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Recognizing Substantive Equality as a Foundational Constitutional Principle

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Articles

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Recognizing Substantive Equality as a Foundational Constitutional Principle

The author proposes that substantive equality be recognized as a foundational constitutional principle. The foundational principles—or underlying constitutional norms—which constitute the constitutional framework have become more important as Canada matures as a regime governed by constitutional supremacy. Most prime social and political values have been recognized as underlying constitutional norms, including democracy, federalism, protection of minority rights, political speech and judicial independence. Although section 15 of the Charter has been interpreted as encompassing substantive equality, which has been identified as a significant social value by the Supreme Court of Canada, the Court has yet to include it among the foundational constitutional principles. The author explains why it should be included, discusses why the explicit guarantee under section 15 is inadequate for this purpose, addresses alternative approaches to a separate identification of substantive equality and outlines some of the elements which should be included in a foundational constitutional principle of substantive equality.

L'auteur préconise que l'on reconnaisse l'égalité matérielle comme principe constitutionnel fondamental. Les principes généraux—ou normes constitutionnelles sous-jacentes—autour desquelles s'articule la charpente de la constitution ont gagné de l'importance avec la maturation du régime canadien, lequel est régi par la primauté de la constitution. La plupart de nos valeurs sociales et politiques primordiales ont été reconnues comme normes constitutionnelles sous-jacentes, notamment la démocratie, le fédéralisme, la protection des droits des minorités, la liberté d'expression et l'indépendance du judiciaire. Cependant, même s'il est convenu que l'article 15 de la Charte englobe l'égalité matérielle et que la Cour Suprême du Canada la reconnaît comme une valeur sociale significative, la Cour n'en a pas encore fait un principe constitutionnel fondamental. L'auteur explique pourquoi il faudrait inclure l'égalité matérielle, pourquoi les garanties explicites offertes aux termes de l'article 15 sont inadéquates à cette fin, propose d'autres approches à l'identification de l'égalité matérielle et définit certains éléments qui pourraient être inclus dans le principe constitutionnel fondamental d'égalité matérielle.

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Introduction

Substantive equality[1] should be accorded the same foundational constitutional status as political speech, democracy or judicial independence. All of these are values we consider crucial to Canada's political and legal identity; yet of these only substantive equality cannot make claim to be a part of the foundation of our constitutional "edifice." Political expression, democracy and judicial independence, as well as other values of similar weight, have all been recognized as fundamental or foundational constitutional principles by the Supreme Court of Canada. In a country governed by constitutional supremacy, the foundational elements of the constitution work together to establish the framework with which government action must conform. Therefore, it is crucial that those values which have a primary role to play in characterizing the country's political culture be part of this mix of values. They constitute a potentially powerful judicial tool for enhancing constitutionalized protections. In the last decade in particular, the list of constitutional principles has grown. Substantive equality has yet to find its place among them. In the next several pages, I explain why it should be.

I first consider how the Supreme Court of Canada has articulated both the constitutional principles comprising Canada's constitutional framework and their role in Canada's constitutional regime. I then explain why substantive equality should be included among these underlying constitutional norms, initially exploring the roots of equality in liberal theory and practice in order to lay the groundwork for a discussion of the importance of substantive equality in the ordering of contemporary Canadian society. In this section I also address some of the arguments which might be raised against recognition of a substantive equality constitutional principle, thereby explaining why a separate substantive equality principle is both necessary and justified. Finally, I outline some of the elements of a constitutional principle of substantive equality,

1. By substantive equality, I mean most simply a form of equality which is satisfied only if policy or law is made meaningful for all members of society, including those who have been racialized or systemically defined by gender, sexuality or disability or similar kinds of characteristics, as well as intersecting identities; in contrast, formal equality is satisfied if everyone is treated as subject to the law or is subject to it in the same way. For brief definitions of equality, see, for example, Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) 46.

building on the Supreme Court's interpretation of section 15 of the Charter without being limited by it. Throughout the analysis, I show that the recognition of a constitutional principle of substantive equality would be consistent with the Supreme Court's development of constitutional principles which they have already articulated.

I. *Foundational Constitutional Principles*

1. The Contemporary Significance of Foundational Principles

Many political and social values which have a major impact in the ordering of Canadian society have received recognition as "underlying constitutional principles." Also called "foundational," "fundamental" or "organizing" constitutional principles, these are political, social and legal values or principles upon which the ordering of Canadian society rests.[2] They have been identified by the Supreme Court of Canada as establishing the parameters of our constitutional framework.[3] They include, among others, principles relating to our political structure such as federalism and democracy; unwritten norms representing a commitment to treating citizens appropriately (the rule of law and respect for minority interests) and ensuring the means of their involvement in the political system (free speech); and unwritten rules reflecting the integrity of the legal system (judicial independence). Underlying constitutional principles reflect a country's national values, historical development and

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2. The Supreme Court of Canada has used all these terms to describe core constitutional principles: *Quebec Secession Reference*, [1998] 2 S.C.R. 217. In that case, they used the phrase "internal architecture" of the Constitution to refer to the sum of the principles: *ibid.*, at 248. Yet another term used to describe these principles is "unwritten norm": *Provincial Judges Reference*, [1997] 3 S.C.R. 3 at 93.

3. The Court has developed the idea of fundamental constitutional principles most fully (although not only) in the *Quebec Secession Reference*, *ibid.*, and the *Provincial Judges Reference*, *ibid.* They have acquired more importance since the advent of constitutionalism in 1982, but they existed prior to the shift from parliamentary supremacy to constitutional supremacy: see, for example, *Chevrier* v. *Canada* (1880), 4 S.C.R. 1, in which Henry J. (in dissent) referred, at 129, to "constitutional doctrines, underlying rights and liberties necessary for the government of the empire and the administration of justice"; *Ontario (Attorney-General)* v. *Canada (Attorney-General)* (1908), 39 S.C.R. 14, a case dealing with the rights of the province vis-à-vis the federal government with respect to trust funds, in which Idington J. (in dissent) referred, at 42, to "a form that the representatives of the people are asked to sanction every important step of ministers in the conduct of the business of the Crown" having the status of "constituted law that bind ministers and Crown alike and have secured and still secure the liberties of the people"; *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121, a decision relying on the application of the fundamental principle of the rule of law. Post-1982, also see the *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721, in which the Court referred, at 752, to "unwritten postulates which form the very foundation of the Constitution of Canada" and *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, in which McLachlin J. (for the majority) recognized, at 377, "principles constitutionalized by virtue of this preamble."

political framework. Foundational principles will affect both institutional arrangements and relations between the state and individuals and among various groups of inhabitants.

In the *Quebec Secession Reference*, the Supreme Court of Canada identified four underlying "foundational" constitutional principles which "inform and sustain the [Canadian] constitutional text: they are the vital unstated assumptions upon which the text is based."[4] These principles, federalism, democracy, constitutionalism and the rule of law and respect for minority rights, are not the only foundational principles characterizing Canadian constitutionalism, only the most significant with respect to the potential dissolution of the country, the subject matter of that case. For example, in the *Provincial Judges Reference* Lamer C.J., for the majority, named, among other "organizing principles of the *Constitution Act 1867*," the independence of judges because in that case the issue was the independence of provincial court judges.[5] More important than the identification of specific principles, however, these cases, particularly the *Quebec Secession Reference*, contain the most extensive consideration of foundational constitutional principles to be found in the jurisprudence.

The acknowledgment of a broader range of fundamental constitutional principles has accompanied the growth of constitutionalism since 1982 and, indeed, may be seen as a concomitant of the shift to a regime of constitutional supremacy. In 1981, for example, the Court had occasion to address this question in the context of the *Patriation Reference* which, along with its discussion of constitutional conventions, also contained a statement explaining that the reason for the convention of provincial agreement to constitutional amendments affecting the provinces is the "federal principle."[6] The Court referred to the *Reference re Alberta Statutes* which relied on "judicially developed legal principles and doctrines," none of which was found in the express provisions of the *British North America Acts* or other constitutional enactments,[7] and then

4. *Quebec Secession Reference*, *supra* note 2 at 247.
5. *Provincial Judges Reference*, *supra* note 2. The Chief Justice also identified as organizing principles or "fundamental constitutional rules" the doctrines of "full faith and credit," paramountcy and "the remedial innovation of suspended declarations of invalidity": *ibid.* at 75.
6. *Patriation Reference*, [1981] 1 S.C.R. 753, at 905. Constitutional values are the "pivot" of the conventions; another example is the democratic principle and the convention of responsible government: *ibid.* at 880.
7. *Reference re Alberta Statutes*, [1938] S.C.R. 100. The Court relied on the principles relating to political expression in this case.

went on to describe these principles in a cautious, almost defensive, fashion:

> [A]ll [the principles developed] have been perceived to represent constitutional requirements that are derived from the federal character of Canada's Constitution... [T]hey have been accorded full legal force in the sense of being employed to strike down legislative enactments... [E]ach was judicially developed in response to a particular legislative initiative in respect of which it might been observed . . . 'There are no Canadian constitutional law precedents addressed directly to the present issue....'[8]

Even more recently there was, it seems, a greater reluctance to apply the constitutional principles than was evident in the *Provincial Judges Reference* and in the *Quebec Secession Reference*. In *New Brunswick Broadcasting Co.*, for example, there is some question about the appropriateness of employing the constitutional principle of the inherent privileges of Canada's legislative bodies to address whether the media could be prevented from filming the Nova Scotia House of Assembly's proceedings; the judges who followed this approach felt compelled to explain that

> [These privileges]... fall within the group of principles constitutionalized by virtue of [the] preamble. . . . This is not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental to the constitutional regime which Canada has adopted in its *Constitution Acts, 1867 to 1982*.[9]

Some of the motivation for McLachlin J.'s apparent "need" to clarify the nature of the principle at issue likely arose from Chief Justice Lamer's reluctance "to import unexpressed concepts... in a way that would evade scrutiny under the express guarantees of the Charter."[10] Although relying on a constitutional principle for the majority decision, McLachlin J. said that she shared the Chief Justice's concern that "unwritten concepts not be freely imported into a constitutional regime which has culminated in a written constitution."[11] She made a distinction between "unexpressed concepts" and inferred concepts from (in this case) the preamble.

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8. *Patriation Reference*, *supra* note 6 at 844-45 (per dissent).
9. *New Brunswick Broadcasting Co.*, *supra* note 3 at 377. The majority view meant that as a constitutional principle, the exercise of the inherent legislative privileges were immune from constitutional review.
10. *Ibid.* at 355. It is interesting to compare the Chief Justice's approach in this case with the more expansive view he takes of the principles in the *Provincial Judges Reference* (in which La Forest J., having concurred with McLachlin J.'s reasoning in *New Brunswick Broadcasting*, argued that it was inappropriate to extend the constitutional principle of judicial independence as the Chief Justice had done): *supra* note 3.
11. *Ibid.* at 376.

In the *Provincial Judges Reference* and especially in the *Quebec Secession Reference*, by contrast, the identification of constitutional principles relies neither on the preamble nor on the federal structure necessarily (although a number do), but on broader considerations about the constitutional "edifice." Furthermore, the assertion of the importance of these principles lacks the caution and restraint evident in the earlier cases, a change which is perhaps consistent with the recognition that a system of constitutional supremacy provides more scope in this regard than does a system of parliamentary supremacy. This broadening of the identification, scope and application of the constitutional principles is one in which a substantive equality constitutional principle fits comfortably in the same way that the protection of minority (and perhaps separately of aboriginal) rights does. It acknowledges a value which was extant in earlier Canadian legal and political practices, but which has gained a contemporary significance beyond that originally ascribed to it.

It is not surprising that the most extensive discussion and enumeration of the principles are to be found in recent cases. Although fundamental constitutional principles have always been part of Canada's constitutional framework, they have gained new significance through the shift from parliamentary supremacy to constitutional supremacy which occurred in 1982. This shift has resulted in increased jurisdiction (or power) in the Court which includes the enhanced development of these common law constitutional principles. Constitutionalism envisions a different place for courts from that granted them by parliamentary supremacy; it recognizes them as partners in the organizing of the society.[12] Through the constitutional principles, the judiciary embeds the nation's most significant values in the fabric of the society and ensures that they are not subject to the vagaries of political administrations.[13]

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12. Indeed as protectors of the constitution it may give them a superior status to the legislatures. See W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) for a negative appraisal of the enhanced powers of the judiciary.

