Expectations of Equality

Bruce Porter*

I. INTRODUCTION

Twenty years ago, Canada was abuzz about equality rights. The beginning of the 1980s had seen intense lobbying and negotiating over the wording of section 15 equality rights during the debates over the new *Canadian Charter of Rights and Freedoms*.[1] Various parliamentary commissions and committees had held hearings and released reports on different aspects of equality. The Report of the Special Committee on the Disabled and the Handicapped, *Obstacles*,[2] had been released in 1981; the Report of the Parliamentary Special Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!*, in 1982;[3] and the Report of the Commission on Equality in Employment (chaired by Justice Rosalie Abella), *Equality in Employment*, in 1984.[4] Section 15 had been delayed in coming into force by three years, until April 17, 1985, to provide governments with time to hear from citizens and to revise legislation and policy to conform with the new right to equality. Academics and advocates were holding national symposia and publishing articles and books assessing the significance and meaning of

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

2 Canada, *Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (Ottawa: Minister of Supply and Services, 1981), online: <http://www.sdc.gc.ca/en/hip/odi/documents/obstacles/obstacles_full.pdf> [hereinafter "*Obstacles*"].

3 Canada, *Equality Now! Report of the Special Committee on Participation of Visible Minorities in Canadian Society* (Ottawa: Minister of Supply and Services Canada, 1984).

4 Rosalie Silberman Abella, *Equality in Employment: The Report of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984) [hereinafter "*Abella Report*"].

the new equality rights. Toward the end of the three-year moratorium, the federal government established a Sub-committee of the Standing Committee on Justice and Legal Affairs, chaired by Patrick Boyer, MP, to hold consultations and make recommendations for changes to federal legislation, policies and programs so that they would conform with section 15. The Sub-committee heard from more than 250 witnesses and received more than 700 submissions. It is interesting, from the vantage of 20 years hence, to look back at what equality seekers, after having fought so strenuously for the particular wording of section 15, expected those words to mean when they were about to come into effect in 1985.

One worries, of course, that if we find that equality-seeking groups expected more of constitutional equality rights than was delivered, we may invite those who were skeptical of the value of the Charter in the first place to say: "We told you so". In anti-poverty Charter litigation, where one is constantly under scrutiny for symptoms of naive Charter optimism and "false hope syndrome", one is hesitant to document naivety or unrealistic expectations. It is helpful to remember, however, that the word "expect" in English has two different meanings. One meaning refers to the prediction of a probable outcome of something entirely beyond our control, as when we say: "We expect Hurricane Katrina to diminish to a category three hurricane by tomorrow". Another meaning, however, is perhaps closer to the original meaning of the word, whose etymology, in Latin, means "to await" or "to look forward to"; it refers not to a predicted outcome, but to what is more subjectively considered or anticipated as an entitlement. So we say: "We expect government officials to act with honesty and integrity" or "We expect participants to be punctual". These statements are not predictions of probable outcomes but moral imperatives. They are forcefully stated, not out of naive optimism, but rather, in an effort to produce appropriate outcomes. The expectations may remain valid, even if they are not realized. It is the second dimension of "expectations" that is most usefully considered when we reflect on what equality seekers voiced as expectations of equality in 1985.

Thirteen years after section 15 came into effect, the Supreme Court, in its decision in *Vriend*,[5] finally applied section 15 to one of the important substantive issues that had been raised repeatedly before the

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5 *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 [hereinafter "*Vriend*"].

Boyer Committee: the obligation to legislate human rights protections from discrimination because of sexual orientation. Justice Iacobucci, writing on section 1 for a unanimous Court, described the Charter as a new social contract: "So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen."[6] It is only appropriate that the expectations of the rights holders in this new social contract should inform our understanding of its meaning. What equality seekers might have predicted 20 years ago about how "the arduous struggle"[7] to realize equality would turn out is not terribly important. What they expected from the right to equality as a framework for new entitlements of citizens and obligations of governments, on the other hand, is critical to an assessment of whether the new social contract has been properly implemented by governments and correctly interpreted and applied by courts.

II. THE EQUAL BENEFIT OF THE LAW

The wording of section 15 went through some critical changes from the time that a draft Charter was tabled by the Trudeau government in the House of Commons and the Senate on October 6, 1980 to its final adoption.[8] When a draft Charter was first tabled, subsection 15(1) was labelled "non-discrimination rights", and read as follows:

> Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

The following year saw a massive public response to this first draft of the Charter. The Special Joint Committee on the Constitution extended its hearings to nearly four months, receiving 1,000 briefs and 300 oral submissions. In response to concerted and effective lobbying led by the National Action Committee on the Status of Women

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6 *Id.*, at para. 135.

7 *Id.*, at para. 68, *per* Cory J.

8 The complete text of the earlier versions of s. 15 can be found in Robin Elliot. "Interpreting the Charter – Use of the Earlier Versions as an Aid" (Charter Edition, 1982) U.B.C. L. Rev. 11, at 37–39.

