

# Prospects For Human Rights — Equality

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Like a number in this room, I took my law degree in the late 60's — and I do not have to tell you that this was a time when nothing was taken for granted; everything was questioned and the social issues of our day were the subject of spirited debate. When the air you breathed was 60's air, you could not help but wonder what could be done to make the law more just. For many of us, and certainly for younger generations, the constitutional entrenchment of equality rights was a step whose time had come — and a step which needed to be taken.

It has now been 10 years since Charter<sup>1</sup> equality guarantees came into effect bringing with them the hopes and expectations that through constitutional entrenchment we could avoid a repeat of the failures of the past as reflected in the limited and minimalist judicial interpretation of the Bill of Rights. Equality seekers, particularly women who understood the limitations of formal equality, fought to ensure that the wording of the equality guarantees left little room for the legislators or the judiciary to marginalize or ignore equality rights. Taking a leaf out of the books of the appeal courts, whose view is that a message may need to be repeated at least three times before the trial court believes that the appeal court means what it said, the equality seekers ensured that every conceivable variation on the equality theme was included in the Charter — not just equality "before" the law, but equality before and "under" the law and the equal protection and equal benefit of the law; and not just reference to gender equality but an express guarantee under section 28 that all Charter rights apply equally to men and women notwithstanding anything else in the Charter; and with respect to this right, a further constitutional guarantee that it cannot, unlike other Charter guarantees, be overridden by parliamentarians. There was to be no "A" list and "B" list of rights. All were to be on an equal footing — legal, political, civil and equality — except for the gender equality rights under section 28 which arguably have an overarching effect on every section of the Charter.

With this auspicious beginning, what did the last 10 years bring? One thing that has been proven beyond a reasonable doubt is that a number of key equality issues were left open to judicial interpretation, the most important of which is what is meant by "equality". Does it mean — as some continue to think in this country — identical treatment? What we call formal equality? Does it mean rectifying disadvantage and, if so, is there a positive obligation on government to take steps to do so as opposed to simply refraining from state action that further disadvantages the already disadvantaged? For

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

example, if a provincial government chooses to prohibit employment discrimination on certain proscribed grounds, must it include similar protection for homosexuals since sexual orientation has been found in *Egan*<sup>2</sup> to be an analogous ground under the Charter? This question will be addressed by the Supreme Court of Canada which has now granted leave in *Vriend*.<sup>3</sup> Or does equality mean an equal right to participate in society even though one's personal limitations may require differential treatment? The Supreme Court of Canada's reasoning in *Eaton v. Brant (County) Board of Education*<sup>4</sup> may address this issue. Or does equality mean not just equality of opportunity but equality of result? And to what extent should equality rights affect the evolution of the common law? And how does Canada's acceptance of international treaty rights guaranteeing equality affect interpretation of domestic law? And how do we reconcile any conflicts between equality rights on the one hand and legal rights on the other?

One particularly difficult human rights challenge we face is that there is no consensus in Canada on how to balance the tension between individual rights and group rights. In addition, we are still trying to determine how those group rights should be played out in the context of aboriginal self-government and the calls for separate aboriginal justice systems.

It is clear that in *Andrews*,<sup>5</sup> the Supreme Court of Canada turned its face squarely against the formal equality model, opting instead for the substantive equality approach. But there are signs of retrenchment on the horizon with the development (by 4 of the judges on the Supreme Court of Canada) in *Miron*,<sup>6</sup> *Egan* and *Thibaudeau*<sup>7</sup> of the concept of internal relevance in the application of section 15. This development is ironic given the fact that in the new South Africa, substantive equality is the solution that country is looking to in order to solve its entrenched inequality problems. It is worth noting that our guest speaker, Albie Sachs, a man who spent a lifetime fighting for equality, publicly acknowledged the debt he owed to feminist theory in his paper.

What does the concept of internal relevance mean? Why do some judges on the Supreme Court of Canada believe that it should be introduced at the breach stage? Does it render the section 1 analysis redundant? Is it as significant an erosion of substantive equality rights as it appears to be?

One might be forgiven for asking why, at this time in the evolution of Charter equality rights, there are disturbing signs for the future. There is no question that because our search for equality, and the meaning it ought to have, has taken the courts — and

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2. *Egan v. Canada*, [1995] 2 S.C.R. 513.

3. *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 (Alta. C.A.). Leave to appeal to the Supreme Court of Canada granted at [1996] S.C.C.A. No. 213.

4. [1996] S.C.J. No. 98 reversing (1995), 22 O.R. (3d) 1 (Ont. C.A.).

5. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

6. *Miron v. Trudel*, [1995] 2 S.C.R. 418.

7. *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.

lawyers — into the social, political and economic worlds in which Canadians live — in other words, into the real world, this has been the source of much concern about Charter equality guarantees. Some have become frightened by the pace of change and question why judges should have the influence they do in defining the scope of equality rights. Others disagree and believe that the judiciary should be protecting equality rights with the same rigour and vigilance that it has used in defence of legal rights. They ask these questions: How is it that the Charter rights of law abiding citizens — the equality guarantees — often seem to be treated as less important than other Charter rights, as second string rights, not first string rights? And how is it, to take one example only, that the freedom of expression rights of a purveyor of pornography are absolute in the first instance and subject only to section 1 scrutiny, while at least in the view of some members of the Supreme Court of Canada, equality seekers must first pass the hurdle of internal relevance before even establishing a breach of section 15?

We are very fortunate to have Lynn Smith Q.C., Dean of Law at the University of British Columbia and Professor Paul Chartrand of the Department of Native Studies at the University of Manitoba to help answer some of these questions. Dean Smith will review the Section 15 jurisprudence to date and comment on where it might be heading. Professor Paul Chartrand will share his vision of human rights as they affect the principle of self-determination of aboriginal peoples and in doing so will touch upon the tension between individuals and groups and how that relates to the constitutional debate over human rights. Professor Chartrand is a Commissioner on the Royal Commission on Aboriginal Peoples and has served in that role for four years.

