

A Charter of Rights: The Canadian Experience

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I Introduction

On 17 April 1982, Canada repatriated its constitution from the Parliament at Westminster, sweeping away one of the final vestiges of its colonial past. At the same time, a *Canadian Charter of Rights and Freedoms*¹ was entrenched, giving people express constitutional rights for the first time. The equality provisions in particular, represented a new era in Canadian constitutional law.

The intense debate leading up to the entrenchment and content of the Charter raised profound questions about the basic nature of the country, its values and its ability and willingness to acknowledge equality for women and other disadvantaged groups. For the first time, equality seekers participated in the process of constitutional renewal.² They expressed a clear desire to be full and equal citizens in Canadian society and to have their needs and aspirations translated into constitutionally recognized rights.³ As a result of the largest lobbying and participatory effort ever mounted by ordinary citizens, particularly women,⁴ very broad and comprehensive equality guarantees⁵ were entrenched in the Constitution. In addition, a specific section entrenching sexual equality as an overriding principle of the Charter was included, the intention clearly being to ensure that Canadian women would enjoy a status equal to that of Canadian men.⁶

Since the entrenchment of the *Charter* in 1982, equality seekers have continued to play a significant role through the use of litigation and other strategies, in order to clarify and develop approaches to constitutional theory and interpretation so that the *Charter's* promise of equality will be realized.⁷ They recognized that entrenched comprehensive equality rights would not achieve legal equality on their own; in order for people to become true equal bearers of rights under the *Charter*, the content of established rights and concepts must be challenged and the legal norms of existing societal and institutional structures premised on *inequality* changed.⁸

It is the author's view that the Supreme Court of Canada, to quite a remarkable degree, has recognized the egalitarian challenge the *Charter* presents. In the past few years, it has launched a promising new era for equality jurisprudence quite unique in the world. The equality theory it has developed goes far beyond that which underlies constitutional law of other western societies including Europe and the United States. It has fashioned principles

which give disadvantaged groups a better chance than ever before to alleviate the inequities they experience in laws, policies and practices of governments and government officials. This is because instead of using abstract, formal rules to analyze equality and discrimination, the Canadian Supreme Court applies a purposive, contextual approach to constitutionally entrenched equality guarantees which in turn defines their scope and purpose in terms of individuals and groups persistently disadvantaged by the legal system.

To understand fully the Canadian approach to *Charter* equality guarantees, the history of equality and discrimination law must be examined. To a large extent, the Supreme Court's interpretation of constitutional equality guarantees in the *Charter* have been informed and influenced by the lessons and themes which emerged from the common law, human rights legislation and earlier attempts at constitutional reform. In this paper I discuss the development of legal equality in Canada including pre-*Charter* recognition of concepts of equality, inequality and discrimination and post-*Charter* interpretation of constitutional equality guarantees. I also discuss the effects of the constitutional equality jurisprudence beyond constitutional law — effects which may ultimately hold the greatest promise for the achievement of social equality in Canada.

II Early Development

Equality in Canada has been an evolutionary process — a slow struggle whereby legislatures, the Parliament of Canada and sometimes the courts have incrementally responded to varying degrees of pressure to eliminate or reduce conditions of disadvantage. One of the reasons progress has been so slow is that different groups being disadvantaged in different ways often did not communicate effectively with each other and their common cause was often overlooked. In this paper the example of gender inequality is used to show how change has come about and where it may lead. Gender is the example used because women experience all the disadvantages experienced by disadvantaged groups, they comprise more than one half of the Canadian population and the women's movement in Canada has led the way in the struggle for equality.

Less than one hundred years before the enactment of the *Charter*, the social and economic position of women was dismal. Women were unable to vote, hold elected or appointed office, sit on a jury, or participate in the professions. Employment outside the home provided minimal opportunities and very low wages. If a woman became pregnant during her employment, she could be discriminated against with impunity because differential treatment on the basis of pregnancy was not considered to be discrimination on the basis of sex.⁹ At the same time, she was legally forbidden access to information and effective methods of controlling her fertility. Marriage exacerbated women's second class citizenship by removing the few rights or legal recognition single women possessed. For example, a married woman lost her own nationality and domicile upon marriage if that differed from that of her husband. In addition, the father of children of the marriage had the legal right at common law to determine their religion and education.¹⁰ Married women were unable to make wills or enter into binding contracts and lost almost complete control over their real and personal property to their husbands. The common law permitted a husband to beat his disobedient wife¹¹ and rape her without fear of punishment.¹² Even after these cruel laws were repealed, the trivialization of wife abuse continued and in many ways, persists until this day.¹³

The law regulating sexual assault presented unique barriers to the realization of women's rights to bodily security and equal right to protection and benefit of the law.¹⁴ The rules of corroboration, recent complaint, warnings to the jury regarding a woman victim's credibility, allowance of examination of the victim's prior sexual history, all treated women victims of violent assault in a gender specific, disadvantaged way.¹⁵ Until 1980, sexual harassment of women in the workplace was not even recognized as a legal issue.¹⁶ It took an appeal to the Supreme Court of Canada to determine, as late as 1989, that sexual harassment amounted to sex discrimination and that it exacerbates the systemic gender inequality that exists in the workplace.¹⁷

In the civil law of tort, the persistent disadvantage of women affects the legal recognition of legitimate lawsuits as well as measurement of compensation when they succeed in establishing their claims.¹⁸ Similarly, the civil law of contracts, specific performance and injunctions has made women's interests invisible by defining the legal principles in male terms.¹⁹

When race combines with gender, systemic disadvantage is more pronounced. Aboriginal women in Canada, for example, have been particularly singled out for adverse treatment. The Canadian version of apartheid, *The Indian Act*,²⁰ successfully denied them their cultural status, connection with family, property rights, inheritance and devolutionary rights.²¹

Canadian women have never willingly accepted legally imposed invisibility and disadvantage. History shows that they have constantly and persistently protested their inequality but lack of power or access to power impeded significant change. A watershed event however, was the 1930 decision of the Judicial Committee of the Privy Council in the 'Persons' case²² which held that the word 'persons' within the meaning of section 24 of the *Constitution Act, 1867*, included women. The narrow ratio of the case stood for the proposition that women could no longer be denied appointment to the Senate of Canada solely because of their sex. They were 'persons' as much as men were. The broader implications of the decision reached similar restrictions based on 'personhood' such that qualifications to practice law, to vote or to hold other offices were gradually removed.²³ As far as formal inequality in statutes was concerned, a victory of sorts was won. Canadian society came to recognize that formal equality for women was a desirable goal. In real terms, however, women as a group continued to be disadvantaged as compared to men. Women continued to suffer adverse treatment in employment, to be under represented in all areas of public life, to be over represented in the poverty class, and to experience disproportionate violence.²⁴

III Pre-Charter Equality Rights: The Non-Constitutional Context

(a) The Canadian Bill of Rights

In 1960, the Parliament of Canada brought the *Canadian Bill of Rights* into force. Although it does not have constitutional status, the jurisprudence developed under it had a profound impact on the shape and content of the constitutionally entrenched *Charter* guarantees of 1982, as well as judicial interpretation of them. Section 1(b) of the *Bill of Rights* addresses equality. It reads:

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 . . .²⁵

During the 1970s the Supreme Court of Canada decided ten cases under this section. In nine of the cases, the Court declined to find any breaches of 'equality before the law' or the 'equal protection of the law' guarantees. Needless to say, equality seekers were disheartened by this result. It appeared to them that the *Bill of Rights* was more of an instrument to perpetuate inequality than one to redress past inequities and promote reform. For example, the two cases which involved gender equality show how judicial interpretation of the equality provision merely served to perpetuate inequality between women and men.

In *A.G. Canada v. Lavelle, Issac v. Bedard*,²⁶ two native women challenged a section of the federal *Indian Act*²⁷ which disqualified them from claiming their Indian status if they married outside their race. The challenge was made under the sex equality guarantee of the *Bill of Rights* because Indian males who married non-Indian women did not suffer the same disqualification. Upon marrying non-Indian women, males not only retained their Indian status, they automatically conferred full Indian rights and status on their non-Indian wives and children. The effect of losing statutory Indian status meant that upon marriage to a non-Indian, women were required to leave their reserve. They could not own property on that reserve and were required to dispose of any property they may have held up to the time of marriage. They could be prevented from inheriting property and could take no further part in band business. Because their children were not recognized as Indian, they were denied access to cultural and social amenities of the community. The women could also be prevented from returning to live with their families on the reserve notwithstanding dire need, illness, widowhood, divorce or separation. The discrimination even reached beyond life — they could not be buried on the reserves with their ancestors.²⁸

When this institutionalized gender inequality was put before the Supreme Court of Canada, it found that the legislation did not violate sex equality rights. The Court interpreted the section to guarantee only procedural, not substantive, equality. It said that Indian women were not the same as Indian men and could not be compared to them. As long as all Indian women were treated the same, no violation of 'equality before the law' or 'equal protection of the law' occurred. The Court refused to consider the inherent unfairness or adverse effect of the law on women.