("NAC"), the National Association of Women and the Law ("NAWL") and the Canadian Advisory Council on the Status of Women ("CACSW"),[9] the version of section 15 that was placed by Justice Minister Chrétien before the Special Joint Committee on January 12, 1981 was substantially altered. It had been renamed, as had been proposed by NAWL, "equality rights"; had been reworded to allow for recognition of prohibited grounds of discrimination other than those specifically enumerated; and included a new reference to equality "under" the law and to the "equal benefit" of the law. After further energetic lobbying by disability rights groups led by the Coalition of Provincial Organizations for the Handicapped ("COPOH", now the Council of Canadians with Disabilities), the section as tabled in the House of Commons on February 13, 1981 read as it does now, including the grounds of mental and physical handicap. With the broad wording and the addition of disability as a prohibited ground in section 15, Canada had adopted a unique protection of equality, considered more expansive than any in the world.

The Supreme Court of Canada has interpreted the addition of "under the law" and the "equal benefit of the law" in section 15 as signalling an intent to safeguard against a line of decisions, under the *Canadian Bill of Rights*,[10] in which the courts had held that discriminatory exclusions from entitlements to benefits were not covered by the guarantee of equality "before the law".[11] In the infamous *Bliss* case, which concerned the denial of unemployment insurance to pregnant women who qualified for regular benefits but not for the stricter regime governing maternity benefits, the Court held that "qualifications required for entitlement to benefits"[12] fell outside the scope of "equality before the law". It is certainly true that NAWL and other groups advocated before the Special Joint Committee for the explicit inclusion of a right to the "equal benefit of the law" in order to ensure that section 15 was "applied to social

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[9] For a description of the lobbying efforts during this time, see Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Educational Press, 1983).

[10] S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

[11] *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 170 [hereinafter "*Andrews*"].

[12] *Bliss v. of Canada (Attorney General)*, [1979] 1 S.C.R. 183, at 190–92 [hereinafter "*Bliss*"].

benefit programs such as welfare".[13] One is struck in reading commentary and submissions from 1985, however, that there was a much broader dimension to the meaning of "the equal benefit of the law" for equality seekers and commentators than a guarantee that the right to freedom from discrimination would be applied by the courts to prohibit discriminatory qualifications for benefit programs.[14] The entire orientation of the right to equality was seen as having been changed from a negatively oriented right to non-discrimination to a positively oriented right to equality.

Equality seekers of 20 years ago argued that transcending the impoverished vision of equality that had defined the jurisprudence under the *Canadian Bill of Rights* in cases such as *Bliss* would require more than non-discriminatory provision of benefits such as unemployment insurance. It would require a change in the paradigm of equality in order to understand the term "equal benefit of the law" in its broader social dimension. They envisaged a positive notion of equality encompassing what had been categorized in international law as economic and social rights such as the right to work, the right to housing, the right to health care and the right to an adequate standard of living – rights which extend beyond prohibition of government action that violates the equality guarantees to require positive government measures to eradicate inequality, including social and economic inequality. Equality seekers articulated the new right to equality as a social right, a guarantee that both government action and inaction would be assessed for compatibility with constitutionally affirmed values of enhanced social participation and economic justice.

Lynn Smith, who had been Stella Bliss's lawyer in the *Bliss* case, argued in a paper to a national symposium on equality held in Ottawa in early 1985 that "section 15 equality rights are meant to create and should create a new paradigm for the definition and solution of inequality problems, new both in Canada and in comparison to other

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[13] Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-Second Parliament, 1980–1981, No. 9 (20 November 1980) 9:127; (9 December 1980) 22:56 – 22:59.

[14] The principle that protection from discrimination should be accorded in all areas of law, including benefit programs, was not a particularly progressive or radical idea at that time. See *Zobel v. Williams*, 457 U.S. 55, at 60 (1982).

jurisdictions."[15] Under the new paradigm, Smith suggested, it is not enough to try to correct the *Bliss* decision simply by ensuring that the courts apply principles of non-discrimination to benefits such as unemployment insurance. Rather, the assumption that the male worker is the norm must be challenged, so that measures such as maternity benefits "would no more be seen as examples of 'special treatment' than would measures necessary to ensure an adequate supply of air for the non-robotic work force ..."[16] Dale Gibson, at the same conference, playfully conjured up the image of "The Two Brians" (Chief Justice Brian Dickson and Prime Minister Brian Mulroney) with a supporting cast of politicians and judges singing the song, "You Gotta Accentuate the Positive and Eliminate the Negative".[17] Francine Fournier emphasized the commonality of the right to equality in the Quebec *Charter of human rights and freedoms*[18] with the new equality rights in section 15 of the Canadian Charter. Both, she argued, incorporated not only civil and political rights but also economic, social and cultural rights.[19] Jill McCalla Vickers noted that the new approach to equality had been defined by, and would continue to rely on, a dynamic relationship with emerging social movements or "equality projects"[20] in order to sustain an alternative vision of equality to the neo-liberal insistence on formal "equality of opportunity".[21]

Anne Bayefsky, in her article of the same year on "Defining Equality Rights", similarly argued that Canadians "are not burdened with visions of the equality Lincoln sought. Minimum standards of welfare — welfare payments, subsidized housing, unemployment insurance, public health insurance, legal aid — are expectations which

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[15] Lynn Smith, "A New Paradigm for Equality Rights" in Lynn Smith, ed., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 353, at 355.

[16] *Id.*, at 368.

[17] Dale Gibson, "Accentuating the Positive and Eliminating the Negative" in *Righting the Balance*, *supra*, note 15, 311 at 312.

