ARISTOTLE
FOUNDATION FOR PUBLIC POLICY

REALITY CHECK

# A Right to Unequal Treatment

## In Canada, some people are more equal than others

**Bruce Pardy** | October 2024

## Introduction

Many Canadians believe that they have similar constitutional rights as Americans. In some cases, they do. People in both countries, for instance, have a right against self-incrimination.[1] But Americans have constitutional rights that Canadians do not. They have the right to bear arms.[2] They have more robust freedom of speech. They have the right to be compensated if the government takes their property.[3] And they have the right to equal protection under the law.

In June 2023, the Supreme Court of the United States declared race-based admissions at universities to be unconstitutional. Harvard University and the University of North Carolina had been admitting students of some races over others to achieve "diversity." In *Students for Fair Admissions v Harvard*,[4] the Court found those admissions processes violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The *Canadian Charter of Rights and Freedoms* says that Canadians have a right to equal protection too. But the Supreme Court of Canada has said otherwise. Over time, the Court has made the Canadian right to legal equality not merely a shadow of the American version, but its opposite. Advantaging some groups and disqualifying others has become ubiquitous. Job openings, university admissions, and government programs openly favour specific races and genders. In some cases, those not favoured are declared ineligible to apply. In Canada, legal equality means equity. The law can treat people differently in the name of equal or comparable group outcomes.

## Two constitutions, two kinds of equality

In the US Constitution, the right to equality comes in two parts: one in the Fifth Amendment, enforceable against the federal government, and the other in the Fourteenth, enforceable against the states. The text is sparse. The Fifth Amendment says only that "No person shall be… deprived of life, liberty, or property, without due process of law…." The Fourteenth says the same, and adds, "… nor deny to any person within its jurisdiction the equal protection of the laws." In its *Harvard* decision, the US Supreme Court said that the Equal Protection Clause of the Fourteenth Amendment applied "without regard to any differences of race, of color, or of nationality" and is "universal in [its] application."[5] The right to equal protection "cannot mean one thing when applied to one individual and something else when applied to a person of another color."[6] Different standards for different people "because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[7] It is wrong to conclude "that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice."[8]

The text of the guarantee to equality in the Canadian *Charter* is more extensive than in the US Constitution. Section 15(1) of the *Charter* states:

> 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.

The section appears to describe a right to equal protection (also known as "equal treatment" or "equal application"). The right belongs to individuals, not to groups. The guarantee in 15(1) applies to everyone, without regard to whatever group affiliations they might claim: gay or straight, black or white, male or female, Jewish or Christian. The words of 15(1) describe a universal right for people to be treated equally without regard to who they are.

But the Supreme Court has insisted that section 15 requires not equal treatment but equity. Equity, also known as "substantive equality" or "equality of outcome," does not mean treating people the same but requires treating them differently. It means that justice should not be blind but instead should inquire into identities, capacities, and practices. The law should make distinctions based upon group affiliation and treat people in proportion to their group's advantages, disadvantages, strengths, and weaknesses. Equity is a right granted not to individuals as individuals, but to members of groups.

Equal treatment and equity are opposites. The law cannot simultaneously apply the same laws and standards to everyone and also adjust them depending upon the group. Equal treatment and equity are mutually exclusive and cannot co-exist. As Friedrich Hayek put it, "From the fact that people are very different, it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them in

an equal position would be to treat them differently. Equality before the law and material equality are therefore not only different but are in conflict with each other; and we can achieve either the one or the other, but not both at the same time."[9]

## How equality became equity in Canada

### The Common Law

Equal treatment lies at the heart of Western legal culture, embedded in common law norms and legal structures. Courts are bound by precedent, meaning that like cases are to be decided alike without regard to the identities of the parties involved. All accused have the right to the same due process protections, presumption of innocence, and penalty regimes. The rule of law meant, in part, that laws applied in the same manner to everyone.

### The Canadian Bill of Rights

However, legislatures can change or override the common law unless the constitution or legislation specifically says they cannot. The right to equal protection in the US Constitution limits what legislatures can do. For most of its history, Canada did not have an equivalent. Parliament and provincial legislatures could enact unequal laws if they were explicit about doing so.

The *Canadian Bill of Rights*, a federal statute, was enacted in 1960. Section 1(b) included a right to equality:

> 1. It is hereby recognized and declared in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> ...
>
> (b) the right of the individual to equality before the law and the protection of the law...

