

CHARTER@30

A feminist perspective on
“competing rights” talk

Charter@30

1. Equality rights
2. Competing rights
 - i. Polygamy ban
 - ii. Niqab bans
3. Intersectional rights

“feminist”

A “feminist”, according to the Oxford English Dictionary, is a person who advocates for the rights of women, based on the theory of the equality of the sexes.

- Chief Justice Beverley McLachlin (2002)

<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm02-16-10-eng.asp>

Most Canadians are feminists

According to this definition, Justice L'Heureux-Dubé is a feminist, *as am I* – as, I suspect, are most people in this room, indeed, most Canadians.

- Chief Justice McLachlin (2002)

Why Canadians are feminist

I say this because equality is more than a “theory” in this country – it is constitutionally required. Equality of the sexes is the law. Of course, one can have different ideas about what this equality means, but there should be no dispute about the merits of the idea of sexual equality.

- Chief Justice McLachlin (2002)

Pop quiz

1. What is a feminist?

2. Are you a feminist?

1. Equality rights

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

Affirmative action programs

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

Andrews, Law, Kapp test(s)

- *Law Society of BC v Andrews*, [1989] 1 S.C.R. 143
- *Law v Canada*, [1999] 1 S.C.R. 497
- *R. v Kapp* 2008 SCC 41
- not sex equality cases
- Does s.15 promote sex equality?

Andrews and *Law* tests

Andrews [1989]

- Comparative concept
- Not formal equality
- Grounds: enumerated & analogous
- Harm: discrimination
- s. 15(1) distinct from s. 1

Law [1999]

- Comparative concept
- Substantive equality
- Grounds: comparator groups
- Harm: dignity
- s. 15(1) overlaps s. 1 (4 contextual factors)

Kapp test [2008]

- Comparative concept
- Template is substantive equality
- Grounds (enumerated & analogous)
- Harm: prejudice and stereotyping
- s. 15(1) distinct from s. 1

Women's Court of Canada

- <http://womenscourt.ca/>
- virtual court
- academics, activists, litigators
- alternative Charter equality decisions
- “fresh” conceptions: **substantive equality**
- 6 decisions published in CJWL/RFD

(2006) 18 CJWL/RFD

- *Symes v Canada*, [1993] 4 S.C.R. 695
- *Native Women's Association of Canada v Canada*, [1994] 3 S.C.R. 62
- *Eaton v Brant County Board of Education*, [1997] 1 S.C.R. 241
- *Law v Canada*, [1999] 1 S.C.R. 497
- *Gosselin v Quebec*, [2002] 4 S.C.R. 429
- *Newfoundland v Newfoundland & Labrador Association of Public and Private Employees*, [2004] 3 S.C.R. 381

Re-writing *Andrews*/ Reconsidering *Kapp* [WCC Workshop]

Kapp

- Reject comparator groups (formal equality)
- Retain substantive equality
- Retain enumerated & analogous grounds
- Harms: prejudice & stereotyping

WCC

- Is comparison necessary? What does it mean?
- Substantive in name; formal in application
- Dis/advantaged groups?
- Harms: exclusion & suppression

Pop Quiz

1. What is substantive equality?
2. Should s. 15 guarantee sex equality rights to men?

Feminist controversy: does s. 15 promote sex equality?

- Andrews/Law/Kapp test confusing, contested
- Success @SCC if challenge sex specific laws:
 - Men won Benner, Trociuk; lost Hess, Weatherall
 - Women won NAPE at s. 15, lost at s. 1
- No success women challenge sex neutral laws:
 - Symes, NWAC, Thibaudeau, Vancouver Society of Immigrant & Visible Minority Women, Health Services & Support-Facilities Subsector Bargaining Association

2. “Competing rights”

- “a developing area of law”
- “situations where the rights of two individuals appear to be in conflict”
- “ever more commonplace as our society continues to diversify”

- Ontario Human Rights Commission Intervener’s Factum in *R. v. N.S.*:

<http://www.ohrc.on.ca/en/resources/Guides/competingrights>

Diversity

- “Whether we like it or not, religious, ethnic and cultural diversity is part of our modern world – and increasingly, part of our national and community reality.”
- diversity → conflicts
- human rights law + courts & tribunals
 - Beverley McLachlin, CJC (2008)

i. Polygamy

- Polygamy: conjugal relations among more than two persons
- Polygyny: husband with multiple wives
- Polyandry: wife with multiple husbands
- Polyamory: multiple relationships with knowledge and consent
- Bigamy: form of marriage among more than two persons

