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THE CONSTITUTIONAL LAW OF EQUALITY IN CANADA

Kathleen E. Mahoney*

I. INTRODUCTION

On April 17, 1982, Canada repatriated its constitution from the Parliament at Westminster, sweeping away one of the final vestiges of its colonial past. At the same time, a Canadian Charter of Rights and Freedoms1 was constitutionally entrenched, giving the people express constitutional rights for the first time. The equality provisions, in particular, represented a new era in Canadian constitutional law.

The intense debate leading up to the entrenchment of the Charter raised profound questions about the basic nature of the country, its values, and its ability and willingness to acknowledge equality for women and other disadvantaged groups. For the first time, equality seekers participated in the process of constitutional renewal.2 They expressed a clear desire to be full and equal citizens in Canadian society and to have their needs and aspirations translated into constitutionally recognized rights.3 As a result of the largest lobbying and participatory effort ever mounted by ordinary citizens, particularly women,4 very broad and comprehensive equality guarantees5

* Professor, Faculty of Law, The University of Calgary; LL.B., University of British Columbia, 1976; LL.M., Cambridge University, 1979; Diploma in International Human Rights, Strasbourg University, 1987. An earlier draft of this paper was presented at a “Justice and Gender” conference sponsored by the University of Maine School of Law in October, 1991. It was presented in a different form to the Canadian-American Cooperation Section at the San Antonio, Texas, meeting of the Association of American Law Schools in January, 1992.


5. Section 15 of the Charter actually contains four equality guarantees and an affirmative action provision. It reads as follows:

(1) Every individual is equal before and under the law and has the right to
were entrenched in the Constitution. In addition, a specific section entrenching sexual equality as an overriding principle of the Charter was included, the intention clearly being to ensure that Canadian women would enjoy a status equal to that of Canadian men.6

Since the entrenchment of the Charter in 1982, equality seekers have continued to play a significant role. They have used litigation and other strategies in order to clarify and develop approaches to constitutional theory and interpretation so that the Charter's promise of equality will be realized.7 From the outset, they recognized that entrenched comprehensive equality rights would not bring about legal equality on their own; in order for people to become true equal bearers of rights under the Charter, the content of established rights and concepts would have to be challenged, and the legal norms of existing societal and institutional structures premised on inequality would have to be changed.8

It is the Author's view that the Supreme Court of Canada, to quite a remarkable degree, has recognized the egalitarian challenge the Charter presents. In the past few years, the Court has launched a promising new era for equality jurisprudence quite unique in the world. The equality theory developed by the Court goes far beyond that which underlies the constitutional law of other western societies, including Europe and the United States. The Court has fashioned principles that give disadvantaged groups a better chance than ever before to alleviate the inequities they experience in laws, policies, and the practices of governments and government officials. This is because, instead of using abstract, formal rules to analyze equality and discrimination, the Canadian Supreme Court applies a purposive, contextual approach to constitutionally entrenched equality guarantees, which in turn defines the scope and purpose of these guarantees in terms of individuals and groups persistently disadvantaged by the legal system.

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6. For a discussion of the history and interpretation of section 28 of the Charter, see de Jong, supra note 3, at 494-512.
7. For example, the Women's Legal Education and Action Fund (LEAF) is a Canadian group created to promote women's equality through litigation of precedent-setting cases, using the sex equality guarantees in the Charter of Rights and Freedoms. See also Shereen Razack, Canadian Feminism and the Law (1991).
To fully understand the Canadian approach to Charter equality guarantees, the history of equality and discrimination law must be examined. To a large extent, the Supreme Court's interpretation of constitutional equality guarantees in the Charter has been informed and influenced by the lessons and themes which have emerged from the common law, human rights legislation, and earlier attempts at constitutional reform. In this Article, I discuss the development of legal equality in Canada, including pre-Charter recognition of the concepts of equality, inequality, and discrimination, as well as post-Charter interpretations of constitutional equality guarantees. I also discuss the effects of the Supreme Court's constitutional-equality jurisprudence beyond constitutional law—effects which may ultimately hold the greatest promise for the achievement of social equality in Canada.

II. EARLY DEVELOPMENT

Equality in Canada has been an evolutionary process—a slow struggle whereby legislatures, the Parliament of Canada, and sometimes the courts have incrementally responded to varying degrees of pressure to eliminate or reduce conditions of disadvantage. One reason progress has been so slow is that different groups, being disadvantaged in different ways, often did not communicate effectively with each other, and thus their common cause was often overlooked. In this Article the example of gender inequality is used to show how change has come about and where it may lead. Gender is the example used here because women experience all the disadvantages experienced by disadvantaged groups, because women constitute more than one-half of the Canadian population, and because the women's movement in Canada has led the way in the struggle for equality.

Less than one hundred years before the enactment of the Charter, the social and economic position of women was dismal. Women were unable to vote, hold elected or appointed office, sit on a jury, or participate in the professions. Employment outside the home provided minimal opportunities and very low wages. If a woman became pregnant during her employment, she could be discriminated against with impunity because differential treatment on the basis of pregnancy was not considered to be discrimination on the basis of sex. At the same time, she was legally forbidden access to information

about, and effective methods of, controlling her fertility. Marriage exacerbated women's second-class citizenship by removing the few rights or legal recognitions single women possessed. For example, a married woman lost her own nationality and domicile upon marriage if it differed from that of her husband. In addition, the father of children of the marriage had the legal right at common law to determine their religion and education. Married women were unable to make wills or enter into binding contracts and lost almost complete control over their real and personal property to their husbands. The common law permitted a husband to beat his disobedient wife and rape her without fear of punishment. Even after these cruel laws were repealed, the trivialization of wife abuse continued—and in many ways persists until this day.

In particular, the law regulating sexual assault presented unique barriers to the realization of women's rights to bodily security and equal right to protection and benefit of the law. The rules of corroboration, recent complaint, warnings to the jury regarding a woman victim's credibility, and allowance of examination of the victim's prior sexual history, all treated women victims of violent assault in a gender-specific, disadvantaged way. Until 1980, sexual harassment of women in the workplace was not even recognized as a legal issue. It took an appeal to the Supreme Court of Canada to


11. See Mary Metzger, A Social History of Battered Women 59 (copies distributed at consultation for Feminist Services Training Program Coordinators, sponsored by Canadian Secretary of State Women's Programme, Nov. 28-30, 1979).


determine, as late as 1989, that sexual harassment amounts to sex discrimination and that it exacerbates the systemic gender inequality that exists in the workplace. 17

