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Supreme Court of Canada Equality Jurisprudence and “Everyday Life”

Patricia Hughes*

I. INTRODUCTION

In the 30 years since the advent of the *Canadian Charter of Rights and Freedoms*¹ and nearly 25 years since the first section 15 equality case, it is worth asking to what extent the Supreme Court of Canada’s equality jurisprudence is meaningful for the initiatives undertaken in “everyday life”. Does it pose a model for the kinds of equality efforts organizations undertake or does it pose too low — or complex — a standard to be helpful? Is it even possible to advance equality significantly through the Supreme Court of Canada’s jurisprudence? From a slightly different but equally important vantage point, how valuable does the section 15 jurisprudence appear to be in non-section 15 cases raising equality issues? In either case, the question is the extent to which the section 15 jurisprudence informs or has the capacity to inform other equality contexts. Here I consider this issue in a preliminary way.

While I cannot provide here an in-depth examination of the many ways in which substantive equality is gradually infusing Canadian life, nor the ways it is not doing so, in the next section, I do briefly examine a few equality initiatives undertaken in the legal, education government and corporate sectors of society.² I am asking whether the Supreme

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² These initiatives are meant to be illustrations only of the various efforts these and other mainstream sectors have undertaken to advance the equality of those affected by or subject to them or to increase the diversity of their membership, for example. I have selected these sectors because they operate in one way or another within the same realm as the Supreme Court of Canada (the legal sector and government), have a significant impact on people’s lives (government) or while not immune from Charter decisions, may consider themselves somewhat distant (corporations). Further, I refer to them only briefly, taking them at face value, and make no effort to assess whether they do in fact satisfy the Charter or their own objectives.

Court's equality jurisprudence has the capacity to guide initiatives or to serve as a "beacon" against which equality initiatives might be measured.

Of course, specific judicial decisions may result in particular initiatives or changes in policy. Furthermore, to some extent the impact of the Charter is "in the air". It has bolstered the "equality conversation" over the last three decades and Supreme Court rhetoric around equality has been part of this process, just as the Court's decisions have ignited debate. However, my more specific conclusion is that Supreme Court decisions do not for the most part assist in prompting or designing societal equality initiatives because the decisions themselves do not accord with the Court's rhetoric, and as a result offer a sometimes erratic path along which those wishing to advance equality must travel. Thus, while the decisions may have an impact in a particular case, this is not the same as the Court's serving as a "leader" in the equality conversation that takes place in many sectors in society, nor does it mean that it has a significant impact in ensuring that equality initiatives occur in sectors slow to develop them.

I suggest that the Court is one participant in a conversation that often (inevitably) transcends the Court's contribution. Many people talk about equality and there are many different views about what it means, how to implement it and how to determine when it is achieved. The Supreme Court has few opportunities to express its views, has only a limited capacity to determine the cases that it adjudicates (being bound by the factual context and usually, at least, the parties' arguments), and a natural and usually appropriate reluctance to stray far beyond the immediate dispute in its commentary, even in constitutional cases. However, this may be less significant than the fact that when the Court does have the opportunity (and seizes it — as I mention below, it often does not), the challenges posed by its jurisprudence mean that it has little to say to those attempting to implement equality "on the ground" or in everyday life.

I provide a brief note on terminology before I elaborate further. A number of different terms are used to refer to "equality" in addition to "equality" or "substantive equality" itself, in particular "equity" and "diversity". To be clear, when I refer to "equality", I mean "substantive equality", although this may not be the case with others to whom I refer. "Substantive equality" requires acknowledgment of and response to differences that members of a particular group might experience in order to be treated equally. It takes into account patterns of disadvantage that may require proactive responses to address. It is distinguished from

“formal equality”, which requires treating “likes alike” and “unlikes” differently to achieve equality, while substantive equality may require treating people differently in order to achieve equality. The creation of a “lens” to assess the impact of law and practice on particular groups is usually for the purpose of advancing substantive equality.³

Sometimes “equity” is used synonymously with “equality”, often meaning “fairness”. “Diversity” may be used instead of “equality” to refer to the inclusion of previously excluded groups in particular initiatives. For example, the Canadian Bar Association’s (“CBA”) *Equity and Diversity Guide* uses the term “lawyers from diverse communities” and states, “This term captures the sum of all differences to consider when planning and implementing equity and diversity initiatives, for example: age, gender, race, physical ability, religious affiliation, faith, and creed”.⁴ Both “equity” and diversity are employed to refer to an increase in numbers of persons from previously excluded groups within an organization or to the incorporation of the cultural or religious practices of these groups.

Underlying all these terms is the idea of “pluralism” as both a description of a society composed of different groups, religions and viewpoints and a prescription about the importance of engaging them in the way society is structured and defined. Perhaps most important, the use of the term “pluralism” connotes a rejection of the assumption that only one viewpoint or experience is acceptable or legitimate, a necessary component in the realization of substantive equality.

Although in other contexts these terms may have different meanings and there may be important reasons that organizations I use as examples have chosen one or the other, for my purposes they are used interchangeably.

³ For example, see Maritime Centre for Excellence for Women’s Health, Gender Equity Lens Resource Document (June 1999), online: <<http://www.acewh.dal.ca/eng/reports/Gender%20Equity%20Lens%20Resource%20Doc.pdf>>. The Law Commission of Ontario has developed two frameworks of this kind, one relating to older adults and one to persons with disabilities, that discuss Supreme Court of Canada jurisprudence as a minimum standard for achieving substantive equality, but not necessarily as the determinative standard: *A Framework for the Law as it Affects Older Persons: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (June 2012) and *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (July 2012), online: <<http://www.lco-cdo.org>> (forthcoming).

⁴ Canadian Bar Association, *The CBA Equity and Diversity Guide and Resource Manual for Successful Law Firms and Legal Organizations* (August 2007), at 7 [hereinafter “*CBA Equity and Diversity Guide*”], online: <http://www.cba.org/cba/equity/pdf/equity_and_diversity_guide_eng.pdf>.

I begin by briefly describing in Part II some of the equality initiatives being undertaken by various sectors of society. In Part III, I explore major themes in the equality jurisprudence, including decisions that, in my view, have provided a signpost against which other initiatives need to be measured, and decisions that have provided blurred signposts or too many possible routes to be useful. I refer in Part IV to other vehicles of equality jurisprudence.

II. RUMINATIONS ON ADVANCING SUBSTANTIVE EQUALITY IN SOCIETY

By 1985, notions of equality embedded in anti-discrimination legislation and jurisprudence were already somewhat advanced, sufficiently so as to be adapted to the Charter context.⁵ Other advances reflecting “equality” were also in play by then, such as pay equity⁶ and sexual harassment,⁷ to name two of many instances.⁸ Mention of these developments is merely meant to indicate that there were sophisticated discussions extant by the time the Charter was enacted, even though the achievement of the objectives reflected in these ideas has been uneven. Similarly, there is today an expectation about equality that is not explicitly tied to the Charter. There are many initiatives that have the

⁵ As I indicate below, the Supreme Court’s first s. 15 case referred explicitly to anti-discrimination postulates or premises in interpreting s. 15: *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.) [hereinafter “*Andrews*”].

⁶ Quebec included a provision for pay equity when its *Charter of Human Rights and Freedoms* was enacted in 1976: R.S.Q. c. C-12. In 1977, the *Canadian Human Rights Act* guaranteed equal pay for work of equal value (“pay equity”) for workplaces under federal jurisdiction: *Canadian Human Rights Act*, S.C. 1976-77, c. 33. By 1985, Ontario had released its *Green Paper on Pay Equity* (Toronto: Ontario Ministry of the Attorney General, 1985), building on developments that had been occurring for several years. My reference to pay equity or any other example is meant solely to indicate that concrete applications of equality were in play prior to the Court’s consideration of equality. In some cases, subsequent developments have advanced equality further and in others, have curtailed it. In the case of pay equity in particular, the Supreme Court has contributed to a perception that it is expendable in the effort to achieve equality: *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2004] S.C.J. No. 61, 2004 SCC 66, [2004] 3 S.C.R. 381 (S.C.C.) [hereinafter “*NAPE*”].

