.

Formal equality entrenched and preserved the power of dominant groups in society to identify differences between them and more vulnerable groups, and to use those differences as justification for inferior status. Substantive equality, on the other hand, requires us to think about and approach differences between ourselves and others in a new way. As the Court held in *Andrews*, s.15 of the *Charter* mandates close scrutiny of legislative distinctions to ensure that they do not single out historically disadvantaged and socially vulnerable groups for more burdensome or less advantageous treatment on the basis of their differences from those in a position of relative privilege.

In the more recent case of *Egan* v. *Canada*, a case involving an equality claim by a member of a gay couple, I described how substantive equality should shape our approach to difference in the following terms:

> Equality as that concept is enshrined as a fundamental value within s.15 of the *Charter* means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, re-gardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend human dignity.

"Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, or offend human dignity."

It is interesting to note that in a very recent judgment, the Constitutional Court of South Africa, after citing these words from my opinion in

Egan,[1] adopted the test I suggested in *Egan* in the following terms:

> To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discirmination. (*Hugo* 40)

The Supreme Court of Israel has similarly adopted equality principles which focus on difference and the impact of distinctions within the broader social, political, and economic context.[2]

At the same time, as Justice McIntyre also stated in *Andrews*, "for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions" (169). This was in recognition of the fact that legislative action which treats those who have been historically disadvantaged or marginalized in the same manner as those from more powerful sectors of society can also create inequality. In such instances, inequality flows not only from the stereotypes and inferior status assigned to certain differences, but also from the failure to recognize and address in the law the impact of these differences on human experience. In these cases, legislative distinctions which redress inequality through recognizing and accommodating differences will be constitutionally required and shielded from those who might contest the fairness of this differential treatment.

A most powerful example of the importance of accommodating differences is provided by equality claims by persons with disabilities. The Court has recently affirmed the principle that changes to the surrounding physical and social environment—which is, after all, designed to meet the needs of the able-bodied population—is necessary to ensure access to a particular benefit for an individual with a disability, will be required in order to achieve equality for that person (*Eaton* v. *Brant County Board of Education*; *Eldridge* v. *British Columbia*). An example of a legislative distinction which was found to promote equality can also be found in the case of *Weatherall* v. *Canada (Attorney General)*. In that judgment, the Court held that a policy which prohibited pat-down searches of women prisoners by male guards, but did not provide parallel protection for male inmates, did not constitute unconstitutional inequality under s.15. Rather, it exemplified accommodation of the significant differences in men's and women's historical and present-day experiences of sexual violence.

The second and related principle from the equality jurisprudence which I wish to highlight is the understanding that inequality can be perpetuated through the disparate impact of legislative enactments on individuals and groups within the broader social, legal, and political context in which the legislation is applied. As Madam Justice Wilson explained in the case of *R.* v. *Turpin:*

> it is only by examining that larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. (1331–32)

Especially now, when most inequality arises not through intentional discriminatory action, but rather through the unwitting failure to appreciate the impact on socially vulnerable groups of legislation passed by the majority of citizens, evidence of the social context within which the impugned law operates is essential to the proper disposition of a *Charter*-based equality claim. This information is key to our ability to uncover the biased assumptions underlying such legislation (i.e. that all affected by the enactment conform to a certain, dominant, norm) and to replace them with a more complete picture of the realities of those to whom the law applies.

For this reason, in *Egan*, I developed an approach to identifying discrimination which focuses directly on the contextual factors involved. So has the Constitutional Court of South Africa, in a case involving a claim that a special remission of criminal sentence for mothers with young children constituted discrimination. The South African court's focus on the social context of the state action in question is evident from the following excerpts from Justice Goldstone's reasons:

> Although no statistical or survey evidence was produced to establish this fact, I see no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers.
> [...]
> It is not enough for the appellants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged. They must show in the context of a particular case that the impact of the discrimination on the people who were discriminated against was not unfair. In section 8(3), the interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discirmination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve this goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular

people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context. (*Hugo* 34, 38–39)

To appreciate whether state action has a discriminatory impact on a group of individuals, in my view, it is essential to examine both the nature of the groups adversely affected and the nature of the interest involved. And this must be assessed from the perspective not of a Supreme Court Justice, but rather of a reasonable person in the same circumstances as those experienced by the rights-claimants. Where the group is one which has historically been relegated to a place of relative disadvantage, and/or is an insular minority vulnerable to having its most fundamental needs and concerns overlooked or discounted, and where the interest is one which is commonly considered fundamental to full participation in Canadian society, discrimination is likely to result (see *Egan*). I have continued to apply and advocate this approach in my opinions as I wish to ensure that we direct our attention and energy to understanding how inequality manifests itself in the context of today's society, and, more importantly, to how best to eradicate it.

