It Takes A Vision: The Constitutionalization of Equality in Canada

The Honorable Claire L'Heureux-Dubé*

> *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. . . . it is unfair to impose all of the costs of pregnancy upon one half of the population.*[1]

I. INTRODUCTION

With these ringing words, in 1988 the Supreme Court of Canada overturned its prior jurisprudence on women's equality rights. The author was Chief Justice Brian Dickson, a person I consider to have been one of Canada's great feminists. After all, you know you've made a good deal of progress toward equality when your male Chief Justice is citing Catharine MacKinnon on sexual harassment in the workplace![2]

I am a great believer in the positive impact of Canada's constitutional guarantee of equality, found in section 15 of our Canadian Charter of Rights and Freedoms, which guarantees the right to be "equal before and under the law" and "to the 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."[3] While the Canadian model cannot and should not simply be transposed into other contexts, exploring how and why section 15 came into being in Canada provides valuable insight into the positive effects that constitutionalizing equality may bring. Specifically, I will outline how and why Canadian women

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* Former Justice, Supreme Court of Canada. I wish to thank my law clerk Laurie Sargent for her assistance in the preparation of this paper.

1. Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, 1243-44. All post-1989 decisions of the Supreme Court of Canada are available through the Court's website: http://www.scc-csc.gc.ca.

2. Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252, para. 49.

3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

contributed to the adoption of section 15 of the Charter, as well as show how their vision has helped to bring about greater justice for all through a major transformation of Canadian law.

II. BACKGROUND TO THE CONSTITUTIONALIZATION OF EQUALITY IN CANADA

But first, a little background. In 1867, Canada became a country.[4] We had a written constitution, but it contained no express guarantee of human rights or civil liberties. This did not stop five women from going to the courts in 1929 to ask a rather fundamental question: Are women persons? They needed to know in order to be appointed to Canada's Senate, among other things. In 1928, the Supreme Court of Canada said "no", women are not persons.[5] In 1929, the Law Lords of the British Privy Council, then our highest court of appeal, overturned that decision and held that women were persons, at least within the meaning of certain sections of the Canadian Constitution.[6] Lord Sankey took care to note, however, that "No doubt in any code where women were expressly excluded from public office, the problem would present no difficulty."[7] Clearly, Canadian women were still a long way from a constitutional right to equality!

The struggle continued, however, and gradually some of the most blatant limitations on women's rights to work and to own property were removed due to political pressures. Then, in 1960, Canadians got a Bill of Rights,[8] which recognized every individual's right to equality before the law and the equal protection of the law. The Bill of Rights had an important limitation, however: While it stated that it could invalidate another federal law, it was only an ordinary law itself, not a constitutional document.

Perhaps for this reason, courts interpreted the equality guarantee narrowly, as a formal and procedural right rather than a substantive one. In other words, if like people were treated the same, the treatment would not be subject to scrutiny on equality grounds, even though differing social groups were not accorded equal treatment. Thus, to give one of the most infamous examples, in

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4. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

5. *Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1967*, [1928] S.C.R. 276, *rev'd* Edwards v. Canada (A.G.), [1930] A.C. 124 (P.C.).

6. Edwards v. Canada (A.G.), [1930] A.C. 124 (P.C.) [known as the "Persons Case"]. The judgment was handed down by the British Privy Council on October 18, 1929. For interesting discussions of this case, see also D. Bright, *The Other Woman: Lizzie Cyr and the Origins of the 'Persons Case'* 13(2) CAN. J. LAW & SOC'Y. 99 (1998); and K. Lahey, *Legal 'Persons' and the Charter of Rights: Gender, Race and Sexuality in Canada* 77(3) CAN. BAR REV. 402 (1998).

7. *Edwards*, [1930] A.C. at para. 43.

8. S.C. 1960, c. 44 (reprinted in R.S.C. 1985, App. III). The *Bill of Rights* equality provision reads:

> 1. 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, color, 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; . . .

the 1979 decision in *Bliss v. Canada*,[9] the Court decided that the denial of benefits on the basis of pregnancy did not constitute sex discrimination, finding instead that: "If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is . . . because they are pregnant and not because they are women."[10] Needless to say, women quickly realized that the Bill of Rights had not provided them with an effective tool for achieving greater equality.