⁷ Constance Backhouse & Leah Cohen, *Secret Oppression: Sexual Harassment of Working Women* (Toronto: Macmillan of Canada, 1979). The *Canadian Human Rights Code* prohibited sexual harassment in 1984.

⁸ Extensive discussions of equality can be found in the *Report of the Royal Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984) and the accompanying *Research Studies* (Ottawa: Minister of Supply and Services Canada, 1985). The Report adopted a substantive equality definition of equality (at 3). Although the Report refers to the Charter, it is a prospective discussion since the Report preceded the coming into force of s. 15.

goal of increasing equality in one context or another (a few I refer to below).

It is important to appreciate, though, that while the effect of the Supreme Court’s jurisprudence may be ambiguous, the existence of the Charter and public conversations resulting from Charter cases run as a ripple throughout Canadian society. In some cases, specific Supreme Court decisions may serve as a catalyst to begin an initiative or to cement a development that was already in place. In fact, it would be unrealistic to think that a case before the Supreme Court (or any level of court) springs up without much that went before. Developments around the realization of gay rights provide an example. The Supreme Court’s recognition of “sexual orientation” as an analogous ground of protection under section 15, for example, was an important step in increasing the equality rights of gays and lesbians (and subsequently the lesbian, gay, bisexual and transgender (“LGBT”) community more widely), yet it was hardly either the first or the last word on the matter.⁹ Quebec had included “sexual orientation” as a protected ground under the *Charter of Human Rights and Freedoms* in 1977, for example. It was not included as a protected ground under the Ontario *Human Rights Code*¹⁰ until 1986, after previous attempts had failed, but nevertheless before the Court’s jurisprudence could have had an impact. The fight began before the Charter was enacted and the amendment occurred a decade before it was judicially added to the grounds under section 15 of the Charter.¹¹

While the Supreme Court’s equality jurisprudence forms part of the background against which equality initiatives are advanced, and while in certain areas the jurisprudence may prompt action, in reality these initiatives are part of a much larger dynamic. This dynamic flows from the increased participation of women in the political and economic spheres and increased diversity in cultural and religious practices, resulting in part from major changes in immigration patterns. Advances may result from pressure from previously excluded groups themselves, either internal or external to organizations, or from the efforts of “dominant” group members who believe in equality or believe the organization

⁹ *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) was the first case; however, the plaintiffs actually lost because a majority of judges upheld the relevant provisions under s. 1 of the Charter.

¹⁰ R.S.O. 1990, c. H.19.

¹¹ The Court did have an impact in Alberta, however, where “sexual orientation” had not been included as a protected ground under the province’s *Individual’s Rights Protection Act*, R.S.A. 1980, c. I-2. In *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.) the Court held that the omission of “sexual orientation” was unconstitutional.

can otherwise benefit from incorporating diversity. Developments such as increased equality for women or accommodation of requirements arising from disabilities cannot necessarily be traced to Supreme Court jurisprudence (although in specific cases may be), but reflect some of the same stimuli that inform the Supreme Court's rhetoric. The Supreme Court's jurisprudence may be one factor that is part of the equality environment, but may not be specifically differentiated as having an impact.¹² In some cases, it is clear that the impetus lay elsewhere.¹³

There are many areas that would serve to illustrate the way in which equality has become part of the way we think about structuring programs or organizing society. For example, the Ontario Social Assistance Review Commission identifies growing "income inequality" as a factor justifying the review.¹⁴ If we think about what equality means in practice, words such as "participation" and "inclusiveness" come to mind and in this context, the short title of the new Ontario legislation governing supports for persons with developmental disabilities is the *Social Inclusion Act*.¹⁵ These various developments have advanced along their own paths, successfully or not.¹⁶ I refer here to only a few of these developments, by way of illustration.

Boyd points out that in law schools, for example, gender equality among students has been "achieved" in the sense that there are equal numbers of female and male students and even, in some cases, equal or nearly equal numbers of male and female faculty members.¹⁷ Propor-

¹² One place where the Court's jurisprudence is credited with influencing a decision can be found in the list of the CBA's equality initiatives. The CBA's Equality Committee was originally called the Standing Committee on Equality and then the Standing Committee on Equity. In 2011, the name was again changed back to the Equality Committee "to reflect developments in s. 15 *Charter* jurisprudence around the meaning of 'equality': "Equality Initiatives" (June 2012), online: <<http://www.cba.org/cba/epiigram/pdf/equality.pdf>> [hereinafter "Equality Initiatives"].

¹³ The Nova Scotia Barristers' Society Equity Office Monitoring Report for 2011 explains that the Equity Program was begun in 1994 in response to the recommendations of the Royal Commission on the Donald Marshall Prosecution in 1990: Emma Halpern, "Equity Monitoring Report" (January 20, 2012), online: <http://nsbs.org/sites/default/files/ftp/2012-01-20_EquityMonitoringReport.pdf> [hereinafter "Halpern"].

¹⁴ Commission for the Review of Social Assistance in Ontario, *Discussion Paper 2: Approaches for Reform* (February 2012), at 47, online: <<http://www.socialassistancereview.ca/uploads/File/Discussion-Paper-2---Approaches-for-Reform-FINAL3.pdf>>.

¹⁵ *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14.

¹⁶ A more thorough assessment of their impact requires a careful differentiation between rhetoric and application, in much the same way as one must assess the Supreme Court's jurisprudence.

¹⁷ Susan B. Boyd, "Spaces and Challenges: Feminism in Legal Academia" (2011) 44 U.B.C. L. Rev. 205, at 205.

tionate numbers of racialized students and faculty members, however, do not yet exist at most law schools, although the numbers are increasing.¹⁸ The curriculum in law schools, while much changed over the past 30 years, is still a work in progress in exposing all law students to the law’s role in advancing or hindering substantive equality. As Boyd argues, it is important to have an ethic of feminism (or more broadly, I add, substantive equality or diversity) throughout the structure and processes of law schools, and not only individuals who act often in isolation or who must grapple with an alien structure.

Both the B.C. Branch of the CBA and the British Columbia Law Society have undertaken “equity” or “diversity” initiatives.¹⁹ The national CBA has listed a variety of equality initiatives covering women, the LGBT community and racialized groups²⁰ and in 2007 issued a guide for advancing equity and diversity in law firms and legal organizations (that emphasized the benefits of diversity for business).²¹ The Nova Scotia’s Barristers’ Society Equity Office has a wide-ranging mandate in relation to the Barristers’ Society, the law and practice of law in Nova Scotia, access to legal services and education for lawyers in cultural competence, with a focus on “African Nova Scotian, Mi’kmaq and other racialized and linguistic communities, as well as other equity-seeking groups”, in particular women and the LGBT community.²²

As have other law societies across Canada, the Law Society of Upper Canada (“LSUC”) has created committees to address access to justice and issues relating to “equity” and Aboriginal persons and has undertaken studies relating to diversity in the profession.²³ One of the LSUC’s current programs is a “Career Coaching Program for Women in Sole and Small Practices”.²⁴ Yet while a report on the composition of the legal profession in Ontario concludes, “[t]he legal profession in Ontario is changing dramatically”,²⁵ one new report shows that only 25 per cent of partners at law firms in the Greater Toronto Area are women and only 2

¹⁸ *Id.*, at 217-18.

¹⁹ Jennifer Chow, “The Call to Diversify the Legal Profession” (2011) 44 U.B.C. L. Rev. 25, at 43-46 [hereinafter “Chow”].

²⁰ “Equality Initiatives”, *supra*, note 12.

²¹ *CBA Equity and Diversity Guide*, *supra*, note 4.

²² Halpern, *supra*, note 13.

²³ The Law Society of Upper Canada, Equity and Diversity, online: <<http://www.lsuc.on.ca/with.aspx?id=2147484177>>. See also Halpern, *id.*

²⁴ Law Society of Upper Canada, online: <<http://www.lsuc.on.ca/index.aspx>>.