The second case involved pregnancy discrimination. In *Bliss v. A.G. Canada*,²⁹ the Court was asked to consider the validity of a legislated benefit provision. The *Unemployment Insurance Act*³⁰ required that before an unemployed pregnant woman could qualify for maternity leave benefits, she must have been employed for ten weeks. At the same time, qualifications were less demanding for unemployed, non-pregnant women and men. The differential treatment of pregnant women was particularly disadvantageous because women in the fifteen weeks immediately surrounding the birth were barred from receiving ordinary benefits even if they were able and willing to work.

When this inequality was challenged under section 1(b) of the *Bill of Rights*, the Supreme Court refused to strike down the discriminatory benefits provision because it could find no breach. Instead, it came to the bizarre conclusion that any discriminatory treatment of pregnant women was not discrimination on the basis of sex. Justice Ritchie, speaking for the Court stated:

Assuming the respondent to have been 'discriminated against', it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. [If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.]³¹

This very restrictive definition of discrimination confined judicial scrutiny to the protected criteria of sex as a totality in itself without considering its components or consequences. (The parallel application in race and disability contexts would prohibit discrimination against the blind or against Sikhs, but would not prohibit discrimination against guide dogs or the wearing of turbans.)³² The Court further reasoned that the legislation conferred a special *benefit* for a *voluntary* condition.³³ Any benefits or positive rights conferred by statute were not subject to the equality provisions of the *Bill of Rights*.

The Court in both *Lavell* and *Bliss*, embraced the view that the meaning of the right to be free from discrimination was freedom from negative rights. Its scope was not broad enough to include positive rights such as the right to enjoy an equal share of society's benefits. Both cases had a considerable impact on Canadian women. Not only did it teach them that courts were not particularly sympathetic to women's equality claims, it made them realize that any future constitutional provisions addressing equality would have to contain broader and clearer substantive protection in order for real equality or even a semblance of real equality to be achieved.

(b) Anti-Discrimination Statutes

From the early 1950s, Canadian provincial legislatures and the federal government recognized the need for comprehensive legislation prohibiting discrimination. The earliest Acts dealt with fair employment practices³⁴ but soon fair accommodation practices were legislated as well.³⁵ But prior to the 1960s and 1970s, anti-discrimination legislation was piecemeal, uncoordinated and placed the whole emphasis of promoting equality upon individual victims of discrimination.³⁶ The result was that victims of discrimination rarely complained and very little enforcement was achieved.³⁷

The situation improved once provinces began to consolidate and strengthen non-discrimination statutes into human rights codes administered by human rights commissions.³⁸ The codes prohibited discrimination in a number of areas, including employment, public accommodation, commercial and dwelling units, and advertising. Legislators were of the view that the establishment of human rights commissions charged with education, administration, promotion and enforcement of human rights legislation would make discrimination a community responsibility. They thought human rights legislation would create both a general environment of equal opportunity as well as correct past inequalities. Despite these laudable intentions, the legislation did very little to advance the status of women or other

disadvantaged groups. In practice, the human rights legislation was unable to address the most serious discriminatory disadvantages.³⁹ For example, despite protection from discriminatory practices in employment and equal pay provisions, the structure of the labour market did not change. Women continued to predominate in occupational job 'ghettos' such as secretarial, nursing and teaching occupations where few men were employed. Anti-discrimination legislation could not reach wide discrepancies in pay between men and women in jobs of comparable responsibility and qualifications just as equal opportunity legislation could not require employers to provide women with comparable opportunities to men. Furthermore, anti-discrimination legislation was and continues to be based on an individual complaint mechanism. Individuals may only lodge a complaint if they can claim themselves to be or to have been the victim of a violation of a right in the statute. Only an individual woman denied a promotion or opportunity on the basis of sex could complain about widespread employment inequities. Nothing could be done for a women disadvantaged as a group by systemic institutionalized discrimination.

Another reason the legislation was ineffective was the acceptance of the 'sameness of treatment' concept of equality. Legislators assumed that if women and men were treated the same procedurally, both males and females of similar talent and motivation would achieve the same opportunities and successes. What they failed to take into account was that men do not experience long-term, wide-spread societal conditioning and systemic subordination as women do. When women's labour is confined to narrow, low valued and low paid areas of work generally unoccupied by male workers, for example, sameness of treatment will not ameliorate workplace disadvantage. This is because the situation of women workers in female job ghettos has no male basis of comparison. If there is no basis of comparison against which to prove differential treatment, the sameness of treatment definition cannot provide a legal basis for complaint.

Even if found to be 'alike', sameness of treatment as a remedy is deficient because it cannot make the necessary adjustments required to be fair. To use the now trite example of two people competing in a foot-race, the same treatment model requires that both runners start and finish the race at the same points, be equally free from any obstacles on the track and be governed by the same rules. Whether or not the runners have unequal strength, training or experience or whether one is older, disabled, or malnourished is irrelevant. Social, economic, and physical disadvantages or prejudices become invisible. The result is that sameness of treatment often has the effect of perpetuating inequality rather than curing it.

While the recognition of formal equality between individuals was an essential first step towards the achievement of legal and social equality, early experiences of equality seekers using human rights legislation made it obvious that much more was required. Equality issues arising out of women's unequal pay, their allocation to under valued work, demeaned physical characteristics, targeting for rape, domestic battery, sexual abuse as children, systematic sexual harassment, use in degrading entertainment and forced prostitution could not be addressed through a system or approach requiring sameness of treatment or male comparators to prove discrimination on the basis of gender. To address the deeply entrenched second class status of women, it became clear that a markedly different approach was needed.⁴⁰

In the late 1980s some human rights statutes were amended to address certain systemic inequalities⁴¹ but more importantly, a series of decisions of the Supreme Court of Canada indicated that courts wanted to put substantive meaning into human rights guarantees. The

first major step was taken when provincial anti-discrimination legislation addressing private discrimination in access to employment, accommodation and services and facilities, was interpreted. The case involved unintended discrimination on the basis of religion. In defining 'discrimination', the Supreme Court of Canada said in addition to differential treatment with intent, it also included unintended effects of neutral practices.⁴² Later, the Court extended the concept of discrimination to say that notwithstanding formal, equal treatment, if neutral laws had an unintended, adverse effect on protected groups or individuals they may be discriminatory.⁴³ A further development occurred when the Court held that in order to prove discrimination, it was not necessary for the complainant to compare himself or herself with a more favoured group,⁴⁴ thus opening up many old but previously unchallenged systemic problems to scrutiny. Greater weight was given to human rights laws in another decision where the Court held that such laws are 'quasi-constitutional' in nature and, that while they may not have the same overriding authority as a constitutional provision, they have a natural primacy over other laws.⁴⁵ The Court also set out the purposive method of interpretation as the appropriate general approach to human rights interpretation. J. McIntyre, for a unanimous Court in the *O'Malley* case stated:

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . . and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary — and it is for the courts to seek out its purpose and give it effect.⁴⁶

On the remedial side, the Court recognized that affirmative action is sometimes necessary to cure systemic discrimination.⁴⁷ Acknowledging that discrimination is not always a wrong against an individual, the Court said when a whole group is wronged, the remedy must give full recognition of the group right not to be discriminated against.⁴⁸ The Court further decided that anti-discrimination legislation requires employers to reasonably accommodate employee needs, to avoid being found in violation of the law.⁴⁹ To emphasize that the purpose of human rights laws is to provide effective remedies to those who are discriminated against, the Supreme Court used a sexual harassment case to establish the principle that employers are vicariously responsible for discriminatory acts of their employees. It said interpretations of the law which undermine its capacity to effectively redress discrimination should be avoided.⁵⁰ In summary, all of these judge-made principles — repudiation of same treatment as the definition of equality, the focus on equality of outcome, the contextual, purposive approach to decision-making and the requirement of effective remedies — indicated that in the context of human rights legislation, the Supreme Court set out to create a new substantive approach to equality rather than a procedural one.

IV. The Canadian Charter of Rights and Freedoms

In the early 1980s, the prospect of a new *Charter of Rights* provided an opportunity for women and others to advance their constitutional interests beyond the formal equality constraints imposed in the jurisprudence established under the *Bill of Rights*. After a massive lobbying effort, two sections relevant to sex equality were incorporated into the *Charter*. They were section 15 and section 28 which read as follows:

Section 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.

(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.