At the same time, however, some judges were beginning to take a more "enlightened" view of women's role in society, particularly in the context of family law. In 1975, for instance, Justice Laskin, later to become Chief Justice of the Supreme Court, wrote in a dissenting judgment:

> No doubt, legislative action may be the better way to lay down policies and prescribe conditions under which and the extent to which spouses should share in property acquired by either or both during marriage. But the better way is not the only way; and if the exercise of a traditional jurisdiction by the Courts can conduce to equitable sharing, it should not be withheld merely because [of] difficulties in particular cases . . . .[11]

By 1978, his views on the need for a doctrine of equitable sharing upon the breakdown of marriage had the support of two other Supreme Court judges and had influenced the other judges to a significant extent.[12]

Not surprisingly, each of these contradictory trends in Canada's Supreme Court jurisprudence inspired women to make concerted efforts in the political sphere to obtain greater recognition of their rights. The time was right: In the late 1970s, Prime Minister Pierre Trudeau opened the door to a process of constitutional renewal in Canada. Although the initiative was partly to secure the final and total independence of Canada from Great Britain, the focal point of the renewal was the proposed Charter of Rights and Freedoms.

As a bit of an aside, I note that the initial drafts of the Charter presented to the public in 1980 made it clear that the government of the day was using the framework set out in international human rights conventions as its model,[13]

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9. [1979] 1 S.C.R. 183. *See also* Canada (A.G.) v. Lavell, [1974] S.C.R. 1349 (holding under the *Bill of Rights* that a section of the federal *Indian Act* that disqualified women from claiming their Indian status upon marriage to a non-Aboriginal man, but did not similarly disqualify men, was not a violation of equality in light of the differences between men and women and because it treated all Aboriginal women the same).

10. *Bliss*, [1979] 1 S.C.R. at 190.

11. Murdoch v. Murdoch, [1975] 1 S.C.R. 423, 450-51 (Laskin, J., dissenting).

12. Rathwell v. Rathwell, [1978] 2 S.C.R. 436.

13. In international law, the human rights approach has dominated ever since the adoption of the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). Article 25 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967) guarantees that all persons are equal before the law and guarantees "equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *See also* Articles 3 and 4, International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1967); International Convention on

rather than the civil liberties model found in the American Bill of Rights.[14] As Madam Justice Rosalie Abella has observed, the key insight of the human rights approach is that human beings should not only be free from the intrusive state but should also be treated with dignity and should have the means necessary for full and equal participation in society. Since human dignity and equal participation encompass both individual and collective aspects of the human experience, the human rights approach requires balancing the rights of individuals, the recognition that historically disadvantaged or minority groups may need special protection, and the collective social interest. Fundamentally, the human rights approach requires that society be free from discrimination.[15]

Thus, while the Charter's initial drafters may not have been aware of it, their selection of the human rights model set the stage for a uniquely Canadian approach to equality, shaped in large part by women, as well as by advocates for the disabled and other disadvantaged groups in Canadian society.

At this historic moment, women were more organized than ever before, with a publicly funded lobby group providing strong leadership in the constitutional process.[16] With great perseverance, they pursued three key demands with respect to the draft Charter: first, the language of the equality guarantee had to be *broader* than that of the Bill of Rights; second, distinctions based on sex had to be subject to a *stringent review* by the courts; and third, the *Charter* had to include a *general statement of equality* between men and women.

Women were obviously sensitive to the language of the draft provision, given their experience with the Bill of Rights. They therefore lobbied for the addition of the words "equal *under* the law" and "equal *benefit* of the law" to the equality guarantee, to ensure that the provision would be more broadly interpreted than the Bill of Rights had been.[17] Their proposed wording was accepted and now forms part of section 15(1) of the Charter.

Canadian women were also aware of the struggle by American women to have the United States Supreme Court accord at least an intermediate level of

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the Elimination of all forms of Racial Discrimination, 660 U.N.T.S. 195 (1966); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S. 13 (1980). CEDAW may be viewed as a more detailed articulation of what constitutes substantive gender equality and of the steps signatory states must take to achieve it.

14. For a more extensive elaboration of this thesis, see Claire L'Heureux-Dubé, *Canadian Justice: Celebrating Differences and Sharing Problems*, 1995 J. SUP. CT. HIST. 5 (1995).

15. *See generally* Justice Rosalie Silberman Abella, *A Generation of Human Rights: Looking Back to the Future*, 36 OSGOODE HALL L. J. 597 (1998).

16. On the history of women's participation in constitutional negotiations during this period, *see generally* 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 183 (A. Bayefsky & M. Eberts eds., 1985); SHERENE RAZACK, CANADIAN FEMINISM AND THE LAW (1991).

