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# The principles of equality and non-discrimination, a comparative law perspective

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Canada

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STUDY

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# THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION, A COMPARATIVE-LAW PERSPECTIVE

## Canada

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November 2020

### **Abstract**

This document is part of a series of studies, which, in a comparative law perspective, seek to present the principles of equality and non-discrimination in different States.

This study examines sources of equality law and judicial interpretation of the principles of equality and non-discrimination in Canada.

Contemporary equality law was a response to histories of both public and private discrimination in Canada. Statutory protections for equality and non-discrimination emerged in the post World War II era and were expanded and consolidated in the 1960s and 1970s. Constitutional reforms in the 1980s enshrined equality in the *Canadian Charter of Rights and Freedoms*. Since then, equality jurisprudence has expanded the interpretation of discrimination to include direct, indirect and systemic discrimination. Courts have rejected formal equality to embrace expansive notions of substantive equality in interpreting constitutional protections. Even with such strides over the last decades towards robust equality and non-discrimination principles and protections, just and effective implementation of their promise remains a pressing challenge for Canada.

## **AUTHOR**

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## List of Abbreviations

<b>AG</b>	Attorney General
<b>Alta</b>	Alberta
<b>AODA</b>	Accessibility for Ontarians with Disabilities Act
<b>BCHRT</b>	British Columbia Human Rights Tribunal
<b>BFOQ/BFOR</b>	<i>Bona fide</i> occupational qualification or requirement
<b>CHRT</b>	Canadian Human Rights Tribunal
<b>CLC</b>	Canada Labour Code
<b>FCA</b>	Federal Court of Appeal
<b>FCR</b>	Federal Court Reports
<b>JCPC</b>	Judicial Committee of the Privy Council
<b>McGill LJ</b>	McGill Law Journal
<b>OHSA</b>	Ontario Occupational Health and Safety Act
<b>QCCA</b>	Quebec Court of Appeal
<b>QHRT/QCTDP</b>	Quebec Human Rights Tribunal
<b>RCMP</b>	Royal Canadian Mounted Police
<b>SCC</b>	Supreme Court of Canada
<b>SCR</b>	Supreme Court Reports
<b>TRC</b>	Truth and Reconciliation Commission of Canada
<b>UK</b>	United Kingdom
<b>UKPC</b>	UK Privy Council
<b>UN</b>	United Nations

## Executive Summary

This study examines sources of equality law and judicial interpretation of the principles of equality and non-discrimination in Canada. Part I outlines the historical development of equality law. Canada emerged in the wake of two centuries of colonization first by the French and then by the British over territory historically occupied by self-governing Indigenous peoples. Canada's early and evolving engagement with Indigenous peoples involved early instances of respect for their autonomy followed by a long history of attempted subjugation and assimilation. Modern Canada emerged as former British colonies joined together to constitute a new nation in 1867. Throughout pre and post-Confederation Canada, exclusionary immigration, property and citizenship laws and policies targeted Black, Indigenous, Chinese and Japanese communities. Women and persons with disabilities similarly faced historical discrimination. Part I then turns to legal responses to discrimination in the 20<sup>th</sup> century, reviewing the limited legal protections against discrimination for roughly 100 years following Canadian Confederation. Legislative protections for equality and non-discrimination emerged in the post-World War II era and were expanded and consolidated in the 1960s and 1970s. In 1982, protections for equality and non-discrimination were constitutionally entrenched in landmark amendments to the Canadian Constitution, including the *Canadian Charter of Rights and Freedoms (Charter)*.

Part II examines current constitutional and legislative provisions for equality and non-discrimination. While the *Charter* is the most significant source of constitutional protection for equality and non-discrimination, constitutional reforms in the 1980s also included protections for the rights of Indigenous peoples. The Supreme Court of Canada has also recognized minority rights as a fundamental constitutional principle. A review of current statutory anti-discrimination laws at the federal, provincial and territorial levels is also provided. Prohibiting discrimination in employment, housing, education, and access to services, these statutes have also created specialized human rights commissions and tribunals to facilitate enforcement and access to justice. More recently, proactive equality rights legislation aimed at preventing and remedying discrimination has also been introduced in the areas of employment equity, pay equity, disability and accessibility, sexual harassment and violence, and anti-racism.

Part III reviews the most significant case-law on equality and non-discrimination. Since the mid-1980s, the concepts of equality and non-discrimination have generally been given a large and liberal interpretation by Canadian courts. For example, the Supreme Court of Canada has interpreted "discrimination" in human rights statutes and the *Charter* to include direct, indirect and systemic discrimination. The protected grounds have been accorded an expansive interpretation in many contexts. In the constitutional domain, the Court has endorsed a substantive approach that focuses on ensuring that the effects of laws and government policies are equitable.

Part IV assesses current and future limits on the protection of equality law as well as associated challenges. It begins with a discussion of structural dynamics that reproduce inequality in society. The concept of inclusive equality is presented as a means to assess both the substantive and procedural dimensions of discrimination. To respond to the challenge of systemic discrimination, the importance of addressing the intersection of inequalities at the micro, meso (institutional) and macro levels is discussed. The potential for integrating equality and non-discrimination norms into participatory institutional decision-making processes is also explored. Part IV then reviews how Canadian courts have addressed tensions and potential conflicts between equality and other competing rights and interests. Legal challenges to affirmative action and group-based ameliorative laws and programs are addressed through the express protections in the *Charter* and human rights statutes. Statutory

anti-discrimination laws also provide specific defences and justifications, such as the *bona fide* qualification defense and the duty to accommodate to the point of undue hardship. Part IV concludes with a sampling of grey areas in Canadian equality law: e.g., continuing uncertainties in interpreting substantive equality, the complexity of group-based identities, evidentiary difficulties in proving discrimination, and the limited protections against discrimination on the basis of socio-economic status.

The analysis concludes with a call for optimistic vigilance: that even with the significant strides made over the last decades towards robust equality and non-discrimination principles and protections, just and effective implementation of the promise of modern equality rights remains a pressing challenge.

# I. Introduction: The Historical Emergence of Equality and Non-Discrimination Principles

## I.1. Historical Denials of Equality

Canada emerged in the wake of two centuries of colonization first by the French and then by the British over territory historically occupied by self-governing Indigenous peoples.<sup>1</sup> Canada's early and evolving engagement with Indigenous peoples involved early instances of respect for their autonomy followed by a long history of attempted subjugation and assimilation. In the wake of the British defeat of the French in 1759, for instance, the British Royal Proclamation of 1763 affirmed the right of Indigenous peoples to live "unmolested" in North America.<sup>2</sup> A series of early treaties were negotiated with the British colonial authorities in Canada following the Royal Proclamation.<sup>3</sup> From the mid-1800s, and for more than the next century, however, Canada's policies and laws shifted. Arriving European settlers were given land grants to farm the expanding territories of the west. With the Confederation of Canada in 1867, there was a continued erosion and denial of the rights of Indigenous peoples.<sup>4</sup> The federal government enacted the *Indian Act*, which created the patrilineal category of "status Indians," set up a reserve system for Indigenous communities controlled by federal government agents, and criminalized ceremonies central to the cultural traditions of Indigenous peoples.<sup>5</sup> During this period, Canada also consolidated a national regime of Indian residential schools.<sup>6</sup> The regime mandated that Indigenous youth must attend residential schools – often far from their home communities – where children were prohibited from speaking their Indigenous languages and indoctrinated into non-Indigenous religion and culture. Extensive litigation and resulting government reparations in the last decades have sought to right these wrongs. Thus, Canada's Truth and Reconciliation Commission has recently labelled the Indian residential school policy one of "cultural genocide."<sup>7</sup> Even with such recognition, initiatives, and governmental apologies, the legacy and continuing mistreatment of Indigenous peoples remain urgent and tragic realities of inequality and discrimination in modern Canadian society.

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<sup>1</sup> For a general overview of the historical relations between Indigenous peoples and European settlers, see Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the report of the Royal Commission on Aboriginal Peoples (RCAP)* (Ottawa: Supply and Services Canada, 1996) online: [www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018#chp4](http://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018#chp4). For a general review of Canadian constitutional history, see WEBBER, J., *The Constitution of Canada: A Contextual Analysis* (Oxford: Bloomsbury, 2015).

<sup>2</sup> October 7, 1763, online: [https://www.solon.org/Constitutions/Canada/English/PreConfederation/rp\\_1763.html](https://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html).

<sup>3</sup> *Historic Treaties, Gov Canada*, online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231#chp3>.

<sup>4</sup> See *Royal Commission on Aboriginal Peoples, People to People, Nation to Nation*, *supra* note 1.

<sup>5</sup> See e.g. *An Act to Amend and Consolidate the Laws Respecting Indians*, SC 1876, c 18 [*Indian Act 1876*] (the 1876 version of the Indian Act is available online at the National Centre for Truth and Reconciliation, online: [nctr.ca/assets/reports/Historical%20Reports/1876%20Indian%20Act.pdf](http://nctr.ca/assets/reports/Historical%20Reports/1876%20Indian%20Act.pdf)); See also, MILLOY, J., *Indian Act Colonialism – A Century of Dishonour, 1869-1969* (Research Paper for the National Centre for First Nations Governance, May 2008), online: [http://fngovernance.org/ncfng\\_research/milloy.pdf](http://fngovernance.org/ncfng_research/milloy.pdf).

<sup>6</sup> See Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1 Origins to 1939* (Winnipeg: TRC, 2015) at 149, online: [nctr.ca/assets/reports/Final%20Reports/Volume\\_1\\_History\\_Part\\_1\\_English\\_Web.pdf](http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_1_English_Web.pdf).

<sup>7</sup> Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation* (Winnipeg: TRC, 2015) at 19, online: [www.trc.ca/assets/pdf/Volume\\_6\\_Reconciliation\\_English\\_Web.pdf](http://www.trc.ca/assets/pdf/Volume_6_Reconciliation_English_Web.pdf).

Canadian history (both pre and post-Confederation) is also characterized by policies and laws that were overtly discriminatory against those of particular ethnic, national or racial origins.<sup>8</sup> Slavery existed in parts of British North America, until it was completely abolished throughout the British Empire in 1834.<sup>9</sup> Following Confederation, racial segregation as well as discriminatory labour, voting and immigration laws were enacted by both provincial and federal governments.<sup>10</sup> The Chinese and Japanese communities were particularly targeted for race-based discriminatory treatment.<sup>11</sup> Nor did any legal protection exist against race-based discrimination by private business owners, employers or educational institutions.<sup>12</sup> In *Christie v. York*,<sup>13</sup> for example, a well-known case from the 1930s, the Supreme Court of Canada concluded that race-based discrimination against a customer in a business enterprise was justified on the basis of the freedom of contract of property owners. Racially discriminatory laws and practices persisted well into the 20<sup>th</sup> century.<sup>14</sup>

Gender-based discrimination provides an additional historical lens. Since Confederation, women have faced discrimination in seeking political office,<sup>15</sup> accessing professions, voting, owning property, and been denied equitable wages and working conditions; they have also disproportionately experienced domestic violence.<sup>16</sup> In thinking about the history of women's rights, it is also important to acknowledge the diversity of women's experiences. For example, most white women became entitled to vote in federal elections in 1920. It was not until 1947, however, that the right was extended to women from certain ethnic minority communities (e.g. Japanese and Chinese Canadians), and not until 1960 was it extended to "status Indians."<sup>17</sup>

During most of the 20<sup>th</sup> century, Canadian eugenic laws and practices discriminated against persons with disabilities, including health disorders or mental health conditions thought to be hereditary. In the two Canadian provinces that enacted sterilization legislation, it is estimated

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<sup>8</sup> HENRY, N.L., "Racial Segregation of Black People in Canada", (28 May 2019), online: [Can Encycl www.thecanadianencyclopedia.ca/en/article/racial-segregation-of-black-people-in-canada](http://www.thecanadianencyclopedia.ca/en/article/racial-segregation-of-black-people-in-canada).

<sup>9</sup> McRAE, M., "The story of slavery in Canadian history", online: [Can Museum Hum Rights https://humanrights.ca/story/the-story-of-slavery-in-canadian-history](https://humanrights.ca/story/the-story-of-slavery-in-canadian-history).

<sup>10</sup> *Ibid.* See *The Chinese Immigration Act, 1885*, SC 1885, c 71 (Chinese head tax); *The Chinese Immigration Act, 1923*, SC 1923, c 33, s 5, online: <https://pier21.ca/research/immigration-history/the-chinese-immigration-act-1885> (known as the Chinese Exclusion Act which prohibited the majority of Chinese immigration to Canada). See also RYDER, B., "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) 29:3 *Osgoode Hall LJ* 619.

<sup>11</sup> See e.g. ROY, P.E., *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: University of British Columbia Press, 1989).

<sup>12</sup> See BACKHOUSE, C., *Colour-coded: a legal history of racism in Canada, 1900-1950* (Toronto: Osgoode Society for Canadian Legal History by University of Toronto Press, 1999) at 252—260 (history of Black segregation in Canada).

<sup>13</sup> *Christie v York (1939)*, [1940] SCR 139, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8489/index.do>.

<sup>14</sup> See BACKHOUSE, *supra* note 12.

<sup>15</sup> See *Edwards v. Canada (AG)* (1929), [1930] AC 124 at 136, online: <https://www.canlii.org/en/ca/ukjpc/doc/1929/1929canlii438/1929canlii438.html>. In a landmarking ruling in 1929 by the Judicial Committee of the Privy Council (when it was still the final appellate court for Canada), Viscount Simon ruled that women should be considered "eligible persons" for the purposes of being appointed to the Senate.

<sup>16</sup> See STODDART, J., "Women and the Law", (5 February 2012), online: [Can Encycl www.thecanadianencyclopedia.ca/en/article/women-and-the-law](http://www.thecanadianencyclopedia.ca/en/article/women-and-the-law).

<sup>17</sup> "Rights of women", online: [Gov Canada http://www.canada.ca/en/canadian-heritage/services/rights-women.html](http://www.canada.ca/en/canadian-heritage/services/rights-women.html).

that some 3,500 women were involuntarily sterilized.<sup>18</sup> The Acts were repealed in the 1970s, but prompted wrongful sterilization litigation long afterwards. The impact of these discriminatory sterilization laws and policies have also been disproportionately experienced by Indigenous and poor women. In the 1990s, Leilani Muir received damages of close to \$750,00 for having been wrongly sterilized when she was 14 while institutionalized at the *Alberta Provincial Training School for Mental Defectives*.<sup>19</sup> Involuntary sterilization is but one example of the kinds of discriminatory treatment encountered by persons with disabilities.

Recognition of these and numerous other realities of inequality in Canadian history is critical to understanding modern day equality and anti-discrimination law.<sup>20</sup>

## I.2. Early Judicial Rulings

Canada had no express legislative protections for equality or non-discrimination until the 1940s. Nevertheless, some creative judicial rulings prior to then provided isolated instances of protection against discriminatory laws and treatment of minorities.

### I.2.1. Federalism and Race-based Discrimination

In an important 1899 decision of the Judicial Committee of the Privy Council, *Union Colliery v. Bryden*,<sup>21</sup> a provision in British Columbia labour law, prohibiting the employment of Chinese persons in underground mines, was held to be *ultra vires* provincial jurisdiction.<sup>22</sup> The Court concluded that the federal government had exclusive jurisdiction with respect to the naturalization of aliens and the legal consequences of naturalization.<sup>23</sup> Provincial restrictions on the employment rights of Chinese immigrants were found to interfere with these federal powers. Accordingly, an overtly discriminatory labour law was struck down on federalism grounds.

Subsequent attempts to build on this precedent to challenge discriminatory provincial laws, however, were unsuccessful. For instance, in 1900, Tomey Homma, a naturalized Canadian of Japanese parentage challenged provincial voting restrictions which excluded all persons of Japanese and Chinese origin.<sup>24</sup> Distinguishing its earlier ruling, the Judicial Committee of the

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<sup>18</sup> MARSHALL, T. & ROBERTSON, G., "Eugenics in Canada", (7 February 2006), online: [Can Encycl thecanadian encyclopedia.ca/en/article/eugenics#:~:text=Many%20Canadians%20supported%20eugenic%20policies,not%20repealed%20until%20the%201970s](http://Can Encycl thecanadian encyclopedia.ca/en/article/eugenics#:~:text=Many%20Canadians%20supported%20eugenic%20policies,not%20repealed%20until%20the%201970s).

<sup>19</sup> *Ibid.* The authors note that in the wake of Muir's case, hundreds of other women and men have obtained legal remedies for wrongful sterilization.

<sup>20</sup> For additional historical background on other communities impacted by discrimination, see MIRON, J., ed, *A History of Human Rights in Canada: Essential issues* (Toronto: Canadian Scholars Press, 2009); see also FITZGERALD, M. & RAYTER, S., eds, *Queerly Canadian: An Introductory Reader in Sexuality Studies* (Toronto: Canadian Scholars Press, 2012). For a recent illustration of the links between past and present discrimination, see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)* 2016 CHRT 2; see also *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2019 CHRT 39.

<sup>21</sup> *Union Colliery v. Bryden*, [1899] UKPC 58. Note that the JCPC was the final appellate court for Canada until 1949.

<sup>22</sup> *Ibid.* See *Coal Mines Regulation Act*, SBC 1877, c 84, s 4 as amended by SBC 1890, c 33, s 1.

<sup>23</sup> See *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s 91(25), which enumerates "Naturalization and Aliens" as a federal head of power.

<sup>24</sup> See *Cunningham v. Homma* (1901), [1902] UKPC 60 [*Homma*]. See also "Unequal Rights", online: *Road to Justice: The legal struggle for equal rights of Chinese Canadians* [www.roadtojustice.ca/court-cases/loss-of-status-and-rights](http://www.roadtojustice.ca/court-cases/loss-of-status-and-rights) ("British Columbia's disenfranchisement of First Nations, Chinese and Japanese was reaffirmed in subsequent amendments and in the Provincial Voters' Act, and extended in 1907 to "Hindus," or all South

Privy Council upheld the discriminatory voting law. The Court reasoned that the voting restrictions applied to all persons of Japanese or Chinese origin, regardless of whether they were born or immigrated to Canada and were therefore a valid exercise of provincial powers over civil rights.<sup>25</sup>

Efforts to rely on jurisdictional arguments to contest racist provincial legislation also failed in the case of *Quong Wing v. R.*<sup>26</sup> The province of Saskatchewan had introduced legislation prohibiting Chinese business owners from employing white women in their establishments. Quong Wing, a naturalized British subject, was charged after hiring two white women as waitresses to work in his restaurant. Quong Wing argued that the Act was *ultra vires* provincial jurisdiction because the law was premised on morality which is considered a criminal matter and because the law impacted naturalized citizens.<sup>27</sup> The Supreme Court upheld the law stating that it applies to people of Chinese origin regardless of their citizenship.<sup>28</sup> In an important dissenting opinion, Justice Idington argued that the legislation was *ultra vires* provincial jurisdiction and critiqued the racist law as “the product of the mode of thought that begot and maintained slavery.”<sup>29</sup>

### **I.2.2. The Rule of Law and Administrative Fairness**

Judicial concerns about the arbitrary and unfair treatment of minorities have occasionally been redressed in historic cases based on principles of administrative fairness and the rule of law. In *Roncarelli v Duplessis*,<sup>30</sup> for example, the liquor license of a restaurant owner in Montreal was not renewed because of his involvement in supporting members of the Jehovah’s Witnesses who were proselytizing and distributing literature about their faith. Roncarelli was a member of the Jehovah Witness community but was not involved in distributing the literature. He had posted bail for numerous Jehovah’s Witnesses who were arrested. Evidence indicated that the Premier of Quebec, Duplessis, had ordered the Commissioner of Liquor Licenses not to renew Roncarelli’s license because of his support of the Jehovah Witnesses. In a famous ruling, the Supreme Court of Canada held that the decision not to renew the liquor license was arbitrary, unfair to religious minorities and inconsistent with the rule of law.<sup>31</sup> Though not using the language of equality rights, the decision effectively protected Roncarelli from arbitrary treatment and discrimination based on his religious affiliation. The decision is often quoted for the proposition that the exercise of governmental discretion must be non-arbitrary, fair and consistent with the underlying purpose of the legislation in question.<sup>32</sup>

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Asians. In 1908, the Province of Saskatchewan also disenfranchised all residents belonging to the Chinese race in An Act respecting Elections of Members of the Legislative Assembly, Saskatchewan (1908”).

