

Judicial review of discriminatory laws in Canada

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Abstract: Giudizio di costituzionalità di leggi discriminatorie in Canada – The essay explores a relatively underdeveloped issue in comparative law, which is that of the invisibility of groups unable to fit grounds for discrimination in Canada. After having expounded the system of judicial review of discriminatory laws in Canada, it sketches out two potential solutions to disentangle the inequalities that impact upon non-normative groups, namely the expansion of the notion of “analogous ground” and the wholesale replacement of the current ground-based doctrine of anti-discrimination with a new approach that does not account for grounds.

Keywords: Anti-discrimination, equality, Canada, Judicial review, non-normative groups.

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1. Introduction

Canada is a unique comparison under many respects. The legal system and in turn the Canadian society are particularly sensitive to diversity issues. I will not engage in inquiries over causation to understand whether society brought about change and the legal system followed along or vice-versa. Suffice it to note that both the complexity and multicultural nature of the Canadian society are a fertile ground on which innovative solutions in the field of anti-discrimination law could thrive.

The demographics themselves give us a snapshot of how diverse the Canadian society is. Only to mention one trend, family pluralism is on the rise to the point that *de facto* couples in Quebec outnumber married couples, multigenerational households are the “fastest-growing household type since 2001 (+38%)”¹. Also, while Statistics Canada did not comprehensively address the issue of polyamorous relationships, a major research institute showed that a stunning number of persons self-identify as “polyamorous”. Out of 527 respondents, almost two thirds were in a self-proclaimed polyamorous relationship, and the remaining third still recognized that it was involved in some way in a polyamorous relationship over the last five years². Likewise, there is a growing religious,

¹ The Vanier Institute of the Family, *A Snapshot of Family Diversity in Canada (February 2018)*, Ottawa, 2018, <http://vanierinstitute.ca/snapshot-family-diversity-canada-february-2018/> (last visited Mar 20, 2019).

² The Vanier Institute of the Family, *Polyamory in Canada: Research on an Emerging Family Structure*, Ottawa, 2017, 3, <http://vanierinstitute.ca/polyamory-in-canada-research-on-an-emerging-family-structure/> (last visited Aug 20, 2018). See also Drake Baer, *Maybe Monogamy Isn't the Only Way to Love*, in *The Cut*, March 6, 2017,

cultural and linguistic diversity that reverberates on a growing policy interest in each of these areas³.

The Canadian anti-discrimination system is multi-layered and elaborate. Its linchpin is the Canadian Charter of Fundamental Rights and Freedoms of 1982⁴. However, many layers can be added to the constitutional one. These include the provincial Charters⁵, the Canadian Bill of Rights⁶, the national and provincial human rights codes, and the rights and freedoms recognized under common law.

In 2017 Canada celebrated the sesquicentennial of the Confederation and of its Constitution Act of 1867. In 1982, the country patriated the Constitution through the landmark introduction of Canadian Charter of Rights and Freedoms. The celebration thus had not so much to do with the Confederation itself, since Canada is now a Federation, but on the pride of having a relatively young but highly powerful constitutional document of their own.

There has been a vivid debate as to whether the Charter brought about the major changes in society or such changes were already underway⁷. For instance, Professor Robert Leckey, discussing the extent to which the Canadian Charter of Rights and Freedoms played a role in shaping substantive family law, opposed enthusiastic proponents of the public law thesis on several grounds. Particularly, he noted how family law underwent change well before the enactment of the Charter, and that such a thesis overstates differences across Canadian provinces⁸. Other scholars pointed to the impulse that the human rights commissions gave to

<https://www.thecut.com/2017/03/science-of-polyamory-open-relationships-and-nonmonogamy.html> (last visited Aug 20, 2018).

³ J. Kunz, *Religious Diversity in a Multicultural Canada: Quo Vadis?*, in 10 *Horizons* (2009), 4-7, http://publications.gc.ca/collections/collection_2009/policyresearch/CP12-1-10-2E.pdf (last visited May 20, 2018).

