SECTION 15 OF THE *CHARTER*

Where have we come from, where are we now, and where are we going?

The York Centre for Public Policy and Law presents a full-day symposium on s. 15 of the *Charter*, critically examining Canadian equality jurisprudence and scholarship.

May 13, 2016

8:30AM-5:00PM

Breakfast and Lunch Included

Hosted by:
York Centre for Public Policy and Law

OSGOODE HALL LAW SCHOOL
4700 Keele St
North York
ON M3J 1P3

York Centre for Public Policy and Law
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York Centre for Public Policy and Law
OSGOODE HALL LAW SCHOOL

SECTION 15 OF THE *CHARTER:*

Where have we come from, where are we now, and where are we going?

SCHEDULE

FRIDAY, MAY 13

8.30	**Breakfast and Intro**
9.00-10.30	**Kerri Froc** **Ian Greene** **Daphne Gilbert** **Beth Atcheson**
10.30-10.45	**Coffee Break**
10.45-12.15	**Kim Stanton** **Errol Mendes** **Mary Eberts** **Richard Haigh** **Bruce Ryder**
12.15-1.00	**Lunch & Keynote Speaker: Elizabeth Shilton**
1.00-2.30	**David Lepofsky** **Jena McGill** **Fay Faraday** **Beverly Baines**
2.30-2.45	**Coffee Break**
2.45-4.45	**Martha Jackman** **Charles-Maxime Panaccio** **Emmett Macfarlane** **Thaddeus Hwong** **Angelica Buggie**
4.45-6.00	**Wrap-Up and Reception**

DRIVING DIRECTIONS

To Keele Campus
4700 Keele Street, Toronto

From Highway 401

- Take Hwy. 401 to Keele Street
- Exit at Keele Street and go north (follow the posted detour signs)
- Follow Keele Street north of Finch Avenue (the campus is on your left)
- Turn left at York Boulevard, north of Finch Avenue

IMPORTANT: Due to the subway extension project, some of the main arteries into York are under construction. Consider exiting on JANE STREET and coming NORTH on Jane instead of Keele St. Follow Jane to SHOREHAM DRIVE. Turn RIGHT onto Shoreham and continue onto the campus.

If you're coming along FINCH AVENUE, use SENTINEL ROAD to access the campus.

From Highway 407

- Take Hwy. 407 to Keele Street
- Exit at Keele Street and go south
- Follow Keele Street south of Steeles Avenue (the campus is on your right)
- Turn onto the campus via York Boulevard, south of Steeles Avenue

IMPORTANT: Due to the subway extension project, some of the main arteries into York are under construction. Consider exiting on JANE STREET and going SOUTH on Jane instead of Keele St. Follow Jane to SHOREHAM DRIVE. Turn LEFT onto Shoreham and continue onto the campus.

From Highway 400 (southbound)

- Take Hwy. 400 south to Hwy. 7
- Exit onto Hwy. 7 and go east
- Follow Hwy. 7 east to Keele Street
- At Keele Street go south (the campus is on your right)
- Turn onto the campus at York Boulevard, south of Steeles Avenue

IMPORTANT: Due to the subway extension project, some of the main arteries into York are under construction. Consider exiting Hwy. 400 on FINCH AVENUE and going EAST on Finch. Follow Finch to SENTINEL RD. Turn LEFT onto Sentinel and continue onto the campus.

From Highway 400 (northbound)

- Take Hwy. 400 north to Steeles Avenue
- Exit onto Steeles Avenue and go east
- Follow Steeles Avenue east to Keele Street
- At Keele Street go south (the campus is on your right)
- Turn onto the campus at York Boulevard, south of Steeles Avenue

IMPORTANT: Due to the subway extension project some of the main arteries into York are under construction. Consider exiting Hwy. 400 on FINCH AVENUE and going EAST on Finch. Follow Finch to SENTINEL RD. Turn LEFT onto Sentinel and continue onto the campus.

TRANSIT DIRECTIONS

Toronto Transit (TTC)

Downsview Station & Sheppard Station - Yonge Station

- **196 York University Rocket** — Express from Downsview Station; 196 B from Sheppard Station via Downsview during peak times
- **106 York University** — from Downsview at non-peak times
- **107 B&C Keele North** — Downsview Station to Rutherford GO Station (107 B) or Teston Rd (107 C) via York U (one-fare service between York Region and York University)