<sup>25</sup> *Homma*, *supra* note 24 at 156. See *Constitution Act, 1867*, s. 92 (13) listing “Property and Civil Rights in the Province” as provincial powers.

<sup>26</sup> *Quong Wing v. R.* (1914), 49 SCR 440 [*Quong Wing*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9673/index.do>.

<sup>27</sup> *Ibid* at 443, 456. Criminal law is enumerated as a federal head of power, see *Constitution Act, 1867*, s. 91(27). As noted above, the federal government also has jurisdiction over “Naturalization and Aliens,” see *Constitution Act, 1867*, *supra* note 23.

<sup>28</sup> *Quong Wing*, *supra* note 26 at 463, 469.

<sup>29</sup> *Ibid* at 452.

<sup>30</sup> *Roncarelli v. Duplessis*, [1959] SCR 121 [*Roncarelli*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2751/index.do>.

<sup>31</sup> *Ibid*.

<sup>32</sup> For extensive commentary on *Roncarelli* case, see McGill Law Journal Special Issue, (2010) 55:3 McGill L Rev, online: <https://lawjournal.mcgill.ca/issue/volume-55-issue-3-2010/>.

### I.3. Post World War II Legislative and Constitutional Reforms

The end of World War II marked an important shift in equality law. The *Universal Declaration of Human Rights* was proclaimed in 1948, its content shaped by the important contributions of Canadian John Peters Humphrey.<sup>33</sup> In 1947, the province of Saskatchewan passed the first *Bill of Rights* in Canada.<sup>34</sup> Beginning in the 1950s, a wave of fair practices legislation was enacted to protect against discrimination in employment and public accommodations.<sup>35</sup> Equal pay legislation was also passed during this period.<sup>36</sup>

A second wave of reforms emerged in the 1960s and 1970s. The Canadian Parliament passed the *Canadian Bill of Rights* in 1960, which included a requirement of equal protection in federal laws.<sup>37</sup> It remains in effect; its limited scope and workings are elaborated below in Part II.1.1. During these decades, provinces and the federal government also adopted more comprehensive anti-discrimination legislation.<sup>38</sup> For instance, in 1977, Canada's Parliament enacted the *Canadian Human Rights Act*,<sup>39</sup> which provides protection at the federal level against grounds-based discrimination in employment, services, and accommodation. Like its provincial counterparts, it generally prohibits discrimination by both private and public actors within its jurisdictional scope. The statutes (i) proscribe discrimination based on a list of enumerated grounds; (ii) provide for the adjudication of written discrimination complaints, and (iii) create specialized human rights/anti-discrimination commissions and tribunals to advance equality standards and facilitate enforcement.<sup>40</sup>

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<sup>33</sup> 10 December 1948 (General Assembly resolution 217 A), online: <https://www.un.org/en/universal-declaration-human-rights/index.html>. For a discussion of John P. Humphrey's contribution to the Universal Declaration of Human Rights, see: CLÉMENT, D., "Canada's Human Rights History", online: <https://historyofrights.ca/encyclopaedia/biographies/john-humphrey/>.

<sup>34</sup> For a discussion of its significance, see "70th Anniversary of Saskatchewan Bill of Rights Act", online: <https://saskatchewanhumanrights.ca/70th-anniversary-of-the-saskatchewan-bill-of-rights-act/>. There were a few other statutory protections enacted during the 1940s; most anti-discrimination initiatives, however, came after World War II. For example, the *Ontario Racial Discrimination Act* of 1942 prohibited the publication, displaying or broadcasting of any materials involving racial or religious discrimination, see MAKARENKO, J., "The Canadian Human Rights Act: Introduction to Canada's Federal Human Rights Legislation" Judicial System and Legal Issues, 2008, online: <https://www.mapleleafweb.com/features/canadian-human-rights-act-introduction-canada-s-federal-human-rights-legislation.html>.

<sup>35</sup> For an excellent overview of the history of human rights in Canada, see CLÉMENT, D., "Human Rights Law," Canada's Human Rights History at 2, online: <https://historyofrights.ca/history/human-rights-law/> including a chronology of the historical enactment of human rights legislation across Canada. Initially the fair practices laws were limited to race and religion – but subsequently extended to sex and age.

<sup>36</sup> *Ibid* at 4. As discussed below, protection for equal pay for work of equal value and pay equity emerged much later: see Part II.2.2.

<sup>37</sup> *Canadian Bill of Rights*, SC 1960, c 44, online: <https://laws-lois.justice.gc.ca/eng/acts/c-12.3/FullText.html>. For historical background, see HOGG, P.W., *Constitutional Law of Canada* (Thomson Reuters: 2020) c 35.1. See also, MCCONNELL, WH, "Canadian Bill of Rights", (last modified 2 July 2020), online: *Can Encycl* [www.thecanadianencyclopedia.ca/en/article/canadian-bill-of-rights](http://www.thecanadianencyclopedia.ca/en/article/canadian-bill-of-rights); "John Diefenbaker and the Canadian Bill of Rights", online: *CBC Digital Archives* <https://www.cbc.ca/archives/entry/john-diefenbaker-and-the-canadian-bill-of-rights>.

<sup>38</sup> For a brief historical overview, see SHEPPARD, C., *Inclusive Equality – The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) c 1. See also, PENTNEY, W., *Discrimination and the Law*, vol 1, revised ed (Toronto: Carswell, 2018) (original edition by Justice Walter M Tarnopolsky); CLÉMENT, *supra* note 35 at 4, where he further notes the more recent enactment of human rights legislation in the territories.

<sup>39</sup> SC 1976-77, c 33, currently *Canadian Human Rights Act*, RSC 1985, c H-6.

<sup>40</sup> PENTNEY, *supra* note 38; SHEPPARD, C., "Anti-Discrimination law in Canada and the Challenge of Effective

A third wave of modern equality reforms emerged in the 1980s through major amendments to Canada's Constitution with the adoption of the *Canadian Charter of Rights and Freedoms*.<sup>41</sup> For the first time in Canada's history, there were express constitutionally-entrenched protections for equality rights and non-discrimination. These equality protections came into force in 1985, to give governments time to eliminate any discriminatory provisions in existing laws and policies. The equality rights provisions in the *Charter* were expansive, and included express protection for affirmative action initiatives. Moreover, the list of protected grounds was non-exhaustive, leaving open the possibility of judicial expansion of protected grounds in the future.

While the *Charter* contains a specific section on equality rights, it also includes a number of other provisions relevant to equality, including an interpretive provision recognizing the multicultural heritage of Canada, a specific section reinforcing gender-based equality, and protections for minority language communities across the country.<sup>42</sup>

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Enforcement" in MERCAT-BRUNS, M., OPPENHEIMER, D. & SARTORIOUS, C., eds, *Comparative Perspectives on the Enforcement and Effectiveness of Discrimination Law in a Global World* (Springer Press, 2018) 83-110. See also, Part II.2.1, below.

<sup>41</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], online: <https://laws-lois.justice.gc.ca/eng/const/page-15.html>. Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.

<sup>42</sup> See Part II.1.1, below. At the time of the *Charter's* enactment, Canada also entrenched Aboriginal rights in the Constitution. These provisions are important for addressing historical and continuing inequalities facing First Nations, Inuit and Métis peoples in Canada and are discussed below in Part II.1.2.

## II. Current Constitutional and Legislative Provisions for Equality and Non-Discrimination

### II.1. Constitutional Sources of Protection

#### II.1.1. Canadian Bill of Rights

The *Canadian Bill of Rights* was adopted by the Parliament of Canada in 1960 and remains in force.<sup>43</sup> While it applies only to the federal government, it recognizes non-discrimination in the exercise of key human rights and fundamental freedoms, specifically equality:

FRAME 1

**Canadian Bill of Rights, Section 1(b)**

**s. 1** *It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,...*

**(b)** *the right of the individual to equality before the law and the protection of the law;*

Enacted as a federal statute rather than as an amendment to the Constitution, the *Canadian Bill of Rights* has nevertheless been deemed a *quasi-constitutional* document.<sup>44</sup> Its protections have been interpreted to take precedence over other inconsistent federal statutes, rendering them inoperable in the event of a conflict. The equality protections in the *Canadian Bill of Rights*, however, have been given a narrow and formalistic interpretation by the courts, which had an impact on subsequent constitutional equality reforms.<sup>45</sup> Today, the *Canadian Bill of Rights* is infrequently used in equality cases given the more expansive protections afforded by the *Canadian Charter*.<sup>46</sup>

#### II.1.2. Canadian Charter of Rights and Freedoms

Emerging from the constitutional reforms of the early 1980s, the *Canadian Charter of Rights and Freedoms*<sup>47</sup> is Canada's primary source of constitutional equality rights and protection against discrimination. Section 15 entered into force in 1985, and provides that:

FRAME 2

**Canadian Charter of Rights and Freedoms, Section 15**

**s. 15 (1)** *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

<sup>43</sup> *Supra* note 37. See also notes 37 & 44 and accompanying text.

<sup>44</sup> MACDONNELL, V., "A Theory of Quasi-Constitutional Legislation" (2016) 53:2 *Osgoode Hall LJ* 508-539, online: <https://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss2/5>.

<sup>45</sup> HOGG, *supra* note 37 at c 35.3 & 35.5. See e.g. *Bliss v. AG of Canada*, [1979] 1 SCR 183 [*Bliss*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2645/index.do>; *AG of Canada v. Lavell*, [1974] SCR 1349, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5261/index.do>.

<sup>46</sup> The *Canadian Bill of Rights* does include protections for private property and due process in civil cases, both of which are not expressly included in the *Charter*. See also, SOSSIN, L., "The Quasi-Revival of the Canadian Bill of Rights and Its Implications for Administrative Law" (2004) 25:1 *Supreme Court Law Rev Osgoode's Annu Const Cases Conf*, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol25/iss1/6>.

<sup>47</sup> *Supra* note 41.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The *Charter* secures equality rights and protects against discrimination in law and government action. It thus applies to federal, provincial, territorial and municipal governments. The protections for equality were drafted to be expansive – including equality before and under the law, equal protection and equal benefit of the law.<sup>48</sup> The *Charter* enumerates prohibited grounds of discrimination including race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, but the list is not considered exhaustive.<sup>49</sup> Section 15(2) of the *Charter* provides for governmental use of ameliorative laws, programs or activities aimed at advancing the conditions of disadvantaged groups. The provision was added to ensure that remedial initiatives would be protected from constitutional allegations of “reverse discrimination.”<sup>50</sup>

While the protections for equality and non-discrimination are expansive, they are subject to the “reasonable limits” clause in section 1 of the *Charter*. It guarantees the “rights and freedoms set out in [the *Charter*] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” If a law is found to breach the *Charter*, section 1 is relied on to assess whether the breach is reasonably justified. Section 1 therefore allows the government to justify the infringement of *Charter* rights under limited circumstances.<sup>51</sup>

The *Charter* also contains important protections for linguistic minority communities, particularly in the domain of education.<sup>52</sup> Section 25 ensures that *Charter* rights and freedoms “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.”<sup>53</sup> Section 27 provides that the *Charter* is to be “interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>54</sup> Section 28 – added in the wake of significant feminist mobilization during the drafting of the *Charter* – provides additional protection for

<sup>48</sup> As noted above, the inclusion of these four dimensions of equality was a response to the narrow interpretations of equal protection of the law under the *Canadian Bill of Rights*, see note 45.

<sup>49</sup> See discussion in Part III.1.2, *below*.

<sup>50</sup> See discussion in Part III.2.3 and Part IV.3, *below*.

<sup>51</sup> See *R v. Oakes*, [1986] 1 SCR 103 [Oakes], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>. For administrative acts, see *Doré v. Barreau du Québec*, 2012 SCC 12 at para 3, [2012] 1 SCR 395, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7998/index.do>. See also Part V (A)(ii)(i), *below* (discussion on limiting rights and discussion of s. 33, the notwithstanding clause, another potential limit on equality rights protection).

<sup>52</sup> See *Charter*, s 16-23, on official bilingualism of federal and New Brunswick government, as well as pan-Canadian protections for linguistic minority education rights. As noted by the Supreme Court of Canada in *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 at para 31, [2000] 1 SCR 3, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1762/index.do>, the educational protections for linguistic minorities “are premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority.”

<sup>53</sup> *Charter*, s. 25. See *R v. Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [Kapp], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5696/index.do>, per Bastarache J. For a discussion of the tensions between the Canadian *Charter* and Indigenous peoples, see TURPEL, M.E., “Aboriginal Peoples and the Canadian *Charter* of Rights and Freedoms: Contradictions and Challenges” (1989) 10 *Canadian Woman Studies* 149-157.

<sup>54</sup> *Charter*, s 27. See *R v. Keegstra*, [1990] 3 SCR 697 [Keegstra], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/695/index.do>.

gender equality, affirming that “the rights and freedoms guaranteed in this Charter are to be provided equally to male and female persons.”<sup>55</sup> Finally, the newly entrenched constitutional rights and freedoms were not to “be construed as denying the existence of any other rights or freedoms that exist Canada” nor to undermine “any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”<sup>56</sup>

### II.1.3. Aboriginal Rights

The reforms of the early 1980s also entrenched Aboriginal rights in the Constitution for the first time. Located outside of the *Charter*, section 35 of the *Constitution Act, 1982* provides:

FRAME 3

**Constitution Act, 1982, Section 35 (1) & (2)**

**s. 35 (1)** *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

**(2)** *In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.*<sup>57</sup>

Shortly after the entrenchment of these provisions, an additional section was added to s. 35 to guarantee aboriginal and treaty rights “equally to male and female persons.”<sup>58</sup> Although Aboriginal rights are not expressly framed as equality or non-discrimination guarantees, they have important implications for the recognition of the equality of Indigenous peoples in Canada.<sup>59</sup>

### II.1.4. Fundamental Constitutional Principles

The Supreme Court of Canada has emphasized that the Canadian Constitution consists of more than simply the written textual provisions.<sup>60</sup> As the Court has noted, it includes fundamental underlying principles that “inform and sustain the constitutional text: they are

<sup>55</sup> *Charter*, s 28. Section 28 provides that “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Women’s groups were concerned that the reasonable limits section, as well as the notwithstanding clause, may put women’s rights at risk. See FROC, K., *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD dissertation, Queen’s University Faculty of Law, 2015) online: <https://qspace.library.queensu.ca/jspui/handle/1974/13905>. See also, BAINES, B., “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation” (2005) 17 *Can J Women & L* 45.

<sup>56</sup> See *Charter*, s 26, 29. Historically, the protection of denominational schools provided protection for the survival of linguistic minority communities, given the alignment of language and religion (i.e. French Catholic and English Protestant).

<sup>57</sup> *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, online: <https://laws-lois.justice.gc.ca/eng/const/>.

<sup>58</sup> *Constitution Act, 1982*, s 35(4). Subsection 35(4) was added by the *Constitution Amendment Proclamation, 1983* (see S1/84-102).

<sup>59</sup> There is an extensive jurisprudence interpreting the meaning of Aboriginal rights in s. 35, which goes beyond the scope of this Report. For a recent review of international and Canadian constitutional law, see BORROWS, J., CHARTRAND, L., FITZGERALD, O.E. & SCHWARTZ, R., eds, *Braiding Legal Orders: Implementing the Declaration on the Rights of Indigenous Peoples* (Waterloo, Ontario: McGill-Queen’s University Press, 2019). The importance of the principle of equality to Indigenous peoples is integral to the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/Res/61/295 (2007), online: [https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>60</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 54 [*Secession Reference*].

the vital unstated assumptions upon which the text is based.”<sup>61</sup> The “principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”<sup>62</sup>

One important underlying principle that the Court has recognized is the protection of minority rights. In so doing, the Court emphasized that “the protection of minority rights is itself an independent principle underlying our constitutional order.”<sup>63</sup> While acknowledging that “Canada’s record of upholding the rights of minorities is not a spotless one,” the Court has stated that protecting minority rights is a goal “towards which Canadians have been striving since Confederation, and the process has not been without successes.”<sup>64</sup> As discussed above, the “rule of law” – another fundamental constitutional principle – provides an important check on potentially discriminatory or arbitrary administration of the law.<sup>65</sup>

## II.2. Legislation

### II.2.1. Canada's Human Rights Codes as Anti-Discrimination Laws

Complementing constitutional protections, anti-discrimination statutes exist at the federal, provincial and territorial levels across Canada. The federal Canadian *Human Rights Act*<sup>66</sup> applies to federally regulated entities and activities, such as banks, transportation, and telecommunications. Provincial and territorial human rights codes apply to businesses, workplaces, educational institutions and entities regulated by provincial and territorial laws.<sup>67</sup>

In each jurisdiction, human rights legislation provides protection against discrimination in areas such as employment, housing, services and education, on the basis of a number of specifically enumerated grounds: e.g. race, national or ethnic origin, sex, religion, mental or physical disability, age, sexual orientation, civil status or family status.<sup>68</sup> Some jurisdictions further prohibit discrimination based on grounds such as gender identity and gender expression, criminal conviction in employment or for a pardoned criminal conviction, source of income, political belief and activity, political convictions, receipt of public assistance, social condition, and language.<sup>69</sup> The specific grounds may evolve, as illustrated by the recent addition of protection against genetic discrimination to the *Canadian Human Rights Act*.<sup>70</sup> As discussed below, anti-discrimination legislation across Canada has generally been accorded a “large and liberal” interpretation – protecting against direct, indirect and systemic discrimination as well as grounds-based forms of harassment. While these human rights codes have been enacted through regular statutory processes, the courts have interpreted them as

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<sup>61</sup> *Ibid* at para 49. This important decision builds upon earlier jurisprudence recognizing an implied bill of rights within the Canadian constitution, prior to the formal entrenchment of fundamental rights and freedoms: see HOGG, *supra* note 37, c 34.4(c).

<sup>62</sup> *Ibid* at para 54.

<sup>63</sup> *Ibid* at para 80.

<sup>64</sup> *Ibid* at para 81.

<sup>65</sup> See above, Part I.2.2. See *Secession Reference*, *ibid* at para 70. See also, SHEPPARD, C., “The Rule of Law as a Non-Discrimination Principle” in LESPÉRANCE, J. ET AL., eds, *Canada and the Rule of Law: 150 Years after Confederation / Le Canada et la primauté du droit: 150 ans après la Confédération* (Ottawa: International Commission of Jurists, 2017).

