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LEAF and the *Law* Test for Discrimination: An Analysis of the Injury of *Law* and How to Repair It.

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Introduction:

The National Legal Committee (NLC) of LEAF is very concerned by what it sees as a major shift away from a substantive equality analysis in recent equality jurisprudence. This shift flows, in the Committee's opinion, from the test set by the Supreme Court of Canada in the case of *Law v. Canada*[1]. That test obscures the meaning of equality and creates unnecessary hurdles for section 15 equality claimants. The problems with the test are apparent in many post-*Law* cases[2].

In light of these concerns, the NLC decided in early 2002, to take the initiative in examining the *Law* test, and to plan how best to respond to the problems with the test. It was decided that there is a need to strengthen and sharpen equality rights analyses, and re-invigorate our strategies in order to be effective in the current complicated equality context. To this end, LEAF sponsored a two-part Colloquium in September 2003 and February 2004 addressing the theme "In Pursuit of Substantive Equality." The overall goal of the Colloquium was to generate provocative think pieces and discussion that would advance our equality analyses and develop strategies to achieve substantive equality. This Colloquium provided an opportunity for legal experts and community advocates (including academics, activists, lawyers and front-line workers interested in social justice issues) to meet to analyze the *Law* decision and to strategize about options for reform.[3]

In addition to organizing, contributing to, and participating in the *Law* Colloquium, the NLC conducted regular study sessions at which it analyzed key components of the *Law* test. All of this collective work product informed LEAF's two most recent Supreme Court interventions, heard within a month of each other, *NAPE (Newfoundland Association of Public Employees)* v. *Newfoundland*[4] and *Connor Auton* v. *British Columbia (Attorney General)*[5]. The interventions in these Supreme Court appeals were LEAF's first opportunity to persuade the Court of the problems associated with the *Law* test, and to advocate for the adoption of an alternative test. These interventions allowed LEAF to crystallize the thinking around the test for discrimination (with a maximum of 20 pages of written argument, and 15 minutes of oral argument, we had to be concise!). Not all of the existing problems associated with the *Law* test for discrimination have been examined by the NLC *Law* project at this point in time. For example, problems with the comparator group analysis, the groups vs. grounds analysis, including what constitutes "suspect markers", and the improved development of intersectional discrimination analyses have yet to be fully addressed.[6] LEAF was planning to undertake some of this analysis in the *Falkiner*[7] intervention, but now that appeal has been abandoned, this will be addressed in another

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[1] [1999] 1 S.C.R. 497

[2] See for example *Gosselin* v. *Quebec (Attorney General)*, [2002] 4 S.C.R. 429; *Lavoie* v. *Canada*, [2002] 1 S.C.R.; *Granovsky* v. *Canada (Ministry of Employment and Immigration)*, [2000] 1 S.C.R. 703; *Trociuk* v. *British Columbia (Attorney General)*, [2003] 1 S.C.R. 835; *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950; *Hodge* v. *Canada (Minister of Human Resources Development)*, [2004] S.C.J. No.60

[3] An NLC subcommittee is currently in the process of editing the papers from the two colloquia; it is anticipated that they will be published in a book format next year.

[4] [2002] N.J. No. 324; 2002 NLCA 72. The *NAPE* case deals with a claim of sex discrimination by female employees of the Newfoundland government for unequal wages for work of equal value to that of male employees.

[5] [2002] B.C.J. No. 2258; 2002 BCCA 538. The *Auton* case deals with a claim of discrimination because of disability against the British Columbia government for its failure to provide autism related health services for children with autism.

[6] For an analysis of problems with the comparator analysis please see Beverly Baines, "*Law* and *Canada*: Formatting Equality" (2000) 11(3) Const. Forum Const. 65 at 89 and Jennifer Koshan, "Alberta (Dis)Advantage:

case or project. The following is a summary of the results of LEAF's work on the *Law* project, including background on the case, problems with the discrimination test in *Law* and subsequent cases, LEAF's guiding equality rights principles, and LEAF's preferred equality rights analysis.

