Timely Interventions: MacKinnon's Contribution to Canadian Equality Jurisprudence

Sheila McIntyre
I would like to thank the organizers of this symposium for inviting me to discuss Professor Catharine MacKinnon’s contributions to Canadian law and feminist legal activism. I have focused on her contributions to equality jurisprudence and to law reforms related to sexual-assault law. This focus only captures some of the most direct of her contributions to Canadian equality thinking and activism during the last twenty-five years. Professor MacKinnon’s work is taught in an astonishingly varied range of law school courses and social science subjects across Canada. It is regularly cited in legal briefs and scholarship devoted to equality and human rights law, theory, and advocacy and to combating male violence against women. In researching this paper, I re-read some of the writings that have been very important to me in my life as a legal scholar and feminist legal activist and read others for the first time. The ideas, the analysis, and the writing are elegant, breathtaking, compelling, deeply challenging, and ground shifting — sentence after sentence, page after page, topic after topic. I read passages out loud to my partner. I ticked passages I wished to return to until I realized there were too many to count. Sadly, at least in Canada, this kind of densely packed, formidably researched, and original scholarship is a rarity in the new entrepreneurial academy dependent on public-private research partnerships and on market-focused learning and teaching. And its uncompromising and demanding radicalism was always and remains a rarity in the academy, in legal practice, and in feminist legal circles. So, again, I wish to say how pleased I am to join in this tribute to a remarkable scholar and activist.

Part I of this article locates Professor MacKinnon’s contributions to Canadian law in their historic context. I hope this contextual framing dovetails with Professor Baer’s contribution to this symposium and suggests the domestic conditions that facilitated adoption of MacKinnon’s equality theory in a foreign jurisdiction. In part II, I discuss her general impact on Canadian equality advocacy methodologically and substantively. Finally, part III highlights some of the key cases which are indebted not just to her dominance theory but to her construction and expression of the legal issues in dispute. I also offer two instances of how Canadian feminists adapted her analysis and method to secure significant legislative reforms to criminal sexual-assault law and procedure.
PART I: LOCATING MACKINNON’S CONTRIBUTION IN ITS CONTEXT

Canada has two Constitution Acts. The first, enacted by England in 1867, ended Canada’s status as a British colony. It codified the procedural rules and powers of our bicameral parliamentary system and an exhaustive division of federal and provincial legislative powers, including over the appointment and jurisdiction of federal and provincial judges. It contained no bill of civil or human rights. Although scattered judges of the Supreme Court of Canada attempted to find fundamental rights such as freedom of speech, religion, and assembly implicit in the preamble to the 1867 Constitution Act, no majority of the Court ever endorsed such an implied bill of rights.

Support for legally enforceable human rights in the wake of World War II initially led to the adoption by most of the ten provinces of antidiscrimination statutes prohibiting discrimination in access to public services, housing, and employment. In 1960, the federal government enacted a statutory bill of rights containing fundamental freedoms, due process rights, and a guarantee of “equality before the law and the protection of the law,” all of which rights the Bill declared “have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex.” Because it was an ordinary statute with no clear enforcement clause, the courts read it very narrowly with excessive deference to Parliament. Between 1960, when the Bill was enacted, and 1982, only one federal law was held inoperative under the Bill. The equality and antidiscrimination guarantees were read especially narrowly by the courts to provide no more than a very narrow grant of formal equality that guaranteed only that every federal law should be neutrally administered in respect of all individuals to whom it applied. The Court further narrowed the antidiscrimination clause to prohibit only differentiation in assignment of penalties such as fines or imprisonment, and not differential allocation of state benefits on grounds prohibited by section one. Hence, in

2. All subsequent amendments of the 1867 Act had to be enacted in Britain.
6. For a history of the enactment of such legislation, see Walter Tarnopolsky, Discrimination and the Law in Canada 25-37 (1982).
7. Canadian Bill of Rights, S.C. 1960, c. 44.
8. See Curr v. R., [1972] S.C.R. 889, 899 (Can.) (“[C]ompelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government.”).
Bliss v. Attorney General of Canada, the Court rejected a sex-discrimination challenge to provisions of the Unemployment Insurance Act that prevented women who had not worked sufficiently long to be eligible for insured pregnancy and childbirth leave from claiming regular benefits for post-pregnancy unemployment for which they would have been eligible but for the fact that their unemployment was preceded by pregnancy. Justice Roland Ritchie for the Supreme Court of Canada reasoned: "These provisions form an integral part of a legislative scheme enacted for valid federal objectives and they are concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation but by nature".