⁴ Canadian Charter of Rights and Freedoms, 1982 (Schedule B to the Canada Act, 1982 [U.K.]), c. 11, repr. RSC 1985.

⁵ A major example of a provincial charter is the Charte des droits et libertés de la personne in Québec. Charte des droits et libertés de la personne, L.R.Q. 1975, c. C-12. These documents protecting fundamental rights are always labeled as charters, so as to distinguish them from the *Constitution*, which, as far as the vehicle is concerned (*i.e.*, the constitutional document), is only enshrined in the Charter of Fundamental Rights and Freedoms for what concerns fundamental rights and freedoms.

⁶ Canadian Bill of Rights, S.C. 1960, c. 44. Assented on 1960-08-10. The fundamental limits of the instrument were its statutory nature, that turns it into a mere interpretative guide in construing laws, and the non-applicability to provincial governments, which did not participate in its enactment. Yet, in the 1980s, the Supreme Court recognized these instruments as having a constitutional nature, and thus as conferring the power to invalidate conflicting statutes. Respectively: *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, 1985 CanLII 65 (Supr. Ct. Can.), and *Winnipeg School Division No. 1 v. Craton*, [1985] 2 SCR 150, 1985 CanLII 48 (Supr. Ct. Can.).

⁷ H. Arthurs and B. Arnold, *Does the Charter Matter?*, in 11 *Review of Constitutional Studies* 37 (2005) (providing an account of the Charter failure to address inequality and positively impact Canadian political economy).

⁸ R. Leckey, *Family Law as Fundamental Private Law*, in 86 *La Revue du Barreau Canadien* 69, 74-75 (2007). In Canada, the dispute over the private versus public nature of family law is not merely theoretical, having it profound implications in terms of vertical separation of powers and division of competences. If family law is understood as being part of private law, it would then fall under the jurisdiction of the provinces (as a matter of “property and civil rights”).

the development of anti-discrimination policies and the relative centrality of these *fora*, compared to judicial courts⁹.

What seems to be undeniable is that the equality clause enshrined in section 15 of the Charter has finally provided the country with a rigid parameter allowing courts to strike down all laws inconsistent with the “evolutive” interpretation of the equality clause. Framers were fully aware of the over-reaching potential of section 15 and delayed its entry into force to 1985 (three years after the enactment of the Charter).

Celebrations clearly give us the opportunity to look back and to account for successes and failures, (possibly) with a view of tacking stock and see where one should go from here. This is a short contribution to this attempt of tacking stock of the unique Canadian experience in the field of anti-discrimination rights. I will thus first outline the main features of the system of protection at the constitutional level, and then assess the potential routes to disentangling inequalities that are not currently addressed by such a system.

2. The system of constitutional review against discriminatory laws

2.1. The standard of review in a comparative perspective

The major distinction between systems of protection vis-à-vis equality runs between those states adopting an equality approach and those adopting an anti-discrimination approach. A large number of European states have equality provisions under which citizens (and sometimes non-citizens) shall be treated as equals before the law¹⁰ or under the law¹¹. In short, this is a conception of equality as rationality meaning that, save when an adequate justification is provided, like cases must be treated alike and different cases must be treated differently. Pursuant to this conception, equality acts as a “self-standing principle of general application.”¹² The concept is intrinsically relational in the sense that for it to apply, one needs to preliminary specify “who” should receive equal treatment and “with respect to what” equality is warranted¹³. Thus, this type of review calls an inquiry into the rationality of the distinction or of the same treatment, where different treatment is warranted.

Furthermore, one must be alert that the principle is so deeply-rooted in European continental systems that often, even when the constitution includes an anti-discrimination provision whereby discrimination is prohibited only with respect to enumerated grounds for discrimination (*e.g.*, race, sex, etc.), the

⁹ As to the specifics of the functioning of human rights tribunals, applying the human rights codes, see *Fundamentals of Human Rights Law in Canada*, Toronto, 2017, 1.