<sup>66</sup> *Canadian Human Rights Act*, *supra* note 39, s 3(1), online: <https://laws-lois.justice.gc.ca/eng/acts/h-6/>.

<sup>67</sup> See PENTNEY, *supra* note 38, c 2.3. For a brief overview, see Canadian Human Rights Commission, “Human Rights in Canada”, online: <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada>.

<sup>68</sup> See SHEPPARD, “Anti-Discrimination law in Canada and the Challenge of Effective Enforcement”, *supra* note 40.

<sup>69</sup> *Ibid*.

<sup>70</sup> See e.g. *Canadian Human Rights Act*, *supra* note 39, s 3(1).

enjoying “quasi constitutional” status, meaning that they prevail over conflicting legislation and policy.<sup>71</sup>

If human rights legislation applies to diverse sectors of society with applicable jurisdiction, it has long been the case that most complaints arise in the employment context. To facilitate access to justice, anti-discrimination protection has been incorporated into most collective agreements, such that internal grievance and arbitration processes may be used for redressing discrimination in most unionized workplaces.<sup>72</sup>

In addition to providing specific protections, human rights legislation across Canada sets out complaints procedures and enforcement mechanisms for vindicating anti-discrimination protections. In most jurisdictions, individual or group-based complaints are filed with human rights commissions, which are empowered under human rights legislation to process and investigate complaints. Where evidence of discrimination is obtained following the investigation, the commissions may endeavour to mediate the dispute and/or refer the case to an independent, specialized human rights tribunal.<sup>73</sup> In some provinces and territories, complaints are not dealt with by human rights commissions; individuals instead take their cases directly to a human rights tribunal (e.g. British Columbia, Ontario, Nunavut). Direct access systems have emerged in response to the drawbacks of channelling complaints through human rights commissions, most notably the significant time delays.<sup>74</sup>

A portrait of Canadian anti-discrimination legislation would be incomplete without highlighting some important provincial differences. For instance, in contrast to most Canadian jurisdictions which provide protection exclusively against discrimination, both Quebec and Saskatchewan provide broader protections for other fundamental rights and freedoms. *Quebec’s Charter of Human Rights and Freedoms* also endorses basic social and economic rights.<sup>75</sup>

## II.2.2. Proactive Legislation to Advance Equality

To move beyond a uniquely reactive model of filing discrimination complaints with human rights bodies, Canada has also turned to proactive legislation that outlines affirmative equality duties, aimed at identifying, remedying and preventing discrimination. Such laws have been introduced in a range of areas, including employment and pay equity, disability and accessibility, sexual harassment and violence, and more recently anti-racism.

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<sup>71</sup> For a discussion of the importance and quasi-constitutional status of human rights laws, see, e.g. *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5502/index.do>; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 SCR 150, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/76/index.do>; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 at para 27, [2000] 1 SCR 665, online: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1789/index.do>.

<sup>72</sup> See SHILTON, E., “Choice, but no Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada” (2013) 38:2 *Queen’s LJ* 461.

<sup>73</sup> See ELIADIS, P., *Speaking Out on Human Rights: Debating Canada’s Human Rights System* (Montreal: McGill-Queen’s University Press, 2014) at 33-28; see also, MAKARENKO, J., “Canada’s Human Rights Commission System: Introduction to the Canadian Human Rights Commission and Tribunal”, (18 November 2008), online: *Maple Leaf Web* [www.mapleleafweb.com/features/canada-s-human-rights-commission-system-introduction-canadian-human-rights-commission-and-tribunal](http://www.mapleleafweb.com/features/canada-s-human-rights-commission-system-introduction-canadian-human-rights-commission-and-tribunal).

<sup>74</sup> ELIADIS, *ibid*, c 2.

<sup>75</sup> *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12, online: <http://www.legisquebec.gouv.qc.ca/en/showdoc/cs/C-12>; *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2, online: <https://saskatchewanhumanrights.ca/wp-content/uploads/2020/03/Code2018.pdf>.

### II.2.2.1 Employment Equity: An Example of Canadian Affirmative Action

Canadian employment equity legislation imposes positive obligations on employers to promote and maintain equality in the workplace. Proactive legislative initiatives to address systemic discrimination in employment have been introduced at both the federal and provincial levels. The Federal *Employment Equity Act*,<sup>76</sup> was introduced in 1986 in the wake of a *Royal Commission Report on Equality in Employment*, which had recommended the need to go beyond a complaints-based model to identify and remedy systemic inequalities proactively.<sup>77</sup> The Act requires employers to identify employment barriers and to develop policies and initiatives to increase the representation of four designated groups in the workplace: women, Aboriginal people, persons with disabilities and visible minorities.<sup>78</sup> The Act also imposes reporting obligations on employers. Compliance is monitored by the Canadian Human Rights Commission through compliance audits. Compliance disputes are adjudicated by an Employment Equity Review Tribunal.<sup>79</sup> The *Employment Equity Act* applies to federally regulated industries. The Act therefore applies to approximately 13-14% of the Canadian workforce.<sup>80</sup> The Federal Contractors' Program (FCP) extends the Act's scope of application by requiring that certain supplies of goods and services to the federal government have employment equity programs.<sup>81</sup>

At the provincial level, some provinces have legislated employment equity programs in the provincial public sector.<sup>82</sup> For example, in Quebec, the *Act Respecting Equal Access to Employment in Public Bodies* requires public bodies to develop and implement an equal access employment program.<sup>83</sup> The government of Nunavut is also required to increase the representation of Inuit in employment within government under Article 23 of the Nunavut Land Claims Agreement.<sup>84</sup>

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<sup>76</sup> *Employment Equity Act*, SC 1995, c 44 [*Employment Equity Act*], online: <https://laws-lois.justice.gc.ca/eng/acts/e-5.401/page-1.html>.

<sup>77</sup> Royal Commission on Equality in Employment, *Equality in Employment: A Royal Commission Report*, by Judge Rosalie Silberman Abella (Ottawa: Supply and Services Canada, 1984), online: [www.bakerlaw.ca/wp-content/uploads/Rosie-Abella-1984-Equality-in-Employment.pdf](http://www.bakerlaw.ca/wp-content/uploads/Rosie-Abella-1984-Equality-in-Employment.pdf).

<sup>78</sup> *Ibid*, s 5.

<sup>79</sup> *Ibid*, Part II (Monetary penalties for non-compliance are also included in the Act, see Part III, *below*).

<sup>80</sup> Evaluation Directorate Strategic Policy and Research Branch Human Resources and Skills Development Canada, *Strategic Evaluation of the Employment Equity Programs* (Ottawa: HRSDC, November 2012), at 2-3; "Population of the Federal Public Service Data", (30 July 2019), online: Gov Canada [www.canada.ca/en/treasury-board-secretariat/services/innovation/human-resources-statistics/population-federal-public-service-department.html](http://www.canada.ca/en/treasury-board-secretariat/services/innovation/human-resources-statistics/population-federal-public-service-department.html).

<sup>81</sup> "Federal Contractors Program", online: Gov Canada <https://www.canada.ca/en/employment-social-development/programs/employment-equity/federal-contractor-program.html>.

<sup>82</sup> See e.g. in Quebec, *An Act Respecting Equal Access to Employment in Public Bodies*, CQLR c A-2.01, online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/A-2.01>. See also BAKAN, A. and KOBAYASHI, A., *Employment Equity Policy in Canada: An Interprovincial Comparison/Politique d'équité en matière d'emploi au Canada: une comparaison interprovinciale* (Ottawa: Status of Women Canada, 2000).

<sup>83</sup> *Act Respecting Equal Access to Employment in Public Bodies*, *supra* note 82.

<sup>84</sup> BERGER, T. "Conciliator's Final Report: Nunavut Land Claims Agreement Implementation Planning Contract Negotiations for the Second Planning Period" (1 March 2006), online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100030982/1542915160660?wbdisable=true>.

### II.2.2.2 Pay Equity

Pay equity legislation has been enacted in Canada to address systemic wage gaps between traditionally male and female job categories. Pay equity laws require employers to take proactive steps to advance equal pay for work of equal value.<sup>85</sup>

Equal pay for work of equal value laws have been legislated largely by Canadian provinces since the late 1980s and 90s, including Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Ontario and Quebec.<sup>86</sup> Ontario and Quebec's pay equity laws apply to both the public and private sector,<sup>87</sup> while pay equity legislation in Manitoba, New Brunswick, Nova Scotia and Prince Edward Island apply only to the provincial public sector. The other provinces, Saskatchewan, Newfoundland and British Columbia have adopted provincial policy frameworks for pay equity which apply to the public sector.<sup>88</sup> Pay equity legislative schemes include complaint mechanisms to address allegations of non-compliance. Recently, the federal government has also introduced pay equity legislation for federally-regulated workplaces.<sup>89</sup>

### II.2.2.3 Disability

Proactive legislation protecting disability rights and promoting accessibility has been adopted by a minority of provinces and the federal government. For instance, disability legislation in Ontario, Manitoba and Nova Scotia requires public and private organizations to be proactive in identifying, preventing and removing barriers to accessibility.<sup>90</sup> The legislation complements human rights codes and does not remove or lessen existing protections under human rights legislation.

Ontario has been at the forefront of proactive accessibility legislative initiatives. The province implemented the *Ontarians with Disabilities Act*<sup>91</sup> in 2001, which was supplemented by the *Accessibility for Ontarians with Disabilities Act* (AODA) in 2005.<sup>92</sup> The AODA requires both public

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<sup>85</sup> For a historical timeline, see Gov Canada, Fact Sheet, *Evolution of Pay Equity*, online: <https://www.canada.ca/en/treasury-board-secretariat/services/innovation/equitable-compensation/fact-sheet-evolution-pay-equity.html>.

<sup>86</sup> See *Manitoba Pay Equity Act*, CCSM 1985, c P-13, online: <https://web2.gov.mb.ca/laws/statutes/ccsm/p013e.php>; *Prince Edward Island Pay Equity Act*, RSPEI 1988, c P-2, online: <https://www.princeedwardisland.ca/sites/default/files/legislation/P-02-Pay%20Equity%20Act.pdf>; *New Brunswick Pay Equity Act*, SNB 2009, c P-5.05, online: <https://www.canlii.org/en/nb/laws/astat/snb-2009-c-p-5.05/latest/snb-2009-c-p-5.05.html>; *Nova Scotia Pay Equity Act*, RSNS 1989, c 337, online: <https://nslegislature.ca/sites/default/files/legc/statutes/pay%20equity.pdf>; *Quebec Pay Equity Act*, SQ 1996, c 43, online: <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=1996C43A.PDF>; *Ontario Pay Equity Act*, RSO 1990, c P-7, online: <https://www.ontario.ca/laws/statute/90p07>.

<sup>87</sup> See *Ontario Pay Equity Act*, *ibid* (first enacted in 1987); *Quebec Pay Equity Act*, *ibid* (introduced in 1996).

<sup>88</sup> For a summary, see Equal Pay Coalition, *The Gender Pay Gap across Canada*, online: <http://equalpaycoalition.org/the-gender-pay-gap-across-canada/>.

<sup>89</sup> *Pay Equity Act*, SC 2018, c 27, s 416, online: <https://laws-lois.justice.gc.ca/eng/acts/P-4.2/>. It is significant that the federal government was slow to enact proactive pay equity legislation: see CÔTÉ, A. & LASSONDE, J., "Status report on pay equity in Canada" (2007) *National Association of Women and the Law, Final Report of the Workshop on Pay Equity* (Ottawa); House of Commons, Special Committee on Pay Equity, *It's Time to Act* (June 2016) (Chair: Anita Vandenbeld). Protection for equal pay for work of equal value is provided in the *Canadian Human Rights Act*, *supra* note 39, s 11, relying on a retroactive complaints process for enforcement.

<sup>90</sup> See *Accessibility for Ontarians with Disabilities Act*, SO 2005, c 11, s 2, online: <https://www.ontario.ca/laws/statute/05a11>; *Accessibility for Manitobans Act*, SM 2013 c 40, CCSM c A1.7, online: <https://web2.gov.mb.ca/laws/statutes/ccsm/pdf.php?cap=a1.7>; *Accessibility Act*, SNS 2017, c 2, online: <https://nslegislature.ca/sites/default/files/legc/statutes/accessibility.pdf>.

<sup>91</sup> *Ontarians with Disabilities Act*, SO 2001, c 32, online: <https://www.ontario.ca/laws/statute/01o32/v4>.

<sup>92</sup> *Accessibility for Ontarians with Disabilities Act*, *supra* note 90.

and private organizations to identify, remove and prevent both the physical and attitudinal barriers faced by persons with disabilities.<sup>93</sup> In doing so, the Act shifts away from an individual accommodation model toward a systemic organizational approach that removes barriers for all. The AODA sets out accessibility regulations with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises.<sup>94</sup>

Disability legislation was enacted in Manitoba in 2015. The *Accessibility for Manitobans Act* aims to achieve accessibility by developing accessibility standards in the areas of employment, customer service, information and communication, transportation and the built environment.<sup>95</sup> More recently, the province of Nova Scotia passed an *Accessibility Act* in 2017.<sup>96</sup>

At the federal level, the *Accessible Canada Act* was adopted in 2019, with the goal of creating a barrier-free Canada “through the proactive identification, removal and prevention of barriers to accessibility wherever Canadians interact with areas under federal jurisdiction.”<sup>97</sup> The Act recognizes that “laws, policies, programs, services and structures must take into account the different ways that persons interact with their environments and the multiple and intersecting forms of marginalization and discrimination faced by persons.”<sup>98</sup> Regulated entities are required to create an accessibility plan in consultation with persons with disabilities, implement feedback tools and carry out progress reports. The Act puts in place an accessibility complaint mechanism which allows individuals to file complaints with the Accessibility Commissioner, who is responsible for compliance and enforcement.<sup>99</sup>

#### **II.2.2.4 Sexual Harassment and Violence**

Proactive legislative initiatives have also been implemented to provide Canadians with greater protections against sexual harassment and sexual violence. The legislation imposes legal requirements on organizations to prevent rather than merely redress problems of sexual harassment.

At the federal level, the *Canada Labour Code (CLC)* was recently amended to strengthen the framework for preventing workplace harassment and violence, particularly sexual harassment and violence in the workplace.<sup>100</sup> The amendment requires employers to conduct risk assessments of both workplace harassment and violence and to develop and implement measures to prevent these risks from materializing. Employers are also required to implement a policy on harassment and violence, and to implement training on workplace violence, workplace harassment and sexual harassment. Employers are thus responsible for training employees on “the policy, the relationship between harassment and violence and human rights protections, how to recognize, minimize and prevent harassment and violence, crisis

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, s 1(a). There is no individual or public complaint mechanism under the AODA; however, individuals may still file human rights complaints pursuant to the Ontario Human Rights Code: see discussion above; see also EDMONDS, R. & KHAN, N., “Overcoming Barriers to Accessibility: The Ontario Experience” (Paper delivered at the 3rd Annual Diversity Conference, Ontario Bar Association, 27 November 2017) at 9, online (pdf): *Ryan Edmonds Workplace Counsel* [rewc-law.com/papers/21\\_overcoming\\_barriers.pdf](http://rewc-law.com/papers/21_overcoming_barriers.pdf).

<sup>95</sup> *Accessibility for Manitobans Act*, *supra* note 90.

<sup>96</sup> *Accessibility Act*, *supra* note 90.

<sup>97</sup> “Making an accessible Canada for persons with disabilities”, online: *Employment and Social Development Canada* [www.canada.ca/en/employment-social-development/programs/accessible-people-disabilities.html](http://www.canada.ca/en/employment-social-development/programs/accessible-people-disabilities.html).

<sup>98</sup> *Accessible Canada Act*, SC 2019, c 10, s 6(e), online: <https://laws-lois.justice.gc.ca/eng/acts/A-0.6/>.

<sup>99</sup> *Accessible Canada Act*, s 75(1), s 94(1).

<sup>100</sup> Bill C-65, *An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act*, 1st Sess, 42nd Parl, 2017, (assented to 25 October 2018), SC 2018, c 22, online: [https://www.laws-lois.justice.gc.ca/eng/AnnualStatutes/2018\\_22/](https://www.laws-lois.justice.gc.ca/eng/AnnualStatutes/2018_22/).

prevention, personal safety and de-escalation techniques, and how to respond appropriately to different incidents.”<sup>101</sup>

At the provincial level, in addition to human rights codes, occupational health and safety protections have been relied upon to raise concerns regarding workplace harassment. In three provinces (New Brunswick, Ontario and Alberta), there are specific protections against sexual violence in workplace health and safety regulations.<sup>102</sup> For example, the Ontario *Sexual Violence and Harassment Action Plan Act*<sup>103</sup> (Bill 132) expands the scope of employer's obligations under the Ontario *Occupational Health and Safety Act* (OHS Act). The OHS Act requires employers to implement workplace violence and harassment policies and a workplace harassment program for the effective implementation of these policies.<sup>104</sup> The Act also requires that employers conduct investigations into incidents and complaints of workplace harassment.

Proactive legislation has also been recently adopted to address sexual harassment and violence at Canadian universities. Legislation in British Columbia, Manitoba, Ontario, Prince Edward Island and Quebec require post-secondary educational institutions to develop policies to address sexual violence on campuses.<sup>105</sup> In Quebec, the *Act to prevent and fight sexual violence in higher education institutions*, requires policies implemented by post-secondary educational institution to consider “persons at greater risk of experiencing sexual violence, such as persons from sexual or gender minorities, cultural communities or Native communities, foreign students and persons with disabilities.”<sup>106</sup>

#### II.2.2.5 Anti-Racism

To date, the province of Ontario is the only Canadian jurisdiction to enact anti-racism legislation.<sup>107</sup> The *Anti-Racism Act* acknowledges the existence of systemic racism in Ontario. The Act aims to eliminate systemic racism and advance racial equity by requiring the government to maintain an anti-racism strategy, prepare progress reports, establish data

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<sup>101</sup> HOWARD, V., “Bill C-65 and the prevention of harassment and violence”, *Rubin Thomlinson* (14 May 2020), online: [rubinthomlinson.com/bill-c-65-and-the-prevention-of-harassment-and-violence/](http://rubinthomlinson.com/bill-c-65-and-the-prevention-of-harassment-and-violence/).

<sup>102</sup> *Occupational Health and Safety Act*, NB Reg 2018-82, 374.1, online: <https://www.gnb.ca/0062/acts/BBR-2018/2018-82.pdf>; *Occupational Health and Safety Act*, RSO 1990, c O-1, s 32(0)(1), online: <https://www.ontario.ca/laws/statute/90o01?search=Occupational+Health+and+Safety+Act>; *Occupational Health and Safety Act*, SA 2017, c O-2.1, s 3(1)(c), online: [https://www.qp.alberta.ca/1266.cfm?page=O02P1.cfm&leg\\_type=Acts&isbncln=9780779800865&display=html](https://www.qp.alberta.ca/1266.cfm?page=O02P1.cfm&leg_type=Acts&isbncln=9780779800865&display=html). For Alberta regulations on violence prevention, see also *Occupational Health and Safety Act*, Alta Reg 87/2009, s 390.1, online: <https://www.qp.alberta.ca/documents/OHS/OHSCode.pdf>.