²⁵ Michael Ornstein, *Racialization and Gender of Lawyers in Ontario* (Law Society of Upper Canada, April 2010), at i, online: <http://www.lsuc.on.ca/media/convapril10_ornstein.pdf>. The picture is slightly more complicated, however, for Black lawyers: see *id.*, at 5.

per cent are “minority women”.²⁶ The processes of law firms have changed somewhat, but the fundamental premises about what it takes “to get ahead” are much as they have been for decades and these practices militate against full participation by some members of the firm whose family commitments or religious beliefs may make it difficult to accord with the firm’s expectations.

Some corporations are encouraging law firms to diversify by making it a condition of their retention by the corporation.²⁷ Yet corporations themselves have not achieved a high level of diversity, although there are also initiatives by the federal government and private foundations to increase diversity on corporate boards.²⁸ Dhir is particularly concerned about the gender and race composition of boards of directors, both of which, but particularly race, are under-represented.²⁹ As does Boyd in the context of law schools, Dhir cautions that simply appointing people from under-represented communities to boards does not necessarily advance equality in a fuller sense, if they merely mimic existing members or are appointed merely to increase access to their communities. The increase in diversity to boards is a formal kind of equality, perhaps, but it does not necessarily help to realize a more deep-seated — substantive — equality. As for employees of corporations, research has found that diversity might be “better for business”.

Diversity in the makeup of a group not only liberates members of the minority group to be more forthcoming about their views and to share information they may have that is unique, but it also induces members of the majority to state their views more explicitly and to re-examine their assumption. [This process] leads to more robust and well-informed decisions.³⁰

²⁶ *DiversityLeads 2012* (Ryerson University’s Diversity Institute, 2012).

²⁷ Chow, *supra*, note 19. Also see *A Call to Action Canada*, online: <<http://www.acalltoactioncanada.com/>>.

²⁸ The federal government has created a new advisory council with the objective of increasing the number of women on corporate boards: Janet McFarland, “Tories to promote women as directors”, *The Globe and Mail* (March 30, 2012) B5. Maytree, a private foundation that promotes equity, provides assistance in diversifying boards in both the private, public and non-profit sectors: Maytree, online: <<http://maytree.com/about-us>>. Also see Ratna Omidvar & John Tory, “Visible Minorities Shut Out of Leadership Positions” *The Toronto Star* (March 19, 2012), online: <<http://www.thestar.com/opinion/editorialopinion/article/1148840--visible-minorities-shut-out-of-leadership-positions>>.

²⁹ Aaron A. Dhir, “Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity” (2010) 35 *Queen’s L.J.* 569, at 572.

³⁰ Beth Bilson, “A Dividend of Diversity: The Impact of Diversity on Organizational Decision Making” (2011) 44 *U.B.C. L. Rev.* 9, at 16.

Increasingly, the public education system is being developed to achieve “equity and inclusiveness”.³¹ There are also government initiatives intended to improve the lives of Aboriginal peoples, in areas such as education, economic status and violence against women.³² Public sector organizations are acknowledging the importance of “doing something” about diversity. The Ontario Public Service has been recognized as a “best diversity employer”.³³ The Diversity and Inclusion Office of the Ontario Ministry of the Attorney General has developed a “toolkit” for assessing law on the basis of diversity, for example.³⁴ The City of Toronto employs an equity lens

for Council and the Toronto Public Service to use when they prepare reports and review programs and services. This tool will guide staff and Council in removing human rights barriers as they plan, develop and evaluate policies, services and programs. The equity lens will be applied to all strategic policy and program reports.³⁵

Many of these initiatives are meant to put theory into practice. For example, the Nova Scotia racial equity/cultural proficiency framework is designed to assist persons in the education system to work effectively in cross-cultural situations.³⁶ Efforts are also being made to measure government equality efforts, again without apparently using the Supreme

³¹ See, for example, Ontario Ministry of Education, *Realizing the Promise of Diversity: Ontario's Equity and Inclusive Education Strategy* (2009), online: <<http://www.edu.gov.on.ca/eng/policyfunding/equity.pdf>>. Also see Nova Scotia Department of Education, *Racial Equity/Cultural Proficiency* (Nova Scotia, 2011), online: <http://www.ednet.ns.ca/pdfdocs/racial_equity/RECPF_WEB.pdf> [hereinafter “*Racial Equity/Cultural Proficiency*”]. This document is a framework intended to govern teachers and other education staff, school boards and curriculum in relation to cultural proficiency. See as well British Columbia Ministry of Education, *Diversity in BC Schools: A Framework*, rev. ed. (Ministry of Education, November 2008). This framework refers to the Charter, among other statutes, as sources for the school system's obligations and values underlying the framework.

³² See, e.g., Ontario Ministry of Aboriginal Affairs, *Working Together to Improve Socio-Economic Outcomes for Aboriginal Peoples Across Canada*, online: <<http://www.aboriginalaffairs.gov.on.ca/english/news/2012/041112-aawg.asp>>. Of course, there are many such efforts and while again, the rhetoric may be progressive, the success of the initiative remains to be determined.

³³ Globecareers, online: <<http://www.eluta.ca/diversity-at-ontario-public-service>>.

³⁴ A description developed in the context of a nomination for an award can be found online: <<http://www.iccs-isac.org/en/councils/pssdc/sea/2011/team/Ontario%20team%20nomination%20-%20OPS%20Diversity%20Office.pdf>>. The lens is available only on the OPS intranet.

³⁵ City of Toronto, online: <<http://www.toronto.ca/diversity/equity-lens.htm>>. For more detail, see “Inclusion of an Equity Analysis using the Equity Lens in Reports to City Council” (September 14, 2009), online: <<http://www.toronto.ca/legdocs/mmis/2009/ex/bgrd/backgroundfile-23751.pdf>> and City of Toronto, Office of Equity, Diversity and Human Rights, online: <<http://www.toronto.ca/diversity/index.htm>>. The City publishes “progress reports” on its website: <<http://www.toronto.ca/diversity/reports.htm>>.

³⁶ *Racial Equity/Cultural Proficiency*, *supra*, note 31, at 1.

Court's decisions as a reference point.³⁷ A report by the Saskatchewan government on its own equality initiatives does not use abstract measures, but names specific concerns raised by women and shows what it has done to satisfy them.³⁸

The above are merely a smattering of the kinds of activities that represent efforts to include members of disadvantaged or previously excluded groups in previously heterogeneous bodies or to improve their situation more generally. There are many more, and there are also many assessments of various areas of life that show much needs to be done before we achieve substantive equality in all aspects of society. The question here is, what does the equality jurisprudence of the Supreme Court of Canada say to or about societal equality initiatives?³⁹ I suggest through an exploration of the jurisprudence that while in some instances the jurisprudence adds important legitimacy to certain ideas about equality, in other — and more frequent — cases, it does not provide the kind of clarity and moral authority from which societal initiatives can benefit.

III. THE EQUALITY JURISPRUDENCE

1. Introduction

The answer to my questions about the Supreme Court of Canada's impact on equality initiatives in everyday life might be quickly and easily answered if we simply accept many academic commentators' overall assessment of the jurisprudence. In the view of many commentators, the equality jurisprudence, despite the Court's self-identified efforts to establish clear interpretations, has been muddled and inconsistent. For example, it has been described as “unsettled in important and troubling ways”,⁴⁰ “confusing, unpredictable, overly burdensome and excessively formalistic”,⁴¹ and “bewildering, contradictory, fractured, and despair-

³⁷ See, e.g., Melissa Martin, “Province gets passing grade” *Winnipeg Free Press* (March 9, 2012) 1, online: <<http://www.winnipegfreepress.com/local/province-gets-passing-grades-142031633.html>>.

³⁸ *Government Initiatives Responding to Women's Issues* (Saskatchewan Status of Women Office, 2003), online: <<http://socialservices.gov.sk.ca/responding-to-womens-issues.pdf>>.