Finally, the Court held that the guarantee of “equality before the law and the protection of the law” did not require universality of application of all laws. Differential distribution of benefits and burdens by Parliament was permissible so long as the legislation served a “valid federal objective.” By “valid,” the Court meant no more than that laws must fall within federal constitutional competence and be “rationally based and acceptable as . . . necessary . . . to meet special conditions and to attain a necessary and desirable social objective.” In the result, only laws proved by the challenger to be “arbitrary or capricious” or “based upon any ulterior motive or motives offensive to the provisions” of the Bill would be found inconsistent with the equality guarantees. The burden of proving that a federal objective was invalid lay on the challenger. Not surprisingly, this onus was virtually impossible to meet. Most statutes have a rationale; few are arbitrary or capricious in origin, and legislative intent — even if benign — is notoriously hard to identify. Requiring the challenger to prove malign intent doomed the guarantee.

Beginning in the 1970s, the national liberal government began to press for “patriation” of the Canadian Constitution by securing amendments that would end the last legal vestiges of Canada’s colonial status — the requirement that all amendments to the Constitution must be formally approved by the British Parliament. As part of this modern overhaul, the liberal Prime Minister, Pierre Trudeau, sought a package of amendments altering resource sharing among the provinces and federal government and adding an entrenched Charter of Rights and Freedoms to the Constitution. The Charter was intended to serve two political purposes. The specific goal was entrenchment of minority language rights to Anglophones in Québec and to Francophones in the other nine, predominantly English, provinces in the hope of dampening separatist aspirations in Québec. Relatedly, the Charter was intended to shore up national unity around the

12. Id. at 190.
15. Id at 407.
embrace and promotion of fundamental rights and freedoms shared by all Canadians regardless of their language, religion, national origin, or geographic location. Efforts to secure provincial agreement to this major constitutional reform were unsuccessful through the 1970s.\textsuperscript{18} and by late 1980 the federal government determined to go straight to Westminster with the federal proposals without provincial support. Concurrently, the Special Joint Committee of the Senate and the House of Commons on the Constitution held lengthy public hearings on the draft Charter of Rights in the hope of enlisting public support for the new guarantees against the holdout provinces.\textsuperscript{19} Entrenchment was deeply contentious for a variety of reasons: provinces feared that federally appointed judges applying a national document would interfere with regional rights;\textsuperscript{20} the Left feared that an unaccountable and unrepresentative judiciary would strike down progressive laws and erode democratic process; the Right feared that special interest groups would seek from courts what they could not secure by majoritarian democratic means.

The continuing and widespread public debates about whether to entrench a constitutional Charter of Rights and about its proposed content occurred at an auspicious time for Canadian women. By 1980, a critical mass of feminists existed in law schools, government offices, legal practice, and public advocacy groups. The Federal Canadian Advisory Council on the Status of Women (“CACSW”) commissioned research to analyze Canadian precedent in order to participate in the popular debate and public hearings and to ensure women’s rights were adequately protected in any amended constitutional document.\textsuperscript{21} Feminist legal scholars also closely analyzed American Fourteenth Amendment jurisprudence and international human rights instruments to the same end.\textsuperscript{22} Virtually all equality-seeking groups involved in the Charter hearings agreed

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19. For a detailed review of the submissions of equality-seeking groups to the Special Joint Committee, see Bruce Porter, TWENTY YEARS OF EQUALITY RIGHTS: RECLAIMING EXPECTATIONS, 23 WINDSOR Y.B. ACCESS TO JUST. 145, 149 (2005).