¹⁰ C. McCrudden and S. Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, Report for the European Commission, Directorate-General Emp., Soc. Aff. & Equal Opportunities, 2009, 3 (mentioning amongst these Bulgaria, Estonia, Cyprus, Finland and Germany). I shall add Italy to this group.

¹¹ *Ibid.*, 3 (mentioning amongst these Belgium).

¹² *Ibid.*

¹³ M. Barberis, *Eguaglianza, ragionevolezza e diritti*, *Rivista di filosofia del diritto*, 1/2013, 193.

prevailing conception is one pivoting on equality as a principle of general application¹⁴.

In addition to this, many European states, with a visible prevalence of states in Western Europe, as opposed to former socialist states in Central and Eastern Europe¹⁵, adopt substantive (or *de facto*) equality provisions. These are provisions placing upon the state an obligation to actively promote equality, either for all individuals¹⁶ or for specific groups¹⁷. This conception aims at correcting the imbalances in the previous and present distribution of social goods and resources, by reaching an equality of opportunity for all social groups¹⁸ (while it that cannot be construed to include an equality of outcomes for all)¹⁹.

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By contrast the approach adopted in Canada and the U.S. is an antidiscrimination one. This is particularly evident in Canada, where a right not to be discriminated against is protected under section 15 of the Charter of Rights and Freedoms. For a claimant to successfully bring a section 15 claim, she necessarily has to link her factual claim to a listed or analogous ground. This is to say that the duty of the state is mainly to shield individuals from invidious discriminations related to certain characteristics.

Unlike the United States, Canada does not feature differentiated standards of review depending on the type of minority. For instance, in the U.S., a very

¹⁴ This is the case of Italy, where the constitutional court after a handful of initial decisions embracing an anti-discrimination approach based on a closed list of grounds for discrimination,¹⁴ soon moved to adopt a broader equality approach. *See e.g.*, Corte cost., sentenza n. 28/1957. This is also the case of Germany. There, the Federal Constitutional Tribunal clarified that the list of prohibited grounds (sex, parentage, race, language, national origins, faith, political and religious opinion) had the “sole” purpose of specifying under which circumstances a differentiation will surely *not* pass muster (except for a *verfassungsimmanente Gründe*, *i.e.*, under the circumstances specified in the constitution itself.) Barberis, *Eguaglianza, ragionevolezza e diritti*, cit., 193-94. Spain is an exception to this. The Constitutional Tribunal has interpreted Article 14 as encompassing in the first paragraph the principle that all Spaniards are equal before the law (equality-as-rationality) and in the second paragraph a clause protecting individuals against discrimination based on specified grounds, which historically proved particularly invidious.

¹⁵ McCrudden & Prechal, *The Concepts of Equality and Non-Discrimination in Europe*, cit., 42 (linking the prevalence of Western European states to the disillusionment that former socialist countries experienced with the substantive notion of equality in force in Soviet Union).

¹⁶ *E.g.*, Article 3.2 of the Italian Constitution of June 2, 1946; and Article 9.2 of the Spanish Constitution of December 6, 1978.

¹⁷ *E.g.*, Article 3.2.2 of the German Constitution of November 26, 1949 (requiring the state to take steps to eliminate current disadvantages suffered due to one’s sex).

¹⁸ Antonella Occhino, *L’aspettativa del diritto nei rapporti di lavoro e previdenziali*, Torino, 2004 (arguing that Article 3.2 of the Italian Constitution, laying out the principle of substantive equality, enshrines an “ideale di giustizia,” or an idea of justice); Sylviane Agacinski, *La politica dei sessi*, Milano, 1998, 173.

¹⁹ For instance, this is the conception of equality informing the preamble to the Protocol 12 to the ECHR and the Protocol as a whole. The mentioned preamble to Protocol 12 allows member states to adopt affirmative actions as long as reasonably justifiable. It reads: “Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.” Convention for the Protection of Human Rights (Protocol No. 12) Preamble, 4.XI.2000, Europ. T.S. 177.

stringent standard of review (called strict scrutiny) applies to a sensitive ground such as race or national origins; intermediate scrutiny usually applies to discriminations based on sex and triggers a less demanding standard compared to strict scrutiny²⁰. Finally, where no ground is invoked a mere rationality test applies, which is highly deferential toward the policy discretion of the Legislature²¹.

