Section 7: The New Section 15?

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15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Introduction

It is no surprise that the law can have disproportionately negative effects on already marginalized groups in Canadian society, whose members often experience inequality on various levels. When the Canadian Charter of Rights and Freedoms was enacted, the promise of equality through section 15 – before the law, under the law and equal benefit of the law – provided a tool to achieve positive, substantive equality rights for equality-seeking groups. After 30 years, however, section 15 has not met the expectations of many. Conversely, while section 7, which protects the right to life, liberty and security of the person, was initially seen as offering only protection for procedural rights, section 7 has exhibited increasing breadth and flexibility, well beyond what many envisaged.

This paper will briefly explore how section 7 has effectively become the “new” section 15 in terms of its potential to address disadvantages experienced by members of Canadian society. Section 15 is now an unlikely means of vindicating the equality rights of claimants that cannot be neatly categorized into an enumerated or analogous ground, or who suffer from disadvantage that cannot be traced directly to a particular law. On the other hand, consideration of systemic inequality as a contextual factor within a section 7 analysis has become more common. An “interpretive lens of equality” approach advocated by Justice L’Heureux-Dubé in New Brunswick (Minister of Health and Community Services) v. G.(J.),1 in which courts are encouraged to consider issues of equality, discrimination and disadvantage within the analysis of other Charter rights, may

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be taking root within section 7. Recent cases illustrate how the consideration of fundamental social and economic inequalities as relevant contextual factors in a section 7 analysis can work to advance equality rights of marginalized groups on whom the law can have disproportionally negative effects.

**Section 15: The Test for Equality**

Since the Supreme Court of Canada first articulated the test for section 15 in *Andrews v. Law Society of British Columbia*, the Court has struggled to set out a consistent analytical approach that can be readily applied by lower courts. While section 15 has been successfully employed to advance many important equality rights, equality-seeking groups have long lamented the formalistic and inconsistent legal test applied to such claims.

One of the first hurdles claimants face is finding an enumerated or analogous ground. Claimants must “fit” their inequality into such categories, which the Supreme Court has been reluctant to expand. While the Supreme Court has recognized marital status, sexual orientation and citizenship as analogous grounds under section 15, the Court has refused to extend the scope of section 15 to areas such as employment or professional status, holding that “it is not a matter of functionally immutable characteristics in a context of labour market flexibility.” Another hurdle is the comparative approach to equality with courts placing undue focus on identifying the correct, specific comparator group. The Supreme Court of Canada has acknowledged the difficulties in applying comparator group analyses, and has recently attempted to broaden the comparison from a formalistic analysis based on “mirror” comparator groups to a more contextual analysis that focuses

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2 [1989] 1 S.C.R. 143. Since the Court’s decision in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*], to succeed in a section 15 claim, a claimant must show (a) that he or she has suffered a disadvantage as compared to a “comparable” person; (b) that the disadvantage is based on an enumerated or analogous ground; and (c) that the disadvantage is discriminatory, in that it perpetuates disadvantage or stereotyping.


instead on the “actual impact of the impugned law,”\(^5\) but the inherent comparative nature of section 15 remains.\(^6\)

Third, the “human dignity” analysis devised by the Court in 1999,\(^7\) recently replaced with a “disadvantage” and “stereotyping” analysis in \textit{Kapp} in 2008,\(^8\) introduced a lack of clarity to the section 15 analysis and placed an additional evidentiary burden on claimants.\(^9\) Further, the definition of discrimination remains narrow, making it difficult to prove claims of indirect discrimination. In \textit{Withler}, the Court suggested that “historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others,”\(^10\) but it is unclear what sort of evidence of historical or sociological disadvantage will meet the burden to show indirect discrimination.\(^11\)

Finally, inequality hinges on determining a burden imposed or benefit denied by law. The government is not required to take positive steps to ameliorate existing disadvantage, as Section 15 only guarantees “equal protection and equal benefit of the law.” In order to make out a claim of disadvantage, a claimant must be able to show that he or she is treated less favourably under the law than the identified comparator group.\(^12\)

\textbf{Section 7: Life, Liberty and Security of the Person}

In contrast, section 7 has expanded significantly over the past 30 years. In fact, by invoking section 7 equality-seeking groups have made progress on significant social


\(^6\) \textit{Withler}, \textit{ibid} at para. 61.