Finch Station

- Steeles 60C or 60F

Jane Station

- **195 Jane Rocket** — Express to York U

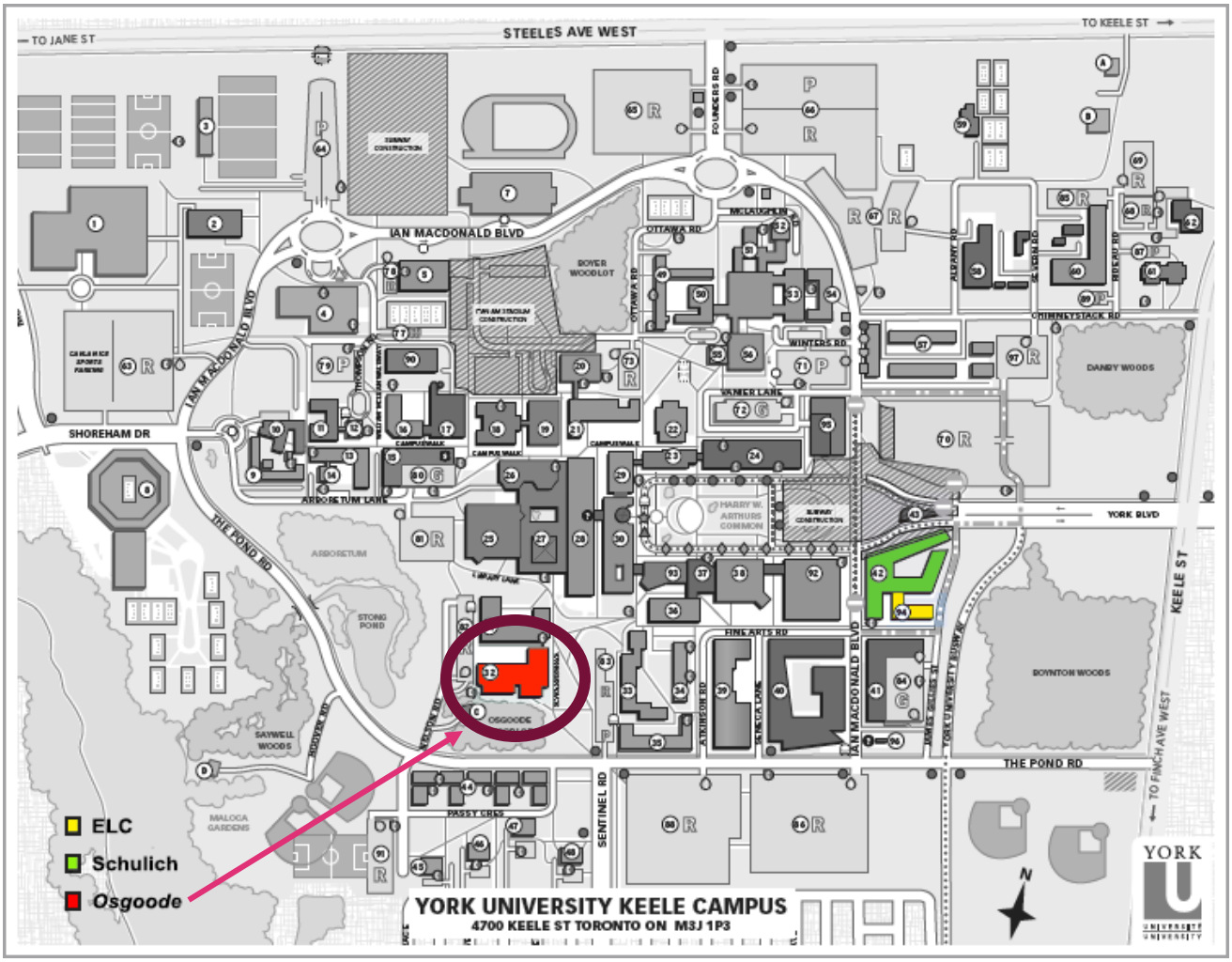
Keele Station

- Keele 41 (41 B — including Petrolia; 41 C — including Steeles Ave via Murray Ross)

GO Transit

- **Hwy 407 Express GO Bus Service**: Hamilton - Burlington - Oakville - Mississauga - Bramalea - York University Common - Thornhill - Mount Joy - Scarborough - Pickering – Oshawa
- **Meadowvale Express GO Bus Service**: Meadowvale - York University
- **Bradford GO Train Service**: Barrie - Bradford - East Gwillimbury - Newmarket - Aurora - King - Maple - York U - Union Stn. A free York shuttle transports passengers to/from the York Common to the York University GO Train Station

CAMPUS MAP


TO JANE ST
STEELES AVE WEST
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SHOREHAM DR
THE POND RD
FINE ARTS RD
YORK BLVD
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SENTINEL RD
ELC
Schulich
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FOREWORD

Thirty+ years of s. 15 of the *Charter*: Where have we come from, where are we now, and where are we going?

Osgoode Hall Law School, York University, May 13, 2016

In 1985, section 15 of the Charter came into effect, three years later than the rest of the Charter. The three year delay was intended to allow governments time to rectify some of their obviously discriminatory laws. In 1989, the Supreme Court of Canada handed down its first decision on section 15(1), recognizing it as a guarantee of substantive equality, and beginning a journey with what the Chief Justice calls "the most difficult right" that continues to this day.

The impetus for this symposium began two years ago when Richard realized that the 30 year anniversary of the section was coming up, and thought that it would be a good time to look back on all those years, as well as think ahead to where we may go from here.

The symposium is an invitation-only event that will examine, from three different aspects, everything there is to know about section 15. We are interested in looking back at it historically, taking the pulse of its current status, and thinking about where it may take us in the future.

This anniversary reflection coincides with the government's consultations on the future of the Court Challenges Program, driver of so much of the ground-breaking litigation on section 15. We hope that our work will contribute to decision-making about the shape of a revitalized Court Challenges Program.

We have gathered together an amazing collection of invitees – albeit all from Southern Ontario, mainly due to the limited budget we have! But we are thrilled to be showcasing a diverse and important collection of thinkers and writers on the impact (or lack thereof) of section 15 on Canadian lives. Hopefully some of the work that has gone into the papers will find its way into broader discourse about equality and discrimination.

We also want to thank Errol Mendes for kindly agreeing to publish some of these papers in a special issue of the *National Journal of Constitutional Law* (after a peer-review process).

Finally, thanks go to all of the presenters in advance, for such stimulating and interesting abstracts. Also, to Richard's fearless research assistants and conference helpers, Shakaira John, Lillianne Cadieux-Shaw, Mahdi Hussein, Victoria Peter and Ian Stedman. And to various members of the Dean's Office and staff at Osgoode for being so supportive.

Early on in the process it was recommended by one of Richard's colleagues that he ask Mary Eberts if she would be interested in participating. At that time, Mary had just been offered a McMurtry Fellowship at Osgoode for the 2016 year. Her plans for the fellowship did not include organizing a conference on section 15, but the two of us hit it off immediately. Richard has found Mary a joy to work with; this symposium would be nothing if it were not for her help and assistance throughout. He is honoured to have her on board. Mary has been grateful for Richard's keen sense of organization and his good humour made the collaboration a happy one, and part of a rich year at Osgoode.

Richard Haigh and Mary Eberts
Symposium Organizers

ABSTRACTS & BIOGRAPHIES

Please visit "**http://ycppl.info.yorku.ca/events/section_15_symposium**" in order to request access to symposium papers and presentations.

Elizabeth Shilton – Keynote Speaker

Biography

Dr. Elizabeth Shilton is a Senior Fellow with the Centre for Law in the Contemporary Workplace, Faculty of Law, Queen's University. She was a founding partner of Cavalluzzo Shilton McIntyre Cornish LLP, a Toronto-based law firm specializing in union-side labour law, where she argued constitutional issues before administrative tribunals and courts (including the Supreme Court of Canada) in significant cases involving employment and equality rights, many involving s.15 of the Charter. After twenty-five years in private practice, Elizabeth returned to the University of Toronto to complete a doctorate. Her new book, *Empty Promises: Why Workplace Pension Law Doesn't Deliver Good Pensions*, explores the history of workplace pension plans and the equality issues embedded within them. She has taught labour, employment and collective bargaining law at the University of Toronto Faculty of Law and Osgoode Hall Law School, and has been a Visiting Scholar at Osgoode's Institute for Feminist Legal Studies. Her research and teaching is currently located at Queens University, where her interests include human rights in the workplace, gender and pension reform, and workplace adjudication systems.