Background:

Section 15 of the *Charter* came into effect in April, 1985. Section 15's dual purpose is to prevent discrimination **and** to promote equality. Since the introduction of s. 15 in 1985, some significant progress has been made relating to its use as an instrument to advance equality rights. The Court's early interpretation of s. 15 in *Andrews* v. *Law Society of British Columbia*[8] and *R.* v. *Turpin*[9] established equality rights tests that were quite helpful indicators of whether a person's equality rights had been violated. Several years after the release of *Andrews* and *Turpin* the Court became divided about how to interpret and apply s. 15, and many members of the Court adopted more restrictive interpretations of equality than had been stated in *Andrews* and *Turpin*[10]. In 1999 the Court, in an apparent effort to clarify and harmonize its equality rights analyses, released its unanimous decision in *Law* v. *Canada* – a decision that has seriously narrowed the judicial scope of equality, and made it much more difficult to advance successful equality rights claims.

Law v. *Canada* involved a widow's claim that her equality rights were violated when she was denied an Employment Insurance pension because she was under age 35. In its unanimous decision, the Supreme Court used the case as an opportunity to synthesize and consolidate its s. 15 equality analysis set out in previous cases, and laid down a new set of 'guidelines' for the application of s. 15 to be followed in subsequent cases. Accordingly, *Law* is the most important *Charter* equality decision since the Court's first s.15 decision in *Andrews*.

In *Law* the Supreme Court set out a three-step test for discrimination: i) is there differential treatment; ii) is the differential treatment based on an enumerated ground; iii) is the differential treatment discriminatory. According to Iacobucci J., the purpose of s. 15(1) is "…to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable

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The *Protection of Children Involved in Prostitution Act* and the Equality Rights of Young Women" Fall 2003, Journal of Law and Equality, 211 at 238-239; for an analysis of the problems associated with the groups vs. grounds analysis and intersecting grounds analyses see Dianne Pothier, "Connecting Grounds of Discrimination to Real Peoples' Real Experiences" (2001) 13 Canadian Journal of Women and the Law, 37

[7] *Falkiner* v. *Ontario (Ministry of Community and Social Services)*, 59 O.R. (3d) 481

[8] [1989] 1 S.C.R. 143

[9] [1989] 1 S.C.R. 1296

[10] See *Egan* v. *Canada*, [1995] 2 S.C.R. 513 (*Egan* challenged the *Old Age Security Act* as discriminatory on the basis of sexual orientation); *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 (*Miron* challenged the exclusion of common law couples from the definition of spouse in the *Insurance Act*, R.S.O. 1980, c.218. ss 231, 233, Schedule C); *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627 (*Thibaudeau* challenged the constitutionality of the *Income Tax Act*, S.C. 1970-71-72, c. 65 s. 56(1)(b) which permitted a non-custodial parent to deduct his/her child support payments from his/her personal income tax calculations, and required a custodial parent to include these payments in her/his income).

and equally deserving of concern, respect and consideration."[11] Iacobucci J. found that four factors may demonstrate an injury to a person's dignity in a manner which violates s.15(1) and that constitutes discrimination under step three of the *Law* test. The four factors are:

(i) Is there pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue?
(ii) Is there correspondence, or lack of it, between the ground on which a claim is based and the actual need, capacity or circumstances of the claimant or others?
(iii) Does the legislation have an ameliorative purpose or effect for a group which has been historically disadvantaged in the context of the legislation?
(iv) What is the nature of the interest affected by the legislation?[12]

Iacobucci J. cautioned that this list of factors is not closed and that there is no specific formula to be applied in the consideration of a violation of human dignity. The Court also stated that the dignity factors identified in *Law* should not be applied "too mechanically".[13]

In subsequent Supreme Court cases and in lower court decisions, it is apparent that the *Law* 'guidelines' have become a 'test' and are now regularly followed by parties and judges in all s. 15 cases. Several court decisions since *Law* have revealed some of the problems inherent in the *Law* approach, and the results for women's equality claims under this test have been disappointing. LEAF is concerned that the *Law* test has not addressed a number of the pre-existing problems that arose through the s.15 jurisprudence, and that the *Law* test has created additional hurdles for s.15 claimants. What follows is a summary of the results of LEAF's work thus far analyzing the problems with *Law*.

