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http://digitalcommons.osgoode.yorku.ca/sclr/vol24/iss1/3

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Inclusive Equality and New Forms of Social Governance

Colleen Sheppard*

I. INTRODUCTION

Caught in the preoccupation with the present and the presumptions of existing doctrinal frameworks, we sometimes fail to reflect upon current predicaments from a macro-historical perspective. In 2003, two decisions of the Supreme Court of Canada involved extensive discussions of constitutional equality rights.1 In both cases, the Court unanimously held that section 15(1) of the Canadian Charter of Rights and Freedoms2 had been violated and that the violations were not justified under section 1. Perhaps this unanimity reflects a shared clarity regarding the meaning of substantive equality, unlike the divergence of views evident in the fractured Supreme Court opinions of 2002.3 However, in both of the 2003 cases, the Supreme Court of Canada overturned provincial court of appeal decisions that had found no violation of section 15(1) equality rights.4 Furthermore, dissenting opinions have resurfaced

* Faculty of Law, McGill University. I wish to thank Yasmina Benihoud and Jameela Jeeroburkhan for their research assistance, Andrew Unger for comments and editorial assistance, and Hester Lessard for her insights on an earlier draft. I also wish to acknowledge the support of the Social Sciences and Humanities Research Council of Canada.


in the 2004 Supreme Court equality jurisprudence. The linchpin of the analyses in all of the various Supreme Court judgments, and at the different appellate levels, continues to be whether the legislative provisions violate human dignity, such that the differential treatment constitutes discrimination. The divergent results attest to ongoing uncertainty about the meaning and application of substantive equality, and the malleable concept of human dignity. It would appear, therefore, to be an appropriate historical moment to reflect more broadly on where we are in terms of constitutional equality rights.

In this article, I seek to understand the contested meanings and applications of constitutional equality rights by examining how changing ideologies about the role of the state influence legal developments. Such an analysis is particularly important in the constitutional law domain, given its concern with the relationship between the state, individuals, institutions, and communities. These shifting understandings of the role of the state, including classical liberalism and the negative state, the postwar social welfare state, neoliberalism and the privatization of state responsibilities, and emerging forms of post-neoliberal social governance, have had important effects on legislative and constitutional reform, and on judicial interpretations of human rights protections. After reviewing divergent approaches to human dignity in recent jurisprudence, I endeavour to situate uncertainties about the meaning of substantive equality in the context of shifting public policy paradigms. I conclude by proposing some preliminary ideas about how we might restructure the contextual factors set out by the Supreme Court of Canada in the leading case on equality in order to achieve a synthesis of the substantive and procedural dimensions of equality — an approach I call “inclusive equality”.

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7 Id.

8 The language of inclusiveness is used by numerous scholars in discussing conceptions of equality. See generally Anthony Giddens, The Third Way — The Renewal of Social
II. CONTINUED UNCERTAINTY REGARDING THE MEANING OF SUBSTANTIVE EQUALITY

Despite the Supreme Court’s effort to articulate a coherent framework for adjudicating claims of constitutional equality in *Law*\(^9\) continued uncertainty characterizes the post-*Law* jurisprudence.\(^10\) The most contentious dimension of the *Law* framework is the third prong of the test, which requires adjudicators to decide if a legislative provision or government policy is discriminatory “in a substantive sense”.\(^11\) This third inquiry occurs once adjudicators have determined that (i) there is differential treatment in purpose or effects, and (ii) that the differential treatment is based on an enumerated or analogous ground. These first two inquiries can also be complex and contested; however, in a large number of cases, disagreement between judges and courts occurs at the third step. According to the Supreme Court, the overarching purpose of section 15 is respect for “human dignity”. In evaluating a discrimination claim, and deciding whether the human dignity of a claimant has been violated, the courts take into account four contextual factors:

(i) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue…

(ii) The correspondence, or lack thereof, between the ground or grounds upon which the claim is based and the actual need, capacity, or circumstances of the claimant and others…

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(iii) The ameliorative purpose or effects of the impugned law in terms of other groups in society…

(iv) The nature and scope of the interest affected by the impugned law… ¹²

Given the arguably amorphous nature of these contextual factors, it is perhaps no surprise that there is significant room for divergent assessments and outcomes.

The key inquiry at the third stage of the Law test appears to be: “whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity?”¹³ Human dignity, according to the Supreme Court, “concerns the manner in which a person legitimately feels when confronted with a particular law”.¹⁴ When claimants lose, judges have often speculated that the reasonable claimant would not have felt a denial of human dignity. Thus, in addition to losing in court, claimants are effectively told that their perceptions of inequality are not consistent with a reasonable claimant’s perceptions. In tort law, it is usually the alleged tortfeasor’s conduct that is assessed for its reasonableness.¹⁵ Civil liability potentially flows from failing to conform to a reasonable person standard. Something seems amiss when we use this terminology in the equality rights domain,¹⁶ and it is especially disturbing that a reasonableness standard is imposed on the claimant rather than the equivalent of the “tortfeasor” in this context.

¹² Law, supra, note 6, at paras. 62-75.
¹³ Id., at para. 60.
¹⁴ Id., at para 53 [emphasis added]. The requirement that the claimant’s subjective feelings be “legitimate” is another way of affirming the objective dimension to the discrimination inquiry.
¹⁵ There is consideration of the reasonableness of the claimant in the context of informed consent law in medical malpractice cases. Generally, however, the focus is on the tortfeasor. I am indebted to Derek Jones for ideas on the interplay between equality law and tort law.
¹⁶ See generally Lovelace v. Ontario, [2000] 1 S.C.R. 950, per Iacobucci J., at para. 90 [hereinafter “Lovelace”]; Lavoie, supra, note 3, per Arbour J., at para. 123; Gosselin, supra, note 3, per McLachlin C.J., at para. 62: “...the Regulation was aimed at ameliorating the situation of welfare recipients under 30. A reasonable person in Ms. Gosselin’s position would take this into account in determining whether the scheme treated under-30s as less worthy of respect and consideration...” [See also paras. 67 and 69]; Granovsky v. Canada (Minister of Employment and Immigration), [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703, at paras. 70 and 81 [hereinafter “Granovsky”].
Why is it not the government actor who is held to a standard of reasonableness? Moreover, the pathbreaking jurisprudence of the mid-1980s taught us that discrimination may occur despite the absence of any intent to discriminate.\(^{17}\) If this is the case, then why is the ameliorative purpose (\textit{i.e.}, intent) even considered when recognition of adverse effects discrimination was to have rendered intent irrelevant?

