

Case Comments / Chroniques de jurisprudence

Cases and Commentaries: A UBC Forum

Christine Boyle, Natasha Affolder, Efrat Arbel, Susan B. Boyd, Gwen Brodsky,
Kim Brooks, Margaret Hall, Fiona Kelly, and Margot Young

Le présent forum réunit une collection de brefs commentaires sur une panoplie de questions juridiques d'actualité concernant les femmes et le droit. Les participantes, toutes de l'Université de la Colombie-Britannique, discutent de nombreux développements récents, y compris d'arrêts judiciaires, mais sans s'y limiter. Le commentaire d'ouverture de Natasha Affolder sert d'exemple du besoin toujours renouvelé d'une présence énergique des femmes au sein des institutions juridiques et du droit. Elle y traite des progrès réalisés en appliquant une analyse fondée sur les rapports sociaux de sexe dans l'évaluation environnementale des mines. Efrat Arbel critique l'arrêt Terre-Neuve (Conseil du Trésor) c. Newfoundland Association of Public Employees (N.A.P.E.), qui a imposé aux seules femmes le fardeau de la réduction du déficit de cette province. Deux exposés reflètent le souci continu des féministes quant à l'appauvrissement de la jurisprudence en matière d'égalité : Kim Brooks discute de l'arrêt Auton (Guardian ad litem of) c. Colombie-Britannique (Procureur général) alors que les remarques finales de Margot Young s'intitulent, de façon éloquente, «L'égalité au point mort». En revanche, Fiona Kelly a espoir que l'article 7 de la Charte canadienne des droits et libertés puisse fonder une contestation judiciaire des coupures à l'aide juridique. Ces commentaires illustrent l'importance des questions économiques dans les débats constitutionnels actuels. Gwen Brodsky discute des droits économiques et sociaux des femmes dans le contexte international, en attirant l'attention sur l'importance de l'application des Principes de Montréal dans l'interprétation du Pacte international relatif aux droits économiques, sociaux et culturels. Susan Boyd identifie l'émergence du concept du «divorce responsable», tel qu'illustré dans l'arrêt Hartshone c. Hartshone, et déplore le fait que l'on n'y tienne pas compte de l'égalité systémique. Margaret Hall traite d'une affaire qui n'a pas encore été décidée par la Cour suprême du Canada et soutient que la prévention de la violence contre les femmes exige que la dissuasion soit reflétée dans le concept du lien de causalité

en droit des délits. Le fil conducteur du forum semble indiquer—hélas! —qu'il y a encore beaucoup à faire pour améliorer la situation des femmes.

This forum is a collection of brief comments on a broad range of current legal issues relating to women and the law. Participants, from the University of British Columbia, discuss a range of recent developments, including, but not limited to, judicial decisions. Exemplifying the continued need for the energetic engagement of women with law and legal institutions is the opening comment, by Natasha Affolder, about some progress that has been made in bringing a gender analysis to bear on environmental assessment reviews with respect to mines. Efrat Arbel critiques the imposition on women of the burden of deficit reduction in Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.). Continued feminist concern about the impoverishment of equality jurisprudence is also reflected in Kim Brooks's discussion of Auton (Guardian ad litem of) v. British Columbia (Attorney General) and in Margot Young's concluding remarks on "Equality at a Standstill." In contrast, Fiona Kelly holds out some hope that section 7 of the Canadian Charter of Rights and Freedoms might form a basis for a challenge to cuts to legal aid. Such contributions show the importance of economic issues in current constitutional debates. The international context for women's social and economic rights is discussed by Gwen Brodsky, drawing attention to the importance that the Montreal Principles should be given in interpreting the International Covenant on Economic, Social and Cultural Rights. Susan Boyd identifies the emergence of the concept of the "responsible divorce," which lacks attention to systemic equality and is illustrated by Hartshone v. Hartshone. Margaret Hall argues, with respect to Mooney v. British Columbia (Attorney General), that the prevention of violence against women requires deterrence to be reflected in the concept of causation in tort law. Unfortunately, the common thread of the forum seems to be that there is still much cause for concern about the status of women.

Introduction

Christine Boyle

During my time as English case comments editor of this journal, I have experimented with different formats for presenting commentary on current legal

developments.¹ The format in this issue is that of a forum at the University of British Columbia (UBC), which is designed to discuss a range of recent developments, including, but not limited to, judicial decisions that are relevant to women and the law. Participants were faculty members, a Ph.D. candidate, and a recent graduate. These short comments show a number of things. First, in my unbiased view, they demonstrate the range and vitality of the feminist work being carried out at UBC. Second, but more seriously, while not exhaustive of current issues of interest to readers of this journal, they illustrate the scope and depth of feminist engagement with legal issues across legal categories. The subjects that are addressed include employment/human rights law, divorce law, tort law, international law relating to the social and economic rights of women, intellectual property, and, of course, the *Canadian Charter of Rights and Freedoms*.² The opening comment exemplifies the continuing need for the energetic engagement of women with law and legal institutions and reveals the progress that has been made in bringing a gender analysis to bear on the environmental assessment reviews with respect to mines.

Unfortunately, the most striking theme of the forum seems to be that there is still much cause for concern about the status of women—with respect to the importance of hearing women's voices on the environment; the imposition on women of the burden of deficit reduction; the struggle to promote positive action by government to achieve women's equality; the gendered implications of the "responsible divorce"; the need for a test of causation responsive to the context of domestic violence; and cuts to legal aid. It is striking that the issues discussed in this forum have arisen at a time when both international and national instruments guarantee equality for women, including the equal right to social and economic rights. Issues of equality lie in the foreground or the background of all aspects of the broad subject of women and the law, including those relating to the inclusion of women in legal processes and in the gendered analysis of the construction of common law concepts. The current judicial approach to the concept of equality itself is therefore of particular significance. For this reason, I asked Margot Young to add her perspective on the current state of equality law by way of conclusion to the forum.

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1. See "R. v. R.D.S.: An Editor's Forum" (1997) 10 *Canadian Journal of Women and the Law* 159 and "The Criminalization of Young Women: An Editor's Forum" (2002) 14 *Canadian Journal of Women and the Law* 389.
 2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [Charter].

Breaking New Ground: Women, Mining Projects, and Canadian Law

Natasha Affolder

Feminist critiques of mining law are hard to come by. The blatant forms of exclusion of women from the industry may be openly acknowledged. Yet the more subtle ways in which mining projects exclude women and ignore women's experiences are less known and only recently being exposed. Public participation in natural resource decisions has been heralded as "one of the signal developments of the last years of the Twentieth Century,"³ but "public" participation in natural resource decisions has largely meant, and continues to mean, "male" participation. It is easy to find well-publicized corporate initiatives and international declarations of commitment to incorporate the voices of women in natural resource decision-making,⁴ but change on the ground is less evident. However, one group of Inuit and Innu women in northern Labrador, in an attempt to directly tackle the invisibility of women in large mining projects, have put gender on the table in a manner unprecedented in Canadian mining projects.

In 1993, what is believed to be the world's largest nickel reserve was found in Voisey Bay, which is located on Labrador's north coast. As the project approval processes began to gain momentum, local Innu and Inuit women became increasingly alarmed about the impacts that this development could have on their homeland, families, environment, and land claims negotiations. Working in cooperation with the Women and Resource Development Committee (a feminist group with the express mission of increasing the participation of women in the trades and technology sector in Newfoundland and Labrador), the Tongamiut Inuit Women and Innu Nation women developed a gender-based analysis of the development and used their analysis to ensure that gender concerns would be incorporated in the Voisey Bay Environmental Assessment Review. To appreciate the potential that environmental assessment review processes hold for integrating gender analysis into mining projects, it is useful to emphasize that an essential part of the assessment process is to examine the potential impacts of the mine on the lives of the people working at it and those living around it. A consideration of the

3. Donald N. Zillman, "Introduction to Public Participation in the Twenty-first Century," in Donald Zillman et al., eds., *Human Rights in Natural Resource Development* (Oxford: Oxford University Press, 2002) 1 at 1.

4. See, for example, the Malmo Ministerial Declaration, which emerged from the first Global Ministerial Environmental Forum, UN Environment Programme, Malmo Ministerial Declaration, available online at <http://www.unep.org/malmo/malmo_ministerial.htm> at para. 19 (date accessed: 21 December 2004).

direct and indirect impacts on women is thus a critical aspect of an ecosystem approach to environmental assessment.⁵

A memorandum of understanding signed by the Labrador Inuit Association, the Innu Nation, and the federal and provincial governments governed the review process. The guidelines developed to govern the process mandated, in an unprecedented attempt to incorporate gender concerns, that the "[p]roponent shall ... explain how it has used feminist research to identify how the Undertaking will affect women differently than men." The guidelines further specified that "[w]herever possible, the Proponent shall differentiate information regarding the baseline description, impact predictions and the effectiveness of mitigation measures by age, gender, aboriginal status and by community."⁶ This express acknowledgment that different members of the community are impacted differently by mine developments, and that these differential impacts need to be identified and addressed at the outset of a project, may be nothing new for the readers of feminist journals, but it does represent some rather novel thinking for the mining industry. These guidelines appear to be the first time that gender has been formally integrated into a major project review process in Canada. The guidelines effectively tasked the mining company involved, the Voisey Bay Nickel Company, with developing a feminist analysis of the project's impacts and incorporating this analysis into its mine review documents.