Problems with the *Law* Test:

There are a variety of different problems with the test developed in *Law* to establish discrimination. For the Court, a "crucial" element of the s.15 test is the identification of the group in relation to which the equality claimant can properly claim "unequal treatment"[14], as per the first branch of the *Law* test.[15] In other words, the identification of a comparator is the exercise used to determine whether the claimant may be said to have experienced differential treatment.[16] According to the principles established in *Law*, the Court is not bound by the claimant's characterization of the appropriate comparator group and has the authority to redefine it where warranted.[17] The Court confirmed this conclusion in *Granovsky*[18], and more recently in

[11] *Law supra* at para.51
[12] *Ibid* at paras. 62-75
[13] *Ibid*, *supra* at para. 88
[14] *Granovsky* v. Canada, [2000] 1 S.C.R. 703 at para. 45; *Lovelace*, *supra* at para. 62
[15] For analyses of problems with the comparator analysis please see Beverly Baines, "*Law* and *Canada*: Formatting Equality" (2000) 11(3) Const. Forum Const. 65 at 89 and Jennifer Koshan, "Alberta (Dis)Advantage: The *Protection of Children Involved in Prostitution Act* and the Equality Rights of Young Women" Fall 2003, Journal of Law and Equality, 211 at 238-239
[16] *Law*, *supra* at para. 24
[17] *Law* at para. 58
[18] *Granovsky* at paras. 47, 52, 64

Hodge[19]. The Court may redefine the comparator based on the subject matter of the legislation, and "biological, historical, and sociological similarities or dissimilarities" between the claimant and others.[20] A misidentification, or at least a misidentification in the Court's opinion, of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis for the claimant.

An example of the problems with the comparator test can be found in the Court's decision in *Granovsky v. Canada (Minister of Employment and Immigration)*. At issue in *Granovsky* was the constitutionality of section 44(2)(b) of the *Canada Pension Plan Act* (the "Plan")[21] as it relates to persons with disabilities. Mr. Granovsky suffered an intermittent and degenerative back injury following a work related accident. He argued that the impugned legislation infringed s.15(1) because the qualifying contributions requirement for a disability pension failed to take into account the fact that persons with temporary disabilities may not be able to make contributions for the minimum qualifying period because they are physically unable to work. Mr. Granovsky argued that the relevant comparator in his case was a healthy, non-disabled person because the Plan's "eligibility clock" had continued to run as though he were an able-bodied person who had the normal opportunities to continue in his employment".[22] The Court found that Mr. Granovsky inaccurately identified the comparator group in his case, and concluded that persons with permanent disabilities were the correct comparator group. This finding resulted in a flawed discrimination analysis, as the focus shifted to a comparative and hierarchical analysis of the relative disadvantage experienced by persons with acquired vs. congenital disabilities, and temporary vs. permanent disabilities. Mr. Granovsky ultimately lost his s. 15 challenge.

The problem with the *Law* test that has received the most attention relates to the injury to dignity analysis. One of the problems with this test relates to the issue of proof. In its decision in *Gosselin* v. *Quebec*[23], the Supreme Court affirmed that the equality claimant bears the burden under s. 15(1) of showing, on a civil standard of proof, that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society.[24] While the required standard of proof may be clear, the challenges in meeting that standard have increased. First, the concept of human dignity is abstract and ambiguous, which makes it a difficult fit with an analysis of human rights violations that demands concrete assessments of context and disadvantage. Because of the amorphous nature of "dignity interests" and the new focus on this element of equality rights, it is more important than ever for claimants to develop a factual record to provide tangible contextual evidence to establish that an allegedly discriminatory distinction violates their dignity. In addition, it is important to provide the Court with extensive evidence relating to the socio-political-economic context of the