\(^7\) \textit{Law v. Canada (Minister of Employment and Immigration)}, [1999] 1 S.C.R. 497.

\(^8\) \textit{Kapp, supra} note 2 at paras. 21-22.

\(^9\) See \textit{e.g.} Justice Binnie’s discussion in \textit{Hodge v. Canada}, 2004 SCC 65, [2004] 3 S.C.R. 357 at para. 18. And see \textit{e.g.} Peter Hogg, \textit{Constitutional Law of Canada}, 5th ed., loose-leaf (consulted on 3 November 2012), (Toronto, Ont.: Thomson Reuters, 2007), ch. 55 at 34.4 [Hogg, \textit{Constitutional Law of Canada}]. The “human dignity” analysis had been adopted in 1999 as a “philosophical enhancement,” but proved difficult to implement as “a legal test.” (See \textit{Kapp, \textit{ibid.}} at paras. 21-22.) However, the shift away from a formal dignity analysis appears to be more in name than in substance. The new test – the perpetuation of disadvantage and stereotyping – “is almost as vague as human dignity, and it continues to rely on the same contextual factors as were used to identify human dignity.” See Hogg, \textit{Constitutional Law of Canada, \textit{ibid.}}, ch. 55 at 32.

\(^10\) \textit{Withler, supra} note 5 at para. 64.


\(^12\) See Hogg, \textit{Constitutional Law of Canada, supra} note 9, ch. 55 at 34.5.

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issues, largely as a result of the development and expansion of the principles of fundamental justice. Section 7 has been invoked to strike down laws regarding abortion, drug addiction and prostitution. As noted by Prof. Peter Hogg in a recent paper, section 7 has proved useful in remedying failures of policy that disproportionately harm groups that have “little popular appeal or political power” and provide legislators with little incentive to take action.\(^{13}\)

Of course, obtaining relief through section 7 requires that a claimant convince the court that section 7 is engaged. While this hurdle can be high, once a claimant is within the realm of section 7, there appears to be more flexibility to deal with disadvantage suffered by the claimant. Two recent decisions - the Supreme Court of Canada’s decision in *Canada (Attorney General) v. PHS Community Services Society*\(^{14}\) and the Ontario Court of Appeal’s decision in *Canada (Attorney General) v. Bedford*\(^{15}\) - are illustrative. In both cases, section 7 was employed to affirm security of the person rights of marginalized individuals. And while section 7 cannot be used to advance purely economic rights, in both cases, fundamental socio-economic disadvantage and inequality were significant contextual factors.

In *PHS*, Insite, a safe injection site in Vancouver’s Downtown Eastside, successfully argued that the Minister of Health’s failure to grant an exemption to the site under section 56 of the *Controlled Drugs and Substances Act* engaged the section 7 rights of the individual claimants – drug addicts. In a decision authored by Chief Justice McLachlin, the Supreme Court accepted the argument that the Minister’s actions were “arbitrary” and the effects of such actions “grossly disproportionate,” and ordered that the Minister grant an exemption to Insite under the Act.


15 2012 ONCA 186 [Bedford CA]. In *Bedford*, the court was asked to consider the constitutionality of sections 210, 212(1)(j) and 213(1)(c) of the *Criminal Code*. Although sex work is not explicitly criminalized in the Code, these sections make it an offence to keep a common bawdy-house, live on the avails of prostitution and communicate for the purpose of engaging in prostitution. After Himel J. at the Ontario Superior Court of Justice held that all three provisions violated section 7 and could not be saved under section 1, the decision was appealed. The Court of Appeal held that the bawdy house and living on the avails provisions were overbroad and grossly disproportionate, and could not be saved under section 1. Note that *Bedford* is on its way to the Supreme Court.
The Court defined gross disproportionality as “state action or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest.”  

The Court held that determining whether a law is arbitrary involves identifying, first, the law’s objectives and, second, the relationship between the impugned law and the state interest served by enacting the law. With respect to the appropriate threshold for arbitrariness, however, the Court acknowledged two competing approaches. In Chaoulli v. Quebec (Attorney General), Justices Binnie, LeBel and Fish were in agreement that an impugned law would be arbitrary when it bore no relation to or was inconsistent with that objective. However, Chief Justice McLachlin and Justices Major and Bastarache preferred asking whether the limit was “necessary” to further the state objective. The Court in PHS side-stepped the need to decide which approach should prevail, reasoning that the government action in PHS was “arbitrary under both definitions.”