Second, one can distinguish between open and closed systems of review²². Open models prohibit discrimination unless a reasonable justification exists, without mandating a specific standard of review. In any such case, it will be up to courts to design the applicable standard to evaluate the justifiability of the unequal treatment. Furthermore, this model relies on an open list of prohibited grounds thereby deferring to courts the decision as to which statuses to include in the list. By contrast, closed models define the catalogue of prohibited grounds, and mandate a specific equality test by spelling out the justifications for a discriminatory action that are “reasonable”²³. Canada, as much as other systems such as the European Convention of Human Rights framework, belongs to the first group and presents an open list of grounds along with a judicially mandated test for discrimination.

Finally, as to a third distinction running between direct and indirect discrimination, Canada features a system that protects individuals from both facially discriminatory rules and the impact on minorities of facially neutral laws (so-called indirect discrimination)²⁴.

2.2. The specifics of the applicable standard of review in Canada

The standard under s. 15, *i.e.*, the equality clause, is overly convoluted and non-linear. It changed many times over the span of 35 years and still is a difficult-to-grasp object of analysis for anti-discrimination lawyers²⁵. The approach is essentially two-pronged:

(1) Infringement prong or s. 15 prong.: the claimant first has to show a denial of “equal protection” or “equal benefit” of the law, compared with some other group, and that the denial amounts to discrimination linked to a prohibited ground.

(2) Justification prong or s. 1 prong: once a violation is found, the onus shifts to the defendant to justify the discrimination²⁶.

²⁰ Craig v. Boren, 429 U.S. 190 (1976).

²¹ Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 443-46 (1985).

²² A.W. Heringa, *Standards of Review for Discrimination: The Scope of Review by the Courts*, in T. Loenen and P.R. Rodrigues, *Non-Discrimination Law: Comparative Perspectives*, Leiden, 1999, 27.

²³ An example of closed system is that in force in the European Union. Reference is especially made to the CJEU’s review in the context of the implementation of directives concerning anti-discrimination rights.

²⁴ Andrews v. Law Society of British Columbia, [1989] 1 SCR 143.

²⁵ B. Ryder, *The Strange Double Life of Canadian Equality Rights*, in 62 *Supr. Ct. L. Rev.* 261, 268 (2013).

²⁶ Miron v. Trudel, [1995] 2 SCR 418, 1995 CanLII 97 (Supr. Ct. Can.), at 418.

To establish that a discriminatory action occurred (infringement prong), under the current approach, courts are required to inquire over whether:

- (a) the law or government action creates a distinction based on enumerated or analogous grounds; and
- (b) the distinction reinforces, perpetuates, or exacerbates disadvantage.

For purposes of our analysis it should be stressed that grounds for discrimination play a crucial role in the Canadian equality jurisprudence²⁷. Grounds soon became the stage where the courts define the categories of persons that deserve being shielded from discrimination²⁸. In *Andrews* the top court inaugurated the “enumerated and analogous grounds approach,” and conferred upon grounds the function of “screening out”²⁹ trivial claims. Ever since, the Supreme Court did not allow claims merely attacking “irrational” or “arbitrary” laws to move forward, as it would be possible in the United States under the rational basis standard³⁰. This approach has been criticized as it seems too formalistic³¹. Yet, at present the centrality of grounds in Canada cannot be overstated.

As to the type of grounds protected in addition to the listed grounds, so-called “analogous grounds,” courts have outlined alternative approaches:

- (1) The target group suffers from historical disadvantage³²;
- (2) The target group constitutes a discrete and insular minority lacking political power and unable to participate in the political process³³;
- (3) The distinction is grounded on a personal characteristic which is immutable or constructively immutable, in the sense that it can only be changed at unacceptable personal expense³⁴.

²⁷ *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 (CanLII), at par. 33 (stating that grounds are “constant markers of suspect decision making or potential discrimination.”).

