

## SYMPOSIUM HONORING JUSTICE RUTH BADER GINSBURG

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I must, at the outset, disclose my “multiple partiality” . . . I have been an unconditional admirer of Justice Ginsburg and her jurisprudence since she was appointed to the Supreme Court of the United States.

Since older, *a fortiori* our respective backgrounds as early career women in law offer a lot of similarity, and I was myself the second woman to sit on the Supreme Court of Canada.

Further disclosure: Justice Ginsburg and I share a passion: opera and a fate (or is it a curse?)—dissents. Her vision of equality and, in particular, gender justice has inspired many. I am one of those.

Gender justice is part and parcel of the much larger issue: that of equality.

A discussion about equality must start with the question: why is equality so important both for the law and the people? The answer for me is simple: inequality is injustice, it is the negation of human dignity.

My own definition of gender equality is the “extraordinary” notion that women are human beings entitled to the same respect, consideration and opportunities as other members of society. That definition applies, *mutatis mutandis*, to all those subject to discrimination by reason of their ethnicity, sexual orientation, religion, social status, etc.<sup>1</sup>

Justice Brennan said it this way: “Human relations are extremely complex” and “the law is there to serve . . . the realization of man’s ends, the ultimate and the ‘immediate . . . the realization of human dignity through full opportunity and the eradication of

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1 The Equal Rights Trust’s Declaration of Principles of Equality defines equality as “(1) the right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and the benefit of the law.” Available at [www.equalrightstrust.org](http://www.equalrightstrust.org); see also Claire L’Heureux-Dubé, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363 (2002); Claire L’Heureux-Dubé, *The Search for Equality: a Human Rights Issue*, 25 QUEEN’S L.J. 401 (2000).

bias.”<sup>2</sup>

Full opportunity for women is a theme that resonates more than once in Justice Ginsburg’s jurisprudence.<sup>3</sup>

It does resonate also in the Canadian Supreme Court jurisprudence based on Section 15 of the Charter of Rights and Freedoms, which does not parallel the vague and laconic language of the Fourteenth Amendment of the United States Constitution guaranteeing all persons the right to protection under the law. Instead, it is clearly elicited in Section 15 of the Canadian Charter of Rights and Freedoms that:

15: (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.<sup>4</sup>

I must add that Canadian women were obviously sensitive to the language of the equality provisions of the Charter and lobbied for broader language, for distinctions based on sex to be subject to a stringent review, and for inclusion of a general statement of equality between men and women. Their proposed wording was accepted and now forms part of Section 15(1) of the Charter.<sup>5</sup>

Contrary to the jurisprudence under the Fourteenth Amendment that had developed the “separate but equal” standard since *Plessy v. Ferguson*,<sup>6</sup> the Supreme Court of Canada rejected this approach and opted at the outset for a large and purposive interpretation of

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2 HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 131 (1995) (quoting William J. Brennan, Jr., Justice, Georgetown University Law Center Gaston Lecture (Nov. 25 1957)).

3 See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Miller v. Albright*, 523 U.S. 420 (1998).

4 See Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 §§ 3–15 (U.K.)

5 On the history of women’s participation in constitutional negotiations during that period, see ALEXANDRA DOBROWOLSKY, *THE POLITICS OF PRAGMATISM: WOMEN, REPRESENTATION, AND CONSTITUTIONALISM IN CANADA* (2000); M. Eberts, *Sex-based Discrimination and the Charter* in *EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 18 (Anne F. Bayefsky & Mary A. Eberts eds. 1985); SHERENE RAZACK, *CANADIAN FEMINISM AND THE LAW* (1991).

6 163 U.S. 537 (1896).

the Charter, adopting Lord Sankey's metaphor in the *Person's Case*<sup>7</sup> of a constitution as a "living tree,"<sup>8</sup> which the Court reiterated as recently as December 22, 2011.<sup>9</sup>

I am aware that this metaphor does not make for unanimity among justices of the United States Supreme Court. Justice Breyer and Aharon Barak's controversial views on the role of the judge in a democracy,<sup>10</sup> as well as their references to foreign jurisprudence,<sup>11</sup> are not widely accepted (Justices Ginsburg and Breyer excepted). Canada has readily embraced such views without any controversy.