17. *See* CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN, HUMAN RIGHTS AND THE CONSTITUTION: SUBMISSION . . . TO THE JOINT COMMITTEE ON THE CONSTITUTION (1981) 2 C.H.R.R. C/35; Eberts, *supra* note 16, at 200-04.

scrutiny to sex-based distinctions under the Fourteenth Amendment. Some groups therefore sought to have an explicit statement in the Charter guaranteeing the strictest level of scrutiny for distinctions based on "sex." Other groups felt that there should be a uniquely Canadian approach to equality and that the levels of scrutiny approach ought to be avoided. Ultimately, the United States model was rejected by the government. The very fact that a debate took place on the issue, however, led to a public record of government statements favoring a strict test for distinctions on the basis of sex.[18]

Finally, at the eleventh hour, the Ad Hoc Conference on Women and the Constitution, a broad-based women's lobby group, secured the inclusion in the Charter of an overarching equality guarantee to women and men from which there could be no derogation, either in the name of preserving Canada's multicultural heritage, or under the government's temporary legislative "opt-out" from the Charter's application.[19] This is now section 28 of our Charter, which reads: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

As you can see, Canadian women, and particularly women lawyers, had a significant influence in shaping the discourse surrounding, and the content of, Canada's constitutional equality guarantees. This constitutes one of the most unique aspects of the Canadian guarantee, as its origins both are modern and relatively inclusive.

Just as crucial, however, is the fact that the vision of the women who negotiated section 15 did not end with the adoption of the Charter in 1982. Based in part on consultations with their American counterparts, who had much to share given their long experience with anti-discrimination legislation, these women understood that they would need to follow up with a multifaceted "Charter-watching" strategy.[20] Thus, the Women's Legal Education and Action Fund, or "LEAF," was born.

III. TOWARD SUBSTANTIVE EQUALITY

The Charter-watching strategy included launching test cases, engaging in public education campaigns and producing academic texts on equality.[21] There was also a comprehensive audit of federal and provincial legislation to determine whether it complied with section 15.[22] Above all, however, it was

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18. *See generally* Eberts, *supra* note 16, at 201-04.

19. For the equality guarantee, see *Charter*, *supra* note 3, § 28. For the multiculturalism provision, see § 27. For the "notwithstanding clause" providing for the possibility of an express legislative override of a maximum five year duration from most of the fundamental rights and freedoms protected by the *Charter*, including section 15, see §33.

20. RAZACK, *supra* note 16, at 36.

21. *Id.*, at 36-41.

22. CHARTER OF RIGHTS EDUCATIONAL FUND, REPORT ON THE STATUTE AUDIT PROJECT (1985). It should be noted that at the same time, many governments undertook their own audits, in order to avoid

understood that the first case heard by the Supreme Court on the issue would be crucial in determining whether a broader interpretation would be given to section 15 than had beeen given to the Bill of Rights equality guarantee. For all of these reasons, many of the same women who led the constitutional negotiation efforts formed LEAF specifically for the purpose of ensuring that women's voices would be heard wherever equality issues arose in the courts.

This was an important strategic tactic, particularly since *Andrews v. Law Society of British Columbia*,[23] the first section 15 case to come before the Supreme Court, involved a white, male lawyer from England who argued that his equality rights had been infringed under the Charter because, as a non-citizen, he wasn't able to practice law in the province of British Columbia. Not exactly the ideal test case for women's equality! Nevertheless, LEAF sought and was granted intervenor status in the appeal, along with a number of other groups, in order to ensure that the Supreme Court had before it important reminders of all that was at stake when it decided *Andrews*.

In *Andrews*, the Court essentially adopted the purposive approach to section 15 put forth by LEAF, thereby overturning the decisions of the lower courts, which had taken a "similarly situated" approach to equality. Both Justices Bertha Wilson and William McIntyre made it clear in *Andrews* that they understood the purpose of section 15 to be the protection and promotion of what we in Canada call "substantive equality,"[24] meaning equality of opportunity and of result, not just similar treatment for those similarly situated. They did so based on the link made in section 15 between equality and discrimination, which led them to find that the *Charter*'s equality provisions had a "large remedial component" requiring the legislature to take positive measures to improve the status of disadvantaged groups. Thus, the Court *broadened* the scope of the equality guarantee.

Drawing on this approach, the Court has since said that the *purpose* of the guarantee is "to protect and promote human dignity,"[25] and has recognized that at the heart of section 15 lies the promotion "of a society in which all are secure

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a flood of litigation once section 15 entered into force in 1985, pursuant to section 33(2) of the *Charter*. The Federal government and many provincial governments passed omnibus "Charter compliance" legislation, which no doubt did avoid a certain amount of litigation. *See, e.g.*, British Columbia's *Charter Rights Amendment Act*, 1985 (Bill 33); Alberta's *Charter Omnibus Act*, (1984 Bill 95) and *Charter Omnibus Act*, (1985 Bill 42); Saskatchewan's *The Canadian Charter of Rights and Freedoms Consequential Amendment Act*, (Bill 41 of 1984-85); Nova Scotia's *Statute Law Amendment Act*, 1985; Ontario's *An Act to Amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms*, (Bill 7, 1985); New Brunswick's *An Act Respecting Compliance of Acts of the Legislature with the Canadian Charter of Rights and Freedoms*, S.N.B. 1984, c. 4; the Federal Government of Canada's Bill C-27, 1985.

