20 Years of Equality Rights: Reclaiming Expectations

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1. Introduction

We will be marking the 20th anniversary of section 15 in April, three years after having marked the 20th anniversary of the *Charter* as a whole. Section 15, of course, was delayed in coming into effect for three years to provide governments with an opportunity to review and change legislation and policy to conform with the requirements of section 15.

Toward the end of the three year moratorium, in 1985, the federal government established a Parliamentary Committee on Equality Rights, Chaired by Patrick Boyer, MP, to hold consultations and make recommendations for changes to federal legislation, policies and programs to conform with section 15. Looking at what equality seekers put forward at that time as expectations associated with section 15, and what obligations the new provision was thought to place on governments and other actors, provides a rare opportunity to assess what equality meant to the new rights-holders before courts had the chance to interpret it.

One worries, of course, that if we look back on 1985 and find that equality seeking groups expected more than they got out of section 15, we may invite those who were critical or skeptical of the value of the *Charter* in the first place to say "We told you so. Didn't we tell you not to invest so heavily in illusory rights?" In anti-poverty *Charter* litigation, where one is constantly under scrutiny for symptoms of naive *Charter* optimism and false hope syndrome, one is hesitant to document naivety or false expectations for section 15.

[1] I would like to thank Shaunagh Stikeman for invaluable research assistance in preparing this paper. The paper was prepared at the request of the Equality Advisory Committee of the Court Challenges Program for the Equality Rights

That turned out not to be a problem, however. The submissions of equality seekers to the Parliamentary Committee on Equality Rights back in 1985 were anything but naive. There were, to be sure, significant "expectations" of section 15. But at the same time there was an acute awareness that the right to equality in the *Charter* would mean little if access to justice issues were not addressed, if the make-up and training of the judiciary were not changed, if equality seekers were not provided with resources to take claims forward, if parliamentary and other institutional mechanisms were not put in place to keep equality issues on the political agenda, if human rights commissions were not effective at promoting the new vision of equality, if everything was left to the courts, if equality were reduced to legal rules. Equality seekers in 1985 expected very little to *automatically* flow from the mere fact of winning constitutional protection of equality.

In reflecting on "expectations of equality" it is worth reminding ourselves that the word "expect" in English has two different meanings. One meaning refers to a predicted or probable outcome of something entirely beyond our control, as when we say "Hurricane Ivan is expected to diminish to a category three hurricane by tomorrow." Another meaning, however, is perhaps closer to the original meaning of the word, whose etymology, in Latin, means "to await" or "to look forward to". It refers not to a predicted outcome, but to what is considered an entitlement. So we say: AWe expect accountability of our governments@ or AWe expect punctuality of our students.@ These statements are not so much predictions of probable outcomes as they are moral imperatives, designed to **produce** appropriate outcomes through the claiming of entitlements. The entitlements may or may not be honoured, but they are "expected" nonetheless.

It is the second meaning of "expect" that is most usefully considered when we reflect on what equality seekers voiced as expectations of equality in 1985 - not what was predicted as the outcome of section 15 coming into force, but what was legitimately claimed and expected by new rights-holders. Over a decade later, in *Vriend*, when the Supreme Court finally applied

section 15 to one of the important substantive issues before the Boyer Committee - the obligation to legislate human rights protections from discrimination because of sexual orientation - Justice Iacobucci, writing for the majority, responded to critics of "judicial activism" by describing the *Charter* as a new social contract. "So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen."[2] It is only appropriate that the expectations of the rights-holders in the new social contract should inform courts' understanding of its meaning. What equality seekers might have **predicted** twenty years ago about how "the arduous struggle"[3] to realize equality would turn out is not terribly important. What they **expected** from the right to equality as new entitlements of citizens and obligations of governments is critical to an assessment of whether the new social contract has been properly implemented by governments and correctly interpreted and applied by the courts.

2. Expectations of "The Equal Benefit of the Law" - A Right to More than Freedom from Discriminatory Exclusion from Benefit Programs

Drafting History of Section 15

As is well known, the wording of section 15 went through some critical changes from the time that a draft Charter was tabled by the Trudeau government in the House of Commons and the Senate on October 6, 1980 to its final adoption. When a draft Charter was first tabled, 15(1), was labeled "non-discrimination rights" and read:

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revised October 5, 2004.

[2] *Vriend* v. *Alberta* [1998] 1 S.C.R. 493 at para. 135 per Iacabucci, J.

[3] *Vriend, supra*, at para. 68, per Cory, J.: "The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain."

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

The following year saw a massive public response to the draft, which forced the government to extend a proposed one month hearing before the Special Joint Committee on the Constitution into nearly four months, with a thousand briefs submitted and three hundred oral submissions. Women's groups and other equality seeking groups sprang into action to demand changes to the wording of section 15. In response to concerted and effective lobbying[4] led by the National Action Committee on the Status of Women(NAC), the National Association of Women and the Law (NAWL) and the Canadian Advisory Council on the Status of Women (CACSW)[5], the version of section 15 that was placed by Justice Minister Chrétien before the Special Joint Committee on January 12, 1981, was substantially altered. It had been renamed, as had been proposed by NAWL, "equality rights", made room for the inclusion of analogous grounds of discrimination, and included a new reference to equality "under" the law and to the "equal benefit" of the law.

> 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 or age

Explanatory notes released with the new draft explained that adding the reference to equality "under" the law "would ensure that the right to equality would apply in respect of the substance as well as the administration of the law" and that the addition of the phrase "equal benefit of the law" "would extend the right to ensure that people enjoy equality of benefits as well as protection of the law."

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[4]One notices, in reading submissions and writing from 1985, that the term "lobbying" was a term of respect in those days. The lobby was the meting place where citizens had the chance to interact directly with politicians.

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

And finally, after further energetic and effective lobbying for the inclusion of disability rights, led by the COPOH (now Council of Canadians with Disabilities) [6] the section, still labeled "equality rights" as tabled in the House of Commons on February 13, 1981 read, as it does now:

> 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.

As noted by the Supreme Court of Canada in the *Andrews* decision, the addition of "under the law" and the "equal benefit of the law" was a safeguard against a line of decisions, under the *Canadian Bill of Rights*, in which the courts held that discriminatory exclusions from entitlements to benefits were not covered by the guarantee of equality "before the law."[7] In the infamous *Bliss* case, the denial of unemployment insurance benefits to women because they were pregnant was found not to violate the guarantee of equality before the law, in part because it did not involve a discriminatory imposition of a penalty but rather "a definition of the qualifications required for entitlement to benefits."[8] In order to safeguard against any similar narrowing of the scope of section 15, NAWL and the Canadian Advisory Council on the Status of Women advocated before the Joint Parliamentary Committee for the explicit inclusion of a right to the "equal **benefit** of the law" in order to ensure that section 15 was applied to social benefit programs such as welfare."[9]

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[6]COPOH was an acronym for the Coalition of Provincial Organizations for the Handicapped. For a description of COPOH's lobbying efforts for the inclusion of disability as an enumerated ground, see Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference? An Assessment by the Council of Canadians with Disabilities* (Council of Canadians with Disabilities: Winnipeg, 2004) online at <http://www.ccdonline.ca/publications/20yrs/20yrs.htm>

[7]*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 170.

[8]*Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 at 190-92.

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

What the Words Were Expected to Mean

There was a much broader dimension to the meaning of "the equal benefit of the law", however, both for legal experts involved in the drafting process, and for equality seeking groups mobilizing in support of the changes, than a guarantee that the right to freedom from discrimination would be applied by the courts to benefit programs.[10] The wording of section 15 had been made broader than any comparable constitutional guarantee of equality in other jurisdictions, and with the addition of disability as a prohibited ground, Canada had adopted a unique protection of equality, seen as being more expansive than any in the world. As the change in the name of the section implied, the more expansive wording of section 15 was seen at the time as having altered the entire orientation of the right to equality, from a negatively oriented right to non-discrimination to a positively oriented right to equality. As Beth Symes said after the rewording of section 15 had been secured: "It is essential to fashion a remedy involving positive action. An order to cease discriminating is not enough. We want to press the court for new remedies."[11]

Lynn Smith, who had been Stella Bliss's lawyer in the *Bliss* case, (now a judge), delivered a paper to a National Symposium on Equality Rights held in January 1985. She said that while it was well accepted that the wording of section 15 demanded a clear departure from *Bill of Rights*

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[10]The principle that protection from discrimination should be accorded in all areas of law, including benefit programs, was not a particularly progressive or radical idea at that time. The U.S. Supreme Court established in the same year that the *Canadian Charter* became law that unequal distribution of benefits is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. See *Zobel v. Williams* 457 U.S. 55 at 60 (1982).

[11]Quoted in Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, *supra*, at p. 117. Ironically, a decade later, the Federal Court of Appeal would reject a section 15 claim brought by Ms. Symes challenging the exclusion of childcare as a business expense, on the basis that applying section 15 to "socio-economic legislation" is "overshooting" the Charter - precisely the danger that the amendments to section 15 were meant to protect against. But the court was more disturbed by the positive social rights dimension it saw in the case. As Iacobucci, J. noted, "Décary J.A. recoiled from the idea that the taxpayer could use s. 15 of the Charter to obtain a positive guarantee of equality, one which would compel "legislatures to adopt measures enabling... her to work" *Symes v. Canada* [1993] 4 S.C.R. 695 at 717-18; [1991] 3 F.C. 507 at 530. Thankfully, the Supreme Court, while dismissing the appeal, affirmed that socio-economic legislation is equally subject to section 15. (*Symes v. Canada* [1993] at 753.

discrimination cases like *Bliss*, consideration of the kinds of issues raised by equality-seekers before the Joint Committee suggests that the real impact is that section 15 "is an equality rights section, not just an anti-discrimination section."[12] She argued that the unique wording of section 15 represented a radical "paradigm shift" that was necessary to meet the expectations of women, people with disabilities and other equality seeking groups at the time. "Section 15 equality rights are meant to create and should create a new paradigm for the definition and solution of inequality problems, new both in Canada and in comparison to other jurisdictions."[13] Under the new paradigm, Smith suggested, it is not enough to try to correct the *Bliss* decision simply by ensuring that the courts apply principles of non-discrimination to Unemployment Insurance benefits. Rather, the assumption that the male worker is the norm and maternity benefits are "special treatment" must be challenged:

> The profound effect of a paradigm shift would be felt when measures such as those would no more be seen as an example of "special treatment" than would measures necessary to ensure an adequate supply of air for the non-robotic work force, or to provide hearing protection for the non-deaf workers in a high-noise industry.[14]

In another presentation to the 1985 symposium, Dale Gibson agreed that the wording of section 15 imposes legal obligations on governments to implement positive measures to address historic disadvantage:

> In my opinion, the constitutional guarantee of a positive right to "equal benefit of the law" establishes a legal obligation on the part of governments to ensure that those who do not enjoy equal benefits because they are members of groups that have been disadvantaged due to past discrimination or other circumstances are given the benefit of special measures designed to erase that historic disadvantage

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[12]Lynn Smith, "A New Paradigm for Equality Rights", in Lynn Smith (ed) *Righting the Balance*: Canada's New Equality Rights (Canadian Human Rights Reporter: Saskatoon, 1986) 353 at p.368.