Many constitutions, particularly those of more recent vintage such as those of India, South Africa, and Canada, have used as their model the framework set out in the Universal Declaration<sup>12</sup> and international human rights conventions,<sup>13</sup> rather than the civil liberties model found in the United States Bill of Rights.

The Court, in its first decision under Section 15 of the Charter in *Andrews v. Law Society of British Columbia*, emphasizes that "the principles applied under the Human Rights Acts are equally applicable to questions of discrimination under [Section] 15(1)."<sup>14</sup>

Fundamentally, the human rights approach requires balancing the rights of individuals, the recognition that historically disadvantaged or minority groups may need special protection, and collective social interests.

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7 *Edwards v. Canada (AG)* (1929) J.C.J. No.2 (1930) A.C. 124 P.C.

8 *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.).

9 *Reference re Securities Act*, [2011] 3 S.C.R. 837, para. 56 (Can.).

10 *See, e.g.*, STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006).

11 *See, e.g.*, *Knight v. Florida*, 120 S. Ct. 459, 462–63 (1999) (Breyer, J., dissenting) (citing numerous decisions from foreign courts); Associate Justice Stephen Breyer, *Keynote Address: The Supreme Court and the New International Law*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003) (stating that other countries' responses to legal issues may "cast an empirical light on the consequences of different solutions to a common legal problem"); BARAK, *supra* note 10.

12 Universal Declaration of Human Rights: GA. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at 71 (Dec. 10, 1948).

13 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 25 (entered into force Mar. 23, 1976); *see also* International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, arts. 3–4 (entered into force Jan. 3, 1976).

14 [1989] 1 S.C.R. 143, 145 (Can.).

That is the foundation of the Supreme Court of Canada's series of decisions on the meaning of equality based on Section 15 of the Charter and its human rights model. The Court has elaborated a powerful concept of "substantive equality."<sup>15</sup>

I am aware of the immense contribution made by Professor Ruth Bader Ginsburg at Columbia University and as a litigator for the ACLU, where the particularly astute strategy she designed has been credited with successfully setting the tone for future gender equality jurisprudence.<sup>16</sup>

Interestingly, the first decision of the Supreme Court of Canada on equality issues did not concern gender equality, but the right of a male British citizen to practice law in British Columbia in spite of the fact that he did not have the Canadian citizenship required by the Law Society of British Columbia. In that judgment, the court laid the foundation of its future decisions by stating that: "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."<sup>17</sup>

It made clear that the purpose of Section 15 is the promotion and protection of equality of opportunity and result, not just similar treatment for those similarly situated. Instead of resorting to different levels of scrutiny, adopted by the United States Supreme Court, the Court resorted to a contextual analysis of different patterns of discrimination to determine whether the challenged legislative provisions perpetuate negative stereotypes and discrimination,<sup>18</sup> either intentionally or by adverse effect,<sup>19</sup> in matters of discrimination in particular. As Johan Steyn, formally of the House of Lords, wrote,

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15 *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143; *Symes v. Canada*, [1993] 4 S.C.R. 695, 786 (Can.); *Law v. Canada*, [1999] 1 S.C.R. 497, 548 at para. 46 (Can.).

16 *Reed v. Reed*, 404 U.S. 71 (1971) (in which Justice Ginsburg authored a groundbreaking brief concerning an Idaho statute, resulting in extension of the constitutional guarantee of equal protection to women); *see also* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (in which Ruth Bader Ginsburg argued her first case before the Supreme Court, stating that the strict scrutiny test, earlier applied to racial discrimination should be applied in sex discrimination cases); *Weinburger v. Wiesenfeld*, 420 U.S. 636 (1973) (Ginsburg was successful in a Social Security case on behalf of widowed fathers who were denied benefits); *Califano v. Goldfarb*, 430 U.S. 100 (1977); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980).