23. [1989] 1 S.C.R. 143.

24. The Court has come to describe its approach to equality analysis with this term. *See, e.g.*, Law v. Canada, [1999] 1 S.C.R. 497, 548, at para. 46. For the first use of the term in a Supreme Court decision, see Symes v. Canada, [1993] 4 S.C.R. 695, 786 (L'Heureux-Dubé, J., McLachlin, J., concurring).

25. *Law*, [1999] 1 S.C.R. at paras. 53-54.

in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[26]

Similarly, section 15 has engendered a more *sophisticated* understanding of how to analyze equality. Based in part on the language of section 15(2), which states that the general equality guarantee does not preclude programs to ameliorate the conditions of disadvantaged groups or individuals, the Court has recognized that differential treatment, particularly in the form of "affirmative action" programs, may be upheld under the equality guarantee, rather than viewed as an exception to it.[27] Regardless of the nature of the distinction or the grounds on which it is based, the basic question remains whether it is consistent with the concept of substantive equality.[28]

Finally, instead of resorting to different levels of scrutiny for different grounds of discrimination, the Court was urged to adopt a *contextual* analysis of historical patterns of discrimination to determine whether the challenged legislative provisions perpetuate negative stereotypes and discrimination,[29] either intentionally or by adverse effect.[30] The Court held that an employer's

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26. *Id.* at 528, 548-550 (adopting a passage from Egan v. Canada, [1995] 2 S.C.R. 513 (L'Heureux-Dubé, J., dissenting)).

27. *See* Weatherall v. Canada, [1993] 2 S.C.R. 872, at para. 6. The Court doubted that differential treatment of male and female prisoners was discriminatory, thereby suggesting that it was in fact consistent with substantive equality. The male appellant had challenged the fact that male prisoners in penitentiaries were searched and patrolled by female guards, but that female prisoners were supervised only by members of their own gender. The Court noted the historical, biological, and sociological differences between men and women, the history of women's disadvantage in society, and the realities of male violence against women. Because of these factors, cross-gender searches do not have the same effects on men as they would have on women. *See also* Lovelace v. Ontario, [2000] 1 S.C.R. 950, at paras. 84-87, 93-108.

28. *See, e.g.*, Law, [1999] 1. S.C.R. at paras. 72-73. *See also* Andrews v. Law Society of British Columbia, [1989] 1. S.C.R. 143, at 171.

29. *See, e.g.*, M. v. H., [1999] 2 S.C.R. 3. The Court held that the exclusion of same-sex spouses from family law legislation determining the rights of common law couples after marriage was an unconstitutional form of differentiation, and therefore discrimination, since it denied the dignity of same-sex partners primarily on the basis of stereotypical views of the nature of their relationships. *See also* Eldridge v. British Columbia, [1997] 3 S.C.R. 624. The appellants, who were deaf, challenged the failure of the British Columbia government to provide sign language interpreters as part of its publicly funded health care system. The Court held that even though the treatment received was formally the same, it constituted discrimination, since those who were not hearing impaired were provided with all the services necessary to receive effective medical care, while hearing impaired people, who required interpreters in order to receive effective treatment, were required to pay for this service, and therefore, unlike others, did not receive the necessary services to enjoy free medical care. Thus, substantively, the hearing impaired did not receive equal services from the health care system. *See also* Vriend v. Alberta, [1998] 1 S.C.R. 493, in which the Court held that the failure by a province to include sexual orientation as a ground for discrimination violated the equality guarantee of the Canadian *Charter*, since it denied the inherent dignity and worth of homosexuals. While formally the legislation treated everyone the same, because no one was protected against discrimination on the basis of sexual orientation, substantive inequality resulted since the under-inclusiveness of the legislation had a disproportionate impact on homosexuals.

30. *See, e.g.*, *Andrews*, [1989] 1 S.C.R. at 173-74. See also, O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536, 547, where McIntyre, J. observed for the Court:

> The [Human Rights] Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. *It is the result or the effect of the action complained of which is significant.* [emphasis added]

rule that employees had to work periodically on Friday evenings and on Saturdays violated, without justification, an employee's right to equality as it imposed a burden on her (she could only be employed part-time) on the basis of her religious creed (Seventh-Day Adventist). This approach has been adopted by the Court with very positive consequences. First, it ensures that when one equality-seeking group "wins" in court, other disadvantaged groups in society may build upon the success, since the courts do not apply different levels of scrutiny.[31] Second, the contextual approach has begun to inject the experience of historically marginalized groups into the notoriously disembodied and acontextual world of law.[32] Indeed, while not all of Canada's past or present Supreme Court judges would be keen to admit it, I think it is fair to say that the Court has benefited greatly from the insights of contemporary legal theory, including feminist legal theory, which remind us that legal issues must be understood in their social context and that legal rules must be viewed as the product of historical circumstance as much, if not more, as objective statements of self-evident truths.[33]