Section 28 Notwithstanding anything in the *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Insertion of the guarantee of equality 'under' the law was considered to be essential in order to avoid the result reached in the *Bliss*⁵¹ and *Lavelle*⁵² cases. It was thought that this guarantee would ensure that constitutional review would reach the substance of laws as well as their procedure. The guarantee of '*equal benefit*' of the law was proposed to overcome the *Bliss* holding which permitted Parliament to differentiate as long as a benefit rather than a burden was conferred by legislation. Women argued that *equal benefit* must also be guaranteed because under-inclusive laws denying benefits contribute to the perpetuation of disadvantage just as much as laws requiring adverse treatment.

The second equality provision, section 28, resulted because women wanted assurance that their section 15 equality rights could never be eroded.⁵³ The wording of the section makes it clear that it overrides everything in the *Charter*, arguably giving it a potency absent from section 15.⁵⁴ Because the section makes reference to all the rights and freedoms guaranteed in the *Charter*, it has a very broad application, including equality in relation to all the legal and political rights. This means it could be used to challenge freedom of expression rights in the context of pornography, bodily security rights in the context of police practices applied to wife abuse or sexual assault cases and any other gender specific laws, policies or practices of government which have the effect of diminishing women's legal or political rights compared to those of men.⁵⁵ Section 28 requires that everyone must be able to enjoy all their constitutional rights and freedoms equally, to an equal extent.

V. Judicial Interpretation of Charter Equality Guarantees

Most scholars predicted that when it came time to interpret the *Charter* guarantees, Canadian courts would be strongly influenced by their American counterparts.⁵⁶ It was thought that notwithstanding the decisions rendered under human rights legislation, Canadian courts would likely follow the American view that adverse-impact or unintended results are excluded from the definition of discrimination for the purposes of constitutional law and that the similarly situated definition of equality would be adopted.⁵⁷

Contrary to the predictions, however, the American constitutional case law was not particularly influential in Canada's highest court. Rather than ignoring its own human rights jurisprudence, the Supreme Court of Canada built upon it in the interpretation of Charter guarantees and rejected the constitutional equality jurisprudence of the U.S. courts.

The implications of this approach to constitutional equality guarantees are profound. The groundbreaking constitutional case was *Andrews v. Law Society of British Columbia*.⁵⁸ Decided by the Supreme Court in February 1989, the case arose when the Law Society of British Columbia refused to admit a landed immigrant to the practice of law for the reason that he did not meet the requirements of the *Legal Professions Act*. The *Act* stipulated that practising lawyers must be Canadian citizens. But for his nationality, Mr. Andrews was fully qualified to practice law. He brought an action to strike down the provision arguing that the citizenship requirement violated his equality guarantees entrenched in section 15 of the *Charter*.

At trial his claim was rejected. The trial judge found that although discrimination on the grounds of citizenship came within the purview of section 15, the essence of discrimination is the drawing of 'irrational' distinctions. He concluded that the citizenship requirement was relevant to the practice of law and thus did not meet the irrationality test.

The British Columbia Court of Appeal also rejected the complaint, but for different reasons. The Court adopted the 'similarly situated' test as the essential meaning of the guarantees to equal protection and equal benefit of the law.⁵⁹ It then tied this test to the meaning of 'discrimination' which was defined in terms of reasonableness and fairness. The Court said that in order to prove a breach of the *Charter* equality guarantees the onus was on the plaintiff to prove, on a balance of probabilities, that the legislative means were unreasonable or unfair. The Court then weighed the purposes of the legislation against its effects on the individual adversely affected.⁶⁰

The Court of Appeal's requirement that interests be balanced suggested a more nuanced approach than that of the trial judge which required a mere testing of distinctions on the basis of rationality. But the spectre of the Aristotelian approach⁶¹ once again determining the content of equality guarantees caused widespread concern.⁶²

The decision of the British Columbia Court of Appeal was appealed to the Supreme Court of Canada. Five important equality questions were put to the Court for the first time: the meaning of the constitutional equality guarantee; its scope; what interests it is designed to protect; the meaning of discrimination; and appropriate remedies when a breach of section 15 is found.

Ultimately, the Court struck down the citizenship requirement in the *Legal Professions Act* as a violation of section 15 equality rights. In so doing, the Court differed markedly in its analysis from both lower courts. In its discussion of equality and discrimination five fundamental principles emerged, all of which have major implications for equality under the Constitution. Summarized, the principles are as follows⁶³:

- the interests protected by section 15 must be determined by way of a generous interpretation using a purposive approach;
- the meaning of equality as sameness of treatment is rejected in favour of an effects-based approach. Intention need not be proven;
- the similarly-situated test is rejected: a finding of discrimination requires harm, prejudice or disadvantage;
- the scope of the equality guarantee is limited to the categories enumerated within the section or grounds analogous to them.

All of these themes are discussed below.

(a) The Purposive Approach

It was clear from the decision in *Andrews* that the Supreme Court wanted to make a difference for people in Canadian society who suffer real inequality.

In adopting the purposive approach, the Court rejected the use of formulaic, abstract rules to determine constitutional violations of the equality guarantee. In earlier decisions, the Court had repeatedly directed that the *Charter* be interpreted with careful attention paid to the provision's text, its legislative history, its role in a free and democratic society and its relationships to other *Charter* rights.⁶⁴ Consistent with this approach, the Court said the interpretation of section 15 specifically required an appreciation and understanding of its social and historical purpose — by the interests it was intended to protect. In other words, interests arising out of inequalities between real people rather than generic or abstract inequalities. J. McIntyre, writing for the majority, stated the purpose of section 15 in these words:

It is clear that the purpose of section 15 is to insure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.⁶⁵

At page 324, J. Wilson added:

It is consistent with the constitutional status of s.15 that it be interpreted with sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come.

Although the statements do not tell us much more than the section itself, read in the context of the entire judgment, it is apparent that the Court was adopting a broad and generous approach to the section purpose similar to that of human rights legislation.⁶⁶

(b) The Meaning of Equality and Discrimination

Addressing the constitutional meaning of equality, the Court first made it clear that sameness of treatment is not necessarily equality.⁶⁷ J. McIntyre stated:

It must be recognized at once . . . that every difference or treatment between individuals under the law will not necessarily result in inequality and, as well that identical treatment may frequently produce serious inequality.

The Court in *Andrews* rejected the view that any distinction constitutes discrimination and also rejected the view that discrimination requires the plaintiff to prove a distinction is unfair or unreasonable.⁶⁸ Its definition of discrimination drawn from human rights jurisprudence places the emphasis on the impact of the law regardless of whether there was intention to discriminate or not. The unanimous court stated that

discrimination may be described as a distinction, whether intentional or not but based upon 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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁶⁹

Rejecting sameness of treatment as the only meaning of equality is a significant departure from traditional constitutional values.⁷⁰ It amounts to a recognition that Canadian society is made up of a diversity of groups and individuals in different circumstances with different needs. The rejection is particularly significant for women. Under the 'sameness of treatment' approach discussed *infra*, when women have discrimination complaints they are always compared to men. In a male dominated society, the equality standards they are forced to accept are designed to meet male, not female needs. By contrast, the approach adopted in *Andrews*, gives women the opportunity to challenge male-defined structures and institutions that disadvantage them and to set their own norms based on their own needs and characteristics. The Court's statement that identical treatment can accentuate inequality incorporates the idea that neutral laws or policies can violate section 15 if they have a disparate impact on disadvantaged individuals or groups. This result-oriented approach expands the protective ambit of the equality guarantees under the *Charter* substantially beyond that permitted by the equal protection doctrine adopted under the Bills of Rights in both Canada and the United States.

There are more implications from a remedial perspective. When discrimination is found, an effects-based approach allows for pro-active remedial responses. Although the remedial options include striking the law or policy down, they also include reforming an unconstitutional provision to secure equality of outcomes or implementing special measures to alleviate the disadvantage it causes or exacerbates. These pro-active remedies will require

standards, rules, laws and policies of the status quo to be challenged in consideration of past, existing and future adverse effect and systemic discrimination.⁷¹ The process of pleading and proof may go some considerable way to identifying and remedying systemic disadvantage. Once this information is in the public domain, other members of excluded groups will be in a much more advantageous legal and political position to argue for better access to resources, skill, education, or employment opportunities⁷² without necessarily invoking the legal process.

In cases involving discriminatory allocation of benefits, courts may be especially inclined to adopt a 'positive' rights approach. When under-inclusive legislation is found unconstitutional⁷³ the ability to promote equality is greatly enhanced if courts extend benefits to those improperly excluded from them. On the other hand, if courts limit themselves to merely striking down unequal benefit provisions, the result in most cases will be contrary to the purpose of the equality guarantees. All that will be achieved will be a guarantee that groups or individuals have the same entitlement to no benefits. This 'dog in the manger' approach to equality produces sameness rather than equality and should be avoided when equality of result is the desired goal.