The Voisey Bay Nickel Company, as part of this analysis, was required to integrate gender balance and equity provisions in its hiring plans and to develop a women's employment plan as a condition of the release of its environmental assessment.⁷ Specific initiatives that were to be written into the plan include programs to advance gender diversity in the workplace, particularly in non-traditional occupations as well as programs to address training, recruitment, hiring, retention, and the advancement of women. The company also committed itself to offering gender sensitivity training in order to accommodate women more profoundly than by simply affording them entry to a highly male-dominated work environment and to provide a monitoring program to document compliance. The

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5. See presentation by Dr. Barbara Neis, Women and Resource Development Committee, *Review of the Canadian Environmental Assessment Act* (7 March 2000), available online at <http://www.ceaa-acee.gc.ca/013/001/0002/0004/0001/neis_e.htm> (date accessed: 21 December 2004).
 6. Voisey's Bay Environmental Assessment Panel, *Environmental Impact Statement Guidelines for the Review of Voisey's Bay Mine and Mill Undertaking* (Ottawa: Canadian Environmental Assessment Agency, 20 June 1997), quoted in Neis, *supra* note 5.
 7. This stems from a practice in Newfoundland and Labrador where the Women's Policy Office (the central agency within government coordinating the development of programs for women in the province) reviews development projects submitted under the environmental assessment provisions of the *Environmental Protection Act*, S.N.L. 2002 E-14.2. In 2003, the Women's Policy Office provided a gender-based analysis of fifty-nine projects, and, in forty-nine of these, proposed that the project proponent should, or must, be required to consider gender balance in hiring and awarding projects. For two major projects, equity provisions were imposed as a condition of release from environmental assessment. See Women's Policy Office of Newfoundland and Labrador, *Annual Report 2003/2004* (St Johns: Government of Newfoundland and Labrador, 2004) at 14.

fact that the details of this women's employment plan are contained in non-public human resource documents means that it is impossible to determine the significance of these measures and their potential for real impact on the hiring, advancement, and work experiences of women.

Employment provisions are also contained in the confidential impact and benefit agreements (IBAs) that were concluded between the company and the Inuit and Innu Nation. The non-public nature of these agreements again prevents an analysis of their content. Assuming that they follow the trend of IBAs that have been concluded for other Canadian natural resource projects, these employment provisions do not address equity issues. The increasing trend in natural resource projects in Canada for private agreements to govern impact and benefit issues prevents women's experiences from being incorporated in project mitigation measures. These private agreements are concluded between predominantly male negotiators, leaving women entirely reliant on these negotiators to disclose the content of the drafts under negotiation. In the negotiations of the IBA between the Voisey Bay Nickel Company and the Labrador Inuit Association, Inuit women were only marginally involved in the negotiations.⁸

The private nature of these negotiations, and the absence of female negotiators, forces one to question whether consultation between the company and the affected Aboriginal people is really taking place. In its recent decision in *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada set new standards for the Crown's duty to consult and accommodate the interests of Aboriginal people.⁹ A specific obligation to consult with Aboriginal women is conspicuously absent from this decision, as it is from many negotiations in practice.

The processes and policies emerging from the Voisey Bay project are too new to comprehensively assess and too narrow to form a basis from which to generalize about the real impact of these developments on the lives of women. However, a number of useful observations have already emerged from this experiment in more "participatory" decision-making. It is clear that women need more than space within environmental review proceedings and impact benefit negotiations to present their concerns. They also require funding to be able to gather and compile vital research. This lack of funding is all the more critical given the absence of existing gender-specific research on the impacts of mining projects. Voisey Bay is Labrador's first major nickel mine. The diamond mines emerging in northern Canada are similarly Canada's first diamond mines. The gendered impacts of these sorts of major developments, including environmental, occupational health, and safety risks, are simply not known.¹⁰

8. Linda Archibald and Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project* (Ottawa: Status of Women Canada, 1999) at 2.

9. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

10. A rare exception to this knowledge void is a recent literature review compiling an evidence-based gender analysis of the impacts of mining on women's health. See CCSG Associates, *Overburdened: Understanding the Impacts of Mineral Extraction on Women's Health in Mining Communities* (Ottawa: MiningWatch Canada, 2004).

It is also clear from the Voisey Bay case that simply telling a company to produce an environmental impact statement that incorporates feminist methodologies is a vastly inadequate approach. The gender-differentiated data presented in the company's environmental impact statement has been criticized by Inuit women for its lack of analysis and insight into how the differential impacts affect Inuit women.¹¹ Companies unfamiliar and inexperienced in understanding and applying feminist methodologies are unlikely to produce results that profoundly benefit from feminist thinking. This problem illustrates the need for guidance on how to engage in gender-based analysis for environmental review processes, for training on the techniques of applying gender-equality indicators, and for referrals to those individuals competent in using these tools.¹²

One of the real risks of allowing environmental review bodies or corporate health, safety, and environment units to translate women's concerns into project commitments is the tendency of these institutions to water down difficult issues for public consumption. For example, in a federal assessment process where women in Labrador outlined the impacts on women of military flight training in the region, "'sexual assault' was portrayed as 'family or community violence,' 'sexually transmitted diseases' became 'communicable diseases,' and 'women's groups' became 'concerned groups.'"¹³ This reticence to use realistic language to describe women's realities prevents meaningful action to address very real problems of sexual violence and overtly hostile (not merely uncomfortable) work environments. In order to address these problems, a regulatory approach that mandates hiring targets and advancement opportunities for women seems a small, albeit important, first step. For any of these regulatory changes to deliver meaningful improvements for women, they must be situated in a management environment that is capable of identifying and addressing the unspoken gendered assumptions underlying processes and practices deeply embedded in the culture of mining operations.

This is not to suggest that the task of creating less hostile work environments can be left to management. The critical task of integrating women into both the work environments of mining projects and the decision-making processes that govern their impacts must not be left only to those employers looking to fill a corporate social responsibility niche. Gender analysis must not be considered an add-on that is reserved only for those projects with a sufficiently high profile to attract special scrutiny and extensive stakeholder consultations. The real challenge lies in making these approaches part of business as usual rather than worthy of the sort of attention I have given them in this comment.

11. Archibald and Crnkovich, *supra* note 8 at 24.

12. On the need to make gender-analysis a routine aspect of environmental assessment under the Canadian *Environmental Assessment Act*, see Archibald and Crnkovich, *supra* note 8 at 34.

13. MiningWatch Canada, *Mining in Remote Areas: Issues and Impacts* (Ottawa: MiningWatch Canada, 2001), quoting the Tongamiut Inuit Annait Ad hoc Committee on Aboriginal Women and Mining in Labrador, *52 Per Cent of the Population Deserves a Close Look: A Proposal for Guidelines Regarding the Environmental and Socio-Economic Impacts on Women from the Mining Development at Voisey's Bay* (16 April 1997) [unpublished].

Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.)

Efrat Arbel

Introduction

*Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.)*¹⁴ (NAPE) was released by the Supreme Court of Canada on 28 October 2004. This landmark decision marks a sea change in Canadian equality jurisprudence, allowing the government, for the first time, a cost-based justification for acknowledged discrimination on the basis of sex. The judgment also raises apprehension about the application of section 1 of the *Canadian Charter of Rights and Freedoms*¹⁵ in future equality rights cases involving women's social and economic rights claims.

The case concerned legislation that altered Newfoundland's obligation to issue pay equity adjustments to persons employed in female-dominated job classifications, under the terms of a pay equity agreement signed in 1988 by the provincial government and the Newfoundland Association of Public Employees. The *Public Sector Restraint Act*¹⁶ was enacted in April 1991, the same month that payments were scheduled to begin under the agreement. Section 9 of the act deferred the commencement of the promised pay equity increase and voided the portion of the agreement that implemented pay retroactively, thus erasing the government's obligation to issue \$24 million in funds to its female employees. The Supreme Court of Canada determined the legislation contravened section 15(1) of the *Charter*—it affirmed a policy of gender discrimination, reinforced the complainants' inferior status, did not correspond to the complainants' actual needs, had no ameliorative purpose, and adversely impacted the complainants' dignity.¹⁷ Still, the Court unanimously upheld the legislation under section 1. In this piece, I critique the Court's application of the section 1 framework and focus on what I believe to be three particularly contentious points of analysis that were determinative of the case's outcome.

14. *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381; 2004 SCC 66 [NAPE].

15. *Canadian Charter of Rights and Freedoms*, *supra* note 2.

16. *Public Sector Restraint Act*, 1991, S.N. c. 3. The 1991 *Public Sector Restraint Act* was supplanted by another *Public Sector Restraint Act*, 1992, S.N. 1992, c. P-41.1, which extended the restraint period for two additional years. The impugned provision remained unimpaired and was continued in force under the 1992 act.

17. NAPE, *supra* note 14 at para. 40-51.

Dollars versus Rights Dilemma

The characterization of the government's objective is important in assessing the section 1 requirements pursuant to *R. v. Oakes*,¹⁸ especially where a discriminatory law or policy is at issue.¹⁹ In this case, the Court held that reducing expenditures to control an escalating deficit was sufficiently important to justify a limitation of section 15(1). Noting that attempts to justify *Charter* infringements on the basis of budgetary restraints will normally be looked at with "strong scepticism," the Court determined that where the impact on the public purse is so significant that social programs are adversely affected, a limitation of individual rights may be justified.²⁰ The Court held that where a fiscal crisis is so severe, governments must be accorded "significant scope to take remedial measures," even if such measures are likely to contravene *Charter* rights.²¹ It is significant to note that while the Court characterized the province's financial crisis as dire, there is some evidence to suggest that the deficit in question was far from exceptional.²²

In my view, this holding strays from the topography of human rights protection that the Supreme Court of Canada has outlined in previous *Charter* jurisprudence. If governments are allowed to evade their constitutional commitments on the basis of budgetary considerations—even if only in situations of so-called financial crises—the balance of power struck between litigants and the government in section 1 is likely to be fundamentally altered.²³ Since the highest price tag is likely to correspond with systematic or pervasive discrimination, cost constraints could further restrict the rights of those who are already disadvantaged in public fiscal policy. If this ruling is followed, gendered economic inequality, which finds its roots in the structure of our social system and requires considerable funds to amend, will have little remedy from the *Charter*.