<sup>103</sup> *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, SO 2016, c 2, online: <https://www.ontario.ca/laws/statute/s16002>.

<sup>104</sup> *Occupational Health and Safety Act*, RSO 1990, c O-1, s 32.0.6(1), online: <https://www.ontario.ca/laws/statute/90o01>.

<sup>105</sup> See *Sexual Violence and Misconduct Policy Act*, SBC 2016, c 23, online: [https://www.bclaws.ca/civix/document/id/complete/statreg/16023\\_01](https://www.bclaws.ca/civix/document/id/complete/statreg/16023_01); Bill 15, *The Sexual Violence Awareness And Prevention Act (Advanced Education Administration Act And Private Vocational Institutions Act Amended)*, 1st Sess, 41st Leg, 2016, (assented to 10 November 2016), online: <https://web2.gov.mb.ca/bills/41-1/b015e.php>; *Sexual Violence at Colleges and Universities*, O Reg 131/16, online: <https://www.ontario.ca/laws/regulation/160131>; *An Act to prevent and fight sexual violence in higher education institutions*, SQ 2017, c 32, online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/P-22.1#:~:text=higher%20education%20institutions-.P%2D22.1%20%2D%20Act%20to%20prevent%20and%20fight%20sexual%20violence%20in%20higher%20education%20institutions&text=The%20purpose%20of%20this%20Act%20for%20students%20and%20personnel%20members>; PEI's *Post-Secondary Institutions Sexual Violence Policies Act* received royal assent and will be proclaimed when new regulations are finalized.

<sup>106</sup> *An Act to prevent and fight sexual violence in higher education institutions*, *supra* note 105, s 3.

<sup>107</sup> *Anti-Racism Act*, SO 2017, c 15, online: <https://www.ontario.ca/laws/statute/17a15>.

standards to identify and monitor systemic racism and establish an anti-racism impact assessment framework.<sup>108</sup>

### II.2.3. Other Legislative Sources of Protection

In addition to the legislative initiatives enumerated above, protections against discrimination have been integrated into laws addressing specific services or sectors. For example, the *Canada Transportation Act* recognizes the right of persons with disabilities to accessible transportation,<sup>109</sup> and empowers the Canadian Transportation Agency to proactively identify, remove, and prevent barriers to accessibility for persons with disabilities in the national transportation system.<sup>110</sup>

Another example is the *Canadian Immigration and Refugee Protection Act*.<sup>111</sup> Section 3(d) states that the Act must be construed and applied in a manner “consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada its principles of equality and non-discrimination.<sup>112</sup> Sections 3(e) and 3(f) respectively demonstrate the Act’s commitment to enhancing the “vitality of the English and French and English linguistic minority communities in Canada, and to complying with international human rights obligations to which Canada is a signatory.<sup>113</sup> Despite these provisions, Canadian immigration legislation continues to allow for health-related exclusions that have been linked to discrimination on the basis of disability. Section 38(1) states that “ A foreign national is inadmissible on health grounds if their health condition; (a) is likely to be a danger to public health; (b) is likely to be a danger to public safety; or (c) might reasonably be expected to cause excessive demand on health or social services.<sup>114</sup> This provision has been widely criticized as inconsistent with Canada’s commitment to equality and non-discrimination. The Council of Canadians with Disabilities maintains that these provisions and their broad interpretation send “a message that people with disabilities are such a burden on Canada that they should be kept out. Such messaging is damaging to the dignity of people with disabilities and perpetuates negative attitudes toward people with disabilities here at home.”<sup>115</sup>

Most recently, the federal *Prevention of Genetic Discrimination Act*<sup>116</sup> was enacted at the federal level in Canada. In addition to amending the federal human rights and labour legislation to provide express protections for genetic-based discrimination, the Act provides protection

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<sup>108</sup> See also, House of Commons, *M-103 Systemic Racism and Religious Discrimination*, 42-1, Vol 148, No 141 (15 February 2017) at 8996 (Speaker: Iqra Khalid) (Federal Motion on Islamophobia and Racism).

<sup>109</sup> “Accessible Transportation”, *Canada Transportation Agency*, online: [otc-cta.gc.ca/eng/accessible-transportation](https://otc-cta.gc.ca/eng/accessible-transportation).

<sup>110</sup> “Bill C-81 The Accessible Canada Act”, *Canada Transportation Agency*, online: [otc-cta.gc.ca/eng/bill-c-81-accessible-canada-act](https://otc-cta.gc.ca/eng/bill-c-81-accessible-canada-act).

<sup>111</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, [*Immigration and Refugee Protection Act*], online: <https://laws-lois.justice.gc.ca/eng/acts/i-2.5/>.

<sup>112</sup> *Immigration and Refugee Protection Act*, s 3(d).

<sup>113</sup> *Immigration and Refugee Protection Act*, s 3(e)—(f).

<sup>114</sup> *Immigration and Refugee Protection Act*, s 38(1).

<sup>115</sup> Council of Canadians with Disabilities, “Repeal of the Excessive Demands Provisions in Canada’s Immigration and Refugee Protection Act (IRPA)” (Brief presented to the Standing Committee on Citizenship and Immigration, Winnipeg, November 2017), online: [www.ourcommons.ca/Content/Committee/421/CIMM/Brief/BR9256474/br-external/CouncilOfCanadiansWithDisabilities-e.pdf](https://www.ourcommons.ca/Content/Committee/421/CIMM/Brief/BR9256474/br-external/CouncilOfCanadiansWithDisabilities-e.pdf).

<sup>116</sup> *Genetic Non-Discrimination Act*, SC 2017, c 3, online: [https://laws-lois.justice.gc.ca/eng/annualstatutes/2017\\_3/](https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_3/).

against discrimination in contracts, and covers potential discrimination in insurance, an area exempt from protection in some provincial human rights legislation.<sup>117</sup>

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<sup>117</sup> Recently upheld by SCC, see *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, online: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18417/index.do>.

### III. Most Significant Case-Law on Equality and Non-Discrimination

To understand the evolving legal interpretation of Canadian concepts of equality and discrimination, it is useful to begin with a review of some key judicial decisions interpreting statutory anti-discrimination protections, followed by a discussion of the most significant *Charter* cases. The expansive definition of discrimination in the statutory domain informed the subsequent legal interpretation of constitutional equality and discrimination in the Canadian *Charter*.

#### III.1. Interpreting Discrimination in Human Rights Legislation

##### III.1.1. Expanding the Definition of Discrimination: Direct, Indirect & Systemic

Beginning in the mid-1980s, the Supreme Court of Canada issued a series of rulings which significantly expanded the meaning of discrimination. A key turning point occurred when the Court first recognized “indirect or adverse effect discrimination.” In the employment case of *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*,<sup>118</sup> a Seventh Day Adventist employee whose Sabbath was Saturday, alleged religious discrimination when her employer required her to work on Saturdays. Justice McIntyre, for a unanimous Court, extended the definition of discrimination to include both direct and adverse effect discrimination:

FRAME 4

##### **Ontario Human Rights Commission v. Simpsons-Sears Ltd. (O'Malley) (1985)**

*Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." ... the concept of adverse effect discrimination... arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees...*<sup>119</sup>

*Justice William McIntyre*

Although the employer had no intent to discriminate against employees on the basis of religion, the Court found that the Saturday work requirement had adverse discriminatory effects on employees whose Sabbath was Saturday.

A few years later, in *CN v. Canada (Canadian Human Rights Commission)*,<sup>120</sup> the Supreme Court of Canada further expanded the reach of anti-discrimination law. The key issue in the case was whether a human rights tribunal could mandate an affirmative action program to remedy the tribunal's finding of sex-based employment discrimination. The Court upheld the statutory authority of the human rights tribunal to make the proactive equity order.<sup>121</sup> In doing so, the Court recognized the legal concept of “systemic discrimination.”

<sup>118</sup> *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 SCR 536 at 547 [O'Malley], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/101/index.do>; see also *Bhinder v. Canadian National Railway Co.*, [1985] 2 SCR 561, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/102/index.do>.

<sup>119</sup> O'Malley, *ibid* at para 18.

<sup>120</sup> *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1134 [*Action travail des femmes*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/6280/index.do>.

<sup>121</sup> *Ibid* at 1139.

FRAME 5

**CN v. Canada (Canadian Human Rights Commission) (Action travail des femmes) (1987)**

...systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" ... To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.<sup>122</sup>

Chief Justice Brian Dickson

Systemic discrimination, therefore, may result from facially neutral rules, policies and practices that unintentionally cause exclusion; it may also be the result of direct and intentional discrimination rooted in stereotypes and biases. As noted by the Quebec Human Rights Tribunal in a case involving discrimination against children with disabilities in education:

FRAME 6

**Commission des droits de la personne du Québec c. Commission scolaire régionale Chauveau (1993)**

...[Systemic] discrimination may also result from a combination of complex factors and institutionalized practices that interact in such a way as to produce a global exclusionary effect on members of protected groups... The discrimination is "systemic" in that it arises from the **cumulative and dynamic** interdependence of different variables.<sup>123</sup>

Judge Michèle Rivet, Quebec Human Rights Tribunal

Systemic discrimination has also been recognized as "a continuing phenomenon which has its roots deep in history and in societal attitudes. It cannot be isolated to a single action or statement. By its very nature, it extends over time."<sup>124</sup>

### III.1.2. Expanding the Grounds of Discrimination

To bring a discrimination claim under Canadian anti-discrimination laws, individuals must frame the complaint in relation to a specific ground of discrimination protected under human rights legislation.<sup>125</sup> In some cases, therefore, protection has been dependent on the interpretation of the scope of specific grounds of discrimination. For example, in an important workplace discrimination case, *Brooks v. Canada Safeway*,<sup>126</sup> the Supreme Court of Canada addressing whether pregnancy-based discrimination qualified as prohibited "sex" discrimination under applicable human rights law. The Court concluded yes. It overturned an

<sup>122</sup> *Ibid.*

<sup>123</sup> *Commission des droits de la personne du Québec c. Commission scolaire régionale Chauveau*, [1993] RJQ 929, 1993 CanLII 7 (QHRT) at 83-84 (emphasis added) (unofficial translation), online: <http://canlii.ca/t/1fy92>.

<sup>124</sup> *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FCR 789 at para 16, online: <http://canlii.ca/t/4nd8>.

<sup>125</sup> Unlike the *Canadian Charter of Rights and Freedoms*, legislative protections are limited to the specific enumerated grounds: see *above*, Part II.2.1 See SHEPPARD, C., "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 *Canadian Bar Review* 893 ["Grounds of Discrimination"]. See also, REAUME, D.G., "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law." *Osgoode Hall Law Journal* 40.2 (2002): 113-144, online: <https://digitalcommons.osgoode.yorku.ca/ohlj/vol40/iss2/1/>. See also Part IV, *below*.

<sup>126</sup> *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219 [Brooks], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/455/index.do>.

earlier *Canadian Bill of Rights* decision, *Bliss v. Attorney General of Canada*,<sup>127</sup> that had reached the opposite conclusion.

FRAME 7

**Brooks v. Canada Safeway (1989)**

*Over ten years have elapsed since the decision in Bliss. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that Bliss was wrongly decided or, in any event, that Bliss would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.*<sup>128</sup>

Chief Justice Brian Dickson

The reasoning demonstrates a willingness to accord anti-discrimination categories an expansive interpretation and a sensitivity to how law may respond to changing socio-economic realities.

The Court has similarly concluded that sexual harassment constitutes sex discrimination. In *Janzen v. Platy Enterprises Ltd.*,<sup>129</sup> two waitresses alleged that the sexual harassment they experienced constituted "sex discrimination." As Chief Justice Dickson wrote:

FRAME 8

**Janzen v. Platy Enterprises Ltd. (1989)**

*To argue that the sole factor underlying the discriminatory action was the sexual attractiveness of the appellants and to say that their gender was irrelevant strains credulity. Sexual attractiveness cannot be separated from gender. The similar gender of both appellants is not a mere coincidence, it is fundamental to understanding what they experienced. All female employees were potentially subject to sexual harassment by the respondent .... That his discriminatory behaviour was pinpointed against two of the female employees would have been small comfort to other women contemplating entering such a workplace. Any female considering employment at the ... restaurant was a potential victim ... and as such was disadvantaged because of her sex. A potential female employee would recognize that if she were a male employee she would not have to run the same risks of sexual harassment.*<sup>130</sup>

Chief Justice Brian Dickson

Such sex discrimination decisions demonstrate judicial sensitivity to the contextual realities of gender-based inequality at work.<sup>131</sup>

The ground of disability discrimination has also been interpreted broadly in Canada. In an important case, three litigants alleged employment discrimination as a result either of physical anomalies that were found in pre-employment medical tests, or due to a chronic health

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<sup>127</sup> *Supra* note 45.

<sup>128</sup> *Brooks*, *supra* note 126 at 1243-1244.

<sup>129</sup> *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252 [*Janzen*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/456/index.do>.

<sup>130</sup> *Ibid* at 1290. Sexual and grounds-based harassment has now been accorded express protection in human rights statutes in Canada.

<sup>131</sup> The ground of "sex" has also been interpreted expansively in some cases dealing with transgender issues: see e.g. *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 (CanLII), online: <http://canlii.ca/t/fqxvb>.

condition.<sup>132</sup> The medical evidence confirmed that the individuals were capable of performing the jobs in question and were not functionally impaired. In extending protection in this case, the Supreme Court concluded that discrimination on the grounds of "disability" extends beyond functional impairment to employers' perception of disability. The Court noted that discrimination based on disability "may result from a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors."<sup>133</sup>

In contrast to discrimination based on sex and disability, expansive interpretations of other grounds of discrimination, like family status, have proved more challenging. In one case, for example, Brian Mossop, a gay man took a day off to attend the funeral of his partner's father and was denied compensation under his workplace bereavement leave policy.<sup>134</sup> Mossop cohabited with his same-sex partner, but at the time the case arose, spousal relations between same-sex couples were not uniformly recognized in Canadian law. Since sexual orientation was not yet included as a protected ground of discrimination, Mossop endeavoured unsuccessfully to argue that his case should be understood as a form of "family status" discrimination, which was legislatively protected.<sup>135</sup> In the wake of this decision and constitutional challenges to the exclusion of sexual orientation from anti-discrimination protections, sexual orientation was added as a ground of discrimination in those jurisdictions where it had not yet been included.<sup>136</sup> More recently, tribunals and courts have been grappling with the extent to which "family status" discrimination includes discrimination based on family care obligations.<sup>137</sup>

### III.1.3. Proving *Prima Facie* Discrimination

Beyond the evolving definitions and grounds of discrimination, another key issue has been the precise requirements for proving discrimination. One of the challenges in proving what the courts have called *prima facie* discrimination is linking the allegedly discriminatory policy or practice to a ground of discrimination. The test for establishing a *prima facie* case of discrimination was initially set out in the *O'Malley* case, noted above, where a Saturday work requirement was held to cause religious-based discrimination.<sup>138</sup> More recently, in the case of *Moore v. British Columbia (Education)*,<sup>139</sup> which involved discrimination in educational services against a young boy with severe dyslexia, the Court explained:

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<sup>132</sup> See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, *supra* note 71.

<sup>133</sup> *Ibid* at para 79.

<sup>134</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/969/index.do>.

<sup>135</sup> The majority concluded that the discrimination related exclusively to the ground of "sexual orientation" (which was not yet protected in the legislation). In dissent, Madame Justice L'Heureux-Dubé held that the discrimination could be understood as being based on "family status." She agreed with the Canadian Human Rights Tribunal that in "defining the scope of the protection for 'family status', [it is] ... essential not only to look at families in the traditional sense, but also to consider the values that lie at the base of our support for families." (629).

<sup>136</sup> See *Vriend v. Alberta*, [1998] 1 SCR 493, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1607/index.do>; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1036/index.do>; see discussion of analogous grounds below in Part III.2.2.

<sup>137</sup> See appellate court decisions: *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 (CanLII), online: <http://canlii.ca/t/hxc1h> (leave to appeal denied).

<sup>138</sup> *Supra* note 118.

<sup>139</sup> *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12680/index.do>.

## FRAME 9

**Moore v. British Columbia (Education) (2012)**

...to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination ...; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.<sup>140</sup>

Justice Rosalie Silberman Abella

In *Moore*, the Court held that disability was clearly a factor in the failure to provide adequate educational services for children with learning disabilities.

In other more recent cases, the link between the ground and the adverse impact has not been as clear. For example, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*,<sup>141</sup> the Court concluded that “the protected characteristic” was not “a factor in the adverse impact.”<sup>142</sup> The case involved the refusal to provide flight training in Canada to Javed Latif, a Canadian citizen born in Pakistan, on the grounds that he had been denied security clearance in the United States. Latif argued that the refusal constituted a form of racial profiling and race-based discrimination. A key issue on appeal, therefore, was the connection between race and the denial of access to the pilot training program.

In *Bombardier*, the Court clarified this aspect of the *prima facie* discrimination test, noting that “the plaintiff has the burden of showing that there is a *connection* between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a *factor* in the distinction, exclusion or preference.”<sup>143</sup> The Court, in this instance, found that the “evidence was not sufficient to support an inference of a connection between Mr. Latif’s ethnic or national origin and his exclusion.”<sup>144</sup>

The question of proving a linkage between a protected ground of discrimination and an adverse discriminatory practice also recently arose before the Supreme Court in the case of *Stewart v. Elk Valley Coal Corp.*<sup>145</sup> There, the employer had put in place a workplace policy requiring employees to disclose any drug dependence or addiction issues prior to any drug-related accident. Once they did so, employees would be provided time off for drug rehabilitation. If they did not disclose and were involved in a workplace accident, they would be terminated. Employee Stewart was involved in a minor workplace accident. Post-accident drug testing revealed that he had used cocaine prior to the accident, but Stewart had not revealed any drug dependence to his employer. A majority of the Supreme Court of Canada concluded that it was reasonable to conclude that the cause of Stewart’s discharge was his failure to comply with the workplace policy of disclosure of an addiction rather than his

<sup>140</sup> *Ibid* at para 33.

<sup>141</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15471/index.do>.

<sup>142</sup> *Ibid* at para 52.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid* at para 81.

<sup>145</sup> *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 SCR 591 [*Stewart v. Elk Valley*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16679/index.do>.

disability. As the majority put it, “the reason for the termination was not addiction, but breach of the Policy.”<sup>146</sup> In a powerful dissent against the majority opinion, Justice Gascon found *prima facie* discrimination, concluding that “Stewart’s addiction had indeed factored into his drug use, and in turn, his violation of the Policy.”<sup>147</sup> Justice Gascon reasoned that one of the contextual realities of drug addiction is the failure to recognize that one has an addiction. In his view, failure to comply with the policy, therefore, was directly related to drug addiction as a disability.

