

The Meaning of Equity

By Gayle MacDonald

Le présent article offre un exposé sur la signification du mot « équité » dans le cadre des dispositions sur l'égalité contenues dans la Charte des droits et libertés. Les interprétations légales du mot « égalité », en termes de similitude, de différence et d'avantage, sont analysées dans une perspective féministe qui utilise le système judiciaire en tant qu'instrument d'évolution sociale.

The meaning of equity is fundamentally, I believe, about rights. The idea of equality on which employment equity and pay equity rests, is about treating people without discrimination. The right to be treated without discrimination is entrenched in our Charter of Rights and Freedoms, section 15. That section claims that people should not be discriminated against before and under the law on the basis of age, race, sex, religious or ethnic origin, physical or mental ability. I would agree, as some recent legal cases have indicated, that discrimination on the basis of sexual orientation and marital status are arguably similar enough to the designated grounds under section 15, to be included in this list. Further, affirmative action programmes are protected under subsection 2 of this provision.

The reason I highlight Charter equality guarantees is that these provisions are legally enforceable in the public realm, and for many of us, section 15 represented a true beacon of hope in the search for equality for all within Canadian social structure. But despite the claim of those detractors of employment equity legislation (most often employers, rather than 'stakeholders'¹) who state that 'equity legislation is not necessary, it is covered by other legislation' or that 'employment equity is about the needs of white women' and therefore can be dismissed, readers need only be reminded that despite section 15, and some would argue as a result of it, there has been an unprecedented backlash to the concerns and the needs of the disadvantaged in Canada. This back-

lash has taken many forms, political correctness is but one. What I mean by backlash is what William Ryan refers to as "blaming the victim."

For example, if a recession hits, then those hardest hit by economic downturns, the disabled, white women, aboriginal women, women of colour, lesbians, single parents and immigrants are blamed for monetary restrictions which have very little to do with them. We are, as the saying goes, "the last hired and the first fired" when economic times get tough.

Feminists need to examine ideas around equity to determine how to combat these practises. Many articles in this journal issue point to strategies on a variety of fronts within "the movement."²

The focus of this discussion, however, will primarily look towards definitions of equality in law, where discussions around equity now (since the 1985 proclamation of section 15) primarily involve Charter equality rights. Hopefully, the reader will be able to trace where we have "come from" in ideas around equity, with some idea, perhaps, of where we are "going."

The Definition of Equality

Recent writings by lawyers, sociologists and professors of jurisprudence who are concerned with the impact of equality decisions on women's lives include Eberts (1985 and 1990), Miles (1985) and MacKinnon (1982 and 1987). Eberts' concern is that a guarantee of equality rights in law should not be treated by women as an implicit understanding by the judiciary or the legal system of the concept of equality. In other words, legislating a legal equality guarantee may neither ensure equality for women, nor may it ensure a definition of equality acceptable to women. Eberts argues for a broad interpretation of equality in law by the judiciary to ensure equality of result. Miles claims that the concept of equality appreciated by the courts is based on an explicit acceptance of the male norm and she

advocates a rethinking of the concept of equality in law altogether. Her premise raises an interesting dilemma. How does one resolve the inherent inconsistency that may exist by claiming any concept of equality norm? For example, the Aristotelian notion of absolute equality, that is, equality defined as "sameness," has dominated legal thinking. The problem with this concept is that it may not represent the lived experience of women. I define "lived experience" in a similar fashion to Dorothy Smith (1987), as the reality of women's lives, a reality which often stands in contrast to patriarchal assumptions, theories and hopes for women's lives.

Basically, an equality of "sameness" purports that women and men are to be treated equally [read the same] regardless of whether women and men have been treated the same up to the point at which the equality standard is applied. No consideration is given to the possibility that treating people "the same" may yield unequal outcomes in a context of systemic inequality.³

It could initially appear that being treated equally or the same is the goal of equality seekers,⁴ and has been so for a long time. An example of this is the women's movement's struggle for employment equity (Abella, 1984). But context is critical for any definition. If the conditions of women's work are such that the "same" work done by women and men is treated differentially in pay rates, then clearly, the two groups are not treated "equally."⁵ But would an absolute standard of equality such as this work in all conditions? The answer is definitely not. For a rationale of absolute equality ignores the lived experience of some people's lives. For example, in circumstances where women's and men's responsibilities differ significantly, women, as a direct result, simply do not have the same opportunities as do men in specific public, economic or political arenas. An absolute standard of equality would do little more than reinforce the

belief that equity somehow exists in the reality of women's lives.