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[19] *Hodge* at para. 21
[20] *Law* at paras. 56-58 and 90 as cited in Jennifer Koshan, *supra* at 234
[21] *Canada Pension Plan Act*, R.S.C., 1985, c. C-8
[22] *Granovsky*, *supra* at paras. 28 and 31
[23] *Gosselin*, *supra*; *Gosselin* was based on a claim that the social assistance regulations in Quebec during the 1980s were discriminatory: single individuals under the age of thirty, who were considered employable, received only one third of the assistance granted to their older counterparts. This was the first case in which the Supreme Court of Canada dealt directly with the constitutionality of social and economic rights.
[24] *Gosselin*, *supra* at para. 18

claim and the impact of the disadvantage resulting from the discrimination.[25] However, even the provision of a fulsome evidential record may not be sufficient to persuade the Court of the discriminatory effect of a law or practice. For example, writing for the majority in *Gosselin*, McLachlin C.J. stated that she disagreed with the minority in that case with respect to "the nature of the inferences" drawn from the factual record. Clearly the challenge of anticipating and addressing "inferences" that the Court may make about dignity evidence is significant; and the challenge of shutting down any judicial prejudices or biases that may be informing those "inferences" may be even larger.

An example of the problems with the malleable nature of the dignity analysis can be found in the Court's decision in *Gosselin*. The majority in *Gosselin* used the term "dignity" freely when supporting its judgment. The majority's conception of dignity in *Gosselin* is particularly troubling. The majority's references to the dignity of work and long-term self-sufficiency regardless of whether it means living at home or being unable to survive demonstrate a lack of consideration for the realities of the class of equality claimants before them: there is no discussion of the "dignity" of being compelled to perform the work no one else wants for minimum wage. There is little dignity in the stereotypical assumption that social assistance recipients will not participate in work or training opportunities unless forced through financial deprivation. Fundamentally, the workfare nature of the Quebec legislation removed the choice to work and the right to be free from coercion that should be central to human dignity, but this was not recognized by the majority in *Gosselin*.[26]

Another problem with the *Law* test is its focus on determining the purpose of the law within the s. 15 analysis, rather than within the s. 1 analysis, where the government has the onus of justifying an established breach. The focus of the *Law* test is on the legislative intent and the nature of the interest affected by the legislation. While the idea of human dignity suggests a focus on personal feelings, the prescribed focus on the purpose of the law detracts from the discriminatory effects of the law. The focus on the purpose of the law means that provisions/actions that are under review may not be deemed discriminatory if they have a beneficial effect on others, or if they are seen as "relevant" to the law's purpose.[27] Although in *Law*, Iacobucci J. did make reference to the need to consider the "purpose and effect" of the impugned legislation[28], this reference to the effect of the law seems to be generally overlooked or interpreted to apply to the larger societal context. The result is a departure from an effects-based analysis of a discrimination claim. The new dignity-based approach to the determination of equality rights violations represents a serious divergence from established human rights law which clearly states that intention, ie: the purpose of the law, is irrelevant to a discrimination analysis.[29]

Another serious problem with the *Law* test is the apparent confusion within the Court about what exactly constitutes a contextual equality rights analysis under the new test. In *Gosselin*,

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[25] These evidentiary requirements may also have access to justice implications for *Charter* claimants.
[26] Natasha Kim and Tina Piper, "*Gosselin* v. *Quebec*: Back to the Poorhouse", (2003) 48 McGill L.J. 749-781 at para. 76
[27] See Bev Baines, "*Law* and *Canada*: Formatting Equality", *supra*
[28] *Law*, *supra* at para. 80 and 88(5)
[29] *O'Malley* v. *Simpsons-Sears* [1985] 2 S.C.R. 536

McLachlin C.J., stated that a contextual analysis involves a determination of whether "… 'the legislation which imposes differential treatment has the effect of demeaning [his or her] dignity' having regard to the individual's or group's traits, history, and circumstances".[30] This approach sounds appropriate, as a contextual analysis should include a comprehensive examination of the effect of the legislation in relation to the historical socio-political disadvantage experienced by the claimant as a member of a disadvantaged group. However, the focus on the legislation's effect on the claimant is lost by the introduction of the competing analysis relating to the purpose of the legislation. Thus, McLachlin C.J. concluded in *Gosselin* that "the context of a given legislative scheme also includes its purpose"[31] and therefore the government's intent, while perhaps not technically determinative, is now significantly relevant. McLachlin C.J. did concede that a beneficial purpose will not shield a discriminatory distinction[32], but it seems clear that the focus of the effect of an impugned law/practice on the claimant is diluted when the context is broadened to consider the legislature's perspective within the s. 15 analysis.