13. In saying this I acknowledge that section 15 of the Charter is subject to the Charter's override provision in section 33 (although because of section 28 this is questionable with respect to sex equality) and therefore equality seems to be a value that the legislatures have said can be subject to political vagaries (although there is an argument in my view that section 28 of the Charter exempts sex equality from the override). The same can be said of political speech, the expression of which has already received recognition as a foundational constitutional principle, but which is guaranteed under section 2(b) of the Charter and is subject to the override. My point, however, is that equality as a foundational principle is not the same as the explicit constitutional provision in section 15 but is at the same time deeper and broader than is section 15's guarantee and no doubt the same would be said of political expression as a foundational principle.

2. *The Significance of Constitutional Principles*

a. *Their Purpose*

Regardless of their content, fundamental constitutional principles capture the major features and values of the legal and political system. They establish the parameters within which the structures, institutions and practices are organized and within which they operate. They encompass and help to integrate new political and constitutional arrangements, such as the Nisga'a Agreement entered into in August 1998 by the British Columbia government, the Federal Government and the Nisga'a Nation to settle land claims by the Nisga'a. Providing for a Nisga'a government to govern Nisga'a lands, the Agreement changes the nature of decision-making in Canada by inserting a new level of government in the territory covered by the Agreement which must interact with the current federalism, that is, with the powers currently exercised by the provincial and federal governments.[14] Challenges to and the operation of these new arrangements may well be—indeed, should be—informed by the fundamental constitutional principles of federalism with its divided or shared political decision-making, democracy with its aspect of self-government and either respect for minority rights or, more likely, an independent respect for aboriginal rights.[15] In short, it would not be surprising if political decisions about a new status for the Nisga'a Nation would have to meet the requirements inherent in Canada's constitutional framework which comprises in part the distinct but interrelated fundamental or foundational principles which I have identified, in the same way that attempts at dissolution of Canada will have to meet them.

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14. The Nisga'a Agreement can be found on the British Columbia Ministry of Aboriginal Affairs website: <http://www.aaf.gov.bc.ca/aaf/>. It has been approved in a referendum held among the Nisga'a in November 1998 and approved by the British Columbia Legislature in April 1999. Debate has begun in the House of Commons. It was made the subject of a court challenge by the Liberal Party of British Columbia: Paul Willcocks, "Lawsuit premature: B.C. government" *The Globe and Mail* (23 November 1998). The Liberals wanted a province-wide referendum on the Agreement which they claim amends the *Constitution Act, 1867*, since the British Columbia *Constitutional Amendment Approval Act*, R.S.B.C. 1996, c. 67 requires a referendum on a constitutional amendment.

15. The Supreme Court of Canada identified federalism, democracy and respect for minority rights as foundational or fundamental constitutional principles in the *Quebec Secession Reference*, *supra* note 2. The Court indicated that protection of aboriginal interests might be an element of the broader respect for minority rights or it might constitute its own principle. I would argue that the preferable approach is to recognize it as an independent principle to acknowledge that First Nations are not in the same position as other so-called "minorities." Federalism, while capturing a highly salient aspect of aboriginal interests, self-government, does not capture all of them. As with other interests, however, these approaches are not mutually exclusive and the articulation of a freestanding principle does not mean that the values it represents are not reflected in other principles.

These principles fill in the gaps of the written text; they are not merely abstract or philosophical guidelines, but may give rise to "substantive legal obligations" of either a general or precise nature. The Supreme Court of Canada described them as being "invested with a powerful normative force."[16] Governments and courts are expected to observe them. Unlike conventions, sanction for their breach lies in a court of law and not "merely" with the political process.

Status as a fundamental constitutional principle, therefore, means that the concept involved will help to define the constitutional framework, influence the interpretation of express provisions and fill in the gaps of the constitutional text. It will apply to any exercise of political authority and to the courts. Consequently, as a whole, these principles have the potential to play a role more extensive than can any particular express constitutional provision, no matter how important.

b. *Their Evolution*

The identification of foundational constitutional principles is not limited to those which were implicit in the preamble to the *Constitution Act, 1867*, although this was for some time the major and perhaps sole source of the principles, but may include principles which have never been articulated before, as long as they are rooted in Canadian practices and values.[17] Nor do the principles remain static. It is beyond dispute that at some level law must keep in step with social and political changes. It is incumbent on government to amend, repeal or enact legislation with this principle in mind. It is similarly within "the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."[18] This principle applies not only to ordinary legislative and common law developments, but to basic constitutional principles. It is the nature of constitutional principles that they are not defined by the fashion of the times and that they are not easily changeable, but it has also been stated clearly that the interpretation given to the terms of a written constitution must evolve in a manner consistent

16. *Ibid.* at 249.

17. In the *Quebec Secession Reference*, the Supreme Court's according of "foundational principle" status to respect for minority interests is indicative of the "addition" of principles based on contemporary relevance: *supra* note 2 at 261-62.

18. *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130 at 1169 (Cory J.).

with the developments in the country as a whole.[19] The same is true of the common law constitution or the manner in which fundamental constitutional principles, such as judicial independence, are defined. With respect to judicial independence, for example, the Supreme Court of Canada has said that although the origins of judicial independence concerned only superior court judges, "our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country."[20] The fundamental principles must reflect the legal culture, while at the same time they will also inform it. In the United States, for instance, the principles of separation of powers and federalism have both changed since 1787 when the United States Federal Constitution came into effect, with almost a reversal of the form federalism originally assumed.[21]

Evolution occurs not only with respect to the meaning of particular principles, but also with respect to the "list" of identified principles. Thus while a number of these principles have had long-standing recognition, albeit having evolved in meaning since confederation,[22] others have only recently emerged, most notably respect for minority interests which was first explicitly identified in the *Quebec Secession Reference*.[23]

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19. *Edwards* v. *A.G. Canada*, [1930] A.C. 123. Compare the approach taken by a number of justices of the United States Supreme Court where there is a more fervent struggle between the originalists (what did the Constitution mean when it was enacted?) and those justices who believe in a modern Constitution. See, for example, Antonin Scalia, et al., *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997). Some commentators have suggested, however, that originalism is a straw doctrine: See also Eric J. Segall, "A Century Lost: The End of the Originalism Debate" (1998) 15 Constitutional Commentary 411.

20. *Reference re Provincial Judges*, *supra* note 2, at 76. Mr. Justice La Forest strongly maintained that the Chief Justice's extrapolation of provincial judges' judicial independence from this principle was inappropriate, at the very least because counsel had merely referred to it briefly and because the issue is relevant to the relations between the political and judicial branches: at 175.

21. Michel Rosenfeld, "Modern Constitutionalism as Interplay Between Identity and Diversity," in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy* (Durham: Duke University Press, 1994) at 12. Rosenfeld also briefly discusses "dramatic" changes to French constitutional principles.

22 . In the case of democracy, for example, not only has the extension of the franchise meant that many more people are entitled to participate in the vote than was the case in 1867, but the conceptual understanding of democracy has changed, as discussed by the Supreme Court in the *Quebec Secession Reference*, *supra* note 2 at 255.

23. *Ibid.* at 261-63.

c. *Their Relationship to the Explicit Provisions*

The principles must be read in conjunction with the explicit constitutional provisions found in the *Constitution Acts, 1867* and *1982*. Some of the principles may have been developed because there was not reference to the value underlying the principle in the written constitution. The political expression principles, for example, were developed or identified at a time when there was no explicit free speech guarantee in the Constitution and no doubt were identified precisely for that reason. Nevertheless, they evidently continue despite the subsequent inclusion of the guarantee of freedom of expression in the Charter, having been listed among the current principles in the *Provincial Judges Reference*.[24] Many of the principles were inferred from the preamble to the *Constitution Act, 1867* or from the federal structure of Canada. Most of the broad fundamental principles are linked to corresponding explicit provisions in the constitution, such as a description of which level of government exercises which powers (the federalism principle), a guarantee of voting rights and a limitation on the length of the legislative assembly (both reflecting the democracy principle), a guarantee of free expression (the "implied bill of rights" political expression principle), the guarantee of minority language education rights (the minority rights principle) and provision for the appointment, payment and tenure of superior court judges (the principle of judicial independence). Fundamental constitutional principles may be considered the source of the explicit provisions which "merely elaborate those organizing principles in the institutional apparatus they create or contemplate."[25] On the one hand, therefore, they are not displaced by explicit provisions. On the other hand, their contemporary meaning may be affected by the explicit provisions, as is the case with judicial independence, considered below. Moreover, the impact of these principles is not limited to whatever corresponding specific provisions may exist, but are employed to develop a coherent interpretation of the constitution as a whole: they operate "in symbiosis."[26]

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24. *Provincial Judges Reference*, *supra* note 2 at 74-75.
25. *Provincial Judges Reference*, *supra* note 2 at 69.
26. *Quebec Secession Reference*, *supra* note 2 at 248. Regardless of what may be a complex interrelationship between principles and explicit rights, the Supreme Court has stated that "there are compelling reasons to insist upon the primacy of our written Constitution": *ibid.* at 249.

d. *The Importance of Identification as a Principle*

The choice of values, concepts or organizational frameworks which enjoy the status of fundamental, foundational or organizing principles signifies the kind of concerns which occupy the society. The identification of the principles reflects their judicially determined nature. Thus a doctrine which did not in fact receive wide support among the judiciary of one judicial era might nevertheless become a constitutional principle or "rule" in another. The Chief Justice's discussion of political speech in the *Provincial Judges Reference* illustrates this point.[27] He draws from the preamble to the *Constitution Act, 1867*'s recognition of Parliamentary democracy a guarantee of freedom of public or political expression. Given the importance of political expression to national political life—to democracy—and also the intention to create one country, he explains that some members of the Court have said that only Parliament can limit political expression. But, he continues, "[t]he logic of this argument . . . compels a much more dramatic conclusion . . . [,] that Parliament itself is incompetent to 'abrogate this right of discussion and debate.'" Thus "the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text" [i.e., the *Constitution Act , 1867*]. He subsequently lists these two "guarantees" of political speech as organizing principles of the *Constitution Act, 1867,* identified by the preamble which "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."[28] What is particularly interesting about this analysis is that while the limitation to Parliament of the competence to limit speech (through the criminal law power) may be said to constitute a majority position, and in any event, uses traditional division of powers analysis to accomplish its goal, at no time has the implied bill of rights doctrine attracted a majority of the Court. Yet Lamer C.J., with the concurrence of the majority of the Court, has identified it as a fundamental constitutional principle.[29]

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27. *Provincial Judges Reference, supra* note 2 at 74-76.

28. *Ibid.* at 75.

29. Freedom of speech and expression has also been identified as "a fundamental animating value in the Canadian constitutional system" and as a "deep-rooted value" and "principle of our common law constitution": *OPSEU* v. *Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at 25 and *Fraser* v. *Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at 462. La Forest J. (for the Court) has also referred to the "principle of open courts" related to the value of representative democracy and to the democratic function of public criticism, that is, to the constitutional principle of free speech, as a common law principle, although one "inextricably tied to rights guaranteed by s.2(b)": *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)* (1997), 110 C.C.C. (3d) 193, at 202-204.

With respect to the fundamental constitutional principles, therefore, it is possible to say that they are common law principles, derived from but not limited to the text, which reflect values significant in the ordering of Canadian society. There is room for the articulation of "new" principles for which some form of prior recognition as a constitutional value can be established or for a revision of previously articulated principles. The values advanced by the principles overlap with each other and the principles themselves inform and both extend and limit each other. In the next section I consider why it is consistent with these characteristics of the foundational principles to grant that recognition to substantive equality.

II. *Substantive Equality as a Foundational Constitutional Principle*

There are good reasons why substantive equality should be recognized as a fundamental constitutional principle: it is a major value in the ordering of Canadian society and equality in some form has had a constitutional presence since Confederation; on the other hand, there is no reason that it should not be so recognized: being a latecomer as a foundational principle should not be a bar any more than it was a bar for protection of minority rights. In this section, I establish that substantive equality is a fundamental value in Canada, consistent with the other principles already identified. It is an important element in our social ordering. I then indicate why other possible approaches to incorporating this value in the constitutional framework are not satisfactory. Finally, I explore the form a foundational constitutional principle of substantive equality might assume.