Elizabeth was a board member and chair of the National Legal Committee of the Women's Legal Education and Action Fund (LEAF) in its formative years, and was counsel for LEAF and other equality-seeking groups in a number of the Supreme Court's early s.15 cases. She has since returned to LEAF as a board member and co-chair of the legal committee. In 2016, she was honoured with a Toronto YWCA Woman of Distinction (Law and Justice) award for her work on women's equality issues.

Abstract

Litigating for Equality: The Triumph of Hope Over Experience?

The paper will provide a retrospective reflection on LEAF's litigation work over 30 years. It will focus on the evolution of LEAF's thinking about how to use litigation as a tool for social change, and the ways in which LEAF's initial optimism has been tempered by the political climate, the human and financial resource costs of litigation and the evolution of both substantive and procedural Charter jurisprudence. Questions are raised about whether courts are experiencing "intervener fatigue," and whether recent appellate decisions on non-party interveners threaten the efficacy of intervention as a useful strategy for equality-seeking groups.

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Beth Atcheson

Biography

Beth, a lawyer, has experience in the private, public, and charitable sectors. A specialist in regulated corporations, Beth has been a partner in a large Toronto law firm, sat as a Vice-Chair of the Ontario Automobile Insurance Board and a member of the Canadian Human Rights Tribunal, and served as an Assistant Deputy Minister in the Ontario Ministry of Finance. Beth was a senior consultant to the Task Force on the Future of the Canadian Financial Services Sector where she was responsible for the research and writing of Empowering Consumers (Background Paper #3). She currently provides policy and project management services to government, businesses and charitable organizations. Beth was a founder of the Women's Legal Education and Action Fund. She has served as the Chair of its National Board of Directors, as well as of the Women's Legal Education and Action Fund Foundation. Beth holds a BA Honours (1970) degree in History from the University of New Brunswick, where she was a Beaverbrook Scholar throughout her studies, and an LLB from the University of Toronto (1978), studies complemented by a year as a Parliamentary Intern in Ottawa (1974-1975). Beth received a Woman of Distinction Award in 1991 from the Toronto YWCA, and the President's Award from the Women's Law Association of Ontario in 2006. Beth is a 2010 recipient of the Law Society Medal, awarded by the Law Society of Upper Canada. In the fall of 2011, Beth was awarded an Honorary Doctor of Laws degree from York University.

Abstract

How Parliament undertakes (or not) Charter review, using the CREF statute audit and experience with gender-based analysis as two specific case studies.

The paper will examine the purpose, method and effectiveness of the sex equality audits, particularly the Charter of Rights Educational Fund's review of selected federal and Ontario statutes, undertaken by community-based women's groups during the moratorium (1982-1985) on the coming into force of section 15 of the *Canadian Charter of Rights and Freedoms*. The audits were one of the tools developed in the women's movement to lever the then-new constitutional equality provisions to address long-standing, adverse systemic discrimination against women, in this case discrimination flowing from public policy choices embedded in statutes. The audits will be considered in the context of the day – taking the politicians at their word – that an express purpose of the moratorium was to bring statutes into compliance with section 15 with some degree of accountability and transparency. Further, the audits will be situated in the on-going struggle for effective Charter compliance mechanisms in public policy choices at the federal level, linking these early efforts to current ones such as gender-based analysis and UN review mechanisms.

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Beverley Baines

Biography

Beverley Baines was a constitutional consultant to the Canadian Advisory Council on the Status of Women and to the Ad Hoc Committee on Women and the Constitution during the 1980-2 constitutional discussions. A Professor at the Faculty of Law, Queen's University, Bev teaches public and constitutional law and has co-edited two books on women's constitutional rights: The Gender of Constitutional Jurisprudence (2004) and Feminist Constitutionalism (2012).

Abstract

Does Sex Equality Have a Future?

As presently configured, the doctrine of sex equality that governs section 15 jurisprudence has no future. Whether informed by substantive or formal equality, this doctrine has failed to protect women's section 15 right to sex equality in a single Supreme Court of Canada decision over the past three decades. The closest we came to recognition and redistribution (to use Nancy Fraser's conceptualization of equality) was in NAPE v Newfoundland, but women lost because the Court deferred to the Newfoundland and Labrador government. Put differently, the Justices credited the Newfoundland and Labrador legislature that enacted the Pay Equity Restraint Act with representing women and men equally. Yet equal legislative representation is a myth that shows no evidence of auto-correction (see Stalled by Trimble, et al). Should we condemn section 15 for complicity in sustaining this myth and search elsewhere – for example, section 3 or section 28 – to remedy unequal legislative representation? Or should we invite the Court to transform the sex equality doctrine that informs section 15 by adopting a requirement of parité to remediate women's unequal legislative representation?

NOTES

Angelica Buggie

Biography

Angelica Buggie is a third-year student at Osgoode Hall Law School. Prior to entering law school, she worked with several women's rights organizations and became passionate about feminist theory and anti-discrimination advocacy. She has continued to explore those passions at law school as a student in the Immigration and Refugee Intensive, co-founder of Canadian Lawyers for International Human Rights-Osgoode and a member of the Wilson Moot competitive team, where she argued for the section 15 rights of transgender individuals to receive funded sex reassignment surgery.

Abstract

Locating Intersectionality Through A Multicultural Lens: Exploring the Interaction Between S. 15 and S. 27 of the Charter

Claimants' often face multiple and intersecting forms of discrimination within their lived experiences. However, Canadian courts have failed to meaningfully recognize and grapple with the compounding nature of these claims in their section 15 analyses to the detriment of vulnerable individuals. In light of this jurisprudential reality, this paper proposes utilizing interpretative aids to guide the court's approach, specifically section 27 of the *Charter*. This provision, in recognizing the preservation and enhancement of Canada's multicultural heritage, provides a dynamic and multi-faceted lens through which courts may identify and evaluate intersecting grounds of discrimination. After exploring the contours of section 27, the paper will canvass section 15 cases to demonstrate how section 27 may have been used to positively shape the court's analysis and the claimant's outcome in those decisions.