This issue arose in *The Queen v. Schachter*,⁷⁴ a case presently before the Supreme Court. The plaintiff *Schachter* is challenging the *Unemployment Insurance Act*⁷⁵ under section 15 of the *Charter* on the grounds that he, a biological father, has been denied parental leave benefits available to adoptive parents⁷⁶ and to biological mothers.⁷⁷ The Federal Court of Appeal found a breach of section 15 and also accepted the argument that striking down the parental leave provisions would not promote equality even though it would place both natural and adoptive parents in the same position. The Court held that as long as the *Act* remains in its present form, it must provide *both* natural parents with the same child care benefits available to adoptive parents. As a result, the law in Canada today is that courts have the authority to extend statutory benefits to those who have been improperly excluded from them. We await a final determination from the Supreme Court.

(c) The Rejection of the Similarly Situated Test

Perhaps the most emphatic aspect of the Court's discussion of equality in *Andrews* was in its rejection of the 'similarly situated' test, or the Aristotelian principle of formal equality.⁷⁸ In no uncertain terms, Justice McIntyre argued that the test is seriously deficient, ignores the content of the law, is tautological and could even justify Hitler's Nuremberg laws as long as all Jews were treated similarly.⁷⁹

The similarly situated test determines discrimination by starting from the proposition that: 'things that are alike should be treated alike and things that are unlike should be treated unlike in proportion to their unlikeness'. Part of the reason the Court criticized the test so harshly was because it provides no guidance as to what should follow once a finding of difference or 'unlikeness' is made. The pregnancy case referred to *infra*, makes the point. Once the Court in *Bliss*⁸⁰ determined that pregnant women workers were 'different' from men and non-pregnant women workers, there was nothing to prevent the government from treating pregnant workers in a way that disadvantaged them because of their pregnancy. The similarly situated test permitted this even if the determination of 'difference' relied solely on the subjective values, stereotypes or biases of the judges at the time. No requirement of objective rationality, certainty or fairness of treatment was required.

Another related weakness the Court identified in the similarly situated test is the way similarity is measured. When women are compared to men, their opportunity to be treated as equal is limited to the extent that they are the same as men. This superficial form of analysis severely limits and circumscribes women's equality claims. As Catharine MacKinnon noted: 'applied to women, it means if men don't need it, women don't get it'.⁸¹ Issues such as pregnancy discrimination, sexual harassment, violence against women, reproductive choice and pornography fall outside the scrutiny of constitutional equality guarantees because men, the comparators, have no comparable need and the similarly situated test is not met. There is no legal basis for complaint. In other words, many legally imposed abuses women suffer are not considered to be equality issues at all. The similarly situated theory effectively works to obscure the systemic, historically embedded disadvantaged reality of women because of the narrowness of its scope.

On the other hand, when discrimination is measured in terms of disadvantage as it was in *Andrews*, the test is applied by asking whether a claimant is a member of a 'discreet and insular minority'⁸² which has experienced persistent disadvantage on the basis of personal characteristics such as those listed in section 15. 'Persistent disadvantage' is determined contextually by examining the group in the entire social, political and legal fabric of our society.⁸³ If the measure under attack continues or worsens that disadvantage, it violates the equality guarantee. No comparator is required.

When the disadvantage test is applied to gender inequality cases, women's social subordination is recognized in terms of a sexual hierarchy with women on the bottom. This revelation adds a new dimension to constitutional equality analysis because it finally requires the law to confront the reality that women suffer from socially created inequality. The systematic abuse and deprivation of power they experience is because of their place in the sexual hierarchy. Viewed this way, the inappropriateness of the similarly situated test is obvious. The test assumes that those using it enjoy social equality and are therefore entitled to legal equality. When one is born socially unequal because of gender (or other personal characteristic) it is almost impossible to be the same, or be 'similarly situated' to the socially advantaged. If true equality or equality of result is the desired goal of constitutionally entrenched equality guarantees, the *Andrews* analysis is much more appropriate than that used under the *Bill of Rights* because the real problems of the socially disadvantaged, the inequality of power between dominant and subordinate groups, can be addressed. The similarly situated criteria, by only concerning itself with sameness and difference, remains in the realm of the abstract.⁸⁴

This is not to say that the related concept of sameness of treatment is always inappropriate. It clearly is not. History shows us that personal characteristics which make people 'different', whether that be gender, skin colour, disability, age or religion, have often put them into the categories of greatest disadvantage. In some situations, identical treatment with those who are the most advantaged will be the most appropriate and effective remedy. In other circumstances, however, different treatment may be required to alleviate the disadvantage. That different treatment will vary in each case depending upon the facts. What is most attractive and practical about the *Andrews* decision is the flexibility it offers to the measurement of equality and the ability it gives the judge to identify and remedy systemic disadvantage in a variety of different ways.

(d) The Scope of the Equality Guarantee

The decision in *Andrews* both broadened and narrowed the scope of the equality provisions. The criteria of disadvantage broadened the scope of section 15 to cover unintentional or adverse impact discrimination. On the other hand, it limited the scope of the equality guarantees in terms of standing. In other words, claims by privileged individuals or groups targeted by legislative classification will rarely succeed.

It could be said that the plaintiff in *Andrews*, a white, male, highly educated, healthy and able bodied person was not in the category of 'disadvantage'. However, the contextual approach applied to his situation as a member of the group of non-citizens, put him within a group analogous to the enumerated groups in section 15. Justice Wilson explained that non-citizens because of their lack of political power, are 'vulnerable to having their interests overlooked and their rights to equal concern and respect violated'.⁸⁵ She stressed that the question of whether a group is analogous to those enumerated must be assessed not only within the context of the challenged law, but also in the context of society generally.⁸⁶ Determining disadvantage by going outside to the legislation is very significant because any rational litigant regardless of group affiliation will always be disadvantaged by the legislation which is the subject matter of their complaint. If the Court is going to adhere to a purposive approach it must be able to determine whether or not the complaint fits into overall patterns of disadvantage and whether or not identical or differential treatment is discriminatory. Justice Wilson explained 'It is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage'.⁸⁷ An external evaluation allows the Court to ensure that those who suffer persistent disadvantage will benefit from section 15 guarantees while those with generic or abstract equality claims will have to take their complaints to some other forum.⁸⁸

VI. Implications For Women's Legal And Social Equality

At a minimum, the decision in the *Andrews* case will allow courts to hear women's stories, whether they have to do with racism, sexual violence, pregnancy, heterosexism, age, poverty, disabilities or dominance of the white culture.⁸⁹ No longer are women held hostage by abstract doctrinal rules which obliterate their reality. The constitutional approach to equality adopted by the Supreme Court provides women with an opportunity to educate the judiciary about their lives. Cases decided subsequent to *Andrews* show the promise this approach holds out.

In *Brooks v. Canada Safeway*⁹⁰ for example, the Supreme Court of Canada overturned its own decision under the *Bill of Rights* in *Bliss* that decided discrimination on the basis of pregnancy did not constitute sex discrimination. In *Brooks*, where pregnant women received disfavoured treatment, the Court said notwithstanding the fact that only women get pregnant, it was sex discrimination. They not only found it unnecessary to find a male equivalent to the condition of pregnancy, they specifically held that the disadvantage the pregnant women suffered came about because of their condition — because of their difference. In recognizing such discrimination, the Chief Justice described its invidious nature as well as its social costs:

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 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.⁹¹

Although the *Brooks* case was decided under human rights legislation, the interrelationship of human rights with *Charter* equality principles fused by the *Andrews* case suggests future possibilities of the Court's approach to constitutional equality. Certainly the tone, reasoning and language of *Brooks* is a far cry from the earlier *Bliss* case.