1. *The Evolution of Equality Practice*

The first inroad of liberalism into absolutism and inequality occurred with the basic liberal commitment to a set of fundamental political rights which would accrue to all citizens.[30] Equality represented an equal claim to political rights which were designed to promote the liberty of all

30. For example, Eric Hobsbawm listed the interrelated liberal values of the nineteenth century as "distrust of dictatorship and absolute rule; a commitment to constitutional government with or under freely elected governments and representative assemblies, which guaranteed the rule of law; and an accepted set of citizens' rights and liberties, including freedom of speech, publication and assembly. State and society should be informed by the values of reason, public debate, education, science and the improvability (though not necessarily the perfectibility) of the human condition:" *Age of Extremes: The Short Twentieth Century 1914-1991* (London: Abacus, 1995), 109-110. These in many respects remain predominant liberal values, although in some respects transformed through the century. Also see George Sabine, *A History of Political Theory*, 4th ed. (Hinsdale, Ill: Dryden Press, 1973) at 668.

individuals in the society.[31] This view of equality as an exercise of *political* rights was transformed into one which took account of *social* expectations and thus one which distinguished between "natural" distinctions and social distinctions, those arising from economic status, and the interrelated distinctions resulting from inequality on the basis of, for example, race or sex (the "conventional inequality" to which I referred earlier). In part, this transformation or extension was necessitated by liberalism's individualist commitment to capitalism which meant in practice that political equality was compromised by distinctions of wealth even after the erosion of the earlier legal inequality characteristic of previous hierarchical political and economic systems. The recognition that "certain basic capacities and needs are possessed equally by all"[32] led (eventually) to a concomitant principle to respond to the inability of everyone to enjoy those needs because of natural inequalities. Some reconciliation between liberalism's equality of opportunity (underlying its economic strand) and the reality of both conventional and natural inequalities was needed. If people were to enjoy commonly recognized needs and were to realize an equal opportunity for self-development which was at the heart of the evolving liberalism, some account must be taken of different needs. At first this principle acknowledged obvious differences. As Raphael points out, everyone needs food, but a diabetic needs insulin; every child needs education, but visually impaired children require "special, more costly facilities." Equal distribution of the means to enjoy basic needs or the equal opportunity for self-development means, therefore, an "equitable, not an arithmetically equal, distribution."[33] The most commonly held liberal view was that where possible,

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31. E.F. Carritt explains that while liberty and democracy (that is, political equality) were first seen as antithetical, in Great Britain it came to be believed "finally by almost all public speakers" of whatever political persuasion that democracy or political equality safeguarded liberty: "Liberty and Equality" in Anthony Quinton, ed. *Political Philosophy* (London: Oxford University Press, 1973) at 127. In fact, the notion that equality of all interferes with liberty for some remains one of the tensions of liberalism today.

32. D.D. Raphael, *Problems of Political Philosophy*, rev. ed. (London: MacMillan Press, 1976) at 185.

33. *Ibid.* at 192. Raphael makes the important distinction, which is fundamental to how the liberal equal opportunity and the taking into account of difference interrelate, between benefits (or results) and means: "So there is a sense in which the distribution of *benefits*, of satisfaction received, is equal, although the distribution of *means* to benefit is unequal because of special needs" [emphasis in original]. In this sense, providing different means in accordance with need is a way of removing barriers, even though the way of removing barriers is actually constituted by a positive giving (of insulin or of special educational facilities, for example).

these natural disadvantages ought to be minimized; only the most ardent believer in individualism believed that they were simply a factor in a societal version of Darwinism.[34]

Legal equality, social equality, economic equality, moral equality and political equality: while they overlap and influence each other, as a practical matter, movement towards them does not always keep pace. What does it mean to speak of being "politically equal," for example? All citizens have one vote; yet not everyone has the same access to resources to influence the political system. Each person is equal under the law; yet not everyone has the same resources with respect to access to the law. While there is a belief that the law should be available to everyone and there are programs in place to assist in providing access, the result is far from equal access. It is obvious—so much so that it is trite to say—that economic inequality can influence the realization of political and legal equality. These apparent "contradictions" are consistent with the liberal understanding of equality which attempts to accommodate both a social or moral equality with an economic individualism.

Nevertheless, one of the great on-going claims (and to a lesser degree triumphs) of the liberal ethos is the formative role that the concept of equality has played in modern societies. Greek society, feudal systems, the periods of slavery and then segregation in the southern United States, apartheid South Africa or Canada's reserve system: these were or are systems organized around exclusion based on difference. Particular groups of people were legally excluded from the *polis*, or status was static and clearly drawn.[35] Certainly this was breaking down prior to the beginning of the twentieth century; equally certainly it has not been broken down yet as we enter the twenty-first. In contrast, liberalism has in the past hundred years or so increasingly promoted the possibility of social or economic mobility and the inclusion of all members of society within the legal system. This is the case in Canada notwithstanding the egregious separate legal regime for status "Indians" under the *Indian Act,* even if it is dissipating in the face of greater aboriginal self-government. Laissez-faire liberalism, with its emphasis on individualism, has been

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34. Indeed, Sabine maintained twenty-five years ago that "[f]rom John Stuart Mill on, no important liberal thinker except Herbert Spencer defended a theory that even approximated *laissez faire*": *supra* note 30 at 669. On the other hand, the debate Sabine identified as "at what point would the regulation of business enterprise become a hazard for political liberalism" has continued, not only in that form, but in the more contemporary form of determining how the pursuit of equality through the positive recognition of difference interferes with liberty. I discuss this point further below.

35. For example, in Canada status Indians were disenfranchised federally until 1960; non-status Indians were enfranchised provincially over a period lasting from 1949 (British Columbia) until 1969 (Quebec).

weakened considerably by the development of social liberalism or welfare-state liberalism. Classical liberalism, reactive to the decline of a static social order, responsive to the growth of a mercantile class, confronted by internal migration of poor and unskilled rural labourers to the urban centres, and dominant in the first significant globalization of the economy through colonialism, had to contend not only with its opposing ideology, socialism, but more importantly, the growth within itself of a new view of social relations. Its conflict with socialism appears to be resolved in liberalism's favour; its internal conflict is still, to some extent, being played out, although the taking account of difference which characterizes contemporary social liberalism has emerged as the stronger strand.

In short, liberalism contains within itself competing views of what constitutes the common good and the marks of common citizenship.[36] Liberal states experience a tension between the commitment to liberty, the freedom to pursue one's own good without interference from government, and the commitment to equality which may require government interference to attain. As a result the process of extending equality is not linear; nor is there universal agreement on the goal or the means. Thus while the understanding and practice of equality has broadened, there are also times when the political regimes have retrenched and diminished the practice of extending equality. It may be said that Canada has been travelling through such a period in recent years with a heightened sense of individualism and conservatism. This process of economic retrenchment has occurred simultaneously with an increasingly broad judicial interpretation of the *explicit* guarantee of equality in the Charter. Despite this unevenness, liberal societies have increasingly defined themselves as pluralist societies, defined by a mix of differences based on an ever increasing list of characteristics. It is the elimination of barriers placed before persons because of particular characteristics and the corresponding need to acknowledge the legitimacy of differences, to engage in the "affirmation" of difference, which characterize liberal equality more than the explicit elimination of economic difference.

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36. Here I mean "citizenship" in the sense of participation in society regardless of formal citizenship, a civic notion rather than a narrower political/legal status based, for example, on the right to vote.

2. *Substantive Equality in Canadian Society*

The importance of equality as a social, legal and political value in Canadian society has been acknowledged in many ways since Confederation, in statutes, official policies and practices and judicial interpretation. A small number of examples illustrate the point: the reflection of equality in the religious education and language provisions of the *Constitution Act, 1867;* in the enactment of the *Canadian Bill of Rights,* human rights legislation, sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*[37] and other Charter provisions such as minority language education, mobility rights and freedom of religion; the aboriginal rights provisions of the *Constitution Act, 1982*; in statutes such as those requiring pay equity and employment equity; in the sentencing provisions of the *Criminal Code;* and in practices and policies such as multiculturalism. Recognition of the gendered nature of the defence of self-defence and of sexual harassment, the need to address the potential of racial bias in jurors and the use of sentencing circles are indicative of the scope of equality's presence in the legal system. While both the wording and interpretation of these commitments to equality may have been limited,[38] and while advances towards equality have been criticized

37. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.) 1982, c.11.

38. The religious education provisions of the Constitution (section 93 of the *Constitution Act, 1867* and section 29 of the *Canadian Charter of Rights and Freedoms*) provide an illustration. They were implemented to recognize and then affirm minority religious education in effect at the time of Confederation, but they have found no echo in similar provisions to recognize publicly funded religious education for more recent religious affiliations and indeed, have been used to deny extending funding: *Reference Re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Mahe* v. *Alberta*, [1990] 1 S.C.R. 342; and *Reference Re Public Schools Act (Man.), ss.79(3), 79(4) and 79(7)*, [1993] 1 S.C.R. 839 all indicate the wide scope accorded minority religions who managed to acquire rights in 1867; by contrast, *Adler* v. *Ontario*, [1996] 3 S.C.R. 609 refused similar rights to religions which had not been accorded rights in 1867. The sex equality provision under the *Canadian Bill of Rights* proved to be an enormous disappointment as a consequence of the Supreme Court of Canada's interpretation in *Canada (Attorney-General)* v. *Lavell*, [1974] S.C.R. 1349 and *Bliss* v. *A.G. Canada*, [1979] 1 S.C.R. 183 (cf. *R.* v. *Drybones*, [1970] S.C.R. 282). More recently, the Court's decision in *Egan* v. *Canada*, [1995] 2 S.C.R. 513 was evidence of how deep-rooted prejudice against certain groups (in this case, gays) can undermine section 15 of the Charter (but cf. *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493).

or repealed,[39] nevertheless they reveal Canada as a country purporting (at least) to place a high value on reducing the disadvantage consequent on what has been termed "conventional inequality."[40] In one way or another, whether in fact or too often in rhetoric, equality has been held to be a fundamental societal value in Canada. It is, in other words, to be taken into account in the ordering of Canadian society through government policy, in the interpretation of the law, and (because of the impact of policy and law) in private contexts, as well.

As our understanding of equality has evolved, its role in the ordering of liberal societies has become more prevalent. It is no longer sufficient to assess inequality at a surface (overt or obvious) level; rather, more subtle forms of inequality (disproportionate impact or based on an intersection of grounds) are now being addressed. While I consider the complexity of this question below, it is sufficient to say now that the core element of this contemporary equality—the recognition of difference instead of homogeneity—which marks what has been called "substantive equality" pervades official and private thinking with respect to all manner of policy-making at all levels. In this sense, the concept of substantive equality is a major value in the organizing of Canadian society. It is a matter of public deliberation and not merely reflective of a toleration for

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39. Bilingualism and multiculturalism have both been criticized, both as too costly, bilingualism as inappropriate where there are equally large or larger communities of ethnic groups other than francophones and multiculturalism as inconsistent with a "Canadian identity." For discussion of and responses to some of the criticisms of multiculturalism in particular, see Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998) at 4-5, 16-17, 26. For an indication that multiculturalism (in some form) is viewed as desirable by Canadians, see Peter S. Li, "The Multicultural Debate," in Peter S. Li, ed., *Race and Ethnic Relations in Canada*, 2d ed. (Toronto: Oxford University Press, 1999) at 162. Li discusses the confusion around this term. An example of the regressive moves is the repeal of employment equity legislation enacted under the NDP Government in Ontario repealed by the successor Progressive Conservatives when they came into power in 1995: *Job Quotas Repeal Act*, 1995, S.O. 1995, c.4; on the unsuccessful challenge to the legislation, see *Ferrel* v. *Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (C.A.) (leave to appeal to SCC dismissed: 9 December 1999).