Polygamy in Canada: Legal and Social Implications for Women and Children (SWC, 2005)

<http://epe.lac-bac.gc.ca/100/200/301/swc-cfc/polygamy-e/index.html>

Polygamy in Canada (SWC)

- A. Campbell. How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis
- N. Bala. An International Review of Polygamy: Legal and Policy Implications for Canada
- M. Bailey, B. Amani, B. Baines, A. Kaufman. Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada
- Alberta Civil Liberties Research Centre. Separate and Unequal: The Women and Children of Polygamy

Bailey, Amani, Baines, Kaufman recommendations

- Recognition of valid foreign polygamous marriages
- Decriminalization
- Not legalization [women in “marriage purgatory” might challenge failure to legalize]

Polygamy research studies

- Martha Bailey & Amy Kaufman, *Polygamy in the Monogamous World* (Praeger, 2010)
- Angela Campbell, “Bountiful Voices” (2009) 47 *Osgoode H.L.J.* 183
- Lori Beaman & Huguette Bourgeois, “Doit-on criminaliser la polygamie au nom de la protection des droits des femmes?” in Louise Langevin, ed., *Rapports sociaux de sexe/genre et droit: repenser le droit* (Paris: Archives contemporains, 2008)
- Rebecca Cook & Lisa Kelly, *Polygyny and Canada’s Obligations under International Human Rights Laws* (Canada: Dept of Justice, 2006)

Polygamy mysteries

- The 19th Wife by David Ebershoff
- Desert Wives by Betty Webb
- Desert Lost by Betty Webb

Decriminalization

- Feds – NOT
- No prosecutions since 1937 (adultery)
- Jan 2009 BC charges Blackmore & Oler
- Sept 2009 charges quashed: *Blackmore v. BC* 2009 BCSC 1299
- Oct 2009 BC launches reference BC SC
- Constitutionality of Criminal Code s. 293

Criminal Code, s. 293

- **Every one** who
- (a) practises or enters into or in any manner agrees or consents to practise or enter into
- (i) any form of **polygamy**, or
- (ii) any kind of **conjugal union** with more than one person at the same time, **whether** or not it is **by law recognized as a binding form of marriage**; or
- (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a) (i) or (ii),
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years

Polygamy reference case

Rights-seekers

s. 2(a) freedom of
religion

BC AG

s. 1 women's sex
equality
(s. 15?)

s. 2(a) Religious Freedom

- defined very broadly in SCC cases
 - R. v Big M Drug Mart, [1985] 1 S.C.R. 295
 - Syndicat Northcrest v. Anselem 2004 SCC 47
 - Bruker v Marcovitz 2007 SCC 54
 - Alberta v Hutterian Brethren of Wilson Colony 2009 SCC 37

“religion”

- “Broadly defined, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith”

Religious belief

- Not objective religious obligation
- Sincerity of belief, if sincerity at issue
- Interference with religious belief “more than trivial or insubstantial”

s. 293 infringes religious freedom → s. 1

Section 1

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

R. v. Oakes [1986] 1 SCR 103

1. sufficiently important objective
2. proportionality test:
 - i. rational connection* between law and objective
 - ii. minimal impairment* of right
 - iii. proportional effects* of the law on the right and of the objective

Oakes test is controversial

- **Reasonableness test:**

- rational connection; minimal impairment
- too deferential (legislature)

or

- **Proportionality test:**

- balance deleterious v salutary effects
(*Dagenais v CBC* [1994] 3 SCR 835)
- too discretionary (judiciary)

Sufficient important objective

- 1893, s. 293 exclude Mormons
- 1954 Mormon reference deleted
- BC: protect women and children
- (i) evidence – inconclusive (A. Campbell)
- (ii) “no shifting purposes” (Big M)
- (iii) “permissible shift in emphasis” (Zundel)

Rational connection

- Is criminalization rationally connected to protection of women and children?
- Underinclusive
- Overinclusive

Minimal impairment

- Does criminalization impair religious freedom as little as possible?
- Penalty of up to 5 years incarceration
- Other Criminal Code provisions → harms
- Regulatory strategies e.g. do not legalize

SCC Justice Deschamps (majority) in Chaoulli

- Struck prohibition on private health insc.
- Used experiences of other countries to assess minimal impairment
- What do other countries do (A. Campbell)?