[13]*Ibid*, at p. 355.

[14]Lynn Smith, "A New Paradigm for Equality Rights", *supra*.

> and place members of the group on a truly equal footing with other members of society.[15]

Arguing that this new positive concept of equality rights would require a new relationship between courts and legislatures to implement it, Gibson playfully conjured up the image of "The Two Brians" (Chief Justice Brian Dickson and Prime Minister Brian Mulroney) with a supporting cast of politicians and judges singing the song, "You Gotta Accentuate the Positive and Eliminate the Negative."[16]

Francine Fournier emphasized the commonality of the right to equality in the *Quebec Charter of Rights and Freedoms* with the equality rights in section 15 of the *Canadian Charter*. Both, she argued, must incorporate not only civil and political rights but also economic, social and cultural rights.

> Policies, measures and legislation aimed at ensuring a more equal and therefore a more equitable distribution of wealth must go hand in hand with those promoting the fight against discrimination if a society is to be built which respects equality rights both from the point of view of civil and political rights and from the point of view of social, economic, and cultural rights.[17]

Anne Bayefsky, in her influential article of the same year on "Defining Equality Rights" similarly argued that the concept of equality embedded in the term "equal benefit of the law" went beyond traditional notions of non-discrimination to positive obligations to ensure that social programs are not only inclusive but adequate:

> This understanding of a goal or purpose of "equal benefit of the law" in section 15 is consistent with the modern Canadian conception of the capacities and responsibilities of government. We are not burdened with visions of the equality

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[15]Dale Gibson, "Accentuating the Positive and Eliminating the Negative," in *Righting the Balance*. *supra*, 311 at p. 332.

[16]*Ibid*, at 312.

[17]Francine Fournier, "Égalité et droits a l'Égalité", in *Righting the Balance*, *supra* p.25 pp.25-26.

> Lincoln sought. Minimum standards of welfare - welfare payments, subsidized housing, unemployment insurance, public health insurance; legal aid - are expectations which distinguish us from American society, even now.[18]

The fact that people with disabilities had successfully mobilized to win the battle for the inclusion of the ground of disability in section 15 was also seen by commentators at the time as confirmation that a new paradigm of equality had been entrenched in the Charter consistent with the social goals of the modern disability rights movement. These goals had been dominant in submissions to the Joint Parliamentary Committee urging inclusion of disability as an enumerated ground. David Vickers, presenting for the Canadian Association for the Mentally Retarded in 1980, for example, had referenced the principle of equality for people with disabilities to the equal enjoyment of economic, social and cultural rights which are fundamental to Canadian citizenship:

> Our plea to you is not a plea for special rights. Our plea as advocates of people with a handicap is that they too will be afforded the full opportunity that attaches to their Canadian citizenship; in short, a plea that they will not be forgotten in education; Article 7 [of the *International Covenant on Economic, Social and Cultural Rights*], the right to an opportunity to work, and just and favourable conditions of work; Article 8, the right to participate in trade unions and Article 9, the right to social security.[19]

David Lepofsky and Jerome Bickenbach noted that discrimination because of disability often does not conform with earlier approaches to discrimination, demanding a positive, remedial framework for equality rights.[20] David Vickers and Orville Endicott, commenting on the meaning of the new equality rights for people with mental disabilities in 1985, noted that the

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[18]Anne Bayefsky "Defining Equality Rights" in A Bayefsky and M Eberts (eds) *Equality Rights and the Canadian Charter of Rights and Freedoms* (Carswell: Toronto, 1985) at p. 24.

[19]Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-second Parliament, 1980-1981, Issue no. 10 (21 November 1980) 10:10

[20] David Lepofsky and Jerome Bickenbach, "Equality Rights and the Physically Handicapped," in *Equality Rights and the Canadian Charter of Rights and Freedoms*, *supra* 323 at 326-27 and 354-55.

social movements generated around the International Year of the Disabled Person (1981) played an important part in winning the inclusion of mental and physical disability in the *Charter*. Section 15, they suggested, should be interpreted so as to "represent continuity with a movement which has touched all free and democratic societies over the past several decades."[21] The new provisions, they argued, need to be interpreted and applied consistently with international human rights, particularly social and economic rights such as the right to an adequate standard of living recognized in article 25 of the *Universal Declaration of Human Rights*, the right to "the highest attainable standard of physical and mental health" in article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the right to an education recognized in article 13 of the ICESCR.[22]

Raj Anand similarly wrote in 1985 that section 15 of the *Charter* should be seen as an implementation of Canada's international legal obligations with respect to racial and ethnic discrimination, including the obligation, recognized in the *International Covenant on Civil and Political Rights* (ICCPR), to take "affirmative action designed to ensure the positive enjoyment of rights."[23] Anand argued that the expansive wording of section 15(1), the provision for affirmative action in 15(2) and the broad remedial powers available to courts in section 24(1) of the *Charter* "provide broad scope for governments and courts to remedy individual, institutional, systemic and cultural discrimination. The wide latitude of these provisions can again be seen as a response to the state of ethnic inequality in Canada when the *Charter* was enacted."[24]

> Particularly in the case of Canada's native peoples, ethnic discrimination has become too entrenched in the operation of our society to permit its redress on a

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[21] David Vickers and Orville Endicott, "Mental Disability and Equality Rights," in *Equality Rights and the Canadian Charter of Rights and Freedoms, supra* 381.

[22] *Ibid*.

[23] Raj Anand, "Ethnic Equality" in *Equality Rights and the Canadian Charter of Rights and Freedoms, supra*, 81 at p. 104.

[24] *Ibid*, at 116.

> completely individual basis. As a Royal Commission report concluded in 1984, "systemic discrimination requires systemic remedies."[25]

In summary, the phrase "the equal benefit of the law" which had been so strenuously fought for by equality seeking groups, had much more potential meaning in terms of the substance, scope and application of equality rights than a more narrowly defined guarantee of the application of a traditional non-discrimination paradigm to under-inclusive benefit programs. A prevailing view among equality specialists in 1985 was that section 15, as it had been transformed and adopted, affirmed not only protection from discrimination but also, and more fundamentally, a positive right to appropriate and adequate government programs and positive measures to address socio-economic disadvantage. It was emphasized that interpretations of equality should be linked to the social and political goals of equality seeking communities and also to an emerging international human rights jurisprudence, not simply in the area of civil and political rights but also, and perhaps more fundamentally, to economic, social and cultural rights.

Equality thinkers did not anticipate, however, that this new paradigm of equality would be implemented without significant resistance. Jill McCalla Vickers noted that the new approach to equality had been defined by, and would continue to rely on a dynamic relationship with emerging social movements or "equality projects." These would be opposed, she noted, by notions of formal equality and "fair play", particularly by neo-liberal economic theory's reliance on competition in the labour market as "the great equalizer" where, as Barbara Cameron had pointed out, for women and other equality-seeking groups, "the equalization is downwards."[26] Vickers emphasized that it would be essential to maintain a strong link between theories of equality and the evolving equality projects that had redefined constitutional equality during the drafting process.[27]

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[25] *Ibid*, at 117.

[26] Barbara Cameron, "Labour Market Discrimination and Affirmative Action," in J.M. Vickers, ed. *Taking Sex into Account: The Policy Consequences of Sexist Research* (1984), at 138, quoted in J.M. Vickers, "Equality-Seeking in a Cold Climate," in *Righting the Balance*, *supra*, 3 at p.18, f.n. 45.

[27] J.M. Vickers, "Equality-Seeking in a Cold Climate," *supra*, at p.18

3. Expectations of Equality-Seekers: The Boyer Committee Hearings

At the same time that legal experts were assessing the meaning and impact of the unique wording of section 15, equality seeking groups were engaged in defining their own equality initiatives, developing their own approaches to and understanding of the new equality rights, and engaging in a direct dialogue with the Parliamentary Committee on Equality Rights about what needed to be done to implement them.

What emerged from the submissions to the Boyer Committee was a remarkably strong agreement among the major equality seeking constituencies about what equality rights ought to mean and what governments and other actors ought to do to implement them. At the centre of the consensus was the idea that the right to equality must extend beyond a right to non-discrimination, even in benefit programs, to include a more general "social rights" dimension addressing the real lives of people and ensuring access to decent work, adequate housing, appropriate healthcare, education and income security. The submissions thus support the sense of legal commentators writing at the time that section 15 embodies an historically and geographically unique paradigm of equality that had emerged from equality-seeking social movements in Canada, as well as from a new international human rights movement with which the Canadian social movements increasingly interacted.

Women's Groups

Shelagh Day, addressing the Boyer Committee on Wednesday April 17th for the Women's Legal Education and Action Fund (LEAF), the day section 15 came into force, summarized the expectations of the equality-seeking communities in Canada that section 15 would introduce a new way of looking at equality, informed by the context of women's concrete equality struggles, and requiring a radical reassessment of the constitutional responsibilities of governments:

> We believe this is the time when we should be looking for the broadest and most practical and most effective interpretations of equality, both from this committee and from governments and indeed, we will be suggesting, from the courts.
>
> We believe we should have definitions of equality that deliver real results that will affect the lives of Canadians. Narrow interpretations or technical pathways that lead us away from what is really happening to the lives of Canadians and to the lives of Canadian women we think is not what we need at this time. We think this is a fresh beginning and that the reason why these guarantees are now here in this fundamental document of the nation is because there is a need for real change.[28]

Jane Shackell, co-presenting for LEAF on April 17th, noted that the Discussion Paper released by the Department of Justice prior to the hearings had focused only on identifying more traditional forms of discrimination against women in benefit programs, such as distinctions in eligibility requirements between regular unemployment insurance and maternity benefits, access to employment in the armed forces, sex-based distinctions in the *Family Allowance Act*, the use of sex-based mortality tables in determining pension contributions, and sex-based distinctions in the age of eligibility for Veterans' Allowances.[29] "If the agenda set in the sexual discrimination section of that paper is the equality agenda for women, then the most important issues have been ignored, " Shackell said. "The issues discussed in the paper are not unimportant, but they are not as important, they are not as real, to many women in Canada. They divert attention from the issues that are real and that do affect women in a more real way."[30]

> It is our view that the poverty of women in Canada is a principal source of inequality in this country, and the issues that give rise to the poverty of women are not really addressed in this paper. Issues such as equal pay for work of equal value, universal access to quality day-care, the control of a woman's body and her reproductive function, legalized prostitution, pension rates, restricted unemployment insurance benefits based on length of participation in the work force, the differential treatment of pregnancy as opposed to temporary disability:

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[28] *Minutes of Proceedings, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs* (April 17, 1985) 1555.