## III.2. Constitutional Interpretation: The Challenge of Substantive Equality

### III.2.1. Recognition of the Concept of Substantive Equality: Section 15(1)

A few years after legal recognition of adverse effect discrimination in the statutory domain, the Supreme Court of Canada began interpreting the constitutional protections for equality rights. The first case to make its way through the appellate process was *Andrews v. Law Society of British Columbia*.<sup>148</sup> Ironically, it was brought by an Oxford-educated, white male lawyer. He maintained that the citizenship requirement for certification as a lawyer in the province of British Columbia discriminated against him on the basis of citizenship. In elaborating the constitutional meaning of discrimination, Justice McIntyre, for a majority of the Court on the interpretation of s. 15(1), wrote:

FRAME 10

#### **Andrews v. Law Society of British Columbia (1989)**

*I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*<sup>149</sup>

Justice William McIntyre

Significantly, the Court interpreted constitutional equality as securing protections against both direct and indirect discrimination. Justice McIntyre recognized that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. As he explains:

FRAME 11

#### **Andrews v. Law Society of British Columbia (1989)**

*Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law*

<sup>146</sup> *Ibid* at para 35.

<sup>147</sup> *Ibid* at para 123.

<sup>148</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 [Andrews], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/407/index.do>.

<sup>149</sup> *Ibid* at 174 (emphasis added). As noted, Justice McIntyre wrote the majority reasons on the interpretation and application of s. 15(1); however, he would have upheld the equality violation as a reasonable limit pursuant to s.1 of the *Charter*; he ultimately dissented on the outcome of the case.

or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.<sup>150</sup>

Justice William McIntyre

Articulating an outcomes-based approach to equality, Justice McIntyre's judgment is widely understood to have adopted a "substantive" rather than "formal" approach to equality.

Following the *Andrews* case, the Supreme Court continued to endorse an expansive interpretation of Charter-based equality rights in a number of cases. In the leading case of *Eldridge v British Columbia (Attorney General)*,<sup>151</sup> for example, the failure of a provincial government to provide funding for sign language interpretation in hospitals and medical care was challenged as discriminatory. As noted by the Court,

FRAME 12

**Eldridge v. British Columbia (Attorney General) (1997)**

*On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.<sup>152</sup>*

Justice Gérard La Forest

The Court unanimously affirmed that constitutional equality rights extend to "adverse effects" discrimination. Justice LaForest, writing for the Court, noted that "[a]dverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled."<sup>153</sup>

*Vriend v. Alberta*<sup>154</sup> was another pathbreaking decision, reflective of judicial willingness to provide protection against discrimination on the basis of sexual orientation – a ground that was not included in the enumerated grounds of protection in s. 15 of the Charter.<sup>155</sup> Delwin Vriend had been discharged from his job when his employer found out that he was gay. He was denied protection under provincial human rights law because it did not include sexual orientation as a protected ground. The Court concluded that the failure of the province of Alberta to include sexual orientation in its human rights legislation violated s. 15(1) of the

<sup>150</sup> *Ibid* at 182.

<sup>151</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do>.

<sup>152</sup> *Ibid* at para 60.

<sup>153</sup> *Ibid* at para 64. More controversial, however, is the case of *Eaton v. Brant County Board of Education*, [1997] 1 SCR 24, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1471/index.do>, where the Court upheld the exclusion of a young girl with cerebral palsy from the regular classroom setting on the grounds that it was in her best interest to be educated in a separate setting. See POTHIER, D., "Eaton v Brant County Board of Education" (2008) 18(1) *CJWL* 121 (critiquing the decision.)

<sup>154</sup> *Supra* note 136.

<sup>155</sup> The Charter has proven to provide effective protection against discrimination on the basis of sexual orientation, particularly in the domain of recognizing family relations: see, e.g. *M v. H*, [1999] 2 SCR 3, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1702/index.do>, as well as the numerous provincial cases dealing with same sex marriage. Legislation was enacted at the federal level to recognize same sex marriage across Canada: see *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2196/index.do>.

Charter, noting that “the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals.”<sup>156</sup> Of significance in this case was the expansive remedial order, requiring the ground of sexual orientation to be read into the provincial human rights legislation.<sup>157</sup>

In the decade following *Andrews*, however, the Court sometimes struggled to agree upon the precise contours of the test for equality rights or the application of the test for substantive equality.<sup>158</sup> In the case of *Law v. Canada (Minister of Employment and Immigration)*,<sup>159</sup> therefore, the Court endeavoured to elaborate a detailed and robust doctrinal test for substantive equality rights. The case involved the denial of a spousal pension to Nancy Law following the death of her husband, because the legislation disqualified spouses under 35 without dependants or a disability. The Court found that the legislation did include an express age-based distinction but concluded that it was not discriminatory. Of note was the Court’s explicit adoption of “substantive” rather than “formal” equality. The Court clarified that both a purposive and contextual approach was required to determine whether a group-based distinction (either direct or indirect) undermined substantive equality. Two key purposes were identified – protection of fundamental *human dignity* and the remedying of group-based disadvantages. These key purposes were to be assessed in relation to four contextual factors:

- (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. ...
- (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. ...
- (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. ...
- (D) The nature and scope of the interest affected by the impugned law. ...<sup>160</sup>

Despite the Court’s efforts to clarify the legal assessment of substantive equality in *Law*, the test proved complex and difficult for claimants to surmount.<sup>161</sup>

A decade later, in *R. v. Kapp*,<sup>162</sup> the Court revisited the doctrinal test for equality rights. The case arose when a preferential fishing license, designed to remedy historical disadvantages facing First Nations communities, was challenged by non-Indigenous fishers. It raised questions, therefore, about what has been called “reverse discrimination” or discrimination against more historically privileged individuals and groups. Thus, as discussed further below, the case was

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<sup>156</sup> *Supra* note 136 at para 82.

<sup>157</sup> *Ibid* at para 179.

<sup>158</sup> See *Miron v. Trudel*, [1995] 2 SCR 418 [*Miron*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1264/index.do>; *Egan v. Canada*, [1995] 2 SCR 513 [*Egan*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1265/index.do>; *Eaton*, *supra* note 153.

<sup>159</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1691/index.do>.

<sup>160</sup> *Ibid* at para 88(9).

<sup>161</sup> See MCINTRYRE, S. & RODGERS, S., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ontario: LexisNexis Butterworths, 2006); *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 65, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2195/index.do>.

<sup>162</sup> *Supra* note 53.

significant for the Court's interpretation of the Charter's s. 15(2) affirmative action provision. But the Court also reframed the legal test for s. 15(1).

As noted by the Court, "*Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned."<sup>163</sup> Recognizing the importance of the *Law* decision in reinforcing the importance of s. 15 "as a guarantee of substantive, and not just formal, equality,"<sup>164</sup> the Court in *Kapp* set out a two-part test for s. 15(1):

- (1) Does the law create a distinction based on an enumerated or analogous ground?
- (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?<sup>165</sup>

Following a finding in the first step of the test that there is a grounds-based distinction, it is necessary to engage in a contextual and purposive inquiry. The second step – designed to identify violations of substantive equality – asks whether the distinction disadvantages the group in question by causing prejudice or engaging in stereotyping. In departing from the earlier focus in the *Law* decision on human dignity, the Court described human dignity as "an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be."<sup>166</sup>

Subsequent decisions further clarified this second substantive equality step. A helpful summary of the underlying purposes of constitutional equality rights is provided by Justice Abella in *Withler v. Canada (Attorney General)*:<sup>167</sup>

FRAME 13

**Withler v. Canada (Attorney General) (2011)**

*The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, **perpetuates prejudice and disadvantage** to members of a group on the basis of personal characteristics within s. 15(1). **Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group.** ...*

*The second way that substantive inequality may be established is by showing that the **disadvantage imposed by the law is based on a stereotype** that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.*<sup>168</sup>

Justice Rosalie Silberman Abella

Most recently, in *Fraser v. Canada (Attorney General)*, the Court reaffirmed substantive equality, with its focus on the impact of the law, as the "animating norm" of constitutional equality

<sup>163</sup> *Ibid* at para 14.

<sup>164</sup> *Ibid* at para 20.

<sup>165</sup> *Ibid* at para 17.

<sup>166</sup> *Ibid* at para 22.

<sup>167</sup> *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2001] 2 SCR 1014, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7925/index.do>.

<sup>168</sup> *Ibid* at paras 35-36 (emphasis added). See also, *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para 20, [2015] 2 SCR 548 [Taypotat], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15383/index.do>; *Quebec (Attorney General) v. A*, 2013 SCC 5 at para 332, [2013] 1 SCR 61, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10536/index.do>.

rights.<sup>169</sup> The case involved a constitutional challenge by three retired members of the Canadian federal police force (RCMP). They maintained that they were disadvantaged in relation to pension benefits as a result of participating in a job-sharing scheme. The scheme was designed to make it easier for RCMP officers to balance childcare and work responsibilities; however, participation in job sharing reduced their pension benefits. A majority of the Court concluded that “[f]ull-time RCMP members who job-share must sacrifice pension benefits because of a temporary reduction in working hours. This arrangement has a disproportionate impact on women and perpetuates their historical disadvantage. It is a clear violation of their right to equality...”<sup>170</sup>

Of particular significance in this case was the majority’s consolidation of its approach to adverse impact discrimination in constitutional cases. Justice Abella, writing for the majority, underscores the centrality of adverse impact discrimination and its importance in “marking a shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups ...”<sup>171</sup>

FRAME 14

**Fraser v. Canada (Attorney General) (2020)**

*There is no doubt ... that adverse impact discrimination “violate[s] the norm of substantive equality” which underpins this Court’s equality jurisprudence ... At the heart of substantive equality is the recognition that identical or facially neutral treatment may “frequently produce serious inequality” ... This is precisely what happens when “neutral” laws ignore the “true characteristics of [a] group which act as headwinds to the enjoyment of society’s benefits” ...*<sup>172</sup>

*Justice Rosalie Silberman Abella*

Abella J. notes that “both evidence of statistical disparity and of broader group disadvantage may demonstrate disproportionate impact; but neither is mandatory and their significance will vary depending on the case.”<sup>173</sup>

In *Fraser*, Justice Abella also clarified how to assess violations of substantive equality, highlighting the need to examine historic and systemic disadvantages, and potential psychological, social, economic, physical or political harms

FRAME 15

**Fraser v Canada (Attorney General) (2020)**

*This brings us to the second step of the s. 15 test: whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage ... This inquiry will usually proceed similarly in cases of disparate impact and explicit discrimination. There is no “rigid template” of factors relevant to this inquiry... The goal is to examine the impact of the harm caused to the affected group. The harm may include “[e]conomic exclusion or disadvantage, [s]ocial exclusion . . . [p]sychological harms . . . [p]hysical harms . . . [or] [p]olitical exclusion”, and must be viewed in light of any systemic or historical disadvantages faced by the claimant group...<sup>174</sup>*

*Justice Rosalie Silberman Abella*

<sup>169</sup> *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [*Fraser*]. Note that three dissenting justices found no violation of equality.

<sup>170</sup> *Ibid* at para 5.

<sup>171</sup> *Ibid* at para 31.

<sup>172</sup> *Ibid* at para 47 [citing *Withler*, *supra* note 167 at para 2, *Andrews*, *supra* note 148 at 164, *Eaton*, *supra* note 153 at para 67; *Eldridge*, *supra* note 151 at para 65]. *Ibid* at para 47 [citations omitted].

<sup>173</sup> *Fraser*, *ibid* at para 67.

<sup>174</sup> *Ibid* at para 76, citing *Quebec v. A*, *supra* note 168 at para 331, *Withler*, *supra* note 167 at para 66 and *SHEPPARD, Inclusive Equality*, *supra* note 38 at 62-63.

In short, the Court's jurisprudence reveals a continued commitment to articulating a substantive rather than formal approach to constitutional equality – an approach that assesses the real impact of laws and government policies on historically disadvantaged groups.

### III.2.2. Enumerated and Analogous Grounds

Another central aspect of the Supreme Court of Canada's expansive interpretation of s. 15(1) protections has been its articulation of "an enumerated or analogous grounds approach."<sup>175</sup> The equality guarantees enumerated in the *Charter* are to be provided "without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." For Justice McIntyre, writing for the majority in relation to the meaning of equality in s. 15(1), grounds-based discrimination is the linchpin. Equality rights are to be provided "without discrimination." The enumerated grounds provide an important indicator of why s. 15 was enacted – it was to protect groups that had historically been subjected to discrimination and exclusion.<sup>176</sup>

Indeed, as noted by the Court in a more recent decision:

FRAME 16

#### **Kahkewistahaw First Nation v. Taypotat (2015)**

*Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context."*<sup>177</sup>

*Justice Rosalie Silberman Abella*

In identifying the criteria for identifying analogous grounds deserving of protection in s. 15, the Court has emphasized actual or constructive immutability:

FRAME 17

#### **Corbière v. Canada (Minister of Indian and Northern Affairs) (1999)**

*What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.*<sup>178</sup>

*Justice Beverley McLachlin and Justice Michel Bastarache*

Despite this focus on immutability, the Court has recognized the importance of other factors, including membership in a "discrete and insular minority or a group that has been historically

<sup>175</sup> *Andrews*, *supra* note 148.

<sup>176</sup> As Justice McIntyre explains at 182:

The third or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15(1) ... However, ... it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. ... A complainant ... must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

<sup>177</sup> *Taypotat*, *supra* note 168 at para 19.

<sup>178</sup> *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13 [*Corbière*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1704/index.do>.

discriminated against.”<sup>179</sup> The Court has recognized the following analogous grounds: citizenship, sexual orientation, marital status and “Aboriginality-residence.”<sup>180</sup>

### III.2.3. Ameliorative Programs – Section 15(2)

The Supreme Court has examined the meaning of s. 15(2) in its continuing efforts to develop and apply a substantive conception of equality. As the Court noted in *Kapp*, “[u]nder s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.”<sup>181</sup> Prior to the *Kapp* case, two divergent approaches had been adopted in relation to s. 15(2). One approach treated s. 15(2) as an exception to s. 15(1); it would save ameliorative programs and laws that would otherwise be in violation of s. 15(1). A second approach viewed s. 15(2) as an interpretative aid mandating a substantive equality approach to the interpretation of s. 15(1).<sup>182</sup>

In *Kapp*, the Supreme Court set out a third intermediary approach. In cases where a “reverse discrimination” type claim is being advanced, once the first step of the equality test is satisfied (i.e. a distinction on the basis of an enumerated or analogous ground), before proceeding to assess whether the distinction violates substantive equality, “it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional.”<sup>183</sup> In so doing, the government must satisfy specific requirements under s. 15(2). It must prove that: “(1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.”<sup>184</sup> In the *Kapp* case, the Court concluded that the ameliorative program for First Nations fishers satisfied the s. 15(2) requirements.<sup>185</sup>

Since *Kapp*, the Court has expanded its analysis of s. 15(2). *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*,<sup>186</sup> involved an equality challenge to a law providing specific protections for Métis peoples in the province of Alberta. Recognizing that the challenged law was designed to “enhance Métis identity, culture, and self-governance by creating a land base for Métis,”<sup>187</sup> the Court upheld the group-based law in the face of a challenge by excluded First Nations individuals, noting that “Section 15(2), ... permits governments to assist one group without being paralyzed by the necessity to assist all.”<sup>188</sup>

In two recent cases from Quebec, a majority of the Supreme Court concluded that s. 15(2) could not be relied upon by the government when the beneficiaries of an ameliorative

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<sup>179</sup> *Ibid.* For a discussion of grounds, see SHEPPARD, C., “Grounds of Discrimination,” *supra* note 125. See also, POTHIER, D., “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13:1 *CJWL* 37.

<sup>180</sup> See *Andrews*, *supra* note 148; *Vriend*, *supra* note 136; *Egan*, *supra* note 158; *Miron*, *supra* note 158; *Corbière*, *supra* note 178.

<sup>181</sup> *Kapp*, *supra* note 53 at para 25.

<sup>182</sup> For an extended discussion, see SHEPPARD, C., *Litigating the Relationship between Equity and Equality*, Study Paper (Toronto: Ontario Law Reform Commission, 1993).

<sup>183</sup> *Ibid* at para 40.

<sup>184</sup> *Ibid* at para 41.

<sup>185</sup> For an analysis of why s. 25 of the Charter should have been relied on by the Court in this case, see McCUE, J., “Kapp’s Distinctions: Race-Based Fisheries, the Limits of Affirmative Action for Aboriginal Peoples and Skirting Aboriginal People’s Unique Constitutional Status Once Again” (2008) 5:1 *Directions* 56 at 60.

<sup>186</sup> *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 [*Cunningham*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7952/index.do>.

<sup>187</sup> *Ibid* at para 3.

<sup>188</sup> *Ibid* at para 49.

program were challenging the law or program.<sup>189</sup> Two aspects of a provincial pay equity scheme were alleged to discriminate on the basis of sex. The majority concluded that the pay equity scheme did indeed result in gender-based discrimination.<sup>190</sup> However, the Court rejected reliance on s. 15(2) by the government.

## FRAME 18

**Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux (2018)**

*In the case before us ... the argument is that parts of an ameliorative scheme violate s. 15(1) because they have a discriminatory impact on women, the disadvantaged group the scheme was intended to benefit. Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect and there is no jurisprudential support for the view that it could do so.*<sup>191</sup>

*Justice Rosalie Silberman Abella*

In the majority's opinion, s. 15(2) should be limited to cases where an equity program is challenged by someone excluded from the program, (i.e. in cases where equity initiatives are being critiqued as "reverse discrimination"). Three justices took a different view, finding that s. 15(2) should be understood to support "the implementation of measures to combat systemic discrimination."<sup>192</sup> Accordingly, in their view, since the Quebec government was endeavouring to remedy systemic pay inequities, "the entire Act should be protected from s. 15(1) challenges."<sup>193</sup>

<sup>189</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 SCR 464 [*Alliance du personnel professionnel*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17077/index.do>; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 SCR 522 [*Centrale des syndicats*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17078/index.do>.

<sup>190</sup> In *Centrale des syndicats*, for example, women in workplaces without male comparators were delayed in accessing pay equity. As Justice Abella notes at para 29, "...since women in workplaces without male comparators may suffer more acutely from the effects of pay inequity precisely because of the absence of men in their workplaces, these categories single out for inferior treatment the group of women whose pay has, arguably, been most markedly impacted by their gender. So the categories set up by ... the Act draw distinctions based on sex both on their face — that is, by their express terms — and in their impact." The Court nonetheless concluded that the violation was a reasonable limit pursuant to section 1 of the Charter. In a concurring opinion, three justices found that there was no sex discrimination.

<sup>191</sup> *Alliance du personnel professionnel*, *supra* note 189 at para 32.

<sup>192</sup> *Ibid* at para 110, (Opinion of Justices Côté, Brown & Rowe).

<sup>193</sup> *Ibid*. As noted in footnote 177, the majority relied on s. 1 rather than s. 15(2) in *Centrale syndicat* to uphold infringements on equality. Chief Justice McLachlin was the sole dissenting justice in this case; she would have struck down the provision. In *Alliance du personnel professionnel*, the majority found that the legislative provisions violated s. 15(1), and that they were not protected by s. 15(2), nor justified under s. 1 of the Charter.

## IV. The Concepts of Equality and Non-Discrimination: Limits, Complexities and Grey Areas

If modern Canadian human rights law and thought have substantially advanced fundamental rights and freedoms over the last decades, those advances have proceeded with an evolving understanding that even such cherished principles as equality are not absolute. This section generally explores how Canadian law balances and limits equality when it intersects with other rights or compelling societal interests. I also discuss selective grey areas and summarize questions and concepts that my scholarship pursues in Canada's quest for modern equality.