[18] R.S.Q. c. C-12.

[19] Francine Fournier, "Égalité et droits a l'Égalité" in *Righting the Balance*, *supra*, note 15, 25. at 25–26.

[20] Jill McCalla Vickers, "Equality-Seeking in a Cold Climate" in *Righting the Balance*, *supra*, note 15. at 18.

[21] *Id.*

distinguish us from American society, even now."[22] David Vickers and Orville Endicott, writing on the meaning of the new equality rights for people with mental disabilities, argued that section 15 needs to be interpreted and applied consistently with international human rights, particularly social and economic rights such as the right to an adequate standard of living, the right to "the highest attainable standard of physical and mental health" and the right to an education.[23] Raj Anand wrote that section 15 of the Charter should also be seen as an implementation of Canada's international legal obligations with respect to racial and ethnic equality, including the obligation, recognized in the *International Covenant on Civil and Political Rights* ("ICCPR"),[24] to take "affirmative action designed to ensure the positive enjoyment of rights."[25]

The prevailing view among equality specialists in 1985 was thus that section 15 affirmed not only protection from discriminatory exclusion from benefit programs but also, and more fundamentally, a positive right to appropriate and adequate government programs and positive measures to address socio-economic disadvantage. It was emphasized that interpretations of equality should be linked to the social and political goals of equality-seeking communities and anchored in an emerging international human rights jurisprudence, not simply in the area of civil and political rights but also, and perhaps more centrally, economic, social and cultural rights.

III. Expectations of Equality-Seeking Social Movements: The Boyer Committee Hearings

At the same time that legal experts were assessing the meaning and impact of the unique wording of section 15, equality-seeking groups were engaged in defining their own equality initiatives, developing their own approaches to and understanding of the new equality rights, and participating in a direct dialogue with the Boyer Committee about what

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22 Anne Bayefsky, "Defining Equality Rights" in Anne Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), at 24.

23 *Id.*

24 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

25 Raj Anand, "Ethnic Equality" in Bayefsky & Eberts, *supra*, note 22, 81 at 104.

needed to be done to implement their understanding of the new constitutional equality rights.

Shelagh Day, addressing the Boyer Committee on behalf of the Women's Legal Education and Action Fund ("LEAF") on Wednesday, April 17 1985, the day section 15 came into force, summarized the expectations of the women in Canada that section 15 would be a "fresh beginning", eschewing "narrow interpretations and technical pathways" for an approach that would "deliver real results that will affect the lives of Canadians."[26] Jane Shackell, co-presenting for LEAF, emphasized that "the poverty of women in Canada is a principal source of inequality in this country" and that the government should focus on issues such as equal pay for work of equal value, access to quality daycare, the control of a woman's body and her reproductive function, legalized prostitution, pension rates, restricted unemployment insurance benefits based on length of participation in the work force, the differential treatment of pregnancy as opposed to temporary disability: all these things contribute to the poverty of women relative to the poverty of men in this country and contribute to the unequal status of women.[27]

NAC, referring to the "intense lobbying and submissions by women's groups in Canada during the drafting process of the *Charter*", argued that Parliament must act in accordance with the political decision to ensure that "the goal of the section is equality, a positive concept, as opposed to non-discrimination, a negative concept",[28] and must incorporate "the obligations of Canada under the international conventions, particularly the United Nations Convention on the Elimination of All Forms of Discrimination against Women. ... This means that the approach it must take to the *Charter* is one of positive action."[29] Gwen Brodsky, appearing on behalf of NAWL, reiterated the prominent theme of women's groups: "Unless the Government implements positive programs to remove barriers to equality it will be

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[26] Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs. *Minutes of Proceedings*, First Session of the Thirty-Third Parliament, No. 3 (17 April 1985), at 3:9.

[27] *Id.*

[28] Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs. Written Submissions (National Archives of Canada Accession No. RG14 File No. 6050-331-E1 [hereinafter "Boyer Committee Written Submissions"], Submission of the National Action Committee on the Status of Women, Box 135, Wallet 16, Submission B-577, at 6-7.

[29] *Id.*, at 2.

signaling tolerance of discrimination and indifference to the expectations of Canadian women."[30]

Racialized groups in 1985 focused on the need for adequate recognition of the prevalence of systemic racial discrimination in Canadian society and for positive measures to address it. The Urban Alliance on Race Relations and the Social Development Council in Toronto published two studies that year to expose the prevalence of racial discrimination in employment.[31] The Abella Commission had broken new ground by adopting the term "employment equity" as a "strategy to obliterate the present and the residual effects of discrimination".[32] Presentations to the Boyer Committee from groups representing racialized and ethnic minorities affirmed the recommendations for positive measures contained in the *Abella Report* and argued that section 15 must be interpreted expansively so as to include recognition of the necessity of sweeping positive measures to address the long-term effects of systemic ethnic and racial discrimination.