[29] Department of Justice Canada, *Equality Issues in Federal Law: A Discussion Paper* (Minister of Supplies and Services Canada: Ottawa, 1985)

[30] *Minutes of Proceedings* (April 17, 1985), 1600.

> all these things contribute to the poverty of women relative to the poverty of men in this country and contribute to the unequal status of women. These are the issues that affect women's lives every day in a real way and are not addressed by this paper. In some cases they are being hived off to other committees and really ignored.[31]

The National Action Committee on the Status of Women (NAC) similarly emphasized that focusing on the more obvious issues of discrimination in legislation "avoids rather than faces the difficult task of assessing and defining what equality means as well as considering the most effective legislative approach to accomplish the ends required by the *Charter*."[32] Referring to the "intense lobbying and submissions by women's groups in Canada during the drafting process of the Charter" NAC argued that Parliament must act in accordance with the political decision to ensure that "the goal of the section is equality, a positive concept, as opposed to non-discrimination, a negative concept forbidding certain governmental activity but without creating the same sense of government's obligation to act positively."[33] Section 15, they argued "imposes a positive duty on the federal government as well as provincial governments to provide equal benefit of the law, meaning that its use of its funds and legislation must equally benefit women."[34] This was consistent, NAC argued, with Canada's obligations under international human rights law:

> We take the Charter as reaffirming and incorporating the obligations of Canada under the international conventions, particularly the United Nations Convention on the Elimination of All Forms of Discrimination against Women. This Convention is a broadly worded document which establishes that the federal government has already committed itself to doing more that just prohibiting

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[31] *Ibid*.

[32] A- 142. National Action Committee on the Status of Women, *Section 15 of the Charter and NAC's Program for Equality: A brief presented to the Subcommittee on Equality Rights in Toronto*, (Toronto, June 18, 1985) at p.6.

[33] *Ibid*, p. 7

[34] *Ibid*.

> discrimination. This means that the approach it must take to the Charter is one of positive action."[35]

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), NAC pointed out, obliges governments in Canada:

> to take in all fields and in particular in the political, economic, and social fields, all appropriate measures, , including measures to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise of human rights and fundamental freedoms on a basis of equality with men.[36]

Prominent among NAC's list of necessary reform of government programs were a federal child-care financing act; measures to ensure access to education and training for low income women and sole support mothers; improved maternity and parental benefits and leave provisions; equal pay for work of equal value; increased commitment to social services and social housing; and comprehensive income support and supplementation to ensure an adequate guaranteed income for all Canadians.[37]

The Charter of Rights Educational Fund[38], which had carried out a far-reaching audit of federal and Ontario statutes for conformity with women's equality rights under section 15 similarly emphasized the role of section 15 in implementing international obligations such as the right to an adequate standard of living in article 25 of the *Universal Declaration of Human Rights*. The "equal benefit of the law", they submitted, guaranteed "result equality", not "rule equality."[39]

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[35]*Ibid*, p. 2.

[36] *Ibid*. Citing article 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women*.

[37]*Ibid*, Appendix

[38]The Charter of Rights Education Fund formed during the 1982-85 moratorium on section 15 to examine the implications of s.15 for federal and Ontario's legislation and programs. Presenting for CREF before the Boyer Committee were Kathleen Lahey from the University of Windsor, Diana Majury, then at the University of Wisconsin, Linda Gehrke from Jane-Finch Community Legal Services in Toronto, and from private practice, Mary Cornish, Elizabeth Atchesan and Peter Maloney. CREF wound down after 1985.

[39]B-422 Charter of Rights Education Fund. Women, Poverty and Income Assistance Programs, p..2.

Implementing this new concept of equality required, according to the CREF, a reassessment of the poverty of women and redress of economic and other disadvantages in areas such as the process of proving welfare entitlement, the allocation of subsidized housing units and decision-making within welfare-bureaucracies. Government programs would need to be reformed to ensure that healthcare funding would better meet the needs of women; that maternity leave, improved access to collective bargaining, revamped unemployment insurance, better protection of part-time workers and immigrant domestic workers, and affirmative action would improve equality in employment and a reformed tax system would begin to address the way the current system reinforced and extended the economic inequalities of women.[40]

NAWL's submissions, presented by Gwen Brodsky, reiterated the prominent theme that positive action to remedy social and economic disadvantage and systemic discrimination is central to the commitment to equality in section 15. "Unless the Government implements positive programs to remove barriers to equality," NAWL's brief stated, " it will be signaling tolerance of discrimination and indifference to the expectations of Canadian women." "Our urgent message is that immediate, profound and positive government action is required in order to fulfill the Charter's promise of equality."[41]

The Canadian Advisory Council on the Status of Women (CACSW), represented by Donna Greschner, though concentrating primarily on s.28 of the *Charter*, similarly argued for positive obligations to eliminate the effects of systemic discrimination. Like other women's groups, the CACSW relied on the substantive obligations in the *CEDAW* as evidence that the *Charter* requires positive measures to address the effects of systemic discrimination.[42]

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[40] *Ibid*, under "Women's Health", "Employment", "Women, Poverty and Income Assistance Programmes", "Sex Discrimination in Immigration", "Women and Taxation".

[41]B-583. National Association of Women and the Law, *The Canadian Charter of Rights and Freedoms: Not Just Words on Paper A Brief Submitted to the Parliamentary Sub-Committee on Equality Rights* (July, 1985)

[42]B-422. The Canadian Advisory Council on the Status of Women, *The Full Implementation of Equality: Brief to the Parliamentary Sub-Committee on Equality Rights* (April 18, 1985).

These predominant concerns from national women's groups that section 15 be applied to the concrete social and economic issues of inequality faced by women in Canada were echoed by women's groups from across the country. The Nova Scotia Chapter of the Canadian Research Institute for the Advancement of Women, for example, emphasized the need for new laws and programs to ensure proportional pay and benefits for part-time workers, access to affordable childcare, and more funding for women's transition houses.[43] The New Brunswick Advisory Council on the Status of Women emphasized that "Women's right to equality must be understood as an obligation on society to achieve equality and not just to end discrimination."[44] The North Shore Women's Centre in Vancouver drew the Committee's attention to the fact that the topic of systemic discrimination had been allocated only half a page in the Federal Discussion Paper on Equality. The Discussion Paper had stated that "This form of discrimination is often not readily identified; it commonly takes statistical analysis to detect it." The NSWC responded that in fact "the empirical data are well documented in the reams of paper work that women's groups have been putting out for years."

> But we also believe that women do not need statistical analysis to know that these inequalities exist. Women experience them; women have been fighting them; women have been telling governments about them for many, many years. Are you listening to them now? We do not believe that it is enough to make a simple change in the laws. We do believe that it is necessary to change the laws as a first step in a long process of unraveling the sex-based discrimination in our society. If the existence of systemic discrimination is recognized, changes in the law must therefore not simply aim at denying that differences exist in the treatment and experience of men and women, by changing wife to spouse and men to persons."[45]

The Saskatchewan Action Committee Status of Women (SACSW) noted that legislation introduced in Saskatchewan to ensure conformity with section 15 had "for the most part, played

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[43]A-151. Barbara Cotrell on behalf of the Membership of The Canadian Research Institute for the Advancement of Women, Nova Scotia, (June, 1985).

[44]B- 672. New Brunswick Advisory Council on the Status of Women, p. 9.

[45]B-743. North Shore Women's Centre, p.2.

with semantics," noting that "little resulted from the Bill that bettered, in any way, the social or economic condition of women in Saskatchewan."

> Increasingly in this country, poverty is becoming a women's issue. The poorest in Canada are elderly women, native women, single mothers and their children. ... Our issues are economic issues: equal pay for work of equal value, support services for working parents, employment conditions, pensions, part time work.[46]

The SACSW concluded its presentation with an exhortation to parliamentarians to be prepared to challenge the accepted order in order to realize the promise of section 15:

> You will need the guts to spend money in ways some will call foolish, and the vision to persevere on a straight course in pursuit of equality. Women in Canada expect and deserve no less, and we will be watching.[47]

Racial and Ethnic Minorities and Immigrants

Issues of racialized minorities were shockingly ignored in the government's discussion paper and largely ignored in the hearings and the Committee's recommendations. As was pointed out by the Chinese Canadian Council:

> Indeed, a perusal of the discussion paper shows a mere 1 ½ pages, out of 65, devoted to discrimination on the basis of race, and exclusively with respect to the native peoples. How are the visible minorities encouraged to feel that Section 15 of the Charter holds opportunity for change if this public document fails to address the potential which the Charter has to ameliorate their condition?"[48]

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[46]B-572. Saskatchewan Action Committee Status of Women, Brief Presented to Committee on Equality Rights (Regina, June 13, 1985)

[47]*Ibid*, at p. 6.

[48] B-507. Chinese Canadian National Council, p. 2.

A major focus of equality advocacy by racialized minorities in 1985 was to get adequate recognition of the prevalence of racial discrimination in Canadian society. The Urban Alliance on Race Relations and the Social Development Council in Toronto published two studies that year to expose the prevalence of racial discrimination in employment.[49] A Parliamentary Special Committee on Participation of Visible Minorities in Canadian Society had released its report *Equality Now!* the year before. As well, in 1983 Judge Rosalie Silberman Abella had been appointed through the Royal Commission on Equality in Employment to "explore the most efficient, effective and equitable means of promoting employment opportunities for and eliminating systemic discrimination against four designated groups: women, native people, disabled persons, and visible minorities." Her report, *Equality in Employment,* had adopted the term "employment equity" rather than "affirmative action", proposing employment equity as a "strategy to obliterate the present and the residual effects of discrimination and to open equitably the competition for employment opportunities to those arbitrarily excluded."[50]

Presentations to the Boyer Committee from groups representing racialized and ethnic minorities affirmed the recommendations for positive measures contained in the Abella Report as a critical component of the new guarantee of equality in section 15. They argued that section 15 must be framed expansively, so as to include recognition of the necessity of sweeping positive measures to address the long-term effects of systemic ethnic and racial discrimination.