³⁹ Of course, some of these initiatives might be challenged under s. 15 of the Charter, but I am speaking more generally here.

⁴⁰ Bruce Ryder & Taufiq Hashmani, “Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010” in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R.(2d) 505, at 515 [hereinafter “Ryder & Hashmani”].

⁴¹ *Id.*, at 517.

inducing”.⁴² Put simply, it lacks the coherence to offer serious guidance about how to realize substantive equality “on the ground”. I do not intend as a general matter to disassociate myself from these assessments, but I do want to identify where in my view the Court has made some important elements of equality clear and where it has not.

Section 15 is, of course, the main source of equality rights in the Charter, but it is not the only one. I first focus on section 15 and then I briefly identify in Part IV, with a very few examples, how equality may be advanced by non-section 15 cases. Fully understanding the impact of the Supreme Court’s equality jurisprudence requires some appreciation of how equality plays out in non-Charter cases or using tools other than section 15. I note here that while I generally refer to “equality” in a general sense, I recognize the need to consider sex equality, race equality, equality on the basis of disability and other forms of equality, as well as their intersection. I note also that “substantive equality” may be said to require “diversity” or “multiculturalism”, that is, it is not only a concept that applies to particular groups and their status in society, but also one that applies to the structure of society itself and how it is defined. When we consider the diverse grounds on which equality claims can be made, it becomes obvious that there are many other sites where equality can develop, a task beyond this paper.

2. Section 15

I limit my consideration to the section 15(1) test, including the meaning of equality, the treatment of grounds and analogous grounds, the comparator issue and the approach to section 15(2).

(a) *The Rollercoaster of the Section 15(1) Test*

Andrews developed the basic parameters of the section 15(1) guarantee in 1989.⁴³ *Andrews* established that section 15’s guarantee was a guarantee of non-discrimination, not a general guarantee of equality, drawing on the existing anti-discrimination case law developed under human rights legislation.⁴⁴ that section 15 advanced substantive and not

⁴² Hester Lessard, Book Review of Colleen Sheppard, *Inclusive Equality: Relational Dimensions of Systemic Discrimination in Canada* (2011) 49 Osgoode Hall L.J. 159.

⁴³ *Andrews*, *supra*, note 5.

⁴⁴ In later cases, notably *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union*, [1999] S.C.J. No. 46, [1999]

merely formal equality; that equality sometimes requires different treatment; that the infringement did not need to be direct or intended, but could be adverse or indirect; and that the list of protected grounds was not exhaustive, and that “analogous” grounds could be judicially added. *Andrews* also developed the test for determining whether there had been an infringement of section 15 that continues to apply: (1) has the law made a distinction between the applicant and others? has the different treatment been on the basis of a protected ground? and (2) has the different treatment had a negative impact on the applicant? Justice McIntyre called this approach the “enumerated or analogous grounds” approach.

The early commitment to use “substantive equality” as the objective of equality jurisprudence was a crucial decision. Its rhetorical force has played a part in shaping our societal understanding of what equality means, although as *Andrews* itself recognized, the concept had developed well before the Supreme Court’s use of it. Even so, it was important to the understanding of equality in Canada that the Supreme Court unequivocally stated its commitment to that understanding at the earliest opportunity. And cases in which this conceptual framing took a more concrete form are equally important. For example, *Eaton v. Brant County Board of Education*⁴⁵ involved the question of whether Emily Eaton, a 12-year-old child living with several types of disability, should be integrated into a regular classroom with the help of a special assistant or should learn in a “special education class”. Justice Sopinka, speaking for the Court on this point, recognized a core element of substantive equality when he emphasized that it is not the “disability” that results in discrimination, but the failure of mainstream society to modify its practices in a way that will include persons with disabilities:

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind

3 S.C.R. 3 (S.C.C.), the Court imported Charter jurisprudence into anti-discrimination law, erasing the distinction between direct and adverse-effect discrimination and integrating reasonable accommodation into the *bona fide* occupational requirement defence. Justice McLachlin (as she then was) for the Court said at para. 47: “In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the *effect* of the impugned law, it has little legal importance” (emphasis in original).

⁴⁵ [1997] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.).

person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses “the attribution of stereotypical characteristics” reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.⁴⁶

While one can certainly argue about whether any particular case results in substantive equality or whether the analysis used is consistent with achieving substantive equality (that is, how well the rhetoric matches outcomes), it is nevertheless a constant in the Supreme Court’s discourse and it gives legitimacy to it as an appropriate objective for societal change.

It may be argued, however, that the Court’s emphasis on substantive equality is limited by the wording of section 15, since the reference to discrimination implies the need for a comparator, that is, a group that represents the way the applicant *ought* to be treated. The Court has read section 15 this way as being consistent with the reference to discrimination in section 15. Thus in the section 15 jurisprudence substantive equality is not an independent, freestanding standard; rather, its content in any given case is determined by how others — others who are more advantaged — are treated, even if this is not explicit.⁴⁷

⁴⁶ *Id.*, at para. 67.

⁴⁷ It has been argued that it is not the requirement of comparison that is the problem, but how comparison was carried out. See, e.g., Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dumps Section 15” (2006) 24 Windsor Y.B. Access Just. 111 [hereinafter “Gilbert & Majury”]. The Court itself accepted these criticisms in *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, 2011 SCC 12, [2011] 1 S.C.R. 396 (S.C.C.) [hereinafter “*Withler*”]. In “Equality Rights and the Relevance of Comparator Groups” (2006) 5 J.L. & Equality 81, Sophia Reibetanz Moreau argues that discrimination does not necessarily involve a comparison and that to require a comparator can miss “certain very real forms of discrimination”. Nevertheless, this is the approach the Court has taken and this has limited the value of its equality jurisprudence. Outside the context of s. 15, substantive equality can be measured differently, as it is in some of the initiatives described above. It is possible to identify the initiatives that need to be undertaken for a particular group to experience equality as the standard to be met and to then compare the situation of the group with those standards without reference to the treatment of another group.

The Court's treatment of the test applied under section 15(1) has also undermined this fundamental commitment to substantive equality. The Court has never abandoned the *Andrews* test, but it has detoured around it. Most notably, in *Miron v. Trudel*⁴⁸ and *Egan v. Canada*,⁴⁹ four judges introduced a "relevancy" component into the section 15 analysis: in order for the distinction to be discriminatory, the personal characteristics must be irrelevant to the purpose of the law at issue. For example, although acknowledging that "marital status" might be an analogous ground, in *Miron v. Trudel*, Gonthier J., for the four-member dissent, held that "[m]arriage is an institution entered into by choice which carries with it certain benefits and burdens", including "the obligation of mutual support". Thus, "where the legislature draws a distinction premised on a characteristic relevant to the institution of marriage, such as these support obligations [which were inherent to marriage and not to common law relationships], then the distinction is not discriminatory and is therefore permissible".⁵⁰ In *Egan v. Canada*, La Forest J., speaking for the four judges, explained that marriage (between a man and a woman) was "the social unit that uniquely has the *capacity* to procreate children and generally cares for their upbringing", and therefore it is appropriate that Parliament respond accordingly by not giving same-sex couples the same benefits.⁵¹

In *Miron v. Trudel*, Gonthier J. refers to the "contextual examination" under section 15 under which "the distinction being drawn may simply reflect certain biological or physical realities or fundamental values which are in themselves relevant".⁵² He explicitly rejected the notion that this approach imported into section 15 considerations more appropriately considered under section 1.⁵³ Justice McLachlin (as she then was), for the majority, explained why she disagreed: "To require the claimant to prove that the unequal treatment suffered is irrational or unreasonable or founded on irrelevant considerations would be to require the claimant to lead evidence on state goals, and often to put proof of discrimination beyond the reach of the ordinary person."⁵⁴ Furthermore, while a distinction

⁴⁸ [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.) (whether denial of insurance benefits to a common law opposite-sex couple was discriminatory).

⁴⁹ *Supra*, note 9. The case deals with whether denial of old age spousal allowance to a same-sex partner because it was available only to a legally married spouse was discriminatory.