Balancing equality rights with the government's fiscal and social obligations in this case was certainly a challenge, especially since the stakes in question—on both sides of the equation—were substantial. On the whole, though, the balancing act mandated by section 1 need not be reduced to an either/or scenario, where proper funding to healthcare or education can only be guaranteed at the expense of the full and immediate realization of equality rights. The section 1 framework is *designed* to permit the resolution of such conundrums, and the standard it

18. *R. v. Oakes*, [1986] 1 S.C.R. 103 [Oakes].

19. Errol P. Mendes, "The Crucible of the *Charter*: Judicial Principles v. Judicial Deference in the Context of s. 1," in Gérald-A. Beaudoin and Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd edition (Toronto: Carswell, 1996), has argued that a court's characterization of the legislative objective can essentially determine whether a law will be struck down or upheld under section 1.

20. *NAPE*, *supra* note 14 at para. 72.

21. The Court further cautioned, *ibid.* at para. 64, that these measures must remain proportional both to "the fiscal crisis and to their impact on the affected *Charter* interests."

22. See "Supreme Court of Canada Allows Discrimination Against Women," *infra* note 99.

23. See Lorraine Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 Supreme Court Law Review 469 at 490-1.

establishes is an appropriately high one. I suggest that in *NAPE*, the Court altered this standard and fell short of exercising the full scope of section 1's potential.

The Purposive Approach

The Court's approach in applying section 1 is also a cause for concern. A defining feature of the section 1 test is its mandated purposive line of inquiry. Since section 1 states that the *Charter* guarantees the enshrined rights and freedoms to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,"²⁴ its purpose, simply stated, is to determine the limits that can be placed on *Charter*-protected rights. The Supreme Court of Canada has acknowledged this point and repeatedly stated that the limitation of rights must remain conceptually distinct from their denial.²⁵ As Justice Bertha Wilson has noted, the section 1 inquiry is undertaken by courts as an aspect of their commitment to uphold *Charter* rights, not to nullify them.²⁶ Only when rights are limited—not denied—do the values underlying those rights remain intact: "Limits do not conflict with rights because they emerge from the same compendium of values out of which the rights and freedoms enumerated in the *Charter* were crystallized, and are sustained or discredited to the extent of their fidelity to those values."²⁷

I suggest that in *NAPE*, the Court interpreted section 1 to authorize a denial of, not a limitation on, equality rights. The impugned legislation explicitly deprived the complainants of \$24 million worth of adjustment payments—a debt that, in the Court's words, illustrates the "scale of discrimination experienced by women hospital workers."²⁸ These were funds that the complainants had earned, to which they had a legal, moral, and constitutional right, but which they were nonetheless obliged to forfeit. In this respect, the complainants were being forced to shoulder an unfair share of the province's fiscal problems by the sole and simple virtue of their sex—their male colleagues suffered no such loss of funds, irrespective of the grievous deficit.²⁹

The Court held that the act's effect on the complainant's rights, in purely financial terms, was simply to defer pay equity and leave them "with their traditionally lower wage scales for a further three years." In my view, it is incomprehensible that denying constituents equal pay for equal work, even if only for a limited time, can be a demonstrably justifiable method of combating fiscal

24. *Charter*, *supra* note 2.

25. In *A.G. Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, for example, the Court identified the conceptual and constitutional distinction that exists between limits and denials of rights. Limits, it held, are permitted under section 1 of the *Charter*, while denials are authorized only by the legislative override permitted under section 33. For a detailed treatment, see Weinrib, *supra* note 23.

26. Bertha Wilson, "Decision Making in the Supreme Court" (1986) 36 *University of Toronto Law Journal* 227 at 241.

27. *Ibid.* at 471 and 506.

28. *NAPE*, *supra* note 14 at para. 87.

29. This argument was advanced by *NAPE* and rejected by Marshall J.A. on appeal.

difficulties. The limited character of the restraint legislation does not justify the resulting discrimination: human dignity is essential to the realization of personhood, and its guarantee cannot simply be put on hold. Support for this proposition is found in *Vriend v. Alberta*, where the Court held that "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equality rights while governments move towards reform one step at a time."³⁰

Values of a Free and Democratic Society

When section 1 is engaged to justify an infringement of rights under section 15(1), the test to be applied is a stringent one, more so than in relation to any other provision.³¹ The Supreme Court of Canada has made this point on several occasions, recognizing that equality is itself a core value of Canadian democracy and that its violation should appropriately be difficult to uphold. In *Oakes*, Chief Justice Brian Dickson held that "commitment to social justice and equality," as well as "faith in social and political institutions which enhance the participation of individuals and groups in society," are integral to the maintenance of a free and democratic society.³²

Accordingly, in our free and democratic society, equality should be a right that is constitutionally guaranteed to both women and men, not a privilege endowed only upon some when it is fiscally feasible to do so. The potential danger of *NAPE* is a judicial perception that the equality guarantee will not be enforced as strongly in situations that implicate significant state resources. I see this in the Court's language characterizing the pay equity cancellation as a "deeply unfortunate" occurrence rather than a constitutional wrong. Little reference was made to the importance of economic equality to personhood, the ability to realize

30. *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at 559 [Vriend]. Also in *M. v. H.*, [1992] 2 S.C.R. 3 at 81, the Court held that "the notion that government ought to be accorded time to amend discriminatory legislation, is generally an inappropriate justification for *Charter* violations." Similarly, in *Egan v. Canada*, [1995] 2 S.C.R. 513 at 575-6, Justices Frank Iacobucci and Peter Cory held that justifying discrimination on account of the need for "government incrementalism" permits section 1 to be used in an "unduly deferential manner" since governments will always be able to uphold legislation that selectively and discriminatorily allocates resources. Cited in Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Canadian Bar Review 299 at 357. See also Martha Jackman, "Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the Charter" (Winter 1996) 34 Osgoode Hall Law Journal 4 at 661, for an interesting discussion of the interplay between democratic principles and the section 1 assessment.

31. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 154.

32. *Oakes*, *supra* note 18 at 136. In *M. v. H.*, *supra* note 30, Justice Michel Bastarache held that discriminatory objectives "could never be pressing and substantial in a free and democratic society" (at para. 364). *Vriend*, *supra* note 30, stated at para. 566 that under section 1 courts "must inevitably delineate some of the attributes of a democratic society," implicitly suggesting that the section 1 assessment should acknowledge that equality rights are always guaranteed in a free and democratic society. See Martin, *supra* note 30 at 363.

the full scope of one's rights, or to the pervasive reality of women's economic inequality in Canada.³³ Rather, the loss of \$24 million was characterized as an unfortunate occurrence to be endured by the complainants. In this respect, I suggest, the Court did not afford due reverence to equality as a central value underpinning our social order.

Conclusion

In the aftermath of *NAPE*, we risk a frequent denial in future jurisprudence of rights that would have otherwise fallen well within the ambit of *Charter* protection. I fear that *NAPE* establishes an insurmountable obstacle for future equality seekers whose rights engage the public purse. Specifically, I worry that *NAPE* will create a barrier for gender-based rights claims that challenge women's economic inequality. If the jurisprudence develops in this direction, the toll exacted will be greater than Newfoundland's grievous deficit and will be paid out not just in dollars but also in human dignity.

The Responsible Divorce?

Susan B. Boyd

When I first read the 2004 Supreme Court of Canada decision in *Hartshorne v. Hartshorne*,³⁴ I found myself experiencing a sense of outrage that seemed disproportionate to the measured tones of the judgment. I wrote a bit of a rant about the renewed emphasis placed on contract, "choice," and individual responsibility in recent family law decisions of the Supreme Court of Canada.³⁵ Since then, I have been pondering the return of the rational liberal individual to family law in relation to the notion of "responsible divorce."

The idea of "the responsible divorce" has been circulating in family law circles in other countries. Those who divorce responsibly "should be reasonable, self-denying, conciliatory, and fully conscious of the implications of their actions for themselves and others."³⁶ As with many apparently gender-neutral concepts

33. See Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14(1) Canadian Journal of Women and the Law 185.

34. *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 [*Hartshorne*].

35. In addition to *Hartshorne*, there is *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, and *Miglin v. Miglin*, [2003] 1 S.C.R. 303 [*Miglin*]. See Susan B. Boyd and Claire F.L. Young, "Feminism, Law, and Public Policy: Family Feuds and Taxing Times," 2004 Barbara Betcherman Memorial Lecture (2004) 42(4) Osgoode Hall Law Journal 545.

36. John Dewar, "The Normal Chaos of Family Law" (1998) 61 Modern Law Review 467 at 483, cited in Alison Diduck, *Law's Families* (London: LexisNexis Butterworths, 2003) at 57 (in a

that appear benign on their face, feminists have inquired more deeply about the implications of this new normative model based on divorcing responsibly. They have found that the shifting of moral responsibility for ensuring the proper process and outcome of divorce away from law and onto individuals has not necessarily resulted in better behaviour on the part of divorcing spouses. Moreover, the consequences of imposing a neo-liberal norm of individual responsibility upon the still highly gendered terrain of family law can be problematic for women. Women's experiences of family relations do not necessarily fit well with the primacy accorded to the rational liberal subject under the responsibility model.