Incorporating an analysis of the purpose of the legislation into the s. 15 analysis shifts the focus away from the effect of the distinction on the claimant as a member of a disadvantaged group, to a focus on the purpose of the legislation – which will almost always have some beneficial purpose. Significantly, McLachlin C.J. claimed to have conducted a contextual analysis in *Gosselin*; however, that analysis was flawed as she interpreted the interests affected by the law to mean the societal interests related to the program in general, rather than the claimant's interests that were particularly affected by the distinction in the application of the law. Her analysis was also flawed by the inclusion of s. 1 proportionality or minimal breach-type considerations relating to the justification for the law at issue within the s. 15 analysis – a consideration not included in contextual analyses prior to *Law*. This kind of confusion about the meaning and nature of a contextual analysis clearly works to the disadvantage of equality rights claimants.

The Court's decision in *Lovelace* v. *Ontario*[33], provides another example of the importation of s. 1 analyses relating to legislative purpose into s. 15. *Lovelace* involved a challenge by Metis and non-status First Nations to the underinclusiveness of an agreement between the Ontario government and Ontario First Nations respecting the distribution of profits from an on-reserve gambling casino. In applying the *Law* test in *Lovelace*, the Court took into account the purpose of the First Nations Fund at issue in that case. The Court considered the fact that the Fund was intended to reconcile the different positions of the Province and bands on the need to regulate reserve based gambling, to support government-First Nations relations, and to ameliorate social, cultural, and economic conditions of band communities. Further, it found that the circumstances of status First Nations were different from those of the claimants, and that a benefit program targeted to a particular disadvantaged group would not necessarily discriminate against other, even more disadvantaged groups. It thereby imported into s. 15 matters normally considered under s.1 when assessing whether the government has demonstrated a pressing and substantial objective and a rational connection. This resulted in raising the discrimination bar for the equality claimants, and lowering the justification bar for the government. In fact, the

[30] *Gosselin*, *supra* at para. 25
[31] *Ibid* at para. 26
[32] *Ibid* at para. 27
[33] *Lovelace* v. *Ontario*, *supra*

government did not have to justify its scheme under s.1 in *Lovelace,* as there was found to be no s.15 violation.

A further problem with the *Law* test is the introduction of a concept that primarily relates to an experience of personal injury as a threshold requirement for a s. 15 violation. The Court has decided that a subjective-objective standard should be used in the assessment of injury to dignity.[34] Both elements of this test may be problematic for equality rights claimants. If the claimant fails to persuade the Court that she has personally suffered an injury to her dignity, the claimant will not pass the subjective element of the test. In order to make such an argument the claimant must portray herself as a victim, a portrait that many who experience discrimination reject as offensive. The need to establish an injury to dignity forces an equality rights claimant to describe in detail the hurt, disempowerment, humiliation, and/or degradation that may be associated with an experience of discrimination[35]. The need for a claimant to paint a picture of herself as damaged and pitiful is problematic. The concept is also problematic as the possibility exists that a victim of discrimination may be thick-skinned and may not actually experience any injury to dignity resulting from the discriminatory experience. The need to demonstrate an injury to dignity could disadvantage claimants who survive the discriminatory experience with their self-respect and self worth intact. The Court appears to have assumed that if your dignity is intact, or that it should be intact, you cannot have experienced discrimination or inequality.