⁵⁰ *Miron v. Trudel*, *supra*, note 48, at para. 2.

⁵¹ *Egan v. Canada*, *supra* note 9, at 537 (emphasis in original).

⁵² *Miron v. Trudel*, *supra*, note 48, at para. 25.

⁵³ *Id.*, at paras. 31-32.

⁵⁴ *Id.*, at para. 129.

made on the basis of a protected ground may be non-discriminatory because it

... does not have the effect of imposing a real disadvantage in the social and political context of the claim, ... *Cases where a distinction made on an enumerated or analogous ground does not amount to discrimination, however, are rare.* Faced with a denial of equal benefit based on an enumerated or analogous ground, one would be hard pressed to show that the distinction is not discriminatory. ...⁵⁵

After the detours of *Miron v. Trudel* and *Egan v. Canada*, the Court attempted to bring a coherent interpretation to section 15 in the unanimous decision in *Law v. Canada (Minister of Employment and Immigration)*,⁵⁶ reflecting the approach L’Heureux-Dubé J. had proposed in the former cases, and bringing the concept of “dignity” to the forefront.⁵⁷ *Law* appeared to be a significant step forward in signalling the end of the relevancy test and a common view of how to assess section 15 challenges. It, in turn, became the subject of growing criticism because of how its emphasis on dignity was applied.⁵⁸ It was also not long before the Court divided again in *Gosselin v. Quebec (Attorney General)*⁵⁹ and *Lavoie v. Canada*.⁶⁰ The Court decided the next three cases unanimously: a successful section 15(1) case in which a man challenged provisions under the *Vital Statistics Act*⁶¹ disallowing him from having a say in the registration of his child’s name (*Trociuk v. British Columbia (Attorney*

⁵⁵ *Id.*, at para. 132 (citations omitted; emphasis added).

⁵⁶ [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter “*Law*”].

⁵⁷ In passing, Iacobucci J. for the Court also indicated that intersectionality could be addressed through s. 15: *id.*, at paras. 93-94.

⁵⁸ For example, although Greschner approved of *Law* as advancing “the cause of equality”, she argued that the Court could have waited to overcome its internal dissent and that it should reconsider “essential human dignity” as central to s. 15: Donna Greschner, “Does Law Advance the Cause of Equality?” (2001) 27 Queen’s L.J. 299. See also Craig D. Bavis, “*Vriend v. Alberta, Law v. Canada, Ontario v. M. and H.*: The Latest Steps on the Winding Path to Substantive Equality” (1999) 37 Alta. L. Rev. 683; and Daphne Gilbert, “Time to Regroup: Rethinking Section 15 of the Charter” (2003) 48 McGill L.J. 627, at 629, who “echo[ed] those who argue that Law’s cohesion was illusory and its test unworkable”.

⁵⁹ [2002] S.C.J. No. 85, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter “*Gosselin*”]. Five judges held that there was no contravention of s. 15(1); seven judges held that there was no contravention of s. 7; four judges held that there was a contravention of s. 15(1) that was not justified; and two judges found a contravention of s. 7 that was not justified. (That is to say, two judges found an unjustified contravention of s. 15, but no contravention of s. 7.)

⁶⁰ [2002] S.C.J. No. 24, 2002 SCC 23, [2002] 1 S.C.R. 769 (S.C.C.). Four judges found that a citizenship requirement for certain positions in the federal civil service contravened s. 15(1) but was justified under s. 1; three judges held that the requirement contravened s. 15(1) and was not justified; two other judges each held separately that there was no contravention under s. 15(1).

⁶¹ R.S.B.C. 1996, c. 479.

General)),⁶² and two unsuccessful cases, one based on sex equality (*NAPE*)⁶³ and the other on the basis of disability (*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*).⁶⁴

These and other cases made it difficult to understand how the section 15 test was to be applied, exactly what was to be addressed under section 15 and under section 1, and the kinds of evidence necessary to justify an infringement under section 1. Although in its most recent cases, the Supreme Court of Canada appears to want to relegate much of the section 15 jurisprudence to the historical development of section 15 rather than as part of the current thinking, and go back to the future with *Andrews*, in practice it is not clear that it has travelled far from the “relevancy” test so decisively rejected by the majority in *Miron v. Trudel* and *Egan v. Canada*. First in 2008 in *R. v. Kapp*,⁶⁵ and then in 2011 in *Withler*,⁶⁶ the Chief Justice and Abella J., speaking for the Court, sought to streamline the inquiry and to diminish the impact of dignity, the use of which had been heavily criticized. In those cases, the Court placed greater emphasis on concepts of prejudice and stereotyping than on the “simple” term “discrimination”, ostensibly diminishing the importance of selecting the “correct” comparator (I return to these cases below after identifying a number of other developments in the section 15 jurisprudence). Nevertheless, the factors relevant to determining a section 15(1) violation continue to conflate the section 15(1) and section 1 inquiries.

In *Ermineskin Indian Band and Nation v. Canada*,⁶⁷ the Court considered whether the Crown had acted appropriately in the way it invested the royalties from oil and gas reserves found under the surface of two reserves which had been surrendered to the Crown. The Crown argued that the *Indian Act*⁶⁸ prevented its investing the funds as the bands wished. The Court dismissed the bands’ section 15(1) claim on the basis that the provisions under the *Indian Act* do not perpetuate stereotyping or prejudice against the bands, that is, they are not discriminatory.⁶⁹ In exploring the “the larger social, political and legal context” beyond the

⁶² [2003] S.C.J. No. 32, 2003 SCC 34, [2003] 1 S.C.R. 835 (S.C.C.). Under s. 1, the Court held that the impugned provisions were not minimally impairing and it is probably not insignificant that the legislature had already amended the statute to make it more responsive to particular concerns.

⁶³ *Supra*, note 6.

⁶⁴ [2004] S.C.J. No. 71, 2004 SCC 78, [2004] S.C.R. 657 (S.C.C.) [hereinafter “*Auton*”].

⁶⁵ [2008] S.C.J. No. 42, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter “*Kapp*”].

⁶⁶ *Supra*, note 47.

⁶⁷ [2009] S.C.J. No. 9, 2009 SCC 9, [2009] 1 S.C.R. 222 (S.C.C.) [hereinafter “*Ermineskin*”].

⁶⁸ R.S.C. 1985, c. I-5.

⁶⁹ *Ermineskin*, *supra*, note 67.

impugned legislation,⁷⁰ Rothstein J. considered the financial benefits of diversified portfolios and other opportunities for investment, with brief mention without analysis of the impact on self-determination by the bands.⁷¹ There is no analysis of the treatment of and presumptions about “Indians” as reflected in the *Indian Act* and other historical developments. The reluctance to treat the broader contextual inquiry more seriously reduces the opportunity for the Court to develop a comprehensive jurisprudence under section 15(1) that adequately assesses the stereotyping and prejudice that has been reflected in Canada’s treatment of Aboriginal peoples. Equally significantly, the entire analysis occurs under section 15(1), and as that claim fails, there is no move to section 1 and therefore no shifting of the burden to government.

The appellants in *Withler* were widows⁷² who received reduced federal supplementary death benefits because of their husbands’ ages at the time of death (the husbands were members of the plan). The benefit, provided in a lump sum, is reduced by 10 per cent for each year by which the plan member at the time of death exceeded age 65 or 60, depending on the particular plan. Their claim was unsuccessful. Chief Justice McLachlin and Abella J., for the Court, considered “the purpose of the impugned provision in the context of the broader pension scheme”,⁷³ including the “allocation of resources and legislative policy goals”.⁷⁴ The claimants did not appear to require the benefit and the cost of the benefits would have been extensive. The decision included assumptions made about survivors’ needs based on the age when the plan member died. While some of the factors considered may well be appropriate to consider in determining whether discrimination is justified, they are again all considered under section 15(1), where the onus lies with the claimants. Furthermore, the section 15(1) analysis is based on generalizations, with the only reference to the claimants’ own situations being a brief reference to the lack of evidence that they needed the supplement (even though the plans are not needs based).