NOTES

Mary Eberts

Biography

Educated at Western University and Harvard law school, Eberts has appeared as counsel to parties and interveners in the Supreme Court of Canada, Courts of Appeal and Superior Courts in Ontario and other provinces, the Federal Court and Court of Appeal, and before administrative tribunals and inquests across Canada. She was instrumental in securing the present language of section 15 of the *Charter,* and was one of the founders of the Women's Legal Education and Action Fund (LEAF). Since 1991, she has been litigation counsel to the Native Women's Association of Canada (NWAC).

Her academic career includes the Gordon Henderson Chair in Human Rights at the University of Ottawa (2004-2005) and the Ariel Sallows Chair in Human Rights at the College of Law, University of Saskatchewan (2011 and 2012), where she taught courses in test case litigation. She has received the Law Society Medal, the Governor-General's Award in Honour of the Persons' Case, the Queen's Diamond Jubilee Medal and several honorary degrees.

Abstract

Section 15 Meets the Indian Act: Equality with a Vengeance

This is a combination of past and present, as the paper will look at the statute audits and revision plans of the government, and then the litigation which followed the 1985 amendments. As well as providing a sad history of just how miserly governments and courts can be in their interpretation of section 15, this topic raises questions of whether there are real conflicts between equality rights under the Charter and the broader rights claimed by Indigenous peoples.

NOTES

Fay Faraday

Biography

Fay Faraday is a lawyer with an independent social justice practice in Toronto. She represents unions, community organizations and coalitions in constitutional and appellate litigation, human rights, administrative/public law, labour and pay equity. She also works collaboratively with community groups and coalitions to provide strategic and policy advice on constitutional and human rights issues. In her work as a lawyer, she has addressed a wide range of issues relating to equality and fundamental freedoms under the *Charter*, gender and work, rights of migrant workers, rights of persons with disabilities, race discrimination, employment equity, poverty, income security, socioeconomic rights, homelessness and the right to housing, and international human rights norms. She has represented clients in constitutional litigation at all levels of court, including numerous cases at the Supreme Court of Canada.

Fay is a Visiting Professor at Osgoode Hall Law School where she has taught courses in *Charter* and human rights law and ethical lawyering. She also holds the Visiting Packer Chair in Social Justice at York University, teaching courses in transnational labour migration and social justice activism. Fay also holds an Innovation Fellowship with the Metcalf Foundation and is engaged in legal and community-based research on the rights of migrant workers. Her reports, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* and *Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers* were published by the Metcalf Foundation in 2012 and 2014.

Fay publishes extensively on labour, human rights and constitutional law. She is the co-author and co-editor of a book on equality rights under the *Charter*: *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Irwin Law, 2006), the co-author of a book on equality rights under Ontario's *Human Rights Code*: *Enforcing Human Rights in Ontario* (Canada Law Book, 2009), co-author and co-editor of a book on labour rights under the *Charter*: *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Irwin Law, 2012) and author of two chapters on unions,

constitutional rights and democratic engagement in *Unions Matter: Advancing Democracy, Economic Equality and Social Justice* (Between the Lines, 2014).

Abstract

Substantive Equality and Systemic Discrimination: Moving Beyond Comforting Illusion to Deliver on Section 15's Elusive Promise

For three decades, Canada's jurisprudence has insisted that s. 15 of the *Charter* guarantees the right to substantive equality. It has also reiterated that the main impediment to securing substantive equality is not a series of isolated practices of discrimination but a reality of systemic discrimination that reinforces relations of privilege and disempowerment that divide groups in society. Yet, to date, most s. 15 litigation has addressed narrow circumstances of formal inequality without unsettling the systemic practices which give rise to the deepest and most entrenched forms of discrimination. This presentation looks to the future of s. 15 and addresses the primary challenge of how to develop legal tools to dislodge truly systemic practices of discrimination. How do we diagnose a human rights violation? How much are we willing to let in as part of the story? Can s. 15 dislodge the gaze of privilege sufficiently to allow realities of oppression to be seen? How do we develop a more sophisticated analysis of state accountability/responsibility? Has our review of legislation and public policy that undermines *Charter* rights begun to excavate the roots of systemic discrimination? Drawing on both conceptual and practical approaches, the presentation will encompass theoretical analysis, practical analysis of litigation strategies, and a case study analysis to illustrate a systemic, equality-based approach to public policy development.

NOTES

Kerri Froc

Biography

Kerri A. Froc is a Postdoctoral Fellow at Carleton University. Her 2015 doctoral dissertation (completed at the Faculty of Law, Queen's University) is entitled, "The Untapped Power of Section 28 of the *Canadian Charter of Rights and Freedoms*." She received her Master of Laws at the University of Ottawa (2009); her Bachelor of Laws from Osgoode Hall Law School, York University (1996); and her Bachelor of Arts from the University of Regina (1993, with distinction). She lectures and writes on constitutional issues concerning gender equality in rights, women's underrepresentation in Parliament, poor women, racialized women, women's work, and access to justice, among others. Ms. Froc's research interests include feminist legal theory, women's constitutional rights claims, and theories of constitutional interpretation (including originalism). Ms. Froc was previously employed by the Canadian Bar Association as a staff lawyer in the area of law reform and equality, as a staff lawyer for the Women's Legal Education and Action Fund (LEAF), and as a civil litigator in Regina, Saskatchewan. She is a member of the bars of Ontario (2005) and Saskatchewan (1997), and resides in Ottawa, Ontario.

Abstract

A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality

This paper will consider the resources history has to offer for the interpretation of section 15 of the *Canadian Charter of Rights and Freedoms*. I will posit an "original meaning" for the provision that emerges from its text and a historical account of its drafting and ratification. In doing so, I adapt US theorist Jack Balkin's concept of "framework originalism" to the Canadian context. I will pay particular attention to how federal and provincial governments, as well as Parliamentarians, conceptualized a constitutional equality/anti-discrimination guarantee beginning from the publication of the federal government's 1968 paper entitled, *A Canadian Charter of Human Rights*; section 15's legislative history; the history of Canadian social and legal inequalities; and the contributions of citizen groups and other organizations appearing before the 1980-81 Special Joint Committee of the Senate and the House of Commons on the

Constitution. Aspects of each were embodied in the amendments made to the section's final text. Next, I will provide a number of examples of how the Supreme Court's lack of attention to section 15's original meaning (both in the sense of overlooking its history and misapprehending it) under the current purposive methodological approach to interpretation has contributed to the problems in construing this supposed "most difficult right." Last, the paper will consider how a structured use of section 15's history under a "new" purposive methodology could help lead to a transformative interpretation of the equality guarantee.