40. This is an inequality traceable to human convention. It refers to the way in which people are treated because of race, sex or other personal characteristics which is distinguished from "natural" inequality (whether one can paint well or run fast or whether one has the ability to be a surgeon or weaver): Francis Fukuyama, *The End of History and the Last Man* (New York: MacMillan, 1992) at 290. Hence we may speak of a "racialized community" to indicate that the inequality derives not from "race" but from how race is treated. In other words, the inequality does not derive from the characteristics, but rather from the societal treatment of the characteristic. "Conventional inequality" is a convenient term, as long as it is remembered (as Fukuyama does not necessarily do) that one of the benefits of being in the majority or dominant groups in society is being able to decide what is "conventional" and what is "natural" and that often the two are conflated.

private expression of differences.[41] Consistent with its public articulation or practice, substantive equality, the form of equality most reflective of recent advances in equality theory, has been accepted by the Supreme Court of Canada as an appropriate way to define equality in a constitutional context.[42] The Court has recently reinforced its approach by importing it into human rights legislation.[43] To do otherwise than give the same legal import to direct and adverse effect discrimination, McLachlin J. said, "may, in practice, serve to legitimize systemic discrimination."[44]

To say that substantive equality plays a significant part in contemporary Canadian society is not at all the same thing as saying it has always been realized or that its recognition is unproblematic, either legally or in practice. On the contrary, one may say about advancing equality, as the Supreme Court said in a different context,

> The concern of our courts and governments to [protect minorities] has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the [protection of minorities]. However, it should not be forgotten that the [protection of minorities] had a long history before the enactment of the *Charter*. . . .

41. Graham Walker, "The Idea of Nonliberal Constitutionalism" in Ian Shapiro & Will Kymlicka, eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997) at 154, 170. I consider this point further below.

42. See, for example, the first case decided by the Court under section 15 of the Charter and the most recent: *The Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143 at 166-68 and *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 517, 518, respectively. In *Law*, Iacobucci J, for the Court, explains that the equality referred to in *Andrews* is substantive equality.

43. *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Services Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3. McLachlin J., for the Court, characterizes the distinction between direct and adverse effect discrimination as "artificial" and explains that "[i]nterpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination": at 26.

44. *Ibid.* at 24.

> . . . Although Canada's record of [the rights of minorities] is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes.[45]

The process of attaining equality in Canada has been uneven, yet a commitment to it in some form has never been totally absent. Overall it can be described more as movement towards increasing equality than the reverse, both quantitatively and qualitatively: more people are "embraced" by the means available to obtain equality (through, for example, the addition of new grounds to human rights legislation) and the term has acquired an increasingly sophisticated meaning (as exemplified in the human rights context as encompassing only overt or direct discrimination to indirect discrimination to the more subtle systemic discrimination, for instance; the last in turn has challenged the continued validity of that earlier progressive move to acknowledge indirect discrimination as a distinct form of discrimination[46]).

As a theoretical matter, the commitment to equality in Canada, as in liberal-democratic regimes generally, is grounded in the belief that each member of society has equal moral worth and as a consequence is entitled to equal consideration in how society is organized and structured.[47] How this philosophical statement is translated into economic or political practice or into legal entitlement or status will vary with the demographic composition, history and political personality of a country. In any given country this is unlikely to be a simple matter. In Canada this is certainly true as different stands of "liberalism" co-exist and compete for dominance. There is a constant tension between so-called classical or laissez-faire liberalism (the liberalism of individualism) and social liberalism

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45. In fact, the Supreme Court of Canada was speaking about protection of minority rights in this passage from the *Quebec Secession Reference*, *supra* note 2 at 262. While it may be true that in fact protection of minority rights was a major motivating factor in light of the desire of the Trudeau Government to enact an entrenched bill of rights which would deflate Quebec's nationalist claims, much attention was paid to the wording of the equality provision to overcome the limited interpretation of the equality provision of the *Bill of Rights*. More importantly, however, recognition that "Canada's record of upholding the rights of minorities is not a spotless one" did not detract from identifying protection for minority rights as a constitutional principle in the company of principles such as federalism or the rule of law, both clearly identifiable as formative constitutional *principles* and not explicit constitutional provisions, from the advent of Confederation.

46. *British Columbia* v. *B.C.G.S.E.U.*, *supra* note 43 at 24.

47. The moral aspect of equality is a consistent theme in the equality cases under section 15 of the Charter. After reviewing how this idea has been phrased in the various equality decisions, Iacobucci J. sums up this approach in *Law* as reflecting the intent of section 15 "to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration:" *Law*, *supra* note 42 at 529.

which gave rise to human rights legislation (the liberalism of community) or the welfare-state liberalism which seeks to reconcile economic individualism with efforts to moderate the worst ravages of poverty.

The same process has occurred with respect to cultural differences. Initially, liberal thinkers argued that the state ought to be "neutral" on the question of difference, treating significant differences as matters of "private choice and personal taste."[48] The state should not be adversarial, for liberals did not, generally speaking, advocate taking positive action to force people to discard their differences;[49] however, cultural differences were to be left to the private sphere, with the watchword being "toleration."[50] To the extent that this reinforced the hegemony of the dominant group, it was not really neutrality and over time, it became clear that neutrality is not consistent with an honest commitment to a pluralist society. By not intervening, the state can become complicit in perpetuating disadvantage. While among extreme groups there may be some question about whether difference should be recognized at all, the prevalent view, reflected in Canadian government policy and jurispru-

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48. Walker, *supra* note 41.

49. "Their differences" is the key phrase here. At this point, the majority society was treated as the norm, the appropriate way to be; minorities were the ones who were different, it was they who would have to change. Today, certainly this is a view held by many people, but with the increase in people who are "different" from this previous norm there has been an increased resistance to this approach and one of the underlying elements of substantive equality is that one group is not necessarily to be characterized as different from some overriding norm, but that each group is different from the other. Thus women are not different from men, but women and men are different from each other. Having said this, there are demographic realities, at least, which mean that there will be some people "in the majority" and others who are far fewer. Over time, however, the composition of these groups may change, as well as the technology to remove some of the consequences of being a "minority." For example, today most houses are more than one story and do not have elevators or other mechanisms for getting upstairs required by persons using a wheelchair (most do not have ramps to obtain access to the front door, in fact); there are very few people in wheelchairs compared to people who do not require a wheelchair. Conceivably all houses would be built (as now are public buildings) to ensure "equal" access and usage by persons in wheelchairs or medical advances would be such that people would no longer require wheelchairs. The fact is, though, that today one is the majority and one is the minority and that while there have been changes to improve accessibility to public life for people in wheelchairs over the last decade or so, there is currently only limited accommodation of the needs of those of us using wheelchairs for mobility.

50. This is the pattern that is still followed more or less with respect to minority religious education, except for religious education guaranteed under section 93 of the *Constitution Act, 1867*. Education in itself is a public matter and the provinces expect anyone teaching children to satisfy the curriculum requirements established; yet this can be done in a number of ways and children are not required to attend specific schools if the requirements are otherwise met. But the province will not usually support these other forms of education. It neither forbids nor encourages them (it "tolerates" them) and it is in that sense "neutral" about them. The alternative approach is that of the "charter" schools which may be seen as a privatization of the school system in the guise of supporting difference.

dence, is that difference is to be taken into account, although there continues to be debate about the extent to which difference is or should be recognized (both from those who seek to have difference recognized and those who consider we may have "gone too far" in recognizing differences), a debate which echoes the older debate about the proper relationship between liberty and equality. Nonetheless, we can speak in rough terms about the movement in Canada from toleration with respect to cultural (and other) differences to non-discrimination (that is, access to various public services is open to all, but no positive steps are taken to promote difference) to affirmation (the promotion of difference).[51] As Kane (following Raz) describes affirmation, it

> transcends the individualistic approach of nondiscrimination and asserts the value of groups possessing and maintaining their distinct cultures within the larger community; the affirmatively multicultural society not only permits but actively encourages and assists different cultures to preserve their separate identities as best they can.[52]

This notion of affirmation underlies the concept and practice of substantive equality. It describes in a fundamental way the structure of society and the interrelationships among communities within it. As federalism describes an important manifestation of the institutional structuring of Canada, so substantive equality describes an important manifestation of the human structuring of Canada. Canada is a self-consciously pluralist society which tends to incorporation of heterogeneity in law and official practice, not to assimilate difference, but to reflect it. The degree to which any country is successful in achieving its theoretical model is debatable, but I speak here of commitment and not realization. Canada must be included among pluralist societies, since many official practices and the legal system both incorporate the need to recognize and respond to "difference."

The recognition of "difference"—me from you, you from me, and both of us from others—is, I would argue, a fundamental governing principle of Canadian society today, if not of liberal societies generally; imperfectly realized, to be sure, but nevertheless one of the measures by which

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51. John Kane, "From Ethnic Exclusion to Ethnic Diversity: The Australian Path to Multiculturalism" in Shapiro & Kymlicka, eds., *supra* note 41 at 540-41. The terminology refers to "a progression of liberal responses to `multiculturalism'" as identified by Joseph Raz and adopted by Kane.

52. *Ibid.* at 542. I make one quick observation here about the "affirmative society" (to be pursued later): this describes Canada not only with respect to "multicultural" groups, but also with respect to other grounds of difference, particularly sex and to some extent disability. Certainly, however, there has not been a uniform progression and we have not yet passed through even tolerance with respect to some differences.

the society is judged. This recognition that the moral worth of each individual cannot be acknowledged or realized in the same way has enormous implications for the ordering of society. Some notion of substantive equality is today, as is formal equality, a fundamental part of the conceptual framework of Canadian society. The contrast between the two forms of equality is this: formal equality insists that differences be ignored; substantive equality insists that where appropriate differences be taken into account.[53] Thus the importance of substantive equality in contemporary Canadian society is akin to the importance of values which have been acknowledged as fundamental constitutional principles.

3. *Recognition as a Foundational Principle*

Although substantive equality plays a significant role in the ordering of Canadian society, it may not be clear why this translates into the need for recognition as a separate or distinct foundational constitutional principle. There are possibly three main arguments one might posit against the recognition of substantive equality as an underlying principle. These are that we already have an equality guarantee and therefore do not need anything more; that equality is already recognized in the rule of law and we do not need anything more (or, alternatively, we can extend the meaning of equality in the rule of law to include substantive equality); and we already have a constitutional principle of minority rights and therefore we do not need anything more (that is, the recognition of substantive equality would be redundant). I want to address each of these objections with the objective of showing why, valuable though each of section 15, the rule of law and respect for minority rights is, substantive equality adds something new and necessary to the mix.

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53. There are many examples of how difference is taken into account in organizing society. One need think only of publicly funded religious-based schooling, affirmative action programs, minority language provisions, wheelchair accessible sidewalks and public transportation or aboriginal policy to see how various needs and historical experience have been "accommodated" to some extent in Canada. More importantly, these have become in many instances simply the way we organize our society—simply one form of "normal" arrangements. This is the practice of disassembling the norm to which I refer below. The responses vary from country to country, as well as in their permanence or vulnerability to elimination, but in all liberal-democratic countries there are some ways in which "difference" of some sort is reflected in fact in the society's structuring. Even in the United States where there is greater resistance to integrating difference, tribal courts and the *Americans With Disabilities Act* are just two ways in which "difference" is recognized, albeit not without controversy in the case of the former. For a variety of ways in which difference has been recognized or which have been the subject of proposals, see Kymlicka, *supra* note 39 at 42. For a typology of eight approaches to "accommodating ethnic and linguistic pluralism," see Jacob T. Levy, "Classifying Cultural Rights" in Shapiro & Kymlicka, *supra* note 41 at 22, 25. Levy provides some Canadian examples and where he does not, it is not difficult to think of them.

a. *Why Nothing Else Satisfies*

i. *We Already have an Equality Guarantee*

Since Canada already has an explicit constitutional guarantee of substantive equality, one may wonder why recognition of a *foundational* constitutional principle is necessary. If one asks this question of equality, however, one must ask it of most of the principles since many of them have corresponding explicit guarantees, as indicated above. As with other principles and "their" express guarantees, a substantive equality foundational principle would serve a different constitutional purpose than its corresponding express guarantee in the written constitution. Foundational principles attract a different type of analysis from that required under the explicit guarantees. In the case of substantive equality, a foundational substantive equality would not be subject to either section 15's wording which is tied to the anti-discrimination approach or by the structural requirements of an express guarantee. Among these are the need in the usual case for individual parties, the impact of section 1 which allows governments to justify their discriminatory legislation and actions and the development of a "formula" upon which to base the analysis, in this case the two-stage analysis developed in *Andrews* and subsequently refined. This is not unique to substantive equality. It is equally true of all the foundational principles: each attracts a different analysis in a different context from that in which the court engages with respect to any corresponding express guarantee.