The Chinese National Canadian Council noted that "a main drawback to the apparent framework of the Committee's task and to the typical approach to the Charter is its reactive nature. We should not merely analyze existing laws and policies; we must also take the initiative and move

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

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

ahead with laws and policies that actively counter the effects of discrimination."[51] "The Government must use the Charter as a guide for action, not merely as a set of limiting rules to which it must ensure legal adherence whenever it wishes to do something."[52]

The Committee for Racial Justice argued that "the spirit of equality that informs the Charter cannot be realized for visible minorities by amending existing legislation alone ... [W]e must recognize that a series of initiatives are needed to overcome a chronic condition of inequality." changes in legislation alone will not result in equality" and that "all of our major social, political and economic institutions must be multiculturalized."[53]

The Canadian Ethno-Cultural Council and many other groups demanded a comprehensive reform of the *Immigration Act* to eliminate discrimination against people with mental and physical disabilities, women, adopted children, common law spouses, and discrimination on the basis of ethnic and national origin. Other concerns raised by a number of groups related to discrimination against women in determining eligibility for language training and the vulnerability of immigrant women in sponsorship situations. CECC affirmed the need for a broad and purposive interpretation of section 15 that would mandate effective remedies to discrimination through human rights legislation as well as through improved social programs to address the socio-economic disadvantage of visible minorities and immigrants. CECC's demands for changes to conform with section 15 included a number of positive measures, such as:

- Measures to ensure adequate pensions and old age security for newcomers;
- Mandatory employment equity in both the public and private sectors;
- Expanded federal support to ethnic women in the areas of ESL and adult basic education;
- Instruction in an official language to all immigrants, with a reasonable living allowance and childcare during this process;

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[51]B-507, Chinese National Council, supra, p.4.

[52]*Ibid*, pp. 5-6.

[53]B-758. The Committee for Racial Justice, Brief Submitted to the Committee on Equality Rights

- Universal quality childcare and access to childcare in the workplace and in community settings;
- Assistance to ethnic communities to establish credit unions and other locally controlled development finance institutions to service ethnic communities; and
- An increase the grant and loan funds available to students from low-income families to enhance access to education.

The demand from equality-seeking organizations that positive measures flow from section 15 was echoed by individual presenters such as Rabab Naqvi, who presented to the Committee speaking "both as a woman and as a person belonging to a visible minority." She emphasized the need to address "individual, institutional, and systemic discrimination in economic, political and social life through "active government intervention." Concerned that subsection 15(2) does not appear to provide any requirement for enforcing affirmative measures, she said mandatory employment equity must be implemented in both the public and private sectors, the Human Rights Commission must be given greater powers and special provisions should be made available "to give concrete meaning and substance to the law."[54]

Disability Rights Groups

Groups representing people with disabilities played a central role in the Boyer Committee hearings in promoting a new vision of equality as a substantive right to social inclusion and meaningful participation.

Many disability rights groups referred back to the wide-ranging recommendations of the 1981 Report of the Special Committee on the Disabled and the Handicapped , *Obstacles*,[55] released in the International Year for the Disabled Person (1981). The Committee and its report had been an

[54]B-569 Naqvi, Rahab.

[55]*Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (Ministry of Supply and Services: Ottawa, 1981) online at

important factor in the ultimate inclusion of mental and physical disability in section 15. The *Obstacles* Report had framed disability equality rights within a broad human rights framework, affirming both civil and political and also economic, social and cultural rights of persons with disabilities as fundamental to their equal citizenship. It had recommended, for example, extensive reform of human rights legislation to ensure a more rigorous standard of affirmative action and accommodation of disability, and also recommended that "the Federal Government encourage all provinces to include in their human rights legislation the right to an education that ensures disabled children the opportunity to reach and exercise their full potential."[56] Other recommendations in the *Obstacles* Report had affirmed the right to an adequate income through a comprehensive disability insurance program, healthcare reform, employment equity and accessible transportation systems.[57] These had been reinforced by recommendations in the Abella Report for employment equity for people with disabilities.

The Coalition for Employment Equity for Persons with Disabilities drew attention to the absence of many of the significant positive measures and reforms proposed in the Abella Report and in the *Obstacles* Report in the government's discussion paper.[58] An assumption of importance to disabled people, it stated, "relates to the kind of equality that we wish to achieve." Employment equity is necessary to address the common characteristics of Aboriginal people, women, disabled people and visible minorities : "high levels of unemployment, low socio-economic status, concentration in low level jobs and limited access to the decision-making processes which critically affect them."[59]

<http://www.sdc.gc.ca/asp/gateway.asp?hr=/en/hip/odi/documents/obstacles/00_toc.shtml&hs=pyp>

[56] *Ibid*, Chapter 1, Recommendation 14.

[57] *Ibid*.

[58] B-433 Coalition on Employment Equity for Persons with Disabilities, Submission to the Parliamentary Committee on Equality Issues, pp. 1-2.

[59] *Ibid*, p. 4.

The Canadian Mental Health Association emphasized that: "Systemic discrimination requires systemic remedies."[60] These included "support in the whole process of community living and in areas related to employment," "individualized and coordinated support systems," and "expanding the concept of work to include a wide range of work options."[61] The Canadian Paraplegic Association also emphasized previous failures to address systemic discrimination under human rights legislation. "In treating the obvious symptoms [of discrimination] we have virtually ignored the disease which, intentional or not, will continue to surface in perpetuity in our present civil liberties system."[62] Systemic discrimination in the area of employment, it noted, "will require what some would consider extraordinary measures to remedy."[63] The Canadian Association of Community Living affirmed that equality for people with disabilities means a decent place to live; an education which nurtures and prepares children for full lives as adults; access to meaningful work and an adequate income; access to full range of social opportunities; having fundamental rights of citizenship recognized and protected; being able to advocate for rights; and having services available and responsive to their own strengths and needs.[64] The PEI Council for the Disabled, PEI Association of the Hearing Impaired, PEI Association for the Mentally Handicapped and the Disabled Women's Network emphasized "that government programs and policies must create an infrastructure where rights are entrenched, and that accountability must be a part of that infrastructure for these rights to become reality for our members, and for all Canadians."[65]

Aboriginal Groups

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[60]B-410 Canadian Mental Health Association, p.4

[61]*Ibid.*

[62] B-420 Canadian Paraplegic Association p. 2

[63] *Ibid*, p. 4.

[64]B-730 Canadian Association for Community Living

[65]B-693 PEI Council for the Disabled, PEI Association of the Hearing Impaired, PEI Association for the Mentally Handicapped and the Disabled Women's Network.

There were relatively few submissions to the Boyer Committee from Aboriginal groups, and all were from Aboriginal Women's groups. Bill C-31, enacting changes to the *Indian Act*, was before parliament at the time, and concern about the failure of Bill C-31 to eliminate discrimination against Native women and their children were predominant in submissions to the Boyer Committee.[66] Gayle Stacey More[67], presenting for the Quebec Native Women's Association, observed that "when one cuts through much of the rhetoric surrounding Bill C-31, one finds that one of the real causes of concern is that of money." She took encouragement from early judgments under the other sections of the *Charter*, however, in which courts had found that the *Charter* "must be interpreted broadly." "The Courts" she noted, "have also looked to the various International Covenants to which Canada is a party both as background material to the enactment of the *Charter* as well as a means of interpreting or enlarging upon the actual provisions of the *Charter*."[68] On this basis, she urged the Committee to consider Bill C-31 "in the light of both the *Charter* and these International Covenants" in considering whether Federal legislation is in conformity with section 15. "We can only hope that the work of this sub-committee will convince the Government that to refuse to act positively to undo injustice is, in fact, to accept that injustice persist."[69]

The Indian Homemakers of B.C. noted that equality would also mean addressing discrimination based on "lifestyles" or poverty:

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

[67] Gayle Stacey More and Sharon McIvor subsequently took the Native Women's Association of Canada challenge forward, challenging the exclusion of Native Women's organizations from direct funding and from participation in constitutional discussions with the Aboriginal communities leading up to the Charlottetown Accord. *Native Women's Assn. of Canada v. Canada* [1994] 3 S.C.R. 627.

[68] B-539 Quebec Native Women's Association, p.4

[69] *Ibid*, p.5.

> What we mean here by "lifestyles" may include culturally determined factors but for most Indian women the problem that we wish to describe here has more to do with poverty and powerlessness, which we do not choose, and the consequent imposition of the values of a dominant society on us than it has to do with culture. More concretely this problem is manifested in the continuing removal of Indian children from their families and their communities by social workers acting under provincial welfare legislation…[70]

Gay and Lesbian Rights Groups

The predominant concern of gays and lesbians in 1985, of course, was to have sexual orientation recognized as an analogous ground of discrimination. Among legislative changes urged upon the Committee by gay and lesbian groups were securing a recommendation for the inclusion of sexual orientation in the *Canadian Human Rights Act*, changes to discriminatory definitions of spouse, removal of discriminatory security clearance guidelines and amendments to the Criminal Code with respect to age of consensual sexual activity. Most of these recommendations, with the exception of the changes to the definition of "spouse" were accepted by the Boyer Committee and received relatively favourable responses from the Government - though certainly no prompt action. Submissions also emphasized the need for positive measures and broader consciousness raising efforts.

In light of the subsequent judicial consideration of the issue of human rights protections, it is noteworthy that the obligation to provide protection from discrimination was generally seen to flow directly from the right to equality rather than relying on comparator groups. The existence of widespread discrimination against gays and lesbians, denying access to employment, services and housing was seen as something which section 15 required the government to address through positive legislative action. The basis for the recommendation of the Boyer Committee for an

[70]B-741 Indian Homemakers' Association of B.C. pp.4-6.

amendment to the *Canadian Human Rights Act* to add sexual orientation was simply that such protections were required in order to provide necessary protection from discrimination.[71]

Anti-Poverty Groups

Another noticeable under-representation in the submissions to the Boyer Committee was anti-poverty groups. The National Anti-Poverty Organization did not submit a brief or appear before the Committee. The Regents' Park Women's Group appeared before the Committee to express concern that "anti-discrimination laws have traditionally excluded groups disenfranchised politically and economically by poverty and its attendant liabilities - namely discrimination in education, housing, health care, nutrition, and all areas of life that would secure for us a future in this society."

> Within any group of poor women there will of course be those who face discrimination because of race, age, national origin, sex, or mental or physical disability. In that sense we support the work of your committee. As poor women, however, we believe that the economic, political and social system that exists today in Canada will continue to work against us and that our struggle remains outside the confines of the fight under Section 15 of the Charter.[72]

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[71] *Equality for All: Report of the Parliamentary Committee on Equality Rights* (October, 1985) at p. 30. Gay and lesbian organizations making submissions to the Boyer Committee included Gay Alliance for Equality, Gay and Lesbian Awareness, Gay and Lesbian Legal Advocates, Calgary, Gay Association in Newfoundland, Gay Community of Regina, Gays and Lesbians of the University of British Columbia, Gays of Ottawa, Gays of Wilfrid Laurier University, Manitoba Gay Coalition. The notion that an obligation to provide legislative protection from discrimination in the private sphere flows directly from section 15 confirms my own recollection of lobbies I was involved with at the time in Ontario for improvements to Ontario's *Human Rights Code* for conformity with section 15. My sense is that both equality seeking groups and politicians at the time operated under the assumption that if discrimination against a disadvantaged group existed and was a significant factor in denying members of the group enjoyment of equality in access to housing, employment or services, then the new *Charter* guarantee of equality imposed on governments an obligation to provide appropriate protections in the form of expanded human rights legislation. We did not feel the need for comparator groups or an analysis of under-inclusion. The adequacy of protections from discrimination, such as in the definition of positive measures required under the undue hardship standard, was seen as being as much of an equality issue as any formal under-inclusion in terms of listed grounds.