NOTES

Daphne Gilbert

Biography

Professor Gilbert specializes in teaching criminal and constitutional law, including courses in Evidence, the Charter of Rights and Freedoms, American Constitutional Law, and Advanced Sexual Assault law. She also teaches a course on Animals and the Law. Her research interests lie primarily in the *Charter of Rights and Freedoms*, with a particular emphasis on equality rights and reproductive rights. Her most recent work considers the impact of physician conscience protections on access to contraception and abortion in Canada. She joined the Faculty at University of Ottawa after obtaining an LLM from Yale University as a Fulbright and SSHRC scholar. She clerked for Chief Justice Antonio Lamer at the Supreme Court of Canada and Mr. Justice Robertson at the Federal Court of Appeal. She is President of the Board of "Women Help Women", an international abortion service provider. She sits on the Action Team on Sexual Violence for the University of Ottawa, and Chairs the Sub-Committee drafting a new Sexual Violence policy. She appeared as co-counsel for LEAF at the Supreme Court hearing in *Withler v Canada*, and she continues to focus on equality issues in her scholarship and teaching.

Abstract

What Lies in the Balance? Equality Rights vs. The Charter

Section 15's rather tortured beginnings have been well-chronicled, and amply critiqued, since the Court entered the fray with the *Andrews* decision. After a frenzied period in the 1990s, a dismal first 10 years of this century, and relative quiet of late, section 15 remains a conundrum. The Court's most recent decision on equality was *A v B*, and it revealed a still-divided bench on whether and how and why Quebec's position on spousal support was, or was not, an equality violation. What makes equality so hard? Why has the Court struggled so with consistency and unanimity in analysis? These questions continue to haunt section 15.

This paper will consider one aspect of the continuing controversy: the sacrifice of equality to other constitutionally protected rights. Other *Charter* rights, and especially

section 2(a) Religion and section 7 Life, Liberty and Security of the Person, have well-developed precedent decisions that have built a jurisprudence the Court is comfortable with. It knows what to do with those sections (even where it disagrees on an outcome, it still knows its direction!). In situations where equality competes for attention, as in for example the decision in *R v N.S.* (the complainant's right to wear a niqab in a sexual assault trial), the Court sacrifices serious engagement with section 15. I argue this is at least in part a reflection of its discomfort with its own methodology and reasoning on equality. I also think the comparative nature of equality analysis (which still resonates even after a "mirror" comparison analysis was dropped in *Withler)*, lends section 15 to a comparative analysis with other *Charter* rights. The Court may insist there is no hierarchy, but equality is often defeated when it competes for attention against *Charter* rights the Court is more devoted to strengthening.

This paper will use the recent controversy around conscience and religious protections for physicians to illustrate the conflict. Physicians argue that they should be allowed to decline to provide some legal medical services (most notably access to contraception, abortion and physician-assisted death) when doing so would require them to act against their *Charter*-protected conscience and religious rights. The refusal to provide service has a direct impact on section 15 equality rights for patients. I consider the *Charter* dimensions to this issue and advocate that equality not get lost in the effort to accommodate other *Charter* rights.

NOTES

Ian Greene

Biography

Ian Greene has taught public policy and administration at York University since 1985. He earned a B.A. from the University of Alberta, and an M.A. and Ph.D. from the University of Toronto. He worked in Alberta's public service for four years in the 1970s and 1980s both as a middle manager, and Ministerial Assistant. Greene is a University Professor Emeritus in the School of Public Policy and Administration, and Master Emeritus of McLaughlin College. He was the founding Director of York's Masters program in Public Policy, Administration and Law. He is a past Chair of the University Senate, and a former Associate Dean in the Faculty of Arts.

Greene's most recent book is *The Charter of Rights and Freedoms* (2014). He is also author *The Courts* (2006), which is part of the Canadian Democratic Audit series. He was the principal author of *Final Appeal*, (1998), which analyses decision-making in Canadian appeal courts, and is based on interviews with 101 of Canada's appellate court judges, including Supreme Court of Canada judges. His co-authored book with David Shugarman, *Honest Politics*, (1997) studies the ethics regimes for Canadian cabinet ministers. His other books are *The Charter of Rights* (1989), and *Judges and Judging* (1990, with Peter McCormick). As well, he was a member of the research team, led by Prof. Maureen Mancuso at the University of Guelph, which published *A Question of Ethics* in 1998 (second edition, 2006). He has authored more than 40 academic journal articles or book chapters. He is a frequent media commentator regarding issues concerning public sector ethics, and judicial decisions.

Ian is married to Eilonwy Morgan, whom he cites as the key to his academic success. Ian and Eilonwy have three children: Christina (23), Philip (21) and Girum (13). Ian and Eilonwy enjoy exploring lively places, from the St. Lawrence Market in Toronto to the Boucarea Market in Barcelona.

Abstract

Are s. 15 issues best dealt with through litigation and the courts?

Chief Justice McLachlin has signaled that s. 15 of the Charter is the most difficult for the Supreme Court to interpret. In cases such as *Schachter*, *Eldridge*, *Symes*, *Thibaudeau*, *Gosselin*, and *Auton*, the Supreme Court appears to have been dragged into finding solutions to social equality policy issues that are arguably more likely to be resolved more sensibly by government policy-makers – so long as the policy-makers are well schooled in the meaning of substantive social equality. Both the Supreme Court and government policy-makers have come up short at times – the court because of its lack of policy expertise and the failure of legal counsel to provide the Court with the most helpful background evidence, and government policy-makers because of too narrow a focus and shortcomings in the policy process.

Clearly, the right to equality, as Chief Justice McLachlin has indicated, is one of the most difficult rights that the Court has to interpret, which is why the Court has been inconsistent in its approach. In the *Law* decision, the Supreme Court muddied the water in its approach to social equality, but the *Kapp* decision appears to have contributed toward a clearer vision.