The Chinese National Canadian Council argued that "the Government must use the *Charter* as a guide for action, not merely as a set of limiting rules to which it must ensure legal adherence whenever it wishes to do something".[33] Similarly, the Committee for Racial Justice argued that equality "cannot be realized for visible minorities by amending existing legislation alone" [34] and that "[W]e must recognize that a series of initiatives are needed to overcome a chronic condition of inequality".[35] The Canadian Ethno cultural Council affirmed the need for a broad and purposive interpretation of section 15 that would

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[30] Boyer Committee Written Submissions, *supra*, note 28, Submission of the National Association of Women and the Law, Box 135, Wallet 16, Submission B-583, at page 2 of section entitled "Women, Poverty and Income Assistance Programs" [each section begins with page 1].

[31] Brenda Billingsley & Leon Muszynski, *No Discrimination Here: Toronto Employers and the Multiracial Workforce* (Toronto: The Urban Alliance on Race Relations and the Social Planning Council of Metropolitan Toronto, 1985); Frances Henry & Effie Ginzberg, *Who Gets the Work? A Test of Racial Discrimination in Employment* (Toronto: The Urban Alliance on Race Relations and the Social Planning Council of Metropolitan Toronto, 1985).

[32] Rosalie Silberman Abella, *Equality in Employment: The Report of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984) [hereinafter "the *Abella Report*"], at 254.

[33] *Id.*, at 5-6.

[34] Boyer Committee Written Submissions, *supra*, note 28, Written Submission of the Committee for Racial Justice, Box 131, Wallet 9, Submission B-578, at 4-5.

[35] *Id.*, at 5.

mandate improved social programs to address the socio-economic disadvantage of visible minorities and immigrants, including adequate pensions and old age security, mandatory employment equity, expanded ESL and enhanced access to education through student loans and grants.[36]

Disability rights groups emphasized a similar paradigm shift toward a positive vision of equality consistent with the inclusion of disability as an enumerated ground. They drew considerable support from the wide-ranging recommendations of the 1981 Report of the Special Committee on the Disabled and the Handicapped, *Obstacles*,[37] which had framed disability equality rights within a broad human rights framework, affirming fundamental social rights such as the right to an adequate income through a comprehensive disability insurance program, health care reform, employment equity and accessible transportation systems as critical components of equality for people with disabilities.[38] The Coalition for Employment Equity for Persons with Disabilities noted that "an assumption of importance" to disabled people "relates to the kind of equality that we wish to achieve". It must address "high levels of unemployment, low socio-economic status, concentration in low level jobs and limited access to the decision-making processes which critically affect them".[39] COPOH expressed the hope that where governments failed to implement necessary programs for people with disabilities, the courts would order special programs, as described under subsection 15(2) of the Charter, as required remedies.[40] The Canadian Mental Health Association emphasized that "systemic discrimination requires systemic remedies",[41] including "individualized and coordinated support systems", and "expanding the concept of work to include

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[36] Boyer Committee Written Submissions, *supra*, note 28, Submission of the Canadian Ethno cultural Council, Box 130, Wallet 6, Submission B-185.

[37] Canada, *Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (Ottawa: Minister of Supply and Services 1981), online: <http://www.sdc.gc.ca/en/hip/odi/documents/obstacles/obstacles_full.pdf> [hereinafter "*Obstacles*"].

[38] *Id.*

[39] Boyer Committee Written Submissions, *supra*, note 28, Submission of the Coalition on Employment Equity for Persons with Disabilities, Box 132, Wallet 11, Submission B-433, at 4.

[40] Coalition of Provincial Organizations of the Handicapped, *Presentation to the Sub-Committee on Equality Rights, Chairman Patrick Boyer* (Winnipeg: C.O.P.O.H, 1985) (on file with author), at 11.

[41] Boyer Committee Written Submissions, *supra*, note 28, Submission of the Canadian Mental Health Association, Box 130, Wallet 7, Submission B410, at 4.

a wide range of work options".[42] The Canadian Paraplegic Association also emphasized the inadequacy of a civil liberties approach to inequality, arguing that inequality in employment "will require what some would consider extraordinary measures to remedy".[43] The Canadian Association for Community Living affirmed that equality for people with disabilities means a decent place to live; an education which nurtures and prepares children for full lives as adults; access to meaningful work and an adequate income; access to a full range of social opportunities; having fundamental rights of citizenship recognized and protected; being able to advocate for rights; and having services available and responsive to their own strengths and needs.[44]

There were relatively few submissions to the Boyer Committee from Aboriginal groups, and all were from Aboriginal women's groups. Bill C-31, enacting changes to the *Indian Act*,[45] was before Parliament at the time, and concern about the failure of Bill C-31 to eliminate discrimination against Aboriginal women and their children predominated.[46] Gayle Stacey Moore,[47] presenting for the Quebec Native Women's Association, took encouragement from early judgments under the other sections of the Charter, in which courts had found that the Charter must be interpreted broadly and had referred to international human rights law "as a means of interpreting or enlarging upon the actual provisions of the *Charter*."[48] On this basis, she urged the Bayer Committee to consider Bill C-31 "in the light of both the *Charter*

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[42] *Id.*

[43] *Id.*, at 4.

[44] Boyer Committee Written Submissions, *supra*, note 28, Submission of the Canadian Association for Community Living, Box 130, Wallet 6, Submission B-730.

[45] R.S.C. 1970, c. I-6.