The responsible divorce is arguably on the rise in Canada. Traces can be found in the new language of "parental responsibility" that law reformers are touting to replace the concepts of child custody and access in the *Divorce Act*,³⁷ ostensibly in order to encourage parents to act selflessly in their children's best interests and to avoid parental rights discourse dominating this field. Whether this objective can be achieved is another question, and feminists have raised questions about the impact of this new philosophy on women and children.³⁸

Perhaps a more obvious example of the rise of responsible divorce is the increased pressure on intimate partners who are separating to use a conciliatory process that avoids conflict, litigation, and possibly using lawyers altogether. For example, mediation is supposed to encourage separating parents, in particular, to reorder, rather than sever, their relationship for the sake of the children. Accomplishing a clean break from an unsatisfactory spousal relationship seems less and less possible. Moreover, the problems that mediation poses for women who have experienced abuse or significant power imbalances in their relationships have been well canvassed.³⁹ As with other conciliatory processes, mediation seems better suited to partners with low conflict divorces.

Less well canvassed, but also part of the trend towards "responsible divorce," is the more recent phenomenon of "collaborative family law," which is a popular new trend in urban family law circles at least. This process re-introduces lawyers

section on "The Responsible Divorce"). See also Helen Reece, *Divorcing Responsibly* (Oxford: Hart Publishing, 2003).

37. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 16.

38. Bill C-22, An Act to Amend the Divorce Act, 2nd Sess., 37th Parl., 2002 (2nd reading 25 February 2003), died when Parliament was prorogued late in 2003, but it is expected to be reintroduced in some form. For analysis of the bill and its potential impact on women, see Susan B. Boyd, "Walking the Line: Canada's Response to Child Custody Law Reform Discourses" (2003) 21 Canadian Family Law Quarterly 397; Linda C. Neilson, "Putting Revisions to the Divorce Act through a Family Violence Filter: The Good, the Bad and the Ugly" (2003) 20(1) Canadian Journal of Family Law 11. For an analysis of how a similar law reform in Australia has affected mothers who raise concerns about a father's capacity to care for children, see Helen Rhoades, "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16(1) International Journal of Law, Policy and the Family 71.

39. Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 Buffalo Law Review 441. Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale Law Journal 1545. For Canadian research, see Sandra A. Goundry et al., *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998).

more centrally than does mediation into the conciliation process, along with mental health professionals and financial advisers. Yet the very premise of collaborative family law is that settlement out of court is the objective: "It removes the adversarial element embedded in many divorce proceedings, and replaces it with an approach that consists of mutual respect and team problem solving."⁴⁰ Herein lies the responsible divorce aspect. If, however, negotiations falter and a return to the litigation mode is expected, the parties must re-start their dispute resolution process, with new lawyers and new bills. This form of divorcing responsibly may work only for those with the funds to hire lawyers in the first place, and those who do not have serious, complex disputes.⁴¹ Notably, it is not a dispute resolution mode that works for women who no longer qualify for legal assistance under the severe cuts that have occurred in recent years to family law legal aid (as discussed later in this forum by Fiona Kelly). Indeed, these women may run the risk of not being able to gain access to legal advice at all. Their ability to "divorce responsibly" will be shaped by this lack of legal advice, and they may well cede rights for lack of legal knowledge. A hierarchy of those who are enabled to achieve a responsible divorce may thus be created.

Finally, divorcing responsibly involves being "fully conscious of the implications of their actions for themselves and others," which raises the spectre of freedom of contract. The question of the extent to which spouses can contract out of family law norms (such as equitable sharing of the economic advantages and disadvantages of a marriage) has been circulating off and on for some time in Canadian law, peaking in the mid-1980s with the so-called *Pelech* trilogy, which permitted spousal support to be limited by domestic contracts except in limited circumstances.⁴² In these cases, the Supreme Court of Canada privileged freedom of contract over the principles underlying spousal support: if a woman agreed at the time of divorce to a contractual arrangement that subsequently proved to be unfair and to leave her in a financially precarious position, the contractual terms would normally prevail. The rigidity of the principle of living (responsibly) with one's agreement was tempered during the 1990s, partly due to extensive feminist critique related to women's inequality of bargaining power and systemic gender-based inequality of women within heterosexual families.

However, recent decisions of the Supreme Court of Canada in *Miglin v. Miglin*⁴³ (spousal support) and *Hartshorne*⁴⁴ (matrimonial property) have arguably returned Canadian family law to an expectation that women should stick by their agreements, no matter how unfair the consequences may be. The discourses of "fairness" and "choice" have re-emerged, based on impoverished

40. "A No Court Approach to Divorce: Collaborative Divorce is a Revolutionary New Process," available online at <<http://www.collaborativedivorcebc.org/>>.

41. For a feminist analysis, see Penelope Bryan, "'Collaborative Divorce': Meaningful Reform or Another Quick Fix?" (1999) 5 *Psychology, Public Policy and Law* 1001.

42. *Pelech v. Pelech*, [1987] 1 S.C.R. 810; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; and *Caron v. Caron*, [1987] 1 S.C.R. 892.

43. *Miglin*, *supra* note 35.

44. *Hartshorne*, *supra* note 34.

understandings of these concepts.⁴⁵ In *Hartshorne*, in particular, the Court severed an analysis of systemic inequality—of the larger social context surrounding women's position in relation to family responsibilities, especially parenting responsibilities—from an analysis of what is fair between two, presumptively equal, ungendered individuals, who are expected to live (responsibly) by their agreements.

The brave new world of divorcing responsibly seems to be catching on, but there is much need for feminist analysis of the gendered consequences of this neo-liberal approach to family law. Women should, of course, be responsible for our own actions, and we should be empowered to make choices. However, the conditions under which choices can be meaningful, free, and equal are almost certainly not yet in place.

Montreal Principles on Women's Economic, Social, and Cultural Rights

Gwen Brodsky

*The International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁴⁶ and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁴⁷ are of growing interest to feminists, because of their explicit social and economic rights content. They are treaties that are binding on all levels of government in Canada. They can be used as aids to the interpretation of the *Canadian Charter of Rights and Freedoms* and domestic legislation.⁴⁸ They can also be used as tools for political activism, domestically and internationally. One provision of the *ICESCR* that is potentially useful to women is Article 11, which obligates governments in Canada to ensure that everyone has an adequate standard of living including adequate food, clothing, and housing. In addition, the *ICESCR* expressly provides that women have a right to the equal exercise and enjoyment of the rights contained in the covenant.

45. Martha Shaffer, "Domestic Contracts, Part II: The Supreme Court's Decision in *Hartshorne v. Hartshorne*" (2004) 20(2) Canadian Journal of Family Law 261.

46. *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc. A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46.

47. *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res. 34/180, UN GAOR, 34th Sess. (Supp. No. 46) UN Doc. A/34/46 (1982) Can. T.S. 1982 No. 31.

48. *Canadian Charter of Rights and Freedoms*, *supra* note 2. Regarding jurisprudential principles applicable to the use of human rights treaties as aids to constitutional and statutory interpretation, see *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-7; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-81; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 68-102; and *United States v. Burns*, [2001] 1 S.C.R. 283 at paras. 79-132.

For those who are concerned about the question of the relationship between women's right to equality and women's social and economic rights, the *Montreal Principles*, which are published in the *Human Rights Quarterly*⁴⁹ are a new resource. The *Montreal Principles* were adopted by legal experts at a meeting convened by the Women's Economic Equality Project (WEPP), the Women's Working Group of the International Network on Economic Social and Cultural Rights (ESCR-Net), and the Centre for Equality Rights in Accommodation (CERA) on 7-10 December 2002 in Montreal.⁵⁰

In the international human rights community, there is a tradition of interpretive statements being issued not only by UN treaty bodies but also by legal experts. Two examples of the latter are the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (*Limburg Principles*),⁵¹ which were adopted at a meeting of leading international human rights experts in 1986, and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (*Maastricht Guidelines*),⁵² which were developed by a group of experts convened by the International Commission of Jurists in 1997. Although they were not promulgated by UN officials, the *Limburg Principles* and the *Maastricht Guidelines* have been influential in the evolution of international law on social, cultural, and economic rights. Both instruments were referred to by Justice of Appeal Michel Robert of the Quebec Court of Appeal in *Gosselin v. Quebec (Attorney General)*⁵³ as aids to the interpretation of section 45 of the *Quebec Charter of Human Rights and Freedoms*.⁵⁴ Similarly, the *Montreal Principles*, while not legally binding, are available for use by judicial bodies and governments, as aids to the interpretation of equality rights and anti-discrimination guarantees.

In the tradition of interpretive statements by legal experts, such as the *Limburg Principles* and the *Maastricht Guidelines*, the *Montreal Principles* are normative guidelines for the interpretation of Articles 3 and 2(2) of the *ICESCR*, which state:

49. *Montreal Principles*, reprinted in (2004) 26(3) *Human Rights Quarterly* 760.

50. An excellent backgrounder to the *Montreal Principles* is Shelagh Day, Leilani Farha, and Marianne Mollman, "The *Montreal Principles*: Needed Clarity on Women's Right to the Equal Enjoyment of Economic Social and Cultural Rights" (2004) 22(3) *Nordic Journal of Human Rights* 345.

51. *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, available online at <<http://www2.law.uu.nl/english/sim/instr/limburg.asp>>.

52. *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, available online at <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html>.

53. *Gosselin v. Quebec (Attorney General)*, [1999] R.J.Q. 1033 (Que.C.A.), Robert J.A. dissenting; affirmed [2002] 4 S.C.R. 429.