17 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 171.

18 *See, e.g., M. v. H.*, [1999] 2 S.C.R. 3 (Can.).

19 *O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536, 547 (Can.).

“[i]n law context is everything.”<sup>20</sup>

A most recent unanimous judgment of the Supreme Court of Canada, *Withler v. Canada (AG)* does makes the point that:

The central and sustained thrust of the Court’s [Section] 15(1) jurisprudence has been the need for substantive contextual approach and corresponding repudiation of a formalistic “treat likes alike” approach. . . . What is required is an approach that takes account of the full context of the claimant group’s situation, the actual impact of the law on that situation, and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group.

The jurisprudence establishes a two-part test for assessing a [Section] 15(1) claim: (1) does the law create a distinction that is based on enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?<sup>21</sup>

Against this background of Canadian and United States Supreme Courts’ approaches to equality issues, looking back at those early days of Ruth Bader Ginsburg as a professor and litigator, it is clear that she was a trailblazer. One is struck by the originality of her thinking at a time when no equality jurisprudence had yet developed, not only in the United States but elsewhere. South Africa and Canada’s new constitutions were not yet born, and equality issues were not yet states’ focus. However, I venture to say that Ginsburg’s views were in the true spirit of the Universal Declaration of Human Rights, in which equality is at the forefront of all guaranteed rights as part and parcel of human dignity.

Later on as a Justice of the Supreme Court, Justice Ginsburg would herself describe women’s rights as “an essential part of the overall human rights agenda, trained on the equal dignity and ability to live in freedom all people should enjoy.”<sup>22</sup>

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20 *R (Daly) v. Sec’y of State for the Home Dep’t*, [2001] 2 AC 532, para. 28, available at <http://www.bailii.org/uk/cases/UKHL/2001/26.html>.

21 [2011] 1 S.C.R. 396, at \*4–5 (Can.).

22 *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, AMERICAN CIVIL LIBERTIES UNION, Mar. 7, 2006, <http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff>.

All these early years fighting for gender justice were the precursors of Justice Ginsburg's Supreme Court jurisprudence.

Justice Ginsburg's jurisprudence as a Justice of the Supreme Court of the United States, I would suggest, is very close to the Canadian approach, particularly in her use of social context and her rich articulation of what we in Canada consider substantive equality.<sup>23</sup>

In her powerful dissent in *Hulteen*, Justice Ginsburg's reasoning is situated within the context of the history of the adverse treatment of pregnant women. I cannot but find great similarity with my own opinion in *Moge v. Moge* where, for the Court, I put in context the economic situation of women with children after divorce in what I called "the feminization of poverty."<sup>24</sup>

Given the great number of cases that Justice Ginsburg dealt with at the Court during her now nineteen years at the Court, either as part of the majority or authoring the majority opinion or in dissent, I would like to focus on a couple of cases in which both the United States and the Canadian Supreme Courts have dealt with similar issues.

In *Benner v. Canada* and in *Miller v. Albright*,<sup>25</sup> both Supreme Courts had to deal with the different treatment, by the law, of citizenship of children born in another country, from a Canadian citizen woman and a Canadian non-citizen father in *Benner*, and an American male citizen and a non-citizen woman in *Miller*.

The Canadian Supreme Court unanimously concluded that the law was discriminating against the Canadian woman, while a divided United States Supreme Court rejected the discrimination claim. Justice Ginsburg, dissenting, writing for herself and two other colleagues, considered the provision of the Immigration and Nationality Act as a violation of equal protection and as a perpetuation of gender stereotypes. Such was the conclusion of the Supreme Court of Canada, in those terms:

[T]he overarching purpose of [Section] 15(1)—[to prevent] violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making . . . .<sup>26</sup>

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23 *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009).

24 [1992] 3 S.C.R. 813, 815 (Can.).

25 [1997] 1 S.C.R. 358 (Can.); 523 U.S. 420, 460 (1998).

26 *Miron v. Trudel*, [1995] 2 R.C.S. 418, 420 (Can.).