[46] Primary concerns were that it failed to reinstate band membership and deprived children of women who had their status reinstated under Bill C-31 of status. Groups addressing discrimination against Aboriginal women in Bill C-31 included the Human Rights Institute of Canada, Indian Homemakers' Association of B.C., National Action Committee on the Status of Women (Toronto), Native Women's Association, Quebec Native Women Inc. and Saskatchewan Native Women's Association.

[47] As representatives of the Native Women's Association of Canada, Gayle Stacey Moore and Sharon McIvor subsequently launched a Charter claim under ss. 2(b), 15 and 28 challenging the exclusion of Native women's organizations from direct funding and from participation in constitutional discussions with the Aboriginal communities leading up to the Charlottetown Accord. See *Native Women's Assn. of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627.

[48] Boyer Committee Written Submissions, *supra*, note 28, Submission of the Quebec Native Women's Association, Box 135, Wallet 18, Submission B-539, at 4.

and these International Covenants... We can only hope that the work of this sub-committee will convince the Government that to refuse to act positively to undo injustice is, in fact, to accept that injustice will persist."[49]

The predominant concern of groups representing gays and lesbians in 1985 was that sexual orientation be recognized as an analogous ground of discrimination under section 15. Groups urged the Boyer Committee to recommend the inclusion of sexual orientation in the *Canadian Human Rights Act*;[50] change discriminatory definitions of spouse; remove discriminatory security clearance guidelines; and amend the *Criminal Code*[51] with respect to age of consensual sexual activity. The obligation to provide protection from discrimination was generally seen as a positive legislative duty emanating from section 15 rather than from an allegation of discriminatory under-inclusion, in comparison to groups such as racial, ethnic and religious minorities that had been included in human rights protections.

From these submissions, we can discern a very distinctive common shape in the way equality seekers and other groups saw the new right to equality in Canada 1985.

A central component was a demand for a more positive conception of equality, placing new responsibilities on governments to identify and address issues of socio-economic disadvantage through positive legislative and social measures. A second common theme was the importance of making the right to equality reach the level of everyday live, engaging the concrete struggles for dignity and security, an adequate income, a decent job, access to child care, transportation, adequate housing, education and health care. A third common theme was that the right to equality must be interpreted in light of positive obligations on governments under international human rights law, to link equality to social and economic rights in international law in order to provide substance to the social rights dimensions of equality. As was noted by the Saskatchewan Association of Human Rights before the Boyer Committee:

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49 *Id.*, at 5.

50 S.C. 1976–77, c. 33.

51 R.S.C. 1970, c. C-34.

> Without an income, without an adequate standard of living, all of the individual civil and political rights are meaningless. We have little constitutional protection against vicious attacks on the unemployed, welfare recipients, and senior citizens unless the interpretation of Section 15 is broad enough to include these situations. We must insist on this interpretation.[52]

And finally, there was a consensus that governments must allocate new resources to ensure access to the courts and that the relationship between courts and governments would have to be redefined by a new approach to litigation and positive remedies to systemic inequality. The Canadian Bar Association, for example, recommended a minimum national standard for legal assistance in equality rights litigation be established by the federal government "at such a level that no person will be denied the right to put forward a reasonable case under section 15 of the *Charter*".[53]

This consensual paradigm of equality as a substantive social right was a somewhat unique feature to Canada. The concept of equality and non-discrimination imported from the American civil rights movement had been transformed in the Canadian context to incorporate a distinctive social rights tradition and the values of an emerging international human rights movement. While there had been a few lonely voices during the repatriation process advocating inclusion of explicit reference to the rights in the *International Covenant on Economic, Social and Cultural Rights*,[54] the primary focus of equality-seeking groups was on entrenching a broad right to substantive equality that would be meaningful to peoples' real struggles for dignity, security and social inclusion.

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[52] Boyer Committee Written Submissions, *supra*, note 28, Saskatchewan Association of Human Rights, Submission B-530, at 1-8.

[53] Boyer Committee Written Submissions, *supra*, note 28, Canadian Bar Association, Submission B-418, at 12, 14-15.

[54] 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976). See the submissions from Nick Schultz of the Public Interest Advocacy Centre on behalf of the National Anti-Poverty Organization, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-Second Parliament, 1980-1981, No. 29 (18 December 1980) 29:21. The Joint Committee subsequently considered an amendment proposed by Svend Robinson to include a reference to the *International Covenant on Economic, Social and Cultural Rights* in s. 36 of the Constitution: see Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-Second Parliament, 1980-1981, No. 49 (30 January 1981), at 65–71.

IV. A CLAIM UNHEARD

In assessing the extent to which the expectations emerging from the unique paradigm of equality in Canada 20 years ago have been realized, it is important to recognize that there have been at least a few victories, and that they owe a lot to a positive vision of equality. The area of discrimination because of sexual orientation stands out when one reflects on positive developments emerging from section 15, especially when one considers that in 1986 only one province, Quebec, protected gays and lesbians from discrimination and virtually all benefit programs excluded same-sex partners. The Supreme Court's affirmation in *Vriend*[55] that the right to equality may be infringed by government inaction as well as by action, and that "s. 32 is worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority"[56] resonated with the positive rights approach to equality advocated by equality seekers before the Boyer Committee. In the area of disability rights, significant advances have been made, with the *Eldridge*[57] decision representing a high watermark, in the recognition of the requirement of positive measures to ensure substantive equality. In that case, a unanimous Court rejected arguments of governments that section 15 "does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action"[58] as a "thin and impoverished vision of s. 15(1)".[59] In the area of equality of the sexes, successful challenges to "spouse in the house" rules first in Nova Scotia in the *Rehburg*[60] case, and more recently, in Ontario in the *Falkiner*[61] decision, represent important litigation successes recognizing the intersectionality of poverty and sex discrimination in a manner that was strongly emphasized by women's groups in 1985. In the area of race, the

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55 *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 64 [hereinafter "*Vriend*"].