22. See, e.g., Anne Bayefsky, Defining Equality Rights, in EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 1, 13-14 (Anne Bayefsky & Mary Eberts eds., 1985). This book also contains reviews of pre-Charter domestic and international jurisprudence, Charter lobbying, and analysis of the potential impacts of the final text of the Charter for discrimination claims based on ethnicity, religion, sex, age, physical and mental disability, marital status, and sexual orientation. Key conferences anticipating the coming into force of the equality guarantees routinely included American constitutional scholars. See, e.g., Kent Greenawalt, A Neighbour’s Reflections on Equality Rights, in RIGHTING THE BALANCE: CANADA’S NEW EQUALITY RIGHTS 189 (Lynn Smith et al. eds., 1986); Stephen L. Spitz, Litigation Strategy in Equality Rights:
that the new equality guarantees had to be drafted in ways that would preclude judges’
timid approach to the Canadian Bill of Rights and their narrow interpretation of the
equality guarantees.\textsuperscript{23} To this end, a remarkable degree of consensus formed around
three goals requiring amendment to the federally tabled draft. First, the equality
guarantee must be expansively drafted to go beyond formal equality and extend to
equality in the substance of the law and equality in allocations of state benefits. As well,
the enumerated list of prohibited grounds of discrimination should be open ended to
allow for recognition of new grounds without the requirement of satisfying the high
threshold for constitutional amendment. Second, the equality guarantee should not only
protect affirmative action measures but impose positive obligations on government to
redress existing inequalities. Finally, successive drafts of the Charter contained an
explicit limitation clause specifying the parameters of the provincial and federal
governments’ authority to place limits on the rights and freedoms entrenched in the
Charter.\textsuperscript{24} In all drafts, the limitations clause was expansively framed. Rights-seeking
groups concurred that the limitations clause must be narrowly framed.\textsuperscript{25} Feminists
associated with the CACSW also sought to secure language that would ensure sex
discrimination claims received heightened scrutiny if equality rights were limited.\textsuperscript{26}

The equality lobby was highly successful in its efforts. The penultimate draft of the
equality guarantee had read as follows:

\begin{quote}
Non-discrimination Rights
15(1) Everyone has the right to equality before the law and to the equal protection of the
law without discrimination because of race, national or ethnic origin, colour, religion, age
or sex.
15(2) This section does not preclude any law, program or activity that has as its object the
amelioration of conditions of disadvantaged persons or groups.
\end{quote}

The final text now reads:

\begin{quote}
Equality Rights
15(1) Every individual is equal before and under the law and has the right to the
equal protection and equal benefit of the law without discrimination and, in particular,
without discrimination based on race, national or ethnic origin, colour, religion, sex, age or
mental or physical disability.
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
\end{quote}
are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. 28

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are
guaranteed equally to male and female persons. 29

The limitations clause was also narrowed as a result of the lobbying of equality advocates. The penultimate draft would have allowed government to place such limits on rights as are “generally accepted” in a Parliamentary democracy. 30 The final draft required limits to be “prescribed by law,” rather than imposed by administrative or executive discretion, and to be “demonstrably justified” by the state. 31

The coming into force of section 15 was delayed three years after the rest of the Charter took effect, ostensibly to allow the provincial and federal governments to review their statutes and regulations and to amend them, as needed, to conform to the expansive new equality rights in the Charter. In fact, the delay yielded little from government, but across the country feminists conducted their own statute audits to identify laws in need of revision or repeal. 32 This undertaking required the feminists involved to immerse themselves in feminist legal theory to try to identify the most effective equality approach for litigating sections 15 and 28 claims. At the time, the special treatment/equal treatment debates about pregnancy leave were dividing U.S. feminist theorists. 33 There was no such division in Canadian feminist legal circles largely because jurisprudence under the Canadian Bill of Rights so decisively demonstrated the limits of a formal equality approach. 35 Consensus was widespread and strong in favour of what was variously referred to as a “substantive equality” or “equality of results” approach or a strategy for achieving a “fair share of social resources.” 36 Feminist legal advocates also tended to

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29. Id. at s. 28. The elaborate history of the fight to secure entrenchment of section 28 is described in Penney Kome, The Taking of Twenty-Eight (1983). For an overview of the numerous battles fought by women against male political leaders throughout the patriation process, see Chaviva Hosek, Women and the Constitutional Process, in And No One Cheered, supra note 18, at 280.