Of note, Chief Justice McLachlin talked extensively about the socioeconomic situation in the Downtown Eastside of Vancouver in PHS, noting that it “is home to some of the poorest and most vulnerable people in Canada.” Divorced from the categorical approach under section 15, the Court was engaged in a more nuanced consideration regarding how the laws that applied to these marginalized groups exacerbated fundamental inequalities.

The remedy in PHS also demonstrates the broad reach of section 7. As Peter Hogg noted, although such a broad use of section 7 is vulnerable to a majoritarian critique, there is “much to like” about these decisions:

The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls “failures of instrumental rationality”, by which he means that the Court accepts the legislative object, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational

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16 PHS, supra note 14 at para. 133.
17 PHS, supra note 14 at para. 132.
18 Ibid. at para. 132.
19 Ibid. at para. 4.
means to achieve the objective, then the law is dysfunctional in terms of its own objective.20

For equality-seeking groups, this presents an attractive alternative to section 15: without the need to identify the correct comparator group and rather than being bound up in abstract concepts such as disadvantage and discrimination, these principles of fundamental justice open the door to broader scrutiny of laws that have a discriminatory impact.

The Ontario Court of Appeal’s decision in *Bedford* also shows courts playing a greater role in policymaking on issues of social importance under the doctrines of overbreadth, arbitrariness and gross disproportionality.

Of particular interest here is the opinion of Justice MacPherson (with Justice Cronk concurring) who agreed with the application judge’s conclusion that the communicating provision was grossly disproportionate.21 One of the reasons for disagreeing with the majority on this point (which held that the law was not grossly disproportionate) was that the majority failed “to properly consider the vulnerability of the persons most affected by the communicating provision, and the ways in which their vulnerability magnifies the adverse impact of the law.”22 As the Canadian Civil Liberties Association pointed out, street prostitutes comprised the vast majority of survival sex workers for whom “prostitution is a means to secure basic human necessities.”23 Justice MacPherson stated:

> The equality values underlying s. 15 of the *Charter* require careful consideration of the adverse effects of the provision on disadvantaged groups...persons engaged in prostitution are overwhelmingly women. Many are aboriginal women. Some are members of lesbian and gay communities. Some are addicted to drugs and alcohol, both of which are forms of disability. Since gender, race, sexual orientation and disability are all enumerated or analogous grounds under s. 15 of the *Charter*, the s. 7 analysis must take into account that prostitutes often hail from these very groups...24

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20 Peter Hogg, “The Brilliant Career of Section 7”, *supra* note 13 at 11.
21 *Bedford CA*, *supra* note 15 at para. 337.
Justice MacPherson drew on Justice L’Heureux-Dubé’s articulation of the interplay between section 15’s equality norms and section 7 in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, where she stated:

Thus, in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 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.

In a paper published in 2000, L’Heureux-Dubé J. elaborated on what she characterized as an “interpretive lens of equality” approach. She noted that “one’s approach to every issue that comes before the courts, and not just to equality challenges, should be informed by the s. 15 equality guarantee. The interpretive lens of equality can help to strengthen and render more meaningful the protections offered by the other Charter rights, as well as generating a more consistent and equality-centred jurisprudence.”

Justice MacPherson’s reference to L’Heureux Dubé J.’s interpretive approach led him to conclude that the security of the person infringement caused by the communicating provision was exacerbated by pre-existing vulnerability experienced by prostitutes, and that denying an “already vulnerable person the opportunity to protect herself…involves a grave infringement of that individual’s security of the person.”

**Conclusion**

Marginalized groups who experience inequality can sometimes struggle to fit their claims into the section 15 test. Where security of the person is engaged, section 7 allows courts to engage in a more contextual and broader analysis of social and economic inequalities,

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25 *G.(J.), supra* note 1 at para. 115. [emphasis added]
27 *Bedford CA, supra* note 15 at para. 359-60.
and can do much to advance rights claims involving politically unpopular causes. In that sense, section 7 has, in some ways, become the “new” section 15.