The notion of substantive equality, therefore, continues to be refined and developed by the various courts around the world which recognize and support this principle. This and the other cases I have mentioned demonstrate, however, that once we learn to shift our approach to difference and to appreciate the social context within which the law operates, we have the necessary tools to make the vision of equality a reality for even the most vulnerable groups and communities within our society.

How can these tools be used to respond to the *changing face of inequality* in our society? Inequality continues to permeate common law rules, approaches to judicial decision-making and statutory interpretation, and other elements of the law which cannot be changed through a direct *Charter*-based equality challenge. Let us consider a number of examples where substantive equality principles have assisted the Court in rooting out and replacing assumptions of gender inequality which have traditionally pervaded these aspects of the law.

The changing face of gender equality

The criminal law is replete with illustrations of the need for and promise of an equality-inspired approach to the interpretation and application of legal principles (see Boyle). It is true that the reformative effect of the *Charter* on criminal law has been greatest in the area of investigation and prosecution of criminal offences, and that the focus of attention has been on certain *Charter* guarantees other than s.15. It remains undeniable, however, that gender equality has begun to inform the Supreme Court's criminal law decisions. We are increasingly seeing attention to significant differences in the experiences of men and women and how these relate to the impact of the criminal law in the surrounding social context.

Valerie Palmer, "Waves," oil on linen, 49" x 53", 1995.
Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

One of the most significant cases from this point of view is the Supreme Court's decision in *Lavallée*. In that case, the Court decided that the defence of self-defence was available to a woman who killed her husband after he had repeatedly threatened to kill her. At trial, the history of the abusive relationship was presented and expert evidence on battered woman's syndrome was adduced. Madame Justice Wilson, for the Court, indicated that the criminal law must take into account the differing experiences and perspectives of those affected by the law. By questioning

the appropriateness of the traditional "reasonable man" standard in the case before her, she invoked the language of substantive equality. Thus, even though s.15 was not formally in issue in the appeal, its goals informed the Court's decision.

In my view, *Lavallée* is an important decision for two reasons. First, it clearly rejects the old view of sexual equality that women have the right to be treated equally to men only to the extent that they are the same as men. It replaces that view with the recognition that sometimes different people must be treated differently in order for substantive equality ultimately to prevail.

Second, *Lavallée* constitutes one of the best examples to date of the need to re-examine long-standing laws, institutions, and assumptions through the relatively new prism of substantive equality. If we truly deem the values of substantive equality to be so fundamental to our society that they merit constitutional entrenchment, then such re-examination is long overdue. In the same vein, it can be seen, from our decision in *Lavallée*, that equality is more than just a discrete right. To be effective, it must permeate our thinking. Equality must be seen as a basic component of justice and an essential characteristic of our commitment to human rights. In recent days, this re-examination has been evident in contexts as diverse as the disclosure of complainants' medical and therapeutic records in sexual assualt trials (*R.* v. *O'Connor*), the application of the "air of reality" test to the defence of honest but mistaken belief in consent (*R.* v. *Park*), and the treatment at trial of young victims of sexual assault (*R.* v. *L. (D.O.)*; *R.* v. *Levogiannis*).