1. \textit{Trociuk v. British Columbia (Attorney General)}\(^{18}\)

Uncertainty linked to differing assessments of human dignity is evident in \textit{Trociuk}. Justice Deschamps, writing for a unanimous court, had to assess whether the differential treatment of mothers and fathers in the birth registration and surnaming process, under British Columbia’s \textit{Vital Statistics Act}\(^{19}\) was discriminatory. The legislation gave birth mothers the option of not including the father on the birth registration forms, either because the father was unknown or because the mother chose to list the father as unacknowledged. If a father were unacknowledged, he was also precluded from the process of determining the surname of the children. The legislative provisions were designed to ensure that mothers who had valid reasons for not acknowledging a known father (\textit{i.e.}, incest, sexual assault) had certainty that there would be no disclosure of the father’s identity. This certainty would encourage mothers to register their children’s births promptly and accurately. The provisions were also designed to reduce conflict between parents, effectively giving the mother decision-making authority over the children’s surnames if a father was unacknowledged. On the facts of the \textit{Trociuk} case, the two issues were linked. The mother’s decision to list the father as unacknowledged was linked to the parents’ dispute about the surname of the children. She was willing to include his name on the birth registration, but wanted the children to have her surname only, since she had sole custody of them.


\(^{18}\) \textit{Trociuk}, supra, note 1.

\(^{19}\) R.S.B.C. 1996, c. 479.
The Supreme Court of Canada unanimously concluded that section 15 was violated — that the differential treatment accorded mothers and fathers in the legislation was discriminatory and undermined the human dignity of fathers. In assessing the contextual factors, Deschamps J. begins with the fourth factor, the nature of the interest affected, noting at the outset “[p]arents have a significant interest in meaningfully participating in the lives of their children”.20 She then concludes that the inclusion of a father’s particulars on the birth registration, and involvement in the process of determining a child’s surname are important dimensions of parental participation in a child’s life.21 Drawing on academic commentary that the historical inability of mothers to pass on their surnames constituted “a sign of the inferiority of women and their incapacity to perpetuate a line by filiation”,22 Justice Deschamps concludes that a “father who is arbitrarily excluded from this activity would reasonably perceive that a significant interest has been affected”.23

On the question of whether such exclusion would demean a father’s dignity, Deschamps J. begins by noting that the absence of historical disadvantage against fathers (men) as a group is not dispositive of whether a reasonable claimant would perceive a violation of human dignity. Instead, she concludes that it would be reasonable “to perceive that the legislature is sending a message that a father’s relationship with his children is less worthy of respect than that between a mother and her...

20 Trociuk, supra, note 1, at para. 15.
21 It may be important to understand this conclusion in light of the civil law tradition of according significant legal importance to “filiation” and formal recognition of the parent-child bond, including an historical focus on the father-child relationship. For a discussion of the civilian concept of filiation, see M.F. Bureau, “L’union civile et les nouvelles règles de filiation au Québec: contrepoin
discordant ou éloge de la parenté désirée” (2003) 105 Revue du Notariat 901, at 906-10 (and references cited therein). The common law tradition is much less concerned with establishing the formal legal nature of family relationships, dealing with family relationships predominantly in terms of the legal consequences in the wake of family breakdown.
Moreover, Deschamps J. finds a further infringement of dignity in the pejorative association between fathers who are excluded without valid reasons by a mother and those who are justifiably excluded (i.e., rapists, perpetrators of incest). In terms of the ameliorative purpose of the impugned provisions for women and children, Deschamps J. maintains:

In the present case, a reasonable claimant would perceive that the legislature could protect a mother from the unwanted disclosure of a justifiably unacknowledged father’s identity, without exposing other fathers to the risk of arbitrary exclusion. The reasonable claimant would conclude that his exclusion was not necessary to achieving the ameliorative objective. He would reasonably perceive that his significant interest in participation in his children’s lives was superfluously sacrificed in the pursuit of that objective. The reasonable claimant would conclude that, despite a correspondence between the ameliorative purpose and the legislative exclusion, his dignity was infringed.

One critique of this reasoning is that the human dignity analysis, considered from the perspective of a reasonable claimant, requires the Court to do a considerable amount of balancing of rights and interests within the confines of section 15 to reach the conclusion. Why wouldn’t a reasonable claimant perceive that his situation was anomalous and isolated and that in the vast majority of cases, the provision achieved an ameliorative objective that redressed a long history of disadvantage against mothers? Why wouldn’t a reasonable claimant realize that the legislature was seeking to protect mothers, not harm fathers, nor undermine the human dignity of fathers?

To add to the uncertainty, a majority of the British Columbia Court of Appeal and the trial judge reached the opposite conclusion. Justice

24 Id., at para. 21.
25 Id., at para 23.
26 Id., at para 29.
27 Id., at para. 42. In assessing s. 1, Deschamps J. finds that the legislative provisions did not minimally impair fathers’ rights, since no procedural mechanism was provided for unjustifiably unacknowledged fathers to contest their exclusion. Indeed, she notes that amendments to the legislation since the litigation began provide fathers with a mechanism for being included on the birth registration documents, demonstrating a less restrictive alternative. Id., at para. 42. The contrast with judicial assessments of the reasonable claimant in Lovelace, supra, note 16, Granovsky, supra, note 16, Lavoie (dissent), supra, note 3 and Gosselin, supra note 3, is significant.
Southin of the Court of Appeal rejected the section 15 claims of Mr. Trociuk. She suggested that his argument in effect would require that “every man that can prove his paternity has a right to be on the birth certificate and have the child bear his name”.28 There is nothing in the evidence in this case to persuade me that the benefits to fathers of such judicial statute revision would not be thought, by many mothers and would-be mothers, especially those who have deliberately chosen to be single mothers, to be a serious diminution of their rights — to constitute “discrimination” against them.29 Justice Southin is so convinced of the groundlessness of the equality arguments that she does not even provide extensive reasons for her conclusions, beyond the suggestion that to find discrimination in the substantive sense “is going far beyond any of the authorities on section 15”.30 Justice Newbury, in her concurring reasons, provides further justifications for concluding that the statute does not discriminate against fathers. She writes:

…I do not believe the effect of the differential treatment of mothers and fathers under the Vital Statistics Act promotes the view that fathers are “less capable, or less worthy of recognition or value” as human beings or members of Canadian society. If anyone has been historically regarded as “less worthy”, it is single mothers, who until recently were treated as “fallen women”, and their children, who were stigmatized as illegitimate or worse. The impugned legislation has removed the statutory and legal attributes of illegitimacy but has not removed the societal and practical difficulties that face single mothers. The terminology employed by the Court in Law is simply not apt to describe fathers in Mr. Trociuk’s situation.31

