
OUTLINE FOR A PRESENTATION ON WHAT THE CANADIAN
EXPERIENCE OF CONSTITUTIONALLY ENTRENCHED EQUALITY
RIGHTS COUNSELS ABOUT HOW TO PROTECT HUMAN RIGHTS

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Access to justice is not merely one aspect of a legal or political system, it is the foundational and recurring inquiry of all who have made law their life's work. Access to justice has many dimensions: substantive principles; effective remedies; structures, procedures and processes; and the availability and affordability of legal redress. Each could easily occupy us for the remainder of the day. In my remarks I would like to focus on substantive principles of equality and entitlements to economic and social rights as cornerstones of the justice to which people want access. Pronouncements on human rights issues are widely and wildly important as they articulate who we want to be as people and what we want to stand for as a nation. Courts, purposively placed above the fray of majoritarian prejudice and preference, are capable of combining moral guidance and symbolic statement with meaningful redress and norms of lawful behavior.

Canadian courts have recently begun to give content to the newly entrenched constitutional rights and guarantees in the Canadian Charter of Rights and Freedoms (the Charter). Equality seekers had, and continue to have, high expectations that *Charter* rights and freedoms will not only constrain the state, but encourage, and perhaps even compel the state to act to promote their human rights. The following observations are my personal reflections after twenty years pursuing justice for all. Ways to help ensure the full protection of equality rights and human rights include:

- 1. Take the Full Measure of the Inequality or Human Rights Issue and Determine its Causes, Costs and Consequences** - I provide further comments in Appendix A below.
- 2. Adopt, Apply and Enforce Principles of Substantive Equality** - Canada has adopted a purposive and substantive approach to equality. I have provided a list of section 15 equality cases in Appendix B.
- 3. Expand, Explore and Remain Vigilant About What Substantive Equality Means**
- 4. Economic, Social and Cultural Rights Have a Positive Rights Component and Orientation**
- 5. International Norms Must Be Used to set the Content and Contours of Human Rights, especially Economic, Social and Cultural Rights**
- 6. Remedies must be Innovative, Purposive and Effective**

¹ An apology and explanation: this text is really only the first cut at an outline for my oral remarks and is not in any sense a formal paper. An invitation to attend this symposium (which is most appreciated at any time) made at the end of October, in combination with a chronically overburdened schedule did not permit me to write a paper in the sanctity of my office. The written word has a permanency that is daunting so I must ask you to forgive these remarks of a jet lagged academic doing her own word processing on a computer she has never seen before and does not trust.

7. Constitutional Principles Must be Integrated into all Aspects of Law, including:

- a. The Interpretation of Statutes
- b. The Development of the Common Law
- c. Principles of Evidence
- d. The Eradication Myths and Stereotypes from the Fact Finding Process
- e. The Fashioning of remedies

8. Judicial Education Programs about Equality, Inequality and Social Context Issues are Necessary for Judicial Competence

APPENDIX A: Considerations when taking the Full Measure of the Inequality or Human Rights Issue and Determining its Causes and Consequences

A crucial first step is to understand the nature, extent and impacts of the inequalities and human rights infractions at issue. This cannot be an abstract undertaking. It must be centered on an assessment of how inequality impacts on people, in their words and from their lived experience. It involves facts and feelings. The legal decision maker is usually more comfortable in the realm of facts and principles but equality calls upon judges not just to listen to, but to empathize with the constraints, indignities and burdens inequality places on the human soul. This is not a call to abandon impartiality and intellectual rigor. It is however, a reminder that it is often difficult to accept how profoundly someone else's experiences may not be one's own. It requires the deepest sympathetic identification with the multiple classes of people society has constructed as "other" and an unflinching commitment to human potential.

The marshalling of facts is still very important, as long as it is recognized that individual testimony is a recognized form of evidence. Contextual decision making requires a full appreciation of the causes and consequences of social inequality. Historic and systemic discrimination must be uncovered in all of its manifestations. Apparently neutral laws, even laws touted as benevolent by those who made them, must be scrutinized for hidden bias, encoded preferences, deleterious and disadvantageous effects and unintended exclusion or devaluation.