²⁸ Sébastien Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities*, Montreal, 2009, 54.

²⁹ *Andrews*, 1 SCR 143, at 189.

³⁰ Questions of reasonableness are addressed in the s. 1 or justification prong, where an inquiry over the reasonableness of the legislative distinction is carried out.

³¹ M. Jackman, *Constitutional Castaways: Poverty and the McLachlin Court*, in 50 *Supr. Ct. L. Rev.* 297 (2010); J. Eisen, *On Shaky Grounds: Poverty and Analogous Grounds under the Charter*, in 2 *Can. J. Poverty L.* 8 (2013).

³² *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC).

³³ *Andrews*, 1 SCR 143. The second factor is epitomized by the *Andrews* decision. In that case, the state was denying admission to the practice of law to non-citizens, who were in all other respects qualified. The distinction was deemed invidious as non-citizens, as a class of persons, were singled out on the ground of their personal characteristics (non-citizen status.) Both the majority opinion, delivered by Justice McIntyre, and Justice Wilson’s dissenting opinion construed the notion of grounds after the footnote 4 of the *Carolene Products* decision of the United States Supreme Court (*United States v. Carolene Products Company*, 304 U.S. 144 (1938)). Justice Wilson elaborated on the political process prong of the footnote, and placed emphasis of a lack of voting rights, which renders some groups of people more vulnerable than others. While this approach could be germane to remedying discrimination, for instance, in the case of prisoners being deprived of the right to vote, it would however be of little help in the case of non-normative families.

³⁴ *Miron*, 2 SCR 418.

The current approach is that under (3). It was outlined in the *Corbiere*³⁵ case. Thereafter, grounds became “characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law”³⁶.

3. Risks and the need to sketch out solutions

Of course, there are many risks associated with a rigid ground-based understanding of equality and anti-discrimination. A thus-framed approach risks overlooking discriminations suffered by groups unable to dovetail with protected grounds, and to protect only a “minority of minorities”. This is the crucial risk I intend to address. Furthermore, a second risk consists in reifying groups and “discourage[e] outcomes subtler than total exclusion or assimilation”³⁷. I fully share these concerns. The analysis thus moves to outlining the potential routes for a change that would lead courts to be more sympathetic to claims brought by non-normative groups, such as poor people and non-traditional families.

For instance, the Court has declined to find that occupational status of farm workers is an analogous ground³⁸. Yet, in *Fraser*³⁹, a case concerning the protection of farm workers governed by a separate (and worst) labor relations regime, it dismissed the s. 15 claim on the ground that there was an insufficient evidentiary record concerning the alleged adverse impact on farm workers⁴⁰. The concurring opinion of Justice Rothstein rejected the claim reasoning that employment status was not an analogous ground, since the plaintiff failed to demonstrate that the regime “utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage”⁴¹.

At present two major routes to overcoming the risks outlined above could be explored. One is the expansion of the doctrine of analogous grounds, the second the abandonment of the such a notion in favor of a more nuanced and inclusive notion of disadvantage, that does without grounds altogether.

The first one is an approach penchant to introducing new grounds were appropriate. For instance, new families are often unable to plead the marital status ground in disentangling discrimination in the distribution of benefits since they are not married (think about two cohabiting relatives outside the prohibited degrees of consanguinity) nor sometimes eligible to marry (polyamorous relationships, siblings, etc.). These families should get across the idea that a new status, namely family status, should be introduced. They could do so on several grounds.

³⁵ *Corbiere*, 2 SCR 203.

³⁶ *Ibid.*, at par. 13.

³⁷ Leckey, *Family Law as Fundamental Private Law*, cit., 71.

³⁸ Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 1 SCR 922, 1989 CanLII 86 (Supr. Ct. Can.); Baier v. Alberta, [2007] 2 SCR 673, 2007 SCC 31 (CanLII); Dunmore v. Ontario (Attorney General), [2001] 3 SCR 1016, 2001 SCC 94 (CanLII).