54. *Quebec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12 s. 45.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 2(2)

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Just as the *Limburg Principles* and the *Maastricht Guidelines* have been helpful in establishing an international consensus that economic, social, and cultural rights can be subject to judicial review in the same manner as civil and political rights, so too the *Montreal Principles* can help to create an understanding of what is entailed in giving effect to women's right to sex equality in relation to economic, social, and cultural rights. As the *Montreal Principles* explain, there is a pressing need to improve the understanding, recognition, and implementation of women's right to the equal enjoyment of economic, social, and cultural rights because women are routinely denied the enjoyment of these rights:

The inequality in the lives of women that is deeply embedded in history, tradition and culture⁵⁵ affects women's access to and enjoyment of economic, social and cultural rights. To ensure women's enjoyment of these rights, they must be implemented in a way that takes into account the context in which women live. For example, the traditional assignment to women and girls of the role of primary care-giver for children, older persons and the sick restricts women's freedom of movement and consequently their access to paid employment and education. The economic and social devaluation of the work, paid and unpaid, that women traditionally do from a very young age, contributes further to fixing women in a position of economic and social inequality. These factors diminish women's earning capacity and their economic autonomy, and contribute to the high rates of poverty among women worldwide. Traditional, historical, religious or cultural attitudes are also

55. A note to the *Montreal Principles*, *supra* note 49, states: "As identified by the Human Rights Committee at para. 5 in its *General Comment 28: Equality of Rights between Men and Women* (article 3), 29/03/2000, CCPR/C/21/Rev.1/Add.10."

used to justify and perpetuate discrimination against women in the delivery of economic, social and cultural rights, including health services and education, by public and private agencies.⁵⁶

The *Montreal Principles* address many important interpretative issues. Perhaps most significantly, the *Montreal Principles* advance, explain, and apply a substantive conception of equality:

De facto, or substantive equality, requires that rights be interpreted, and that policies and programs—through which rights are implemented—be designed in ways that take women's socially constructed disadvantage into account, that secure for women the equal benefit, in real terms, of laws and measures, and that provide equality for women in their material conditions. The adequacy of conduct undertaken to implement rights must always be assessed against the background of women's actual conditions and evaluated in the light of the effects of policies, laws and practices on those conditions.⁵⁷

Women are subject to diverse forms of discrimination. However, increasingly, the governmental discrimination experienced by women does not take the form of blatant stereotyping within the four corners of isolated legislative schemes. Rather, discrimination occurs at the macro level of decision-making about the allocation of government resources and is most obvious when a range of legislative choices is examined simultaneously. For example, Canadian governments have rolled back welfare schemes and related social services that women rely on, cancelled pay equity awards, and privatized women's jobs, driving their wages and benefits down. In effect, this constellation of legislative measures implicates women's security and equality and discriminates against women. However, the discrimination inherent in these governmental choices is not necessarily made visible by an approach to equality and discrimination that is fixated on stereotyping.

Thus, it is reassuring to see that the *Montreal Principles* do not focus narrowly on stereotyping alone. Rather, they urge an understanding of women's right to the equal enjoyment of economic, social, and cultural rights—an understanding that focuses on “subordination, stereotyping, and structural disadvantage that women experience.”⁵⁸ Moreover, the *Montreal Principles* recognize that substantive equality and, in turn, the sex equality provisions of the *ICESCR* necessarily require governments to take positive steps to address the actual material and social disadvantage of women. Paragraph c. 5 of the *Montreal Principles* states:

56. *Montreal Principles*, *supra* note 49 at 2, Introduction.

57. *Ibid.* at 8.

58. *Ibid.*

Women's Sex and Gender Inequality

Unequal power relations between women and men must be acknowledged and changed, and the entrenched disadvantage caused by this power imbalance must be addressed, if women are to achieve the equal exercise and equal enjoyment of their economic, social and cultural rights.

Similarly, paragraph c. 6 states:

Non-Discrimination and Equality

Legal guarantees of non-discrimination based on sex and legal guarantees of equality for women, though expressed differently, are articulations of the same obligation. This obligation is not confined to negative restraints on States and third parties because negative restraints, alone, do not successfully eliminate discrimination against women. Both the right to non-discrimination and the right to equality mandate measures that prevent harmful conduct and positive steps to address the long-standing disadvantage of women.

The *Montreal Principles* set out a detailed summary of the particular legal obligations that flow from a substantive equality interpretation of Article 3 and 2(2), some of which are:

- women's rights to non-discrimination and equality are enforceable by judicial bodies and administrative tribunals in all circumstances, including when they raise issues of government allocation of resources for the realization of economic, social, and cultural rights;⁵⁹
- governments are required to both refrain from acting harmfully and to take positive steps to advance women's equality;⁶⁰ and
- resources allocated to economic, social and cultural rights must be distributed in a manner that provides substantively equal exercise of economic, social and cultural rights by women.⁶¹

59. *Ibid.* at para. 13.

60. *Ibid.* at para. 16.

As well, the *Montreal Principles* explicitly recognize that violations of women's economic, social, and cultural rights can occur through acts of omission or commission by states or other actors that are unregulated or insufficiently regulated by the state party. Finally, the *Montreal Principles* offer concrete recommendations for mechanisms and remedies.

The *Montreal Principles* provide reinforcement for an already substantial body of jurisprudence and literature recognizing that civil and political rights and social and economic rights are necessarily interrelated and that the realization of human rights necessarily entails the assumption of positive obligations by governments. It is encouraging to see the significant impact that the *Montreal Principles* have already had internationally, having been endorsed by Nancy Rubin, the former United States ambassador to the United Nations Commission on Human Rights, and Justice Richard Goldstein of the Constitutional Court of South Africa and former chief prosecutor of the International War Crimes Tribunal for the Former Yugoslavia and Rwanda.⁶² Advocates and adjudicators in Canada will also find the *Montreal Principles* useful in a variety of legal contexts involving the interpretation and application of human rights.

Auton (Guardian ad litem of) v. British Columbia (Attorney General)

Kim Brooks

In a decision that continues the move of equality jurisprudence based on section 15 of the *Canadian Charter of Rights and Freedoms* closer to its "prevents discrimination" and farther from its "promotes equality" objectives, Chief Justice Beverley McLachlin, writing for an unanimous court, held in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*⁶³ that when the British Columbia government chose not to fund applied behavioural analysis (ABA) or intensive behavioural intervention (IBI) for autistic children, it did not violate section 15. The central theme of the judgment is articulated in paragraph 2:

[T]he issue before us is not what the public health system *should* provide, which is a matter for Parliament and the legislature. The issue is rather whether the B.C. Government's failure to fund these services under the health plan amounted to an unequal and discriminatory denial of benefits under that plan.

61. *Ibid.* at para. 18.

62. These endorsements have been documented by Day, Farha, and Mollman, *supra* note 50.

63. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 [Auton].

Although earlier jurisprudence had emphasized the dual purpose of section 15 as both preventing discrimination and promoting equality, the latter part of the section 15 equality guarantee has clearly been lost. Instead, the reasoning in *Auton* reflects what section 15 equality advocates might appropriately perceive as an increasingly apparent obsession by the Supreme Court of Canada with a formulaic approach to applying section 15, including a particularly restricted approach to the choice of an appropriate comparator group, and with the cost to government of the expansion of social programs.

In analyzing the case, perhaps most surprisingly, the Supreme Court of Canada held that the claim to ABA/IBI treatment was not a claim for a benefit provided by law. Emphasizing the phrase in section 15 that guarantees individuals only the "equal benefit of the law," the Court held that the BC public medical legislative scheme simply distinguished between core and non-core services. Core services, defined as physician-delivered services, were fully funded. Non-core services (services provided by a host of other medical practitioners) were only partially funded. Since ABA/IBI practitioners were not on the list of authorized health care practitioners of non-core services, they were found not to be part of the legislative scheme, and, therefore, the claim was not held to be one for a benefit provided by law.

Although this determination ended the required section 15 analysis, in *obiter* the Court also analyzed the appropriate comparator group. The Court emphasized the importance of the choice of comparator group in affecting the outcome of the section 15 analysis, concluding that the appropriate comparator group is "a non-disabled person or a person suffering a disability other than a mental disability ... seeking or receiving funding for a non-core therapy important for present and future health, which is emergent and only recently becoming recognized as medically required" (para. 55). The Court then held that since there was no evidence that the government treated autistic people any differently than it did people in these comparator groups (no evidence having been adduced) there was no denial of a benefit granted to a comparator group on an enumerated or analogous ground. Gone from the analysis is any meaningful attempt to examine the alleged discrimination from the claimant's perspective—an attempt that had at least been superficially made in *Law v. Canada (Minister of Employment and Immigration)*⁶⁴ and subsequent cases.

Given the framework through which the Supreme Court of Canada applied the equality analysis, it is not surprising that the Court held that section 15 was not violated. However, the framework itself is an impoverished one that avoids altogether any serious consideration of how governments should promote equality interests. There is no doubt that autistic children experience stigmatization, isolation, and increased likelihood of life-long poverty. Stepping away from the mechanistic application of section 15, it is hard to imagine that the failure to provide any medically necessary health services to autistic children, which might include a range of services that possibly includes ABA/IBI, would promote their

64. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

equality interests. As found at the trial level, the BC government's "plan" for autistic children relied heavily on the provision of support and health services by their parents. The real problem with the legislation and government decision-making in *Auton* is that services that might assist people with disabilities were denied because they were not provided by hospitals and doctors but instead were provided by unlisted health care practitioners. A court mindful of equality concerns might have seriously questioned the assumed priority of doctors in the health care equation. It would seem obvious that a system that fully funds the health care treatments provided by doctors, but only partially funds (if at all) health care treatments provided by other health care practitioners, might provide greater benefits to non-disabled people than to those with disabilities.