IV. PLACING EQUALITY AT THE HEART OF THE LAW

Convincing the courts to adopt a substantive definition of equality in the abstract is only half the battle, as women and other equality-seekers well know. To be meaningful and effective, a constitutional equality guarantee must not only lie at the heart of the law, it must become its very life-blood.[34] In Canada,

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31. *See, e.g., Andrews*, [1989] 1 S.C.R. 143 (involving discrimination on the "analogous ground" (as opposed to enumerated ground) of non-citizenship). *Andrews* was foundational for all equality challenges to follow, regardless of the grounds on which they were based. The equality analysis in that decision, as well as in other decisions dealing for example with the equality rights of gays and lesbians, have contributed to establishing a strong principle of substantive equality that informs all equality rights cases. *See, e.g., Law*, [1999] 1 S.C.R. 497 (Court refining its equality analysis by drawing on cases such as *Andrews, M. v. H.*, [1999] 2 S.C.R. 3, and *Egan*, [1995] 2 S.C.R. 513).

32. On the "contextual revolution" which has taken place at the Court over the past 15 years, see generally Shalin M. Sugunasiri, *Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability* 22(1) DAL. L. J. 126 (1999).

33. To give just a few examples, the Court has cited the work of a number of feminist scholars in its judgments, usually as they were presented by LEAF and other intervenors in their briefs to the Court, including: CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979) and CONSTANCE BACKHOUSE & LEAH COHEN, THE SECRET OPPRESSION: SEXUAL HARASSMENT OF WORKING WOMEN 38 (1978), *cited in* Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252, para. 49, by a unanimous Court; Jennifer Nedelsky, *Embodied Diversity and Challenges to the Law*, 42 MCGILL L. J. 91, 107 (1997), *cited in* R. v. R.D.S., [1997] 3 S.C.R. 484, para. 42 (L'Heureux-Dubé & McLachlin, JJ., LaForest & Gonthier, JJ., concurring); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 142-43 (1989), *cited in* R. v. Seaboyer, [1991] 2 S.C.R. 577, 664-65 (L'Heureux-Dubé, J., dissenting).

34. While it is beyond the scope of this paper, the normative effects of a constitutional guarantee of equality may also spill over into non-legal spheres, since the guarantee may affect the expectations of many citizens about their equality rights and provide a "symbolic catalyst for social justice goals," even if it does not directly affect their lives. *See* Mary Jane Mossman, *The Charter and Access to Justice in Canada*, *in* CHARTING THE CONSEQUENCES 271, 273 (David Schneiderman & Kate Sutherland eds.,

it is clear that despite some setbacks, the efforts of women and other equality-seeking groups over the past fifteen years have begun to bring about this necessary transformation in areas such as criminal, family, employment and tort law. Similarly, Canadian courts have increasingly recognized that all decisions must be consistent with the philosophy of substantive equality, even if the parties are not bringing a direct constitutional challenge to the law or state action in question on the basis of their constitutional equality rights.[35]

To give some concrete examples of how the permeation of the law by equality principles may occur, years of dialogue between Parliament and the courts recently culminated in the upholding of significant changes to the manner in which sexual offences are prosecuted. In 1999, our new Chief Justice Beverley McLachlin, writing with Justice Iacobucci, upheld legislation which protects the complainant's therapeutic records from disclosure by the defense, where the evidence is of marginal or no relevance and could lead the trier of fact to make impermissible inferences based on stereotypes about women and discriminatory reasoning.[36] In so finding, the Court balanced the complainant's rights to dignity, privacy and equality with the accused's right to a full answer and defense. Similarly, the Court has recognized that the criminal law must be applied in a manner consistent with equality and therefore that the justice system must understand women's experience.[37]

1997). *See also* J. Fudge, *The Public/Private Distinction: The Possibilities and Limitations to the Use of Charter Litigation to Further Feminist Struggles* 25 OSGOODE HALL L.J. 485 (1987).

35. The Court has acknowledged that "the section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*." *Andrews*, [1989] 1 S.C.R. at 185. *See also* New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46 (L'Heureux-Dubé, J., concurring).