In 1974, the Supreme Court said that this section did not create a right to equal protection like the one in the US Constitution. "[T]his phrase is not effective to invoke the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the courts of that country," wrote Mr. Justice Ritchie for the majority of the Court in *Attorney General of Canada v. Lavell*.[10] Instead, the Court held that the provision meant only that courts must apply the law in a neutral way.[11] "[T]he phrase "equally before the law" as employed in section 1(b) of the *Bill of Rights"* wrote Ritchie, "is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land."[12] This kind of equality meant only that courts applied laws as written, even if those laws treated people differently.

### The Royal Commission on Equality in Employment

Unlike the *Bill of Rights*, the *Charter* is part of the Constitution. The *Charter* contains an equality provision, section 15. The *Charter* was adopted in 1982 but section 15 did not come into force until April 1985. The Supreme Court of Canada did not decide its first case under section 15, *Andrews v. Law Society of British Columbia*, until 1989. In the interim, another development would have a significant impact on the path of equality law in Canada.

In 1984, the federal government established the *Royal Commission on Equality in Employment*,[13] also known as the Abella Commission after its commissioner Rosalie Abella, later a judge of the Supreme Court (now retired). The commission was to enquire into employment discrimination in Canada, particularly against women and visible minorities. Its report, released in October 1984, recommended employment equity policies in the federal government and in federally regulated companies. Its recommendations led to the passage of the federal *Employment Equity Act* in 1986, which required federal employers to "ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce"[14] that reflected their representation in the Canadian workforce at large. In other words, it required federally regulated employers to adopt affirmative action programs that gave preference to candidates from some groups over others. It mandated equity, or unequal treatment. The work of the Abella Commission would prove to be influential in the development of Canada's equality jurisprudence.

### The Supreme Court goes down the wrong path: *Andrews v. Law Society of British Columbia*

As a mere statute, not part of the Constitution, the *Employment Equity Act* did not bind the Supreme Court's interpretation of the *Charter's* equality provision. But the Act was newly in place when the Supreme Court heard the case of David Mark Andrews. Andrews was a British citizen and permanent resident of Canada, and a qualified lawyer. However, British Columbia required lawyers to be Canadian citizens. Andrews challenged the requirement.

The British Columbia Court of Appeal concluded that the requirement violated Andrews' right to equality.[15] The decision was the closest Canada would get to judicial endorsement of equal protection as a constitutional right. "The essential meaning of the constitutional requirement of equal protection and equal benefit," wrote Justice Beverley McLachlin, later the Chief Justice of the Supreme Court of Canada, "is that persons who are similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated."[16]

The case was appealed to the Supreme Court. In 1989, *Andrews v. Law Society of British Columbia*[17] became the Court's first decision under s. 15. It upheld the Court of Appeal's conclusion but rejected its analysis. Instead, the Court found that section 15(1) required "substantive equality." In a passage that still influences equality jurisprudence to this day, Justice McIntyre wrote:

> … a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law… the main consideration must be the impact of the law on the individual or the group concerned…. the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.[18]

*Andrews* launched the Supreme Court on its journey towards equity, not equal treatment, as a constitutional right. The Supreme Court has decided numerous cases under section 15 since *Andrews*, and it has not left the path. As the Court itself noted in a later case, "*Andrews* set the template for the [Supreme] Court's commitment to substantive equality – a template which subsequent decisions have enriched but never abandoned."[19]

## Undermining equal treatment: The exception in section 15(2)

Again, the words of Section 15(1):

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

These words were intended to guarantee a right to equal treatment, and not equity. We know that in part because Section 15 has an exception. Section 15(2) states:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) allows for programs of affirmative action that discriminate against members of some groups to promote the fortunes of others. Affirmative action is equity, and anathema to equal treatment. Part (2) is worded as an exception to (1). The opening words of 15(2) say "Subsection (1) does not preclude…" Those words mean that (2) is inconsistent with (1). If it was not inconsistent with (1), there would be no need to specify that (1) does not preclude the permission granted in (2). Indeed, there would be no need for (2) at all. Part (2) was written as the exception, and (1) as the general rule: equal treatment.

## The exception becomes the general rule: *Kapp*

In *R. v. Kapp,*[20] the federal government had developed an Aboriginal Fisheries Strategy to increase Aboriginal participation in commercial fishing. It issued fishing licences to three Aboriginal bands that authorized them to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. Non-Aboriginal fishermen were ineligible for the licences and were excluded from the fishery during the 24-hour period. To protest

their exclusion, several of them fished anyway and were ticketed. They argued that the licencing strategy violated their equality rights under section 15.

