

Equality: The Most Difficult Right

Beverley McLachlin P.C.

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

McLachlin, Beverley P.C.. "Equality: The Most Difficult Right." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 14. (2001).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol14/iss1/2>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

EQUALITY: THE MOST DIFFICULT RIGHT

The Right Honourable Beverley McLachlin, P.C.*

The *Canadian Charter of Rights and Freedoms* guarantees a panoply of rights — democratic rights, liberty rights, the right to free expression and to follow the religion of one's choice, rights of association, rights against undue intrusion of the state in the guise of the police power and the right to a fair trial. And like most modern bills of rights, it guarantees equality. Of all the rights, this is the most difficult.

The Canadian Charter¹ guarantees equality not just in one way, but in four — we are declared to be equal before the law, equal under the law, entitled to equal benefit of the law and to the equal protection of the law. Its framers were determined to pre-empt the restrictive interpretations that courts had placed on the guarantee of “equality before the law” used in the Charter's predecessor document, the Bill of Rights.² They gave the courts clear, unequivocal instructions: This is a guarantee of equality. Take it seriously. Don't cut it down. Interpret it in a meaningful and expansive way.

The challenge was exciting. But it has also proved daunting. The language of equality is so open and general that it is difficult to assign it precise legal meaning. At the same time, every nuance is critical. Too narrow an interpretation, and one sends the law down the formalistic *cul de sac* of *Lavell*³ and *Bliss*.⁴ Too broad an interpretation, and one risks undermining long-standing social institutions and upsetting the careful equilibria crafted by Parliament and the legislatures to maintain social stability.

* Chief Justice of Canada. This paper was originally presented at the April 6, 2001 conference entitled “2000 Constitutional Cases: Fourth Annual Analysis of the Constitutional Decisions of the S.C.C.” sponsored by the Professional Development Program at Osgoode Hall Law School.

¹ *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.

² Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, Ont.: Carswell, 1997), at 1240.

³ *Canada (Attorney General) v. Lavell*, [1974] S.C.R. 1349.

⁴ *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183.

In the next few minutes, I would like to explore with you some thoughts on our encounters with equality thus far: first, why the right is so difficult; second, the three rocks of certainty that have emerged in modern equality flunking; and finally, the different goals of equality and how they may impact on future developments.

First, let me address the difficulty of defining equality. Canadians are not the only ones who find equality difficult. Sidney Verba and Gary Orren argue that few issues have sparked more controversy or held more sway over the course of history than equality. “Ships have been launched, lives given, governments toppled — all in the name of this one ideal.”⁵

And this ideal is not a simple one. In his 1990 analysis of the rhetorical force of equality in moral and legal discourse, Professor Peter Westen lists just some of the adjectives used by lawyers and philosophers over the years to describe the concept of equality. These include “strange and difficult,” “complex,” “intricate,” ambiguous,” “elusive,” “slippery” and “mysterious.”⁶ To underline his point, he notes that his book on equality was, by conservative estimate, one of 30 to 40 books on the topic that were expected to be published in English that year. His book also followed the publication of 370 books about equality in the decade from 1978 to 1987.⁷

Westen argues that while people seem to share the concept of equality, they have very different conceptions of it, and he points to the difference of opinion that exists about what “equality” on grounds of “sex” means under the Equal Rights Amendment (ERA) in the U.S.A. Everyone agrees that the ERA would render men and women equal under the law, but people have different conceptions of what such sexual equality means. Some people contend, and some deny, that it will require men and women to be treated interchangeably for purposes of military combat duty. Others contend, and others deny, that it mandates subsidized abortions for indigent women, legitimates homosexual marriage, or outlaws separate athletic teams and events for men and women. Indeed, the 17 states that have adopted ERAs of their own differ considerably in their interpretations of what such equality means.⁸

The Supreme Court of Canada itself has commented on the difficulties posed by section 15. In 1989, in its first decision dealing with section 15 of the Charter, *Andrews v. Law Society of British Columbia*, McIntyre J., speaking for the Court,

⁵ Verba and Orren, *Equality in America: The View from the Top* (Cambridge, Mass.; London, England: Harvard University Press, 1985), at 1, cited in Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of “Equality” in Moral and Legal Discourse* (Princeton, N.J.: Princeton University Press, 1990), at 59.