A more significant answer to why an explicit guarantee does not suffice or even precludes recognition of a constitutional principle which encompasses the same value lies in the role foundational constitutional principles play in a country governed by constitutional supremacy: as I have already indicated fundamental constitutional principles have a significance beyond that of specific constitutional provisions. An analogy may be found in the Supreme Court of Canada's consideration of judicial independence in the *Provincial Judges Reference.* Although section 11(d) of the *Canadian Charter of Rights and Freedoms* provides for the independence of provincial court judges, and sections 96-100 of the *Constitution Act, 1867* for the independence of superior court judges, Lamer C.J. (speaking for six of the seven judges who heard the matter) stated that "judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the

Constitution Acts."[54] Its scope and significance are accordingly heightened. As a fundamental constitutional principle, it applies to the actions of courts and governments, regardless of whether their actions fall within the confines of the relevant express constitutional guarantees. In the particular instance of provincial judges' judicial independence, for example, section 11(d) applies only to criminal courts (that is, it is a right which can be claimed only by persons charged with an offence) while sections 96-100 applies only to superior courts: thus the provincial or inferior civil courts fall into a gap since they are encompassed neither by the provision which applies to the inferior courts nor by the provisions which apply to civil courts. In this case, the foundational constitutional principle of judicial independence fills the gap left by the combination of the express provisions. This is very much an example of judicial "constitution-making." The legislators responsible for sections 96-100 of the *Constitution Act, 1867* did not contemplate that judges of the provincial courts should have the same protections (and, in turn, that those appearing before them would have the same protections) of judicial independence as did the judges of the superior courts and the persons who appeared before them. This distinction arose from adoption or inheritance of the British principles which did not have to account for "provincially appointed courts." The drafters of the Charter extended the protection to matters which involve, in the most obvious sense, the state versus the individual, that is, criminal matters. Furthermore, even the judges who agreed with the extension of the judicial independence principle accepted that section 11(d) of the Charter was sufficient to dispose of the question before them. Nevertheless, the fundamental constitutional principle of judicial independence now applies to all provincial court judges and, it appears indeed, since then, to justices of the peace in Ontario.[55] The express provision and the constitutional principle are, of course, related, but the existence of the former does not mean that the latter will not be recognized, applied or even go beyond the express provisions.

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54. *Provincial Judges Reference*, *supra* note 2, at 63-64 (emphasis in original). The decision actually relies on the operation of section 11(d) of the Charter, however, since the parties argued it on that basis, and the Chief Justice's comments are, strictly speaking, *obiter*. Section 11(d) states that "Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

55. *Re Ontario Federation of Justices of the Peace Associations* v. *The Queen in Right of Ontario* (1999), 43 O.R. (3d) 541 (Div. Ct.).

The difference between the scope of a constitutional principle and explicit constitutional guarantees may also be illustrated by the unsuccessful claim made by native women in Canada to participate in the constitutional talks which culminated in the Charlottetown Accord.[56] The federal Government had granted certain native groups financial support in connection with the constitutional proceedings, involvement in a consultation process and subsequent participation in the process to prepare constitutional amendments. A portion of the money had to be spent on women's issues. The Native Women's Association of Canada claimed that the failure to include them and to give them funding directly contravened their freedom of expression and equality guarantees in the *Canadian Charter of Rights and Freedoms*. The claim reflected the doubt among many native women about whether the male leaders who dominated the four groups who had been recognized would adequately represent their interests with respect to any proposal with respect to aboriginal self-government; in particular, they wanted to be sure that the *Charter of Rights* would apply to aboriginal self-government.

The majority of the Supreme Court of Canada stated that there was no obligation on the government to fund or consult anyone, except where the provision of funds to one group infringed the expression of another group (not the case here, according to the Court), and that, in any event, the native women had many opportunities to express their views; their argument that the funded groups advocated a male-dominated form of self-government was rejected. McLachlin J. was the only justice explicitly to take the position that the Charter does not apply to governments in their decisions to fund their advisors, but her colleagues' analysis indicate that it would be extremely difficult to establish a contravention of an explicit Charter guarantee in the context of public consultation. While consideration of this issue under the framework of fundamental constitutional principles would not necessarily result in a different outcome,[57] the dynamics of the analysis would be quite different.

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56. *Native Women's Assn. of Canada* v. *Canada*, [1994] 3 S.C.R. 627. The Charlottetown Accord contained wide-ranging proposals for constitutional amendments; it was defeated in a (with one provincial exception) national referendum in October 1992 (Quebec held its own referendum in which the Accord was defeated). The Federal Court, Trial Division dismissed the application, but the Federal Court of Appeal declared that the women's freedom of expression and equal guarantees under section 28 of the Charter had been contravened:[1992] 3 F.C. 192 (F.C.A.), allowing appeal from a judgment of the Trial Division, [1992] 2 F.C. 462.

57. I want to be clear that my argument is not intended to provide an "end run" around section 15 (or section 2) of the *Charter of Rights and Freedoms*, but rather to suggest the kind of case that is not easily dealt with as a section 15 case, but would be appropriately considered within the context of a fundamental substantive equality principle.

I merely want to suggest the nature of that analysis here. It is highly significant that the matter at issue was involvement in constitutional consultation and talks: this is the epitome of democratic participation, one mark of the broad notion of citizenship to which I referred earlier. This situation attracts the fundamental principles of democracy, respect for minority rights (or of a possible principle of respect for aboriginal interests) and given aboriginal self-government issues, of federalism. Analyzed in this way, post-*Quebec Secession Reference*, something capable of interpretation as government "largesse" might become an obligation. It is doubtful, on the other hand, that the native groups to whom the government had given funding would have been successful had they been forced to take their case for participation to court under the Charter, using the analysis in the *Native Women's Association* case.

Thus the initial question of whether there is some "obligation"[58] to include various groups, including native groups, in constitutional talks would implicate the democratic principle and probably, the principle of protection of minority rights or aboriginal rights. Assuming that this analysis results in an acceptance that certain groups, at least, should be consulted by the government or should have a place at the negotiating table, the next question is which particular groups or which members of

58. At the least this is a constitutional or moral obligation; it is less clear that it is a legal obligation since the Supreme Court of Canada was ambiguous on the legal (as opposed to constitutional) status of the fundamental principles, saying both that these principles had legal status but, as some commentators have thought, they would not enforce them. Speaking generally, the Court said in the *Quebec Secession Reference* that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force', as we described it in the *Patriation Reference* . . .), which constitute substantive limitations upon government action. . . The principles are . . . binding upon both courts and governments": *supra* note 2 at 249. On the other hand, the Court also said they had "clarif[ied] the legal framework," but that the political actors would have to reconcile the different constitutional interests and "[t]o the extent issues addressed in the course of negotiation [with respect to Quebec's claim to secession] are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role:" *ibid.* at 295. These two statements can be reconciled, however, if the Court means that they are not concerned with the details, but are prepared to enforce the failure to observe the constitutional factors which set the parameters of the negotiations. That is, their concern in this regard, at least, is for process, rather than for content, although the two are often closely interrelated.

a more widely defined group should be included.[59] Here (if not at an earlier stage of the analysis) a substantive equality principle would play a significant role. It would require consideration of whether native women's interests might be distinct from those of the male-dominated native groups: taking account of the intersecting interests of particular communities is at the heart of a substantive equality analysis and the recent historical record indicates that a substantial number of native women struggle with that intersection between their commitment to their aboriginal identity and their treatment as women within their aboriginal communities.

ii. *Equality is Already Recognized in the Rule of Law*

Currently, the only equality with status as a foundational constitutional principle is formal equality as it has developed in the rule of law.[60] It is correct to say that the concept of equality has been recognized as an element in the constitutional framework for at least one hundred and fifty years: since the development of liberal notions of the rule of law, the equal application of the law has been one of its elements. Stated simply, the principle is that the law applies to everyone regardless of status or station. This principle of legal equality is meant to ensure that people's status will not assist them in avoiding the consequences of their actions. Legal equality is a *sine qua non* of a regime purporting to operate in accordance with the rule of law. The glory of this principle lies in its ostensible neutrality: the "sovereign," no less than you or I, must abide by the law and be answerable to it.[61] It is as important today as it has always been,

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59. I am making this assumption for the sake of argument, but roughly the case would take this form: the democracy principle "requires a continuous process of discussion" (perhaps primarily by different levels of government, but not exclusively) and to the consideration of "dissenting voices": *Quebec Secession Reference, ibid.* at 256. If governments are to be representative, they must ensure that they establish means to take into account all types of voices and views. This is reinforced by the need to take into account the "protection of minority rights" or, as an independent principle, "protection for existing aboriginal and treaty rights": *ibid.* at 262. In addition, however, a substantive equality principle would demand a consideration of the extent to which the concerns of various members of a "minority" (or of aboriginal peoples) are being satisfactorily expressed: in short, to what extent is a minority's (or aboriginal people's) own heterogeneity recognized?

60. Formal equality is a component of the rule of law. Although it may not always be phrased in quite this way, it is an essential part of the bundle of processes or values which comprise the rule of law. It refers to the equal coverage of law: it applies to everyone and it is to be applied consistently or "fairly." It is this aspect of the rule of law to which I refer in using the term "formal equality."

61. Possibly the most passionate statement or application of this principle in Canadian jurisprudence occurs in *Roncarelli* v. *Duplessis*, *supra* note 3. Premier Duplessis had intervened to ensure that Mr. Roncarelli would be denied a liquor licence for his restaurant because the restauranteur had posted security for bail for Jehovah's Witnesses whose activities were the subject of a campaign by the provincial authorities (the Witnesses' beliefs were viewed as insulting to Roman Catholics). Premier Duplessis evidently considered himself above the law.

for the temptations of power have not diminished. But it has not changed since it was first articulated: it remains a formal equality which emphasizes treating everyone in the same way.[62] Given its context, this may well be appropriate, but it no longer reflects our understanding of equality which is more comprehensive than it was over a hundred years ago when formal (legal) equality was first articulated.

Formal equality is crucial in requiring all to obey the law, especially those in power—this statement of legal equality underlies our legal system, but it fails to acknowledge that law affects people differently. The importance of legal equality in the development of a constitutional democracy is not to be gainsaid. Today, however, this statement of equality, while necessary, is, alone, inadequate and unreflective of social reality. Rather than a reassuring statement of the inclusionary, non-hierarchical nature of law, it appears, on its own, to be exclusionary. A contemporary statement of fundamental constitutional principles—the principles which underlie all our legislation, legal procedures and government action and which comprise the constitutional framework—must recognize the multivariate nature of the communities subject to the same law. A neutral law may impose additional burdens on some because of their skin colour or fail to provide its benefits because of their gender. Therefore it is not sufficient to say only that the law applies equally to all: it must apply in a manner which is equally *meaningful* for all. Thus equality as a core constitutional principle be recognized as going beyond this formal "rule of law equality" to a distinct substantive equality principle in order to reflect changing social realities in keeping with the necessary evolution of constitutional principles.

Perhaps, then, we should change the meaning of equality in the rule of law? In many ways, this is an appealing approach since it merely asks that an already clearly recognized principle evolve to meet the demands of contemporary times. The rule of law is a deeply rooted constitutional principle inherited from the United Kingdom through the preamble to the *Constitution Act, 1867.* It has already evolved, since in Canada the principle is no longer tied, as it was in 1867, to the doctrine of parliamentary supremacy.[63] Considering the legitimacy of law, indeed, it is appropriate to bring to bear a substantive understanding of equality: law is legitimate and deserves to be obeyed when it recognizes that not everyone

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62. *Reference re Manitoba Language Rights, supra* note 3 at 748 and *Quebec Secession Reference, supra* note 2 at 258.