### IV.1. Selective Insights from the Author's Scholarship

Much of my own research and scholarship explores potential responses to significant challenges facing equality law. In this subsection, I highlight four themes from my research: (i) the need to elaborate an inclusive conception of equality; (ii) understanding systemic discrimination through a multi-layered analysis, (iii) integrating the legal norm of equality into everyday institutional decision-making processes, and (iv) situating equality within shifting regulatory paradigms.

#### IV.1.1. Towards Inclusive Equality

While the shift from formal to substantive equality constituted a major step forward towards a more robust protection of rights, the focus on equitable outcomes risks overlooking the very processes that contribute to inequality and its reproduction. To minimize the risk, I propose a legal concept of inclusive equality that emphasizes the substantive dimensions of inequality and its procedural dimensions.<sup>194</sup> Inclusive equality, in my view, demands probing study of both equitable substantive outcomes and the institutional and societal processes that either enhance or undermine equality.

Building upon commitments to substantive equality, inclusive equality prompts an inquiry into both the actual realities and conditions of inequality and the social, political and institutional processes that account for its reproduction.<sup>195</sup>

In my 2010 book, *Inclusive Equality*, I outline legal recognition of both substantive equality and systemic discrimination in the Canadian context, and then elaborate the relational processes that either erode or have the potential to reinforce social and institutional equality. I endorse an empowering conception of caring relations and greater participatory democracy in the institutions of everyday life.

Inclusive equality embraces the lessons of both substantive equality and systemic discrimination. It highlights the ways in which inequality is linked to both the substantive effects of discrimination (including social, psychological, physical, and economic harms) and the systemic and institutional practices and processes that reproduce it. These include procedural inequities such as failure to consult or investigate the possibilities of accommodation, exclusion of historically disadvantaged

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<sup>194</sup> The concept of inclusion has been an important dimension of political and social mobilization for equality, particularly for those advocating for the rights of persons with disabilities: see e.g., "Nothing about us without us" slogan, James I Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (Berkeley: University of California Press, 2000). I suggest its relevance to how we conceptualize constitutional equality.

<sup>195</sup> SHEPPARD, *Inclusive Equality*, *supra* note 38 at 9.

groups from decision-making, lack of democracy, and absence of relationships of care.<sup>196</sup>

There are interesting parallels between my suggested incorporation of an inclusive conception of equality into Canadian law with the work of other legal scholars, who identify democratic participation and voice as important indicators of substantive equality.<sup>197</sup> Such an approach also draws on the insights of scholarship outside of law, whose conceptions of justice include concerns with recognition, redistribution and representation.<sup>198</sup>

#### **IV.1.2. Systemic Discrimination as Multi-Layered Concept**

My vision of inclusive equality leads my scholarship to conceive, understand and address significant and entrenched inequalities such as those perpetuated by systemic discrimination. There is growing public concern and engagement regarding the systemic dimensions of discrimination. No longer does it suffice to understand discrimination as an aberrant phenomenon resulting from the intentional misconduct of individual wrongdoers. Rather, the realities of group-based inequalities and discrimination are much more pervasive, embedded in facially neutral institutional rules and policies, and linked to historical patterns of exclusion and disadvantage in society. In exploring the meaning of systemic discrimination, I urge us to do so through a multi-layered analysis from the individual, to the institutional, to the societal level – that is, through a micro, meso, and macro analytic lens.<sup>199</sup>

Micro-level discrimination is caused by individuals in their everyday interactions with others – in the workplace, in educational institutions, in public services (i.e. policing). It may take the form of harassment, bullying, mistreatment, undervaluing or exclusion of individuals based on their membership in certain groups in society. The power of individuals to discriminate is often integrally connected to their position, authority, power or privilege within institutions. When these individual acts of discrimination are pervasive in an organization, they become systemic.

The meso/institutional level concerns the panoply of policies, rules, power structures, culture and norms within which individual interactions take place. Anti-discrimination law in Canada recognizes that seemingly neutral institutional rules, policies, laws or practices may have discriminatory effects on specific groups protected in human rights laws. Often the

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<sup>196</sup> *Ibid* at 147. See also, *Fraser, supra* note 169 at para 76, where the Supreme Court of Canada recognizes how discrimination may result in economic disadvantage/exclusion, social exclusion, political exclusion, physical and/or psychological harm, citing Sheppard, *Inclusive Equality, ibid* at 63.

<sup>197</sup> FREDMAN, S., "Substantive Equality Revisited" (2016) 14.3 *International J Con Law* (I.Con) 712. See also, COLLINS, H., "Discrimination, Equality and Social Inclusion" (2003) 66 *Mod L Rev* 42.

<sup>198</sup> See FRASER, N., *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2010). See also, LESSARD, H., "Book Review: Inclusive Equality: Relational Dimensions of Systemic Discrimination In Canada, by Colleen Sheppard" (2011) 49:1 *Osgoode Hall LJ* 159, online: [digitalcommons.osgoode.yorku.ca/ohlj/vol49/iss1/6](https://digitalcommons.osgoode.yorku.ca/ohlj/vol49/iss1/6). I have also sought to apply this framework to Indigenous peoples and self-governance: see SHEPPARD, C., "Jordan's Principle: Reconciliation and the First Nation's Child" (2018) 26:4 *Constitutional Forum* 3.

<sup>199</sup> See SHEPPARD, C. and SHEPPARD-JONES, K., "Comprendre la discrimination systémique", *Le Devoir* (2018), online: <https://www.ledevoir.com/opinion/idees/536633/comprendre-la-discrimination-systemique>. See also, SHEPPARD, C., THERMITUS, T. & JONES, D. "Understanding How Racism Becomes Systemic", *The Globe & Mail* (24 July 2020), online: <https://www.theglobeandmail.com/opinion/article-understanding-how-racism-becomes-systemic/>; Sheppard, *Inclusive Equality, supra* note 38, c 3. See also, SHEPPARD, C., "Theorizing the Context of Justice" in GENDREAU, Y., ed, *Developing Law with Doctrine* (Thémis: Université de Montréal, 2006) 31-57; SHEPPARD, C., "Systemic Discrimination and Gender Inequality: A Life-cycle Approach to Girls' and Women's Rights" in MENDES, E.P. & SRIGHANTHAN, S., eds, *Confronting Discrimination and Inequality in China* (Ottawa: University of Ottawa Press, 2009) 232.

discriminatory effects are unintentional; still, they exclude and discriminate. When this is the case, we often talk about discrimination that is systemically embedded in institutions.<sup>200</sup>

But institutional policies and practices do not operate in isolation from the larger society. That which occurs inside an organization is deeply connected to the conditions and realities outside of an institution. For example, what happens in the family affects workplace equality or inequality; educational histories affect professional opportunities. And these effects occur over an individual's lifecycle (i.e. gender-based wage discrimination increases the incidence of poverty amongst elderly women) and across generations. Institutional inequalities are also deeply affected by broader public policies.

Thinking about discrimination from a systemic perspective, therefore, requires us to connect and address individual acts of discrimination (the micro), discrete institutional policies and practices that exclude or disadvantage (the meso) and the larger political and structural context (the macro).

### **IV.1.3. Informal Law, Legal Pluralism and Institutional Change**

Connecting formal equality norms to informal institutional practices and policies provides an important means for advancing equality without recourse to courts or tribunals.<sup>201</sup> Rather than relying exclusively on retroactive complaints processes, I maintain that it is critical to assess the potential for integrating or mainstreaming equality concerns into the processes of decision-making in organizations, such as workplaces or educational institutions. In theorizing this potential shift, I have drawn on the scholarship of legal pluralism to examine how informal legal norms and practices are embedded in non-state institutions.<sup>202</sup> Doing so touches what has been called "second generation discrimination."<sup>203</sup> Integrating legal norms of equality and non-discrimination into the policies, practices and decision-making processes of the institutions of everyday life has been increasingly recognized as essential to their effective realization. For instance, an ongoing research project examines how evolving workplace norms, processes and evolving policies on mental health information violate or advance workers equality and privacy rights.<sup>204</sup>

In exploring how we can promote more equitable institutional policies and practices without recourse to retroactive complaints or external tribunal or court rulings, however, it is important to recognize both the strengths, as well as some of the risks of this approach.<sup>205</sup>

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<sup>200</sup> SHEPPARD, C., « Contester la discrimination systémique au Canada: Droit et changement organisationnel », (2018) 14 *La Revue des droits de l'homme* 1, [« Contester la discrimination systémique »] online: <https://journals.openedition.org/revdh/4161>.

<sup>201</sup> *Ibid.* See also SHEPPARD, C., "Equality through the Prism of Legal Pluralism" in PROVOST, R. & SHEPPARD, C., eds, *Dialogues on Human Rights and Legal Pluralism* (New York: Springer Press, 2012) 129; SHEPPARD, C., "Reducing Group-based Inequality in a Legally Plural World" (2010) Oxford University CRISE (Centre for Research on Inequality, Human Security and Ethnicity) *Working Paper No 75*, online: <https://assets.publishing.service.gov.uk/media/57a08b39ed915d3cfd000be8/workingpaper75.pdf>.

<sup>202</sup> SHEPPARD, C., "Equality Rights and Institutional Change: Insights from Canada and the United States" (1998) 15:1 *Arz J Intl & Comp L* 143 (integrating insights from Sally Engle Merry, "Legal Pluralism" (1988) 22:5 *Law & Soc'y Rev* 869).

<sup>203</sup> STURM, S., "Second Generation Employment Discrimination: A Structural Approach" (2001) 101:3 *Columbia L Rev* 458.

<sup>204</sup> See JONES, D.J. & SHEPPARD, C., "Human Rights at Work: Mental Health Privacy & Equality in the Workplace", (forthcoming 2021).

<sup>205</sup> See SHEPPARD, C., "Institutional Inequality and the Dynamics of Courage" (2013) 31:2 *Windsor YB of Access to Justice* 103; SHEPPARD, C., "Inclusion, Voice and Process-based Constitutionalism" (2013) *Osgoode Hall LJ* 547; SHEPPARD, C., "Constitutional Equality and Shifting Conceptions of the Role of the State: Obstacles and

Seeking to incorporate the norms of equality into institutional practice complements rather than displaces reliance on formal law and litigation. Both strategies are important and often connected.<sup>206</sup>

#### IV.1.4. Equality Law: Shifting Regulatory Approaches

Inclusive equality also enables my exploration and analysis of the intersection between legal theories of equality, social governance and shifting regulatory approaches. Once we realize that our legal conceptions of constitutional equality may not always synchronize with dominant political conceptions of equality rights, it frees us to think critically about equality at the frontiers of political and legal theory.<sup>207</sup> For instance, at the historical moment when the courts began articulating a substantive conception of equality, we were witnessing the emergence of neo-liberalism in the political sphere. Substantive equality aligns best with the philosophy of the post World War II social welfare state, whereby governments assume an important role in securing equitable social and economic conditions and outcomes.<sup>208</sup> It is in tension with neo-liberal principles that prioritize privatized responsibility for social and economic well-being and promote individualism rather than social solidarity. I, therefore, advise courts to be attentive to the political contexts and philosophies within which their decision-making responsibilities occur and to recognize how they may shape the tenor and content of legal argumentation.

In "Mapping Anti-discrimination Law onto inequality at Work,"<sup>209</sup> I also highlight how the expansion of the legal meaning of discrimination prompted shifting regulatory strategies for redressing and preventing it. Recognition of adverse effects discrimination and systemic discrimination prompted the emergence of more proactive regulatory techniques aimed at delegating to institutional actors the legal responsibility for identifying, redressing and preventing discrimination.<sup>210</sup>

Beyond efforts to regulate institutions, the broader structural and systemic dimensions of discrimination require inter-sectoral and inter-generational initiatives. These law reform initiatives often take the form of specific sectoral initiatives. In the domain of work, for example, I have observed a convergence between the normative objectives of anti-discrimination law and those of proactive and sector-specific labour laws. For example, enacting regulatory requirements that domestic workers be paid in accordance with the minimum wage redresses historical pay inequities that disadvantaged racialized women disproportionately.

As protection against discrimination in the workplace expands to encompass the systemic and structural sources of exclusion and disadvantage, moreover, a

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Possibilities" (2006), 33 *Supreme Court L Rev* (2d) 251 ["Constitutional Equality"]; also published in RODGERS, S., MCINTYRE, S. & EBERTS, M., eds, *Strategizing Systemic Inequality Claims: Equality Rights and the Charter* (Toronto: Lexis-Nexis, 2006) 251 (exploring the problem of institutional resistance to change). See also, SHEPPARD, C., « Contester la discrimination systémique », *supra* note 200.

<sup>206</sup> See SCOTT, J. & STURM, S., "Judges as Courts as Catalysts: Re-thinking the Judicial Role in New Governance" (2007) 13:3 *Columbia J European L* 1, online: <http://www2.law.columbia.edu/ssturm/pdfs/Courts%20as%20Catalysts%20-%20%20Rethinking%20the%20Judicial%20Role%20in%20New%20Governance.pdf>.

<sup>207</sup> SHEPPARD, C., "Inclusive Equality and New Forms of Social Governance" (2004), 24 *Supreme Court L Rev* (2d) 1; SHEPPARD, "Constitutional Equality", *supra* note 205. See also, SHEPPARD, C., "Bread and Roses": Economic Justice and Constitutional Rights" (2015) 5:1 *Oñati Socio-legal Series* 225.

<sup>208</sup> SHEPPARD, Inclusive Equality, *supra* note 38 at 52.

<sup>209</sup> SHEPPARD, C., "Mapping anti-discrimination law onto inequality at work: Expanding the meaning of equality in international labour law" (2012) 151 *Intl Labour Rev* 1-19 [Mapping anti-discrimination law].

<sup>210</sup> See also SHEPPARD, « Contester la discrimination systémique », *supra* note 200.

convergence has occurred between anti-discrimination law, on the one hand, and other legal and policy initiatives to reduce class-based socio-economic inequality and poverty, on the other.<sup>211</sup>

I explore, therefore, “how a broadening of the legal meaning of discrimination converges with an expanding understanding of international labour law and, more broadly, with growing concerns about socio-economic inequality globally.”<sup>212</sup>

While my scholarship has addressed a range of challenges to contemporary equality law, so too has Canadian equality law continued to grapple with the limits of equality in diverse contexts.

## IV.2. Equality versus Fundamental Freedoms

An important area of equality law which has been a source of significant controversy concerns conflicts between equality and other fundamental rights and freedoms. In the Canadian context, these conflicts have most often implicated the relationship between equality rights and the fundamental freedoms of expression and religion, as well as constitutional protections for due process in criminal cases. While the Court has rejected a hierarchy of rights approach,<sup>213</sup> it has emphasized the need to balance equality with the protection of other rights and freedoms, taking into consideration the contextual realities at issue.<sup>214</sup> There are three primary legal mechanisms for balancing rights and freedoms: (i) the reasonable limits clause of the *Canadian Charter* and the parallel provision in the *Quebec Charter of Human Rights and Freedoms*; (ii) integrating efforts to accommodate conflicting rights and freedoms in the trial process; and (iii) incorporating a balancing approach into the judicial review of administrative discretion.<sup>215</sup>

### IV.2.1. Balancing based on Reasonable Limits Clauses

Section 1 of the *Canadian Charter of Rights and Freedoms* states that the rights and freedoms guaranteed in it are subject to “reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society.”<sup>216</sup> Pursuant to the doctrinal test for applying this balancing provision set out in the *Oakes* decision, the government must prove that it is pursuing a pressing and substantial objective and that the means are proportionate to achieving that objective.<sup>217</sup>

In some cases, equality rights may be limited to advance other important societal interests, rights or freedoms.<sup>218</sup> In cases involving the infringement of other fundamental freedoms or legal rights, however, the protection of equality may emerge as a justification for *Charter* violations. Section 1 of the *Charter*, therefore, may function to protect equality in the face of constitutional violations of other fundamental rights or freedoms. One of the most well-known

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<sup>211</sup> SHEPPARD, “Mapping anti-discrimination law”, *supra* note 209 at 2.

<sup>212</sup> *Ibid* at 3.

<sup>213</sup> *R v. Mills*, [1999] 3 SCR 668, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1751/index.do>.

<sup>214</sup> See *Edmonton Journal v. Alberta (AG)*, [1989] 2 SCR 1326 [*Edmonton Journal*] (per Wilson J), online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/555/index.do>.

<sup>215</sup> For an excellent overview of conflicting rights and freedoms in the statutory domain, see Ontario Human Rights Commission, *Balancing Conflicting Rights: Towards an Analytical Framework* (August 2005), online: <http://www.ohrc.on.ca/en/balancing-conflicting-rights-towards-analytical-framework>.

<sup>216</sup> *Canadian Charter*, s 1.

<sup>217</sup> See *Oakes*, *supra* note 51 at paras 63-71.

<sup>218</sup> See discussion in Part IV.D.(i), *below*.

examples of reliance on s. 1 to protect equality, is the case of *R v. Keegstra*.<sup>219</sup> In that case, *Criminal Code*<sup>220</sup> prohibitions on hate speech were challenged as infringements of freedom of expression. Although the Court agreed that the legislative prohibitions on hate speech violated freedom of expression, they were upheld pursuant to section 1 of the *Charter*. In applying section 1, the

Court began by citing the following passage from the *Oakes* case, where the importance of a values-based approach was articulated:

FRAME 19

**R v. Oakes (1986)**

*The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, **commitment to social justice and equality**, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.*<sup>221</sup>

Chief Justice Brian Dickson

Additionally, the Court underscored the need to adopt a contextual approach, which was outlined in an earlier case dealing with limits on freedom of expression.

FRAME 20

**Edmonton Journal v. Alberta (AG) (1989)**

*The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.*<sup>222</sup>

Justice Bertha Wilson

Applying this value-based contextual approach, the majority in *Keegstra* concluded that the infringements on freedom of expression were justified pursuant to s. 1. Equality was central to the Court's analysis.

FRAME 21

**R v. Keegstra (1990)**

*In light of the Charter commitment to equality, and the reflection of this commitment in the framework of s. 1, the objective of the impugned legislation is enhanced insofar as it seeks to ensure the equality of all individuals in Canadian society. The message of the expressive activity covered by s. 319(2) is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is*

<sup>219</sup> *R v. Keegstra*, *supra* note 54.

<sup>220</sup> *Criminal Code*, RSC 1985, c C-46, s. 319(2).

<sup>221</sup> *Oakes*, *supra* note 51 at para 64, cited with approval in *Keegstra*, *supra* note 54 at 736.

<sup>222</sup> *Edmonton Journal*, *supra* note 214 at 1355-1356 (per Wilson J). For an analysis of Madame Justice Bertha Wilson's contributions to the Court, see SHEPPARD, C., "Feminist Pragmatism in the Work of Justice Bertha Wilson" (2008) 41:1 *Supreme Court L Rev Osgoode's Annu Const Cases Conf*, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol41/iss1/6>.

therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.<sup>223</sup>

Chief Justice Brian Dickson

In addition to referencing s. 15 of the Charter in terms of equality, the Court also noted the importance of s. 27 of the Charter, which requires that the Charter be interpreted in light of the multicultural nature of Canadian society.<sup>224</sup>

A recent example, *Saskatchewan (Human Rights Commission) v. Whatcott*,<sup>225</sup> concerned restrictions on the publication of hate speech in provincial human rights legislation. While the Court agreed that the fundamental freedoms of expression and religion were infringed, most of the provisions were upheld as reasonable limits to advance the equality of minority groups, in this case, the LGBTQ+ community. As the Court notes:

FRAME 22

**Saskatchewan (Human Rights Commission) v. Whatcott (2013)**

*We are therefore required to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing Charter rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings...*<sup>226</sup>

Justice Marshall Rothstein

Another recent case involving the conflict between equality and freedom of expression arose in Quebec. The *Quebec Charter of Fundamental Rights and Freedoms* contains a balancing clause similar to section 1 of the *Canadian Charter*. In the case of *Mike Ward v. Commission des droits de la personne et les droits de la jeunesse*,<sup>227</sup> the Quebec Human Rights Tribunal held that discriminatory expression, in this case against persons with disabilities, was justifiably limited to ensure robust protection of equality rights. A majority of the Quebec Court of Appeal agreed; however, the case has generated considerable controversy and has been appealed to the Supreme Court of Canada.