[72]B-333 Regent Park Sole Support Mothers' Group,

Thus, while other equality-seeking and social policy groups defended an approach to equality that placed issues of socio-economic inequality within an equality framework, anti-poverty groups seemed to consider section 15 to be of less relevance to them, in part because of the absence of protection from discrimination because of poverty.

The Canadian Bar Association supported the recognition of "property and income" as an analogous ground, the Solidarity Coalition in B.C. proposed "economic status, and the Charter of Rights Education Fund suggested that poverty ought to be recognized as an analogous ground of discrimination"[73]

Other Groups

Many other groups appearing before the Boyer Committee, though not equality seeking groups themselves, bolstered the general consensus of equality seekers that the right to equality, in the Canadian context, ought to go beyond the right to non-discrimination so as to encompass social rights and positive obligations consistent with international human rights instruments. Social development groups saw potential in section 15 to address broader issues than had previously been addressed through the legal system, noting "an awakening interest in the voluntary sector that the achievement of human services goals could be assisted by the law"[74] The Canadian Bar Association noted that ssection 15 "is an equality rights section, not merely an anti-discrimination section. The difference between an equality purpose and an anti-discrimination purpose is that the former is broader and more positive than the latter."[75]

The Canadian Teachers' Federation observed that while the *Charter* makes no specific promise to remedy poverty, "the basic problem in Canada is the persistence of socio-economic

[73]B- 418. Canadian Bar Association, p. 52; B-541 Solidarity Coalition (British Columbia), pp 5-6;

[74]B-727. Social Planning Council of Metropolitan Toronto, p. 26.

[75]B-418. Canadian Bar Association, p. 15.

inequalities, which are intertwined with the educational system." A guaranteed minimum income for families and universal access to childcare programs were essential, in the Federation's submission, to breaking the poverty cycle.[76]

The Saskatchewan Association of Human Rights noted that many of the rights in the *Universal Declaration of Human Rights*, such as the right to social security, to equal pay for work of equal value, to just and favourable conditions of work, and to an adequate standard of living were not enumerated in the *Charter*.

> Without an income, without an adequate standard of living, all of the individual civil and political rights are meaningless. We now have little constitutional protection against vicious attacks on the unemployed, welfare recipients, and senior citizens, unless the interpretation of Section 15 is broad enough to include these situations. We must insist on this interpretation.[77]

Access to Justice and Participatory Rights

Broadened participatory rights, enhancing both access to justice and access to political processes to promote equality rights for disadvantaged groups were seen by equality seeking groups presenting to the Boyer Committee as a critical component of the equality guarantee. Virtually all of the major equality-seeking and human rights groups included in their submissions arguments in support of extending the Court Challenges Program, which at the time was limited to language rights, to include challenges brought under section 15 of the Charter.[78]

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[76] *Ibid*

[77] B-530 Saskatchewan Association of Human Rights pp. 1-8:

[78] Groups supporting a Court Challenges Program covering section 15 included the Advocacy Resource Centre for the Handicapped (ARCH), the Canadian Association for Children and Adults with Learning Disabilities, the Canadian Bar Association, the Canadian Council of the Blind. the Canadian Council on Social Development, the Canadian Ethnocultural Council, the Coalition of Provincial Organizations of the Handicapped, the Canadian Bar Association, the Canadian Research Institute for the Advancement of Women, Nova Scotia, the Canadian Legal Advisory and Research Association of the Disabled (CLAIR), the Charter of Rights Education Fund, the N.D.P.

The ARCH brief noted that "if Charter litigation is to be mounted in any sustained way on behalf of disabled people it will be necessary to establish a sizeable resource which is administered at arms length from government in order to finance cases of widespread importance for disabled people."[79] Shelagh Day, in a return appearance before the Boyer Committee on June 18th, 1985, focused LEAF's submissions on the fact that "access to justice is essential if the *Charter* guarantees are to be meaningful."[80] The Canadian Bar Association supported the idea of a litigation fund administered by an independent agency and also recommended a minimum national standard for legal assistance in equality rights litigation be established by the Federal Government "at such a level that no person will be denied the right to put forward a reasonable case under section 15 of the *Charter*."[81]

Adequate funding of equality seeking groups themselves, to participate meaningfully in both political and legal action to promote equality was also seen as critical by equality seeking groups. Aboriginal women's groups noted that inequities in funding between male dominated Aboriginal groups and Aboriginal women's groups denied them an effective voice.[82] The Toronto Social Planning Council observed that:

> If the Charter is to be an instrument not simply for the legal profession and the judiciary to interpret our rights and freedoms, it is necessary for government to support initiatives which will give wider access for the public to the provisions and protections of the Charter. … We do not as yet in Canada have sufficient infrastructure in place to ensure that our social development interests can be advanced through the Charter. It is our contention that government must support

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Women's Rights Committee (Halifax, Nova Scotia), the National Action Committee on the Status of Women, the National Union of Provincial Government Employees, the Canadian Jewish Congress, Quebec Native Women Inc, Saskatchewan Native Women's Association, Social Planning Council of Metropolitan Toronto and the Women's Legal Education and Action Fund.

[79] B-433 Advocacy Resource Centre for the Handicapped "Equality for Disabled People: A Preliminary Analysis of the Impact of Section 15(1) of the Charter of Rights and Freedoms" p.79.

[80]Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings*, 18-6-1985 1725.

[81]B-418 Canadian Bar Association, pp.12, 14-15.

[82]B-741 Indian Homemakers of B.C.;

> initiatives from organizations within the voluntary sector which have the capacity to advance the interests of social development vis-a vis the Charter.[83]

Access by the poor to Charter challenges was seen as particularly critical. The Solidarity Coalition (British Columbia)) noted that "equality issues cannot be considered in splendid isolation from social and economic issues."

> Most often where discrimination exists there are underlying differences in income distribution. Obviously, accessibility to rights is seriously impaired without the financial capacity to fight for those rights. ... If our government is serious about public participation, it must ensure that Canadians have the necessary resources to participate."[84]

Submissions also consistently emphasized that equality cannot be left up to courts to implement and that "we do not want to litigate our way to equality."[85] It was emphasized that the Government should be acting immediately to implement the equality guarantee through positive measures such as those contained in recommendations of the Abella Report, not waiting to have these positive duties of equality litigated.[86] A more inclusive and open governance was seen as a critical component of equality rights. Ongoing consultation with people with disabilities and other equality seeking groups should be the norm, rather than the exception.[87] The Committee for Racial Justice recommended the establishment of a permanent, non-partisan committee or agency to monitor the implementation of the equality rights provisions of the *Charter*, conduct ongoing consultations with equality seeking groups and report directly to parliament.[88]

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[83]B-727. Social Planning Council of Metropolitan Toronto, pp. 26-28.

[84] B-541. Solidarity Coalition (British Columbia)) p. 7-8.

[85]Shelagh Day, Sub-Committee on Equality Rights, *Minutes of Proceedings* 17-4-1985 1635.

[86]*Ibid.*

[87]B-674. Canadian Paraplegic Association – Toronto.

[88] B-182. Committee for Racial Justice, p. 16

Equality thinkers also believed that section 15 would require a rethinking of the traditional adversarial relationship in court cases, so that the court could function as a constructive means by which government could have issues of inequality brought to its attention. Shelagh Day for LEAF, argued that:

> This document belongs to everyone and we ought not to see the government of Canada going in to argue against equality rights, unless it is a frivolous issue. We ought to see the Government of Canada on the side of equality-seekers, not simply acting as a lawyer for its department in a particular case. ... It seems to me this is something which ought to be considered, what kinds of instructions are being given when litigation comes up. I believe, as I have said, - and I think women across the country hope - that we do not find ourselves fighting our government, that we find our governments on our side.[89]

Contours of Equality, 1985

While the submissions of equality seeking groups before the Boyer Committee raised a diversity of issues and included very explicit demands for legislative and policy change, we can discern, from a distance of twenty years, a very distinctive common shape in the way equality seekers and other groups saw the new right to equality.

A central component was a demand for more positive conception of equality, placing new responsibilities on governments to identify and address issues of socio-economic disadvantage and systemic discrimination and to implement positive legislative and programmatic measures in both the public and private sectors.

A second common theme was the importance of making the right to equality reach the level of peoples' lives, engaging the concrete struggles for dignity and security, an adequate income, a decent job, access to childcare, transportation, adequate housing, education and healthcare. These interests were affirmed not as spheres in which discrimination ought to be prohibited but

[89] *Ibid*, 1635

rather as positive rights in themselves, linked to the notion of dignity and fundamental to any conception of equality that would be meaningful to peoples' lives.

A third common theme was that the right to equality must be interpreted in light of positive obligations on governments under international human rights law. Evolving international human rights norms, particularly in the area of social and economic rights, were seen as providing the foundation for assessing positive requirements on governments to act. It was seen as particularly important to link equality to social and economic rights in international law in order to provide substance to the social rights dimensions of equality.

And finally, it was affirmed that equality demanded a new form of participatory governance and access ti justice. In order to identify necessary proactive measures to address systemic inequality and socio-economic disadvantage, governments would have to develop new models of accountability to groups that had previously had little democratic voice. A critical aspect of this accountability would be through courts, and this new role for courts was seen as requiring new guarantees of access to justice as well as important changes in the relationship between courts, legislatures and disadvantaged groups. There was a consensus that governments must allocate new resources to ensure access to justice and that the relationship between courts and governments would have to be redefined by a new approach to litigation and positive remedies to systemic inequality. It was felt that governments must play an equality-promoting role even in court cases in which their policies were being reviewed for compliance with section 15.

This consensual paradigm of equality among the new rights-holders in 1985 was, it seems to me, a somewhat unique feature to Canada. The concept of equality and non-discrimination that had been imported from the American civil rights movement had been transformed, in the Canadian context, to incorporate a distinctive social rights tradition and the values of an emerging international human rights movement that found strong resonance with Canadian notions of equality and social rights. The application of positive rights to social and economic policy, not just to remedy under-inclusive benefit programs but to coherently address and remedy systemic

socio-economic disadvantage was seen by equality-seekers as essential to the way Canadians saw rights and governmental responsibility in the new "social contract".