63. The content of the rule of law will almost certainly be inferred from a country's legal culture, respecting the rights which are "part of the backbone of the legal culture, part of its fundamental traditions:" Joseph Raz, "The Politics of the Rule of Law" (1990) 3 Ratio Juris 331, 337.

can be treated in the same way. But this is rather different from saying that everyone is obliged to obey the law regardless of their position in life; in this sense treating people equally is to say that no one is *above* the law. This principle in a democracy has value in and of itself and it is still needed: in this context the emphasis is on ensuring that those who may have the means to avoid law do not avoid it. This statement about formal equality is far from outmoded, but treating people in the same way *is* outmoded in other contexts in which it is appropriate to take difference into account. Rather than redefining formal equality, therefore, it is preferable to acknowledge the need to recognize the concomitant substantive form of equality with each applied in the appropriate case.

iii. *Is Equality Just Another Word for "Minority Rights?"*

The recognition of a foundational constitutional principle of substantive equality may seem simply another way of embedding in the constitutional framework the values inherent in the protection of minority rights. Therefore, it might be argued, it could bring little to the analysis which that recently articulated principle could not bring. There is, of course, an equality component to "minority rights." The Court's admittedly brief discussion of this principle seems to define it with regard to group or collective rights, including possibly aboriginal rights.[64] The principle of democracy also "accommodates cultural and group identities," although not surprisingly given the context in which this comment is made (the "rules" governing negotiation over Quebec secession), this appears to be related to self-government.[65] Many of the principles reflect similar values, however; nor does identification of a similar or related principle mean that there might not still be a need for a distinct articulation of a particular doctrine, as was the case with the addition of the protection of minority interests, despite a related element in democracy.

Inevitably, if the Constitution possesses a coherence, there will be considerable overlap among the constitutional principles. One might argue, for example, that political expression is simply a concomitant of democracy, deriving from the association between democracy and the need for public information and widespread debate of ideas, yet it has status as a free-standing principle. Similarly, although aboriginal rights might seem (in a general sense, at least) to be a type of minority right, the Supreme Court has said that it might be an independent principle and there is much to be said for this approach: although minority and aboriginal rights share much in common (they both represent a place

64. *Quebec Secession Reference*, *supra* note 2 at 261, 262, 269.
65. *Ibid.* at 254. Federalism is also in part a response to "diversity": *ibid.* at 244, 252.

carved out from the homogenous character of the country), it is the differences (primarily in the claim by aboriginal peoples to be "peoples") between them that matters. The same may be said of protection of minority rights and a substantive equality principle. Both principles address difference, both address participation and recognition. Yet minority rights cannot avoid the dichotomy inherent in the name, that between the minority and the majority; minorities are "fixed," refer to clearly set parameters and *tend* towards "institutionalized" recognition in (for example) minority language or education rights. It is true that they do not need to be so limited and no doubt they will not be. Nevertheless, the minority rights principle does not capture the fluid and flexible nature of substantive equality which pays at least as much, if not more, attention to the individual as the group. Most importantly, substantive equality seeks to remove the notion of hierarchy or of "the norm" which is effectively inherent in majority-minority relations. The minority rights principle is about "protection"; the substantive equality principle would be about transformation.

Reference to the *Native Women's Association* case is again useful, this time to illustrate the difference between the protection for minorities principle and a substantive equality principle. While a minorities (or better in this context, an aboriginal) principle would capture the interests of aboriginal peoples generally, it is less adequate in providing an appropriate shelter for aboriginal women in relation to aboriginal men (that is, from those who "dissent" from those who claim to be "the norm"). Yet this is precisely what the substantive equality principle would do: it would permit a framework for analysis of differing views within a particular "group" (minority or aboriginal people). In the context of something like the constitutional talks, the application of the substantive equality constitutional principle would invoke questions about the legitimacy of any results from a process which had ignored this history.

The recognition of the protection of minority rights is important not only in itself, but also because it indicates the Court's willingness to develop a contemporary "list" of constitutional principles responsive to Canada's current social reality and because it evidences a consciousness about the fundamental status of equality type principles. But it differs from substantive equality not only in content, but because it does not, as does substantive equality, provide a process of analysis or interpretation of government action. Substantive equality provides a means not only by which equality seekers may have their experiences reflected in policy, but also by which government action can be assessed for conformity with the constitutional framework.

Consideration of alternatives to a freestanding substantive equality principle serves to highlight what is different about substantive equality from other principles and what would be different about the foundational principle compared to the explicit guarantee. Changing the meaning of equality in the rule of law would hide the continuing significance of formal equality in the appropriate context; nor should an explicit guarantee be confused with the role of a foundational principle, any more than it is with judicial independence or political speech. Substantive equality deserves the same level of recognition as a fundamental constitutional principle as does political speech or respect for minority rights; like aboriginal rights (which I maintain should have independent status)[66], it shares something in common with an already recognized principle (in both cases, protection of minority rights and in the case of equality, the rule of law), yet demands recognition on its own terms as a foundational constitutional principle.

b. *The Special Contribution of the Substantive Equality Principle*

A substantive equality principle would speak to the process of contemporary constitutionalism. James Tully has cited the *Canadian Charter of Rights and Freedoms* as an example of "presumed, culture-blind liberal constitutionalism" which has been imposed as a reflection of "the imperial imposition of a pan-Canadian culture" over "the distinct cultural ways" of Quebec, Aboriginal peoples, women and the provinces.[67] Whether the Charter's wording is and its interpretation has been more complex than Tully suggests in at least some respects, inevitably as a constitutional document the Charter is based in large measure on an assumption of sufficient "commonality" (or "heterogeneity") to form a single political entity, just as the Constitution as a whole is.[68] The substantive equality principle I have proposed leavens the constitution's homogeneity, although I do not argue here that it changes the constitution from one which is essentially liberal to one that is post-liberal. Nevertheless, it would contribute significantly to the kind of "just form of Constitution" which Tully contrasts with the "neutral" Constitution

66. In the *Quebec Secession Reference*, the Court suggests that respect for aboriginal rights might be an element of respect for minority rights or might be a free standing right: *supra* note 2 at 262-63. For reasons I have indicated, I hold the view that it is sufficiently distinct to warrant the latter of these possibilities.

67. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 7.

68. Indeed, one might argue that the Charter imposes a less homogeneous vision than does the rest of the Constitution, but if so, this is perhaps still a question of degree rather than kind.

which has been predominant in the past and which was consistent with liberalism's earlier "neutrality" on the question of difference. I would argue, moreover, that the Canadian Constitution, through judicial interpretation, has gradually been moving beyond this "neutrality" towards "the full mutual recognition of the different cultures of its citizens,"[69] a process which is not only compatible with a substantive equality principle, but is aided by it.[70]

Applied to institutions, as well as to "citizens," substantive equality would bring to bear considerations of the mutuality and interaction requisite in both institutional and individual actors. I have primarily considered the value of this principle for individuals or communities based on personal characteristics; however, it would also have an impact on institutional arrangements. For example, it would seem to me to support an asymmetrical federalism which acknowledges the fundamentally different needs of Quebec without resulting in the feared "balkanization" of Canada. It might, for example, be brought to bear in considering the legitimacy of the constitutional structure implied by the Calgary Declaration with its assertions of sameness in the treatment of provinces.[71] Similarly, as I have already suggested, it might have a role to play in interpreting federalism with respect to the Nisga'a governance.

I next explore the meaning of substantive equality and how it might be applied. Although I begin with the treatment of equality under section 15 of the Charter, as developed by the Supreme Court of Canada, for reasons I explain, the section 15 jurisprudence can constitute only that—an already established start to the kind of content a substantive equality needs to be meaningful.

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69. Tully, *supra* note 67 at 8.

70. This is, I recognize, a large proposition but in its defence I point to the articulation of other fundamental principles, such as minority rights and the "reformulation" of principles such as federalism from one encompassing institutional relations to one also addressing citizen relations, the recognition of oral evidence as "legitimate" evidence in aboriginal rights cases and the legitimacy accorded the secession of Quebec under certain conditions. On oral evidence, see *Delmaguukw* v. *British Columbia*, [1997] 3 S.C.R. 1010; and on the legitimacy of secession, see the *Quebec Secession Reference*, *supra* note 2. On the change from a "government's constitution" to a "citizens' constitution," see the views of Alan Cairns, esp. in Douglas E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change. Selected Essays by Alan C. Cairns* (Toronto: McClelland & Stewart, 1995).

71. Article 2 of the Calgary Declaration states that the provinces enjoy "equality of status." The Declaration was agreed to by all premiers of the "English-speaking" provinces on 17 September 1997.

4. *Thoughts on the Inquiry Required by a Fundamental Constitutional Principle of Substantive Equality*

The concept of equality is complex and "elusive."[72] As a justice of the Supreme Court of Canada has phrased it, "[t]he quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations."[73] At a less exalted level, "[t]he principle of equality before the law has long been recognized as a feature of our [Canadian] constitutional tradition."[74] The express guarantee of equality under section 15 of the *Canadian Charter of Rights and Freedoms* "'rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and respect.'"[75] It goes beyond formal equality to guarantee substantive equality.[76]

My primary purpose in this section is to raise the kind of concerns which might be considered in delineating the parameters of a foundational constitutional principle of substantive equality. In doing that I draw on the considerable literature extant in the area of equality. As with any of the principles, its meaning would evolve and would be affected by the specific context in which the principle would be considered. Because this concept has already been given content by the Supreme Court, however, it is possible to articulate at least some elements which are a *sine qua non* of the concept. For this, I draw on the Court's own jurisprudence.

The most important aspect of the concept of substantive equality is the taking into consideration the differences among people which might require different treatment in order to achieve equality. This aspect highlights the distinction between substantive and formal equality, that is, between emphasizing difference and emphasizing sameness. Yet they both address the goal of eliminating the gap between the powerful and the powerless or between the rich and the poor, the one by curtailing the power of the rich, the other by curtailing the disadvantage of the poor.

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72. *Andrews*, *supra* note 42 at 164 (McIntyre J.).
73. *Law*, *supra* note 42 at 507 (Iacobucci J. for the Court).
74. *Andrews*, *supra* note 42 at 170. As McIntyre J. pointed out, this concept of equality, known as formal equality, had received statutory recognition in the *Canadian Bill of Rights* where its limitations became only too readily apparent.
75. *Ibid.* at 171, quoting Chief Justice Howland in *Reference Re An Act to Amend the Education Act* (1986), 53 O.R.(2d) 513 (C.A.). The notion of equal respect and worth is echoed in other section 15 cases: see, for example, *Vriend* v. *Alberta*, *supra* note 38 at 535, and *Law*, *supra* note 42 at 530.
76. *Law*, *supra* note 42 at 517-18, 527.

The notion of "affirmation of difference" captures the essence of substantive equality.[77] There are significant differences between the claims of autonomy or self-government (as made by aboriginal peoples) and claims to full participation in "mainstream" society, the larger society (as made by most ethnically-identified groups, persons with disabilities and "women"[78]). In the latter case, this would be a claim premised on a restructured society which recognizes the distinctive characteristics of those who are excluded in different ways (and to a different extent) as an integral part of the society, instead of abnormal or "different."[79] It is important to recognize that one of the characteristics of substantive equality is that it can encompass a variety of forms of difference and mutual recognition.[80]

The "taking account of difference" which lies at the heart of substantive equality had been well-established as a principle by the time section 15 of the *Canadian Charter of Rights and Freedoms* came into effect in 1985 because it had already been developed in case law under human rights legislation. It and other similar developments were immediately incorporated into the interpretation of section 15 in *Andrews*, the first case decided under section 15, and have constituted part of the meaning given to "equality" in section 15 since then. Nevertheless, the meaning of equality developed under section 15 is, I would argue, inadequate for a foundational principle of equality because of its reliance on the concept of discrimination. In this regard, the concept of substantive equality comprising a foundational principle can build on the interpretation of

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77. In considering this concept, Kane addresses only the claims of multicultural groups which seek inclusion in society and therefore not with groups seeking self-rule or sovereignty (specifically, indigenous peoples): *supra* notes 51 and 52.

78. "Women" may constitute a distinct group for many purposes, but they may well be making claims which overlap with other claims based on, for example, ethnicity, ability, class or sexuality or may be making distinctive claims within these other communities.

79. Kymlicka makes a similar distinction: *supra* note 39 at 64. Cf. Tully who would class all claims for cultural recognition as instances of a claim to self-rule ("to rule themselves in accord with their customs and ways"), even though the form it takes may divide roughly as I have described it: Tully, *supra* note 67 at 4-5. These are not easy determinations; thus while usually persons with disabilities want to eliminate the (irrelevant) barriers that prevent them from participating fully in society, persons who subscribe to the Deaf culture have a very different outlook, the heart of which is, perhaps not surprisingly, language: Kymlicka, *supra* note 39 at 93-95.