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Richard Haigh

Biography

Richard Haigh is an Assistant Professor at Osgoode Hall Law School and Director of York's Centre for Public Policy and Law and a Co-Director of the Part-Time LLM in Constitutional Law at Osgoode. He has a doctorate from the University of Toronto in the area of freedom of conscience and religion. He was, until December 2007, the Associate Director, Graduate Program at Osgoode Professional Development. He has been a Senior Lecturer at Deakin University in Melbourne, Australia, a Senior Advisor at the National Judicial Institute in Ottawa, and a Legal Research and Writing Lecturer at Osgoode. His research and teaching interests include Constitutional Law, Public Law, and Equity and Trusts. His recent published works include papers on metaphors in constitutional interpretation, division of powers in freedom of expression cases, freedom of conscience and whistleblowing, freedom of religion, dialogue theory, noise by-laws, election financing laws and prisoner's voting rights; he also contributed a chapter to the State and Citizen casebook on *Public Law* (Emond-Montgomery, 2006, 2nd ed., 2011, 3rd ed., 2015).

Abstract

Thirty Years On: Section 15 and an Assessment of Facially Discriminatory Legislation

Section 15 of the Charter's implementation was delayed three years ostensibly to allow governments to amend statutory language that was discriminatory. Work was done in the early 1980s to "audit" statutes from some jurisdictions, mainly by feminist scholars to assess how many laws discriminated on the basis of sex (as it was then called). Since April 2014, I have been performing an updated audit of all statutes in Canada, examining them for direct discrimination on all listed grounds (in short, whether now, more than 30 years later, we have truly removed all direct discrimination provisions from our statute books).

NOTES

Thaddeus Hwong

Biography

Thaddeus Hwong is an associate professor crossed-appointed to School of Public Policy and Administration and School of Administrative Studies in the Faculty of Liberal Arts and Professional Studies at York University. He aspires to find creative ways to use our collective understanding of law and policy to tackle income and wealth inequalities, and his current research projects explore the social benefits and economic costs of taxation as well as the financial accountability of the rich and the powerful to society. He is an adjunct senior research fellow at the Department of Business Law and Taxation at Monash University in Australia and a research associate of Canadian Centre for Policy Alternatives.

Abstract

What Do People Want from s. 15 in Fighting Against Income and Wealth Inequalities?

Income and wealth inequalities could be argued to be inequalities of our times as they appeared to have captured the imagination of the masses in the past decade. Citizens have marched against them, journalists have written about them, and scholars have examined them. Not just in the Occupy Movement of the grassroots, but also in the World Economic Forum of the power suits, approaches to reduce income and wealth inequalities have been sought. In an online survey experiment – likely the first of its kind in Canada – the possible role of s. 15 in fighting against income and wealth inequalities is explored in light of the public perception. Do people think the s. 15 equality rights protect them from income and wealth inequalities in some ways? Do people want some protection against income and wealth inequalities from s. 15? What price are people willing to pay for the inclusion of socio-economic rights against income and wealth inequalities in s. 15? Based on the empirical evidence from the survey experiment, a conjecture is made on what people really want s.15 to be. The struggle to extend the reach of s. 15 has been ongoing, and no one could foreclose the future easily, as when there is a will, there might just be a way.

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Martha Jackman

Biography

Martha Jackman, B.A. (Queen's), LL.B. (Toronto), LL.M. (Yale), is a professor of constitutional law in the French Common Law Program at the University of Ottawa. She publishes primarily in the areas of socio-economic rights, equality and the *Charter* and has acted as legal counsel in a number of *Charter* test cases, most recently on behalf of the Charter Committee Coalition in the *Tanudjaja* case. She is a member of the National Steering Committee of the National Association of Women and the Law and a former member of Equality Rights Panel of the Court Challenges Program of Canada and of the National Legal Committee and Board of Directors of the Women's Legal Education and Action Fund. In 2007, she received the Law Society of Upper Canada Medal for her contributions to the profession and in 2015 she was awarded the Canadian Bar Association's Touchstone Award.

Abstract

Overcoming the Poverty of Charter Equality

The extent to which *Charter* equality guarantees require Canadian governments to actively address systemic disadvantage and social and economic rights violations experienced by people living in poverty remains an ongoing question in Canada. More than thirty years after its entry into force, section 15 has had little or nothing to say to poverty, access to food, housing or decent work – issues of major concern for equality seeking groups when the text of section 15 was negotiated. Instead, most social and economic rights claims brought by people living in poverty have been rejected by the courts based on a formalistic approach to section 15 and findings that poverty does not qualify as an analogous ground of discrimination. The paper will consider why section 15 has been so impervious to poverty-related claims and what will be required for this situation to change moving forward.

NOTES

David Lepofsky

Biography

Since the late 1970s, David has been active in a volunteer capacity, advocating for new laws to protect the rights of persons with disabilities in Canada. In 1980, he appeared before the Joint Committee of the Senate and the House of Commons on the Constitution of Canada, on behalf of the Canadian National Institute for the Blind for an amendment to the proposed Charter of Rights, to guarantee equality rights to persons with disabilities. The efforts of a great many combined to lead Parliament to pass the disability amendment to the Charter. From 1980 to 1982, he served on the leadership team of a broad disability coalition that successfully advocated for inclusion of protection against discrimination based on disability in the Ontario Human Rights Code. From 1994 to 2005, he led the Ontarians with Disabilities Act Committee. That coalition successfully campaigned for ten years to win passage of two new Ontario laws to make Ontario fully accessible to persons with disabilities, the Ontarians with Disabilities Act 2001 and the Accessibility for Ontarians with Disabilities Act 2005. Since then, he has helped in efforts to get that law effectively implemented.

As of late February, 2009, he became the Chair of the Accessibility for Ontarians with Disabilities Act Alliance. He and the Alliance have pressed for the prompt enactment and enforcement of strong accessibility standards under the Disabilities Act. In 2010 they succeeded in getting Ontario election legislation amended to address accessibility barriers impeding voters with disabilities, although they have more to do to get telephone and internet voting to become a reality in Ontario elections. He is a founding member of, and now serves as co-chair of Barrier-Free Canada. It is a community coalition that advocates for the enactment of a national Canadians with Disabilities Act. Starting in 1994, he campaigned to get the Toronto Transit Commission to announce all subway stops, and later all bus stops, for the benefit of passengers with vision loss. Between 2001 and 2007, he personally fought two cases against TTC. In 2005, the Human Rights Tribunal ordered the TTC to consistently announce all subway stops (Lepofsky v. TTC #1). In 2007, the Human Rights Tribunal ordered the TTC to announce all bus and streetcar stops (Lepofsky v. TTC #2).