This is not to suggest that disadvantaged groups in Canada were unique in the world for the value they placed on social rights. What was perhaps unique, however, was the idea that the right to equality, as it had been reformulated during the repatriation debate with the direct involvement of equality seeking constituencies, was expansive enough to encompass the kinds of social and economic rights that, in other jurisdictions, and in international law, would be enumerated separately. While there had been a few lonely voices during the repatriation process advocating inclusion of explicit reference to the rights in the *International Covenant on Economic, Social and Cultural Rights*[90], the primary energy around social rights protections in Canada was focused on entrenching a broad right to substantive equality that would be meaningful to peoples real struggles for dignity, security and social inclusion. Thus, a recurrent theme in the submissions from the major equality seeking groups to the Boyer Committee was that equality must be interpreted and applied broadly enough to encompass substantive social rights, to adequately implement Canada's obligations under international law, and to provide political, judicial and administrative remedies to the concrete issues of inequality faced in peoples' everyday lives.

4. Assessing Outcomes

Celebrating Our Victories

[90] See the submissions from Nick Schultz of the Public Interest Advocacy Centre on behalf of the National Anti-Poverty Organization, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-second Parliament, 1980-1981, Issue no. 29 (18 December 1980) 29:21; The Joint Committee subsequently considered an amendment proposed by Svend Robinson to include a reference to the *International Covenant on Economic, Social and Cultural Rights* in section 36 of the Constitution. Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-second Parliament, 1980-1981, Issue no. 49 (30 January 1981) at pp. 65-71.

In assessing the success of the new positive rights paradigm of equality that was presented so eloquently before the Boyer Committee, it is noteworthy that many of the significant litigation victories for equality seeking groups in the last 20 years have had significant "positive rights" dimensions.

The area of discrimination because of sexual orientation stands out, of course, when one considers that in 1986 only one province, Quebec, protected gays and lesbians from discrimination and virtually all benefit programs excluded same-sex partners from protections. The law reform victories across the country in this area, bolstered by precedent-setting victories in court in cases such as *Vriend*[91] and *M v. H*[92] must be recognized as being at the forefront of equality rights world-wide. The success of these equality claims has been a clear outcome of a substantive, positive rights approach to equality which has been advocated throughout by groups such as Egale.

In the area of disability rights, as Yvonne Peters has described in a recent paper[93], significant advances have been made, with the *Eldridge*[94] decision representing a high water mark in the recognition of the requirement of positive measures to ensure substantive equality. As with *Vriend*, the Supreme Court's decision in *Eldridge* places Canadian equality jurisprudence at the forefront of developments in equality rights internationally. The unanimous court's rejection of governments' arguments that section 15 "does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action" as a "thin and impoverished vision of s. 15(1)" [95] was about as clear a statement in support of the positive vision of equality presented by equality seekers in 1985 as one could hope for in the case.

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[91] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 64

[92] *M. v H.*, [1999] 2 SCR 3.

[93] Yvonne Peters, *Twenty Years of Litigating for Disability Rights. Has it Made a Difference? supra.*

[94] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

[95] *Ibid*, at para.73

In the area of sex equality, successful challenges to "spouse in the house" rules first in Nova Scotia in the *Rehburg*[96] case, and more recently, in Ontario in the *Falkiner*[97] decision, represent important litigation successes recognizing the intersectionality of poverty and sex discrimination in a manner that was emphasized by women's groups in 1985.

In the area of race, the *Sparks*[98] case in Nova Scotia, finding that excluding public housing tenants from security of tenure provisions constitutes discrimination because of race sex and poverty, and extending protections to conform with section 15 represents, again, a leading case internationally in the area of race, housing and poverty exemplifying the link between equality, interpreted positively, and social and economic rights such as the right to housing.

In the area of immigration, though not explicitly a section 15 case, the *Baker*[99] case, overturning an immigration officer's discriminatory[100] decision not to reverse a deportation order on humanitarian and compassionate grounds, was groundbreaking in establishing the link between international human rights law and *Charter* equality values - a basic tenet of the submissions from equality seeking groups to the Boyer Committee. The requirement that the exercise of discretion be consistent with these values has immense repercussions for ensuring that equality values inform the day to day exercises of administrative discretion that affect access to income security, work, housing, daycare, education and healthcare – precisely as advocated in submissions before the Boyer Committee in 1985.

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[96] *R. v. Rehberg* (1994), 111 D.L.R. (4th) 336 (S.C.)

[97] *Falkiner v. Ontario (Ministry of Community and Social Services)* (2000) 188 DLR (4th) 52 (Div. Ct.), (2002) 212 DLR (4th) 633 (CA).

[98] *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 244 (C.A.).

[99] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[100] The officer's reasoning for the refusal was the following: "The PC is a paranoid schizophrenic and on Welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will of course be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her Four CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity."

There have been a number of other significant victories which, though not explicitly section 15 cases, were clearly informed by the kind of equality values which were promoted by equality seeking groups before the Boyer Committee. The *Morgenthaler*[101] decision, establishing women's right to abortion, the *Dunmore*[102] decision, requiring protections of labour rights for agricultural workers, the *Marshal*[103] decision, establishing the right to earn a moderate livelihood as an Aboriginal treaty right, and *G(J),* finding that legal aid must be provided to low income parents in custody cases have all been important victories for a "positive rights" approach to equality.

The Role of the Court Challenges Program

All of the above victories have owed a lot to equality seeking groups playing an active role in assisting courts to better understand the vision of equality as both a right to non-discrimination and a positive social right. Indeed, when we consider how much these victories have owed to the constant presence of equality seeking groups intervening, particularly at the Supreme Court of Canada, to defend a broader vision of equality against the "thin and impoverished" vision propounded by governments, we can recognize that one of the most significant victories emerging directly from the Boyer Committee hearings was the extension of the Court Challenges Program to cover section 15 challenges to federal law, policy or action. Without that program, it is doubtful that the original vision of equality could have been so successfully promoted and defended by equality seekers over the last two decades.

The strength of the commitment of equality seekers to a program that is critical to the development of equality jurisprudence in Canada was evidenced when the federal government cancelled the program in February, 1992, as part of a deficit reduction effort, suggesting that

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[101] *R.v. Morgentaler* [1988] 1 S.C.R. 30.

[102] *Dunmore v. Ontario* (Attorney General) [2001] 3 SCR, 1016

[103] *R.* v. *Marshall*, [1999] 3 S.C.R. 456 at paras. 7, 8 and 59.

there was already a "substantial body of caselaw." Massive protests from equality-seeking and official language minority groups led to special hearings of the Standing Committee on Human Rights and the Status of Disabled Persons which recommended, in June, 1992, that the program be reinstated. The U.N. Committee on Economic, Social and Cultural Rights[104] and a myriad of other organizations and bodies recommended reinstatement of funding, and that funding be extended to include challenges to provincial government legislation and programs. The Program was reinstated in October 1994, though has still not, unfortunately, been extended to cover provincial challenges, where many of the most important issues related to poverty and social rights arise.

Despite its limited mandate, the Court Challenges Program has played a critical role in promoting the kind of participatory vision of governance and the use of courts that was put forward by equality seeking groups before the Boyer Committee in 1985, not simply by funding litigation, but by actively promoting a more inclusive equality rights movement. It was at the initiative of the Court Challenges Program in 1988, for example, that a meeting of anti-poverty organizations and legal advocacy organizations was organized in conjunction with a national meeting of other equality seeking groups, to address the lack of participation by anti-poverty groups in equality litigation. The Charter Committee on Poverty Issues (CCPI) was formed, with strong support from the National Anti-Poverty Organization (NAPO) and a number of other organizations involved in poverty law. Since that time, CCPI has intervened in a number of cases, including 11 cases at the Supreme Court of Canada, and taken forward a number of litigation initiatives to promote the kind of integration of social rights and equality which came through so clearly from other equality seeking groups at the Boyer Committee hearings. The recognition of poverty as a critical issue of inequality, and of the importance of including people

[104]United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C 12/1993 (10 June 1993) at para. 28: "The Committee recommends that the federal Government implement the recommendations of the Standing Committee on Human Rights and the Status of Disabled Persons, of June 1992, to restore the "Court Challenges Programme", and that funding also be provided for Charter challenges by disadvantaged Canadians to provincial legislation.

living in poverty in equality rights litigation has become a distinctive and positive feature of the Canadian equality rights movement.[105]

There is, in short, a lot for equality seeking groups to be proud of in what they have accomplished in the twenty years since many of them appeared before the Boyer Committee to advance a new and unique vision of equality. However, we must also confront, as we look back at all of this, a profound sense of unfulfilled expectations - not in the sense of false hopes, but of continued and recurrent failures of governments, courts and other institutions to live up to what was legitimately expected of them under the "new social contract".

Sidetracking, Rather than Mainstreaming Equality Rights in Political Institutions

In comparison to 1985, when there were numerous commissions and committees that had consulted with equality seeking groups and assisted in making their voices heard within the democratic process, there is now virtually nothing in our parliamentary system to ensure that equality seeking voices are heard or that equality rights will frame government policy and legislation in a proactive way. While international institutions work on "mainstreaming" human rights, our governmental institutions have sidetracked them. Imagine what a difference it would make if we had even one parliamentary committee on equality rights, with an ongoing mandate, and staff, to hear from affected constituencies and oversee the ongoing implementation of the right to equality. Is it too much to expect that the preeminent right of the *Charter* might enjoy the devoted attention of one parliamentary committee?

The Role of Human Rights Institutions

[105] Though, as noted, the limited mandate of the Program, excluding challenges to provincial legislation or policy, limits the ability of the program to fund cases relating to poverty. It is critical that the mandate of the program be extended to include these challenges if the poor people are to have equal access to its benefits.

It was also recognized in 1985 that while equality seekers needed resources to take claims forward on their own, they also needed support from equality promoting and enforcing institutions such as human rights commissions. Groups appearing before the Boyer Committee recommended an expanded mandate for the Canadian Human Rights Commission and major improvements to the *Canadian Human Rights Act*, so that the Commission could act as a positive force for the new vision of equality. Five years ago, the Canadian Human Rights Act Review Panel, chaired by Justice LaForest, toured the country to hear from equality seekers and others about their recommendations for changes to the *Canadian Human Rights Act.* The panel reported that "we heard more about poverty than any other single issue."[106] Yet proposals submitted by the panel to the Ministry of Justice for reform of the Commission, ensuring access to adjudication, improving the *Act* to prohibit discrimination because of social condition and giving the Commission a mandate to address issues of compliance with international human rights law have been gathering dust at the Ministry of Justice for four years.[107]

The UN Committee on Economic Social and Cultural Rights has twice recommended adding social and economic rights to the *Canadian Human Rights Act*, and this recommendation has been endorsed by the Canadian Human Rights Commission[108] as well as the majority of major equality seeking groups across Canada.[109] Yet the Commission still has no mandate to consider issues social and economic rights or of compliance with international human rights law binding on Canada. A country which used to provide leadership in the area of human rights institutions

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[106]Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Department of Justice, Ottawa, 2000) p. 114

[107]*Promoting Equality, supra*.