Different types of inequality or human rights infringements require different considerations, although they all require a review of the social, political, and economic place of a group in society. For example, in Canada there have been numerous studies into the cause, costs and consequences of gender bias and sexism in the legal system.² While members of oppressed groups share exclusion and the asymmetrical allocation of society's burdens, the forms of exclusion and indicia of discrimination may vary. The issues facing women derive, in significant respects, from the ways in which they are not physically or socially like men, in particular in terms of reproductive capacities, targeting for violence and social opportunities. However, studies into systemic racism demonstrate the different ways in which race in Canada limits life choices.³ Further studies show the

² There have been more than 60 national, provincial and territorial reports, studies and articles on gender bias and the law. See for example Subcommittee on the Status of Women, Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, *The War Against Women* (Ottawa: Queen's Printer, 1991); Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System, *Gender Equality in the Canadian Justice System* (Ottawa: Dept. of Justice, 1992); *Changing the Landscape: Ending Violence - Achieving Equality*, Final Report of the Canadian Panel on Violence Against Women (Ottawa: Queen's Printer, 1993); Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993); Anne McGillvray, *Intimate Violence, Aboriginal Women and Justice System Responses: A Winnipeg Study* (Winnipeg: Manitoba Research Centre on Family Violence and Violence Against Women, 1996); *Ontario Association of Interval and Transition Houses, Report to the Special Rapporteur on Violence Against Women* (Toronto: OAITH, 1996); *Diversity and Justice: Gender Perspectives - A Guide to Gender Equality Analysis* (Ottawa: Office of the Senior Advisor on Gender Equality, 1998); Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998); Status of Women, Canada *Questions and Answers about Violence Against Women* (Ottawa: Status of Women Canada, 1998); National Film Board of Canada, *Unbalanced Scales: Gender Bias in the Justice System* (video recording) (Montreal: National Film Board of Canada, 1999).

³ There have been more than 10 studies which investigate the effects of racial bias in the Canadian legal system. See for example Western Judicial Education Centre, *Racial, Ethnic and Cultural Equity* (Vancouver: Legal Education Society of British Columbia, 1992); and Four-Level Government/African Canadian Community Working Group, *Towards A New Beginning, The Report and Action Plan of the Four-Level Government/African Canadian Community Working*

devastating impact European colonization has had on Canada's indigenous peoples.⁴ Canada's native peoples have been torn from their traditional knowledge and way of life by segregation, poverty, lack of education, poor health and medical care, and widespread alienation as manifested by drug and alcohol dependency rates, violence and suicide.

Individuals with a physical or mental disability have distinctive concerns and considerations. They require accommodation of their individual circumstances to allow equality of access. Part of this requires overcoming stereotypic notions of capacity and incapacity, but it goes further and requires the provision of benefits and services that tend not be needed by the able bodied. Ramps into doorways are not reverse discrimination against those who can walk but substantive equality for those who require them for equal access. Not only is the ramp a wonderful metaphor for what equality of result calls for, it is also actually what is physically lacking in many Canadian courtrooms. Disability rights activists describe how, even when pursuing equality or human rights claim, they often face a law building that is literally inaccessible to them. Imagine the level of trust and confidence such a plaintiff must have and the indignity of being forced into a service elevator or being hoisted by a security guard so that he or she can be physically present to make their complaint.

Studies are often done on a particular basis or for a particular purpose. For example, most of these studies focus on particular groups or classes of people, with the demarcation following the prohibited grounds of discrimination contained in the *Canadian Charter of Rights and Freedoms*. In this way the law structures our thinking, and the way equality cases are argued and resolved before the courts. However, the focus of equality and human rights needs to be on people and many individuals belong to one or more of these groups. "Intersectionality" is the legal term that tries to capture the truth that a claimant lives life whole, as a full being, but the law imposes categories upon experience. A poor black woman who cannot read and has poor health knows only that she cannot find a job; not what category of complaint is operating against her in a particular circumstance. To be responsive, inclusive and equal, the law must allow people to bring all of themselves to court- not just the part that may garner certain protections under defined categories of protected discrimination.