#### IV.2.2. Accommodating Rights to Avoid Conflicts

In some cases, two potentially conflicting rights arise simultaneously. For example, in the case of *R. v. N.S.*,<sup>228</sup> two accused persons were charged with sexually assaulting N.S. When she was called to testify, she informed the judge that as a Muslim woman, for religious reasons, she

<sup>223</sup> *Keegstra*, *supra* note 54 at 756. See also SHEPPARD, C., "The Social Values of Justice", in GUTH, D., ed, *Brian Dickson at the Supreme Court of Canada 1973-1990*, (Ottawa: Supreme Court of Canada Historical Society, 1998) 133-140.

<sup>224</sup> *Ibid*. See also the companion case *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/697/index.do>. While the majority upheld the prohibitions on hate speech, there were important dissenting reasons in the *Keegstra* case. In a subsequent decision, *R v. Zundel*, [1992] 2 SCR 731, online: [https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/904/index.do?site\\_preference=normal&pedisable=false](https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/904/index.do?site_preference=normal&pedisable=false), other provisions regarding propagating false news were not sustained under s. 1.

<sup>225</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12876/index.do>.

<sup>226</sup> *Ibid* at para 66.

<sup>227</sup> *Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres) c. Ward*, 2016 QCTDP 18, online: <http://canlii.ca/t/hq9d9>; *Ward c Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres)*, 2019 QCCA 2042, online: <http://canlii.ca/t/j3p58>.

<sup>228</sup> *R. v. N.S.*, 2012 SCC 72, [2012] 3 SCR 726 [N.S.], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do>.

wished to appear in Court wearing her niqab. The accused persons claimed that to ensure their right to a fair trial, N.S. should be required to testify without her niqab.

To address this conflict of rights, the Court began by assessing each right in turn, and then endeavoured to reconcile them to avoid a conflict between them. As Chief Justice McLachlin notes, “once a judge is satisfied that both sets of competing interests are actually engaged on the facts, he or she must try to resolve the claims in a way that will preserve both rights.” She goes on to explain that judges are required “to consider whether “reasonably available alternative measures” would avoid the conflict altogether ... We also call this “accommodation”. We find a way to go forward that satisfies each right and each party. Both rights are respected, and the conflict is averted.”<sup>229</sup>

If it is not possible to accommodate both rights and avoid the conflict, courts are required to balance the salutary and deleterious effects of protecting one or the other.

FRAME 23

**R. v. NS (2012)**

*The question is whether the salutary effects of requiring the witness to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion...*<sup>230</sup>

Chief Justice Beverley McLachlin

The Court sent the case back to the trial judge to engage this balancing framework.<sup>231</sup>

### IV.2.3. Administrative Decision-Making & the Balancing Rights

In cases involving judicial review of discretionary administrative decisions, a balancing and values-based approach has been applied. Although the Supreme Court is still somewhat divided on its precise contours, it is less structured than the standard s. 1 Charter analysis. The first case where a majority of the Court endorsed this approach to the balancing of fundamental rights and freedoms was *Doré v. Barreau du Québec*.<sup>232</sup> The case involved the freedom of expression of a lawyer who was disciplined for criticizing a judge. Rather than applying the *Oakes* framework directly, the inquiry focused on whether the administrative decision “reflects a proportionate balancing of the *Charter* protections at play.”<sup>233</sup> Nevertheless, the Court noted that there is “conceptual harmony between reasonableness review and the *Oakes* framework.”<sup>234</sup> The key question for assessing reasonableness is whether “in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives.”<sup>235</sup>

<sup>229</sup> *Ibid* at para 32 (Citations omitted), citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 878 [*Dagenais*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1204/index.do>.

<sup>230</sup> Citing *Dagenais*, *ibid* at 878; *R v. Mentuck*, 2001 SCC 76 at para 32, [2001] 3 SCR 442, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1917/index.do>.

<sup>231</sup> A similar approach is used in private litigation cases involving the common law, where the *Charter* does not directly apply. Indeed, the *Dagenais* case relied upon by the Court in *N.S.*, *supra* note 228, involved a challenge to a publication ban based on common law legal principles.

<sup>232</sup> *Doré*, *supra* note 51. See also, *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14703/index.do>.

<sup>233</sup> *Ibid* at para 57.

<sup>234</sup> *Ibid*.

<sup>235</sup> *Ibid* at para 58. See also, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17140/index.do> (upholding a provincial law society’s refusal to approve a new evangelical Christian University law program that was considered discriminatory against LGBTQ+ students.).

### IV.3. Affirmative Action and Equity Programs

As outlined above in section III.2.3, the *Canadian Charter of Rights and Freedoms* contains a specific provision designed to safeguard affirmative action initiatives (ameliorative laws, policies and programs) from constitutional challenges.<sup>236</sup> The express inclusion of s. 15(2) provided constitutional recognition of the importance of proactive group-based initiatives to redress the historical and continuing discrimination facing socially disadvantaged groups in society. The drafters of the *Charter* in the late 1970s and early 1980s were cognizant of the bitter legal battles over affirmative action in the United States and sought to avoid similar litigation in Canada.<sup>237</sup> Human rights codes across Canada also contain special exemption clauses to insulate affirmative action programs from allegations that they result in “reverse discrimination.”<sup>238</sup>

Of significance in the Canadian context was the influential *Royal Commission Report on Equality in Employment* in 1984. Justice Rosalie Silberman Abella was mandated to investigate discrimination in employment facing women, visible minorities, persons with disabilities and Aboriginal people. At the outset of her Report, she notes a preference for a new term, “employment equity” rather than “affirmative action.”<sup>239</sup> In her view, both describe, “employment practices designed to eliminate discriminatory barriers and to provide in a meaningful way, equitable opportunities in employment.”<sup>240</sup>

After reviewing the workplace inequalities facing the four designated groups, Justice Abella recommended proactive employment equity initiatives, concluding:

FRAME 24

**Royal Commission Report on Equality in Employment (1984)**

*Interventions to adjust the systems are thus both justified and essential. Whether they are called employment equity or affirmative action, their purpose is to open the competition to all who would have been eligible but for the existence of discrimination. The effect may be to end the hegemony of one group over the economic spoils, but the end of exclusivity is not reverse discrimination, it is the beginning of equality. ...*<sup>241</sup>

*Rosalie Silberman Abella, Commissioner*

The Report was influential in prompting legislative initiatives to advance employment equity at the federal level and contract compliance initiatives which reached numerous provincially regulated workplaces.<sup>242</sup>

The Supreme Court of Canada also cited Justice Abella’s Report with approval in the important case of *Action travail des femmes*.<sup>243</sup> Though the case turned on a statutory interpretive issue regarding remedies, the Court unanimously endorsed affirmative action/employment equity initiatives in this pathbreaking judgment. The Court recognized that equity initiatives,

<sup>236</sup> See *Canadian Charter*, s 15(2). See also Kapp, *supra* note 53.

<sup>237</sup> See SHEPPARD, *Litigating the Relationship between Equity and Equality, Study Paper, supra* note 182.

<sup>238</sup> *Ibid*; see Appendix of the *Study Paper*.

<sup>239</sup> Justice Abella, *Royal Commission Report on Equality in Employment, supra* note 77 at 7. As she notes at 7, “No great principle is sacrificed in exchanging phrases of disputed definition for newer ones that may be more accurate and less destructive of reasoned debate.”

<sup>240</sup> *Ibid*.

<sup>241</sup> *Ibid* at 10.

<sup>242</sup> See *Employment Equity Act, supra* note 76; *Federal Contractors Program, supra* note 81.

<sup>243</sup> Justice Abella, *Royal Commission Report on Equality in Employment, supra* note 77.

including hiring quotas, “are a rational attempt to impose a systemic remedy on a systemic problem,” outlining the key purposes of an employment equity program.<sup>244</sup>

First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless. . .

Secondly, by placing members of the group that had previously been excluded into the heart of the workplace and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping. . .

Thirdly, an employment equity program helps to create what has been termed a “critical mass” of the previously excluded group in the workplace. This “critical mass” has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of “tokenism.”<sup>245</sup>

Thus, there have been strong and unanimous endorsements of the importance of proactive equity initiatives, including, in some cases, quotas, in the Canadian context. There is fairly widespread acceptance (both juridically and socially) of the need to treat individuals from historically disadvantaged and underrepresented groups differently in order to achieve equality. While Canada has not been immune from some backlash or critiques that affirmative action constitutes reverse discrimination, the courts have endorsed an approach that views proactive ameliorative programs as important and integral to the advancement of substantive equality.

## **IV.4. Exceptions and Grounds Justifying the Non-Application of the Principles**

### **IV.4.1. The Canadian Charter and Reasonable Limits on Equality Rights**

As noted above, a conclusion by courts that a law or governmental policy violates s. 15 does not end the legal analysis. Pursuant to s. 1, rights and freedoms set out in the *Charter* are subject to “reasonable limits prescribed by law as can be justified in a free and democratic society.”<sup>246</sup> Equality is no exception. In most equality cases, however, section 1 has not been invoked. Instead, either the purposive and contextual analysis of substantive equality has resulted in the Court concluding that s. 15(1) has not been violated, or s. 15(2) has allowed for ameliorative distinctions.<sup>247</sup>

In two pay equity cases, s. 1 has been relied on to justify violations of constitutional equality. The first was *Newfoundland (Treasury Board) v. N.A.P.E.*,<sup>248</sup> where a legislative provision postponing the implementation of a gender-based pay equity agreement for government employees was upheld as a reasonable limit on s. 15 equality rights. The Newfoundland government maintained that a fiscal crisis made it impossible to implement pay equity for women workers. The Court accepted that there was a severe financial crisis in the province

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<sup>244</sup> *Action travail des femmes*, *supra* note 120.

<sup>245</sup> *Ibid* at 1143–44.

<sup>246</sup> *Canadian Charter*, s 1. See discussion above in Part IV.2.1 on the doctrinal approach to s.1.

<sup>247</sup> See e.g. *Law*, *supra* note 159, *Eaton*, *supra* note 153, *Gosselin v. Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2027/index.do>, where the Court concluded that grounds-based legislative distinctions did not violate substantive equality. See also, *Kapp*, *supra* note 53, *Cunningham*, *supra* note 186, where s. 15(2) was relied upon to sustain the constitutionality of grounds-based distinctions.

<sup>248</sup> *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 SCR 381 [N.A.P.E.], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2182/index.do>.

that justified the delay in implementing pay equity. While emphasizing that courts should be skeptical in accepting budgetary constraints as a justification for limiting *Charter* rights and freedoms, “courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.”<sup>249</sup> More recently, the Supreme Court concluded that s. 1 justified delays in securing pay equity for women workers in traditionally female workplaces where there were no male comparator groups.<sup>250</sup>

#### IV.4.2. Statutory Defences & the Duty to Accommodate

While courts and human rights tribunals have expanded the meaning of discrimination in the statutory context, they were also careful to recognize limits and defences to discrimination claims. In an important early decision, *Ontario Human Rights Commission v. Etobicoke*, two firefighters alleged that mandatory retirement at age 60 constituted age-based discrimination.<sup>251</sup> The Court agreed that there was an age-based distinction; however, the legislation allowed such distinctions provided they could be proven to be “*bona fide* occupational qualification and requirements [BFOQ/BFOR].”<sup>252</sup> Initially, the BFOQ/BFOR defences were applied exclusively in direct discrimination cases. The test set out in the *Etobicoke* case required employers to prove that the grounds-based requirement (in this case, age) was established in good faith and that it was necessary to the effective performance of the job.<sup>253</sup> In the *Etobicoke* case, the Court found that there was insufficient evidence to justify the age-based distinction.

In cases involving adverse effect discrimination, the courts developed a slightly different approach. Where a facially neutral workplace rule has a discriminatory adverse effect, the Court explained that employers or service providers may retain the rule provided it is generally necessary to the business (e.g. a Saturday work requirement). What was required, nonetheless, was reasonable accommodation to the point of undue hardship of the affected individuals.<sup>254</sup> In the *O’Malley* case, discussed above, for example, the employer failed to adduce any evidence of undue hardship and was found therefore to have failed in its duty of reasonable accommodation.<sup>255</sup>

In *Meiorin*, the Supreme Court of Canada merged these two lines of jurisprudence and articulated a unified justificatory test for a BFOR/BFOQ applicable to both direct and indirect discrimination cases. Indeed, the Court emphasized that in many cases, the line between what

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<sup>249</sup> *Ibid* at para 72.

<sup>250</sup> *Centrale des syndicats*, *supra* note 189 (McLachlin CJ dissenting). See also, discussion above at Part III.2.3.

<sup>251</sup> *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 SCR 202, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2434/index.do>.

<sup>252</sup> *Ibid* at 204.

<sup>253</sup> *Ibid*. As the Court explained at 204:

To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

<sup>254</sup> See discussion in Part III, A (ii), *below*. See discussion in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/641/index.do>; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/910/index.do>.

<sup>255</sup> *O’Malley*, *supra* note 118 at para 29.

constitutes direct versus indirect discrimination will be difficult to ascertain. Accordingly, the Court concluded that if a *prima facie* case of direct or indirect discrimination is proven, the employer may argue that the workplace policy or rule is a *bona fide* occupational qualification or requirement pursuant to the following test.

FRAME 25

**British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin) (1999)**

- (1) *that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
- (2) *that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and*
- (3) *that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.<sup>256</sup>*

Chief Justice Beverley McLachlin

In elaborating the third requirement, the Court noted that the following questions may be helpful to the analysis:

FRAME 26

**British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin) (1999)**

- (a) *Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?*
- (b) *If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?*
- (c) *Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?*
- (d) *Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?*
- (e) *Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?*
- (f) *Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?*

Chief Justice Beverley McLachlin

Of significance is the Court's concern that "[e]mployers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards."<sup>257</sup> Accordingly, the Court recognized both a substantive and a procedural dimension of the duty to accommodate.<sup>258</sup>

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<sup>256</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at para 54 [Meiorin], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1724/index.do>. For an extended analysis of the Meiorin decision, see SHEPPARD, C., "Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U." (2001) 46:2 *McGill LJ* 533.

<sup>257</sup> *Ibid* at para 68.

<sup>258</sup> See LEPOFSKY, M.D., "The Duty to Accommodate: A Purposive Approach" (1992) 1 *CLEJLJ* 1.

Despite the suggestion in *Meiorin* that the employer must prove that it is “impossible to accommodate individual employees,” further clarification of the limits of reasonable accommodation was provided a few years later in a case involving the accommodation of employees following a disability-related leave of absence.<sup>259</sup> As noted by the Court

FRAME 27

**Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ) (2008)**

*The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.*<sup>260</sup>

Justice Marie Deschamps

Despite the Court’s efforts to clarify the BFOR/BFOQ standard and tests, these legal standards still give rise to divergent applications and divided judgments.<sup>261</sup>

## IV.5. Grey Areas

Over 30 years of evolving Canadian jurisprudence and scholarship on the meaning, scope, and application of Canadian equality law commitments, have resolved several but not all leading legal issues. A number of areas in Canadian anti-discrimination law, thus, require further clarification. Included below, is a brief review of a few selective issues that continue to challenge human rights tribunals, courts, and jurists. They include evidentiary standards, the complexities of group-based categories of discrimination, socio-economic discrimination, and how we identify substantive violations of equality.

### IV.5.1. Identifying Violations of Substantive Equality

One of the most significant and positive developments in Canadian equality rights law has been the rejection of formal equality and the embrace of a substantive vision of the meaning of equality. Equality is not to be reduced to a formulaic “likes are to be treated alike” rule. Rather, equality is to be assessed in terms of equitable outcomes and the recognition of group-based differences. However, it is not always clear whether equal treatment or differential treatment advances substantive equality. If equitable outcomes are the determining factor, what outcomes must be equalized? In *Andrews*, the Court highlighted a concern with assessing whether a government law or policy perpetuates stereotypes or historical disadvantage.<sup>262</sup> The Court introduced the criterion of human dignity a decade later as a central consideration in determining infringements of substantive equality.<sup>263</sup> The indeterminacy of the individualistic concept of human dignity prompted a return to a focus on stereotypes and group-based historical disadvantage.<sup>264</sup> Such shifts, evidencing a continuing search for the meaning of substantive equality, makes it difficult to predict the outcomes in constitutional equality rights cases. The challenge of assessing violations of a substantive conception of

<sup>259</sup> *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2507/index.do>.

<sup>260</sup> *Ibid* at para 16.

<sup>261</sup> See e.g. *Stewart v. Elk Valley*, *supra* note 145.

<sup>262</sup> *Andrews*, *supra* note 148.

<sup>263</sup> *Law*, *supra* note 159.

<sup>264</sup> *Kapp*, *supra* note 53; For a good discussion of substantive equality, see *Withler*, *supra* note 167 per Justice Abella.

constitutional equality rights continues to be a significant grey area of equality law in Canada.<sup>265</sup>

#### IV.5.2. Complexity and the Group-based Categories of Anti-discrimination Law

Equality law emerged historically to redress the mistreatment accorded to individuals based on their membership in specific groups. In terms of legal protections, individuals are granted protection based on specific grounds of discrimination, like sex, race, disability, sexual orientation etc. Individual identities interface with group identities. The complexity of group-based identities, however, has become increasingly apparent. Scholars and activists have raised concerns about the “intersectional discrimination” faced by those who are members of more than one group protected by anti-discrimination law.<sup>266</sup> In addition, some individuals reject binary group-based categories and articulate new complex non-binary identities.<sup>267</sup> These challenges to the coherence of the group-based categories at the heart of anti-discrimination law mark an important grey area.

How shall Canadian anti-discrimination law respond? Important legal paths remain. Individuals, for instance, do not have to choose between pursuing separate gender or race-based claims, given the inclusion of numerous grounds in human rights laws.<sup>268</sup> Indeed, the Supreme Court of Canada has recognized the legal concept of intersectionality, noting that “there is no reason in principle, ... why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds.”<sup>269</sup> Nevertheless, the Court has yet to have the occasion to elaborate or apply the concept of intersectionality. The tendency in Canadian law continues to focus on a single grounds-based comparative approach, reinforced in many instances by the non-availability of the disaggregated data necessary to prove intersectional claims.<sup>270</sup>

Another challenge to traditional anti-discrimination law is the reality of mixed identities, where individuals do not fit into a single identity category. They may be biracial or have parents of different religious, ethnic backgrounds, or they may reject bifurcated categories, such as gender, or sexual orientation. How do courts and tribunals adjudicate anti-discrimination claims at the interstices of complex new identity categories? Biracial individuals are often subjected to race discrimination such that their claims can be addressed through existing categories of discrimination.<sup>271</sup> Similarly, expansive interpretations of gender-based

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<sup>265</sup> For a critical assessment of the Court’s constitutional equality jurisprudence, see MCINTRYRE, S. & RODGERS, S., *Diminishing Returns*, *supra* note 161.