36. The Supreme Court has now expressly recognized in the area of criminal law that obtaining disclosure of a complainant's therapeutic records in the course of a sexual assault trial requires consideration of the complainant's rights to dignity, privacy and equality, as well as the accused's right to a full answer and defense. R. v. Mills, [1999] 3 S.C.R. 668. The new legislation was based, in large part, on the parameters set out in dissent in R. v. O'Connor, [1995] 4 S.C.R. 411, 419-22 (L'Heureux-Dubé, J., dissenting). For comments regarding the need to eliminate the use of myths and stereotypes in judging sexual assault cases in Canada, including the "twin myths" that "unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief," see R v. W.(G.), [1999] 3 S.C.R. 597, para. 29, (L'Heureux-Dubé, J., concurring); R. v. Ewanchuk, [1999] 1 S.C.R. 330, paras. 82, 87-97 (L'Heureux-Dubé, J., concurring); R. v. Esau, [1997] 2 S.C.R. 777, 814-15 (McLachlin, J., dissenting); R. v. Osolin, [1993] 4 S.C.R. 595, 670 (Cory, J., concurring); *Seaboyer*, [1991] 2 S.C.R. at 604, 630 (McLachlin, J., concurring); *Id.* at 651 (L'Heureux-Dubé, J., dissenting in part).

37. *See, e.g.*, R. v. Lavallée, [1990] 1 S.C.R. 852. Self-defense, as generally interpreted by courts in the past, mandated the apprehension of immediate danger at the time of the crime. *Lavallée* modified this requirement for battered women, so the defense now reflects the fact that those who have experienced cycles of abuse in the past often know when further abuse will come. The Court allowed expert testimony to assist juries in understanding the perspective of women who have been battered. We emphasized that it is unreasonable to expect women who fear for their lives from those who have battered them to wait until they are directly threatened or attacked again in order to defend themselves. *Lavallée* was an important step in making the criminal law more responsive to women's lives and therefore respectful of their human rights. *See also* R. v. Butler, [1992] 1 S.C.R. 452 (taking into account women's experience with respect to the harm caused by pornography in upholding a challenge to *Criminal Code* obscenity provisions and finding that while the provisions violated freedom of

In family law, equality principles have continued to inform and strengthen doctrines of equitable sharing of the economic consequences of marriage or its breakdown.[38] Somewhat ironically, however, where direct constitutional challenges were brought to income tax legislation relating to the taxation of child care expenses and child support payments, women have not had as much success in court.[39] Parliament has since bowed somewhat, however, to women's demands on this front.[40]

In employment law, the equality guarantees provided by anti-discrimination legislation have proven the most significant means of ensuring that substantive equality applies even in the absence of direct government action. Even though the Charter does not itself apply to most workplaces, it has led to the reinterpretation of this anti-discrimination legislation[41] and has therefore had an important, if indirect, effect on equality rights in the employment context.[42] Post-Charter decisions of the Supreme Court and of

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expression, the prohibition nevertheless accorded with § 1 of the *Charter*, which allows for limits on fundamental rights and freedoms as can be demonstrably justified in a free and democratic society).

38. *See, e.g.*, Moge v. Moge, [1992] 3 S.C.R. 813. Despite the fact that this case was not brought under section 15 of the *Charter*, the Court held that equality considerations must inform the determination of spousal support obligations under the *Divorce Act*. The Court recognized that in order to be sensitive to the equality implications of their interpretation of the relevant provision, judges may need to examine the factual social and economic context in which a particular piece of legislation operates. In that particular case, focusing on equality enabled the Court to look at the perspective and experiences of women and children, so as to ensure that the principles governing spousal support took into account their needs and realities. Moreover, as a result of that case, the concept of substantive equality became important not only for the area of family law, but also more generally for judicial methods of fact-finding and analysis. This positive trend has continued in subsequent cases of Peter v. Beblow, [1993] 1 S.C.R. 980, and Willick v. Willick, [1994] 3 S.C.R. 670. *See also* G.(L.) v. B.(G.), [1995] 3 S.C.R. 370; and Bracklow v. Bracklow, [1999] 1 S.C.R. 420, in which the Supreme Court recently reiterated that courts must ensure that the amount and duration of spousal support payments must be equitable, taking into account all of the circumstances of the spouses, including not only any disadvantages that the dependent spouse may have incurred due to the marriage, but also the supporting spouse's ability to pay, particularly if the supporting spouse has significant resources available.

39. *See* Symes v. Canada, [1993] 4 S.C.R. 695 (L'Heureux-Dubé & McLachlin, JJ., dissenting) (the applicant, a professional woman, was unsuccessful in her challenge to have the *Income Tax Act* interpreted such that child care expenses could be deducted as business expenses); R. v. Thibaudeau, [1995] 2 S.C.R. 627 (L'Heureux-Dubé & McLachlin, JJ., dissenting) (the applicant mother failed in her challenge to the tax regime governing child support payments). The regime allowed the payor of child support to deduct support payments from income, while the recipient had to include the payments in income for tax purposes. For a discussion of the complex interaction between section 15 and tax policy, see K. Lahey, *The Impact of the Canadian Charter of Rights and Freedoms on Income Tax Law and Policy*, *in* CHARTING THE CONSEQUENCES, *supra* note 34, at 107.