28 Trociuk C.A., supra, note 4, at para. 82.
29 Id., at para. 84.
30 Id., at para. 83.
31 Id., at para 179. Justice Newbury also commented at para. 177: “To require mothers to acknowledge fathers against their wishes would be a serious incursion into the interests of the mother, who may have good reason for refusing to acknowledge (and disclose in a public document) the identity of the father”. On the nature of the interest affected, she wrote at para. 178: “If by being denied rights of registration and naming, Mr. Trociuk was also being excluded from the right to participate in the support and upbringing of his children as well as in their naming, I would agree that s. 15 was clearly engaged. But all that is in issue in this
In her dissent, however, Prowse J.A. concludes otherwise, writing:

I conclude that the differential treatment of mothers and fathers under these provisions withhold a benefit from fathers in a manner which has the effect of signaling to them and to society as a whole that fathers are less capable or less worthy of recognition or value than mothers, and that they are not regarded as being equally deserving of concern, respect and consideration. … if these rights are significant to mothers, surely it is reasonable to conclude they are equally significant to fathers.32

For Prowse J.A., the provisions did not meet the minimal impairment test under section 1 — “the impugned provisions permit the mother to become the ultimate arbiter of the rights of the father in relation to registration and naming of children”33

…Such a right could be circumscribed, however… by giving the father a right exercisable within a limited time, to show cause why he should be acknowledged on the birth registration as the father… In my view, providing the father with the right to challenge his exclusion from the registration and naming process would be more likely to deter a mother from providing false or spurious reasons for refusing to acknowledge the father. 34

My point in including these diametrically opposed judicial conclusions is simply to underline the indeterminacy of the current test for constitutional discrimination.

2. *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*35

In *Martin*, the issue was the exclusion of chronic pain from the regular workers’ compensation benefits and the provision instead of a limited four-week Functional Restoration Program.36 Again, the out-

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32 *Id.*, at paras. 143 and 145.
33 *Id.*, at para. 153.
34 *Id.*, at para. 156.
35 *Martin*, supra, note 1.
36 *Id.*
comes differed at the Supreme Court and the Court of Appeal levels. The key divergence of opinion was focused on the human dignity requirement, assessed in relation to the four contextual factors set out in Law. The Supreme Court of Canada found that exclusion of chronic pain injuries was discriminatory and violated the human dignity of the claimant, while the Nova Scotia Court of Appeal reached the opposite conclusion.

Writing for a unanimous Supreme Court of Canada, Gonthier J. emphasizes at the outset that regarding the historical disadvantage factor, the “claimants belong to a larger group — disabled persons — who have experienced historical disadvantage or stereotypes”. In terms of the second contextual factor, Gonthier J. highlights the actual effects of the exclusion:

The challenged provisions … while maintaining the bar to tort actions, exclude chronic pain from the purview of the general compensation scheme provided for by the Act. Thus, no earning replacement benefits, permanent impairment benefits, retirement annuities, vocational rehabilitation services or medical aid can be provided with respect to chronic pain….Instead, workers … who suffer from chronic pain are entitled to a four-week Functional Restoration Program, after which no further benefits are available.

While the respondents maintained that the four-week program responded effectively to the medical needs of chronic pain sufferers, Gonthier J. disagrees, finding that the impugned provisions do not respond to the needs, capacities or circumstances of those suffering from chronic pain. The ameliorative purpose factor is held inapplicable. Justice Gonthier argues that a legislative decision to redress the most severe cases “cannot serve to shield an outright failure to recognize the actual needs of an entire category of injured workers”. And finally, in terms of the nature of the interest affected, Gonthier J. clarifies:

In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely-held negative

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37 Id., at para. 88. Noting that chronic pain sufferers are not required to show that they are more disadvantaged than the comparator group (those with other workplace disabilities).
38 Id., at para. 95.
39 Id., at para. 102.
attitudes towards the claimants and thus reinforce the assault on their dignity.\(^{40}\)

Furthermore, Gonthier J. emphasizes that the dignity of chronic pain sufferers is undermined because the provisions affect access to work and employment, which has been recognized as “a fundamental aspect of a person’s life”.\(^{41}\) The exclusion of chronic pain from the full range of workers’ compensation benefits reinforces negative assumptions about chronic pain “by sending the message that this condition is not ‘real’, in the sense that it does not warrant individual assessment or adequate compensation”.\(^{42}\)

In assessing whether the violation is justified pursuant to section 1 of the Charter, Gonthier J. reviews the four identified purposes for the legislative exclusion of chronic pain from the workers’ compensation scheme. First, he rejects the purpose of ensuring the viability of the Accident Fund, writing that “[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective.”\(^{43}\) Second, the objective of ensuring a consistent legislative response is rejected to the extent that “[m]ere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a Charter right”.\(^{44}\) Justice Gonthier accepts the third purpose, the avoidance of fraudulent claims, but finds that the minimal impairment requirement is not satisfied because the “wholesale exclusion” of chronic pain sufferer results in provisions that “make no effort whatsoever to determine who is genuinely unable to work and who is abusing the system”.\(^{45}\) The fourth objective, to promote early medical intervention and return to work as the best available treatment for chronic pain conditions, also fails the minimal impairment test.\(^{46}\)

Precisely the opposite conclusion was reached at the Nova Scotia Court of Appeal.\(^{47}\) Justice Cromwell concludes that the special provi-

\(^{40}\) Id., at para. 103.
\(^{41}\) Id., at para. 104, citing Lavoie, supra, note 3, at para. 45.
\(^{42}\) Id., at para. 105.
\(^{43}\) Id., at para. 109.
\(^{44}\) Id., at para. 110.
\(^{45}\) Id., at para. 112.
\(^{46}\) Id., at para. 116. Justice Gonthier assumes without deciding that the fourth objective is pressing and substantial.
\(^{47}\) Martin C.A., supra, note 4.
sions for chronic pain injuries in the workers compensation scheme are not discriminatory. First, with respect to pre-existing disadvantage, he concludes that “the record in this case does not show widespread attribution of traits that do not exist (i.e., stereotyping) or the historic disadvantage and prejudice in relation to chronic pain sufferers”. Second, in terms of the second and third factors, Cromwell J.A. writes:

…chronic pain presents a difficult challenge to the workers’ compensation system….In his report prepared for the Board, Dr. Murray pointed out that chronic pain is a complex of physical, psychological, emotional, social and cultural factors that interplay to produce and continue this syndrome. The chronic pain provisions in issue here attempt to respond to this reality …

Justice Cromwell further emphasizes that the “overall purpose of the workers’ compensation scheme is unquestionably ameliorative. There is considerable correspondence between the provisions and the circumstances, capacities and needs of injured workers with chronic pain …”.