For instance, in sexual assault cases I have favoured limiting the ability of the defence to rely on certain kinds of evidence relating to the complainant, where the evidence is of marginal relevance and could lead the trier of fact to make impermissible inferences based on stereotypes and discriminatory reasoning. In such cases, the equality rights of complainants *do not derogate* from the right of the accused to a fair trail. Rather, equality *enhances* the fairness of the trial.[3]

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My efforts to change the common law's approach to the defence of mistaken belief in consent in sexual assault cases are also inspired by equality concerns. In cases where the issue of this defence arises, I have advocated focussing not on whether the complainant expressly refused to engage in the activity in question, but rather on whether and how the accused ascertained that the complainant had communicated her positive consent or permission to him. This interpretation emphasizes an egalitarian view of gender relations, one that recognizes women's right of control over their bodies. It further encourages men to appreciate that women's passivity when understood in the context of the power differences inherent in their relationship may not indicate consent but rather a fear of the violent consequences of resisting (see *R.* v. *Park*; *R.* v. *Esau*).

In other areas of the law, however, the furtherance of equality may enter into conflict with other rights. In such circumstances, the Supreme Court has recognized that in a free and democratic society, the right of every person to equal concern and respect is of vital importance. Consequently, it may be justifiable for the State to impose reasonable limits on other *Charter* rights for the purpose of protecting equality interests. This reasoning was employed by the Court in *Butler*, to uphold provisions of the *Criminal Code* banning certain types of pornography. The contribution of pornographic material to the exploitation of and violence against women in the broader society was found to justify a stringent limit on the freedom of expression enjoyed by those who engage in its production and distribution.

Equality values have similarly protected statutory schemes in the *Criminal Code* which accommodate the special needs of young complainants in sexual assault trials, in the face of claims that these provisions violated an accused person's constitutional civil rights. The Court's commitment to the equality interest of young children had a significant effect on its decisions to reject these challenges. In *R.* v. *L. (D.O.)*, for example, a provision allowing the use in court of videotaped statements by young complainants in certain sexual offences withstood a constitutional challenge. The Court recognized that this reform in the criminal law was an appropriate response to the dominance and power held by adults over children by virtue of their age, and a necessary accommodation of the special need on the part of children to be shielded as much as possible from the stress and trauma they experience through the course of the prosecution of a sexual assault case.

In the companion case of *R.* v. *Levogiannis*, a provision allowing complainants under the age of 18 to testify behind a screen was similarly upheld. Writing for the Court, I observed that this section addressed the differing needs of children as regards treatment in the courtroom. In my view, to get at the truth in cases involving sexual offences against minors, protecting them from the trauma of face-to-face confrontation with the alleged aggressor may well be necessary. An equality-inspired treatment of young witnesses in these circumstances was thus shown to accord with central principles of fundamental justice.

A further area where women's differing experiences and concerns have been viewed through the prism of substantive equality is that of family law. The judgment of the Court in *Moge* paved the way for egalitarian developments in this field through its reliance on the relevant social context and

substantive equality principles to interpret legislation providing for spousal support upon the breakdown of a marriage. Upon taking judicial notice of the incontrovertible phenomenon of the impoverishment of women upon divorce, and the benefits men often gain in their earning capacity due to the unrecognized work by women in the home, the Court was inspired to fashion a doctrine of equitable sharing of the economic consequences of the marriage or its breakdown.

Subsequent Supreme Court cases in the family law domain are consistent with this encouraging trend. *Peter* v. *Beblow* and *Willick* v. *Willick*, for instance, recognize in no uncertain terms the value of "housework," as well as the value of the child-rearing responsibilities undertaken by the custodial spouse. These decisions have served to advance the economic and social status of women and children in society when one considers the post-divorce reality that women make up the majority of custodial parents and tend to live in impoverished circumstances when compared to their former male partners.

The importance of due regard for social realities or context and other equality considerations have also inspired developments in the law governing civil litigation for damages arising from sexual abuse and assault. For example, in *Norberg* v. *Wynrib*, a case involving a physician who had exacted sexual favours from a patient who was dependent on drugs prescribed by the physician, we held that consent in tort law could be vitiated by factors other than those traditionally recognized: violence, fraud, or drug-induced incapacity. We observed that the doctor-patient relationship is frequently characterized by an imbalance of knowledge and power and that this imbalance could in some cases invalidate the assumption of individual autonomy that forms the basis for the concept of consent.

In another torts decision, *K.M.* v. *H.M.*, we held that the limitation period applicable to tort actions arising out of incest was suspended until the victim could reasonably discover the connection between the incest and any psychological injuries he or she may have suffered.