Polygamy a crime today in

- United States, European Union states, Australia, New Zealand, China, Norway, Samoa, Trinidad & Tobago, Tunisia, Paraguay, Thailand, Vietnam, Turkey, Cuba, Russian Federation
- A number of these states were predominantly white, christian and patriarchal when polygamy was criminalized

Polygamy legal in jurisdictions with

- **Islamic law:** Syria, Morocco, Libya, Iraq, Algeria, Jordan, Yemen, Egypt, Indonesia;
- **Plural religious marriage laws:** India, Bangladesh, Pakistan, Sri Lanka, Philippines, Singapore, Cameroon, Burkina Faso, Gabon, Bhutan;
- **Customary law:** Eritrea, Nigeria, Kenya, Uganda, Zambia, Namibia, Guinea, Zimbabwe, South Africa

International instruments

- No international covenant/convention adverts to polygamy;
- Human Rights Committee of the ICCPR recommended abolition of polygamy
- Committee on the Elimination of Discrimination Against Women (CEDAW) recommended prohibiting polygamous marriages

proportionality

- Deleterious effects (on right) v. salutary effects (of objective)
- Deleterious effects mattered to SCC Justice Abella in *Multani* (kirpan)
- Salutary effects mattered to SCC Justice Abella in *Braker* (Jewish woman's get)

SCC Justice Charron (majority) in Multani

- Struck down school's prohibition on kirpan
- Absolute prohibition stifled values such as multiculturalism, diversity
- [impact of criminalization of polygamy on immigrant women]
- Religious tolerance more important than offending sense of propriety
- [polygamy offends sense of propriety]

Polygamy's Fate?

- Criminalizing polygamy may fail minimal impairment (reasonableness), given other regulatory tools, and multiculturalism
- Balancing benefits of criminalization against deleterious effects suffers from an evidentiary deficit
- Decriminalize to research effects of polygamy on women before regulation

ii. Niqab bans

- Bill 94 An Act to establish guidelines governing accommodation requests within the Administration and certain institutions (March 24, 2010 National Assembly QB)
 - Deny reasonable accommodation to niqab-wearing women for reasons of security, communications and identification
- R. v N.S. (2009) CanLII 21203 (ON S.C.)
 - victim of sexual assault must remove niqab to testify at preliminary inquiry

Religious freedom

R. v N.S.

- preliminary inquiry judge (Weisman) denied sincerity of belief: driver's licence photo
- Justices of Appeal Doherty and Moldaver sharply critical of Weisman saying he "jumped on" the driver's licence issue and made it out to be far more revealing than it really was (G&M, 9 June 2010, A6)

Sufficiently important objective

- Bill 94: protect women from subordination
 - Competing rights (diversity)
- R. v N.S.: demeanour → full answer & defence
 - Competing rights (traditional)
 - Moldaver JA: “Society should not be put in a position of losing evidence from critical witnesses because we don’t quite get to see all of their demeanor.”

R. v. N.S.

- Not a Charter case although Charter arguments made at ON Court of Appeal (see newspaper reports)
- For sex equality argument in R. v. N.S. see Women's Legal Education and Action Fund (LEAF) Intervener's Factum:
http://www.leaf.ca/features/documents/Factum_Final_NS_Signed.pdf

Rational connection

Bill 94:

- Over-inclusive: no evidence all niqab-wearing women pose security, communication, identification problems
- Under-inclusive: terrorists, bank robbers, etc cover faces and pose these problems

Minimal impairment

Bill 94

- Absolute ban not minimal
- Possible to ascertain identity privately
- assumes all bureaucrats sighted

Proportionality

Bill 94

- Again Multani (religion) v Bruker (sex equality)
- Complicated by Quebec Charter's new s. 50.1 sex equality provision: controversy over whether its purpose is to act as a trump card for women's equality rights, see my Women's Court of Canada Blog.

Critique of competing rights

- Juxtaposing s. 2(a) religious freedom v s. 1 limitation (sex equality)
- Ignores claims of intersectional rights seekers

3. Intersectional rights

- refuse to choose between religious freedom and sex equality
- seek both, equally
- not “reconciling” rights
 - OHRC Factum: “harmonizing” (not balancing)
 - Only if no “true” conflict

Intersectional rights-seekers

- Women living in polygamous relationships
- Niqab-wearing women
- If they claim rights to both religious freedom and sex equality = Intersectional feminists
- Where are their voices?
- Absent from s. 2(a) v s. 1 contest

Intersectional feminists

- Disrupt conventional contest
- Argue s. 293 & Bill 94 violate their intersectional rights to s. 15 sex equality rights as well as to s. 2(a) religious freedom
- Deprive state of s. 1 sex equality justification?