³⁹ Ontario (Attorney General) v. Fraser, [2011] 2 SCR 3, 2011 SCC 20 (CanLII).

⁴⁰ C. Sheppard, *Bread and Roses: Economic Justice and Constitutional Rights*, in 5 *Oñati Socio-Legal Series* 225 (2015).

⁴¹ *Fraser*, 2 SCR 3.

First, they could pivot on the concept of constructive immutability and argue that the state places an unfair burden on them by forcing them to dissolve their relationship if benefits are to be obtained. Yet, the dissolution of the family bond can only be done “at unacceptable cost to personal identity”⁴².

Second, they should stress the need to harmonize the statutory claims founded on human rights codes with constitutional claims pursuant to the reasoning in *Andrews*, treating the statutory jurisprudence as a guide and inspiration in interpreting the Charter⁴³. Since the family status ground is present in all provincial human rights codes, this established need for harmonization suggests that the ground be added to the Charter list of prohibited grounds for discrimination.

A second route consists in doing away with grounds altogether. This route is enshrined in the reasoning by Justice L’Heureux-Dubé in the *Egan* decision⁴⁴. Disadvantage is much more likely to arise from the way in which individuals are treated, rather than from some characteristics that individuals possess⁴⁵. L’Heureux-Dubé’s approach rather than focusing on grounds and related characteristics expressly focuses on economic prejudice and denial of benefits: “If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter”⁴⁶. This approach too could be more conducive to equality than a rigid ground-based approach to discrimination.

4. Concluding remarks

Far from offering a full-fledged analysis of the potential solutions to the shortcomings associated with a ground-based anti-discrimination approach to equality, the present analysis constitutes a stepping-stone to addressing the problem in the future. It first sets out to describe the present situation as one where the exclusion of non-normative groups constitutes a problem. The emergence of a problem clearly is the first and essential step toward the framing of solutions. By contrast, the section related to the potential solutions to the problems requires further research. Meanwhile, it could be advisable for anti-discrimination lawyers interested in the Canadian system to expound the two potential routes outlined above: one that seeks to expand the notion of analogous ground, the other that attempts to “get rid” of grounds and imagine a brand-new approach where courts focus on the more nuanced notion of disadvantage, following the suggestions of Justice L’Heureux-Dubé in the *Egan* decision.

However, while it was the aim of this short piece to outline the potential solutions to a perceived problem, the piece is largely silent on the many merits of

⁴² *R. v. Kapp*, [2008] 2 SCR 483, 2008 SCC 41 (CanLII), at par. 335, quoting *Corbiere*, 2 SCR 203, par. 13.

⁴³ Ryder, *The Strange Double Life of Canadian Equality Rights*, cit., 264-65.

⁴⁴ *Egan v. Canada*, [1995] 2 SCR 513, 1995 CanLII 98 (Supr. Ct. Can.).

⁴⁵ *Ibid.*, at 552.

⁴⁶ *Ibid.*

the Canadian contribution to a global dialogue on anti-discrimination rights. Such a contribution has been valuable, as the number of references to the Canadian top courts in foreign decisions show⁴⁷. At present, this centrality is so undeniable that scholars frequently argue that the U.S. Supreme Court has been largely overshadowed by its Canadian counterpart in the thread of this world-wide debate. However, while the merits of the Canadian contribution to a global dialogue have been thoroughly expounded⁴⁸, a relatively unexplored field of research in comparative law is that concerning the insufficiently inclusive nature of the Canadian approach with respect to non-normative groups. It is precisely this lacuna that this piece has intended to fill, with a view to laying the ground to future, more in-depth research.

⁴⁷ T. Groppi, *A User-Friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies*, in Ian Peach *et al.*, eds., *A Living Tree: The Legacy of 1982 in Canada's Political Evolution*, Toronto, 2007.

⁴⁸ It is worth mentioning, amongst the others, a recent Symposium on the Constitution of Canada held at the Scuola Superiore Santa'Anna in Pisa, Italy in May 2017, organized by Richard Albert, Giuseppe Martinico, Antonia Baraggia, and Cristina Fasone.