In the end, Cromwell J.A. returns to what he calls the “key inquiry”:

…would a reasonable person, in circumstances similar to those of the claimants and taking account of the various contextual factors, consider that the chronic pain provisions demean their human dignity? … do these provisions in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice? Do the provisions perpetuate the view that injured workers with chronic pain are less capable or less worthy of recognition or value as human beings or as members of Canadian society?

His answer to these questions is no and the Court unanimously concludes:

I do not think…that the chronic pain provisions, viewed in the context of a targeted, ameliorative scheme like workers’ compensation and of the problematic place of chronic pain in that scheme would be seen as demeaning. Instead, these provisions would be seen as one of many

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48 Id., at para. 262.
49 Id., at para. 274.
50 Id., at para. 283.
51 Id., at para. 287.
examples of the workers' compensation scheme being unable to fully meet
the legitimate needs of all.52

How can we make sense of these contradictory outcomes? It appears
that the contextual factors do not ensure consistent outcomes, as the
above examples indicate. The historic disadvantage factor is sometimes
simply disregarded, or framed in divergent and multiple ways. The
correspondence and ameliorative purpose factors appear to bring vary-
ing degrees of justification into the section 15(1) analysis. Disagreement
regarding the second and third factors also raises the extent to which
justificatory considerations should be assessed in section 15, or left to a
section 1 analysis. The fourth factor, the nature and scope of the interest
affected, though seemingly concrete, is also subject to divergent inter-
pretations about what is at stake in various cases. In addition, the very
nebulous overarching criterion of human dignity, speculatively assessed
from the perspective of some abstract reasonable claimant, does not
appear to provide significant certainty in predicting outcomes. Beyond
these doctrinal debates, and arguably legitimate differences of opinion,
are there larger, more institutional, historical or sociological factors that
explain the widely divergent outcomes in equality law?

III. SHIFTING CONCEPTIONS OF THE ROLE OF THE STATE:
FROM FORMAL TO SUBSTANTIVE EQUALITY

Constitutional law develops against a backdrop of changing concep-
tions of the role of the state and shifting approaches to public policy,
governance, and regulation. The evolution of legal approaches to equal-
ity reflects these different understandings of government. Formal equal-
ity, which is consistent with a classical liberal understanding of the role
of government, has been replaced by the more social welfare concept of
substantive equality, which in turn is now challenged by the emergence
of neo-liberal theories. Some of the key differences between these ap-
proaches include the following:

52 Id., at para. 288.
Classical Liberalism/ Formal Equality

- Equality as an individual right
- Equality of opportunity
- Equality as equal treatment or sameness of treatment
- Discrimination as an exceptional, irrational aberration
- Equality grafted onto unquestioned institutional status quo
- State to provide equal political and civil rights, but not responsible for social and economic inequalities in private sphere
- Assimilative — right to be treated the same as individuals from dominant groups.

Social Welfare State/ Substantive Equality

- Equality as a group right
- Equality of outcomes
- Recognition of adverse effect discrimination — unequal effects of equal treatment based on dominant norms
- Discrimination recognized as systemic
- Equality requires systemic change and revising of dominant norms
- State responsibility for social well-being (emergence of idea of social as well as political citizenship)
- Instrumental conception of law — law can effect social change
- Preventive and systemic remedial approaches regulated by the state
- Accommodation of differences and diversity

Neo-liberal Policy Developments

- Decline in support for a social welfare state
- Privatization of responsibility for economic well-being
- Dismantling or downsizing of state agencies and institutions (e.g., human rights commissions)
- Globalization, economic competition and accentuating inequalities (especially socio-economic)
- Increased focus on individual responsibility
- Resurgence of conservative moral values — traditional private family (neo-conservatism)
- Revival of formal equality discourse
In examining equality rights jurisprudence, it is nevertheless apparent that judicial discourse does not consistently align itself with the dominant ideologies about the role of the state at any particular historical moment. For example, when welfare state ideology was at its high-point politically in the 1960s and early 70s, the Supreme Court of Canada was articulating a classical liberal definition of equality rights (particularly in its interpretations of the 1960 Canadian Bill of Rights). When neo-liberalism began to have an impact on Canadian public policy in the mid-1970s and 1980s, the Supreme Court of Canada formally endorsed welfare state ideals regarding substantive equality and the systemic dimensions of legal inequality in interpreting human rights legislation and the Charter. At the same time, however, it has been suggested that neo-liberal ideals have begun to influence Charter discourse, “not only in the rejuvenation of the classical liberal ideas of negative liberty and formal equality, but also in the introduction of the neo-liberal discourse of privatization”. Despite the late 20th century passage of the Canadian Charter of Rights and Freedoms, many of its basic legal presumptions are informed by 19th century classical liberalism. Structurally, it is predominantly a negative rights document, protecting citizens from state-based human rights violations. Furthermore, the “autonomous adult individual” of classical rights discourse is the main beneficiary of Charter protections. However, the Charter does contain important provisions that reflect both a more social democratic vision of the state and its more recent drafting. Section 15(1) secures equal protection and equal benefit of the law. Similarly, section 15(2) provides that ameliorative government laws or programs, designed to remedy group-based inequalities will not violate section 15(1). The balancing of fundamental rights and freedoms with countervailing societal interests is expressly mandated by section 1. As

56 Section 1 provides: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
well, the equality and positive rights dimensions of collective rights are integral to minority language rights provisions and to Aboriginal rights.57 Thus, the seeds of substantive equality are not entirely absent from the Charter itself.

While judges have embraced the concept of substantive equality in interpreting the equality rights provisions of the Charter, the full implications of its redistributive underpinnings remain somewhat ambiguous. Substantive equality finds its theoretical sustenance in the egalitarian ideas of social democracy. Equality is measured by actual outcomes — by examining the effects of laws, policies, and programs on economic, social, political, and psychological well-being. The state (via government policy, law, and formal rights) is accorded a primary and instrumental role in securing and enforcing equality. The shift to substantive equality also marks recognition that equal treatment can have unequal effects in a world of systemic inequality, that group-based histories of disadvantage matter, and that the accommodation of diversity and difference is sometimes necessary to advance equality of outcomes.

Yet, substantive equality is out of sync with traditional legal theory, still influenced by the pull of legal formalism and steeped in the assumptions of classical liberal thought.58 To carry substantive equality to its logical conclusion would be to challenge some of the fundamental economic and political pillars of modern society — something judges are not planning to do. While recognizing the importance of ameliorative state action, there continues to be considerable judicial discomfort with the idea of positive economic and social rights.59 There is concern as well about the economic implications of recognizing poverty as a ground of discrimination. Such doctrinal developments would arguably force judges to make resource allocation decisions of a political nature — decisions deeply inconsistent with traditional understandings of judicial review.