[108]Canadian Human Rights Commission, *Annual Report 1997* (Ottawa: Canadian Human Rights Commission, 1998) 2.

[109]Among the organizations supporting the inclusion of social and economic rights were the Charter Committee on Poverty Issues (CCPI), the National Anti-Poverty Organization (NAPO), Equality for Gays and Lesbians Everywhere (EGALE), The African Canadian Legal Clinic, Action travail des femmes, La table féministe de concertation provinciale de L'Ontario, the National Association of Women and the Law (NAWL), the Council of Canadians with Disabilities (CCD), Coalition of Persons with Disabilities (Newfoundland and Labrador) and Independent Living Resource Centre (St. John's, Newfoundland), Metro Toronto Chinese & Southeast Asian Legal Clinic, Affiliation of Multicultural Societies & Service Agencies of B.C. (AMSSA) and the Canadian Council for Refugees (CCR). Submissions to the Canadian Human Rights Act Review Panel, on file with the Panel.

internationally is in blatant contravention of the *Paris Principles*, endorsed by the United Nations Human Rights Commission and the General Assembly, which provide that a national human rights institution shall have "as broad a mandate as possible" with particular responsibility "to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation."[110]

Rather than promote an integration of international obligations with the right to equality, as promoted by equality seekers in 1985, our human rights institutions seem to proceed as if their mandate is to work in opposition to it. An example is the treatment by Ontario's Human Rights Commission of a recent complaint under Ontario's *Human Rights Code* submitted by a number of social assistance recipients denied access to adequate housing because of the gross inadequacy of shelter components of social assistance in Ontario. The complainants alleged that the governments' refusal to address the growing desperation of recipients, many of whom are forced into homelessness, violates the rights of welfare recipients (an enumerated group in housing in Ontario's *Code*) to equality in housing. The complainants relied, in part, on the argument that the substantive right to equality in housing in Ontario's *Code* ought to be interpreted in light of international human rights law to include positive obligations on governments to address this kind of systemic denial of access to housing. The Ontario Human Rights Commission recently dismissed the complaints as 'frivolous', thereby denying the complainants access to a hearing before a Human Rights Tribunal.[111]

The Role of Governments in Equality Cases

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[110] *National Institutions for the Promotion and Protection of Human Rights*, GA Res. 48.134, UN GAOR, 48th Sess., 8th Plenary Mtg, UN Doc. A/RES/48/134 (20 December 1993); *National Institutions for the Promotion and Protection of Human Rights*, Res. 1994/54, UN HRC, 56th Meeting, UN Doc. E/CN.4/RES/1994/54 (4 March 1994) at paragraphs 2 and 3(b).

[111] C. B. v. *Her Majesty the Queen in Right of Ontario, as represented by the Minister of Community Family and Children's Social Services* Unreported, Ontario Human Rights Commission, File No JWIS-5JUR3L, Decision to Dismiss the Complaint Pursuant to s.34(1)(b) of the Human Rights Code, 17 March 2004) [On file with the author]

Equality seeking groups in 1985 also said they expected governments to be allies rather than adversaries in the struggle for substantive equality. Yet as the UN Committee on Economic, Social and Cultural Rights has observed:

> The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.[112]

Time and again equality seeking groups have faced benches full of lawyers for attorneys general intervening to oppose equality claims. It is amazing how governments that can do nothing but bicker at each other at inter-governmental meetings on healthcare suddenly become very cozy when these divisive issues are dealt with in court. In the *Eldridge* case, the Federal Government was not even prepared to defend the equal application of the principles of the *Canada Health Act* to the deaf and hard of hearing, arguing instead that denying the deaf and hard of hearing access to adequate healthcare, while clearly a violation of section 15, can be justified under section 1 of the *Charter* because "available funds were used in a manner which government had determined to be a reasonable balancing of competing social demands."[113] When provincial governments have intervened in cases like *Gosselin*[114], to argue that the right to equality implies no positive obligation to comply with international human rights law by ensuring that disadvantaged groups are not denied assistance necessary for adequate food, clothing and housing, the Federal Government, which ratified the treaties, with agreement from provinces to implement them in areas of provincial jurisdiction, has been nowhere to be seen.

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[112]United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/1/Add.31 (10 December 1998) at para. 14.

[113]See the Government's attempt to defend its position to the UN Committee on Economic, Social and Cultural Rights in United Nations Committee on Economic, Social and Cultural Rights,Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights,* HR/CESCR/NONE/98/8 (October, 1998) question 6.

The Role of Courts: A Claim That Has Not Really Been Heard

Despite the significant victories of equality seeking groups over the last two decades, one is left with a sense, on surveying the role of courts with respect to equality as a positive social right, that the central claim to equality articulated before the Boyer Committee in 1985 has never really received a hearing. Equality seeking groups, through their interventions, writings, and advocacy, have succeeded in keeping the door open to this positive vision of equality, but there has not yet been a case in which the Supreme Court of Canada has been prepared to hear it or to affirm it. All of the cases cited above, though moving in the right direction, were ultimately found by the Court to fall within a framework of an under-inclusive benefit – resolved through the fairly straightforward application of a principle of formal equality to a benefit-conferring program. On no occasion has the Court considered evidence of persistent or worsening socio-economic disadvantage of an enumerated group, and found, on the basis of that evidence, that positive action must be taken to ameliorate it.

The Court came close in *Eldridge* and *Vriend,* to affirming a core obligation to address and remedy disadvantage. The Court could have chosen to affirm in *Eldridge* a positive obligation on governments to provide appropriate healthcare to the deaf and hard of hearing as a social right to equal citizenship in Canada. It could have affirmed in *Vriend* the obligation to legislate human rights protections for groups facing discrimination as a positive duty on governments, emanating from the equality guarantee. This is certainly the way these cases would be dealt with under international human rights law.[115] But in each case, the Court chose, in the end, to remain with the paradigm of under-inclusion, leaving unanswered a question which most equality-

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[114]*Gosselin v. Quebec (Attorney General)* [2002], 4 SCR, 429.

[115] See, for example, U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 5*, 11th Sess., 38th Mtg., U.N. Doc. E/C.12/1994/13 (1994) para. 9 on obligations with respect to people with disabilities. With respect to the obligation to legislation human rights protections, treaty monitoring bodies have been clear that providing legal remedies to discrimination in the private sphere is a positive duty of states parties. The *International Covenant on Civil and Political Rights* establishes that "where not provided for by existing legislative or other measures" governments are obliged to "to adopt such legislative or other measures as may be necessary to give effect to the rights" (article 2).

seeking groups in 1985 would not have even posed as a question - that is, whether section 15 would require governments to provide any healthcare at all, or any human rights protections against discrimination. In 1985, equality seekers did not question those obligations. They assumed them to be at the centre of the positive concept of equality that had been entrenched in the *Charter*.

In fairness to the Supreme Court, however, I am not aware of a case in which the section 15 claim has been placed squarely before it as a positive rights claim rather than an allegation of an under-inclusive benefit. The *Auton*[116] case, currently reserved at the Court, may be such a case. In that case the respondent parents have argued that section 15 imposes an obligation to fund the treatment they seek for their children irrespective of any particular statutory framework. As I watched the televised hearing of the *Auton* case over the summer, however, I was struck by how anxious the court seemed to be to keep the analysis within a framework of discriminatory under-inclusion from a single program or benefit, particularly when counsel for the respondents suggested that it did not really matter to them whether the necessary program was provided as a health service, a social service or an educational program - as long as the need was met. That kind of holistic approach to governments' equality obligations, based on an assessment of the unique situations and needs of disadvantaged groups, rather than on the wording or scope of a particular legislative provision is what equality seekers emphasized in 1985 as the essence of equality. Yet courts would still rather not hear this type of claim.

Judicial Competence

Some would say that courts are reluctant to hear social rights equality claims because they lack the competence to adjudicate these kinds of equality claims that are, in essence, social rights

[116]Auton (Guardian ad litem of) v. British Columbia (Minister of Health) [2000] B.C.J. No. 1547; Auton (Guardian ad litem of) v. British Columbia (Minister of Health) [Judgment re remedies/damages] [2001] B.C.J. No. 215; Leave granted to SCC

claims. The experience of equality seekers in international fora, however, has convinced us of the opposite.

In the last decade equality seeking groups in Canada have increasingly turned to international review procedures as an adjudicative forum for substantive rights claims that have not been heard domestically. Understaffed and part-time UN Committees, with only a couple of days of a session every five years or more allocated to reviewing the implementation of a broad range of rights in Canada, have been inundated with lengthy briefs and oral submissions from a wide range of equality seeking groups in Canada.[117] These have documented and argued complex issues of policy and legislation of the sort that were presented to the Boyer Committee. By and large, the treaty monitoring bodies have risen above their significant institutional limitations. They have done a remarkable job of identifying the critical areas in which governments in Canada have failed to meet their human rights obligations, and provided sensible and reasoned recommendations for remedying them.[118] If a treaty monitoring body sitting for two days in Geneva or New York can demonstrate this level of competence in adjudicating complex social rights issues in Canada, there is no reason that courts and tribunals in Canada could not rise to the task. Evolving international jurisprudence, bolstered by domestic experiences in countries with explicit protection of social and economic rights, such as South Africa, have made protestations around lack of judicial competence increasingly less convincing.

Outcomes Assessment

These days, when equality seeking groups are lucky enough to secure funding from the federal government or one of its funding agencies, we usually receive a contract which requires us to be

[117] See, for example, the collection of submissions made to the Committee on Economic, Social and Cultural Rights by Canadian NGOs at the last periodic review of Canada, in 1998, online at <http://www.equalityrights.org/ngoun98>

[118]For an analysis of these concerns and recommendations see, Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights" (2000) 15 *J. Law & Soc. Pol'y* 117 and Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight" (1999) 10 *Constitutional Forum*.

accountable to measures of "outcomes". Perhaps our governments, as a party, and our courts, as trustee of the social contract of equality rights that came into force twenty years ago, should themselves be held accountable in the same fashion to the outcomes expected by citizens. As Jane Shackell of LEAF said on April 17th , equality seekers most of all expect the right to equality to make a real difference in the lives and everyday struggles of women and other equality seeking groups for decent paying jobs, income security, daycare, housing. Those were the expected outcomes. Have these expected outcomes been realized?