⁷⁰ *Id.*, at para. 193, quoting *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1331 (S.C.C.).

⁷¹ *Id.*, at paras. 196-199.

⁷² They were representative plaintiffs in two class actions.

⁷³ *Withler*, *supra* note 47, at para. 71.

⁷⁴ *Id.*

(b) *Treatment of the Grounds*

The Supreme Court has dealt with several issues arising from the listing of grounds under section 15, including the addition of other grounds, the degree of scrutiny afforded different grounds and whether a complainant can make a claim on a combination of grounds.

Although there is no basis in section 15 to subject complaints based on some grounds to less scrutiny than others, “age”, while an enumerated ground, and despite the Court’s protests to the contrary, tends to be given shorter shrift than the other grounds, as evident in *Gosselin* and *Withler*.⁷⁵ In *Gosselin*, McLachlin C.J.C. relies on her general impression to find that young people are not discriminated against, even though she cites references showing that they had higher rates of unemployment; however, the program at issue was designed to respond to that situation and therefore ameliorate it.⁷⁶ *Withler* continues to treat age as the basis on which distinctions are obviously and necessarily made, without putting the government’s feet to the fire to show that *in the particular case*, the age distinction is necessary, that is, that it is not merely a proxy for administrative efficiency or other similar reasons.⁷⁷ This is not to say that age is not meaningful to our capacity to engage in a wide range of activities or to be independent, for example, especially when one considers the extreme ends of the age continuum. The message from the Court, however, is that “age” automatically matters, and that it does not require the kind of serious inquiry about its use as other grounds should attract, and sometimes do.

⁷⁵ *Gosselin*, *supra*, note 59; *Withler*, *supra*, note 47.

⁷⁶ *Gosselin*, *id.*, at para. 44. Justice L’Heureux-Dubé stated at para. 112 (citations omitted, emphasis in original):

At the s. 15 stage, courts should not be concerned with whether the legislature was well-intentioned. This Court has long recognized that an intention to discriminate is not a necessary condition for a finding of discrimination ... By necessary implication, the fact that a legislature intends to *assist* the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them.

She also pointed out at para. 136 that the reference to ameliorative programs is meant to refer to programs designed to help those more disadvantaged, not the claimant.

⁷⁷ A defence under s. 1 that the use of age contributes to administrative efficiency might well succeed, but at least it would be clear that it is the government’s responsibility to provide the evidence on a balance of probabilities that this is actually the case and that a different approach might not be required to meet the minimal impairment test. The use of age as a proxy and the presumptions associated with age are considered in depth in the Law Commission of Ontario’s Final Report on *Advancing Substantive Equality for Older Persons*, *supra*, note 3.

In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, the Court took the opportunity to clarify the status of analogous grounds:

The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. ...

The same applies to the grounds recognized by the courts as “analogous” to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality ... Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.⁷⁸

Although the Court has added a number of analogous grounds, it has steadfastly refused to add grounds representing economic status. For example, an attempt to add “workers and dependents” under Newfoundland’s *Workers’ Compensation Act, 1983*⁷⁹ was dismissed without an explanation about why these groups were not analogous to the enumerated grounds.⁸⁰ In *Dunmore v. Ontario (Attorney General)*, although L’Heureux-Dubé J. engaged in a full analysis to explain why “agricultural workers” was an analogous ground, the other members of the Court dismissed it more or less out of hand.⁸¹ One might infer that the Court does not believe that economic status has much to do with substantive equality.

Although *Law* recognized that intersecting grounds (or a “confluence” of grounds) might constitute an analogous ground,⁸² little has come

⁷⁸ [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, paras. 7 and 8 (S.C.C.) [hereinafter “*Corbiere*”].

⁷⁹ S.N. 1983, c. 48.

⁸⁰ *Reference re Workers’ Compensation Act, 1983 (Nfld.)*, ss. 32 & 34, [1989] S.C.J. No. 35, [1989] 1 S.C.R. 922 (S.C.C.).

⁸¹ [2001] S.C.J. No. 87, 2001 SCC 94, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter “*Dunmore*”]. In *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, [2007] 2 S.C.R. 673 (S.C.C.), the Court rejected the claimants’ assertion that they, school employees, constituted an analogous ground. School employees, unlike municipal employees, were prevented from running as school board trustees.

⁸² *Law*, *supra*, note 56, at paras. 93-94.

of it. An exception occurred in *Corbiere*, where the Court recognized “Aboriginality residence” as an analogous ground because, in the words of the majority, “the distinction goes to a personal characteristic essential to a band member’s personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.”⁸³ “Residence” itself does not constitute an analogous ground because decisions “average” Canadians need to make are not as “profound” as decisions about whether to live on or off a reserve are. Furthermore, “[e]mbedded” analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.”⁸⁴ Although the Court has not pursued this line of thinking, it nevertheless does hold potential for understanding claims that members of a particular group might bring in relation to the practices of their “own” groups, assuming that these cases fall under the Charter (although for a limitation on this, see the discussion of section 15(2) below).

(c) *Comparators*

I refer only briefly to the issues of comparators here, merely to reiterate the view that the Court has to date accepted that the need for a comparator group appears to be inherent in the reference to “discrimination” in section 15(1). The problem has been that finding the comparator the Court accepts or otherwise considers appropriate has been the bane of section 15 claimants, as academic commentators and the Court itself have said.⁸⁵ In *Hodge v. Canada (Minister of Human Resources Development)*, speaking for the Court, Binnie J. said, “a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis. In fact, the seemingly straightforward selection of a comparator group has proven to be the Achilles’ heel in a variety of recent cases” and “the correctness of the ‘comparator group’ contended for by a claimant has thus been an important battleground in much of the s. 15(1) jurisprudence.”⁸⁶

⁸³ *Corbiere*, *supra*, note 78, at para. 14.

⁸⁴ *Id.*, at para. 15. Another “embedded ground” is pregnancy.

⁸⁵ See, e.g., Gilbert & Majury, *supra*, note 47.

⁸⁶ [2004] S.C.J. No. 60, 2004 SCC 65, [2004] 3 S.C.R. 357, at para. 18 (S.C.C.). Justice Binnie specifically referred to *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, 2000 SCC 28, [2000] 1 S.C.R. 703 (S.C.C.); *Lovelace v. Ontario*, [2000] S.C.J. No. 36, 2000 SCC 37, [2000] 1 S.C.R. 950 (S.C.C.) [hereinafter “*Lovelace*”]; *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] S.C.J. No. 54, 2003 SCC 54, [2003] 2 S.C.R. 504

Law explained that “a variety of factors” are relevant to determining the appropriate comparator, including the subject matter, purpose and effect of the legislation, as well as “[t]he biological, historical, and sociological similarities or dissimilarities”.⁸⁷ Generally, the claimant will select the comparator; however, the court may refine it or determine that a different comparator is more appropriate. However, “a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced”.⁸⁸ In *Auton*, the Court did reject the claimant’s choice of comparator and its own selection, “a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required”,⁸⁹ one hopes is the nadir of unpredictable and cumbersome comparators. Not surprisingly, despite *Law*’s caution, there was no evidence about how the government had responded to requests for other new therapies and therefore no evidence about how the claimants had been disadvantaged.

In *Kapp* and *Withler*, the Court said that it was taking a different view of the comparator requirements, reducing the focus on “‘mirror’ comparator groups” for a variety of reasons, all advanced by commentators and earlier decisions critical of the concept. Ironically, however, in *Withler* itself, the Court’s disagreement with Rowles J.A.’s dissent in the Court of Appeal is that in using the mirror comparator approach, the dissent “de-emphasized the operation of the Reduction Provisions on the death benefit in the context of the entire plan and lifetime needs of beneficiaries” and therefore failed “to fully appreciate that the package of benefits, viewed as a whole and over time, does not impose or perpetuate discrimination”.⁹⁰ In other words, it is not the mirror comparator approach that brings the claimants’ challenge to a halt at the section 15(1) stage at the Supreme Court, but *not* using the mirror comparator approach.