Problems also exist with the objective element of the test, primarily the way in which the reasonable person test is used to the disadvantage of those outside of the dominant norm, such as women with disabilities, or racialized women. The concept of reasonableness is a product of non-disabled, white, middle-class, heterosexual male perspectives and experiences, imposed on the law as an allegedly "neutral" standard. It is through the imposition of this standard that the dominant norm maintains power and control over the exercise of the law to the disadvantage of those outside of the norm. For example, feminist legal theorists Karen Busby and Lise Gotell[36] have analyzed how the standard of the "reasonable" person has worked to the disadvantage of women who are primary witnesses in sexual assault trials. The reasonableness standard decontextualizes the inquiry as its effect is to achieve a neutral and universal perspective on the matter. It distances the decision maker from the context of the inquiry. It invokes principles of universality that favour the non-disabled, white, male. The imposition of the objective, reasonable person standard into an analysis of whether or not an injury to dignity has occurred is troubling. The determination of whether the claimant's personal feelings of hurt are reasonable is open to the imposition of biased norms that can work to the disadvantage of those who appear 'unreasonable' from the perspective of the decision maker. Dianne Pothier has legitimately argued that judicial assessments of human dignity need to be scrutinized for discriminatory

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[34] "The appropriate perspective is subjective-objective. Equality analysis under the *Charter* is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1)." *Law* at para. 61

[35] These are the kinds of harms generally associated with an injury to dignity; the Court in *Law* did provide reference to injury to dignity involving these kinds of harm, but the test itself does not get at these elements of the concept. *Law*, *supra* at para. 53

[36] Karen Busby, "Discriminatory Uses of Records In Sexual Violence Cases" (1997) 9 C.J.W.L. 148; Lise Gotell, "Colonization through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law" (2001) 10 Social and Legal Studies 315

tendencies.[37] This is because the subjective-objective approach to the dignity question provides no guarantee of impartial decision making.

An example of the problems with the subjective/objective analysis can be found in the Court's decision in *Granovsky*. The Court made numerous insensitive findings and inferences about the experience of disability within the *Granovsky* decision. For example, the Court stated that Stephen Hawking, Beethoven, Franklin D. Roosevelt, and Terry Fox were able to earn a living despite their disabilities, and implied that Mr. Granovsky should have been able to make a living despite his back injury, and that his failure to do so was his own responsibility.[38] Given the Court's apparent failure to "get" disability, it is not surprising that the Court failed to appreciate that a reasonable individual sharing Mr. Granovsky's attributes would experience injury to dignity as a result of the discriminatory nature of the CCP requirements. The Court did conclude in *Granovsky* that the reasonable individual should share the appellant's attributes. However, the Court's ableist predisposition appeared to restrict its understanding of what is reasonable from the perspective of the hypothetical reasonable disabled person.

These problems with the *Law* test and the way in which it has been applied raise serious concerns for LEAF about the Court's understanding of the scope and meaning of the equality guarantees found in s.15. It has become apparent through the Supreme Court's decisions since *Law* that the hoped-for clarification and improvement on the meaning and application of s.15 that *Law* was intended to herald has not materialized. The post *Law* decisions opened up space for critiquing the *Law* approach, for developing arguments to present to courts for the redirection of s. 15 equality analysis, and for the creation of a more substantive vision of s.15 equality. The challenge of developing such arguments has been the focus of LEAF's most recent work.

LEAF's Basics For Equality Rights Analyses:

In approaching its critique of the problems with the *Law* test, LEAF identified the following principles as fundamental to any equality rights analysis, including those in the *NAPE* and *Auton*[39] cases:

1. The heart of the substantive equality approach is the recognition that differentiation, by itself, is not a violation of equality rights. A violation of equality rights is established by differentiations that substantively discriminate – these are grounds-based differentiations that reflect, perpetuate, reinforce, exacerbate or fail to remedy historical patterns of oppression of particular groups and individual members of these groups. The prohibited grounds of discrimination are those enumerated in s. 15, grounds analogous to the enumerated grounds, and interlocking grounds, for example, gendered disability discrimination, racialized gender discrimination and gendered age discrimination.