Another recent human rights case dealt with sexual harassment. The Supreme Court unanimously overturned a lower court's decision which had concluded that sexual harassment did not constitute sex discrimination.⁹² Similar to the *Brooks* decision, the Court rejected formalistic, sameness reasoning in favour of the approach adopted in *Andrews*. Rather than merely relying on the concept of adverse affect discrimination which could have resolved the matter, in favour of the complainants, the Court developed a much more sophisticated analysis which explained the relationship between sexual harassment and gender. C.J.C. Dickson, writing for the majority first discussed how sexual harassment has a differential impact on women in terms of the gender hierarchy of the labour force and the inherent 'abuse of both economic and sexual power'⁹³ it entails. The Court then defined sex discrimination in the manner suggested by *Andrews*:

Discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.⁹⁴

Looking at the social and economic realities of women, the disparate impact of sexual harassment and the gender hierarchy of the workforce, the Court concluded that sexual harassment amounted to sex discrimination. The lower courts' analysis which led to the conclusion that sexual harassment involved discrimination on the basis of sexual attractiveness of the victim, not discrimination on the basis of sex, was much like that in *Bliss* where discrimination on the basis of pregnancy was not considered to be discrimination on the basis of sex. The Manitoba Court also thought that sexual harassment was treatment accorded to an individual, not a group characteristic. The Supreme Court of Canada rejected these views as misconceived. It said:

While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than as the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of the individual.⁹⁵

C.J.C. Dickson went on to say the notion of sexual attractiveness, like pregnancy cannot be separated from gender.⁹⁶

The contextualized approach the Supreme Court used in *Janzen v. Platy* demonstrated sensitivity to women's perspectives. It seems the Court understood that in the context of a deeply sexist society that objectifies women's bodies and perpetuates a male-defined image of sexual attractiveness, the practice of sexual harassment cannot be separated from the unequal relations of sexual interaction that disadvantage women.⁹⁷ The Court noted with approval the view that a hostile or offensive working environment created by sexual harassment 'is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.'⁹⁸

Both the *Brooks* and *Janzen* decisions are positive and important legal victories for women in Canada. Although neither were *Charter* cases they further developed the approach to discrimination articulated in *Andrews* and revised legal doctrine which previously reflected only male defined norms. Two other important examples which show a willingness on the part of the Court to question male assumptions underlying the law are the *Morgentaler*⁹⁹ and *LaVallee* cases.¹⁰⁰

In *Morgentaler*, the *Criminal Code* legislation relating to abortion was struck down on the basis of a constitutional challenge that it violated section 7 of the *Charter* which guarantees everyone 'the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. The majority of the Court found the legislation unconstitutional because of its violation of the security of the person guarantee. However, Justice Wilson in concurring, expanded the reasoning under the liberty guarantee linking the notion of being women with the notion of being human in a way never before articulated in Canadian jurisprudence. She described the implications of an unwanted pregnancy as follows:

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman . . . It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large.

It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be a response of the whole person.¹⁰¹

She elaborated on the point by rejecting male-centred norms that influence the concept of 'liberty' because the experiences of pregnancy, birth and abortion are ones for which men have no analogy:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out . . . the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men . . . It has not been a struggle to define the

rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The rights to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.¹⁰² (emphasis added)

Although Justice Wilson did not refer to section 28 of the *Charter*, its values are implied in her judgment. Clearly if liberty and security rights are to be enjoyed equally by male and female persons, courts must interpret laws which infringe upon them in a way that is meaningful for women as women. The *Morgentaler* decision is a landmark case for future gender equality jurisprudence because it interpreted the abortion law from the empathetic perspective of the experiences, aspirations and problems of women and demonstrates how courts can begin to incorporate women's reality within the meaning of constitutional rights.

The *LaVallee* decision demonstrates the effect of *Andrews* beyond constitutional and human rights law. The case involved the criminal law of self-defence in a case of a woman who shot her partner in the back of the head as he left her room. The shooting occurred after an argument where the appellant had been physically abused and was fearful for her life after being taunted with the threat that if she did not kill him first, he would kill her. She had frequently been a victim of his physical abuse. In assessing her defence of self-defence, the Court recognized the inequities perpetuated by the 'same treatment' model of equality. Borrowing analytically from the approach adopted in *Andrew*, the Court found that the common law self-defence criteria of 'imminent danger' is gender biased when applied in the context of wife abuse.

Expert evidence of the battered wife syndrome was held to be admissible, which in turn allowed the Court to apply a woman-centered approach to the criteria of reasonableness. The Court said:

Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality.¹⁰³

The Court then extended the analysis to recognize the gender specificity of battering. In reasoning similar to that in *Morgentaler*, Justice Wilson questioned the male-defined concept of reasonableness when it is women who are the victims:

If it strains credibility to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstance which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.

In its conclusion, the Court determined that the law's traditional concept of self-defence evolved out of a 'bar-room brawl' model which comprehends only a male concept of reasonableness. In order to be fair to women and (presumably) to recognize their right to equal protection and benefit of the law, the Court reconstructed the defence. It is quite clear

from the decision that *Charter* values underlie *LaVallee* even though the *Charter* was not argued in the case.

Another example worthy of note is the Supreme Court's decision in *R v. Keegstra*.¹⁰⁴ Although not involving gender equality directly, its implications for future sex equality jurisprudence are considerable. This was a case involving a freedom of expression constitutional challenge to hate propaganda laws in the Criminal Code. The Court upheld the law, advancing an equality harm-based rationale to support the regulation of hate propaganda as a practice of inequality. The Court used section 15 in a unique way in the case. It said that not only can the constitutional guarantee be used to strike down laws which discriminate, it can also be used constitutionally to *support* laws which further section 15 values. Further, it held that the objective of promoting social equality that lies behind section 15 is relevant to the inquiry about justifiable limits on freedom of expression. The Court examined the larger social, political and legal context of the target groups protected by the hate propaganda provisions and balanced them against the free speech interests of hate mongers. In other words, the Court contemplated the social meaning of hate propaganda and uncovered its harmful effects.¹⁰⁵ Once they were revealed, the balancing of interests resulted in the establishment of equality as a pre-eminent value in Canadian society. The centrality of equality to the enjoyment of individual as well as group rights in the decision demonstrates a firm acceptance of the view that equality is a positive right, that the *Charter's* equality provision has a large remedial component and that legislatures should take positive measures to improve the status of disadvantaged groups. Most importantly, the *Keegstra* decision identifies the transformative potential in the *Charter*, a potential to achieve social change towards a society that responds to needs, honours difference and rejects abstractions.

The importance of the *Keegstra* decision to women's equality rights was borne out in the case of *R. v. Butler*, the first case to challenge obscenity laws as a violation of the freedom of expression guarantee.¹⁰⁶ Because the *Charter* issues were approached in a manner which located harm to women at the centre of the analysis, the threat pornography posed to other *Charter* values such as physical integrity and equality, was accentuated. This in turn led to the important conclusion that regulating pornography is not a question of regulating morality but rather one of regulating harm. It was argued in the case that while the harms-based approach to hate propaganda adopted in *Keegstra* was correct, pornography presents a much stronger case for regulation. The Court adopted the contextualized approach which revealed that pornography is much more commonplace, socially accepted and widely distributed across class, race and geographical boundaries than hate propaganda is and it exists in a context of social inequality. It said that the most serious risk of harm arises when the material in question presents sexual representations that degrade and dehumanize the participants, subjects them to violence, and reduces them to mere objects of sexual access. Women's experience viewed in the larger context — including rape, battery, prostitution, incest and sexual harassment — when placed beside the encouragement and promotion of women's subordination in pornography, demonstrated its undermining effects on women's social equality.

The Court logically concluded that the deeper, wider and more damaging harm to social life caused by pornography, as compared to hate propaganda, outweighs any free speech interest of pornographers or their consumers. In a society where gender inequality and sexual violence exist as entrenched and widespread social problems, criminal legislation with the objective of prohibiting material which attempts to make degradation, humiliation, victimization and violence against women appear normal and acceptable is a pressing and

substantial concern. Just as the Court said in *Keegstra*, 'Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred',¹⁰⁷ it recognized in *Butler* that Parliament promotes equality when it moves against the 'undue exploitation of sex, or of sex and one or more of the following subjects, namely, crime, horror, cruelty and violence.'¹⁰⁸

On the remedial side, the Supreme Court recently developed a potentially far reaching approach to *Charter* remedies in the case of *Shalom Schachter v. The Queen*.¹⁰⁹ Up until this decision, the extent to which courts could rewrite unconstitutional laws in order to extend benefits to those wrongfully denied them was unclear. As under-inclusive benefit schemes are a common equality problem, the decision was of major importance for women and other disadvantaged groups seeking to share in societal resources.

The facts of the case were that the plaintiff, Shalom Schachter, a biological father, wished to stay home with his newborn son so that his partner, the child's mother, could return to work. He applied for benefits under the *Unemployment Insurance Act* which provided women with 15 weeks of maternity benefits¹¹⁰ and benefits for both adoptive parents who wished to stay home with a newly adopted child.¹¹¹ The legislation did not allow for benefits for natural fathers except where the natural mother died or became disabled.¹¹²

The Unemployment Insurance Commission rejected his applications. On appeal to the Federal Court, Mr. Schachter was successful in obtaining a declaration that the benefit scheme was discriminatory, violating his s.15 equality rights on the basis of parental status.