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57 Minority language rights are set out in s. 23 of the Charter. Aboriginal rights are protected from countervailing Charter rights in s. 25. Aboriginal rights are also protected in s. 35 of the Constitution Act, 1982.

58 The pull of legal formalism in equality rights law is reflected perhaps in the repeated attempts to structure objective doctrinal tests, with intricate steps of analysis.

The pressures of neo-liberal social policy and the competitive global economic environment also pose challenges to the pursuit and realization of substantive equality. Courts have increasingly been required to adjudicate government regulatory initiatives informed not by redistributive social welfare values, but by neo-liberal interests in privatizing social welfare responsibilities, increasing individual responsibility, and responding to global economic competition. Though initiated by the state, these regulatory measures have had detrimental effects on some of the most vulnerable groups in society. The extent to which constitutionalized human rights, including substantive equality, can be relied upon to contest these policy developments remains uncertain. To the extent that provisions such as section 15(2) and section 1 of the Charter tend to presume a social welfare state ideology, such assumptions may be problematic with the apparent emergence of a neo-liberal public policy context. It is important to ensure adequate government accountability, transparency, and scrutinize the extent to which the regulatory objectives ameliorate or aggravate the conditions of socially disadvantaged individuals and groups. The current formulation of substantive equality simply does not provide sufficient guidance to judges, and the tendency to decide cases based on a section 15 analysis, rather than section 1, reduces the likelihood of significant government accountability.

Adjudicating constitutional rights and freedoms becomes even more complex as new trends in government regulatory approaches emerge. Some suggest that new forms of social governance represent a synthesis of the egalitarian ideals of the social welfare state and the neo-liberal critique of big government with its “command and control” strategies for social change. Others maintain that the apparently new forms of social governance are predominantly inspired by neo-liberal ideology. Nevertheless, these new approaches to government regulation are having an impact on government policy-making and law reform. Confronted with these new state initiatives, it is important for judges to appreciate their contours, distinctiveness and underlying assumptions, to allow for effective adjudication regarding their constitutionality. It is my

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60 See generally Giddens, supra, note 8.
contention that these new forms of social governance may open up new pathways to equality, while potentially also creating new problems of inequality.

IV. NEW FORMS OF SOCIAL GOVERNANCE

One influential source of new thinking about the role of government in the global era is Anthony Giddens’ book, *The Third Way — The Renewal of Social Democracy*.\(^{62}\) Giddens articulates a new approach to governing that moves beyond both old style social democracy and the harshness of neo-liberalism. While he recognizes the inadequacy of traditional social democracy, he seeks to reconstruct it rather than replace it with a neo-liberal approach. His “third way” endorses the values of “equality, protection of the vulnerable, freedom as autonomy, no rights without responsibilities, no authority without democracy, cosmopolitan pluralism, and philosophical conservatism”.\(^{63}\) Third way governance accords an important role to the state, but emphasizes the need to act in partnership with communities to reinvigorate democracy, and well-being on the individual and community levels. In effect, Giddens advocates a shift from a “welfare state” to a “welfare society”,\(^{64}\) characterized by a robust and healthy civic life.

In the domain of equality, Giddens defines “equality as inclusion and inequality as exclusion”.\(^{65}\) He rejects the neo-liberal focus on equality of opportunity because it risks resulting in too much disparity and inequality. Practically, it does not actually operate given the uneven and unfair privileges that skew the operation of meritocracy and equal opportunities. Equality as inclusion “…refers in its broadest sense to citizenship, to the civil and political rights and obligations that all members of a society should have, not just formally, but as a reality of their lives”.\(^{66}\) Access to work and to education are two key components of

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\(^{63}\) *Id.*, at 66.

\(^{64}\) *Id.*, at 117.

\(^{65}\) *Id.*, at 102.

\(^{66}\) *Id.*
equality to be enjoyed in a renewed and healthy public space. Giddens insists that it is critical to redress the exclusion of marginalized groups at the bottom by ensuring their inclusion in education and employment. He also condemns what he calls “voluntary exclusion” marked by “a withdrawal from public institutions on the part of more affluent groups.” More privileged social groups opt out of public spaces (e.g., private schools, private healthcare, walled communities etc.). Giddens emphasizes how involuntary and voluntary exclusion are connected, with greater marginality reinforcing a greater retreat from the public domain. Both forms of exclusion, Giddens argues, are self-reproducing. Government policy must endeavour to break the self-perpetuating cycles of exclusion in order to foster and promote equality.

1. The Social Investment State

One important new public policy trend is the shift from a social welfare to a social investment state. Giddens emphasizes that the “guideline is investment in human capital wherever possible rather than the direct provision of economic maintenance”. Jane Jenson and Denis Saint-Martin characterize such a policy reorientation as a shift from Fordism to LEGO™ism. In other words, governments are shifting from “passive spending on social protection to investments that will generate an ‘active society’ and an ‘active citizenry’”. Such measures focus on education and retraining for employment and increased civic participation. The LEGO™ imagery underscores a particular concern with the education and training of children — the future citizen-workers. It is designed to ensure “supply side egalitarianism” and “implies a conception of equality different from the one embedded in the post-war welfare

67 Id., at 102. As Giddens observes: “In a society where work remains central to self-esteem and standard of living, access to work is one main context of opportunity. Education is another...”.
68 Id., at 103.
69 Id., at 122.
71 Id., at 1.
state”. Jenson and Saint-Martin explain that whereas “…social policy traditionally focused on redistribution, on fostering greater equality in the here-and-now... the LEGO model emphasises equality of life chances.”

The challenge of this shift in policy orientation to the adjudication of equality rights was apparent in the Gosselin case, which engaged the courts in assessing the fairness of an age-based remedial workfare and training program. Social assistance recipients under the age of 30 in Quebec were required to participate in educational or employment training programs to be entitled to receive full welfare benefits. Failure to participate resulted in a significant reduction in monthly benefits. Louise Gosselin, certified to represent the class of social assistance recipients under the age of 30, found her social assistance payments reduced on a number of occasions when she was not engaged in the remedial programs. She maintained that the reduced benefits were so low as to make it impossible to meet her basic needs for food and shelter, thereby denying her fundamental human dignity and constitutional rights.

Though McLachlin C.J. affirms at the outset that section 15’s “purpose of protecting equal membership and full participation in Canadian
society runs like a leitmotif through our section 15 jurisprudence," she concludes that the conditional benefit entitlement does not violate equality.