80. Tully views constitutional "mutual recognition" as an element of (indeed, perhaps as the defining characteristic of) post-liberal constitutionalism: *supra* note 67. Fukuyama calls this a form of liberalism: "For Hegel, by contrast [with Hobbes and Locke for whom "[l]iberal society is . . . a reciprocal and equal agreement among citizens not to interfere with each other's lives and property], liberal society is a reciprocal and equal agreement among citizens to mutually recognize each other . . . [Hegelian liberalism is] the pursuit of *rational recognition*, that is, recognition on a universal basis in which the dignity of each person as a free and autonomous human being is recognized by all": Fukuyama, *supra* note 40 at 200.

section 15, but would not be limited by the actual wording of the provision, in the same way that the meaning given to the principle of judicial independence is reflected in the explicit provisions of the *Constitution Acts* but is not limited by them.

In many respects the Supreme Court of Canada has already indicated that it has an understanding of substantive equality grounded in an appropriate recognition of the interrelation between sameness and difference.[81] As I have already indicated, from the beginning the Court was cognizant of the significance of the difference in wording between section 15 of the Charter and section 1 of the *Bill of Rights*, as well as of the relevance of advances in anti-discrimination jurisprudence.[82] A brief review of the section 15 jurisprudence helps to illustrate the characteristics of the substantive equality concept I am proposing. As I have already explained, in rehearsing the section 15 jurisprudence my intent is not to suggest that it constitute the content of a core constitutional principle of substantive equality. Inevitably, however, it will inform the judges' appreciation of a core principle and its desirable and less desirable elements are worth consideration both for that reason and because it can, in a sense, serve as a foil in developing the broader principle.[83]

Underlying the analysis developed in *Andrews* and subsequent cases is the view that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized

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81. American courts have been less responsive to this invitation than have Canadian judges: Barbara Flagg & Katherine Goldwasser, "Fighting for Truth, Justice, and the Asymmetrical Way" (1997) 76 Washington U. L. Q. 105.

82. Section 15 guarantees equality "before and under the law" and 'the equal protection and equal benefit of the law," while the Bill of Rights recognizes "equality before the law and the protection of the law." The status of the Bill of Rights as an ordinary statute and the wording ("It is hereby recognized and declared that in Canada there have existed and shall continue to exist [specified rights and freedoms]"), as well as the interpretation clause which required courts to interpret legislation in a manner which did not contravene the Bill of Rights (contrasted with the courts' power to strike down legislation inconsistent with the Charter) resulted in a narrow and stultifying application of the Bill: *Canada (Attorney-General)* v. *Lavell*, [1974] S.C.R. 1349; *R.* v. *Burnshine*, [1975] 1 S.C.R. 693; *Bliss* v. *A.G. Can.*, [1979] 1 S.C.R. 183; *MacKay* v. *The Queen*, [1980] 2 S.C.R. 370. In fact, the first hint of the new direction came before the Court had an opportunity to consider section 15 itself. Dickson C.J. observed in *Big M Drug Mart*, which involved a challenge to the *Lord's Day Act* under section 2(a) of the Charter, the guarantee of freedom of religion, that "the interests of true equality may well require differentiation in treatment": *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 347.

83. Critical assessments of the section 15 jurisprudence abound: see, for example, Bakan, *supra* note 1, esp. 48ff; Dianne Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 N.J.C.L. 295; David M. Beatty, "The Canadian Conception of Equality" (1996) U.T.L.J. 349. Also see Frances Henry & Carol Tator, "State Policy and Practices as Racialized Discourse: Multiculturalism, the Charter, and Employment Equity," in Li, ed., *supra* note 39, esp. 99-103. For examples of arguments advanced under section 15, see Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996).

at law as human beings equally deserving of concern, respect and consideration."[84] In practice, that recognition entails acknowledging that "identical treatment may frequently produce serious inequality."[85] By 1982 the courts had acknowledged that the intention to treat someone unequally (or in a discriminatory fashion) is irrelevant, that superficially neutral legislation or conduct may nevertheless result in inequality,[86] that differences among groups may be as important as differences between groups and that in either case, different treatment may be required to satisfy equality.[87] These are all important characteristics of a substantive approach to equality, both with respect to an explicit constitutional guarantee and to a foundational principle. They were adopted as part of the interpretation of section 15 in *Andrews* in 1989 and have remained as the core of the Court's approach, despite some serious divergences with potential—perhaps now overcome—to undermine the more progressive aspects of the Court's approach in *Andrews*.[88]

In some respects, the nature of the inquiry which courts will undertake with respect to a foundational equality, as they must undertake with the other foundational principles, is a "dialogue" about the nature of a society through the legal lens.[89] Thus the substantive equality principle is a major tool in the process of one aspect of this dialogue, as "culturally diverse sovereign citizens of contemporary societies negotiate agreements on their ways of association over time in accord with the conventions of

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84. *Andrews, supra* note 42 at 171. The Court has been criticized for forgetting this principle in cases such as *Symes* and *Thibaudeau* in which the circumstances of individual women were assessed from the point of view of their family status: *Symes* v. *Canada*, [1993] 4 S.C.R. 695; *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627. For an example of this criticism, see Claire F.L. Young, "It's All in the Family: Child Support, Tax, and *Thibaudeau*" (1995) 6 Constitutional Forum 107.

85. *Andrews, supra* note 42 at 164.

86. This was most recently confirmed under section 15 of the Charter in *Eldridge* v. *British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624.

87. *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241; also see *Weatherall* v. *Canada (Attorney General)*, [1993] 2 S.C.R. 872.

88. While acknowledging that there had been some dispute about the appropriate interpretation of section 15, Mr. Justice Iacobucci confirmed in *Law* that "there has been and continues to be general consensus regarding the basic principles relating to the purpose of s.15(1) and the proper approach to equality analysis. . . ": *Law*, *supra* note 42 at 509. His Lordship might be said to gloss too easily over the differences in approach; on the other hand, the Court seems to be saying in *Law* that it has effectively rejected the more restrictive "relevancy" approach followed by four members of the Court in *Egan, supra* note 38 and *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

89. On this notion of "dialogue," see Jennifer Nedelsky, "Reconceiving Rights as Relationship" in Jonathan Hart & Richard W. Bauman, eds., *Explorations in Difference: Law, Culture and Politics* (Toronto: University of Toronto Press, 1996) at 67, 80-81.

mutual recognition, consent and continuity."[90] Equality claims (which in essence are about being treated with dignity and respect) will be contradictory and it will not always be possible to reconcile the conflicts; judges will have to make choices. This power in judges is, of course, the thing that gives some people pause and it is almost impossible to avoid the expression of their own subjective views. This is inherent in the nature of constitutionalism, however. In making decisions about the impact of a substantive equality foundational principle, as they do in all cases involving foundational principles, judges will take into account the other principles and explicit constitutional guarantees, as well as the legislative preferences, especially in cases where there are a number of alternative policies which can meet constitutional standards.

In a liberal society, it is impossible to avoid the problem that some practices are inconsistent with basic liberal principles.[91] This is clearly a formidable task. It will sometimes be the case that some of the differences are significantly at odds with the general pattern. For example, if the general pattern is designed to enhance "equality," as I suggest should be the case, what does one do with "customary patterns" based on the subordination of some members of the group to others? That liberalism cannot tolerate intolerance is especially true when unequal practices are being challenged in court as contravening some right or are being used to defend inequality. While the practices of private groups are less amenable to challenge as a constitutional matter, government's willingness to permit or tolerate them in the name of pluralism may be. The more diverse the society and the more diversity is accepted, the more likely such challenges are likely to occur, requiring consideration of the interrelation between different foundational principles, even between a principle of substantive equality and that of protection of minority rights.

While acknowledging the "difference argument" in *Andrews*, the Supreme Court of Canada did not seriously struggle with this view of equality until it had its first significant disability case. In *Eaton* v. *Brant County Board of Education*, Mr. Justice Sopinka, for the majority, recognized that for some persons with disabilities "[e]xclusion from the

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90. Tully, *supra* note 67 at 184. Tully describes these conventions as "norms that come into being and come to be accepted as authoritative in the course of constitutional practice, including criticism and contestation of that practice": *ibid.* at 116. He contends that "[i]f they guide constitutional negotiations, the negotiations and resulting constitutions will be just with respect to cultural recognition": *ibid.* at 117.

91. Robert Justin Lipkin, "Can Liberalism Justify Multiculturalism?" (1997) 45 Buffalo L. Rev.1.

mainstream of society results [in part] from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access." The importance of a contextual analysis is brought home by these cases in a way it was not previously, for it is true that "segregation can be both protective of equality and violative of equality depending upon the person and the state of disability."[92] Yet even this may not capture what it means to treat someone with respect and to pursue an "equality of well-being" which is premised on the right of people to make choices.[93] One may say, however, that judges do understand that they should take into account the complainant's perspective,[94] another important aspect of a substantive equality.

A fully realized substantive equality concept requires an appreciation of the flexibility and overlapping nature of identity and of the distinction between an externally imposed and an internally derived identity. Here the structure of section 15 and its roots, through wording and interpretation, in human rights or anti-discrimination jurisprudence make it less useful as a guide. Human rights legislation is based on a site-specific (rental accommodation, workplaces) individual approach to redressing inequality (this person was refused accommodation or a job or denied a promotion). It has thus provided a remedy for individual wrongs, reflective of its intent, initially, at least to reveal to people the error of their ways. Its grounds based approach, imported into section 15, is an impediment to a dynamic concept of identity. The need to "categorize" the basis of the inequality as falling within recognized grounds makes it difficult to view inequality in the more complex way required by the intersecting identities to which I have previously referred:[95] substantive

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92. *Eaton*, *supra* note 87 at 274.

93. Marcia H. Rioux, "Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality" (1994) 7 Can. J. L. & Jur. 127, 143. Rioux explores the problem of formal equality theory "with its principles of homogeneity, individualism, and interchangeability" for persons with intellectual disabilities: *ibid.*, 135.

94. L'Heureux-Dubé J. explicitly uses the term "subjective-objective standard" in *Egan* which means that the effect of the distinction must be assessed "from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member" and this approach apparently received the support of the full Court in *Law*, *supra* note 42 at 532.

95. Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179. Also see Beatty, *supra* note 83. Madam Justice L'Heureux-Dubé has tried to rely less closely on the "grounds approach" (in *Egan*, especially) and some of her general statements were approved in *Law*, yet the wording would seem to discourage taking this analysis very far. It should be noted, however, that the possibility of a "synthesis" of grounds was contemplated in Law, *supra* note 42 at 555.

equality recognizes that "the self is a text with a multitude of discourses"[96] and human rights discourse has not traditionally accommodated this reality well.

While the section 15 jurisprudence should not be used as the definitive interpretation of a foundational substantive equality principle, there are lessons to be gained by considering it. On the one hand, it shows that substantive equality is not alien to our judiciary but is, rather, at the heart of their consideration of the constitution's explicit equality guarantee. On the other, however, it illustrates the weaknesses even in a constitutional context of the human rights jurisprudence on which it relies. The analysis under a fundamental constitutional principle of substantive equality can benefit from the work done to date on equality but it does not need to be constrained by it. The constraints will derive from the principle's interrelationship with the other foundational principles relevant in any given case and the coherent development of the constitutional framework as a whole.

What are the implications of "taking account of difference"? The first is to recognize the legitimacy of different views or approaches, needs or experiences. The mainstream or dominant view is not necessarily the only view and the goals which the mainstream or dominant group seek are not necessarily those sought by non-dominant members of society.[97] Substantive equality acknowledges that mainstream ("majority" or "dominant") values, institutions and experiences are not always the appropriate way to organize the society or to organize it for all its members. Substantive equality is, in large measure, about disassembling the norm. Furthermore, the experience of some members of society may be at odds with that of others: how one perceives the police, groups of men walking down the street, an emphasis on abortion rights rather than on the right to give birth, a flight of steps and myriad other situations will often seem to reflect a world different from how someone else experiences and perceives these situations. But all are reflective of the fact that in our heterogeneous societies one person's "truth" may be omitted from someone else's truth or indeed may be someone else's "lie."

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96. M.M. Slaughter, "The Multicultural Self: Questions of Subjectivity, Questions of Power," in Rosenfeld, *supra* note 21 at 369, 374.

97. Leon E. Trakman, "Substantive Equality in Constitutional Jurisprudence: Meaning within Meaning" (1994) 7 Can J. L. & Jur. 27 at 31: "the ends of privileged groups are not coincident with those whom privileged groups, supposedly, empower." For an example, see Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in Caroline Andrew & Sanda Rodgers, eds., *Women and the Canadian State/Les Femmes et L'État Canadien* (Montreal and Kingston: McGill-Queen's University Press, 1997) 64. For many First Nations women equality is not an end they seek. This is not the same as saying that all women seek equality, but we need to recognize that it may take different forms.