While certain legal inequalities have been eliminated, others persist to the present day, particularly in areas where the Supreme Court’s Charter jurisprudence has yet to be felt. In the civil law of tort, the persistent disadvantage of women affects the legal recognition of legitimate lawsuits, as well as the measurement of compensation when women do succeed in establishing their claims. For example, in personal injury cases, it has only very recently been recognized that the impairment of homemaking capacity is properly a compensable loss to the homemaker rather than to her spouse, and even to this day the contention is resisted. Where assessments have been awarded, they have been meager in the extreme, especially by comparison with those awarded for impairment of working capacity outside the home. 18 Similarly, in legal texts the concerns and interests of women are, by and large, not addressed. For example, Christine Boyle points out in a review of two leading Canadian textbooks on remedies that “human” is equated with “male.” When the authors of these texts relate general principles to remedies, the concentration is on commercial or property interests rather than on areas of arguably greater interest to women, such as family law or public interest equality law. 19

When race combines with gender, systemic disadvantage is more pronounced. Aboriginal women in Canada, for example, have been particularly singled out for adverse treatment. The Canadian version of apartheid, The Indian Act, 20 successfully denied them their cultural status, connection with family, property rights, inheritance, and devolutionary rights. 21

Canadian women have never willingly accepted legally imposed invisibility and disadvantage. History shows that they have persistently protested their inequality, but a lack of power or access to

Harassment of Working Women (1978); Tarnopolsky & Pentney, supra note 9, at 8-23.

21. See Beverly Baines, Women, Human Rights, and the Constitution 28-31 (Aug. 1980) (unpublished manuscript available at Canadian Advisory Council on the Status of Women, 151 Sparks Street, Box 1541, Station “B”, Ottawa, Canada K1P 5R5 and at University of New Brunswick Law Library). The offending provisions of the Indian Act were repealed only after the Act was challenged under the International Convention on Civil and Political Rights and the United Nations Human Rights Committee found that it violated the convention.
power has impeded significant reform. A watershed event, however, was the 1930 decision of the Judicial Committee of the Privy Council in the “Persons” case,22 which held that the word “persons” within the meaning of section 24 of the Constitution Act, 1867, included women. The narrow ratio of the case stood for the proposition that women could no longer be denied appointment to the Senate of Canada solely because of their sex. They were “persons” as much as men were. The broader implications of the decision reached similar restrictions based on “personhood,” such that qualifications to practice law, to vote, or to hold other offices were gradually removed.23 As far as formal inequality in statutes was concerned, a victory of sorts was won. Canadian society came to recognize that formal equality for women was a desirable goal. In real terms, however, women as a group continued to be disadvantaged as compared to men. Women continued to suffer adverse treatment in employment, to be under-represented in all areas of public life, to be over-represented in the poverty class, and to experience disproportionate violence.24

III. Pre-Charter Equality Rights: The Non-Constitutional Context

A. The Canadian Bill of Rights

In 1960 the Parliament of Canada brought the Canadian Bill of Rights into force.25 Although the Bill of Rights does not have constitutional status, the jurisprudence developed under it has had a profound impact on the shape and content of the Charter guarantees of 1982 and their judicial interpretation.

Section 1 of the Bill of Rights addresses equality. It reads, in pertinent part:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely . . .

(b) the right of the individual to equality before the law and the protection of the law . . . .26

During the 1970s the Supreme Court of Canada decided ten cases under this section. In nine of the cases, the Court declined to find any breaches of “equality before the law” or of the “equal protection

23. See supra note 8, at 186-86.
24. Id. at 186-87.
of the law" guarantees. Needless to say, equality seekers were disheartened by this result. It appeared to them that the Bill of Rights was, in practice, an instrument more likely to perpetuate inequality than to redress past inequities and promote reform. For example, the two cases which involved gender equality show how judicial interpretation of the equality provision merely served to perpetuate inequality between women and men.

In Attorney General of Canada v. Lavell,27 two native women challenged a section of the federal Indian Act28 that disqualified them from claiming their Indian status if they married outside their race. The challenge was made under the sex equality guarantee of the Bill of Rights because Indian males who married non-Indian women did not suffer the same disqualification. Upon marrying non-Indian women, males not only retained their Indian status, they automatically conferred full Indian rights and status on their non-Indian wives and children as well. By contrast, the effect of losing statutory Indian status meant that upon marriage to a non-Indian, Indian women were required to leave their reserve. They could not own property on that reserve and were required to dispose of any property they may have held up to the time of marriage. They could be prevented from inheriting property and could take no further part in band business. Because their children were not recognized as Indian, they were denied access to the cultural and social amenities of the community. The women could also be prevented from returning to live with their families on the reserve, notwithstanding dire need, illness, widowhood, divorce, or separation. The discrimination reached even beyond life—these women could not be buried on the reserves with their ancestors.29

When this institutionalized gender inequality was put before the Supreme Court of Canada, the Court found that the legislation did not violate sex equality rights.30 The Court interpreted Section 1 of the Bill of Rights to guarantee only procedural, not substantive, equality.31 The Court said that Indian women were not the same as Indian men and therefore could not be compared with them. As long as all Indian women were treated the same, no violation of "equality before the law" or "equal protection of the law" had occurred.32 The Court refused to consider the inherent unfairness or adverse effect of the law on women.

28. R.S.C., ch. I-6, § 12(1)(b) (1970) (Can.) was the section challenged.
29. For a discussion of discrimination against aboriginal people generally, see THOMAS R. BERGER, FRAGILE FREEDOMS HUMAN RIGHTS AND DISSERT IN CANADA (1981).
31. Id. at 1373.
32. Id. at 1372.
The second case involved pregnancy discrimination. In *Bliss v. Attorney General of Canada*,33 the Court was asked to consider the validity of a legislated benefit provision. The Unemployment Insurance Act34 required that before an unemployed pregnant woman could qualify for maternity leave benefits, she must have been employed for ten weeks. At the same time, qualifications for unemployment benefits were less demanding for men and non-pregnant women. The differential treatment of pregnant women was particularly disadvantageous because women in the fifteen weeks immediately surrounding the birth were barred from receiving ordinary benefits even if they were able and willing to work.

When this inequality was challenged under section 1(b) of the Bill of Rights, the Supreme Court refused to strike down the discriminatory benefits provision because it could find no breach. Instead, the Court came to the bizarre conclusion that discriminatory treatment of pregnant women was not discrimination on the basis of sex. Justice Ritchie, speaking for the Court, stated:

Assuming the respondent to have been “discriminated against”, it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.35

This very restrictive definition of discrimination confined judicial scrutiny of sex as a protected criteria to sex as a totality, without considering its components or consequences. (A comparable application in the disability and race contexts would prohibit discrimination against the blind or against Sikhs but would not prohibit discrimination against guide dogs or the wearing of turbans.36) The Court further reasoned that the legislation conferred a special benefit for a voluntary condition.37 And any benefits or positive rights conferred by statute were not subject to the equality provisions of the Bill of Rights.

In both Lavell and Bliss, the Court embraced the view that the right to be free from discrimination was a negative right—the right to be free from something. The scope of this view was not broad enough to include positive rights such as the right to enjoy an equal share of society’s benefits. Both cases had a considerable impact on Canadian women. Not only did the cases teach them that the Court was not particularly sympathetic to women’s equality claims, they also made them realize that any future constitutional provisions addressing equality would have to contain broader and clearer substantive protection in order for real equality—or even a semblance of real equality—to be achieved.