The illusion that women have achieved equality is almost as pervasive as the reality of oppression (Brodsky and Day, 1989:11).

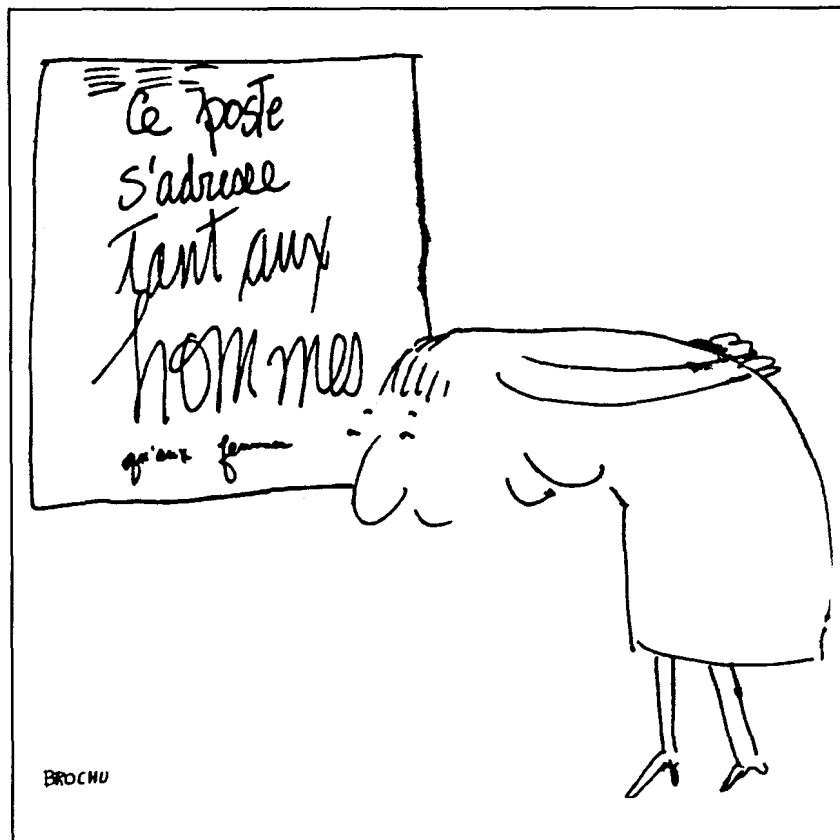
Men and women are not equal, not in socio-economic status (Mies, 1986), not in wage scales (McDermott, 1991), not in career opportunity nor advancement (Armstrong and Armstrong, 1983; Pask et al., 1985) and certainly not in the home (Delphy, 1984; Luxton, 1980; Luxton and Rosenberg, 1986).

To treat "equals equally and unequals unequally," in the Aristotelian sense is neither accurate nor useful. It simply reinforces the type of judgment found in Bliss. Stella Bliss was fired from her job because she was pregnant and found she was ineligible to collect either unemployment insurance benefits (due to her pregnancy) or pregnancy benefits (because she was unemployed). In this case, the court refused to invalidate a sector of the Unemployment Insurance Act which set out different rules for eligibility to unemployment insurance for women who had just given birth to a child. Judicial reasoning such as this formed the basis for the inclusion of the phrase "every individual... has the right to the equal protection of the law and to equal benefits under the law" in section 15 (Atcheson et al., 1984).⁶ Clearly, Bliss was denied benefits under the law. The decision in this case would contravene the equality provision as it now reads in the Charter of Rights and Freedoms.

Some initial suggestions that take us beyond the 'absolute equality' framework look to a 'sex-specific' theory of equality. Essentially the sex-specific concept of equality offers a way out of the rigidity of the absolute equality theory. By stating

that there are some situations in which the sexes should be treated differently, advocates of this position are reclaiming maternity leave for mothers and exploring support systems for women breast-feeding at work.