⁶ Westen, *supra*, note 5, at 61.

⁷ *Id.*, at 285.

⁸ *Id.*, at xv-xvi.

remarked that “more than any of the other rights and freedoms guaranteed in the Charter, [the equality right] lacks precise definition.”⁹ Ten years later, in *Law v. Canada (Minister of Employment and Immigration)*, Iacobucci J. described section 15 as “perhaps the Charter’s most conceptually difficult provision.”¹⁰ He noted that one of the difficulties in defining the concepts of “equality” and “discrimination” is the abstract nature of the words and the similarly abstract nature of words used to explain them. No single word or phrase can fully describe the content and purpose of section 15(1). Part of the difficulty in defining the concept of equality, he said, stems from its exalted status:

The quest for equality expresses some of humanity’s highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the Charter is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.¹¹

Difficulties in defining and applying concepts of equality are not restricted to common-law systems. Susanne Baer, of Humboldt University’s School of Law in Berlin, states that almost every German analysis of the subject opens with two observations: “first, the right to equality is the most frequently cited right in the jurisprudence of the German Constitutional Court and, second, the equality doctrine is the area of constitutional law containing the greatest number of conundrums.”¹² Courts and policy makers around the world have struggled with the meaning of equality and with its limits — limits that are shaped by the political and social histories of the countries involved.

Equality’s track record is clear. It is the Leviathan of rights. It has humbled the most sophisticated legal minds, the most refined and liberal legal systems. We in Canada should therefore not be surprised if we encounter difficulty with this, the most difficult right.

The difficulties in interpreting equality stem from a number of sources. The first, as noted, is the generality of equality language. In every country, courts punctuate their struggles with equality with references to the fact that equality can mean anything and everything, from minimal protection of democratic rights at one end of the spectrum to full economic equality at the other. What constitutes equality in a given situation is a matter open to debate and argument.

⁹ [1989] 1 S.C.R. 143, at 164.

¹⁰ [1999] 1 S.C.R. 497, at 507.

¹¹ *Id.*

¹² Baer, “Constitutional Equality: Equality: The Jurisprudence of the German Constitutional Court” (1999), 5 *Colum. J. Eur. L.* 249, at 249.

This brings us to a second difficulty. Equality debates usually turn on the proponent's view of society and what it should be. This raises the question of whether the courts can capture the complexity of social life in a way that permits them to make the best decisions. At a more abstract level, who should be making fundamental decisions about the kind of society we have — the legislatures or the courts? Again, should the law preserve the social status quo, or should it seek to change?¹³ And underlying the question of how far to go in changing things is the fact that the Canadian equality guarantee, like the equality guarantees of most modern democracies, has been superimposed on a system that espouses a market economy and the importance of open competition.

A third difficulty is that the reality of equality can never meet its promise. Equality is not only the Leviathan of rights; it is also a Tantalus. It promises more than it can deliver.

The diversity of our society and its foundation in the competition of the marketplace mean that absolute substantive equality is impossible. It is beyond the resources of society and the law to place everyone in exactly the same position of relative advantage and disadvantage, even if we wished to. And even that is in doubt. German scholar Susanne Baer, writing against the history of a totalitarian Reich that idealized the unity of the people, warns against “the nightmare of the equality state of total conformity.”¹⁴ A market-based representative democracy necessarily tolerates a certain degree of disparity, economic and otherwise. It is perhaps for this reason that the Canadian equality experience, expressed in human rights legislation as well as in the enumerated grounds of section 15, focuses on particular sources of inequality which have historically proved unjust and harmful to the affected individuals and to society as a whole.

So we must accept that equality in our society is not a simple matter. Yet, the same experience that confirms the difficulty of equality points to the solutions. This brings me to my second point — the emerging rocks of certainty on which we can anchor our evolving jurisprudence.

The first is the rock of substantive or material equality, as contrasted with formal Aristotelian equality. Substantive equality recognizes the fallacy of formal equality — that it permits discriminatory acts simply by classifying groups as “unlike.” Substantive equality is founded on the principle that all human beings are of equal worth and possessed of the same innate human dignity, which the law must uphold and protect, not just in form, but in substance.