In these cases, the Court refused to apply blindly the traditional rules relating to consent or limitations periods. Instead, the Court carefully examined the rationale for the relevant principles of law, and applied them in a manner that was sensitive to the realities of each context. The approach taken by the Court in these cases illustrates a point made by David Lepofsky, namely that the common law in Canada is capable of evolving over time to respond meaningfully to changes in society.

The importance of a contextual approach cannot be emphasized enough. We have repeated this point tirelessly, most notably in our decision in *Andrews* v. *Law Society of British Columbia*, in which we said that a distinction created by legislation must be examined, in the larger social, political, and legal context, in order to determine whether it constitutes discrimination. The value of a sensitive, contextual approach to equality has nowhere been more evident than in the area of employment law.

Indeed, some of the greatest strides in the achievement of gender equality through the application of substantive equality principles can be found in successful discrimination in employment complaints by women under human rights legislation. Two particularly instructive examples come immediately to mind. The first is the case of *Janzen*, where the Court had to consider whether sexual harassment was a form of sex discrimination within the meaning of the Manitoba *Human Rights Act*. The Manitoba Court of Appeal had accepted the employer's argument that sexual harassment was gender-neutral, and not a form of categorical discrimination against women. However, the Supreme Court undertook an examination of the *context* of sexual harassment, and noted that "those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female" (*Janzen* 1284). At the same time the Court ruled that there could be discrimination even if all members of the target group were not treated uniformly. As a result, the Court concluded that sexual harassment constitutes sex discrimination and could be addressed through the remedial mechanisms in human rights legislation.

Similarly, in the second example of *Brooks*, the Court adopted a contextual approach in determining that the exculsion of pregnant women from an employer's accident and sickness plan is a form of sex discrimination. The Court reasoned that the plan disadvantaged pregnant women solely because of their pregnancy, a condition unique to women. It also noted that pregnancy is something that benefits all society, and concluded that the costs of pregnancy should not be imposed solely on women. In reaching these conclusions, the Court overruled its earlier decision on the same issue in *Bliss*, a case which arose under the *Canadian Bill of Rights*. Thus, *Brooks* underscores the need to re-examine existing doctrines in the light of our new, contextually sensitive understanding of equality.

Conclusion

As the *Charter*'s equality guarantees continue to prevent and correct direct discrimination by state actors and legislation, the mani-festations of inequality in our society are changing. The preceding review of Supreme Court jurisprudence has illustrated that some of the most daunting obstacles to access to justice by women are found in discri-minatory reasoning and in tra-ditional principles and approaches in the law which fail to account for women's differing concerns and experiences or to accord them equal status to

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men's. As these obstacles are more difficult to discern, they may seem more arduous to overcome. Nevertheless, the cases I describe demonstrate how tools for achieving substantive equality in the constitutional context can assist us in fashioning an overall approach where all are "secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration."

The tools I have described help analyze legal problems through uncovering the assumptions underlying traditional rules and assessing whether they need repositioning to accord with an egalitarian vision of society. The more that arguments based on this approach are brought forward, the easier it will be for judges to fulfill their responsibility of discerning the truth and rendering justice. Truth without equality is only a partial truth. Justice without equality is not justice, but injustice. If we are to be true to our professional and personal aspirations, we must dedicate ourselves to the pursuit of equality in all aspects and areas of the law—for *equality is justice!*

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[1] *President of the Republic of South Africa and Another* v. *Hugo* at 38 [hereinafter *Hugo*].

[2] See *El-Al* v. *Danilowitz* per Justice Barak, for the majority, and Justice Dorner, concurring. This case involved a successful claim by an airline steward that the airline's refusal to provide certain benefits such as free air travel to same-sex partners which were provided to married spouses and common-law heterosexual partners constituted discrimination. Justice Dorner cites a passage from pages 1331–32 of Justice Wilson's reasons in *Turpin* (41), and develops a contextual approach to equality principles. In so doing, she also refers to my dissenting reasons in *Canada* v. *Mossop*, where I advocate a broad and purposive approach to "family status," one which includes same-sex partners.

[3] See *R.* v. *O'Connor*; see also *A.M.* v. *Ryan per* with Justice L'Heureux-Dubé (dissenting) for a consideration of these issues in relation to discovery of such records in the context of civil litigation regarding sexual assault.

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