The second significant problem underlying the judgment in *Auton*, and which is explicit in the judgment in *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.)*⁶⁵ (discussed in the second section of this forum), is the Supreme Court of Canada's concern with imposing costs on governments. It is true that many section 15 claims, if successful, would bring with them additional costs for governments. Such a conclusion is the inevitable result of designing a government program that discriminates against some groups or fails to promote equality interests. However, the deference accorded to perceived government impecuniosities is unjustifiable. This justification lies at the heart of the decision in *N.A.P.E.* and is a less explicit part of the judgment in *Auton*. In *Auton*, the Court notes that the BC government's response to providing support for autistic children was largely to devolve responsibility for their care to their parents, who might privately fund additional health care services if they wanted to. In addition, the Court notes, largely in passing, that the government delay in funding ABA/IBI therapy was in part because of the financial concerns and competing claims on insufficient government resources.

Yet, governments do not suffer "grievous deficits" beyond their control in the way construed by the courts. In the period under consideration, it is true that provincial governments may have run deficits. Yet these deficits are entirely within their control. The government has over the same period of time offered significant tax cuts, hence, reducing their revenue base. The decision to cut taxes (or to fail to increase them) and to suffer debt as a result is a choice that governments make, and one for which they must be held accountable under our constitution. The Court's responsibility under section 15 of the *Charter* should be to ensure that government programs are offered in a fashion that promotes equality interests. Governments are then free to make difficult choices—to delay tax cuts, to increase tax revenues, or, in some cases, to cut valuable social programs. These are the decisions that can be left to the government to make. Governments are simply not impecunious in the same way that an individual might be, and courts should not provide the degree of deference to the cost of

65. *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.)*, *supra* note 14.

social programs that are delivered in a discriminatory fashion that these decisions reflect.

Bonnie Mooney Case

Margaret Isabel Hall

Do the police have a responsibility to protect women and children from the harm of domestic violence? The answer, according to the British Columbia Court of Appeal in *Mooney v. B.C. (A.G.)*,⁶⁶ is no. While the police should use the means available to them to respond to violence against women both threatened and realized, it cannot be said that their failure to do so is itself a cause of harm. The violent man is ultimately uncontrollable and unpredictable and solely responsible for the damage he causes, with no causal connection existing between the law's failure to respond to a perceived threat or the realization of that threat in violence.

The *Mooney* case concerned an action in negligence brought by Bonnie Mooney against a Royal Canadian Mounted Police (RCMP) officer who failed to respond to her complaint of threatening behaviour by her partner, Ronald Kruska. One month after this complaint, Kruska attacked the Mooney household, shooting and killing Ms. Mooney's friend and shooting and seriously wounding her young daughter. Kruska subsequently killed himself before setting the Mooney cabin on fire.

At the time of her complaint, Kruska was on probation for assaulting Ms. Mooney. The RCMP constable taking the complaint informed Ms. Mooney that there was nothing he could do—Kruska's threats were not sufficient to trigger further police action—and he advised Mooney to stay in public places in the future. There were in fact actions available to the constable that day. Indeed, provincial policy that was then in place required a proactive response to domestic violence complaints. The RCMP acknowledged that the constable's response was improper but argued that it was nevertheless not causally related to Kruska's subsequent murderous rampage.

The BC Court of Appeal agreed—causation could not be shown under the traditional "but for" test nor could it be said that the constable's failure to act had "materially contributed"⁶⁷ to Kruska's violence. It was not possible to say that the constable's failure to intervene had increased the risk of violence in the same way that exposure to asbestos in an industrial setting would increase a worker's risk of contracting mesothelioma. No prior interventions had deterred Kruska from

66. *Mooney v. B.C. (A.G.)* (2004), 31 B.C.L.R. (4th) 61 (B.C.C.A.), leave to appeal to S.C.C. denied, March 3, 2005, No. 30546.

67. See *Athey v. Leonati*, [1996] 3 S.C.R.; *Fairchild v. Glenhaven Funeral Services*, [2002] 3 All E.R. 305 (H.L.).

further threats and violence (Kruska had previous convictions and incarcerations for violent offences and was on probation at the time of his final assault and killing). It was impossible to conclude that a new risk was created by the constable's inaction on this particular occasion. Specific reliance, which may create risk when an individual acts in a particular way in reliance on a promise by the police to take certain actions, was not relevant in this case.⁶⁸ Bonnie Mooney knew the constable taking her complaint would take no action.

Underlying the analysis of the majority is a characterization of men who use violence against their intimate partners and children as being beyond the control of authorities in a way that other criminals are not. The obvious question is why, if Kruska was perceived to be a dangerous man who would pay no serious heed to the law's intervention, Bonnie Mooney was expected to be able to control or handle the threat of his violence by herself. The intervenor, Rape Relief, suggested that the situation of responsibility for male violence in their female victims is systemic and long-standing. Policy directives were intended to force the police, with their special professional abilities to respond and restrain, to assume responsibility for controlling domestic violence, just as they do for other crimes and classes of victims. *Mooney* tells us that policy directives are not, in themselves, enough, and it suggests that long-standing assumptions about violence against women as occurring outside of the scope of police responsibility prevail, at least in some cases.

Justice Ian Donald, in dissent, found that Kruska's continued violent behaviour in the face of prior sanction worked to establish the foreseeability of future violence rather than Kruska's essential uncontrollability. The constable's failure to act with the objective of *reducing* the risk posed by Kruska therefore supplied the necessary causal link. It was not necessary to show that the inaction itself had inflamed that risk. Nor was it necessary to show conclusively that the appropriate police response would have prevented Kruska's violence. The provincial policy in place, but which was not followed by the constable that day, was adopted in recognition of the fact that a proactive police response works generally to reduce the risk of future domestic violence, and it was reasonable to infer a causal link between the failure to follow this policy and the realization of clearly foreseeable risk in violence and death: "[T]he right to police protection is so strong in these circumstances and the need for teeth in the domestic violence policy so great that the causal linkage must be found sufficient to ground liability. Contemporary authority ... requires flexibility in the rules of causation so that compensation for a wrong will be provided where fairness and justice require."⁶⁹ If the causal connection underlying this policy is not recognized we might understand it as little more than "window dressing" intended to give the

68. See, for example, *Swinney v. Chief Constable of Northumbria*, [1997] Q.B. 464, regarding assurance made to an informant; and *Brandon v. County of Richardson*, No. S-00-022 (Neb. S.C. 2001), regarding the murder of Teena Brandon following assurance by police that a group of men who had assaulted her would be apprehended.

69. *Mooney*, *supra* note 66 at para. 12.

appearance of taking domestic violence seriously while avoiding the real change and commitment necessary to do so.⁷⁰

Indeed, it may be argued that specific reliance was also a factor in this case. In a real and important sense, a probation order—in lieu of incarceration—is a promise to the victim of violence that the machinery of the legal system is capable of protecting her without the incarceration of her attacker. Indeed, *Mooney* shows us that an “experienced” trial judge at Kruska’s trial for assault had predicted future violence and given Ms. Mooney “an assurance that the authorities would respond to any complaint if she was threatened again.”⁷¹ Causation on the facts of *Mooney* is justified for reasons of both policy and principle.

The BC Court of Appeal did not determine the threshold question of duty of care, finding the case failed on causation. Clearly, however, the constable taking Ms. Mooney’s complaint owed her a duty of care. Contrary to *Hill v. Chief Constable of West Midlands*⁷² (which was argued by the defendant as being persuasive for a finding of no duty of care), it is not a situation in which the perpetrator was unknown and at large and the victim also unknown—the member of an unbounded class. *Mooney* was a case involving an individual identified victim and an identified perpetrator who had already been brought within the control of the legal system through his probation order. The decision of the trial judge on this issue was correct.

The California courts have referred to “abstract negligence” to describe a situation in which a duty of care has been breached and the foreseeable harm giving rise to the duty subsequently realized, but where causation cannot be established through the prevailing rule.⁷³ “Abstract negligence” in a case such as *Mooney* is unjust, placing a manifestly unfair burden on individual citizens who must rely on the legal system for their protection. A new theory of causation is necessary in the context of third-party perpetrator harms that is able to take account of the particular and unusual factual circumstances of these cases, as the material contribution test has developed in the context of industrial disease where the traditional “but for” test has been recognized as being overly exclusionary. Consistency and rational incremental, analogous development of any new categories in tort causation is key.⁷⁴ Recent developments in the law of vicarious liability regarding the intentional torts of third parties may provide appropriate guidance.

70. This was the argument of Vancouver Rape Relief as intervener in the case.

71. *Mooney*, *supra* note 66 at para. 25.

72. *Hill v. Chief Constable of West Midlands*, [1989] A.C. 53 (H.L.). The suggestion of a “blanket immunity” for police officers under the policy branch of the test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728, has been decisively rejected by the English courts following the decision of the European Court of Human Rights in *Osman v. UK*, [2000] 29 Eur. H.R. Rep. 245.

73. *Noble v. Los Angeles Dodgers*, 214 Cal. Rptr. 395 (Ct. App. 1985); *Nola M. v. University of Southern California*, 20 Cal. Rptr. 2d 97 (Ct. App. 1993).