After finding a violation of the *Charter*, the Court then turned to the question of remedies. On one hand, the government argued that the only appropriate remedy was to strike down the legislation as invalid and of no force and effect. On the other, the plaintiff argued that rather than striking the law down, the appropriate remedy was to extend the benefits to natural fathers by 'reading-in' their entitlement. The Federal Court decided on the latter proposal. This decision was upheld on appeal in the Federal Court of Appeal and subsequently appealed to the Supreme Court of Canada.¹¹³

What was at stake here was a very basic implementation question. If the purpose of the *Charter* is to promote the equality of historically disadvantaged groups,¹¹⁴ including women, it follows that remedies must be able to give effect to the purpose. If all the courts are able to do is strike down under-inclusive benefits legislation, then the remedy defeats the *Charter's* purpose. Would-be applicants wrongfully denied benefits would be reluctant to litigate their claims if success could well mean the destruction of the entire benefit scheme.

To be in compliance with the *Charter*, all the government would need do is deprive benefits to everyone equally. This would result in a kind of 'equality with a vengeance', or 'dog in the manger' litigation strategy.¹¹⁵ Such a solution not only fails to promote social equality, it renders 'equal benefit of the law' a meaningless, hollow right. The 'reading-in' remedy by contrast, is consistent with *Andrews* in the sense that its application achieves equality of result rather than mere formal equality.

In July 1992, the Supreme Court of Canada decided unanimously in favour of a flexible approach to *Charter* remedies.¹¹⁶ It said that courts have three options when a law violates the *Charter*. Depending on the circumstances of the case, a court could:

- (1) strike down the legislation;
- (2) strike down the legislation but suspend the effect of that decision to give the legislature a chance to revise the law to be consistent with the *Charter*, or
- (3) reformulate the law so that it is consistent with the *Charter*. This would be achieved either by 'reading down' (declaring the offending section of the law to be inoperative) or 'reading in' (by, for example, extending benefits in the case of an under-inclusive law).

While stressing that each case must be decided on its own merits, the Supreme Court provided guidelines to assist lower courts in assessing which of the three options is appropriate. The striking down remedy would normally be used where the purpose of a law is not sufficiently pressing to warrant overriding a *Charter* right. Where the legislative objective is pressing and substantial but the means of achieving it are not rationally connected to the objective, the Court said the legislation as a whole or the portion which fails the rational connection test should be struck down. However, if it is the case the legislation rationally furthers an important social objective but the means may be inappropriately tailored to that end, then more flexibility is permitted. Some argue that giving such remedial power to the courts usurps the role of Parliament. This is incorrect. Parliament is still supreme. The Court was careful to point out that 'reading-down' or 'reading-in' remedies are available where it is possible to fulfil the purposes of the *Charter* while minimizing judicial interference in politics. For example, if there are various policy options which could make a law constitutional, the choice should be left up to the legislature.¹¹⁷ The Court said reading in or reading down remedies could be properly employed where:

- (1) the legislative objective is clear and the remedy would further the objective or constitute a lesser interference with that objective than the striking down option;
- (2) where the means chosen are not so unequivocal that reading in or reading down would be an unacceptable intrusion into the legislative domain; and
- (3) reading in or reading down would not involve an intrusion into the budgetary sphere so substantial as to change the nature of the legislative scheme in question.

On the third point the Court emphasized that the question is not whether a court can ever grant remedies with a budgetary impact but rather whether it is appropriate in a particular case given the principles underlying the *Charter*. An example where the Court said 'reading-in' would be appropriate was that of *A.G. Nova Scotia v. Phillips*.¹¹⁸ In that case, the Nova Scotia Court of Appeal struck down a benefits provision for single mothers after it was found to violate the equal benefits right of single fathers. Both single mothers and fathers were denied welfare benefits — 'equality with a vengeance'. Clearly, extending the benefits to fathers would have been the more appropriate remedy. The Court explained that even though section 15 does not create positive obligations, the 'reading-in' remedy would have been more in keeping with the goals of section 15 and the welfare legislation in question.

On the facts of *Schachter*, the Court chose not to read-in benefits for natural fathers. The reasons cited were that it lacked a factual base, the excluded group was vast and that including them could alter the entire scheme of parental benefits. The massive financing 'reading-in' would require could also result in benefits being cut from other disadvantaged groups. As a result, the Court was of the opinion that Parliament was in a better position to evaluate the broader implications and solutions. It was also noted that Parliament had already amended the legislation to provide parental benefits to all parents, albeit on a smaller scale.

The decision in *Schachter* is significant for women. When one of the purposes of s. 15 is to overcome the effects of disadvantage, it does not make sense to interpret a remedial provision to make the applicants worse off. If courts are to safeguard and promote equality rights of women and other disadvantaged groups they must provide a strong incentive to governments to amend under-inclusive, discriminatory benefit provisions.

Furthermore, the flexible approach outlined by the Court provides parties before the courts a much broader remedial scope. By allowing the 'reading-in' option, the Court has acknowledged that the guarantee to equal benefit of the law can be a positive right. At a minimum, the decision encourages governments to provide benefits to disadvantaged groups and to be as faithful as possible within the requirements of the *Charter* to the scheme enacted by the legislature.

VII. Conclusion

Just as in *Andrews*, *Brooks*, *Morgentaler*, *LaVallee* and *Janzen and Platy*, the *Keegstra*, *Butler* and *Schachter* decisions demonstrate a re-thinking of legal concepts. The assumption that human behaviour can be generalized into natural universal laws is being challenged by an analytical approach which favours context rather than detached objectivity. Starting in human rights cases, elaborated and expanded upon in *Charter* equality cases, it is now reaching into criminal and civil law. By expanding the perimeters of the discussion, previously hidden underlying facts and issues are being exposed. The cases demonstrate that social and economic arrangements which have been taken for granted often disadvantage women in a multitude of ways. To redress past wrongs, equality principles have been taken beyond the sameness approach because the courts have begun to realize that not all individuals have suffered historic, generic exclusion on the basis of their group membership. Where barriers impede fairness for some individuals, they must be removed even if this means treating some people differently. The Supreme Court of Canada has demonstrated in a number of different cases on a number of different issues that gender equality in the Canadian context is result-oriented. Rights and duties are being allocated equitably, not simply on the basis of abstract, doctrinally stagnant principles of formal equality which thwart rather than achieve substantive equality.

This is not to say that real equality has been achieved in Canada. Far from it. What it does say is that a major stumbling-block to its achievement has been identified and a methodology developed to move toward our country's proclaimed commitment to legal and social equality. Much remains to be done but what is critically important is that women can now address, in constitutional terms, the deepest roots of social inequality of the sexes. Issues such as reproductive control and sexual violence can now be considered as sex equality issues and laws dealing with them subjected to constitutional scrutiny. The Supreme Court of Canada is the first court in the world to adopt the reality of social disadvantage as a basis for

constitutional equality analysis. It will as a result, be the first court which will have the opportunity to change it.¹¹⁹

1. *Canadian Charter of Rights and Freedoms*, Part 1, of the *Constitution Act, 1982*, being *Schedule B of the Canadian Act, 1982* (U.K.). 1982. c.11 [hereinafter *Charter*].
2. The Special Joint Committee of the Senate and House of Commons on the Constitution of Canada sat from 7 November 1980 to 9 February 1981 to hear submissions on the Constitution. Over 1,200 groups and individuals appeared before the Committee. See Issue 57 of the *Minutes of Proceedings and Evidence* for the Committee's Report to Parliament submitted on 13 February 1981.
3. Katherine J deJong, 'Sexual Equality: Interpreting Section 28' in *Equality Rights and the Canadian Charter of Rights and Freedoms*, Bayefsky and Eberts, eds., Carswell 1985, pp.493-528. See also, E. McWhinney, in *Canada and the Constitution 1979-1982*, 1982, pp.104-5.
4. Penny Kome, *The Taking of 28*, Women's Press, Toronto, 1983; Chaviva Hosek, 'Women and Constitutional Process' in *And No One Cheered*, K. Banting, R. Simeon, eds, Methusen, Toronto, 1983; L. Gotell, *The Canadian Women's Movement, Equality Rights and the Charter*, C.R.I.A.W., 1990.
5. Section 15 actually contains four equality guarantees and an affirmative action provision. It reads as follows:
 - (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.
 - (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.
6. For a discussion of the history and interpretation of s.28 see K. deJong, *supra*, note 3, pp. 494-512.
7. In *Canadian Feminism and the Law*, Second Story Press, 1991, Sherene Razack describes the history of the Women's Legal Education and Action Fund (LEAF), a Canadian group created to promote women's equality through litigation of precedent-setting cases using the sex equality guarantees in the *Charter of Rights and Freedoms*.
8. Mary Eberts, 'Sex and Equality Rights', in *Equality Rights and the Canadian Charter of Rights and Freedoms*, *supra*, note 3, p.199.
9. *Bliss v. Attorney-General of Canada*, [1979] 1S.C.R. 183; *Leier v. C.I.P. Paper Products Ltd.* (1979), cited in Tarnapolsky and Pentney, 'Discrimination and the Law', De Boo (1989) pp.8-13; *Wong v. Hughes Petroleum* (1983), 4 C.H.H.R.D./1488; *Breton v. La Société Can. des Métaux Reynolds Ltée* (1981), 2 C.H.H.R.D./532; *Nye v. Burke* (1981), 2 C.H.H.R.D./538; *C.D.P.Q. v. L'Equipe du Formulaire L.T. Inc* (1982), 3 C.H.R.R.D./1141.
10. C. Cleverdon, *The Woman Suffrage Movement in Canada*, 2nd ed., 1974 and M.E. MacLellan, 'History of Women's Rights in Canada' in *Cultural Tradition and Political History of Women in Canada*, Studies of the Royal Commission on the Status of Women in Canada #8, 1971.
11. M. Metzger, 'A Social History of Battered Women', p.59, cited in L. Macleod, *Wife Battering in Canada: The Vicious Circle*, Canadian Advisory Council on the Status of Women, 1980.
12. T. Davidson, *Conjugal Crime: Understanding and Changing the Wife Beating Pattern*, Hawthorn Books, New York, 1978; D. Russell, *Rape in Marriage*, New York, Collier, 1982.