B. Anti-Discrimination Statutes

Beginning in the early 1950s, Canadian provincial legislatures and the federal government recognized the need for comprehensive legislation prohibiting discrimination. The earliest acts dealt with fair employment practices, but soon fair accommodation practices were legislated as well. However, prior to the 1960s and 1970s anti-discrimination legislation was piecemeal and uncoordinated, and it placed the entire burden of promoting equality upon the individual victims of discrimination. The result was that victims of discrimination rarely complained, and very little enforcement was achieved.

The situation improved once the provinces began to consolidate and strengthen nondiscrimination statutes into human rights codes administered by human rights commissions. The codes prohibited discrimination in a number of areas, including employment, public


39. Ontario again led the way with the Fair Accommodations Practices Act, ch. 24, § 2, 1954 S.O. (Ont.), which dealt with equality of access to “the accommodation, services, facilities available in any place to which the public is customarily admitted.”


41. See Day, Impediments to Achieving Equality, in Equality and Judicial Neutrality, supra note 18, at 404-05.

accommodation, residential and commercial real estate, and advertising. Legislators were of the view that the establishment of human rights commissions charged with human rights education and with the administration, promotion, and enforcement of human rights legislation would make nondiscrimination a community responsibility. They thought that human rights legislation would both create a general environment of equal opportunity and serve to correct past inequalities. However, despite these laudable intentions, the legislation did very little to advance the status of women or other disadvantaged groups. In practice, the human rights legislation was unable to address the most serious discriminatory disadvantages.42 For example, despite protection from discriminatory practices in employment and equal pay provisions, the structure of the labour market did not change. Women continued to predominate in occupational job “ghettos” such as secretarial, nursing, and teaching occupations, where few men were employed. Anti-discrimination legislation could not reach wide discrepancies in pay between men and women in jobs of comparable responsibility and qualifications, just as equal opportunity legislation could not require employers to provide women with opportunities comparable to those enjoyed by men. Furthermore, anti-discrimination legislation was and continues to be based on an individual complaint mechanism. Individuals may lodge a complaint only if they claim to be or to have been the victim of a violation of a statutory right. Only an individual woman denied a promotion or opportunity on the basis of sex can complain about widespread employment inequities. Nothing can be done for women disadvantaged as a group by systemic institutionalized discrimination.

Contributing to the legislation’s ineffectiveness was the acceptance of the “sameness of treatment” concept of equality. Legislators assumed that if women and men were treated the same procedurally, both males and females of similar talent and motivation would achieve the same opportunities and successes. What they failed to take into account was that men, unlike women, do not experience long-term, widespread societal conditioning and systemic subordination. When, for example, women’s labour is confined to narrow, low-valued, and low-paid areas of work generally unoccupied by male workers, sameness of treatment will not ameliorate workplace disadvantage. This is because the situation of women workers in female job ghettos has no male basis of comparison. If there is no basis of comparison against which to prove differential treatment, the sameness-of-treatment definition cannot provide a legal basis for complaint.

Furthermore, even when clearly differential treatment gave rise to

43. See supra note 36 and accompanying text.
discrimination under these statutes, sameness of treatment as a remedy was deficient because it could not make the necessary adjustments required to be fair. To use the now trite example of two people competing in a footrace, the same-treatment model requires only that both runners start and finish the race at the same points, be equally free from any obstacles on the track, and be governed by the same rules. Whether or not the runners have unequal strength, training, or experience—or whether one is older, disabled, or malnourished—is irrelevant. Social, economic, and physical disadvantages or prejudices become invisible. The result is that sameness of treatment often has the effect of perpetuating inequality rather than curing it.

While the recognition of formal equality between individuals was an essential first step toward the achievement of legal and social equality, the early experiences of equality seekers using human rights legislation made it obvious that much more was required. Equality issues arising out of women’s unequal pay, allocation to disrespected work, demeaned physical characteristics, as well as targeting for rape, domestic battery, sexual abuse as children, systemic sexual harassment, use in degrading entertainment, and forced prostitution could not be addressed through a system or approach requiring sameness of treatment or male comparators to prove discrimination on the basis of gender. To address the deeply entrenched second-class status of women, it became clear that a markedly different approach was needed.44

In the late 1980s some human rights statutes were amended to address certain systemic inequalities.45 More importantly, a series of decisions of the Supreme Court of Canada indicated that the Court intended to put substantive meaning into human rights guarantees. The first major step was taken in Ontario Human Rights Commission and O’Malley v. Simpsons-Sears Ltd.46 when provincial antidiscrimination legislation addressing private discrimination in access

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to employment, accommodation, and services and facilities was interpreted. *O'Malley* involved unintended discrimination on the basis of religion. In defining "discrimination," the Supreme Court said that in addition to differential treatment with intent, the term also encompassed unintended effects of neutral practices. Later, in *Canadian National Railway v. Canada*, the Court extended the concept of discrimination to say that, notwithstanding formal equal treatment, if neutral laws have had an unintended adverse effect on protected groups or individuals, they may be discriminatory. A further development occurred in *Brooks v. Canada Safeway Ltd.*, wherein the Court held that in order to prove discrimination it was not necessary for the complainant to compare herself with a more favoured group. This decision opened up to scrutiny many old, but previously unchallenged, systemic problems.

In *O'Malley* the Court gave greater weight to human rights laws by holding that such laws are quasi-constitutional in nature and that, while they may not have the same overriding authority as a constitutional provision, they have a natural primacy over other laws. The *O'Malley* Court also set forth a purposive method as the appropriate general approach to the interpretation of human rights legislation. Writing for a unanimous Court, Justice McIntyre stated:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . . and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary—and it is for the courts to seek out its purpose and give it effect.

On the remedial side, the *O'Malley* Court further recognized that affirmative action is sometimes necessary to cure systemic discrimination. Acknowledging that discrimination is not always a wrong only against an individual, the Court said that when a whole group is wronged, the remedy must give full recognition of the group right not to be discriminated against.

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47. *Id.* at 547.
49. *Id.* at 1138-39.
54. *Id.*
The Court later held in *Central Alberta Dairy Pool v. Alberta*\(^{55}\) that anti-discrimination legislation requires employers to reasonably accommodate employee needs absent undue hardship.\(^{56}\) Earlier, the Supreme Court used a sexual harassment case, *Robichaud v. Canada*,\(^{57}\) to establish the principle that employers are vicariously responsible for the discriminatory acts of their employees, in order to emphasize that the purpose of human rights laws is to provide effective remedies to victims of discrimination. The *Robichaud* Court observed that interpretations of the law which undermine its capacity to effectively redress discrimination should be avoided.\(^{58}\)

In summary, all of these judge-made principles—repudiation of “same treatment” as the definition of equality, the focus on equality of outcome, the contextual, purposive approach to decision-making, and the requirement of effective remedies—indicated that in the context of human rights legislation, the Supreme Court had set out to create a new substantive approach to equality rather than a procedural one.