2. The substantive equality approach is thus defined by several interconnected principles, which will be elaborated in the paragraphs that follow:

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[37] Dianne Pothier, "But It's for Your Own Good", forthcoming
[38] *Granovsky, supra* at paras. 33 and 48
[39] LEAF's facta for these interventions are available on the LEAF website at: www.leaf.ca

- A claimant does not need to prove discriminatory intent.
- Mere differentiation does not violate equality rights. Violations of equality rights involve discriminatory differentiation, including the failure to properly recognize and address difference.
- The focus should be placed on the effect of the discrimination on the claimant(s).
- Questions of reasonableness and relevance of the challenged government action or inaction are conceptually distinct from the substantive equality analysis, and should be considered only as part of the s. 1 inquiry.
- Dignity, if it is to be retained as a concept under s.15, must be made meaningful.

3. Substantive equality rights have a strong remedial purpose that focuses on the effects of discrimination. The purpose of equality rights is to remedy inequality; the purpose is not to assign blame or impose punishment.

4. Although discrimination is sometimes consciously intended, more often it unconsciously imposes the norms of the dominant group(s) so as to subordinate other norms and values. Discriminatory norms reflect and naturalize the needs, realities and circumstances of relatively more powerful groups, relationally ignoring or devaluing the needs, realities and circumstances of relatively less powerful groups. Substantive equality claims challenge discriminatory norms by seeking to expose the construction of difference and the power of the dominant perspective.

5. Eliminating differentiation is the appropriate remedy where the differentiation results in negative effects upon members of an oppressed group. Conversely, differentiation is the appropriate remedy where the failure to recognize and respect different needs, realities and circumstances results in negative effects upon members of an oppressed group. Both approaches may require transformation of established norms of social, political, economic and legal systems, and place positive obligations on governments to respond to the equality needs of women and other disadvantaged groups.

6. The Supreme Court has used a variety of indicia to describe substantive discrimination, including:

   "Devalued", "stigmatization", "political and social prejudice", "stereotyping", "lacking political power", "exclusion", "marginalized", "historical disadvantage", "social, political and legal disadvantage"; "vulnerability", "oppression", "powerlessness".

   These injuries of discrimination deny equal inclusion and participation in society, deny equal recognition as citizens, deny equal enjoyment of social and economic resources, and deny equal autonomy as human beings.

   To the extent that dignity is retained as a focal point under s.15, it should be considered in terms of these indicia of harms to substantive equality.

7. The question as to whether a distinction is discriminatory within the meaning of s. 15 is conceptually distinct from the question as to whether discrimination is reasonable or justifiable. The reasonableness and justification of discrimination are matters to be

considered under s. 1 of the *Charter*, where the onus is on the party seeking to justify the infringement.

8. Justifications of equality rights violations under s.1 of the *Charter* must not be based upon empty rationalizations such as broad and abstract appeals to the "public good" or "the general fiscal welfare". To do so suggests that equality rights are luxuries that are separate from the democratic good, instead of rights that substantively define and enhance the public good.

LEAF's Preferred Equality Rights Analysis:

The central goal of LEAF's *Law* project has been to get s. 15 jurisprudence back on track, by identifying and understanding the flaws with the *Law* test, as discussed above. The project has provided LEAF with a unique opportunity to explore the *Law* test, and to consider effective ways to direct the Court towards a more progressive and equitable interpretation and application of equality jurisprudence.

LEAF understands that, in part as a result of *Law*, equality rights law has not really progressed beyond the much-critiqued formal approach to equality. It is crucial to communicate to the Court how and why this is the case, and to move toward the substantive equality model to which the Court has clearly committed itself, and that is the cornerstone of LEAF's understanding of equality. It is LEAF's position that the s. 15 discrimination analysis must support an effective and meaningful substantive equality analysis, and must ensure that the full purpose of s. 15 is realized. The s. 15 discrimination analysis should focus on the unequal effects of systemic disadvantage to ensure that s. 15 rights are properly protected and advanced.

Because of the problems associated with the *Law* test for discrimination, LEAF advocated against its adoption before the Supreme Court in *NAPE* v. *Newfoundland* and in *Auton* v. *British Columbia*, both argued in the spring of 2004. In LEAF's interventions in these cases, LEAF critiqued the *Law* test along the lines of the analysis provided above. LEAF argued that it was unhelpful and artificial to analyze the discrimination at issue in those cases according to the *Law* test because the elements of the steps that make up the *Law* test are actually substantially intertwined. LEAF argued that a holistic substantive equality analysis is more appropriate, especially where the differential treatment step is complex and contested, as it was in *Auton*.