56 *Id.*, para. 60, quoting from Dianne Pothier, "The Sounds of Silence: Charter Application when the Legislature Declines to Speak" (1996) 7 Const. Forum 113, at 115.

57 *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 [hereinafter "*Eldridge*"].

58 *Id.*, at para. 72.

59 *Id.*, at para. 73.

60 *R. v. Rehberg*, [1994] N.S.J. No. 35, 111 D.L.R. (4th) 336 (S.C.).

61 *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 212 D.L.R. (4th) 633 (Ont. C.A.).

Sparks[62] case in Nova Scotia (finding that the exclusion of public housing tenants from security of tenure provisions constitutes discrimination because of race, sex and poverty and extending protections to conform with section 15) is seen as a leading case internationally, as it links equality rights with the right to housing.

There have been a number of other significant victories which, though not explicitly section 15 cases, were clearly informed by the kind of equality values which were promoted by equality-seeking groups before the Boyer Committee. The *Morgentaler*[63] decision, which established women's right to abortion; the *Dunmore*[64] decision, which required access to collective bargaining for agricultural workers; the *Marshall*[65] decision, which established the right to earn a moderate livelihood as an Aboriginal treaty right; and *G.(J.)*,[66] which found that legal aid must be provided to low income parents in Crown wardship proceedings, have all been important victories for the positive vision of equality put forward by equality seekers in 1985. In the area of immigration, the *Baker*[67] case (overturning an immigration officer's discriminatory[68] decision not to reverse a deportation order on humanitarian and compassionate grounds) established the link between international human rights law and Charter equality values: a basic tenet of the submissions from equality-seeking groups before the Boyer Committee.

These and other victories have owed a great deal to equality-seeking groups playing an active role in affirming a vision of equality as a positive social right. Yet in all cases, the Court invariably stepped back from affirming a coherent vision of equality as it was articulated in the

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62 *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97, 101 D.L.R. (4th) 24 (C.A.).

63 *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30.

64 *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016.

65 *R. v. Marshall*, [1997] S.C.J. No. 55, [1999] 3 S.C.R. 456 at paras. 7–8, 59.

66 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46.

67 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817.

68 *Id.*, at para. 5. The officer's reasoning for the refusal was the following: "The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has *four children in Jamaica and another four born here*. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her *four Canadian-born children*. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity". (officer's emphasis).

1985 Boyer Committee hearings. At the same time as condemning the governments' argument that there is no obligation to address pre-existing disadvantage in *Eldridge*, the Court insisted that it need not answer the question of positive obligations to ameliorate systemic inequality in that case.[69] Similarly, in *Vriend*, the Court avoided dealing with the critical remedial issue in that case of whether the legislature could choose to comply with section 15 simply by revoking all human rights protections for all protected groups. Such a cynical and draconian move was explicitly accepted by Major J. as a means by which Alberta might choose to "comply" with the Court's finding of a violation of section 15. "The issue", he wrote, "may be that the Legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination."[70] Yet the majority, noting that the question of positive obligations had been "left open" by the Court in *Eldridge*, found that "it is neither necessary nor appropriate to consider that broad issue in this case".[71]

It would have been unthinkable to equality seekers in 1985 that the broad right to equality for which they had mobilized could ever be interpreted so narrowly as to invite legislatures to refuse to provide health care or legislative protections from discrimination in order to "comply" with the new right to equality. The ambivalence of the Supreme Court on this issue, and its apparent reluctance to hear or decide on the central claim of equality seekers of 20 years ago, has created a deep divide between section 15 jurisprudence on the one hand and the expectations of those for whose rights the Court acts as trustee on the other.

In the recent decision in *Auton*,[72] we see worrying signs that the McLachlin Court may in fact wish to increase the divide between expectations and the Court's approach by closing the door on a positive rights approach to section 15 that was quite explicitly left open in *Eldridge* and *Vriend*. One is tempted to give the *Auton* decision less weight than others because the reasoning of the Chief Justice appears so

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69 *Id.*, at paras. 72–73.

70 *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 196 [hereinafter "*Vriend*"].

71 *Id.*, at para. 64, citing *Eldridge*, *supra*, note 57, at paras. 72–73.

72 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 [hereinafter "*Auton*"].

much at odds with earlier section 15 jurisprudence, and to read it simply as a convenient route to a desired result than as a considered or coherent reversal of the basic tenets of substantive equality previously affirmed by the Court. However, the decision may be indicative of the Court's reaction to a more explicit positive rights claim than it had previously had occasion to consider under section 15. Appealing to earlier jurisprudence on under-inclusion, the appellants in *Eldridge* and *Vriend* had largely framed their claims as challenges to discrimination through under-inclusion. It was the Court, in a critical response to governments' "thin and impoverished" version of equality advanced in arguments against positive obligations, which commented on, and then left undecided, the question of positive obligations to legislate, to provide benefits or to allocate resources reasonably. The parents of children with autism in the *Auton* case, on the other hand, argued quite clearly that section 15 imposes an obligation to fund the treatment for their children irrespective of any particular statutory framework or under-inclusive benefit scheme. They argued that children with autism have unique needs and that a refusal by governments to meet those needs has a discriminatory consequence in terms of fundamental issues of dignity, security and human development.