**IV. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

In the early 1980s, the prospect of a new Charter of Rights provided an opportunity for women and others to advance their constitutional interests beyond the formal equality constraints imposed in the jurisprudence established under the Bill of Rights.

After a massive lobbying effort, two sections relevant to sex equality were incorporated into the Charter. They were section 15 and section 28, which read as follows:

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.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.\(^{59}\)

Insertion of the guarantee of equality “under” the law was consid-


\(^{56}\) Id. at 491.

\(^{57}\) [1987] 2 S.C.R. 84.

\(^{58}\) Id. at 92-94.

\(^{59}\) Charter, *supra* note 1, §§ 15, 28.
ered to be essential in order to avoid the result reached in *Bliss* and *Lavell*. It was thought that this guarantee would ensure that constitutional review would reach the substance of laws as well as their procedure. The guarantee of "equal benefit" of the law was proposed to overcome the *Bliss* holding, which had permitted Parliament to differentiate as long as a benefit, rather than a burden, was conferred by legislation. Women argued that equal benefit must also be guaranteed because under-inclusive laws denying benefits contribute to the perpetuation of disadvantage just as much as laws requiring adverse treatment.

The second equality provision, section 28, resulted because women wanted assurance that their section 15 equality rights could never be eroded. The wording of the section makes it clear that it overrides everything else in the Charter, arguably giving it a potency absent from section 15. Because the section makes reference to all the rights and freedoms guaranteed in the Charter, it has a very broad application, encompassing equality in relation to all legal and political rights. This means that it could be used to challenge freedom of expression rights in the context of pornography, bodily security rights in the context of police practices applied to wife abuse or sexual assault cases, or any other gender-specific law, policy or practice of government which has the effect of diminishing women's legal or political rights compared to those of men. Section 28 requires that all persons must be able to enjoy all their constitutional rights and freedoms equally, to an equal extent.

V. Judicial Interpretation of Charter Equality Guarantees

Most scholars predicted that when it came time to interpret the

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61. Section 15 is subject to the section 33 override provision, which allows provinces and the federal Parliament under certain conditions to override the fundamental freedoms in section 2 or the rights in sections 7 to 15.

62. These section 28 arguments have been made in some constitutional cases, but it is too early to tell whether the Supreme Court will give them the weight suggested here. In *Jane Doe v. Toronto Metropolitan Police*, 74 O.R.2d 225 (Ont. Ct. App. 1990), the Court of Appeal of Ontario held that the plaintiff had the right to sue the police force for its investigation of a serial rapist who sexually assaulted her and many others. One of her complaints was that the police policy of keeping secret both the assailant's modus operandi and the police estimation concerning where the assailant would strike next violated her constitutional guarantee of equal security of the person. Another example which does not bode well for the Author's proposition was the case of *Seaboyer and Gayme v. R.*, [1991] 2 S.C.R. 577, where rape shield provisions were struck down as constitutional violations of the accused's guarantee of presumption of innocence. The majority did not even address the argument that women's security rights and equality rights should weigh more heavily in the balance. *But see id. at* 643 (L'Heureux-Dubé, J., dissenting).
Charter guarantees, Canadian courts would be strongly influenced by their American counterparts.\footnote{63} It was thought that notwithstanding the decisions rendered under human rights legislation, Canadian courts would likely follow the American view that unintended or adverse-impact results are excluded from the definition of discrimination for the purposes of constitutional law and that the "similarly situated" definition of equality would be adopted.\footnote{64}

Contrary to these predictions, however, the American constitutional case law was not particularly influential in Canada's highest court. Rather than ignoring its own human rights jurisprudence, the Supreme Court of Canada built upon it in the interpretation of Charter guarantees and rejected the constitutional equality jurisprudence of the U.S. courts.

The implications of this approach to constitutional equality guarantees are profound. The groundbreaking constitutional case was 
Andrews v. Law Society of British Columbia.\footnote{65} Decided by the Supreme Court in February, 1989, the case arose when the Law Society of British Columbia refused to admit a landed immigrant to the practice of law because he did not meet the requirements of the Legal Professions Act. The Act stipulated that practicing lawyers must be Canadian citizens. But for his nationality, Mr. Andrews was fully qualified to practice law. He brought an action to strike down the provision, arguing that the citizenship requirement violated his equality guarantees entrenched in section 15 of the Charter.

At trial his claim was rejected. The trial court found that although discrimination on the ground of citizenship came within the purview of section 15, the essence of discrimination is the drawing of "irrational" distinctions. The court concluded that the citizenship requirement was relevant to the practice of law and thus did not meet the irrationality test.\footnote{66}

The British Columbia Court of Appeal also rejected the complaint, but for different reasons. This court adopted the view that the essential meaning of the guarantees of equal protection and

\footnote{63} See, e.g., Walter Tarnopolsky, The Equality Rights, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY (Walter Tarnopolsky & Gerald Beaudoin eds., 1982). The author is now a judge of the Ontario Court of Appeal.

\footnote{64} The United States Supreme Court requires that before a statute can be struck down intentional discrimination must be found. It holds to this principle even though American federal human rights legislation acknowledges disparate-impact discrimination. See McCleskey v. Kemp, 481 U.S. 279, 297-99 (1987); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 278-80 (1979); Washington v. Davis, 426 U.S. 229, 239, 246-48 (1976).


equal benefit of the law is that persons similarly situated should be similarly treated.\textsuperscript{67} It then tied this test to the meaning of “discrimination,” which was defined in terms of reasonableness and fairness. The court said that in order to prove a breach of the Charter equality guarantees, the onus was on the plaintiff to prove, on a balance of probabilities, that the legislative means were unreasonable or unfair. The court then weighed the purposes of the legislation against its effects on the individual adversely affected.\textsuperscript{68}

The Court of Appeal’s requirement that interests be balanced suggested a more nuanced approach than that of the trial court, which required a mere testing of distinctions on the basis of rationality. But the spectre of this Aristotelian approach\textsuperscript{69} once again determining the content of equality guarantees caused widespread concern.\textsuperscript{70}

The decision of the British Columbia Court of Appeal was appealed to the Supreme Court of Canada.\textsuperscript{71} Five important equality questions were put to the Court for the first time: the meaning of the constitutional equality guarantee; its scope; the interests it is designed to protect; the meaning of discrimination; and appropriate remedies when a breach of section 15 is found.