The government’s longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order eventually to integrate into the workforce and become self-sufficient. This policy reflects the practical wisdom of the old Chinese proverb: “Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime.” This was not a denial of young people’s dignity; it was an affirmation of their potential.76

In a similar vein, she explains that:

[T]he social assistance regime … sought to promote the self-sufficiency and autonomy of young welfare recipients through their integration into the productive workforce, and to combat the pernicious side effects of unemployment and welfare dependency. The participation incentive worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity….77

Chief Justice McLachlin emphasizes that “[a]s a matter of common sense, if a law is designed to promote the claimant’s long-term autonomy and self-sufficiency, a reasonable person in the claimant’s position would be less likely to view it as an assault on her inherent human dignity.”78 Here we see a shift away from the post-liberal focus on effects to assessment of rights violations in terms of the subjective perspective of a reasonable claimant.

In her dissenting opinion, L’Heureux-Dubé J. emphasizes that “a discrimination claim should be evaluated primarily in terms of an impugned distinction’s effects…The point of departure should not lie in

75 Id., at para. 23.
76 Id., at para. 42.
77 Id., at para 65. Parallel reasoning was relied upon by Cromwell J.A. of the Nova Scotia Court of Appeal in the Martin case, supra, note 3, upholding the constitutionality of the Functional Restoration Program, as an ameliorative initiative designed to get chronic pain sufferers quickly back into the workforce.
78 Id., at para. 27.
abstract generalizations about the nature of grounds”.79 Thus, it is not simply a matter of assessing the category of those less than 30 years of age; one must consider the harsh effects of inadequate social assistance in terms of lack of food, shelter and the inability to fulfil basic human needs. Justice L’Heureux-Dubé concludes that the scheme resulted in a violation of both psychological and physical integrity:

There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government’s own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was $152. The guaranteed monthly payment to young adults was $170. I cannot imagine how it can be maintained that Ms. Gosselin’s physical integrity was not breached.80

Was the age-based initiative consistent with this new social investment approach to equality or did it reinforce inequality? Did it promote equality or harm individual social assistance recipients by failing to take into account to a sufficient degree the structural conditions of poverty and systemic constraints on individual capacities to participate in such retraining and employment initiatives?

2. The Facilitative State and Responsibilization Strategies

A second important change in regulatory approaches involves a shift from an instrumentalist state to a facilitative state. David Garland characterizes this shift in the domain of criminal justice policy as the “responsibilization strategy”, or “governmentality”.81 In contrast to the traditional command and control approach to law and policy, responsibilization strategies “extend the reach of state agencies by linking them up with practices of actors in the ‘private sector’ and ‘the community’”.82 Garland

79 Id., at para. 111 [emphasis in original].
80 Id., at para. 130.
82 Id., at 124. Interesting parallels characterize human rights policies, which in the 1960s and 70s, relied predominantly in state-enforced command and control policies, focused on the individual complaints process, investigated and controlled by state-financed human rights commissions. It is only in the 1980s and beyond that we see the emergence of employ-
maintains that this shift reflects government acknowledgment of what he calls a “basic sociological truth: that the most important processes producing order and conformity are mainstream social processes within the institutions of civil society, not the uncertain threat of legal sanctions.”

Garland’s insights in this regard parallel a growing scholarship on legal pluralism. Responsibilization strategies also resonate with a recent federal public policy interest in “social capital”, defined as “the networks of social relations that provide access to needed resources and supports.” It is hoped that an examination of social capital as a public policy measure will provide “a useful lens for understanding the health of a community or civil society, and potentially … important clues to variations in social and economic outcomes”.

Pursuant to a responsibilization approach, government policy increasingly employs indirect forms of social governance that effectively delegate government functions to non-state actors. Speaking in terms of criminal justice policy, Garland explains:

Government authorities are, in this field of policy as in several others, operating across and upon the boundaries that used to separate the private from the public realm, seeking to renegotiate the question of what is properly a state function and what is not. In doing so, they are also beginning to challenge the central assumption of penal modernism, which took it for granted that crime control was a specialist task, best concentrated within a differentiated state institution.

From a constitutional law perspective, these developments render complex the classical liberal dichotomy between the public and the private.

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83 Id., at 126.
85 Social Capital: Building on a Network-Based Approach PRI Project, Social Capital as a Public Policy Tool (October, 2003).
86 See Policy Research Initiative, online: <http://policyresearch.gc.ca>.
87 Garland, supra, note 81, at 126.
Judicial attempts to respond to these shifts in delineating the contours of the state action doctrine have been understandably complicated, though the Supreme Court has been endeavouring to recognize state action despite the indirect or delegated nature of government responsibility.88

3. The Partnership State

A third strategy of new social governance, which is a dimension of the responsibilization approach, engages the state in partnerships for social change.89 I highlight it separately because in the domain of equality rights, it is integral to the pursuit of equality by collectivities, particularly minority language and Aboriginal communities. Wendy Larner and David Craig, maintain that local partnerships “are usefully understood as a post-welfarist, post-neoliberal form of social governance”.90

They represent innovative strategies on the part of local communities and the cutting edge of decentralized, locally responsive government. As such, they present important challenges to more traditional, centralized, vertically integrated, sectoral approaches to policy development, service provision and community support. 91

In distinguishing local partnerships as a model of governance, Larner and Craig maintain that “[w]hereas Keynesian welfarist strategies were premised on universalist nation-state conceptions of the social, and earlier neo-liberal strategies focused primarily on the individual, the new form of social governance recognizes multiple and fragmented social groups”.92 Of significance in terms of equality rights is the connection they make between the emergence of identity politics, rejecting the “assimilationist and integrationist assumptions of earlier policy formulations” and the rise of the partnership model. In turn, local com-

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89 The partnership approach to social governance is in some cases simply a euphemism for privatization and a refusal on the part of the state to assume full responsibility for certain government programs and organizations.
91 Id., at 7.
92 Id., at 17.
Inclusive Equality

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Communities are themselves understood as internally diverse, meaning that they do not always speak in one voice.

In the Canadian constitutional context, the local partnership model of governance has been important in Aboriginal law and policy. To what extent does constitutional equality or constitutional Aboriginal rights require forms of governance that empower local communities? How do judges adjudicate divisions between Aboriginal communities or within particular communities? In the domain of minority language education, democratic participation in education policy, empowerment of parents, and government accountability for inaction in setting up effective minority language education, have been informed by underlying collective conceptions of equality.