In this sense, the central concern of equality seekers 20 years ago was squarely at issue in *Auton*. This was really the first case to explicitly challenge the Supreme Court to distinguish between equality rights as they had been envisaged in 1985 and a right to freedom from discrimination within particular programs or benefit schemes. Though the remedial questions may have been controversial, the critical question with respect to the general approach to equality raised in *Auton* was how the Court would address the claim that governments have an obligation to meet the unique needs of a clearly disadvantaged group, whether there is an under-inclusive benefit scheme or not.

The Court, however, was determined to avoid taking this kind of core equality claim seriously. The Chief Justice, writing for a unanimous Court, reverted to precisely the kind of non-discrimination analysis that had been rejected during the drafting of section 15. Disregarding the Court's openness on earlier occasions to a broader paradigm of positive obligations, McLachlin C.J. simply asserted under-inclusion as the complete code for equality analysis, declaring that "[t]his Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social

programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner."[73] The Chief Justice then stated that to establish a violation of section 15, the petitioners in *Auton* must show differential treatment in comparison to a "a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required."[74] One is reminded, of course, of the futile quest for the "pregnant man" comparator in the *Bliss* case. Without a comparator, the Chief Justice "reasoned", an equality analysis does not even get to the question of dignity or the fundamental interests which the right was expected to protect. The "more fundamental" distinction described in *Vriend,* between those in need and those who are not in need of the benefit in question, was not even on the Court's radar screen in *Auton*. The Chief Justice simply asserted that "[t]here can be no administrative duty to distribute non-existent benefits equally."[75] The "big picture" of systemic inequality, social exclusion and the role of governments in addressing these issues is nowhere to be seen.

However controversial the specific treatment sought in *Auton* might be, it is difficult to explain the decision merely as a way of avoiding a remedy the Court did not like. In *Auton*, the Supreme Court was considering, really for the first time, the constitutionality of doing nothing to meet the needs of an extremely disadvantaged group in our society. It appears to have affirmed, in a shocking fashion, the government's "right" to do nothing. As such, the decision represents an unprecedented betrayal of the expectations of equality seekers that the right to equality ought to mean something to those who have unique and significant needs; that, in fact, it ought to mean the most to those groups.

Perhaps the *Auton* decision is simply another in which the majority of the Court simply declined to hear, or to rule upon, the central claim of equality seekers as it was originally articulated before the Boyer Committee. We can only hope so. In any case, it is clear that the unique vision of equality behind section 15 is in serious jeopardy, either through utter neglect or explicit judicial disavowal. In 20 years of

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[73] *Id.*, at para. 41.
[74] *Id.*, at para. 55.
[75] *Id.*, at para. 46.

equality claims, the Supreme Court has on no occasion considered evidence of persistent or worsening socio-economic disadvantage of an enumerated group, and found on the basis of that evidence that positive action must be taken to ameliorate it. Yet this was the core notion of equality as advanced by equality seekers.

Justice Arbour has noted in her new role as UN High Commissioner of Human Rights that the first two decades of Charter litigation testify to "a certain timidity — both on the part of litigants and the courts — to tackle head on the claims emerging from the right to be free from want."[76] She suggests that this may have been in part the result of the three-year moratorium on section 15, during which "the judiciary had had an opportunity to flex its intellectual muscles on the more familiar and less challenging claims related essentially to fairness in the criminal justice system".[77] However, during that same three years, the equality-seeking movement was also finding its feet, and sketching the contours of a distinctively Canadian paradigm of equality which continues to have resonance in Canada, even without judicial affirmation.

V. OUTCOMES ASSESSMENT

These days, when equality-seeking groups are lucky enough to secure funding from governments, we usually sign a contract which requires us to be accountable to measures of "outcomes". The focus of outcomes assessment, as I understand it, is not to show that we produced required "deliverables" but rather to review the results of our work against results that were expected. Perhaps our governments, as a party, and our courts, as trustees of the "social contract" of equality rights that came into force 20 years ago, should themselves be asked for a 20-year outcome review of section 15. As Jane Shackell of LEAF said on April 17, 1985,[78] equality seekers most of all expect the right to equality to make a real difference in the lives and everyday struggles of women and

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[76] Louise Arbour, 2005 Lecture (Lecture presented at the LaFontaine-Baldwin Symposium, Quebec City, 4 March 2005) online: <www.lafontaine-baldwin.com/speeches/2005>.

[77] *Id.*

[78] Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings*, First Session of the Thirty-Third Parliament, No. 3 (17 April 1985), at 3:9.

other equality-seeking groups for decent paying jobs, income security, daycare and housing. Have these expected outcomes been realized?