(S.C.C.), as well as *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.) and *Gosselin*, *supra*, note 59, in which the issue “sparked a good deal of judicial debate”.

⁸⁷ *Law*, *supra*, note 56, at para. 57.

⁸⁸ *Id.*, at para. 58.

⁸⁹ *Auton*, *supra*, note 64, at para. 55.

⁹⁰ *Withler*, *supra*, note 47, at para. 81.

(d) *Section 15(2): Substantive Equality for Whom?*

The first attempt by the Supreme Court to provide any guidance about section 15(2) was *Lovelace*.⁹¹ It held that “the normal reading of s. 15(1) includes the kind of special program under review in this appeal”⁹² and the first step of an equality claim should be section 15(1) to “ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review”.⁹³

In *Kapp*, the Court effectively turned *Lovelace* on its head and decided that a finding that the impugned program is an ameliorative program under section 15(2) is normally the end of the inquiry with no need to “ensure that the program is subject to the full scrutiny of the discrimination analysis” or, indeed, any scrutiny under section 15(1).⁹⁴ *Kapp* made no mention of section 1, but it is difficult to understand how section 1 has any real meaning once a program has been “justified” as a section 15(2) program with likely no analysis under section 15(1). *Kapp*’s section 15(2) analysis gives some long-awaited robustness to that section; however, it leaves important questions unanswered and, while intended to advance substantive equality, risks adding to the weakness of section 15(1) for those who are most disadvantaged.⁹⁵ It weakens the promise in *Corbiere* of the value of “embedded” analogous grounds (or even embedded enumerated grounds, one assumes).⁹⁶ And it tells governments that they can respond to minority group needs by addressing the issues of the most “advantaged” (and possibly even “connected”) members without concern for those even more disadvantaged.

Alberta (Aboriginal Affairs and Northern Development) v. Cunningham provided an opportunity to apply *Kapp*.⁹⁷ Alberta and the Métis negotiated the *Metis Settlements Act* (“MSA”) to establish lands for the Métis, recognize self-government and provide for protections for Métis culture. The claimants had registered as Indians under the *Indian Act* in order to obtain medical benefits. However, the MSA provided that voluntary registration under the *Indian Act* means that an individual

⁹¹ *Supra*, note 86.

⁹² *Id.*, at para. 105 (emphasis in original).

⁹³ *Id.*, at para. 108.

⁹⁴ *Kapp*, *supra*, note 65.

⁹⁵ I discuss this further in P. Hughes, “Resiling from Reconciling? Musing on *R. v. Kapp*” in J. Cameron, P. Monahan & B. Ryder, eds. (2009) 47 S.C.L.R. (2d) 255. Also see Sophia Moreau, “*R. v. Kapp*: New Directions for Section 15” (2008-2009) 40 Ottawa L. Rev. 283.

⁹⁶ *Corbiere*, *supra*, note 78.

⁹⁷ [2011] S.C.J. No. 37, 2011 SCC 37, [2011] 2 S.C.R. 670 (S.C.C.).

cannot be a member of a Métis settlement. The claimants argued that this was discriminatory under section 15(1). The Court held that the MSA was an ameliorative program under section 15(2) and that it was consistent with the objective of the program to exclude Métis who were also Indians. In writing for the Court, the Chief Justice concluded that “this does not mean that every program must recognize everyone who holds some claim to a group targeted by an ameliorative program”. In the particular case, “[i]n order to preserve the unique Métis culture and identity and to assure effective self-governance through a dedicated Métis land base, some line drawing will be required.”⁹⁸ The Chief Justice’s reasoning does appear to soften the contours of the *Kapp* section 15(2) analysis, in part by blurring the distinction in approach between it and *Lovelace*.⁹⁹

While ostensibly minimizing the impact of the mirror comparator group, the recent jurisprudence shows that whether the comparator is a “mirror” of the claimant’s group or whether it is broader, comparator is still a serious problem in section 15 analyses: now claimants will be unsure whether they need to compare themselves to a specific group that receives benefits they do not or that does not bear a burden they bear, or to a potential “universe” of comparators.

(e) Conclusion

The significance of the Supreme Court’s constant commitment to the notion of “substantive equality”, even if not always reflected in the cases themselves, cannot be gainsaid. At the same time, however, despite the Court’s seemingly continual efforts to refine how to determine whether there has been a breach of substantive equality, we have been left with confusion and ambivalence about the role of the comparator, the tendency to treat some grounds with less rigorous scrutiny than others and the almost complete insulation of programs designed to ameliorate the lives of disadvantaged persons from review to ensure that they do not worsen the lives of others. As I conclude below, these aspects of the section 15 analysis make it arduous to transfer generalizations from the jurisprudence to equality initiatives in society at large, discussed above, and equality analysis in other areas of law, discussed next.

⁹⁸ *Id.*, at para. 86. In this case, the distinction between “Métis” and “Indian” was core to the program.

⁹⁹ *Id.*, at paras. 48-52.

IV. EQUALITY BY ANOTHER NAME

Before the coming into force of section 15, the Court refused to find an equality right under guarantees other than section 15.¹⁰⁰ In general, however, while there has been some debate over the issue, the Court has recognized that similar interests might be protected under different rights and that the rights are interrelated. For example, in *Baier v. Alberta*, Rothstein J. stated that “*Charter* rights overlap and cannot be pigeon-holed. The interrelationship between the *Charter*’s various rights and freedoms is a long-standing principle that informs *Charter* analysis.” Nor does the fact that one section protects a particular right or interest mean another guarantee might also do so.¹⁰¹ However, when the Court is faced with a claim that includes section 15 and other grounds, it will often find that the other grounds are able to dispose of the case without saying much about section 15.¹⁰² On the other hand, section 15 has played a role under section 1 in cases in which the main issue was brought and considered under a different guarantee.¹⁰³

Although this paper does not permit an extended consideration of how other sections of the Charter might be vehicles for advancing substantive equality in different contexts, briefly canvassing the possibilities illustrates that neither equality nor approaches to it need be found exclusively within the boundaries of section 15. Section 25 in relation to Aboriginal rights and section 23 in regard to the language of education

¹⁰⁰ For example, see *R. v. Cornell*, [1988] S.C.J. No. 24, [1988] 1 S.C.R. 461 (S.C.C.), in which the Court was asked to find that a conviction for failing to provide a roadside breathalyzer was unconstitutional because the relevant *Criminal Code*, R.S.C. 1985, c. C-46 provision had not been proclaimed in all provinces. Because s. 15 was not in force, the argument was that equality before the law is a principle of fundamental justice under s. 7 of the Charter. However, the Court refused to accept the argument, not because s. 7 might not contain an equality interest, but because Parliament had made the decision not to bring the equality interest in s. 15 into force until 1985. Also see *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357 (S.C.C.), in which a challenge to a citizenship requirement for law society membership on the basis that it discriminated between Canadian citizens and permanent residents was brought under s. 6(2)(b) of the Charter. Although no reference was made to equality, the interpretation of s. 6 was settled as not including a general right to work. Thus the challenge failed, to be resuscitated in the successful challenge in *Andrews*, *supra*, note 5, under s. 15.

¹⁰¹ *Supra*, note 81, at para. 58.

¹⁰² Ryder and Hashmani discuss this point in some detail: *supra*, note 40. As examples, see *Dunmore*, *supra*, note 81, in which the majority decided the case under s. 2(d) of the Charter, the guarantee of freedom of association; and *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.), in which the claim was addressed primarily as a s. 2(a), freedom of religion, claim.