13. K. Mahoney, 'The Legal Treatment of Wife Abuse: A Case of Sex Discrimination' course materials, Judicial Education Seminar, 1991, Western Judicial Education Center, 1362 Mathers Avenue, Vancouver, British Columbia, V7V 2K5. See also (1992) U.N.B.L.J. (in print).
14. Sheilah Martin, 'The Social Context of Sexual Violence', Course Materials, Judicial Education Seminar, 1991, Western Judicial Education Center, 1362 Mathers Avenue, Vancouver, British Columbia, V7V 2K5.
15. T.B. Dawson, 'Sexual Assault Law and Past Sexual Conduct of the Primary Witness', 1988, 2 Can. J. of Women and the Law 310; J.G. Hoskins, 'The Rise and Fall of the Corroboration Rule in Sexual Offence Cases', 1983, 4 Can. J. Fam. L. 173; L. Vandervort, 'Mistake of Law and Sexual Assault: Consent and Mens Rea', 1988, 2 Can. J. of Women and the Law, 233-309; *Sexual Assault Legislation in Canada: An Evaluation Report #2, The New Sexual Assault Offences*, Ottawa, Department of Justice, Canada, 1973; L.O. Wener, *An Examination of the New Sexual Assault Legislation*, Alberta Law Foundation, Calgary, 1985; G. Ruebsaat, *The New Sexual Assault Offences: Emerging Legal Issues*, Ottawa, Department of Justice, 1985.
16. See C. Backhouse and L. Cohen, *The Secret Oppression: Sexual Harassment of Working Women*, Toronto, Macmillan, 1978; Tarnapolsky and Pentney, *supra*, note 9. pp.8-23.
17. *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 [hereinafter Janzen].
18. K. Cooper-Stevenson, 'Past Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims' in *Equality and Judicial Neutrality*, K. Mahoney and S. Martin eds, Carswell, 1987, p.226.
19. See Christine Boyle, Book Review of *Injunctions and Specific Performance* by R.J. Sharpe, [1985] Can. B. Rev. 427.
20. R.S.C. 1970, c.1-16.
21. See Beverly Baines, *Women, Human Rights and the Constitution*, the Canadian Advisory Council on the Status of Women, 151 Sparks Street, Box 1541, Station 'B', Ottawa, Canada K1P 5R5, pp. 46-50.
22. *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.) reversing the Supreme Court of Canada in *In the Matter of Reference as to the Meaning of the Word "Persons" in Section 24 of the British North American Act, 1867*, [1928] S.C.R. 276.
23. *ibid.*, pp.186-7.
24. Mary Eberts, 'Sex-based Discrimination and the Charter' in *Equality Rights and the Canadian Charter of Rights and Freedoms*, Bayefsky and Eberts, eds., Carswell, Toronto, 1985 pp.185-6.
25. See R.S.C. 1970, Appendix III.
26. [1974] S.C.R. 1349.
27. *Supra*, note 20, s.12(1)(b) was the section challenged.
28. For a discussion of discrimination against aboriginal people generally, see Thomas P. Berger, *Fragile Freedoms, Human Rights and Dissent in Canada*, Clarke, Irwin and Company Ltd., Toronto/Vancouver.
29. [1979] 1 S.C.R. 183.
30. *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c.48, s.30(1).

- ³¹. *Supra*, note 29, pp.190-1, per Ritchie, J.
- ³². Dale Gibson, 'The Law of the Charter: Equality Rights', Carswell, 1990, p.31.
- ³³. *ibid.* This voluntarism rationale is still propounded by some as a justifiable limit on the right to equal treatment. See for example, Thomas Flanagan in the 'Manufacture of Minorities' in *Minorities and the Canadian State*, Toronto, Mosaic, 1985, p.10. For a reply, see Dale Gibson, 'Stereotypes, Statistics and Slippery Slopes: A Reply to Professors Flanagan and Knopff and other Critics of Human Rights Legislation', in the same volume, pp. 125-37.
- ³⁴. Ontario was the first jurisdiction to pass such legislation with *The Fair Employment Practices Act*, S.O. 1951, c.24. Within five years, Manitoba, Nova Scotia, New Brunswick, British Columbia and Saskatchewan adopted similar legislation.
- ³⁵. Ontario again led the way with the *Fair Accommodations Practices Act*, S.O. 1954, c.28 which dealt with equality of access to 'the accommodation, services, facilities available in any place to which the public is customarily admitted'.
- ³⁶. See Shelagh Day, 'The Process of Achieving Equality' in *Human Rights in Canada*, R. Cholewinski, ed., Human Rights Research and Education Centre, University of Ottawa, 1990, for a critique of human rights legislation and procedure. See also her paper, 'Impediments to Achieving Equality' in *Equality and Judicial Neutrality*, *supra*, note 18.
- ³⁷. *ibid.*
- ³⁸. Tarnapolsky and Pentney, *supra*, note 9, pp.14-1 to 15-1. For example, in 1962, Ontario strengthened its human rights legislation by consolidating all its non-discrimination statutes in the *Ontario Human Rights Code* administered by the Ontario Human Rights Commission, S.O. 1960-61, c.63.
- ³⁹. *Supra*, note 35.
- ⁴⁰. See Catharine MacKinnon, discussion of equality in *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, 1987, pp.23-5, 40-1, 169-70, 277-9.
- ⁴¹. Laws guaranteeing equal pay for work of equal value have been introduced in a number of jurisdictions. In Quebec and in the federal jurisdiction, equal pay for work of equal value is guaranteed in the human rights laws encompassing both public and private sectors. Ontario has pay equity legislation which requires equal pay for work of equal value applicable to private and public sector with 10 or more employees. Legislation in the Yukon, Nova Scotia, Manitoba, New Brunswick and Prince Edward Island requires pay equity for public sector employees. The provinces of Alberta, British Columbia and the Northwest Territories do not have provisions for pay equity.
- ⁴². *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, 1985, 2 S.C.R. 536 at 547.
- ⁴³. *Canadian National Railway Co. v. Canada, Canadian Human Rights Commission; Action Travail des Femmes*, [1987] 1 S.C.R. 1114 at 1138-39.
- ⁴⁴. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.
- ⁴⁵. *Supra*, note 42 at 547.
- ⁴⁶. *ibid.* at 547. This judgment built on *Ins. Corp. of B.C. v. Heerspink*, [1982] 2 S.C.R. 145, 43 N.R. 168, Lamer J., and *Winnipeg School Division No. 1 Craton*, [1985] 2 S.C.R. 150, 6 W.W.R. 166, 21 D.L.R. (4th) 1.