Ultimately, the Court struck down the citizenship requirement in the Legal Professions Act as a violation of section 15 equality rights. In so doing, the Court differed markedly in its analysis from both lower courts. In its discussion of equality and discrimination, five fundamental principles emerged, all of which have major implications for equality under the Constitution. Summarized, the principles are as follows:

- The interests protected by section 15 must be determined by way of a generous interpretation using a purposive approach;
- The meaning of equality as sameness of treatment is rejected in favour of an effects-based approach. Intention need not be proven;
- The similarly-situated test is rejected;
- A finding of discrimination requires harm, prejudice or disadvantage; and


\textsuperscript{68} Id. at 322.

\textsuperscript{69} See ARISTOTLE, ETHICA NICHOMACEN 1131 (W.D. Ross trans., 1925). See also discussion supra part III.a.

\textsuperscript{70} Many third parties intervened in the appeal, including the Women’s Legal Education and Action Fund (L.E.A.F.) to argue against use of the similarly-situated test in defining equality. Other intervenors included the Coalition of Provincial Organizations of the Handicapped, The Canadian Association of University Teachers, and the Ontario Confederation of University Faculty Associations. Andrews v. Law Soc’y of British Columbia, [1989] 1 S.C.R. 143.

\textsuperscript{71} Id.
The scope of the equality guarantee is limited to the categories enumerated within the section or grounds analogous to them.

Each of these themes is discussed below.

A. The Purposive Approach

It was clear from the decision in *Andrews* that the Supreme Court wanted to make a difference for people in Canadian society who suffer real inequality.

In adopting the purposive approach, the Court rejected the use of formulaic, abstract rules to determine constitutional violations of the equality guarantee. In earlier decisions, the Court had repeatedly directed that the Charter be interpreted with careful attention paid to the equality provision's text, its legislative history, its role in a free and democratic society, and its relationships to other Charter rights.\(^72\) Consistent with this approach, the Court said that the interpretation of section 15 specifically required an appreciation and understanding of its social and historical purpose, and of the interests it was intended to protect—i.e., interests arising out of inequalities between real people rather than generic or abstract inequalities.

Justice McIntyre stated the purpose of section 15 in these words:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. 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. It has a large remedial component.\(^74\)

Justice Wilson added: "It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the unremitting protection of equality rights in the years to come."\(^75\)

Although the statements do not tell us much more than does the section itself, read in the context of the entire judgment, it is apparent that the Court was adopting a broad and generous approach to the section's purpose similar to that which the Court had earlier used in the interpretation of human rights legislation.\(^76\)

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74. *Id.* at 171 (McIntyre, J., dissenting in part).

75. *Id.* at 153.

76. See supra text accompanying notes 41-50.
B. The Meaning of Equality and Discrimination

Addressing the constitutional meaning of equality, the Andrews Court first made it clear that sameness of treatment is not necessarily equality. Justice McIntyre stated: "It must be recognized at once . . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."  

In Andrews the Court rejected the view that any distinction constitutes discrimination and also rejected the view that discrimination requires the plaintiff to prove that a distinction is unfair or unreasonable. The Court's definition of discrimination, drawn from its human rights jurisprudence, places the emphasis on the impact of the law regardless of whether there was intention to discriminate or not. The unanimous court stated:

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.  

Rejecting sameness of treatment as the only meaning of equality is a significant departure from traditional constitutional values. It amounts to a recognition that Canadian society is made up of a diversity of groups and individuals in different circumstances with different needs. The rejection is particularly significant for women. Under the sameness-of-treatment approach, when women have discrimination complaints they are always compared to men. In a male-dominated society, the equality standards that women are forced to accept are designed to meet male, not female, needs. By contrast, the approach adopted in Andrews gives women the opportunity to challenge male-defined structures and institutions that disadvantage

78. Id.
79. The Court left this part of the analysis to be decided under section 1 of the Charter, which states: "The [Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Charter, supra note 1, § 1.
them, and to set their own norms based on their own needs and characteristics. The Court's statement that identical treatment can accentuate inequality incorporates the idea that neutral laws or policies can violate section 15 if they have a disparate impact on disadvantaged individuals or groups. This results-oriented approach expands the protective ambit of the equality guarantees under the Charter substantially beyond that permitted by the equal protection doctrine adopted under the Bills of Rights in both Canada and the United States.

There are additional implications from a remedial perspective. When discrimination is found, an effects-based approach allows for affirmative remedial responses. Although the remedial options include striking down the law or policy, they also include reforming an unconstitutional provision to secure equality of outcomes or implementing special measures to alleviate the disadvantage it causes or exacerbates. These affirmative remedies will require the standards, rules, laws, and policies of the status quo to be challenged in consideration of past, existing, and future adverse effects and systemic discrimination. The process of pleading and proof may go some considerable way to identifying and remediying systemic disadvantage. Once this information is in the public domain, other members of excluded groups will be in a much more advantageous legal and political position to argue for better access to resources, or to skill, education, and employment opportunities without necessarily invoking the legal process.

In cases involving discriminatory allocation of benefits, courts may be especially inclined to adopt a "positive" rights approach. When under-inclusive legislation is found unconstitutional, the ability to promote equality is greatly enhanced if courts extend benefits to those improperly excluded. On the other hand, if courts limit themselves to merely striking down unequal benefit provisions, the result in most cases will be contrary to the purpose of the equality guarantees. The only thing achieved will be a guarantee that groups or individuals have the same entitlement to no benefits. This "dog in the manger" approach to equality produces sameness rather than equal-

84. This was the case in Schachter v. Canada, [1990] 2 F.C. 129 (Fed. Ct.), and that finding has been appealed by the Federal Government to the Supreme Court of Canada. A similar result was achieved in Re Blainey and Ontario Hockey Ass'n, 54 O.R. 2d 513 (Ont. Ct. App. 1986) (leave to appeal denied), where the court, applying the Ontario Human Rights Code, excluded application of the Code's nondiscrimination provisions to the Ontario Hockey Association, which in turn refused to allow girls to play hockey on any of their teams.
ity and should be avoided when equality of result is the desired goal.

This issue arose in Schachter v. Canada,85 a case currently before the Supreme Court. The plaintiff in Schachter is challenging the Unemployment Insurance Act86 under section 15 of the Charter on the ground that he, a biological father, has been denied parental leave benefits available to adoptive parents87 and to biological mothers.88 The Federal Court of Appeal found a breach of section 15 and also accepted the argument that striking down the parental leave provisions would not promote equality, even though it would place both natural and adoptive parents in the same position. The court held that as long as the Act remains in its present form, it must provide both natural parents with the same childcare benefits available to adoptive parents.89 As a result, the law in Canada today is that courts have the authority to extend statutory benefits to those who have been improperly excluded from them. We await a final determination from the Supreme Court.