Since the Supreme Court issued its first decisions under section 15 in *Andrews*, half a million more households have fallen into poverty.[79] The number of single mothers living in poverty has increased by more than 50 per cent and their poverty has, in many cases, deepened to the point of extreme destitution. Food banks, a rare phenomenon in the early 1980s and unheard of when the Charter was first being debated, are now a critical means of survival for three-quarters of a million people and fail to come close to meeting the needs of an estimated 2.4 million hungry adults and children.[80] Women and children have been the most dramatically affected by the epidemic of homelessness, with the number of homeless women and children living in shelters in Toronto more than doubling since 1989.[81] What's more, a national child care program, first promised by the Conservative government in 1984 and then by the Liberal government in 1993, remains the "longest-running broken political promise in Canada".[82] The poverty rate for visible minority women is now as high as 37 per cent. The average income of Aboriginal women is $13,300.[83]

These are not the outcomes equality-seeking groups expected of the new right to equality when it came into force in 1985, and they are not the outcomes they are entitled to expect 20 years later.

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[79] "The Face of Poverty in Canada: An Overview" (2003), online: National Anti-Poverty Organization <http://www.napo-onap.ca/en/issues/face%20%20of%20poverty.pdf>.

[80] Lisa Orchard, Rob Penfold & Dan Sage, *HungerCount 2003*: "*Something Has to Give*": *Food Banks Filling the Policy Gap in Canada* (October 2003), online: Canadian Association of Food Banks <http://foodbank.duoweb.ca/documents/HC2003_ENG.pdf>.

[81] City of Toronto, *The Toronto Report Card on Housing & Homelessness 2003*, online: <www.toronto.ca/homelessness/pdf/reportcard2003.pdf>.

[82] Carol Sanders "MP seeking national child care program. Longest-running broken political promise in Canada" *Winnipeg Free Press* (28 September 2004), at A3. The newly elected Conservative government has proposed to dismantle federally funded expansion of child care barely months after federal-provincial agreements had been negotiated by the prior Liberal government. In lieu of publicly funded child care, the Conservatives propose to give all parents $100 per month per child to support whatever child-rearing or child care arrangements they choose.

[83] "The Face of Poverty in Canada: An Overview" (2003), online: National Anti-Poverty Organization <http://www.napo-onap.ca/en/issues/face%20%20of%20poverty.pdf>.

VI. CONCLUSION

Some might suggest that in light of these outcomes we should reconsider the value of the unique Canadian paradigm of equality; this unusual notion that the right to equality can carry with it so broad an array of social rights and government obligations. Should we question whether there were too many expectations placed on section 15?

In other jurisdictions such as South Africa, social and economic rights are explicitly enumerated as justiciable rights. Yet in order to establish a foundation of justiciability and an effective review of such rights, and to determine where governments must begin in the process of implementing these rights in the face of massive social need and scarce resources, social and economic rights have been approached by advocates and courts in South Africa within what we in Canada think of as an "equality" paradigm. In the *Grootboom*[84] and *Treatment Action Campaign* cases[85] in South Africa, for example, the Constitutional Court adopted a standard of "reasonableness" which incorporated as a central principle the obligation to take positive measures to consider and address the needs of the most disadvantaged groups in relation to the enjoyment of fundamental social rights such as housing and health care. It is equally true that for us in Canada to find a starting place for our broad vision of substantive equality, and to give courts guidance about where to start in identifying the nature and extent of positive obligations to address socio-economic disadvantage, we tend to approach the right to equality within a social rights paradigm.

Whether equality is situated within a paradigm of substantive social rights, or whether social rights are situated within a framework of substantive equality does not really matter. A purposive approach to these interdependent rights moves in the same direction and ends up in the same place. The point, as the submissions to the Boyer Committee made clear, is to make the rights real, to ensure that they address peoples' real lives and struggles, to solve, in Lynn Smith's words, the real inequality problems of our society.

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[84] *Government of the Republic of South Africa v. Grootboom*, [2001] 1 S. Afr. L.R. 46 (Const. Ct.).

[85] *Minister of Health and Others v. Treatment Action Campaign and Others*, [2002] 5 S. Afr. L.R. 721 (Const. Ct.).

In Canada, in 1982–85, social rights were read into equality rights. That became the uniqueness of our constitutional democracy. Insight into the special relationship between equality and social and economic rights has underpinned many of the important contributions of equality-seeking groups and of equality rights specialists in Canada to developments in both domestic and international law. However (to steal a metaphor from the right wing Republican attempts to rollback New Deal constitutional reform in the United States), Canadians' unique understanding of the right to equality is now in danger of being forced into constitutional "exile" by a Canadian brand of judicial restraint, encouraged by right wing attacks on the role of the Supreme Court.[86] The poor and other disadvantaged groups are at risk of becoming, to borrow a phrase from our own McLachlin C.J., "constitutional castaways" in a country which was determined 20 years ago to place its interests at the core of the constitutional right to equality.[87]

Equality meant a lot to people in Canada when section 15 of the Charter came into effect 20 years ago, and it still means a lot to us. We should not to be talked out of our expectations.

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[86] See Cass R. Sunstein, "Hoover's Court Rides Again" *Washington Monthly* (September 2004), online: Washington Monthly <http://www.washingtonmonthly.com/features/2004/0409.sunstein.html>.

[87] *R. v Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236, at 102.