Starting in April 2015, he served as a member of the Toronto District School Board's Special Education Advisory Committee. In January 2016 he became its chair. That legally-mandatory committee advises the Toronto District School Board on reforms needed to improve special education services and programs. Awards include investiture in the Order of Canada (1995), the Order of Ontario (2007), and the Terry Fox Hall of Fame (2003), honorary doctorates from Queen's University and the University of Western Ontario, and awards from other organizations including e.g. the City of Toronto, the Law Society of Upper Canada, the Ontario Bar Association Public Lawyers Section, the Advocates Society, the Ontario Crown Attorneys Association, the Ontario March of Dimes and Community Living Ontario.

He is the author of one law book, and the author or co-author of 30 law journal articles or book chapters on topics including constitutional law, criminal law, administrative law, human rights, and the rights of persons with disabilities. His publications have been cited with approval in several decisions of the Supreme Court of Canada, as well as by trial and appeal courts across Canada. He has lectured on topics including these across Canada, and in the U.S., Israel, the Republic of Ireland, Denmark and Belgium.

Abstract

A Discussion Paper on What to Include In the Canadians with Disabilities Act

Prime Minister Justin Trudeau promised in the 2015 federal election that his Government would enact a Canadians with Disabilities Act, if elected. This presentation and paper will focus on priorities for what that legislation should include. It will build on experience with the development and implementation of provincial accessibility legislation in Ontario, enacted in 2005, and in Manitoba in 2013. It will focus on the need for this legislation to make the constitutional requirements enshrined in the Supreme Court of Canada's landmark Eldridge decision become a reality in the lives of people with disabilities in Canada.

NOTES

Emmett Macfarlane

Biography

Emmett Macfarlane is an assistant professor of political science at the University of Waterloo. His research focuses on the intersection of rights, courts, governance and public policy. He is the author of *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press, 2013), and the editor *Constitutional Amendment in Canada* (University of Toronto Press, in press). He has also published in the *McGill Law Journal, Supreme Court Law Review, International Political Science Review,* and the *Canadian Journal of Political Science*, among others.

Abstract

Examining section 15's capacity for accommodating an evolving role for positive or social/economic rights in Canada

The extent to which the Charter of Rights and Freedoms includes, or ought to include, protection for social and economic rights has been the subject of much commentary. Outside of specific provisions (section 23's minority language education rights, for example), the Charter is largely interpreted as a negative rights document; that is, it generally protects against government interference with rights rather than requiring governments to take action to provide particular programs or services. Normative arguments in favour of interpreting Charter provisions like section 7's right to life, liberty, and security of the person as containing free-standing positive rights run into significant questions concerning institutional roles and competence, as well as judicial overreach in the absence of formal constitutional amendment. However, a number of cases pose a challenge for the conceptual distinction between positive and negative rights, particularly those that are situated in a negative rights frame but have obvious implications for a right of access to particular services. In this paper I argue that section 15's equality rights offer a path forward to dealing with this dilemma. More specifically, a circumscribed role for positive rights under the ambit of section 15 may in the future be necessary to deal with problems with Supreme Court jurisprudence in cases involving access to health care and reproductive rights.

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Jena McGill

Biography

Jena McGill is an Assistant Professor at the University of Ottawa Faculty of Common Law. She graduated from the joint LL.B./M.A. program of the University of Ottawa Faculty of Law and the Norman Paterson School of International Affairs at Carleton University, and served as a law clerk to Madam Justice Louise Charron at the Supreme Court of Canada. Jena worked at the United Nations International Law Commission in Geneva, and then completed her LL.M. at Yale Law School. Jena's research centers on human rights and equality in both the domestic and international contexts, and particularly on questions related to gender, sexuality and the law.

Abstract

Whether and how concerns about the application of the Kapp analysis to cases of under-inclusivity or adverse effects have played out in recent years

Section 15(2) of the *Canadian Charter of Rights and Freedoms* affirms that ameliorative laws and programs are important tools in the pursuit of substantive equality. In *R v Kapp*, the Supreme Court of Canada set down a novel interpretation of section 15(2), giving it independent interpretive force to "save" government laws or programs with an ameliorative purpose from full scrutiny under section 15(1) or section 1 of the *Charter*. Following *Kapp*, and the subsequent decision in *Alberta v Cunningham*, it became clear that the Court's reading of section 15(2) could prove problematic in equality cases alleging that a law or program with a purportedly ameliorative purpose is nonetheless underinclusive or results in adverse effects for an equality-seeking group. This paper will consider whether and how concerns about the application of the *Kapp* analysis to cases of underinclusivity or adverse effects have played out in recent years. Is the government using section 15(2) to try to shield allegedly ameliorative programs from full *Charter* review? How are Canadian courts interpreting and applying the *Kapp* framework when equality claimants argue that an ameliorative program is underinclusive or results in adverse effects? Is the *Kapp* analysis consistent with the overarching goal of substantive equality promised by section 15 of the *Charter*?

NOTES

Errol Mendes

Biography

Professor Mendes is a lawyer, author, professor and has been an advisor to corporations, governments, civil society groups and the United Nations. His teaching, research and consulting interests include constitutional and human rights law, corporate law, global governance, public international law (including humanitarian and international criminal law) and international business and trade law. Professor Mendes completed his term as Director of the Human Rights Research and Education Centre on June 30, 2001, and returned to full-time teaching in the Common Law section. He had been Director of the Centre since 1993.