<sup>266</sup> CRENSHAW, K., “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, (1988) 1989:1 *University of Chicago Legal Forum* 138 (article 8), online <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>.

<sup>267</sup> For a narrative account, see COYOTE, I., *Tomboy Survival Guide* (Vancouver: Arsenal Pulp Press, 2016).

<sup>268</sup> See e.g. *Canadian Human Rights Act*, *supra* note 39, s 3(1).

<sup>269</sup> *Law*, *supra* note 159 at para 94.

<sup>270</sup> See SHEPPARD, C., “Multiple Discrimination in the World of Work” (2011) *International Labour Organization Working Paper No 66* at 5. Some human rights tribunals and lower courts are beginning to apply intersectional analysis, see e.g. *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302, online: <http://canlii.ca/t/h08j7>; *Turner v. Canada (Attorney General)*, 2012 FCA 159, online: <http://canlii.ca/t/frm7l>. See generally, Ontario Human Rights Commission, “An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims”, online (pdf): *Ontario Human Rights Commission* [www3.ohrc.on.ca/sites/default/files/attachments/An\\_intersectional\\_approach\\_to\\_discrimination\\_%3A\\_addressing\\_multiple\\_grounds\\_in\\_human\\_rights\\_claims.pdf](http://www3.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination_%3A_addressing_multiple_grounds_in_human_rights_claims.pdf); IYER, N., “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 *Queen’s LJ* 179 at 184-5.

<sup>271</sup> For a complex case in the family law domain, see *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 SCR 1014, online:

discrimination would provide protection for more complex “gender identity and expression” claims. The analogous grounds in the *Charter* provide one avenue for recognizing new identities.<sup>272</sup> In the statutory domain, where the grounds are exhaustive, legislative reforms have been enacted in some jurisdictions to ensure protection for “gender identity and expression.”<sup>273</sup> Despite some interpretative innovation in this domain, most anti-discrimination law continues to view exclusion, stereotyping and remedies through traditional group-based categories.

### IV.5.3. Evidentiary Challenges

Another grey area concerns evidentiary issues. The initial burden of proof is on the plaintiff/complainant to adduce sufficient evidence to convince tribunals/courts that there is *prima facie* discrimination, based on the civil standard. Then, the burden shifts to the defendant to prove any potential defences.<sup>274</sup>

It continues to be challenging, however, for individuals and groups claiming direct, indirect or systemic discrimination to access sufficient evidence to prove their claims.<sup>275</sup> In the case of direct discrimination, employers or service providers do not publicize their discriminatory exclusions in overt ways. When indirect or adverse impact discrimination is implicated, it is often difficult to link what appears to be a facially neutral rule or policy to specific grounds of discrimination. The recent *Fraser* decision has clarified that evidence to substantiate adverse impact discrimination *may include* “evidence about the physical, social, cultural or other barriers” facing the claimant group, evidence about the impact of the impugned law or policy, and evidence establishing “clear and consistent statistical disparities.”<sup>276</sup> The precise evidence required will depend on the specific circumstances of the case.

#### FRAME 28

#### **Fraser v. Canada (Attorney-General) (2020)**

*When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.*<sup>277</sup>

*Justice Rosalie Silberman Abella*

While the *Fraser* case suggests that the Court is broadening its approach to evidence, in past cases, courts and tribunals have been quite demanding in requiring evidence of adverse effects *vis-à-vis* the specific workplace or community.<sup>278</sup> They are reticent to accept more general social context evidence as proof of discrimination in specific cases. Racial profiling, for example, may be evident in a particular police force, but courts are often reluctant to deduce

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1899/index.do>; see also: HILL, L., *Black Berry, Sweet Juice: On Being Black and White in Canada*, 1st ed, (Toronto: HarperFlamingo, 2001).

<sup>272</sup> See e.g. *Corbière*, *supra* note 178.

<sup>273</sup> See e.g. *Canadian Human Rights Act*, *supra* note 39.

<sup>274</sup> See *O'Malley*, *supra* note 118; *Bombardier*, *supra* note 141.

<sup>275</sup> For an early extensive analysis of the challenges of proving discrimination, see VIZKELETY, B., *Proving Discrimination in Canada* (Toronto: Carswell, 1987). See also *Fraser*, *supra* note 169 at paras 56-67.

<sup>276</sup> *Fraser*, *supra*, note 169 at paras 57-63. The Court noted, *ibid* at para 59, that the “weight given to statistics will depend on, among other things, their quality and methodology.”

<sup>277</sup> *Ibid* at para 63.

<sup>278</sup> See SHEPPARD, C. & CHABOT, M.L., “Obstacles to Crossing the Discrimination Threshold: Connecting Individual Exclusion to Group-Based Inequalities” (2018) 96:1 *Can Bar Rev* 1.

from this that a specific stop by a police officer was racially motivated.<sup>279</sup> The role of social context evidence in individual cases continues to challenge adjudicators and judges.

#### IV.5.4. Poverty and Socio-Economic Inequalities

One final grey area that deserves mention is the issue of discrimination on the basis of poverty or socio-economic inequalities. The enumerated grounds of discrimination in the *Canadian Charter* do not include poverty or socio-economic disadvantage. Legal protection for discrimination based on poverty or socio-economic status would, therefore, need to be accorded by interpreting these as analogous grounds.<sup>280</sup> To date, the Supreme Court has not done so. The ways in which poverty is disproportionately experienced by individuals in groups that are protected in the Charter (e.g. elderly women, racialized and immigrant communities, persons with disabilities) means that economic inequalities may be addressed using traditional grounds-based categories.<sup>281</sup> Socio-economic disadvantage is experienced as one of the effects of discrimination based on sex, race, disability, for example, rather than being protected as a separate ground of discrimination. Inequalities based on poverty and socio-economic disadvantage are protected at the interstices of other grounds of discrimination.<sup>282</sup>

Statutory human rights protections also provide very limited protection against socio-economic inequality and discrimination based on poverty. The *Quebec Charter of Human Rights and Freedoms* does include “social condition” as a ground of discrimination,<sup>283</sup> and affirms the equitable protection of social and economic rights.<sup>284</sup> Some human rights statutes provide limited protection for welfare recipients in accessing accommodation; for example, the *Ontario Human Rights Code* provides protection for “equal treatment with respect to the occupancy of accommodation” without discrimination based on inter alia “being in receipt of social assistance.”<sup>285</sup>

Canadian equality law, therefore, does not address socio-economic disadvantages or discrimination linked to poverty directly. Rather, redress for such disadvantages arise as integral dimensions of other grounds of discrimination.

#### IV.6. Have Equality Principles Been Deliberately Wrongly Applied?

Equality has been called an “elusive concept”<sup>286</sup> and the complexities of anti-discrimination law are widely recognized. Though there is considerable consensus regarding the general principles, legal concepts and definitions, applying these concepts in specific institutional and social contexts has proven challenging. It is in the application of the concepts that divergent opinions have emerged. In my view, however, these divergent opinions are not based on any deliberate wrongful application of principles; rather, there are genuine differences in judicial understanding of how various concepts should be applied. Efforts to clarify broad legal principles such as substantive equality, adverse effects discrimination, and the duty to

<sup>279</sup> For a comprehensive analysis of racial profiling in Canadian law, see TANOVICH, D., *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2005).

<sup>280</sup> See SYLVESTRE, M.-E. & BELLOT, C., “Challenging Discriminatory and Punitive Responses to Homelessness in Canada” in JACKMAN, M. & PORTER, B., eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 30.

<sup>281</sup> See SHEPPARD, “Bread and Roses”, *supra* note 207.

<sup>282</sup> Note that s 7, life, liberty and security of the person – argued as sources of social and economic rights. See dissenting reasons by Justice Arbour in *Gosselin*, *supra* note 247.

<sup>283</sup> See *Quebec Charter*, *supra* note 75, s 10.

<sup>284</sup> *Ibid*, s 39-48.

<sup>285</sup> See *Ontario Human Rights Code*, s. 2(1), online: <https://www.ontario.ca/laws/statute/90h19/v8>.

<sup>286</sup> *Andrews*, *supra* note 148 (per McIntyre J).

accommodate to the point of undue hardship, for example, continue, but the complexities of diverse institutional and social realities mean that adjudicators and judges may well arrive at different conclusions, without any deliberate attempt to subvert equality law principles.

## V. Conclusions

### V.1. The Current Situation

#### V.1.1. Are These Principles Sufficiently Protected?

The principles of equality and non-discrimination are solidly affirmed in constitutional and statutory documents in Canada. Securing effective enforcement and access to justice, however, continues to be a significant challenge. As a result, societal inequalities and institutionalized discrimination persist despite extensive legal protections. Two leading approaches to regulating and remedying discrimination have emerged in Canada over the past decades: the retroactive complaints model and proactive legislative model. Neither model has provided sufficient protection. First, with respect to the retroactive complaints-based approach (both in the statutory and constitutional domain), it has proven time-consuming, plagued with delay, and often expensive.<sup>287</sup> It is also insufficient when individual incidents of discrimination are rooted in broader institutional and societal inequalities.

The second approach to enforcement, based on proactive, legislative initiatives that require organizations to identify and remedy systemic barriers within their institutions, emerged as a response to the perceived inadequacies of retroactive complaints-based processes. Yet, even these innovative initiatives are often inadequate. Ensuring effective monitoring and accountability for institutional engagement with equality has proven difficult. Moreover, these proactive initiatives are generally limited to large organizations, with sophisticated infrastructures for advancing equality. Many of the most vulnerable individuals in our society – who face significant discrimination in their daily lives – are excluded from such institutions, including large workplaces and educational institutions.

Both the retroactive complaints model and the proactive institutional change approach are further limited to the extent that they do not address inequalities that emerge across diverse sectors of society or across the lifecycle of individual lives. For example, if children experience inequitable educational opportunities, their options for higher education and good jobs in their early adult years will be compromised. Similarly, socio-economic vulnerability across a gender or racial divide will impact poverty and life chances amongst older adults.<sup>288</sup> Yet these broader societal inequalities are difficult to address through specific anti-discrimination protections or equality rights.

#### V.1.2. Balance Between Protecting These Principles and the Public Interest

Many Canadians view the protection of equality and non-discrimination as essential to advancing the public interest in a fair, just and equitable society. There have been some instances where limits on constitutional equality rights have been justified as reasonable limits to protect other public interests.<sup>289</sup> But generally, there is not an extensive public discourse that construes equality principles as adverse to, or something to be balanced against, the public interest. Equality is widely endorsed as a principle that is integral to the public interest.

#### V.1.3. Are Exceptions Eroding or Negating Equality Principles?

Generally, the exceptions, defences and justifications in Canadian equality law have not eroded, nor rendered meaningless, the principles of equality and non-discrimination. There is a genuine commitment on the part of adjudicators and judges to applying equality law

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<sup>287</sup> ELIADIS, P., *supra* note 73. See also, SHEPPARD, *Inclusive Equality*, *supra* note 38 at 141-146.

<sup>288</sup> SHEPPARD, C., "Systemic Discrimination: A Life-cycle approach", *supra* note 199.

<sup>289</sup> See e.g. *N.A.P.E.*, *supra* note 248.

principles fairly, giving a “large and liberal” interpretation to the equality guarantees, and a more restrained interpretation to limits on those rights.<sup>290</sup> Once an equality infringement has been proved in Canadian law, shifting the burden of proof to defendants to justify the basis, content, and scope of an infringement, reinforces a concern with ensuring that limitations on rights are justified. Of course, there are cases where there has been significant divergence of opinion, with critics maintaining that the courts did not accord a sufficiently expansive definition to equality or non-discrimination, or that the exceptions were interpreted too broadly. These debates, however, simply attest to the complexities of equality law.

Against those broad working principles, one issue has emerged in recent years as a controversial threat that risks undermining equality rights and fundamental freedoms. It arises from Section 33 of the *Canadian Charter* is the so-called “notwithstanding clause.” Section 33(1) states:

FRAME 29

**Canadian Charter, Section 33(1)**

**s. 33 (1)** *Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that **the Act or a provision thereof shall operate notwithstanding a provision included** in section 2 or sections 7 to 15 of this Charter.*<sup>291</sup>

The notwithstanding clause was added during the 1980s constitutional debates in response to concerns about the constitutional entrenchment of fundamental rights and freedoms. Its addition responded to fears about moving away from a system rooted in Parliamentary supremacy towards a system where the judiciary could effectively invalidate democratically enacted legislation.

Given widespread political support for the protection of fundamental rights and freedoms, and the availability of other legal mechanisms for limiting rights (such as section 1 of the Charter), the notwithstanding clause was used very rarely for the first 35 years of the Charter's existence.<sup>292</sup> Nor has the notwithstanding clause been the focus of extensive litigation. In an early decision concerning minority language rights, the Courts took a “hands off” approach to s. 33, noting that provided all of the formal requirements for enacting legislation were met, the Court would not assess the substantive wisdom or fairness of opting out of rights or freedoms.<sup>293</sup>

Over the past few years, however, some provincial governments have been turning to section 33 in an effort to insulate legislative provisions from being scrutinized in relation to *Charter* rights and freedoms. A recent important example is Quebec's Bill 21, *An Act respecting the laicity of the State*.<sup>294</sup> Enacted in 2019, it prohibits public servants from wearing religious symbols at work and requires that no religious face coverings be worn in most circumstances while accessing government services.<sup>295</sup> Critics of the legislation maintain that the Act violates

<sup>290</sup> See *O'Malley*, *supra* note 118. See also, *Hogg*, *supra* note 37, c 36.

<sup>291</sup> Section 33(3) also limits legislative overrides to five years, at which time, they are no longer in effect and must be reenacted.

<sup>292</sup> For an overview of how section 33 has been used, see *HOGG*, *supra* note 37, c 39.

<sup>293</sup> *Ford v. Quebec (Attorney General)*, [1998] 2 SCR 712, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/384/index.do>.

<sup>294</sup> SQ c C-12, online: <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-21-42-1.html?appelant=MC>. Royal assent was received on 16 June 2019 after having been introduced in the National Assembly on 28 March 2019.

<sup>295</sup> *Ibid*, s 6, 8.

freedom of religion and discriminates against religious minorities, particularly Muslim women.<sup>296</sup> Yet, the Act explicitly includes a notwithstanding clause to limit the application and protection of rights and freedoms in both the Canadian and Quebec Charters.<sup>297</sup> For example, the Act states that it shall “have effect notwithstanding sections 2 and 7 to 15”<sup>298</sup> of the *Canadian Charter*. The Act is currently being challenged. The litigation raises critical issues, such as the grounds for and scope of governmental use of s. 33. Shall the notwithstanding clause be strictly confined to narrow, exceptional instances, consistent with the general approach of Canadian human rights laws? If not, its invocation runs a significant risk of eroding and negating fundamental equality rights to the point of rendering them meaningless in some contexts and instances.

## V.2. Approaches to Future Challenges

Canadian equality law includes significant and robust protections both in the statutory and constitutional domain. Since the 1980s, courts and tribunals have demonstrated a willingness to interpret equality guarantees broadly, shifting from the earlier formal equality paradigms to embrace substantive equality and to recognize indirect and systemic forms of discrimination.

As in many countries around the world, despite the presence of strong protections for equality and non-discrimination on paper, enforcing these rights remains the most pressing challenge. Inequality and discrimination persist in Canadian society. The disparate effects of the COVID-19 pandemic and the anti-Black racism mobilization attest to the persistence of systemic and structural inequalities in Canadian society. We need to identify effective legal responses in the face of these challenges.

Our equality law still relies extensively on retroactive litigation and individual complaints processes, which are plagued by delay, excessive costs and inequitable access to justice. The emergence of proactive legislative provisions aimed at engaging institutions in the identification and remedying of discrimination is promising, but institutional resistance or incapacity to engage in organizational change, as well as insufficient accountability and reporting mechanisms, have undermined the effectiveness of these proactive regulatory initiatives.

Additionally, given the ways in which inequalities in one sector of society are connected to those in others, and the ways in which inequality operates across our lifecycles and intergenerationally, broader legal, political and societal solutions to inequality need to be imagined. For example, equitable access to high quality, primary and high school education for children is indispensable to remedying inequalities in representation in higher education and professional programs, as well as ensuring equitable work opportunities. Equitable pay and work opportunities for women, racialized communities, and persons with disabilities are

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<sup>296</sup> See FROC, K.A. “Shouting into the Constitutional Void: Section 28 and Bill 21” (2019) 28:4 *Constitutional Forum* 19, online: [https://journals.library.ualberta.ca/constitutional\\_forum/index.php/constitutional\\_forum/article/view/29391](https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/29391); see also JONES, R., REILLY, N. & SHEPPARD, C., “Contesting Discrimination in Quebec’s Bill 21: Constitutional Limits on Opting out of Human Rights” *Canadian Race Relations Foundation* (November 2019), online: [https://issuu.com/crrf-fcrr/docs/directions8\\_bill\\_21\\_commentary\\_sheppardjonesreilly](https://issuu.com/crrf-fcrr/docs/directions8_bill_21_commentary_sheppardjonesreilly); Quebec, Commission des droits de la personne et des droits de la jeunesse, “Mémoire à la Commission des institutions de l’Assemblée nationale – Projet de loi n° 21, Loi sur la laïcité de l’État” (Quebec: 3 May 2019), online: [https://www.cdpedj.gc.ca/Publications/memoire\\_PL\\_21\\_laicite.pdf](https://www.cdpedj.gc.ca/Publications/memoire_PL_21_laicite.pdf).

<sup>297</sup> *Ibid*, s 33, 34.

<sup>298</sup> *Ibid*, s 34. Section 2 of the Charter protects the fundamental freedom of religion; s. 7 protects life, liberty and security of the person, and of course, s. 15 protects equality rights.

indispensable to ensuring their socio-economic well-being throughout their lifecycle and protecting against disproportionate poverty in certain older populations.

Canadian equality and anti-discrimination laws provide an important normative expression of the value of all human beings in society, but an abiding challenge remains. The realization of these principles demands improved access to justice, their incorporation into everyday human relations, their recognition in law reform and public policy, and active citizen engagement and mobilization towards modern democratic justice.

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This document is part of a series of studies, which, in a comparative law perspective, seek to present the principles of equality and non-discrimination in different States.

This study examines sources of equality law and judicial interpretation of the principles of equality and non-discrimination in Canada.

Contemporary equality law was a response to histories of both public and private discrimination in Canada. Statutory protections for equality and non-discrimination emerged in the post World War II era and were expanded and consolidated in the 1960s and 1970s. Constitutional reforms in the 1980s enshrined equality in the *Canadian Charter of Rights and Freedoms*. Since then, equality jurisprudence has expanded the interpretation of discrimination to include direct, indirect and systemic discrimination. Courts have rejected formal equality to embrace expansive notions of substantive equality in interpreting constitutional protections. Even with such strides over the last decades towards robust equality and non-discrimination principles and protections, just and effective implementation of their promise remains a pressing challenge for Canada.

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