47. *Supra*, note 42.
48. *ibid.*
49. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.
50. *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 (sub. nom. *Robichaud v. R.*) 40 D.L.R. (4th) 577, 8 C.H.R.R. D/4326.
51. *Supra*, note 29.
52. *Supra*, note 26.
53. See C. Hosek, 'Women and the Constitutional Process' in Banting and Simeon, *And No One Cheered*, Methusen, 1983, at 295ff. and P. Kome, *The Taking of 28*, Women's Press, 1983.
54. Section 15 is subject to the s.33 override provision which allows provinces and the federal parliament under certain conditions to override the fundamental freedoms in section 2 or the rights in sections 7 to 15.
55. These section 28 arguments have been made in some constitutional cases but it is too early to tell whether or not the Supreme Court will give them the weight suggested here. In *Jane Doe v. Toronto Metropolitan Police*, 40 O.A.C., 161 the Court of Appeal of Ontario held that the plaintiff has the jurisdiction to sue the police force for its investigation of a serial rapist who sexually assaulted her and many others. One of her complaints was that the police policy of keeping the fact of the *modus operandi* of the assailant a secret as well as their judgment as to where he would strike next, violated her constitutional guarantee of equal security of the person rights. In *R. v. Butler*, [1991] W.W.R. 97 (Man. C.A.) at 141, a similar argument was made in a case involving a constitutional challenge to obscenity laws. The Supreme Court has yet to render a judgment on the point as to whether or not section 28 guarantees equal freedom of expression rights to women to the extent that laws promoting such equality should be constitutionally valid. A third example which does not bode well for the author's proposition was the case of *Seaboyer and Gayme v. R.* S.C.J. No. 62, where rape shield provisions were struck down as constitutional violations of the accused's presumption of innocence guarantee. The majority did not even address the argument that women's security rights and equality rights should weigh more heavily in the balance. But see the dissenting opinion of L'Heureux-Dubé J.
56. For example, see Walter Tarnapolsky, 'The Equality Rights', in the *Canadian Charter of Rights and Freedoms: Commentary*, W. Tarnapolsky and G. Beaudoin, eds, 1982, p.442. The author is now a judge of the Ontario Court of Appeal.
57. The United States Supreme Court requires that before a statute can be struck down intentional discrimination must be found. They hold to this principle even though American federal human rights legislation acknowledges disparate impact discrimination. See *Washington v. Davis*, 426 U.S. 299 (1976); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *McCleskey v. Kemp*, 481 U.S. 279 (1987). See also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
58. [1989] 1 S.C.R. 143 [hereinafter *Andrews*]. See also two subsequent decisions which added further clarification to the principles articulated in *Andrews*, namely, *Ref. re Workers Compensation Act, 1983 (Newfoundland)*, [1989] 1 S.C.R. 922; *R. v. Turpin*, [1989] 1 S.C.R. 1296.
59. (1985), 22 D.L.R. (4th) 9, at p.16, 66 B.C.L.R. 363 at p.370, [1986] 1 W.W.R. 252 at p.259 (B.C.S.C.).
60. *ibid.*, at p.605 (D.L.R.), 311 (B.C.L.R.), 248 (W.W.R.).

- ⁶¹. Aristotle, *Ethica Nichomacen*, trans, W.Ross, Book V3 at p.1131 a-6 (1925). See discussion in text pp.11-12.
- ⁶². Many third parties intervened in the appeal, including the Women's Legal Education and Action Fund (L.E.A.F.) to argue against the similarly situated test being used to define equality. L.E.A.F. is a charitable organization whose purpose is to achieve equality for women by means of litigation using the guarantees of the *Charter*. Other groups which intervened included the Coalition of Provincial Organizations of the Handicapped, The Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations.
- ⁶³. *ibid.*, at p.610 (D.L.R.), 315 (B.C.L.R.), 253 (W.W.R.).
- ⁶⁴. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p.344; *Reference re s.94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 482 at pp.499-500; *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at p.394; *Reference Re Roman Catholic Separate High Schools* (1987), 77 N.R. 241, pp.267-8 (S.C.C.); *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at pp.604-5.
- ⁶⁵. At p.171 (D.L.R.).
- ⁶⁶. See discussion in the text associated with endotes 41-49.
- ⁶⁷. *Supra*, note 58 at 164 (S.C.R.).
- ⁶⁸. The Court left this part of the analysis to be decided in section 1 of the *Charter*.
- ⁶⁹. *Andrews, supra*, note 58 at 174-5, J McIntyre .
- ⁷⁰. The U.S. Supreme Court rejected an effects-based approach in *Washington v. Davis*, 426 U.S. 229 (1976).
- ⁷¹. See N. Colleen Sheppard, *Recognition of the Disadvantaging of Women*, 1989, *McGill L.J.*, p.207, p.215.
- ⁷². Per Dickson C.J. in *Action Travail des Femmes, supra*, note 43 at 1143.
- ⁷³. This was done by the Federal Court of Appeal in the case of *The Queen and Canada Employment and Immigration Commission v. Shalom Schachter* and has been appealed by the Federal Government to the Supreme Court of Canada. A similar result was achieved in *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.) (leave to appeal denied) where the Ontario Human Rights Code excluded the application of its non-discrimination provisions to the Ontario Hockey Association which in turn, refused to allow girls to play hockey in any of their teams.
- ⁷⁴. *ibid.*
- ⁷⁵. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c.48.
- ⁷⁶. *ibid.*, s.32.
- ⁷⁷. *ibid.*, s.30.
- ⁷⁸. *Supra*, note 58 at p.166.
- ⁷⁹. *ibid.* But see comment of William Black and Lynn Smith [1980] 68 Can. Bar. Rev. 591 at 660-01/ See also J.T. Tussman and J. Tenbroek, 'The Equal Protection of the Laws', 1949, 37 Calif. L. Rev. 341 at pp.345-6.

- ⁸⁰. *Bliss, supra*, note 29.
- ⁸¹. *Turpin, supra*, note 58 at 1332.
- ⁸². *ibid.* note 57.
- ⁸³. *ibid.*
- ⁸⁴. N. Colleen Sheppard, *supra*, note 71.
- ⁸⁵. *Supra*, note 58 at 152.
- ⁸⁶. *ibid.*
- ⁸⁷. *R. v. Turpin, supra*, note 58 at 1332.
- ⁸⁸. L. Smith, *Gender Equality in the Canadian Context: Implications For Judicial Decision Making*, Course Materials, Judicial Education Seminar, Western Judicial Education Centre 1991.
- ⁸⁹. *ibid.*
- ⁹⁰. [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6183.
- ⁹¹. *ibid.* at 1234-44 (S.C.R.).
- ⁹². *Janzen and Govereau v Platy Enterprises* [1989] I.S.C.R. 1252, 59 D.L.R. (th) 352, 10 C.H.R.R. D/6205.
- ⁹³. *ibid.* at S.C.R. at 1284.
- ⁹⁴. *ibid.* at 1279.
- ⁹⁵. *ibid.* at 1288.
- ⁹⁶. *ibid.* at 1290.
- ⁹⁷. Sheppard, *supra*, note 71 at 233; see also C. MacKinnon, *The Sexual Harassment of Working Women: A Case of Sex Discrimination*, New Haven, Yale University Press, 1979 c.5.
- ⁹⁸. *Supra*, note 90 at 1284.
- ⁹⁹. *R. v Morgentaler*, [1988] 1 S.C.R. 30.
- ¹⁰⁰. *R. v. LaVallee*, [1990] 1 S.C.R. 852.
- ¹⁰¹. *Supra*, note 99 at 171.
- ¹⁰². *ibid.* at 171-172.
- ¹⁰³. *Supra*, note 98 at 880 per J Wilson.
- ¹⁰⁴. *R. v. Keegstra*, [1991] 2 W.W.R. 1.
- ¹⁰⁵. *ibid.*, p.44.

- ¹⁰⁶ *R. v. Butler*, [1991] 1 W.W.R. 97 (Man. C.A.).
- ¹⁰⁷ *Supra*, note 102, p.46.
- ¹⁰⁸ *Criminal Code*, s.163(8). See also, K. Mahoney, 'An Equality Approach to Freedom of Expression', *Duke L.J.* (forthcoming); K. Mahoney, 'R. v. Keegstra: A Rational for Regulating Pornography?', *McGill L.J.* (forthcoming).
- ¹⁰⁹ [1992] 139 N.R. 1.
- ¹¹⁰ Section 30, *Unemployment Insurance Act*.
- ¹¹¹ Section 32.
- ¹¹² Section 32.1.
- ¹¹³ After the Federal Court of Appeal decision, Parliament amended the *Act* providing ten weeks of parental benefits to both natural and adoptive parents. Sections 32 and 32.1 were repealed and replaced by a new section 20.
- ¹¹⁴ The Supreme Court has made this assertion many times.
- ¹¹⁵ See intervenor factum, Women's Legal Education and Action Fund.
- ¹¹⁶ *Schachter v. The queen*, [1992] 139 N.R. 1.
- ¹¹⁷ The Court used *Hunter v. Southam* as an example. In that case, the court found the procedures for authorizing searches under the *Combines Investigation Act* unconstitutional. The Court could have read in safeguards but that remedial option would have meant an arbitrary choice between a variety of options.
- ¹¹⁸ (1986), 34 D.L.R. (4th) 633.
- ¹¹⁹ Catharine MacKinnon, 'Breaking New Ground', *LEAF LINES*, Women's Legal Education and Action Fund, Vol. 3, No. 2, February 1990, p.2.