LEAF argued that the first and fourth factors of the third step of the *Law* test lie at the core of the substantive equality approach, and should guide the interconnected analysis. The first "contextual factor" examines whether the affected group has experienced or experiences oppression. The fourth "contextual factor" examines how the claimant's interest is affected by the impugned measure. LEAF argued that the second and third factors should not be independent inquiries because they are corollaries of the first factor. The second factor relates to the substantive equality principle that differential treatment can be required to properly address non-stereotypical, differential needs. If this factor is considered in isolation, however, it has the potential to import conceptions of "relevance" and "reasonableness" that fail to question the very discriminatory norms the equality claim seeks to eliminate. It also has the potential to shift the focus away from effects to look instead for discriminatory intention. Similarly, the third factor

reflects the substantive equality principle that affirmative action measures are not discriminatory differentiations. This factor should be part of the analysis only where such measures are at issue, otherwise it too has the potential to shift the focus away from effects of the law towards a search for discriminatory intention.

LEAF's position before the Supreme Court was that a full analysis of inequality requires an assessment of differential treatment that incorporates the interrelated concepts of grounds and discrimination. To disaggregate the analysis potentially jeopardizes the dual purpose of s. 15 to prevent discrimination and promote equality. Disaggregation has the potential to unnecessarily complicate the analysis, and/or to obscure the actual unequal effects. In contrast, a holistic substantive equality analysis promotes equality by paying close attention to the unequal effects that are revealed when examining the interrelationships among differential treatment, grounds, and discrimination. To achieve s. 15's purpose of addressing inequality, a broad understanding of human dignity is necessary. A narrow conception risks ignoring significant manifestations of inequality if it fails to incorporate the full harm of discrimination. Confining affronts to human dignity to hurt feelings ignores the structural and systemic bases of discrimination. Discrimination must be interpreted to include experiences of exploitation, marginalization, powerlessness, cultural imperialism, violence, historical disadvantage, and exclusion from the mainstream of society.[40] These experiences are the indicia of inequality that are pertinent to the purpose of s. 15.

LEAF also argued that to fulfil the special role of s. 15, the focus must be on the promotion of equality. The concrete power relations at the source of discriminatory behaviour must be examined to link more clearly the impugned law or (in)action to the relations of domination that perpetuate and rationalize the systemic inequality of oppressed groups. It is the experiences of marginalization, exclusion, powerlessness, imperialism/colonialization, and violence that result from discrimination that are all profound indicia of inequality and injury to dignity. Human dignity is a malleable concept. Care needs to be taken so that it is not used to undermine substantive equality. If the inquiry is focused on individual emotive feelings, or used to import s. 1 justification questions into s. 15, or used to validate similarly situated analyses, it will indeed undermine the purposes of s. 15. What is required instead is an analysis of inequality that challenges the norm and fulfils the unique purpose of s. 15 to promote substantive equality.

With respect to s. 1, LEAF argued that the s. 1 test is found in the language of s. 1 – the guaranteed *Charter* rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". A substantive interpretation of democracy incorporates a recognition of values and principles such as equality, inclusion, social justice, and participation, and is not a mere "majority rules" approach. Equality is thus one of the values and principles underlying substantive freedom and substantive democracy, in addition to being guaranteed as a right under the *Charter*. Equality needs to inform the meaning of freedom within the *Charter* and is one of the fundamental values of a democratic society.

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[40] Iris Marion Young, *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press, 1990) at 48-65

While LEAF is hopeful that the injury done to equality rights law by *Law* can be repaired, it is anticipated that the dialogue with the Court about the appropriate s. 15 analysis to be used in discrimination claims will continue for some time, as the jurisprudence evolves, and as we continue the struggle to advance women's equality rights through the law. LEAF's work on the *Law* project has been challenging, demanding and exciting – it is important work that will no doubt need to continue as women continue to fight for equality in Canada.