¹³ Baer, *id.*, at 280, lists these as challenges for German law.

¹⁴ *Id.*, at 273.

Substantive equality comes with a venerable lineage. Liberal German scholars of the Weimar Republic held that equality is not a right against formal distinctions alone, but against inappropriate, irrelevant or unjust distinctions. After the defeat of the formal totalitarian equality of the Third Reich, the new Federal Republic adopted substantive equality (sometimes translated as “material equality”) as the Grundnorm of the 1945 German constitution.¹⁵ Substantive equality thinking is reflected in the United States cases like *Brown v. Board of Education*¹⁶ and its progeny, although the emphasis on individualism in the United States has arguably prevented its unambiguous realization.¹⁷ French historical experience has led to an acceptance of the state actively seeking to ensure equality.¹⁸ And in recent decades, as we all know, substantive equality has been affirmed throughout Europe, as well as in Canada, Israel and South Africa.

Substantive equality is recognized worldwide as the governing legal paradigm. It is here to stay. We can count on it. But we must also recognize that it introduces a new difficulty that formal equality did not possess — the need to decide when a distinction is inappropriate or unjust. Substantive equality requires the court to determine whether a given situation is “substantially the same” or “substantially unlike” another. Here we find ourselves back in the uncertain sea of value judgements. Every Canadian scholar of section 15 knows the result. Relevance, disadvantaged group, human dignity — these concepts and more attest to our search for a simple rule that will indicate whether a particular distinction treats persons in a way that is substantially the same or substantially different.

Whatever words are used, drawing the line between appropriate and inappropriate, just and unjust, distinctions, inevitably involves the courts in weighing and balancing conflicting values. Is the impugned distinction justified when judged against the legislative goal, or is it not? This poses Canadian courts a challenge not faced by courts in many other countries. Our equality guarantee is subject not only to the internal proportionality constraints inherent in substantive equality, but also to the separate proportionality constraint of section 1 of the Charter. How do we work the two together while avoiding redundancy or reducing section 1 to a mere formality?¹⁹

¹⁵ *Id.*, at 259-60.

¹⁶ 344 U.S. 141 (1952).

¹⁷ Vroom, “Equal Protection Versus The Principal of Equality: American and French Views on Equality in the Law” (1992), 21 *Cap. U. L. Rev.* 199.

¹⁸ *Id.*

¹⁹ See Bredt and Nishisato, “The Supreme Court’s New Equality Test: A Critique” (September-October 2000), 8 *Canada Watch* 16.

As important as substantive equality is, it comes with a price tag — the price of having to determine what distinctions are just, or fair, or equal, and which are not. It is a price we must accept and find a way to pay. For we cannot go back on substantive equality. Substantive equality is the only equality for our time, and we cannot turn back the pages of history even if we wished to.

If substantive equality is the first rock of modern equality doctrine, it is supported by a second — the idea that equality is concerned not with the letter of the law, but also with effects. It is not enough to look at the facial distinction the statute makes to determine whether it is appropriate. If our goal is substantive equality, we must look to the actual effect of the law or government action on the lives of men, women and children. This idea, too, is now widely accepted in Western equality jurisprudence. But again, it brings its own difficulty — how are courts to ascertain the social effects of a law? Unlike Parliament, courts cannot conduct social research, test existing research or hire experts to advise and consult. Nor, as bodies activated by principle, can they use arbitrary compromise to resolve intractable issues that divide social groups. Courts must rely on the parties to adduce and critique the evidence needed to assess social effect. Parties may fail to provide complete evidence and forceful critiques for a variety of reasons. How then is the Court to make the necessary evaluation? We can only do what we can within the limits of our constitutional role and our institutional resources.

The third rock of modern equality jurisprudence is the concept that the right to like treatment invokes a comparable right to unlike treatment. It is not enough to treat those in substantially similar situations alike; the law must also treat those in substantially different situations differently to avoid inappropriate distinctions and discrimination. Again, this idea has attained virtual consensus in modern equality doctrine.