It could also be argued, however, that giving women "special status" in law reaffirms prevailing notions that women need protectionist policies in order to function in the 'public' world of men. In these instances, advocates claim that a 'sex-neutral gender-specific' concept of equality could fill the desire for sameness,



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and the need for differences when appropriate. For example, the situation cited above regarding maternity leave could be argued simultaneously with a policy on parenting leave for both sexes. This would be consistent with the 'sex-neutral gender-specific' position, protecting women when necessary, and allowing both sexes to fully participate in responsibilities that should be shared. To state equality as a fundamental principle of law, however, does not guarantee equality of result, as the Blainey case would illustrate.

Justine Blainey is a young woman who wanted to play hockey on a boy's team in September, 1985. She had practised with the team for a year, and she and the team's coach agreed she should play in the

upcoming season. All members of a team are subject to the regulations of the Ontario Hockey Association. Justine was denied on the basis that if she wanted to play hockey, she should play with the women's league. That league did not afford the challenge that her athletic ability required. Blainey filed a complaint with the Ontario Human Rights Commission that the Ontario Hockey Association's ruling was discriminatory. The case eventually reached the courts, which found in her favour. She was 12 years old when the proceedings began, but by the time legal

proceedings were terminated, she was too old to play in the league. Although she eventually won, the result of the case did little by the time it was rendered.

Other principles in law have the same effect. For example, the "statute of limitations" in law applies to the time period within which legal proceedings may be taken. Admittedly, such a principle prevents miscarriage of procedural justice; that is, there is a limit to how long after an incident one has to live with the threat of a law suit or criminal prosecution. But this principle unevenly

impacts on women in cases of incest. Often a woman reaches at least the age of majority before she can report the crime. A charge of sexual assault, however, if proceeded with as a summary conviction offence, needs to be filed in a period of six months after the alleged assault (C.C.Cs. 785). If the victim wishes to obtain damages in a civil lawsuit, she must bring her action within two years of the assault. If the incest was a single act, and if the woman was a very young child when the act occurred or if she only recovers the memory after years of therapy, it is reasonable to assume that neither six months (the limitation period on a summary conviction), nor two years (the limitation period on a civil suit) may reflect the

reality of most women's experience.⁷ As Golding states: "there is little point in devising standards or rules of fair procedure unless following them results in just decisions or outcomes" (Golding, 1975:120).

The case of Schacter is yet another example where a legislative guarantee may not always result in just outcomes. Mr. Schacter argued that biological and adoptive fathers who want to share the responsibilities of child-rearing should receive the same benefits under the law as do biological mothers. The difficulty in this case was not his objective, but the arguments by which he hoped to achieve his objective. He was arguing that biological fathers should get a share of biological mother's maternity leave benefits. This argument greatly endangers hard-won maternity benefits for women in law. To achieve his objective, the argument would be more accurately an argument for increased parenting leave, rather than one for decreased maternity leave. Although Justice Strayer of the Trial Division of the Federal Court accepted the intervenor's⁸ arguments and extended parental benefits for both parents while protecting maternity leave, it still leaves open the possibility that his decision can be challenged at a later date; in fact, the federal government is appealing the Federal Court decision.

It appears that the focus for a researcher interested in examining what equality actually means in Canadian law needs to look beyond definitions of equality in law, beyond the fact that equality is a legislated guarantee, in order to determine on what basis decisions and arguments around the concept of equality are made.

These arguments concerning definitions of equality tend to obfuscate a critical point for feminist work, however. Arguments that are concerned with which definitions of equality are to be utilized effectively in a court of law do not point up the inherent contradiction of using any concept of equality fixed in a liberal democratic/male dominated tradition. Equality, by definition, comes from a liberal humanist tradition which begins with Jean-Jacques Rousseau and ends up in the legislation of a liberal democratic state, of which the Charter of Rights and Freedoms is part. The inconsistency resurfaces; that is, do the study of equality rights which

are framed in patriarchal discourse deserve the study and attention of feminist scholars wanting to advance the positions of women in society by using law as a mechanism of social change? Can law be used at all? Judy Fudge (1991) is skeptical. She claims:

The problem with an approach that requires us to litigate our way to gender neutrality is that litigation favours a few at the expense of the many. Only large, well-financed, women-dominated unions can afford, both politically and economically, to litigate. (75)