V. INCLUSIVE EQUALITY: THE PROCESS AND SUBSTANCE OF CONSTITUTIONAL EQUALITY

It would appear, therefore, that these new forms of social governance hold both promise and risks for the attainment of equality. While it is possible to continue to advocate an approach to constitutional equality that focuses on the substantive effects of new governance initiatives, it is also essential to scrutinize their institutional, systemic and procedural dimensions. To engage in the most difficult debates regarding the meaning and application of equality means developing principles and doctrines that speak to institutional dynamics of discrimination, the intersection of public and private normativity, the intergenerational reproduction of inequality, process values such as democracy, citizenship, participation, transparency, accountability in decision-making, and mechanisms for reinforcing both individual and collective agency and empowerment. There are glimpses of recognition of these complex and dynamic public policy issues within judicial decisions, but they are fleeting and not connected to a larger theory of equality rights that re-


sponds to the challenges of inequality in a neo-liberal and post neo-liberal world. Indeed, the shift to human dignity reflects a renewed focus on process issues, such as the ameliorative objective of the state and the correspondence between the needs and circumstances of the claimant and the purpose of the government initiative. The process implications of this shift, however, are not openly acknowledged, funneled as they are through the vague substantive ideal of human dignity.

What theoretical conception of equality would provide sufficient guidance to adjudicators in the context of these new social policy initiatives? While these new forms of social governance raise questions about how we conceptualize the first two steps in the Law equality framework, I want to focus on the human dignity criterion for assessing substantive discrimination and the contextual factors analysis. Simply put, it is my contention that the human dignity inquiry and the contextual factors set out in Law, though useful in some ways, do not provide us with sufficient guidance in adjudicating the procedural and substantive fairness issues at the heart of constitutional equality rights.

While the concept of substantive equality was essential in taking us beyond a formal equality that looked only to procedural equal treatment and not to equality of substantive outcomes, focusing on effects alone may not provide us with sufficient insight into the institutional and systemic reproduction of inequality. We still require a comprehensive and coherent analysis of the effects of inequality, but we also need an explicit assessment of process issues to understand how inequalities are reproduced in the procedural and institutional contexts of public and private life. Such an inquiry will then set the groundwork for the development of remedial approaches that redress not only the conditions of inequality, but the systemic dimensions of its reproduction as well. What I am suggesting is a rethinking of the parameters of substantive equality or the replacement of substantive equality with a new synthesizing concept — inclusive equality — a vision of equality that would emphasize the intimate connection between process and substance in terms of our understanding of both sections 15 and 1 of the Charter.95

95 A. Gutmann and D. Thompson, Democracy and Disagreement (Cambridge: Harvard University Press, 1996), note at 26: “Procedural and constitutional democrats agree that their disagreement turns on the question of whether democratic procedures have priority over just outcomes or just outcomes have priority over democratic procedures. Deliberative democracy rejects this dichotomy. It sees deliberation as an outcome-oriented process.”
In this concluding section, I provide some preliminary ideas about how we might reframe the contextual factors to articulate more clearly the harmful effects of discrimination, inequitable process concerns, and greater clarity on the extent to which efforts to ameliorate social disadvantage should be assessed as part of the section 15 inquiry. This rethinking also requires a reappraisal of the interaction between sections 15(1) and (2), the latter effectively subsumed under the contextual factors analysis in the wake of the Law and Lovelace decisions. Finally, the role of section 1 in equality jurisprudence needs to be clarified, particularly in an era of shifting public policy paradigms.

As is so often done, it is important to revisit McIntyre J.’s judgment in Andrews v. Law Society of British Columbia. Drawing on his recent innovations recognizing adverse effects discrimination in the domain of statutory human rights law, McIntyre J. approached the constitutional equality guarantees through a human rights code lens. He therefore recognized that discrimination was often caused by harmful differential treatment, but that it might also result from facially neutral legislative policies that had harmful differential effects on diverse groups in society. A process-based definition of equality that considered only whether there had been differential treatment was accordingly inadequate and McIntyre J. endorsed an effects-based test. It was by examining the effects of a law or policy (rather than its form) that judges could identify whether or not discrimination existed. And the effects, obviously, had to be harmful. In statutory equality rights cases, arising in the context of employment, the provision of services or housing, the harm of discrimination is often clear — exclusion or less advantageous employment remuneration, benefits or working conditions.

In the constitutional context, courts must assess the fairness of legislation, a particularly complex exercise when government benefit programs are the focus of the litigation or when the legislation is a response to complicated histories of social inequality. Thus, we see the Supreme Court providing additional guidance in its articulation of human dignity as an overriding purpose of section 15 and in its enumeration of four

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96 See Law, supra, note 6; Lovelace, supra, note 16.
98 This statutory frame of reference explains in part the current difficulties we are having in understanding the specific challenges of constitutional equality and the extent to which equality rights demand state-based redistribution, fairness, accountability, transparency.
contextual factors for assessing whether human dignity has been undermined. How might we reframe the contextual factors analysis? A preliminary elaboration of a revised contextual factors analysis is set out below.⁹⁹

1. Contextual Factors

Types of Harmful Effects: An assessment of whether the law, policy or program results in harmful effects, including:

- economic exclusion or disadvantage
- social exclusion, prejudice, denials of membership
- psychological harms to dignity, respect, integrity, identity
- physical harms to bodily integrity, security, health and well-being
- political exclusion

Degree of Harm: An assessment of the degree or extent of harm (from relatively minor infringements to significant or major encroachments on economic, social, psychological, physical, political well-being).

Exclusionary Processes and Structural/Systemic Dimensions of Harm:
- Pre-existing disadvantage
- Reinforcement of disadvantage, vulnerability, harmful dependencies

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⁹⁹ For the purposes of this article, only the very general contours are enumerated. I am currently in the process of expanding this analysis in a research project entitled, Inclusive Equality: Rethinking Rights, Relationships and Remedies, supported by the Social Sciences and Humanities Research Council.

¹⁰⁰ One useful enumeration of categories of rights, sites of power and domains of empowerment is provided by D. Held, Democracy and the Global Order — From the Modern State to Cosmopolitan Governance (Stanford, CA: Stanford University Press, 1995), Table 9.1, at 192-94.

¹⁰¹ Situating the individual in her or his social/collective/group context is critical to discrimination law, which prohibits group-based harms and exclusion.

¹⁰² See Falkiner v. Ontario (Minister of Community and Social Services) (2002-05-13 (ONCA)). Justice Laskin of the Ontario Court of Appeal formulated the first contextual factor in this way at para. 99 and discusses the nature of the interest at stake at para. 105. See also, “Abrams, ‘Sex Wars’”, supra, note 73. For a discussion of a distinction between relationships of temporary versus permanent inequality, see C. Sheppard, “Caring in Human Relations and Legal Approaches to Equality” (1993) 2 N.J.C.L. 305-45.
• Exclusion from decision-making processes
• Absence of democratic participation\textsuperscript{103}
• Absence of consultation\textsuperscript{104}
• Access to justice, institutions, processes
• Failure to investigate possibilities of accommodation\textsuperscript{105}

This restatement of the contextual factors to a certain degree subsumes the second and third factor into the first inquiry into whether there are harmful effects. It also extends the scope of the inquiry into the processes of exclusion, disadvantage and harm.