¹⁰³ See, e.g., *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.), in which Keegstra’s Charter challenges were under s. 2(b), freedom of expression, and s. 11(d), the right to a fair trial; however, the infringement of students’ equality rights was part of the reason the contravention of freedom of expression was held to be justified.

can be said to affirm or extend equality rights for Aboriginal persons and French and English minority linguistic populations, respectively. It has been argued that section 2(a) jurisprudence on freedom of religion might provide a better approach for equality analysis than that which has developed under section 15.¹⁰⁴

In a different way, equality may be an issue in freedom of religion cases. A controversial variation of the relationship between freedom of religion claims and equality is found in *Bruker v. Marcovitz*,¹⁰⁵ which is about “intra-religion equality”, since both parties held the same religious views. Bruker and Marcovitz were divorced and as part of the agreement governing their divorce, Marcovitz agreed to obtain a *get*, a Jewish divorce. He failed to do so, and because Bruker also believed the *get* was necessary to her remarrying in the Jewish faith and to her having children, she was not in a position to have the benefits that her civil divorce provided. Marcovitz argued that to require him to obtain the *get* or to pay damages for failing to do so infringed his freedom of religion. Apart from questioning whether the husband was actually motivated by his religious belief, Abella J. for the majority treated his failure to obtain it as a breach of contract and stated:

[The resulting limitations on Bruker’s personal life] represented an unjustified and severe impairment of her ability to live her life in accordance with this country’s values and her Jewish beliefs. Any infringement of Mr. Marcovitz’s freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker’s ability to live her life fully as a Jewish woman in Canada.¹⁰⁶

Section 27 of the Charter may be another source to underpin equality arguments. It provides that the Charter “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”. It has led to some concerns that its application as an interpretive provision could affect gender equality negatively. One commentator argues to the contrary, maintaining that section 27 should

¹⁰⁴ Carissima Mathen, “What Religious Freedom Jurisprudence Reveals About Equality” (2009) 6 J.L. & Equality 163. Mathen suggests that the freedom of religion jurisprudence might be “more consonant with the Supreme Court’s own, early view of section 15”: *id.*, at 1.

¹⁰⁵ [2007] S.C.J. No. 54, 2007 SCC 54, [2007] 3 S.C.R. 607 (S.C.C.). *Bruker v. Marcovitz* has also been viewed as an infringement of liberty, however; on this view, it “threatens to make conformity to state values the measure of the acceptability at law of the faith of individuals and communities”: F.C. DeCoste, “Caesar’s Faith: Limited Government and Freedom of Religion in *Bruker v. Marcovitz*” (2009) 32 Dal. L.J. 153, at 155.

¹⁰⁶ *Bruker v. Marcovitz*, *id.*, at para. 93.

be seen as advancing gender equality, not threatening it.¹⁰⁷ It would allow the recognition of “the cultural and gendered (or other) aspects of many women’s identities”, that is to say, how their various affiliations interrelate.¹⁰⁸ Section 27, usually treated as an interpretive section, is also more directly relevant to equality; for example, it supports (although it does not itself guarantee) acknowledging the “equality” of different religious days of rest.¹⁰⁹

Finally, in some cases, equality is advanced in non-Charter cases and without any reference to the Charter. For example, *R. v. I. (D.A.)* involved section 16 of the *Canada Evidence Act*,¹¹⁰ which provided for certain conditions to be met in relation to the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities, as they applied to a 23-year-old woman with the mental age of a three- to six-year-old child.¹¹¹ The majority emphasized the importance of a concrete assessment of whether a witness could communicate the evidence; it held that the trial judge was in error to rely only on whether the witness could distinguish between a truth and a lie in the abstract.¹¹² Many lower court cases also illustrate how diversity issues can arise in personal injury, family, defamation and liberal, property, nervous shock, employment and immigration cases.¹¹³

As long as there is no useful guidance from the Supreme Court on the nature of “substantive equality”, however, there is the risk that the search for it in the lower courts in non-Charter cases, as well as in Charter cases, will be more *ad hoc* than helpful and that the treatment of equality in other Charter guarantees will lack a consistent framework.

V. CONCLUSION

In considering how the Supreme Court of Canada views equality, it is crucial to see how it addresses it throughout its jurisprudence, although

¹⁰⁷ Natasha Bakht, “Reinvigorating Section 27: An Intersectional Approach” (2009) 6 J.L. & Equality 135.

¹⁰⁸ *Id.*, at 139-40.

¹⁰⁹ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at paras. 99-101 (S.C.C.).

¹¹⁰ R.S.C. 1985, c. C-5.

¹¹¹ [2012] S.C.J. No. 5, 2012 SCC 5 (S.C.C.).

¹¹² The dissent, however, contended that this turned the inquiry required to ensure that someone understands the consequences of lying into a “formal” inquiry.

¹¹³ Lana K.L. Li, “Cultural Factors in the Law” (2011) 44 U.B.C. L. Rev. 111. Li relies heavily on Jeff Berryman, “Accommodating Cultural Factors in Damages for Personal Injury” (2007) 40 U.B.C. L. Rev. 1 for many of the cases she reviews.

the section 15 cases are the core and should govern or at least play a role in how equality claims are addressed when made through provisions other than section 15 or in non-constitutional cases. The additional issues raised by those cases or provisions would enrich the thinking about section 15 and, in the latter cases, would provide an opportunity to see how section 15 jurisprudence plays out in concrete situations other than constitutional equality contexts. This does not often occur, however. It is as if section 15 jurisprudence and other equality-related cases exist in isolation from each other, treading their own distinct and rarely intersecting paths.

Similarly, a meaningful jurisprudence would have significance for how substantive equality is advanced in society generally. Those seeking guidance from the Court, however, will learn that while substantive equality is the goal, getting there places a significant onus on claimants; that selecting the appropriate comparator may still be more important than a broader understanding of what substantive equality means; and that governments can relatively safely advance the interests of “less disadvantaged” members of minorities without serious concern paid to the more disadvantaged members among them. Many societal initiatives simply do not involve an analysis of how to achieve their goals (or if they do, they rarely feel the need to refer to the discourse from the Supreme Court, whether actually ascribed to the Court or not), but seem to operate on an organic or elemental notion of (substantive) equality, stated as a given. And it is these initiatives that have the potential to change how our society operates.

There are many societal arenas in which equality is cited as a goal, although the practice may seem less than stellar. The Court’s jurisprudence does not provide an adequate model by which these efforts to meet the goal of substantive rather than formal equality can be designed and assessed. The Court’s approach to economic issues under section 15 downplays by implication the importance of initiatives directed at economic equality. Similarly, the jurisprudence has little to offer as guidance to efforts to make equality concrete, to implement objectives in practice. It may be that it cannot. The Court’s task is to decide specific cases dealing with sometimes narrow albeit serious contraventions of section 15 of the Charter. I would argue, however, that through doing so it should also provide the higher-level reference against which concrete measures can be assessed. Yet the Court’s decisions fail to have this impact, in part because too often the broader direction the Court is taking is unclear and is subject to detours, and in part because its own decisions

fall short of the more soaring rhetoric that is so often found in the Court's decisions. Thus state and civil society efforts to increase substantive equality must and will continue for the most part without the degree of leadership the Supreme Court of Canada's equality jurisprudence could and should provide.

Yet it would be a mistake to suggest that the Court's objective is not to provide this leadership, and equally a mistake to assume that all societal initiatives need to reference the Court's jurisprudence. There will always be (to put it simply for this purpose) distinctive legal and societal paths along which substantive equality should advance. Ideally, they should enrich each other. To the extent these initiatives are government initiatives (in education, for example), they may from time to time be challenged under section 15 of the Charter; others may be reviewed in ways invoking equality (under human rights legislation, perhaps). Should the Court have the opportunity to review these cases, they might consider how these societal initiatives provide concrete examples that explore the implementation of substantive equality. More likely, other equality cases will allow the Court to review its section 15 jurisprudence (or other jurisprudence related to equality) and to apply it to new contexts. To diminish confusion is not to fix the jurisprudence at a particular time, but to acknowledge that the jurisprudence will need to evolve and to appreciate that weaving threads into a coherent fabric, recognizing the importance of nuance and avoiding abrupt turns, will take us further over time. Only a jurisprudence that accepts the complexity of substantive equality will have something to say to the kinds of equality initiatives on the ground that must incorporate different needs and experiences, the way in which identities intersect and the reality of other societal demands.