74. See *Caparo v. Dickman*, [1990] 2 AC 605, with respect to developing categories of duties of care.

The fact that Constable Craig Andrichuk chose not to follow explicit policy direction that day tells us that policy is not, in itself, enough, despite the public illusion of the protection it provides. The most important question in *Mooney* is never asked: why did Constable Andrichuk choose not to follow up on Bonnie Mooney's complaint? Perhaps, adhering to traditional beliefs associated with police culture (which the policy was designed to counteract), he thought the matter was a private issue between Mooney and Kruska and that further investigation at this point was neither warranted nor appropriate.⁷⁵ Perhaps, having noted Kruska's "flagging" as a violent individual, Constable Andrichuk was afraid of confronting him over what was, after all, a private matter between the former partners.⁷⁶ Whatever his private reasons, the important point for the rest of us is that policy direction was insufficient to outweigh them. Policy guides; liability deters. The prevention of violence against women requires deterrence.⁷⁷

Family Misfortune: British Columbia's Legal Aid Cuts, the Charter, and Family Law

Fiona Kelly

In 2002, the British Columbia provincial government announced a 40 per cent cut to the BC Legal Services Society's (LSS) budget over three years.⁷⁸ Most of the

75. See L. Lakeman for Canadian Association of Sexual Assault Centres, *Canada's Promises to Keep: The Charter and Violence against Women* (Vancouver, BC: Canadian Association of Sexual Assault Centres, 2003); G. Kristian Miccio, "Notes from the Underground: Battered Women, The State, and Conceptions of Accountability" (2000) 23 *Harvard Women's Law Journal* 133.

76. The dangerousness of domestic violence for police intervenors is an important, if seldom discussed, factor affecting police response. See, for example, R. Armentrout "Car 54 Where Are You? Police Response to Domestic Violence Calls" 40 *Drake Law Review* 361 at 365.

77. A longer article dealing with the issues raised by the *Mooney* case will be published in a forthcoming volume of the *McGill Law Journal*. M.I. Hall "Duty, Causation and Third Party Perpetrators: The Bonnie Mooney Case" (2005) 51 (3) *McGill Law Journal* [forthcoming].

78. While the BC cuts were unusually large, the reduction of legal aid services is neither new nor unique to British Columbia or Canada. For details of earlier cuts and the international trend towards reducing state-funded legal services, see, for example, Penny Bain, Shelley Chrest, and Marina Morrow, *Access to Justice Denied: Women and Legal Aid in BC* (July 2000); Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice*, report for the National Association of Women and the Law, September 1998; Melina Buckley, *The Legal Aid Crisis: Time for Action*, report for the Canadian Bar Association, June 2000; Rosemary Hunter, Jeff Giddings, and April Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia: A Study to Examine the Relationship Between the Limited Availability of Legal Aid Funds and the Phenomenon of Self-Representing Litigants in the Family Court*, report for the Socio-Legal Research Centre, Griffith University, May 2003; and Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report no. 69, April 1994, ch. 4.

40 per cent cut occurred in family law legal aid and as a result of the complete elimination of provincial funding for poverty law and immigration law.⁷⁹ In contrast, only minor cuts were made to criminal law services.⁸⁰ According to *Legal Aid Denied*, a recent report by the Canadian Centre for Policy Alternatives and the West Coast Women's Legal Education and Action Fund (LEAF), the virtual elimination of family law legal aid has disproportionately affected women because women's need for legal services and representation is overwhelmingly in the area of family or civil law, not criminal law.⁸¹ Prior to the cuts being implemented, women were receiving only 38 per cent of the LSS services. After the cuts, this number dropped to 30 per cent.⁸² In contrast, while the total number of men served by the LSS dropped by 8,301 after the cuts, the percentage of total referrals provided to men actually rose by 8 per cent.⁸³ In fact, after the cuts, 83 per cent of individuals who were referred to an actual lawyer *and* who had an opportunity to be represented at trial were men, while only 17 per cent were women.⁸⁴ This reduction in funding and services has, according to *Legal Aid Denied*, resulted in women losing custody of their children, giving up valid legal rights to support, and being subject to litigation harassment. The simultaneous funding withdrawal from associated support services used by women, such as daycare, women's centres, and community programs, has only exacerbated the situation.

In addition to the cuts, the 2002 reforms also placed restrictions on legal aid eligibility. Most significantly for women, family law legal aid is now only available to someone who is fearful for their own safety or that of their children.⁸⁵ Such a restriction will be particularly harmful to women for several reasons. First, it opens women up to the assertion that they are making false allegations in order to receive assistance.⁸⁶ Second, women who do not disclose violence because they fear repercussions by their abusers, or because of language or cultural barriers, will have their legal aid applications dismissed at the point of intake. Finally,

79. Alison Brewin (with Lindsay Stephens), *Legal Aid Denied: Women and the Cuts to Legal Services in BC*, report for the Canadian Centre for Policy Alternatives and West Coast LEAF, September 2004, available online at <www.policyalternatives.ca> [*Legal Aid Denied*].

80. The number of funded referrals to private lawyers for family law matters decreased by 58 per cent between 2000-1 and 2003-4, while referrals for criminal cases decreased by just 2 per cent. *Ibid.* at 4.

81. Women are twice as likely to access family law legal aid, whereas men are five times more likely to access criminal legal aid. *Ibid.*

82. *Ibid.* at 10.

83. *Ibid.*

84. *Ibid.*

85. Prior to the cuts, assistance was provided for custody and access, maintenance, and other family law issues. The amount of representation available has also decreased dramatically. Even when aid is granted, it is limited to a maximum of eight hours and is provided only to assist with obtaining a restraining order or change in custody agreement to protect the recipient's and/or her children's safety.

86. See BC Institute against Family Violence, BC Association of Specialized Victim's Assistance and Counselling Programs, and the BC/Yukon Society of Transition Houses, "BC Provincial Cuts to Legal Aid: Anticipated Impact on Women Who Experience Violence," available online at <www.bcifv.org/cuts/legal_aid.pdf>.

women whose former partners are using the court system to continue to harass or dominate them will have almost no legal recourse. This may result in women agreeing to give up custody of their children or support payments to which they are entitled. Thus, while the new eligibility requirement might, on its face, appear to at least acknowledge the risk to women posed by domestic violence, as it is argued in *Legal Aid Denied*, only "access to adequate, quality legal representation based on need, not violence, will ensure that victims of domestic violence are able to free themselves of that violence and abuse."⁸⁷

The cuts to legal aid, and their subsequent impact on women involved in family law disputes, have left a number of organizations wondering what can be done to rectify the situation. One possibility, raised by both the Canadian Bar Association (CBA)⁸⁸ and LEAF,⁸⁹ is to directly challenge the cuts by attacking their constitutionality by way of a test case under the *Canadian Charter of Rights and Freedoms*.⁹⁰ In June 2005, the CBA launched a test case challenging British Columbia's legal aid scheme with the goal of establishing a constitutional right to civil legal aid in Canada.⁹¹

The litigation proposals of both LEAF and the CBA raise the questions of what kind of *Charter* challenge could be brought and how such a challenge might draw particular attention to the impact of the cuts on women? Perhaps the strongest *Charter* argument can be made under section 7, which provides that where "life, liberty or security of the person" are threatened, the *Charter* guarantees the right to a fair hearing in accordance with the principles of fundamental justice.⁹² The right to a fair hearing includes, by definition, the right to participate in this hearing in a real, as opposed to illusory, manner. Historically, however, the rights enshrined in section 7 have tended to be reserved for criminal matters. However, in the Supreme Court of Canada decision of *J.G. v. New Brunswick*,⁹³ which dealt specifically with the right to "security of the person," it was held that in some circumstances, including in some civil law matters,⁹⁴ the ability to participate fully in a hearing will require the state to supply and fund

87. *Legal Aid Denied*, *supra* note 79 at 13.

88. "Taking Action: CBA Launch a Test Case to Help Resolve Legal Aid Crisis in Canada," press release for the Canadian Bar Association [CBA]. The test case litigation was approved for funding by the CBA's Council in August 2004.

89. Alison Brewin, *Legal Aid and Family Law: Women's Access to Justice*, update report, March 2004, available online at <www.westcoastleaf.org/pdfs/march_2004_campaign_update.pdf>. Initially, the Women's Legal Education and Action Fund [LEAF] had hoped that an individual case uncovered during their affidavit campaign might be used as a test case, but the organization subsequently decided that a direct *Charter* challenge would be more likely to succeed.

90. *Canadian Charter of Rights and Freedoms*, *supra* note 2.

91. "CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid," Press Release, Canadian Bar Association, 20 June 2005.

92. *J.G. v. New Brunswick (Ministry of Health and Community Services)*, [1999] 2 S.C.R. 46 [*J.G.*]. For further comment, see Mary Jane Mossman, "New Brunswick (Minister of Health and Community Services v. G.(J.): Constitutional Requirements for Legal Representation in Child Protection Matters" (2000) 12 *Canadian Journal of Women and the Law* 490.

93. *Ibid.*

94. *Ibid.* at paras. 65-7.

counsel for people unable to afford counsel themselves. Thus, in *J.G.*, which involved the question of legal aid funding for parents involved in child protection proceedings, it was held that depending upon the seriousness of the interests at stake, the complexities of the hearing, and the capacities of the parent, effective participation by a parent will sometimes require the assistance of counsel.⁹⁵

The decision in *J.G.* provides some insight into the types of civil law cases where the courts might support a constitutional right to legal aid. In fact, by specifically recognizing the significance for parents of decisions relating to the custody of their children, the decision suggests that courts might be particularly open to a legal aid entitlement in the area of family law.⁹⁶ The minority judgment of Justice Claire L'Heureux-Dubé (Justices Charles Gonthier and Beverley McLachlin concurring) also offers some hope specifically to women involved in family law disputes. L'Heureux-Dubé J. held that "the rights in section 7 must be interpreted through the lens of sections 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."⁹⁷ Thus, given the uneven impact of the cuts in British Columbia, women may have a particularly strong argument in favour of the provision of state-funded legal aid.

While the Supreme Court of Canada's decision in *J.G.* is by no means conclusive of the issue, it does give some indication of a willingness on the part of the courts to extend section 7 rights to civil law matters. Thus, given the disproportionate impact of the cuts on women, a claim brought under section 7, particularly if raised in conjunction with sections 15 and 28, might provide the first step towards challenging the current system.