40. Despite its "win" in *Thibaudeau*, Parliament amended the *Income Tax Act* in 1997 to eliminate the deduction formerly available to payors of child support and to end the requirement that the custodial parent include child support as part of his or her taxable income.

41. First and foremost, since the entry into force of the *Charter*, courts have recognized that both national and provincial human rights statutes must be given a large and liberal interpretation given their "quasi-constitutional" status. *See generally* Ontario (Human Rights Commission) v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536.

42. After 1985, for example, the Supreme Court reconsidered its pre-*Charter* decisions under the *Bill of Rights* anti-discrimination jurisprudence in light of its post-*Charter* understanding of substantive equality. *See* Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, para. 29 (invoking its decision in *Andrews*, [1989] 1 S.C.R. 143). The Court in *Brooks* expressly overturned the infamous decision in Bliss v. Canada (A.G.), [1979] 1 S.C.R. 183, and held that the express exclusion of pregnant women

human rights commissions have reminded us, for example, that when sexual harassment occurs,[43] when there is systemic discrimination within a workplace,[44] or when rules of the workplace have a negative impact on members of certain groups,[45] discrimination has occurred. In addition, the Supreme Court has recently emphasized the need to ensure that the two streams of statutory and constitutional human rights jurisprudence are consistent in their respect for the principle of substantive equality.[46]

The principle of substantive equality has also begun to permeate certain aspects of the common law. The Supreme Court has held that common law rules must develop "in accordance with '*Charter* values,'" including substantive equality.[47] In tort law, the Court has therefore recognized that even though constitutional rights may not be directly in issue, the principle of substantive equality requires that the law take into account women's experiences where they have been ignored or excluded in the course of the law's development, such as with respect to limitation periods and the specific problems they cause in relation to the reasonable discovery of childhood sexual assault.[48] The Court has also recognized the power imbalance which may exist between a male doctor and his female patient.[49]

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from a private employer's accident and sickness plan constituted a form of sex discrimination under the Manitoba *Human Rights Act*.

43. Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252. Sexual harassment was held to constitute sex discrimination, since it was a practice or attitude which had 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, regardless of the fact that not all female employees in any given workplace are subject to harassment. The employer was held liable under the Manitoba *Human Rights Act* for damages caused by its employee's acts.

44. Action Travail des Femmes v. Canadian National Railway, [1987] 1 S.C.R. 1114. Taking a purposive approach, the Court upheld a human rights tribunal's jurisdiction to impose an employment equity program upon an employer as a remedy in a discrimination claim, in order to address problems of systemic discrimination in the hiring and promotion of a disadvantaged group (in this case, women). The Court noted that the purpose of the *Canadian Human Rights Act* was to prevent discrimination, rather than to punish wrongdoing, and therefore that broad remedial powers were consistent with that purpose.

45. B.C. (Public Service Employee Relations Committee) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3. The Appellant union alleged that the claimant, a female fire-fighter who had performed her work satisfactorily for over three years, was improperly dismissed on the basis of her failure to meet a discriminatory aerobic standard required under a new series of fitness tests adopted by the B.C. Government. The Court held that under the B.C. *Human Rights Code*, the minimum fitness standard had a discriminatory effect on women and could not be justified as a *bona fide* occupational requirement, since a lower standard could still provide sufficient protection to the public, while also having a less discriminatory impact on women. *See also* O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536.

46. *B.C.G.S.E.U.*, [1999] 3 S.C.R. at para. 49.

47. A.M. v. Ryan, [1997] 1 S.C.R. 157, 172 & 175; R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 592-93; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, 876-77; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, para. 121.

48. K.M. v. H.M., [1992] 3 S.C.R. 6. The plaintiff's father sexually abused her when she was between the ages of 8 and 16, but she did not commence an action for damages until she was 28, beyond the time limit of the relevant limitation period. In interpreting the limitations legislation, the Court considered social science evidence on the impact of incest on its survivors and noted that because of the nature of such abuse, incest survivors often repress memories about what occurred, are unaware of the

V. CONCLUSION

Overall, there is no question that section 15 of the Charter has brought about a major and ongoing transformation in many areas of Canadian law. Recognizing that my views are informed by this Canadian experience, in all of its social, historical and political specificity, I hope nevertheless that this overview of why women fought to constitutionalize equality and how they brought it about, may provide some insight as to how such guarantees have the potential to achieve greater justice for all.

But please do not think me naive: I would be the first to admit that on its own, a formal constitutional guarantee of equality does not go very far toward achieving justice. The word "equality" is notoriously indeterminate[50] and, depending on the meaning ascribed to it, has the potential to lead to justice or injustice, inclusion or exclusion, substantive change or maintenance of the *status quo*.[51] Indeed, this is the very reason Canadian women mobilized to ensure a rich definitional content of the guarantee prior to its constitutionalization, and to watch over its interpretation subsequent to 1982.