Professor Mendes has also been an advisor to governments, civil society and the global private sector on business and human rights. Professor Mendes has taught, researched, consulted and published extensively in the area of Global Governance, International Business Law and Ethics, Constitutional Law and Human Rights Law. He is also Editor-in-Chief of Canada's leading constitutional law journal, "The National Journal of Constitutional Law". He is the author or co-editor of seven books, including the landmark constitutional law text, co-edited with Senator G. Beaudoin, The Canadian Charter of Rights and Freedoms, 3rd and 4th Editions, Carswell, 1996 and 2005 and the internationally recognized texts, Towards a Fair Global Labour market: Avoiding the New Slave Trade, Routledge, New York and London, 1999, (co-authored); Democratic Policing and Accountability: Global Perspectives, Ashgate, U.K., (co-edited); Between Crime and War, Terrorism, Democracy and the Constitution, Carswell, Toronto, 2003 (co-edited); Global Governance, Economy and Law, Routledge, New York and London, 2003.

Since 1979, Professor Mendes has taught at Law Faculties across the country, including the University of Alberta, Edmonton from 1979 to 1984, the University of Western Ontario, London, Ontario from 1984 to 1992 and the University of Ottawa from 1992 to present. He was a visiting Professor at the Faculty of Law, McGill University and the Université de Montréal in 1992. In 2013, he was a Visiting Fellow at Harvard Law School and gave lectures both at the Law School and the Harvard University Weather-

head Centre for International Affairs. He has acted as a member of the Canadian Human Rights Tribunal Panel and has extensive experience as a Human Rights Adjudicator under the Ontario Human Rights Code.

Professor Mendes was appointed by the Prime Minister of Canada as a Senior Advisor in the Privy Council Office of the Government of Canada during the academic year 2005-2006. In that position he advised the Clerk of the Privy Council on a range of issues including national security, diversity, national unity, foreign policy and corporate social responsibility. In 2006, he was awarded the Walter S. Tarnopolsky Human Rights Award by the Canadian Section of the International Commission of Jurists and the Canadian Bar Association for his human rights work in Canada and across the world.

Abstract

Is Section 1 the protector or the dagger at the heart of Section 15?

This paper focuses on the most recent decisions of the Supreme Court, especially the ruling in the so called Eric v. Lola decision (Quebec (Attorney General) v. A., to answer the question in the title.

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Charles-Maxime Panaccio

Biography

Charles-Maxime Panaccio (B.C.L., L.L.B, McGill, 1999; B.C.L., Oxford, 2003; S.J.D., Toronto, 2008) was a clerk for Justice Charles D. Gonthier at the Supreme Court of Canada. He is interested in constitutional rights, the philosophy of law and the law of evidence.

Abstract

Section 15: Aristotle's Revenge

Andrews's rejection of Aristotle's 'similarly situated' approach to equality is still part of s. 15's official canon. I suggest that, in almost every s. 15 case, the Supreme Court of Canada has in fact been applying an Aristotelian, 'similarly situated', equality doctrine. Of course, this is not the legalistic, 'formal', version of that idea, which merely requires that legal rules be applied consistently and impartially. Rather, it is the idea that persons ought to get equal legal benefits when this is justified in terms of moral reason. This is a fully 'substantive' notion of equality, built on a substantive (and in many ways, Aristotelian!) notion of moral reasoning, on which I elaborate in the paper. This doctrine of substantive equality perfectly fits the judiciary's role under the *Charter*, and it is therefore no surprise that the Court has been applying it *sub rosa* from *Andrews* (1989) to *Quebec v. A* (2013).

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Bruce Ryder

Biography

Professor Ryder joined Osgoode Hall Law School's faculty in 1987. His research and publications focus on a range of contemporary constitutional issues, including those related to federalism, equality rights, freedom of expression, Aboriginal rights, and Quebec secession. He has also published articles that explore the historical evolution of constitutional principles and is currently researching the history of book censorship in Canada.

Abstract

An Empirical Review of How Lower Courts Follow s. 15 Jurisprudence

The paper will present data on patterns in s.15 decision-making since *Andrews* by all levels of the courts by ground, jurisdiction and year, focusing on the sharp downward trends in the number of cases brought and the rate at which violations of s.15 are found, as well as the variations in the rate of established s.15 violations by ground - sexual orientation and marital status are the highest (primarily because they are analogous grounds and legislatures and governments have not adequately reviewed their statute books to cleanse laws of facial distinctions on these grounds), and race the lowest or one of the lowest (which reflects access to justice concerns, and also the absence, apart from Aboriginality, of facial distinctions in statutes on the basis of race).

NOTES

Kim Stanton

Biography

Dr. Kim Stanton is a lawyer and feminist advocate. She has worked at the British Columbia Human Rights Council, the United Nations Relief and Works Agency for Palestinian Refugees in the Gaza Strip and the Ghana Centre for Democratic Development in Accra, where she was an Official Observer of Ghana's National Reconciliation Commission and a consultant with the African Women Lawyers Association. Her legal practice focused on constitutional and Aboriginal law while her academic work has focused on truth commissions and public inquiries. She completed her Masters of Law and Doctorate of Juridical Science at the University of Toronto, where she is a Senior Fellow of Massey College. She is the Legal Director of the Women's Legal Education and Action Fund (LEAF), a national equality rights organization.

Abstract

The Disappearance of Systemic Discrimination from Canadian Equality Jurisprudence

(Paper is co-authored with Mary Eberts). Equality-seekers' growing interest in framing Charter claims under section 7, or using a combination of sections 7 and 15, reflects their awareness that the Supreme Court's interpretation of section 15 has rendered it virtually ineffectual, especially in cases raising substantive equality arguments. There are many reasons for the moribund state of section 15. One is the Court's deference to legislative "balancing" of the interests of the vulnerable, in cases it characterizes as being about social and economic policy. Another and very significant reason is the Court's hesitancy to recognize systemic discrimination. Over the almost 30 years since section 15 of the Charter came into effect, it has proved a challenge for equality-seeking groups to succeed with such claims under section 15. While cases such as *Ipelee*, *Williams* and *Gladue* have recognized systemic discrimination, there have been few acknowledgments of such pervasive discrimination in s. 15 analyses. It appears that an individual case of discrimination must be proven before systemic discrimination can be invoked as a contextual characteristic. This hurdle suggests that the link

between systemic discrimination and substantive equality that feminist lawyers have made since 1985 will not achieve the results sought by them before the SCC. In other words, it appears that formal equality arguments continue to be the most effective, while substantive equality arguments are increasingly made using other sections of the Charter. Given that the Court has largely ignored the four elements of equality in the language of s. 15, preferring instead to focus solely on the definition of "discrimination", is it time to go back to the roots of what was intended by the framers of s. 15?

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