As Ackermann J. of the South African Constitutional Court has explained:

We need [...] to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in the different context.²⁰

²⁰ *The National Coalition for Gay and Lesbian Equality and Others v. Minister of Justice and Others* 1998 (6) BCLR 726 (W), at para. 61 citing with approval *President of the Republic of South Africa and Another v. Hugo* 1997 (6) BCLR 708 (CC), at para. 41.

While widely accepted, the idea that equality embraces both like and unlike treatment also imports its difficulties. Must the law compensate for every difference and disadvantage suffered by every person? This seems impossible. Laws by their nature are general, applying to everyone or to everyone within a designated group. Laws carve out exceptions, true, but the exceptions are also focused on classes or groups of people. So laws by their nature are inconsistent with the idea that all differences must be addressed and erased. But on the other hand, if every individual has the right to equal treatment, as the Charter pronounces, how can we justify the law's undue impact due to individual differences? Alternatively, if we accept that the best that can be done is to recognize class differences, where do we draw the line? How large or significant must the class be before the law recognizes the right to differential treatment? And when does different treatment to compensate for different situations cross the line and become a special advantage creating, rather than reducing, inequality? The answer, of course, is that the line between equality and inequality here, as elsewhere, depends on whether the difference is viewed as "substantial" or significant.

So we arrive at this point. Amid all the difficulty and confusion that surrounds modern equality doctrine, three rocks have emerged upon which we can ground future developments with confidence that we are heading in the right direction — the rocks of substantive equality, equality of effect and equality expressed both through like treatment and unlike treatment. Each comes with its own profound problems. Our task is to acknowledge and explore these problems to the end of preserving the values embodied in the new equality while building a legal structure that offers reasonable guidance to individuals, groups and legislatures.

This brings me to the third and final portion of my comments. Many of the equality issues we will see in the years to come will be concerned with working out the fine points and difficulties of substantive equality, equality of effect and the dual like-unlike treatment faces of the guarantee. And many of these issues will be bound up with a more general question: the ambit of the equality guarantee — whether, and if so to what extent, it should apply outside its traditional discrimination-oriented focus.

It may be helpful to think of equality doctrine in terms of the purposes it serves. Let me suggest three related but distinct purposes that can be put forward. The first and traditional focus of substantive equality is the goal of improving the situation of members of disadvantaged groups. A second purpose might be to promote the equal conferral of state benefits. A third purpose or concern might be to promote equal status. These focuses are often intertwined. A particular case may raise one, two or all three. Yet, often, one emerges as dominant, changing the complexion of the case and raising the question of

whether different goals require different legal treatment, and, if so, how we should incorporate this into our equality doctrine.

The first and arguably primary goal of modern equality law is to improve the situation of people belonging to groups that have traditionally suffered discrimination. Canada has pursued this goal since the 1960s, when, province by province and on the federal level, we adopted human rights codes. The Charter of 1982 affirmed this goal by referring to discrimination in its opening words and by situating the four facets of equality on the fulcrum of the enumerated grounds that targeted traditional sources of adverse-effect discrimination. We call this kind of equality, directed at actually improving the lives of individuals and society by reducing stereotypical discrimination, ameliorative equality.

The ethos of ameliorative equality dominates recent thinking. Supreme Court of Canada decisions repeatedly assert that reversing the harmful effects of stereotypical discrimination is the central purpose of section 15. The same holds elsewhere. Consider the words of Ackerman J. in *The National Coalition for Gay and Lesbian Equality and Others v. Minister of Justice*, referring to section 9(2) of the S.A. Constitution, who has stated:

The State is [...] obliged “to promote the achievement of such equality” by “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination,” which envisages remedial equality.²¹

Not surprisingly, given this focus, the principles that guide us in achieving the goal of ameliorative equality are relatively clear, at least in their core applications. We recognize stereotypical discrimination that demeans and limits opportunity and achievement when we see it, and we usually know what to do about it. On the periphery, however, questions persist. Even in cases where the goal of alleviation of discrimination is paramount, many groups other than those enumerated have experienced historic disadvantage. Should all be recognized, or only the most egregious? Again, as we move away from the core types of discrimination identified by the enumerated grounds, should our standards of scrutiny become more flexible, as suggested by the German jurisprudence?²²

However, rectifying the situation of disadvantaged groups is arguably not the only type of equality that falls within section 15 of the Charter. The Charter positively accords Canadians equal benefit of the law and equal protection from the law’s burden. This can be argued to extend the guarantee of equality to matters beyond the scope of traditional anti-discrimination law, to the equal

²¹ *The National Coalition for Gay and Lesbian Equality and Others v. Minister of Justice and Others*, *supra*, note 20, at para. 62.