Moreover, a meaningful statutory, constitutional or international guarantee of equality requires much more than a good definition. Those who need its

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injuries it has caused them, or blame themselves for the events. Our Court held that the limitation period legislation should be interpreted, in the context of incest cases, so that the time period does not begin to run until the plaintiff becomes aware of the abuse, the responsibility of the defendant for that abuse, and the fact that the abuse caused psychological or physical injuries she later experienced. In so doing, the Court recognized the important role that therapy often plays in coming to this understanding.

49. Norberg v. Wynrib, [1992] 2 S.C.R. 226. In that case, our Court dealt with the claim of a drug-dependent woman whose physician had given her narcotics in exchange for sex. The Court recognized the imbalance and abuse of power in this relationship, and held that the physician was responsible for aggravated and punitive damages for the tort of battery (sexual assault), *id.* at 258 (LaForest, J.; Gonthier & Cory, JJ., concurring). The physician knew of the plaintiff's dependency on drugs, could have taken steps to treat her for that dependency, but instead chose to take advantage of it for purposes of his own gratification. Recognizing that she did not truly consent to the sexual activity was an affirmation of the fact that the doctor had infringed her human right to substantive equality. The minority also found a breach of fiduciary duty. (McLachlin & L'Heureux-Dubé, JJ., dissenting). *See also* Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753 (L'Heureux-Dubé & McLachlin, JJ.) (holding that the principle whereby the common law must reflect the values found in the *Charter* provides a further reason why common law liability for negligence should not be applied to pregnant women in relation to the unborn); K. Sutherland, *The New Equality Paradigm: The Impact of Charter Equality Principles on Private Law Decisions*, *in* CHARTING THE CONSEQUENCES, *supra* note 34, at 245.

50. John Schaar, *Equality of Opportunity and Beyond*, *in* NOMOS IX: EQUALITY 228 (J. Roland Pennock & J. W. Chapman eds., 1967). The broad language of constitutional equality guarantees create the potential for a wide variety of interpretations, and therefore have the potential to do justice or injustice, to be purely abstract or to permeate every aspect of the law. In *Andrews*, [1989] 1 S.C.R. 143, 164, for example, the Supreme Court of Canada recognized the importance of choosing carefully among different conceptions of equality, citing John Schaar's observation that:

> Equality is a protean word. It is one of those political symbols – liberty and fraternity are others – into which [people] have poured the deepest urgings of their heart. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society.

Schaar, *supra*.

51. *See, e.g.*, D. Majury, *Equality in a Post Modern Time*, *in* CANADIAN CONSTITUTIONAL DILEMMAS REVISITED 45 (D. Magnusson & D. Soberman eds., 1997).

protection must have the means to ensure it is put into practice. For, as one of America's great female leaders, Eleanor Roosevelt, expressed so eloquently:

> Where after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. . . . Such are the places where every man, woman or child seeks equal justice, equal opportunity, equal dignity, without discrimination. Unless these rights have meaning there, they have little meaning anywhere.[52]

The deplorable situation of women in Afghanistan today, as well as recent gross violations of human rights in Yugoslavia, Rwanda and East Timor demonstrate in the clearest manner possible that all the human rights treaties in the world, drafted and interpreted to give the most meaningful protections possible, cannot achieve justice on their own.

There are no easy answers to these problems. I put it to you, however, that part of the solution is for each of us to *envision* all possible means of ensuring that guarantees of equality, whether they be statutory, constitutional or international, penetrate every aspect of state conduct and, ultimately, of human behavior. This brings me back to the passage I quoted from Chief Justice Brian Dickson at the beginning of this paper. My observation that he was one of the greatest Canadian feminists was made half in jest, half in great seriousness. For it is only when men as well as women become open to women's experience and perspectives, that we know that we are well on our way to transforming attitudes and behavior. In Canada, thanks in large part to the vision and strategy of women's groups, the constitutionalization of equality has played a large part in bringing about such a transformation.

Furthermore, the Canadian experience suggests that when women help to forge and shape the development of constitutional guarantees of equality, these norms have the potential to provide one of the most powerful means available for making equality a reality for all. Taking hope and inspiration from this experience, and from our professional and personal aspirations as jurists, we must therefore re-dedicate ourselves to the achievement of equality in all aspects of the law. For it is my firm belief that justice without equality is no justice at all.

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52. Eleanor Roosevelt, Remarks at a Ceremony in the United Nations, March 27, 1958, *reprinted in* R. Bilder, *Rethinking International Human Rights Law: Some Basic Questions*, 1969 WISC. L. REV. 171, 178.