Equality at a Standstill: Some Conclusory Remarks to the Forum

Margot Young

While the cases discussed in this forum cover a range of areas and issues, all of which are important to women, three clear themes emerge. The first theme reiterates what is by now a standard mantra of the legal feminist movement—a substantive equality analysis is a necessary part of any equality inquiry. As the critical sense we bring to issues of women's equality has been refined and

95. *Ibid.* at para. 75.

96. Though it should be noted that the Court in *J.G.* emphasized that child protection matters involve children being *removed* from parents by the *state*, and it was this state removal that created the necessary "profound effect on a [parent's] psychological integrity" (para. 60). In contrast, family law disputes do not involve the state, are usually about choosing *which* parent will have custody of the child, and rarely involve removing the child from both parents. It could be argued that family law matters are therefore less likely to involve a restriction on a parent's s. 7 rights.

97. *J.G.*, *supra* note 92 at para. 115.

polished over years of analysis, we can now see and name more clearly the inequality women and other marginalized groups experience. However, absent the kind of contextual, political, and nuanced inquiry a substantive equality analysis demands, many of the significant harms women currently experience will continue to go unrecognized and unaddressed. Maintenance of gender inequalities by the state and other powerful social and economic actors is no longer so obvious and blunt as it was perhaps in the past—formal and categorical denials or burdens are less likely to figure as the current mainstays of the gender hierarchy. Indeed, Gwen Brodsky's discussion of the *Montreal Principles* illustrates that the salience and priority of a substantive equality vision are recognized at the international level as well and, thus, in relation to the international equality guarantees to which Canada is bound.

In the domestic judicial decisions discussed, the Supreme Court of Canada demonstrates that, rhetoric aside, it either has no notion of what substantive equality requires or no desire/courage for such a transformative elaboration of inequality and equality. While doctrinal intricacies form and sculpt these failures, the politics of these decisions are clear. The *Charter*—and section 15(1) in particular—holds little promise for the individual who falls short of the self-reliant, autonomous, and able-bodied person populating the world of classical liberalism, reborn in the dominant neo-liberal mindset as the market actor, freely and willfully negotiating *his* own way in the world. In this world, and as, increasingly it seems, the courts see it, denizens cannot expect the state to assist or ameliorate their misfortunes, mistreatment, and misery—despite the systemic character and causes of such inequality. The second observation, then, is that, consonant with neo-liberal thought, the state is not to be held constitutionally obligated to fix or address the inequality problems endemic to a deeply divided and unequal patriarchal and capitalist society. Thus, we see resurrected and inserted boldly into section 15 in the *Auton* decision the notion that absent positive state action directly linkable to the harm the claimant elaborates, no constitutional duty pertains. The locus of control and of responsibility appears firmly entrenched at the individual level and more sophisticated, subtle, and socially transformative visions of how inequality is meted out and distributed in Canadian society are ignored.

The last, and third, theme that I want to mention is a speculative one and looks to the issue of the legitimacy of the institution of judicial review and, thus, of the Supreme Court of Canada itself. How might the Supreme Court of Canada's perception of its own institutional legitimacy figure as a background to recent section 15 cases? Under significant attack from the right for what commentators of that ilk consider illegitimate judicial activism—a supplanting of the democratic legislative role—the Court appears to have retrenched, drawing back from the bolder use of section 15 promised in earlier section 15 cases.⁹⁸ Thus, in the last

98. For example, in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296, the Court strongly rejected formal equality, or equal treatment, as the metric of its equality analysis. Moreover, in *Turpin*, particularly, Justice Bertha Wilson was

few years of section 15 decisions, the Court has issued judgments remarkable for their formalism, their apologism for the state, and their unnuanced reliance on older, thinner notions of liberty, choice, and familial autonomy. More specifically and recently, in the closing months of 2004, the Supreme Court of Canada's record is damning. *NAPE*, followed by *Auton*, show a judicial eagerness to embrace either the excuses that the state proffers as justification for discrimination or some formalist means of condemning the individual to her/his victimization by pre-existing distributions of advantage and disadvantage. In *NAPE*, as Efrat Arbel details, we see a straightforward case of sex discrimination justified in the name of a funding shortfall that, as Kim Brooks notes in her comment on *Auton*, results from non-inevitable government choices and that, as a number of women's organizations note in a separate publication, is neither remarkable nor exceptional.⁹⁹ Yet, in the name of state choice, what can be understood as the selective taxation of vulnerable women, acknowledged by the Court itself as a kind of double discrimination, is upheld as justifiable. In *Auton*, the equality argument is effectively pre-empted by a new emphasis on positive state action as trigger to section 15 coverage. As Kim Brooks again points out, what is clearly at play is judicial concern about the implications of judicial direction of state budgets and policy—concern, that is, about the institutional legitimacy of the role the Court has been asked to play by the *Charter*. In these cases, in combination with the earlier case of *Gosselin v. Québec (Attorney General)*,¹⁰⁰ we see a Court clearly shy away from fulfilling the full mandate of substantive equality when such a mandate implicates state spending on more than an insignificant level. Yet, like all rights—political, civil, or social—equality rights, fully realized, as the *Charter* surely must promise, demand government resources but no more than, say, the right to vote or the right to a fair trial contained elsewhere in the *Charter*. The difference, of course, is that ongoing spending on the latter rights forms the invisible infrastructure of liberal democracies such as Canada, while the resources that substantive economic equality demands have yet to be expended and thus seem more exceptionable.¹⁰¹ Yet, the inequality that these cases document, however, remains pressing and deeply destructive of a just society.

clear in her understanding of section 15 as requiring a substantive analysis, one that looked to the history and context of the claimant group and one that addressed exacerbation of pre-existing discrimination and disadvantage.

99. In a November Alert entitled "Supreme Court of Canada Allows Discrimination against Women," the Feminist Alliance for International Action [FAFIA], the National Association of Women and the Law [NAWL], and the Newfoundland and Labrador Advisory Council on the Status of Women, argue that the deficit anticipated by the government of Newfoundland and Labrador was more typical and indeed somewhat lower than budgetary outcomes of the years preceding and following the year in question in the case. In light of this record, the Supreme Court of Canada's easy acceptance of the budget overrun as exceptional so as to justify what is in effect a discriminatory tax against vulnerable women is suspect [communiqué on file with author].

100. *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429.

101. Former Supreme Court of Canada Justice and current United Nations Commissioner on Human Rights Louise Arbour made a similar point in a recent lecture:

As a last word on the evolution of equality jurisprudence to date at the Supreme Court of Canada level, one would be remiss to neglect a nod in the direction of the late 2004 term opinion in the same-sex reference case.¹⁰² In an opinion commonly, but mistakenly, understood as establishing the unconstitutionality of an opposite-sex requirement to marriage,¹⁰³ the Supreme Court of Canada effectively cleared the way for the federal government to legislate changes to traditional notions of marriage. While the decision does not engage section 15 directly, it does, however, carry significant equality implications for gays and lesbians desiring access to the traditional institution of marriage.¹⁰⁴ And it certainly involves an issue of some social controversy. In confirming the legislative competence of the federal government to recast marriage, the Court dealt with a number of claims, all of which called for judicial restraint in interpreting the constitution. The Court's decision to ignore these calls for judicial deference (this time to traditional common law and the founding fathers' notions of marriage) has predictably catalyzed familiar cries of judicial activism and the overstepping of institutional boundaries.¹⁰⁵ Yet, they are levelled at a court that has been, over the last year or two, remarkably deferential and thus that may be, because of this history, more immune from such charges. What a shame, however, if the Court's willingness to craft a less constraining constitution in the same-sex marriage case in any way rests upon the Court's refusal to acknowledge and address the substantive claims in the other cases this comment discusses. It is these latter cases that hold some promise for transformation of

With the international standards and experience in view, it is impossible to regard socioeconomic rights obligations as fanciful or far-fetched. Human rights of all kinds involve 'freedoms', as well as 'entitlements.' Each kind of obligation may have cost implications to varying degrees, be it for the infrastructure necessary for the administration of justice, human and technical resources necessary to regulate financial or social sectors, or direct provision of water, sanitation, housing or other services as needed.

Louise Arbour, LaFontaine-Baldwin Symposium 2005 Lecture, Quebec City, 4 March 2005, available online at <http://www.lafontaine-baldwin.com/lafontaine_baldwin/e/2005_speech_4.html> (date accessed 17 March 2005).

102. *Reference re Same-Sex Marriage*, 2004 SCC 79.

103. Indeed the Court refused to rule on this specific question. The Court had been directly asked to rule on the constitutionality of the opposite-sex requirement (the traditional common law definition of marriage) in the fourth reference question put to it by the federal government. The Court declined to answer this question, citing a number of reasons why to do so would be unwise. *Reference re Same-Sex Marriage*, *ibid.* at paras. 61–71.

104. My comments to follow do not in any way imply a lack of recognition for these equality struggles. My point simply is that the struggle for access to the traditional institution of marriage by same-sex couples is less politically transformative, or politically compelling even, than many of the other equality issues that have claimed section 15 support.

105. For example, Gwen Landolt, an outspoken critic of same-sex marriages responded to the opinion by stating: "The time has come that we will restore democracy across Canada." CBC News, "Traditional Groups Call for Marriage Referendum," 14 December 2004, available online at <<http://www.cbc.ca/story/canada/national/2004/12/09/samesex-reax041209.html>> (date accessed: 29 December 2004).

Canadian society (to the extent that any single case or group of Supreme Court of Canada cases ever does.) To reserve one's judicial chips to play them on a case such as *Reference re Same-Sex Marriage* would be further indication of the skewed politics and priorities that the *Charter* era has seen ushered into the Canadian polity.

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