The Supreme Court found that the Strategy was a program that fell within the ambit of s. 15(2). Therefore, a claim under section 15(1) was precluded. However, the Court went further. The majority[21] wrote:

> Section 15(1) and (2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds.... Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.[22]

This passage fails to explain why 15(2) exists. Section 15(2), the majority said, "preserves the right of governments to implement such programs, without fear of challenge under s. 15(1)."[23] If (2) is an exception to (1), this explanation is correct. But if 15(1) requires substantive equality as the Court insists, the explanation does not make sense. If 15(1) requires substantive equality, affirmative action programs would be consistent with (1). No successful challenge could be made, whether 15(2) exists or not. If 15(1) and 15(2) both protect substantive equality, 15(2) is redundant.

### Equal rules are unconstitutional: *Fraser*

It is one thing to excuse affirmative action as an exception. It is another to declare it a constitutional requirement.

In 1997, the RCMP introduced a job-sharing program. Members in twos or threes could choose to split the duties of one full-time position. Those who worked at least 12 hours per week contributed a percentage of their earnings to a statutory pension plan. Upon retirement, they received a pension benefit that was proportional to their hours of work. The job-sharing program was open to men and women. In *Fraser v Canada*,[24] released in 2020, the Supreme Court of Canada found the program violated section 15(1) and declared it to be unconstitutional.

Most participants who chose to enrol in the program were women with children. Having elected to work part-time, those women received lower pensions benefits than men who worked full-time. Therefore, the majority said, the voluntary program had a disproportionate impact and perpetuated "a long-standing source of economic disadvantage for women."[25]

The program did not discriminate against women directly, the majority wrote, but was an instance of "adverse impact discrimination," which occurs "when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground [listed at the end of s. 15(1)]."[26]

To prove a violation of s. 15(1), the majority reasoned, a claimant must show that the law or policy "creates a distinction based on enumerated or analogous grounds and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating,

or exacerbating disadvantage."[27] Section 15(1), it said, reflects a commitment not to prevent discrimination generally, but specifically "against disadvantaged groups."[28] The Court, and the country's leading legal authorities, perceive no conflict between equality and preferential treatment. In his constitutional law text, for instance, Peter Hogg wrote, "different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it."[29]

In *Fraser*, the Supreme Court found that a voluntary program available to everyone on the same terms violated the equality guarantee. In the name of equity, section 15(1) does not now merely allow discrimination but may require it.

### Human Rights codes, too

Section 15 of the *Charter* is part of the Canadian Constitution. It applies only to governments. But human rights codes, which are statutes, not constitutions, create equality rights that are enforceable against private businesses and individuals. Like section 15(1) of the *Charter*, human rights codes describe a right to equal treatment. Section 1 of the Ontario *Human Rights Code*, for example, states:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Like s. 15(2) of the *Charter*, some human rights codes provide an exception. Section 14(1) of the Ontario code, for instance, states:

> A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups…

This section, like s. 15(2) of the *Charter*, is an "equity" exception to equal treatment. It allows affirmative action programs that discriminate against some individuals and give preference to others who are members of the right groups. A government, company, or organization can apply to designate a discriminatory program as a special program under s. 14(1).

Like under section 15 of the *Charter*, in some provinces the equity exception has become the general rule. In June 2021, an Ontario high school student tried to sign up for a summer program. He was rejected because he was white. The "SummerUp" program, sponsored by the Ontario government, was open only to black students. His father filed a complaint with the Ontario Human Rights Tribunal alleging racial discrimination. The Tribunal dismissed the complaint.[30] White people, wrote the Tribunal, cannot claim discrimination. "An allegation of racial discrimination or discrimination on the grounds of colour is not one that can be or has been successfully claimed by persons who are white and non-racialized."[31]

The SummerUp program had not been designated as a special program under s. 14(1). But the Tribunal determined it met the requirements anyway, which the Code empowers it to do. Section 14(10) of the Code reads:

> For the purposes of a proceeding before the Tribunal, the Tribunal may make a finding that a program meets the requirements of a special program under subsection (1), even though the program has not been designated as a special program…

If a program discriminates against the "correct" groups, it will fit within the exemption as a matter of course. The statute that purports to prohibit discrimination authorizes it instead.

## Conclusion

In Canada, legal equality has come to mean equity, not equal treatment. Equity means that different rules and standards will be applied to members of different groups. Equality rights have become weapons wielded by preferred groups to demand advantageous outcomes. Lady Justice's blindfold has been ripped off and her thumb is on the scales. In Canada, some people are more equal than others.

## About the author

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# References

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