Despite the dangers of litigating equality, organizations such as the Women's Legal Education and Action Fund (LEAF) have taken cases on equality rights since 1985. Indeed, the issue may have now become whether or not to put all the proverbial "eggs" in the litigation basket. As recently as February, 1992, key strategists within LEAF, such as Mary Eberts, were publically stating that political action is as necessary to feminist advances around equality as is litigation.⁹

In order to assess the utility of legislation, however, feminist researchers need to analyse, expand and influence definitions of equality in law. For if the terms on which equality rights are based are not contested by feminists, then the theory and vision of the "results" of a legal equality rights challenge may look very similar to every other liberal democratic process. Simply put, neither the guarantee of equality rights in law nor debates over which definition of equality is most effective in court will ensure that equality rights in practise resemble the intent of said equality rights as legislated.

To analyze the concept of equality, then, feminists need to address not only the intent of law, but the process of working through law to formulate social change. Any analysis which does not reveal this process denies the experiences of those who are actively engaged in the struggle for equality. To deny the voices of women is, I would argue, akin to denying the very struggle upon which definitions of equality are based. Such denial ultimately begs the question. Where are all of those women, those sisters of mine, who are not writing about equity today because they are cleaning houses, or scrubbing toilets or looking after someone else's children,

drycleaning clothes, or packing groceries and who are simply too busy putting food on the table to have the leisure to "write" about equity? In what legislation can I find guarantees for those women that their jobs will be secure tomorrow, that they will not be surreptitiously slipped into "casual" categories, or temporary contracts simply because they may have, in the best case scenario, asked to be promoted, or in the worst case scenario, tried to start a union?

Those who do this work, as well as those who act on behalf of clients, those who struggle for equity in the workplace, those who are underpaid and exploited, are engaged in the process of formulating equality praxis in this country.¹⁰ However, the process of the shaping of law and what equality looks like on an everyday level must not be lost to legal and academic arguments based on results. The manner by which feminists reach towards equality is just as critical as the point when we have reached it. If this were not the case, the ontology of feminist struggle would be a temporal one. We would define the effectiveness of feminist work only by outcomes, when we readily acknowledge that much of the important work of feminism occurs in the process of reaching towards result, those points at which women realize their feminism.¹¹ We need to be attentive to our struggle as much as we are attentive to the outcome of struggle. That attentiveness needs to be turned to the process of the guarantee of equality, the struggles around formulation, definition and argument that lie in the words of those who perform those tasks daily.

Hence, we need a systematic analysis of equality rights to determine the contributions of traditional philosophical reasoning in the formation of a definition of equality, as well as the contributions to equality theory that schools of thought specifically interested in the ability of law to affect social change—which means the contributions of the feminist movement.

Future Directions

Recent, alternative definitions around equity in law are primarily practised, at the time of this writing, by the Women's Legal Education and Action Fund. Theories around equality have moved and shifted from the "sameness/difference" debates to concepts that capture the idea

of "disadvantage."¹² What this shift does is to capture the nature of women's reality in the courtroom. Women are not "equal" to men at the door of the courtroom; women are not even equal to each other. It was clear to feminist litigants that a definition to capture this idea, to build on the critical Andrews decision (which effectively erased the need to "similarly situate" groups to each other to prove discrimination, and which was detrimental to arguing women's inequality without a comparison group), to illustrate women's inequity as it exists, rather than as it appears, was critical. The concept of "disadvantage" is used by LEAF to capture the idea that women, due to differences based on sex, as well as differences based on class, race and ethnic origin, age, sexual orientation and physical or mental ability, differ not only from men, but from each other; and that these differences may largely disadvantage women within legal definitions that are based on male privilege.

This departure is a critical point in the utility of legislative ends to meet feminist concerns. For a concept such as "disadvantage" to be used in legal circles, while not entirely new, is relatively novel in terms of work around the specific situations encountered by women in equality cases. To argue that women's discrimination exists in its own right, and not in opposition to standards set by men (MacKinnon, 1989) is new. But this discussion around which definition in law obfuscates another, is a critical point.