Since the Supreme Court issued its first decisions under section 15 in *Andrews*, half a million more households have fallen into poverty.[119] The number of single mothers living in poverty has increased by more than 50% and their poverty has in many cases deepened to the point of extreme destitution. Foodbanks, a rare phenomenon in the early 1980's are now a critical means of survival for three quarters of a million people every month, including over 300,000 children, but still fail to come close to meeting the needs of an estimated 2.4 million hungry adults and children.[120] A national child-care program, first promised by the Mulroney Government in 1984 and then by the Liberal Government in 1993, remains the "longest-running broken political promise in Canada."[121] Women and children have been the most dramatically affected by the epidemic of homelessness, with the number of homeless women and children living in shelters in Toronto more than doubling since 1989.[122] The poverty rate for visible minority women is now as high as 37%. One third of households in which one parent is an immigrant now live in poverty, which includes 231,000 children. The average income of Aboriginal women is

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[119] National Anti-Poverty Organization (2003) *Face of Poverty: An Overview* online at http://www.napo-onap.ca/en/issues/face%20%20of%20poverty.pdf.

[120] L. Orchard, R. Penfold and D. Sage D, *Hunger Count 2003: A Surplus of Hunger* (Canadian Association of Food Bank, Toronto, 2003) Online at www.cafb-acba.ca/pdfs/other_documents/HC2003_ENG.pdf.

[121] Carol Sanders, " MP seeking national child care program. "Longest-running broken political promise in Canada"" *Winnipeg Free Press*, (28 Sep 2004).

[122]City of Toronto (2003) Toronto Report Card on Housing and Homelessness 2003 [Online] Available: www.toronto.ca/homelessness/pdf/reportcard2003.pdf [10 August 2004]

$13,300.[123]

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

5. Some Possible Twentieth Anniversary Strategies For Reclaiming Expectations of Equality

Taking Forward More Explicit Positive Rights Equality Claims

Faced with very diminished resources, most equality seeking groups have largely given up on advancing cases on their own, from trial level. Many of us have focused on intervening in cases that reach higher levels of court as a way of achieving maximum effect with scarce resources. During very regressive years for equality rights, equality seeking groups have successfully defended a broader equality paradigm through interventions and have built up some helpful positive rights equality jurisprudence. We have also used international human rights bodies to develop a much fuller body of jurisprudence on Canadian equality issues than was available to equality seekers in 1985. In those days, it was primarily the provisions of the treaties alone which could be cited in support of substantive equality claims. We now have detailed jurisprudence from treaty monitoring bodies emerging from periodic reviews of Canada, addressing many of the issues that we might want to take forward as positive social equality claims.

In light of these accomplishments, it may be the time to more actively assert the claim to equality as a positive social right. By collaborative approaches, equality seekers might together take forward cases which are framed unambiguously as positive rights, social equality claims, with no

[123]National Anti-Poverty Organization (2003) *Face of Poverty: An Overview* online at <http://www.napo-onap.ca/en/issues/face%20%20of%20poverty.pdf.>

reference at all to an under-inclusive law, program or benefit. This need not involve setting aside current equality jurisprudence, just framing the notion of under-inclusion and equal benefit more broadly, as it was understood in 1985, as a challenge to under-inclusive governance and failures to take appropriate measures to protect and enhance the social rights of groups guaranteed equality in section 15. Such cases could build on victories that have previously been won, but insist on placing them in a new conceptual framework, considering the larger frame of systemic socio-economic inequality rather than the smaller frame of statutory under-inclusion.

Infiltrating Other Decision-Makers with Equality Rights Arguments

We might also try to more stubbornly assert the positive rights paradigm in other areas of law, using section 15 in conjunction with international law as a requirement of reasonable decision-making. The Charter of Rights Education Fund submission in 1985 emphasized that section 15 needs to be applied to concrete decisions related to eligibility for welfare and housing. There are hundreds of decisions made every day in Canada, to deny a discretionary benefit needed for healthcare or to evict families into homelessness which are in violation of international human rights law and arguably of section 15. Such decisions can and should be challenged for their inconsistency with section 15 and with international human rights values.

A strategy of requiring administrative bodies to deal more directly with section 15 and international human rights law may be helpful in reclaiming the kind of equality culture which was expected, in 1985, to infuse all levels of decision-making. Arne Peltz pointed out a number of years ago in a paper prepared for the Court Challenges Program that when we talk about claiming our *Charter* rights, we typically think about "going to court" and not "going to the board."[124] The Supreme Court's revisiting of the issue of the jurisdiction of administrative bodies to consider *Charter* issues in *Martin*[125] may now provide an opportunity for a more diverse strategy of advancing section 15 claims before the bodies that are making the decisions

[124]Arne Peltz, *Deep Discount Justice*: *The Challenge of Going to Court with a Charter Claim and No Money* (Unpublished Manuscript on file with the author).

[125]*Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 SCR, 504.

of first instance - those which are most likely, in fact, to affect peoples' access to income security or housing. Rather than taking issues related to income security or housing policy to courts for section 15 review, when the courts may be unfamiliar with the issues (and not great on equality, either) it may be helpful to work in the other direction, and take section 15 and international law more consistently before administrative bodies.[126] In addition, if we can manage to get through human rights commission "gatekeepers" to human rights tribunals, we may now be able to add section 15 claims to human rights complaints and begin to use human rights tribunals again as a nurturing ground for progressive *Charter* equality jurisprudence.

A recent consent court order in a case in Nova Scotia sending a decision back to the Social Assistance Appeal Board for a re-hearing of a decision to deny access to dental surgery is a good example of this strategy of "infiltration". The order contained a provision under the heading "Guidance to the Board When Interpreting and Applying the Law to the Facts of the Case" requiring that the board ensure that the exercise of discretion under the statute be in accordance with the purposes of section 15 of the *Charter* and with Canada's international human rights obligations, particularly the right "to the enjoyment of the highest attainable standard of physical and mental health" as provided in the *International Covenant on Economic, Social and Cultural Rights*.[127]

Diverse Claims within a Common Framework

There are many other strategies we might develop to reclaim the expectations of equality-seekers in 1985. But perhaps the key is to realize that the greatest strength of the movement was, and continues to be, that equality seekers speak with many and diverse voices, from within a shared vision.

[126] Though the independence and competence of administrative tribunals is negatively affected by political appointments, a strategy of appealing decisions that are inconsistent with section 15 and with international law may begin to improve decision-making in a number of areas.

[127] Sandra McKeigan v. Department of Community Services, Province of Nova Scotia (Supreme Court of Nova Scotia Court File No. S.H.205270. Consent Order Leblanc, J., August 17, 2004.

This convergence of visions of equality is what I recall somewhat nostalgically from my own early involvement with lobbying for changes to Ontario's *Human Rights Code* in that province's hearings into what was required for conformity with section 15 in 1985-86. There were so many groups working on so many different issues, but the shared framework and vision grew stronger as the hearings before the Standing Committee on the Administration of Justice into Ontario's *Equality Rights Statute Law Amendment Act* (Bill 7)[128] progressed. The agenda mixed all equality issues together. Four women living on social assistance in a shelter might be followed by the Coalition for Gay Rights in Ontario, followed by the United Senior Citizens, followed by Women Working with Immigrant Women, followed by several women with disabilities. Each submission seemed to strengthen the others. It was contagious. Even the Committee members found themselves energized by the process, as they continually returned to caucus with more suggested additions to the statute. There was a feeling of being involved in something important that was happening to the country.

A Twentieth Anniversary Equality Coalition?

Perhaps, without being overly ambitious, we should think of establishing a Twentieth Anniversary Equality Coalition which could set itself a couple of goals for the twentieth anniversary of section 15. One might be a collective strategy of targeted resistance, effected through the internet and email, focused not on the larger public campaigns, but on smaller events that might otherwise go unnoticed. So, for example, when the Ontario Human Rights Commission dismissed the complaints of women on social assistance about desperately inadequate shelter allowance as "frivolous" , an email could go out to the Equality Coalition. Instead of getting only an "Application for Reconsideration" the Commission might at least receive a flurry of emails from leaders in the equality rights movement so that those who have the courage to take forward these kinds of claims would feel supported by a national movement.

On the more positive side, perhaps we could collectively lobby the Minister of Justice for implementation of a twentieth anniversary agenda, and distribute it at every twentieth

[128]SO 1986, c. 64.

anniversary of section 15 cocktail party in Ottawa. Some of the items we might consider for our list would be a parliamentary committee on equality and human rights; an improved *Human Rights Act* in conformity with the requirements of the United Nations; extension of the mandate of the Court Challenges Program to include provincial challenges; inclusion of human rights obligations in inter-governmental agreements and the Social Union Framework Agreement; a review procedure for government pleadings in equality cases; a procedure for follow-up to the recommendations of treaty-monitoring bodies; a fund for equality seeking groups for organizational funding.

6. Conclusion

Some, of course, might suggest that in light of the "outcomes" of the expectations of equality in 1985, we should instead reconsider the value of this unique Canadian paradigm of equality, this idea that the right to equality can carry with it so broad an array of social rights and government obligations. Should we question whether there were too many expectations placed on section 15?

In other jurisdictions such as in South Africa, social and economic rights are explicitly enumerated as justiciable rights. Yet in order to establish a foundation of justiciability and effective review of such rights, and to ground an understanding of where governments must begin in the process of implementing them, in the face of massive problems and scarce resources, my sense is that social and economic rights have been approached by advocates and courts in South Africa within what we in Canada think of as an 'equality' paradigm. In the *Grootboom* and *Treatment Action Campaign* cases in South Africa, for example, the Constitutional Court adopted a standard of "reasonableness" which incorporated as a central principle the obligation to take positive measures to address the needs of the most disadvantaged groups in relation to the enjoyment of fundamental social rights such as housing and

healthcare.[129] It is equally true that for us in Canada to find a starting place for our broad vision of substantive equality, and to give courts guidance about where to start in identifying the nature and extent of positive obligations to address socio-economic disadvantage and ensure that the right makes a different in the real struggles of disadvantaged groups for dignity and security, we in Canada tend to approach equality within a social rights paradigm. Whether equality is read into explicit social rights, or whether social rights are read into equality does not really matter. A purposive approach moves in the same direction and ends up in the same place. The point, as the submissions to the Boyer Committee made clear, is to make the rights real, to ensure that they address peoples' real lives and struggles, to solve, in Lynn Smith's words, the real inequality problems of our society.

In Canada, in 1982-85, social rights were read into equality rights. That became the uniqueness of our constitutional democracy. It has framed many of the important contributions of our equality seeking groups to developments in international law. Equality meant a lot to people when they fought for it in the *Charter*, and it still means a lot to us. We should not to be talked out of our expectations.

[129] *Government of the Republic of South Africa v. Grootboom* (2001) (1) South African Law Reports 46 (CC); *Minister of Health and Others v. Treatment Action Campaign and Others* 2002, (5) South African Law Reports 721 (CC) (Date of Decision : 5 July 2002)