²² Baer, *supra*, note 12.

provision of state benefits, even where the group excluded is not the object of historic discrimination. The primary concern in such cases is not whether the group to which the plaintiff belongs has suffered historical disadvantage requiring a legal remedy, but whether the state's largesse has been appropriately distributed. This concept of equality is discussed by philosophers like John Rawls, and figures in foreign equality jurisprudence such as Germany's.²³

Where the goal is equal distribution of benefits, the rules seem less clear than where the goal is amelioration of the downtrodden class's situation. Must the claimant be a member of a disadvantaged group? Could the government, for example, cut all men out of a welfare scheme on the ground they are not disadvantaged, leaving section 15(2) aside for the moment? What serves as a sufficient or substantial distinction between one disadvantaged group and another? Where, within groups, can the legislature permissibly draw cut-off lines? What about the argument that it is for the legislature to decide how to allocate limited resources? Canadian courts have wrestled with these issues in *Schachter*²⁴ and, again, in *Law*. In *Law*, the Court upheld Parliament's power to cut off benefits on the basis of age, reasoning that the distinction did not deny the complainant's human dignity. However, issues remain, and the Canadian attempt to fit benefit schemes into section 15 doctrine will continue to develop.

Here, too, Canadians are not alone in their difficulty. Benefit schemes have posed difficulty for equality doctrine in other countries, too. In some jurisdictions, like Germany, courts increase equality protection in direct relation to how closely the benefit at issue engages the liberty interest. For example, a legal aid scheme may be constitutionally required, given that it impacts on the equal right of every person to a fair court hearing. At the same time, denial of a benefit not linked to liberty may be permissible.²⁵ In the Canadian context, this suggests links between section 7 and section 15.

In yet other cases, a third focus may assume primary importance — status. In some cases, the tangible burden or benefit may be small or non-existent, and the denial of status may become the primary or only grievance. Is a person entitled to equal status on the basis of human dignity and equal worth, even where no other benefits or burdens are involved? Our Court has not yet faced this issue, and I comment on it no further.

While Canadian courts have arguably begun to make distinctions between situations where the goals differ from the classic goal of amelioration of group-based disadvantages, much terrain remains to be explored. Will we distinguish

²³ Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971).

²⁴ *Schachter v. Canada*, [1992] 2 S.C.R. 679.

²⁵ *Law*, *supra*, note 10.

between these and, perhaps, other types of equality claim? If so, on what grounds? These questions will doubtless occupy the courts in the years to come.

Here again, we may find it useful to look abroad. The equality jurisprudence of many countries seeks to differentiate between various equality goals by a range of jurisprudential devices, like hierarchies of interests, the presence or absence of a liberty component and proportionality analyses providing different levels of scrutiny for different goals and different cases. It is not yet clear that we must go down any or all of these roads. Contrary to experience elsewhere, we may prove capable of constructing a simple, unified equality rule that at the same time embraces the varied goals of the guarantee. Yet, we are well advised to survey the general geography before we chart our new roads and lay down the heavy pavement.

Canadian equality law is in its infancy. We have made a good start by founding our jurisprudence on the rocks of substantive equality, effects equality and the reality that equality embraces both like and unlike treatment. It remains to work out the implications of this beginning. It is a worthy endeavour. Mahatma Ghandi taught that if we could eliminate inequality, we could eliminate most of the world's problems. We can never reach complete equality, even if we wished to. But we can work to use the law to combat the evils that flow from inequality. We can work to remove the barriers, legal and systemic, that hold women, men and children back. We can and must work to promote the fundamental worth and human dignity of each member of society. We ask your help, as scholars of the law, in finding the right answers for equality, the most difficult right.