This could have been written by Justice Ginsburg!

In *Brooks v. Canada Safeway Ltd.*, the Canadian Supreme Court dealt with discrimination in the workplace on account of pregnancy, as did the United States Supreme Court in *AT&T v. Hulteen*.<sup>27</sup> In *Brooks*, the Canadian Supreme Court upheld the claimants' claim of discrimination on these terms:

Pregnancy discrimination is a form of sex discrimination simply because of the basic biological fact that only women have the capacity to become pregnant . . . . Those who bear children and benefit society as a whole should not be economically or socially disadvantaged. It is thus unfair to impose all of the costs of pregnancy upon one half of the population.<sup>28</sup>

In *Hulteen*, Justice Ginsburg's eloquent dissent, joined by Justice Breyer, disagreed with the majority (which rejected the claim of discrimination on the basis of pregnancy in the workforce) and observed that:

Certain attitudes about pregnancy in childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens.<sup>29</sup>

In summary, Justice Ginsburg's dissent refused to allow women to be penalized in perpetuity for taking pregnancy-based disability leave earlier in their careers, just as the unanimous Canadian Supreme Court refused to impose the costs of pregnancy upon half of the population

Finally, on the issue of sexual harassment in the workplace, both Supreme Courts came to the same conclusion, but Justice Ginsburg's definition of sexual harassment in the workplace in her concurring opinion is more akin to the Supreme Court of Canada's own definition.

In *Harris v. Forklift Systems, Inc.*, Justice Ginsburg stated that the inquiry should be about "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" and whether "a reasonable person subjected to th[at] discriminatory conduct would find that the

27 556 U.S. 701.

28 [1989] 1 S.C.R. 1219 (Can.).

29 556 U.S. 701, 724.

harassment so altered working conditions as 'to make it more difficult to do the job.'"<sup>30</sup>

In *Janzen v. Platy Enterprises Ltd.*, Chief Justice Dickson, writing for the unanimous Court, after reviewing extensive academic views, came to the following conclusion:

Without seeking to provide an extensive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment.<sup>31</sup>

While this exploration of both the United States and Canadian Supreme Courts' decisions on similar issues is necessarily a limited one for the purpose of this symposium, it is at least an indication of the sharing of values between the Supreme Court of Canada's interpretation of gender justice and Justice Ginsburg's own interpretation, both in her majority and concurring opinions, as well as in her dissents. They share a human rights approach to equality, where inequality is a violation of human dignity and freedom.

I must, however, add that over and above our differences, the Canadian and United States Supreme Courts are the gatekeepers of fundamental rights and freedoms, albeit at times in different ways which reflect the different historical, economic, and social eras and context, as well as cultural differences of two neighboring but friendly countries.

This said, the contribution of Justice Ginsburg to equality and, in particular, to gender justice has been tremendous, both as a litigator and a judge.

Even considering only her landmark decision in *United States v. Virginia* and her resounding dissent in *Ledbetter v. Goodyear*<sup>32</sup> would constitute a tremendous legacy on equality and particularly for women's opportunities. But there is more to come . . . .

I would be remiss not to salute the courage of Justice Ginsburg in relentless pursuit of her vision of equality, whether in writing for the majority, concurring, or dissenting. I must say I have a predilection for dissenters . . . and relish the words of Chief Justice Hughes:

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30 510 U.S. 17, 25 (1993).

31 [1989] 1 R.C.S. 1252, 1284 (Can.).

32 *United States v. Virginia*, 518 U.S. 515 (1996); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

A dissent in a Court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error in which the dissenting judge believes the court has been betrayed.<sup>33</sup>

To borrow the words of Justice Brennan, Justice Ginsburg is a "Prophet with Honour"<sup>34</sup> of the highest Order.

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33 C.E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 69 (1928), noted in K.M. ZO Bell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 211 (1959); see also Claire L'Heureux-Dubé, *The Dissenting Opinion: Voice of the Future?*, 38 OSGOODE HALL L.J. 495-517 (2000).

34 W.J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430-31 (1986).