C. Rejection of the “Similarly Situated” Test

Perhaps the most emphatic aspect of the Court’s discussion of equality in Andrews was its rejection of the “similarly situated” test—the Aristotelian principle of formal equality.90 In no uncertain terms, Justice McIntyre argued that the test is seriously deficient, ignores the content of the law, is tautological, and could even justify Hitler’s Nuremburg laws as long as all Jews were treated similarly.91

The similarly-situated test determines discrimination by starting from the proposition that things that are alike should be treated alike and things that are unlike should be treated unlike in proportion to their unlikeliness. Part of the reason the Court criticized the test so harshly was that it provides no guidance as to what should follow once a finding of difference or “unlikeness” is made. The Bliss pregnancy case makes this point. Once the Court in Bliss determined that pregnant women workers were “different” than men and non-pregnant women workers, there was nothing to prevent the government from treating pregnant workers in a way that disadvantaged them because of their pregnancy.92 The similarly-situated test permitted this treatment even if the determination of “difference”

87. Id., ch. 48, § 20.
88. Id., ch. 48, § 30.
relied solely on the subjective values, stereotypes, or biases of the judges at the time. No requirement of objective rationality, certainty, or fairness of treatment was required.

Another related weakness the Court identified in the similarly-situated test is the way similarity is measured. When women are compared to men, their opportunity to be treated as equal is limited to the extent that they are the same as men. This superficial form of analysis severely limits and circumscribes women's equality claims. As Catharine MacKinnon has observed, this approach in practice means that if men don't need it, women don't get it. Issues such as pregnancy discrimination, sexual harassment, violence against women, reproductive choice, and pornography fall outside the scrutiny of constitutional equality guarantees because men, the comparators, have no comparable needs and the similarly-situated test is not met. There is, thus, no legal basis for complaint. In other words, many legally sanctioned abuses women suffer are not considered equality issues at all. The similarly-situated theory effectively works to obscure the systemic, historically embedded, disadvantaged reality of women because of the narrowness of its scope.

On the other hand, when discrimination is measured in terms of disadvantage, as it was in Andrews, the court asks whether a claimant is a member of a "discreet and insular minority" that has experienced persistent disadvantage on the basis of personal characteristics such as those listed in section 15. "Persistent disadvantage" is determined contextually by examining the group in the entire social, political, and legal fabric of our society. If the measure under attack continues or worsens that disadvantage, it violates the equality guarantee. No comparator is required.

When the disadvantage test is applied to gender inequality cases, women's social subordination is recognized in terms of a sexual hierarchy with women on the bottom. This revelation adds a new dimension to constitutional equality analysis because it finally requires the law to confront the reality that women suffer from socially created inequality. The systematic abuse and deprivation of power they experience is due to their place in the sexual hierarchy.

Viewed this way, the inappropriateness of the similarly-situated test is obvious. The test assumes that those using it enjoy social equality and are therefore entitled to legal equality. When one is born socially unequal because of gender (or other personal characteristics), it is almost impossible to be the same as—or to be "similarly situated" to—the socially advantaged. If true equality or equal-

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ity of result is the desired goal of constitutionally entrenched equality guarantees, the Andrews analysis is much more appropriate than that used under the Bill of Rights because the real problem of the socially disadvantaged—the inequality of power between dominant and subordinate groups—can be addressed. The similarly-situated criterion, by concerning itself only with sameness and difference, remains in the realm of the abstract.96

This is not to say that the related concept of sameness of treatment is always inappropriate. It clearly is not. History shows us that personal characteristics that make people “different”—whether gender, skin colour, disability, age, or religion—have often put them in the categories of greatest disadvantage. In some situations, identical treatment with those who are the most advantaged will be the most appropriate and effective remedy. In other circumstances, however, different treatment may be required to alleviate the disadvantage. That different treatment will vary in each case, depending upon the facts. What is most attractive and practical about the Andrews decision is the flexibility it offers to the measurement of equality and the ability it gives the judge to identify and remedy systemic disadvantage in a variety of different ways.

D. The Scope of the Equality Guarantee

The decision in Andrews both broadened and narrowed the scope of the equality provisions. The criterion of disadvantage broadened the scope of section 15 to cover unintentional or adverse-impact discrimination. On the other hand, it limited the scope of the equality guarantees in terms of standing. In other words, claims by individuals or groups which cannot prove disadvantage by legislative classification will rarely succeed.

It could be said that the plaintiff in Andrews, a white, male, highly educated, healthy, and able-bodied person was not in the category of “disadvantaged.” However, the contextual approach, as applied to this plaintiff (as a member of the group of non-citizens), put him within a group analogous to the enumerated groups in section 15. Justice Wilson explained that non-citizens, because of their lack of political power, are “vulnerable to having their interests overlooked and their rights to equal concern and respect violated.”97 She emphasized that the question of whether a group is analogous to those enumerated in section 15 must be assessed not only within the context of the challenged law, but also in the context of society generally.98

Determining disadvantage by going outside the legislation is very

96. See Sheppard, supra note 84, at 218-22.
98. Id.
significant because any rational litigant, regardless of group affiliation, will always be disadvantaged by the legislation which is the subject matter of his or her complaint. If the Court is going to adhere to a purposive approach it must be able to determine whether or not the complaint fits into overall patterns of disadvantage and whether or not identical or differential treatment is discriminatory. Justice Wilson explains: "[I]t is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage." An external evaluation allows the Court to ensure that those who suffer persistent disadvantage will benefit from section 15 guarantees while those with generic or abstract equality claims will have to take their complaints to some other forum.

VI. IMPLICATIONS FOR WOMEN'S LEGAL AND SOCIAL EQUALITY

At a minimum, the decision in Andrews will allow Canadian courts to hear women's stories, whether they have to do with racism, pregnancy, heterosexism, age, poverty, disabilities, or dominance of the white culture. No longer are women held hostage by abstract doctrinal rules that obliterate their reality. The constitutional approach to equality adopted by the Supreme Court provides women with an opportunity to educate the judiciary about their lives. Cases decided after Andrews show the promise held out by this approach.

In Brooks v. Canada Safeway, for example, the Supreme Court of Canada overturned Bliss, which had decided, under the Bill of Rights, that discrimination on the basis of pregnancy did not constitute sex discrimination. In Brooks, as in Bliss, pregnant women plaintiffs had received disfavoured treatment. On this occasion, however, the Court said that, notwithstanding the fact that only women get pregnant, the disfavoured treatment constituted sex discrimination. The Court not only found it unnecessary to find a male equivalent to the condition of pregnancy, it specifically held that the disadvantage the pregnant women suffered came about because of their condition—because of their difference. In recognizing such discrimination, Chief Justice Dickson described its invidious nature as well as its social costs:

101. Id.
103. Id. at 1243.
Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.104

Although Brooks was decided under human rights legislation, the interrelationship of human rights and Charter equality principles fused by the Andrews case suggests future possibilities for the Court's approach to constitutional equality. Certainly the tone, reasoning, and language of Brooks is a far cry from the earlier decision in Bliss.