Group (Toronto, November, 1992); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995); *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association, 1999); *Race, Courts and Tribunals: Emerging Doctrines and Their Impact* (Toronto: Law Society of Upper Canada, 2000).

⁴ There have been more than 25 which document the concerns of the Aboriginal communities about the justice system. See for example Nova Scotia, *Royal Commission on the Donald Marshall, Jr. Prosecution: Commissioners Report: Findings and Recommendations* (Halifax: The Commission, 1989) (Commissioner: T. Alexander Hickman); Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta* (Edmonton: The Task Force, 1991); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, August 12, 1991; Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System: *Report of the National Round Table on Aboriginal Justice Issues, 1993*; *Justice For and By the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities* (Quebec: The Committee, 1995); *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996); *Contemporary Aboriginal Justice Models* (Ottawa: Canadian Bar Association, 1996); *Royal Commission on Aboriginal Peoples* (Canada: The Commission, 1996); Royal Commission on Aboriginal Peoples, *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Royal Commission, 1996); *Final Report and Recommendations of the Aboriginal Justice Implementation Commission* (Winnipeg: AJIC, 2001).

Inequality tends to compound. In this respect it has been said that if inequality is a tapestry then the common thread is poverty.

It is also important to canvass who benefits from the structures that create and continue inequality. Oppression may be a state but it is actively manufactured, assiduously maintained and explained away on any number of ingenious and sometimes even appealing bases. Inequality is often rendered invisible or made to look like something else: an intractable social problem, an issue for the politicians, the nature of things or a consequence of personal choice. This aspect of the inequality analysis is sometimes seen as more threatening. It is one thing to state that a given person is “disadvantaged”; it is more difficult to address how I may be privileged as a result of that disadvantage or to question what role I may play in structural inequality, whether as judge, lawyer, or citizen of the world.

APPENDIX B: CANADIAN CASES UNDER S. 15 OF THE CHARTER

Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143
Alberta (Human Rights Commission) v. Central Alberta Dairy Pool [1990] 2 S.C.R. 489
Robichaud v. Canada (Treasury Board) [1987] 2 S.C.R. 84
Action Travail des Femmes v. Canada (Canadian Human Rights Commission) [1987] 1 S.C.R. 1114
R. v. Turpin (1989) 48 C.C.C. (3d) 8 (S.C.C.); *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219
Tetreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 418;
Symes v. Canada, [1993] 4 S.C.R. 695
Thibaudeau v. Canada, [1995] 2 S.C.R. 627
Egan v. Canada, [1995] 2 S.C.R. 915
Miron v. Trudel, [1995] 2 S.C.R. 418
Adler v. Ontario, [1996] 3 S.C.R. 609
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624
Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358
Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 609
Vriend v. Alberta, [1998] 1 S.C.R. 493
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497
Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203
M. v. H., [1999] 2 S.C.R. 3
Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625
Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989
Granovsky v. Canada (Minister of Employment & Immigration), [2000] 1 S.C.R. 703
Lovelace v. Ontario, [2000] 1 S.C.R. 950
Little Sisters Book and Art Emporium v. Canada (Minister of Justice) (2000), 193 D.L.R. (4th) 193 (S.C.C.)
Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772
Dunmore v. Ontario (Attorney General) (2001) 207 D.L.R. (4th) 193 (S.C.C.)
Re Therrien [2001] 2 S.C.R. 3
Lavoie v. Canada, 2002 SCC 23
Sauve v. Canada (Chief Electoral Officer), [2002] SCC 68
Nova Scotia (Attorney General) v. Walsh, [2002] SCC 83
Gosselin v. Quebec (Attorney General), [2002] SCC 84
Siemens v. Manitoba (Attorney General), [2003] SCC 3
Martin V. Workers Compensation, [2003]
Trociuk v. British Columbia (Attorney General), [2003] 34