2. Section 15(2) and Ameliorative Government Laws, Programs and Activities

The Supreme Court has endorsed section 15(2) as an interpretative aid, designed to underscore the substantive meaning of equality in section 15(1). Section 15(2), however, may be understood in two ways. First, it may be understood simply to indicate that differential treatment alone is insufficient to sustain a claim of discrimination. There must be harmful effects as well. For individuals and groups who do not share the needs or disadvantages that ameliorative programs are designed to redress, there is simply no harm. For example, if the government subsidizes hearing aids, an individual without a hearing impairment is not harmed by the government subsidy. Second, section 15(2) may be relied upon to resolve conflicting equality claims in favour of historically disadvantaged groups, without recourse to section 1.\textsuperscript{106} Thus, it would be relevant where governments are faced with violating equality rights through either action or inaction. Failure to develop an ameliorative

\textsuperscript{103} C. Sheppard, “Equality Rights and Democratic Theory” (unpublished manuscript, on file with author, 2003); See also Young, supra, note 8.
\textsuperscript{104} Some of the ideas emerging on the duty to consult and Aboriginal rights could be applied to equality. See T. Isaac, “The Crown’s Duty to Consult and Accommodate Aboriginal People” (2003) 61 The Advocate 865.
program or law would effectively perpetuate a status quo that reproduces systemic inequalities. While section 1 could also be relied upon to justify ameliorative programs, section 15(2) effectively signals a constitutional preference in favour of historically disadvantaged groups.107

3. Government Accountability and Section 1

While courts appear increasingly reluctant to deal with equality rights cases through the section 1 analysis, preferring instead to deny claims under the nebulous human dignity test, section 1 is of critical importance in an era of shifting approaches to governance and regulation. It provides a coherent substantive and procedural inquiry that demands government accountability, transparency, respect for democracy, and evidence-based public policy decision-making.108 The basic Oakes framework requires the state to justify, in both substantive and procedural terms, the fairness of its regulatory initiatives.109 If section 1 is not invoked, the government does not have the burden of justifying its exclusionary choices.

It is in this context that an understanding of changing approaches to government regulation is particularly important. Whether one views the state as the predominant source of rights infringements (the classical liberal and neo-liberal visions), as a source of enhancement and protection of rights (the social welfare state) or as some combination of the two (new forms of social governance), will have a major influence on the nature and degree of scrutiny accorded under section 1. Accordingly, it is essential to have a nuanced understanding of shifting regulatory paradigms when applying the substantive and procedural components of the section 1 analysis. In some equality cases, it appears that judges adopt a somewhat deferential stance when faced with apparently ameliorative government initiatives. While such deference may have been

107 The Trocuk case provides an illustration of a case where there are conflicting problems of inequality.


appropriate during the heyday of the Keynesian social welfare state era, it does not provide sufficient protection to human rights in an age of neo-liberal and new regulatory approaches to governance.

V. CONCLUSION

Despite widespread consensus about the importance of equality in modern society, as a constitutional right, it eludes easy definition. The rhetorical power of the ideal of human dignity does not provide sufficient specificity to adjudicate the complex and dynamic problems of discrimination, yet it is often the decisive inquiry under the Law analysis. As a result, we are left with a patchwork of contradictory outcomes that are difficult to reconcile. Returning to the 2003 equality rights cases, what is encouraging in the Supreme Court decision in Martin is the demonstrated willingness to find a violation of section 15, based on an holistic assessment of the legislation — an evaluation that considered both exclusionary processes and harmful effects. Justice Gonthier also engages in a stringent section 1 analysis, scrutinizing the legitimacy of the legislative objectives and the means devised to attain them. In contrast, the Nova Scotia Court of Appeal deferred to the legislature in the context of the ameliorative workers’ compensation program, denying the equality claim under section 15 and thereby excusing the government from justifying the exclusion of chronic pain injuries under section 1. Such an approach, though consistent with the tenor of the majority opinions of the Supreme Court in earlier cases, may not ensure sufficient accountability and transparency when governments exclude individuals and groups from the reach of social programs.

The Trociuk case is more complex. The reasoning in Trociuk has been critiqued for the ways in which it reinforces a formal equality approach without adequate consideration of the substantive inequalities between mothers and fathers. Beyond the abstract concern with treating both parents as symbolically equal, one wonders to what extent the procedures for birth registration and naming may legitimately exclude

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110 See Gosselin, supra, note 3; Granovsky, supra, note 16; Lovelace, supra, note 16, Law, supra, note 6.
111 See “Lessard, ‘Mothers’” supra, note 23.
fathers to secure the equality of mothers?\textsuperscript{112} The effects of the exclusion are addressed, but the procedural dimensions of redressing the exclusion are unclear.\textsuperscript{113} Moreover, when and to what extent should family disputes be subject to litigation? Indeed, it is interesting that despite apparently winning at the Supreme Court of Canada, Mr. Trociuk did not actually get what he went to court to obtain — inclusion of his name as part of the surname of the children. The mother had already agreed to include his name on the birth registration documents. Before providing such a remedy, the Court wisely required that the matter be assessed in light of the best interests of the children. These 2003 cases, therefore, reflect how constitutional law engages us in inquiries into the role of the state in the lives of individuals and communities. In tracing the contours of a conception of constitutional equality that includes an inquiry into both the substantive and procedural dimensions of exclusion and discrimination, I hope to encourage greater scrutiny of the institutional and systemic aspects of inequality. As jurists, it is also important to be aware of the larger macro-historical contexts within which state regulation occurs. In highlighting shifting public policy paradigms, I hope to advance the potential for constitutional lawyers to make arguments that take into account the complexities of new forms of social governance. In this way, we may secure effective protection of socially disadvantaged individuals and communities, and empower individuals and communities, within a regulatory context of democratic accountability, transparency, and fairness.

\textsuperscript{112} If such were the case, s. 15(2) might have been relevant in resolving the conflicting equality concerns.

\textsuperscript{113} Additional questions are also left unanswered in Trociuk. See “Lessard, ‘Mothers’” supra, note 23. As Lessard clarifies, the ameliorative objectives of the state in this domain are questionable, as birth registration and the defining of family units are intimately connected to larger questions of public versus private responsibility for the economic well-being of family members.