In short, the meaning of equality is in part a revealing of inequality which has been hidden because we have approached the inquiry (is there inequality here?) from a particular point of view. Thus the inquiry necessary to determine whether there is substantive inequality must be undertaken from more than one viewpoint. As Crenshaw has said, when examining a question which appears to be one of gender, we should ask "where is the racism in this?"[98]

Current inequality is a consequence of the interplay of historical practice, existing norms and the detritus of apparently outdated norms, deep-seated ideological assumptions and the failure to take adequate measures to overcome recognized disadvantages. The inquiry raised by claims of substantive inequality therefore requires asking what it is about societal structures, existing norms and ideological assumptions which results in inequality and what must be changed in order to achieve equality.[99] The process of constructing an identity for one group by another—attributing characteristics and behaviours as oppositional to how the constructing group sees itself—includes treating those constructed attributes as natural and therefore a legitimate basis for unequal treatment.[100] These unstated attributions must be revealed. While necessary, however, this analysis on its own fails to capture the need to treat "ethnicity/race, gender, and class . . . as social relations which have to do with how people relate to each other through productive and reproductive activities."[101] Equality is a relational concept which derives from the way in which societal structures have governed those relations. Thus an important part of the process is moving beyond the other-constructed, the identity revealed through the gaze of the other, to the meaning of identity developed internally, as well as recognizing that any internal identity will contain its own tensions.

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98. Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" in Dan Danielsen & Karen Engle, eds., *After Identity: A Reader in Law and Culture* (New York: Routledge, 1995) at 350, fn. 6. Obviously, this question applies in reverse and to other characteristics which may have a bearing on how law effects people.

99. Simone de Beauvoir, *The Second Sex* (New York: Vintage Books, 1973). Minelle K. Mahtain, "Polarity versus Plurality: Confessions of an Ambivalent Woman of Colour" (1994) 14 Can. Woman Studies 14, 17: of Indian/Iranian origin, Mahtain explains that "[r]egardless of my own ambiguities about this placement [as a woman of colour], I have been positioned as a mere bearer of an unexplained label."

100. Slaughter, *supra* note 96 at 372.

101. Roxana Ng, "Racism, Sexism, Canadian Nationalism" in Himani Bannerji, *Returning the Gaze: Essays on Racism, Feminism and Politics* (Toronto: Sister Vision, 1993) at 230. Nitya Iyer, "Disappearing Women: Racial-Minority Women in Human Rights Cases," in Andrew & Rodgers, *supra* note 97 at 260: we need to see discrimination "as a relational and structural problem whose solution calls for institutional change."

The test of whether persons are being treated equally is whether they are being treated as if they are of equal moral worth, recognizing that equal moral worth may mean that it will be necessary to treat people differently from each other in order to respect their specific needs and experiences. There is no easy formula which can be applied to every circumstance but rather a process which the courts are able to apply to the particular context and persons involved. Accordingly, any substantive equality assessment must be grounded in actual experience; furthermore, the persons for whom it is a reality must have a means to communicate that experience to decision-makers. The most successful communication will be in their own "language," defined broadly, although this is not always possible. "Hearing from the complainant about his or her own experience" and "questioning one's own assumptions" reveal alternatives to the dominant view.[102] This is why the Supreme Court required that aboriginal oral histories be treated as evidence even though they do not comply with "traditional" evidence rules.[103] The admission of oral histories requires a reconsideration of the "authoritative language" of evidence law.[104] A substantive equality principle means that the constitutional framework incorporates the negotiation of diverse claims through "unpacking" the "shared language of constitutional recognition." As Tully explains,

> The aim of negotiations over cultural recognition is not to reach agreement on universal principles and institutions, but to bring negotiators to recognize their differences and similarities, so that they can reach agreement on a form of association that accommodates their differences in appropriate institutions and their similarities in shared institutions.[105]

The reality of cultural identity includes experiences which are differentiated on the basis of sex, race, sexuality, class, ability and other characteristics. There is, however, a tension between these differing experiences both among "groups" or "communities" which share characteristics and within individuals who consider themselves members of or are "allocated to" a number of communities simultaneously.[106] For

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102. For an example of judicial consideration of issues outside the judge's experience, see Wendy Baker, "Women's Diversity: Legal Practice and Legal Education—A View from the Bench" (1996) 45 U.N.B.L.J. 199.

103. It is also another reason for finding that native women should be at the table during the constitutional amendment process.

104. Tully, *supra* note 67 at 54.

105. *Ibid.* at 131.

106. By "allocated," I mean that individuals are treated as if they are members of communities merely by "real" or perceived external characteristics, no matter what their own sense of affinity with the group may be.

example, not only are individuals members of ethnic or "racial" communities, but also of class or ability communities, as well as numbers of others; any particular individual is likely to have an affinity with more than one ethnic or cultural (or other) community.[107] (On the other hand, when identity is imposed on us, it unlikely to be that complex, but rather the imposition will simplify our identity according to pre-determined categories, likely those comprising human rights grounds.) Our identifications and alignments are not static but shift with circumstances. Nor is any particular group homogeneous. Feminists are among those well aware of the temptation of universalizing experience and of the exclusion that results from essentialism[108] and have sought "languages and images that account for multiplicity and difference, that negotiate contradiction in affirmative ways, and that give voice to a politics of hybridity and coalition."[109] This approach is a reflection of the dynamic nature of equality theory, both in process and in content.

The exploration of identity and of integration of identity into political, social and legal practice is ongoing:

> [C]ultures . . . are continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others. The identity, and so the meaning, of any culture is thus aspectival rather than essential: like many complex human phenomena, such as language and games, cultural identity changes as it is approached from different paths and a variety of aspects come into view. Cultural diversity is a tangled labyrinth of intertwining cultural differences *and* similarities, not a panopticon of fixed, independent and incommensurable worldviews in which we are either prisoners or cosmopolitan spectators in the central tower.[110]

The inquiry into whether individuals or groups are experiencing substantive inequality in a particular context demands a complex assessment. It will ask how the equality needs of different people relate to each other. In a pluralist society there will inevitably be differing views of what it means to be equal as part of the more general project of different views

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107. Iyer, *supra* note 95; Judy Scales-Trent, "Sameness and Difference in a Law School Classroom: Working at the Crossroads," (1992) 4 Yale J.L. & Feminism 415.

108. Nira Yuval-Davis, "Women, Ethnicity and Empowerment" in Ann Oakley & Juliet Mitchell, eds., *Who's Afraid of Feminism: Seeing Through the Backlash* (New York: The New Press, 1997) esp. 89ff; Angela P. Harris, "Race and Essentialism in Legal Theory" (1990) 42 Stanford L. Rev. 581; Rioux, *supra* note 94.

109. Lesley Heywood & Jennifer Drake, "Introduction" in Heywood and Drake, eds., *Third Wave Agenda: Being Feminist, Doing Feminism* (Minneapolis: University of Minnesota Press, 1997) at 9. Also see Daiva K. Stasiulis, "Feminist Intersectional Theorizing," in Li, ed., *supra* note 39.

110. Tully, *supra* note 67 at 11 [emphasis in original].

of the "good society."[111] The inquiry cannot assume one view, but neither can it be without moral (some might prefer "political") compass. The values which govern this process and the meaning of substantive equality are not immune from criticism or change, but neither are they without some significant grounding in a more comprehensive understanding of how people are to be treated and how they are expected to treat each other.

As those responsible for determining whether inequality exists and what is required to replace it with equality, judges must be prepared to "ask the other question" which "forces us to look for both the obvious and non-obvious relationships of domination."[112] It follows that judges must be prepared to realize that their own experiences and "social location" affect their view of the world and of the case before them and to go beyond that.[113] This approach turns the notion of judicial impartiality on its head and ostensible neutrality is recognized for what it is: partiality and the imposition, intentionally or not, of the dominant view or experience. If judges do not acknowledge (in the pursuit of impartiality) the necessity of questioning and act accordingly, they have failed to recognize that "[p]reexisting inequalities in power and resources can only be reproduced, not redressed, in a legal arena that treats all participants identically."[114]

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111. In *Political Liberalism*, John Rawls acknowledges that *A Theory of Justice* inadequately took into account the fact that in a pluralist society not everyone would agree about what the "well-ordered society" comprised: John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at xvi. Rawls explains that "[p]olitical liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime."

112. Mari Matsuda, "Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition" (1991) 43 Stanford L. Rev. 1183 at 1189. The failure to "ask the other question" when making choices may mean that the result has unanticipated effects. For example, in finding obscenity laws justifiable because pornography undermines the equality of women (unmodified), the Supreme Court of Canada has been criticized for failing to appreciate the situation of gays and lesbians: James Peterson, "Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas about Sex and Gender" (1998) 2 Wisconsin L. Rev. 625. See *R.* v. *Butler*, [1992] 1 S.C.R. 452. Another example is the institution of mandatory charging policies in "domestic violence" complaints which failed to consider how effective they could be in communities with a high distrust of the police.

113. Leslie Roman, "White is a Color! White Defensiveness, Postmodern and Anti-racist Pedagogy" in Cameron McCarthy & Warren Critchlow, eds., *Race Identity and Representation in Education* (New York: Routledge, 1993). It is generally the case that "whiteness generally is transparent to whites:" Flagg & Goldwasser, *supra* note 81 at 106.

114. Flagg & Goldwasser, *supra* note 81 at 109.

In sum, substantive equality requires consideration of the impact of government policy and decisions on the various communities subject to them; that, in turn, requires a determination of how decisions affect members of society because of unexamined beliefs about their needs, behaviour and experiences. Substantive equality will require addressing omissions (what needs to be added to satisfy substantive equality?) and commissions (what needs to be removed to achieve substantive equality?). This is unlike formal equality which ensures that everyone is subject to the law and that everyone is treated in the same way. The characteristics which signal a reason to consider the impact of policy are not static categories, however, and are not meant to suggest a society divided into isolated groups whose members are seeking their predominant identity, but rather a society whose members' alignments or interests may differ from time to time. These tend to be the characteristics which underlie people's experiences in life, how they are treated by others and their access to society's goods and benefits. In a broader sense, however, the objective is to ensure that policy-making treats people with equal dignity and respect, recognizing that it must be manifested in different ways in light of the fact that people are differently situated. In order to comply with substantive equality requirements, policy-makers must consider interests relevant to the moral worth of those affected by the policy or by its absence.

The characteristics of substantive equality which I have outlined above are intended to provide an indication of the nature of substantive equality. They are rooted in the interpretation of equality developed by the Supreme Court under section 15, just as other constitutional principles find echoes in the express guarantees which they resemble. Like those other principles, however, a substantive equality foundational principle would not be bound by the interpretation given its express guarantee. The recognition of a substantive equality principle would permit the evolution of an interpretation which can fulfil the promise of substantive equality at which section 15 analysis has hinted. Substantive equality is then susceptible to the evolution which the Court has developed in employing other values crucial to Canada's identity, such as democracy or judicial independence.

Conclusion

In a country based on constitutional supremacy the choice of values to include among fundamental constitutional principles is an indication of which values are pre-eminent in the society. This was confirmed by the *Quebec Secession Reference* which although directed at the specific issue of Quebec separation represents the most comprehensive statement yet

by the Supreme Court of Canada on the impact of foundational constitutional or organizing principles. Building on that opinion and the treatment of equality as a societal value I have argued that substantive equality is sufficiently characteristic of Canada that it should be recognized as a fundamental part of the constitutional framework, those principles from which the explicit guarantees arise and by which they are assessed.[115] I have further outlined the beginning of an understanding of a foundational substantive equality which finds some echo in the section 15 jurisprudence but which goes beyond the interpretation of section 15. A foundational substantive equality deserves its own interpretation which will be informed by and in turn inform the other foundational principles relevant to any given situation.

Recognition of a foundational constitutional principle of substantive equality would contribute to the on-going construction of the "internal architecture" of Canada's Constitution.[116]

115. Louis Henkin, "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects," in Rosenfeld, ed., *supra* note 21 at 48.
116. *Quebec Secession Reference*, *supra* note 2 at 248.