Another recent human rights case, Janzen v. Platy Enterprises,106 dealt with sexual harassment. In Janzen the Supreme Court unanimously overturned a lower court's decision which had concluded that sexual harassment did not constitute sex discrimination. As in Brooks, the Court rejected formalistic, "sameness" reasoning in favour of the approach adopted in Andrews. Rather than merely relying on the concept of adverse-effect discrimination, which could have resolved the matter in favour of the complainants, the Court developed a much more sophisticated analysis that explained the relationship between sexual harassment and gender. Writing for the Court, Chief Justice Dickson first discussed how sexual harassment has a differential impact on women in terms of the gender hierarchy of the labour force and the inherent "abuse of both economic and sexual power" that the harassment106 entails. The Court then defined sex discrimination in the manner suggested by Andrews: "[D]iscrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender."107

Looking at the social and economic realities of women, the disparate impact of sexual harassment, and the gender hierarchy of the workforce, the Court concluded that sexual harassment amounted to sex discrimination. The lower court's analysis that led to the conclusion that sexual harassment involved discrimination on the basis of

104. Id. at 1243-44.
106. Id. at 1284.
107. Id. at 1279.
sexual attractiveness of the victim, not discrimination on the basis of sex, was much like that in Bliss, where the lower court had held that discrimination on the basis of pregnancy was not discrimination on the basis of sex. The lower court in Janzen also thought that sexual harassment was treatment accorded to an individual, and that the victim's gender was irrelevant. The Supreme Court of Canada rejected these views as misconceived. It said:

While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that the ascribing of a group characteristic to an individual is a factor in the treatment of that individual.

Chief Justice Dickson went on to observe that the notion of sexual attractiveness, like pregnancy, cannot be separated from gender.

The contextualized approach used by the Janzen Court demonstrated sensitivity to women's perspectives. The Court appeared to understand that in the context of a deeply sexist society that objectifies women's bodies and perpetuates a male-defined image of sexual attractiveness, the practice of sexual harassment cannot be separated from the unequal relations of sexual interaction that disadvantage women. The Court noted with approval the view that a hostile or offensive working environment created by sexual harassment "is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."

The Brooks and Janzen decisions are positive and important legal victories for women in Canada. Although neither were Charter cases, they further developed the approach to discrimination articulated in Andrews and revised legal doctrine that previously reflected only male-defined norms. Two other important cases demonstrating a willingness on the part of the Court to question male assumptions underlying the law are R. v. Morgentaler and R. v. LaVallee.

In Morgentaler the Criminal Code legislation relating to abortion was struck down on the ground that it violated section 7 of the Charter, which guarantees everyone "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."

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108. Id. at 1288.
109. Id. at 1290.
The majority of the Court found the legislation unconstitutional as a violation of the security of the person guarantee. Justice Wilson, in a concurring opinion, expanded the reasoning under the liberty guarantee, linking the notion of being a woman with the notion of being human in a way never before articulated in Canadian jurisprudence. She described the implications of an unwanted pregnancy as follows:

This decision [whether to seek an abortion] is one that will have profound psychological, economic and social consequences for the pregnant woman. . . . It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be a response of the whole person.118

She elaborated on the point by rejecting male-centred norms that influence the concept of "liberty" because the experiences of pregnancy, giving birth, and abortion are ones for which men have no analogy:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out . . . the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.118

Although Justice Wilson did not refer to section 28 of the Charter, its values are implied in her judgment. Clearly, if liberty and security rights are to be enjoyed equally by male and female persons, courts must interpret laws which infringe upon these rights in a way that is meaningful for women as women. The Morgentaler decision is a landmark case for future gender equality jurisprudence because

116. Id. at 171-72 (citation omitted).
it interpreted the abortion law from the empathetic perspective of the experiences, aspirations, and problems of women and demonstrated how courts can begin to incorporate women’s reality within the meaning of Constitutional rights.

Lavallee demonstrates the effect of Andrews beyond constitutional and human rights law. Lavallee involved the criminal law of self-defence in the prosecution of a woman who shot her partner in the back of the head as he left her room. The shooting occurred after an argument in which the appellant had been physically abused and was fearful for her life, having been taunted with the threat that if she did not kill him first, he would kill her. She had frequently been a victim of his physical abuse. In assessing her defence of self-defence, the Court recognized the inequities perpetuated by the sameness-of-treatment model of equality. Borrowing analytically from the approach adopted in Andrews, the Court found that the common law self-defence criterion of “imminent danger” is gender-biased when applied in the context of wife abuse.117

Expert evidence on the battered wife syndrome was held to be admissible, which in turn allowed the Court to apply a woman-centered approach to the criterion of reasonableness. The Court stated: “Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality.”118 The Court then extended the analysis to recognize the gender specificity of battering. In reasoning similar to that of Morgentaler, Justice Wilson, writing for a unanimous court, questioned the male-defined concept of reasonableness when it is women who are the victims:

If it strains credibility to imagine what the “ordinary man” would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical “reasonable man”.119

In its conclusion, the Court determined that the law’s traditional concept of self-defence evolved out of a “bar-room brawl” model that comprehends only a male concept of reasonableness. In order to be fair to women and (presumably) to recognize their right to equal protection and benefit of the law, the Court reconstructed the defence. It is quite clear from the decision that Charter values underlie Lavallee even though the Charter was not argued in the case.

Another noteworthy example is the Supreme Court’s decision in

118 Id. at 880.
119 Id. at 874.
R. v. Keegstra.\textsuperscript{120} Although not involving gender equality directly, its implications for future sex equality jurisprudence are considerable. This was a freedom of expression case involving a constitutional challenge to a hate propaganda law in the Criminal Code. The Court upheld the law as, among other things, advancing equality and preventing harm. The Keegstra Court supported the regulation of hate propaganda on the ground that its dissemination constituted a practice of inequality. In doing so, the Court used section 15 in a unique way. It said that the constitutional guarantee could be used not only to strike down laws which discriminate, but also to constitutionally support laws which further section 15 values. Further, it held that section 15's objective of promoting social equality is relevant to the inquiry about justifiable limits on freedom of expression. The Court examined the larger social, political, and legal contexts of the groups targeted for protection by the hate propaganda provisions and weighed them against the free speech interests of hate mongers. In other words, the Court contemplated the social meaning of hate propaganda and uncovered its harmful effects.\textsuperscript{121} Once these were revealed, the weighing of interests resulted in the establishment of equality as a pre-eminent value in Canadian society. In Keegstra, the centrality of equality to the full enjoyment of individual as well as group rights demonstrated a firm acceptance of the view that equality is a positive right, that the Charter's equality provision has a large remedial component, and that legislatures should take positive measures to improve the status of disadvantaged groups. Most importantly, Keegstra demonstrated the Charter's potential to achieve social change, envisioning a society that responds to needs, honours difference, and rejects abstractions. Keegstra should have major implications for the issue of women's equality raised by pornography.