Have feminists decided, in the end, to use the legal arena to affect change? One could argue that given the recent interest by women's groups in the Employment Equity Consultation Hearings of the NDP government in Ontario that there is some agreement on this point.*

One thing is clear. Judging from the response¹³ to the Hearings, it is safe to say that most groups concerned with equity agree that legislated employment equity is an absolute necessity. Without legislation, without mandatory reporting on the part of both the private and public sector, without clearly defined scales that take into account gender divisions of specific groups (aboriginals as a category is not enough, for example), without mandatory goals and timetables set for the achievement of equity, informal rules will become the order of the day.

The problem with informality is that it has *never* protected the disadvantaged (Williams, 1991). Formal rules and procedures, clearly defined categories that have some relationship to reality, such as concepts that get at why so called "targeted" groups are leaving employment, or disability defined as more than wearing glasses, end up making equity possible in recessionary times.

The possibility of equity in a recession is a point which any systemic analysis of equality rights reveals, and it is an argument that needs to be made on the basis of the price paid when issues of equity are ignored. The idea that equity "costs" is, in my mind, a ridiculous idea. Let me make that point another way. *Inequity costs*. Unequal opportunities in the job market, deceptive categories and job descriptions which cover gross inequities in wage disparities, forced termination of work, all represent increased costs to employers, governments and people. The economic costs of not advancing employees, of denying wages on the basis of highly spurious categories and reasoning, costs money to employers, insurance companies and the state in terms of worker health, emotional stability, productivity and efficiency.

It is a productive, stable, healthy, adequately paying/promoting and humane work environs, free from sexual harassment, to which equity work is dedicated. The right for any woman to work, to live and to grow in such a space, is ultimately, the true meaning of equity.

* See the excerpts of briefs presented to the Employment Equity Commissioner in this issue.

¹ National Action Committee Brief to the Ontario Employment Equity Consultations, January, 1992.

² I use quotations here to indicate my skepticism around this term. The idea there is but one "movement" within feminist work has effectively denied the contributions of many women who do not actually "write" about feminism or "do" activist work. It is critical that feminist researchers (I include myself in this category) keep this in mind.

³ The concept of "sameness," as it evolves in jurisprudence, appears under various guises in the literature. It has been re-

ferred to as "absolute equality" (Charter of Rights Education Fund, 1985), and as "formal equality" (Greene, 1989). This contrasts with the attempts to categorize "equality before the law" as referring to only procedural guarantees of equality (Brodsky and Day, 1989:14) or "facial discrimination" (on the face of the law only) (Canadian Advisory Council on the Status of Women, 1985) and "substantive equality" or equality of results meaning the intent or actual equality interpretation necessary for section 15 (Women's Legal Education and Action Fund, 1986).

⁴ See Razack, 1991 for a historical discussion of the development of the phrase "equality seekers" (49).

⁵ See the LEAF publication *Litigation Works 1987* for a more complete discussion on how employment law affects equality legal cases.

⁶ See Brodsky and Day, *One Step Forward: Two Steps Back*, Canadian Advisory Council on the Status of Women, Ottawa: 1989, 11-17 for a more complete argument on the inclusion of the phrases "before and under the law" "equal benefit and protection" of the law in the wording of section 15.

⁷ LEAF is involved in a Charter challenge based on that very premise. LEAF has agreed in principle to assist two B.C. women who are challenging the two-year limitation period for filing civil suits for damages in cases of sexual assault ... LEAF says that the two-year limitation period for bringing civil action for damages for sexual assault in childhood does not take into account the profound physical and psychological injury caused by such assault (*Leaf Lines*, 3.2, February, 1990:4).

⁸ The intervenor I refer to here is the Women's Legal Education and Action Fund.

⁹ These were comments released by media coverage of a LEAF conference held in Ottawa, February 12-15, 1992.

¹¹ Ann Oakley, *Taking It Like a Woman* London: Flamingo, Fontana Paperbacks, 1985. For a more complete analysis of the importance of consciousness raising as method, see Catherine MacKinnon, *Feminism Unmodified* 1987a.

¹² The use of the "disadvantage" concept may have ontological problems all its own. There are claims that this concept has existed in human rights legislation for

years, and perhaps the concept is being appropriated by white feminists. Further, some who are not entirely comfortable with the idea of having their discrimination described in terms of their own inherent "disadvantage." (From a conversation with the national Public Education Committee of LEAF, August, 1991).

¹³ As reported in *The Kingston Whig Standard* "Excerpts from hearings on Employment Equity," February 7, 1992.

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