Finally, on February 27, 1992, the Supreme Court decided R. v. Butler.\textsuperscript{122} In Butler, the Court unanimously upheld Canada's anti-obscenity law,\textsuperscript{123} using a harms-based equality analysis. The Court held that the law infringed freedom of expression as protected by Section 2(b)\textsuperscript{124} of the Charter, but that it nevertheless passed the section 1 "reasonable limit" test.\textsuperscript{125} Although the Court declined to

\textsuperscript{121} Id.
\textsuperscript{123} R.S.C., ch. C-46, § 163 (1985) (Can.).
\textsuperscript{124} Section 2 of the Charter states, in pertinent part, "Everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . ." Charter, supra note 1, § 2.
\textsuperscript{125} Section 1 states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Charter, supra note 1, § 1.
accept the argument that some forms of pornography fall outside the Charter's ambit because they constitute a violent form of expression, the Court focused on the harms of violence, degradation, and dehumanization in pornography as the basis for its decision.

The Court limited its deliberations to an examination of the definition of obscenity in section 163 of the statute, which defines obscenity as "the undue exploitation of sex, or of sex and one or more of the following subjects, namely, crime, horror, cruelty and violence." The Court said that the meaning of "undue" must be determined by a "community standard of tolerance." This determination must be made on the basis of the degree of harm that may flow from such exposure, harm of the type which predisposes persons to act in an anti-social manner. In explicitly finding pornography to be harmful, the Court held that it harms women's rights to be equal, their sense of self-worth, and their physical safety. The harm is exacerbated, the Court said, by the " burgeoning pornography industry," making the regulatory objective of Parliament more pressing and substantial now than when the statute was first enacted.

Most significantly, in its section 1 analysis the Court clarified the purpose of the obscenity provisions. It said that Parliament's objective is not moral disapproval but, rather, avoidance of harm of the type which potentially victimizes women. This classification in the law is of historic importance. For the first time, the Supreme Court of Canada has linked the obscene with what subordinates or degrades women rather than with what offends some notion of sexual morality.

Having found that the purpose of the legislation was the avoidance of harm, the Court had little difficulty in finding that the regulation of pornography can be constitutionally justified. For example, Justice Sopinka, writing for the Court, observed that the harms analysis makes it untenable to argue that time, place, and manner restrictions are a better form of regulation than prohibition. This is correct because imposing heavy taxes on pornography, or requiring special licences for its distribution, sends the message that harms to women will be tolerated as long as the user pays. Government would

127. R. v. Butler, _____ S.C.R. at _____, 134 N.R. at 105. According to the Court, the type of sexual material at which the statute aims is the portrayal of sex coupled with violence or explicit sex that is degrading or dehumanizing—both of which create a substantial risk of harm. Explicit sex which is neither violent nor degrading nor dehumanizing will not be considered obscene unless it involves the use of children in its production. The Court recognized an exception to the law where the obscene depiction is necessary for artistic purposes or for the serious treatment of a theme. Id. at 113.
128. Id. at 134.
129. Id. at 127.
be complicit in the pornography trade, and even become a participant in it, if it collected such taxes or issued such licences. Justice Sopinka pointed out how inconsistent and hypocritical it is to argue that time, place, and manner restrictions are preferable once the state has reasonably concluded that certain acts are harmful to certain groups in society. To permit such acts as long as conditions are more restrictive is wrong because the harm sought to be avoided remains the same in either case. This approach is encouraging because it means that the Charter is not neutral on practices which promote inequality. Rather, it is a constitutional commitment to ending them.

The suggestion that reactive solutions to the problems caused by the degradation of women, such as the provision of counselling for rape victims, are more effective than absolute prohibitions, also loses its force once harms are recognized. As alternatives to prohibition, reactive solutions imply that women must absorb the harm caused by the very behaviour encouraged by pornography. It is hard to believe that such a requirement could have any credibility in a society which is free and democratic and aspires to the most basic norms of human rights. Certainly these and other measures should be offered to protect women from violent men. But to argue, as the civil liberties intervenors in Butler did, that such responses are preferable to controlling the dissemination of the very image that contributes to such behaviours, diminishes the harm and consequently diminishes women and children as full citizens. As the Court emphasized, serious social problems, such as violence against women and children, require a multifaceted approach.

In examining the freedom-of-expression values of seeking and attaining the truth, participating in the political process, and individual self-fulfillment, the Court found, as it did in Keegstra, that speech which harms people is of low value. The Court said that the kind of expression represented by pornography does not stand on an equal footing with other kinds of expression. The Court buttressed this view by taking judicial notice of the fact that pornography is motivated, in the overwhelming majority of cases, by economic profit. In summary, the Court's recognition that the sexual exploitation of women and children can lead to "abject and servile victimization" as well as other types of harm goes some way toward redistributing speech rights between men and women. The Court's contextually sensitive method of defining pornography is re-

130. Id. at 145-46.
131. Id. at 146-47.
132. See supra text accompanying notes 120-21.
134. Id. at 137, 142.
135. Id. at 132 (citation omitted).
responsive to progress in the knowledge and understanding of pornography and its harms. The Butler decision is a welcome and important development in the law which other countries and the international human rights community should contemplate if they are genuinely serious about the issues of women's human rights, violence against women, and women's equality.

VII. Conclusion

Just as in Andrews, Schachter, Morgentaler, Lavallee, Brooks and Janzen, the Keegstra and Butler decisions demonstrate a rethinking of legal concepts. The assumption that human behaviour can be generalized into natural universal laws is being challenged by an analytical approach which favours context rather than detached objectivity. Starting in human rights cases, elaborated and expanded upon in Charter equality cases, this new approach is now reaching into criminal and civil law. By expanding the perimeters of the discussion, previously hidden facts and issues are exposed. The cases demonstrate that social and economic arrangements that have been taken for granted often disadvantage women in a multitude of ways. To redress past wrongs, equality principles have been taken beyond the sameness approach as the courts have begun to realize that not all individuals have suffered historical, generic exclusion on the basis of their group membership. Where barriers impede fairness for some individuals, they must be removed—even if this means treating some people differently. The Supreme Court of Canada has demonstrated in a number of cases on a wide range of issues that gender equality in the Canadian context is now result-oriented. Rights and duties are being allocated equitably, not simply on the basis of abstract, doctrinally stagnant principles of formal equality that thwart rather than achieve substantive equality.

This is not to say that real equality has been achieved in Canada. Far from it. What it does say is that a major stumbling block to its achievement has been identified, and that a methodology has been developed to move toward our country's proclaimed commitment to legal and social equality. Much remains to be done, but what is critically important is that women can now address, in constitutional terms, the deepest roots of social inequality of the sexes. Issues such as reproductive control and sexual violence can now be considered sex equality issues, and laws dealing with these issues can be subjected to constitutional scrutiny. The Supreme Court of Canada is the first high court in the world to adopt the reality of social disadvantage as a basis for constitutional equality analysis. As a result, it will be the first court with an opportunity to change it.