30. Bayefsky, supra note 22, at 72.

31. Id.

32. See Gibson, supra note 23, at 44 n.183 (list of the government reports and of the feminist audits produced). Gibson states that governments were “far from whole-hearted” and very cautious in their responses. Id. at 44. For criticism of governments’ inaction, see Mary Eberts, A Strategy for Equality Litigation Under the Canadian Charter of Rights and Freedoms, in Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms, supra note 18, at 411.


34. There were multiple political strains of feminism, including liberal, socialist, and cultural feminism, within the Canadian women’s movement. Socialist feminists, for instance, were highly skeptical about resort to courts for egalitarian change. However, within feminist legal circles, there was little support for the formal equality approach. For a summary of the different movements of Canadian feminism, see Susan B. Boyd & Elizabeth A. Sheely, Feminist Perspectives on Law: Canadian Theory and Practice, 2 Canadian J. Women & L. 1, 8–13, 16–18 (1986).

35. Formal equality was nevertheless pursued in some law reform efforts. Rape law was comprehensively overhauled in the early 1980s to eliminate formally unequal treatment of women and men, and of subcategories of women who reported rape and indecent assault. See Sheila McIntyre, Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law, Canadian Woman Stud., Fall 2000, at 72, 74–75.

36. See, e.g., Baines, supra note 21; Mary Eberts, Sex-Based Discrimination and the Charter, in Equality
favour the development of contextualized reform strategies tailored to the particular inequality problem being addressed. \(^{37}\) With few exceptions, Canadian feminist writing of the early 1980s illustrated the substantive potential of the new equality guarantees in relation to embedded social, economic, and legal inequalities stemming from women’s reproductive and childrearing roles and from political disenfranchisement and marginalization, all overlaid with centuries of ascribed inferiority. \(^{38}\) Some writing linked these indicia of systemic inferiority to male violence against women. \(^{39}\) Such embedded inequalities were the substance to be remedied by equality law. But such issues as why, how, and in whose interests it is that the social costs of reproduction are so asymmetrical and so devalue women’s reproductive and paid labour; why male violence against women is so endemic; why female gender co-relates with poverty; and why women’s second-class status is so normalized in law and politics were little theorized in the pragmatic push to prepare for the first section 15 cases. \(^{40}\)

During this period, a study was funded by the CACSW of the NAACP and the ACLU to evaluate the potential of establishing a litigation arm for the Canadian women’s movement. \(^{41}\) The study recommended that a permanent legal action fund operating on a national basis be established to finance Charter sex equality litigation. In response, the Women’s Legal Education and Action Fund (“LEAF”) was founded in 1985 to handpick equality test cases that would incrementally build a substantive equality jurisprudence while also undertaking public education favoring achievement of women’s equality through law. \(^{42}\)

Finally, during the time between entrenchment of the Charter and when the first section 15 case reached the Supreme Court of Canada, human rights litigators were securing the doctrinal building blocks for substantive equality jurisprudence. In 1982, the Court had repudiated narrow, technical readings of human rights statutes in favour of a broad, generous interpretive approach consistent with their remedial purpose. \(^{43}\) By 1985, the Supreme Court of Canada had held unanimously that discriminatory intent need not be proved to establish violation of an antidiscrimination statute, had recognized the

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38. See Eberts, supra note 36, 189-90.


concept of adverse-effect discrimination, and had read an implied duty of reasonable accommodation into human rights law.\textsuperscript{44} In 1987, the Court also recognized the existence of systemic discrimination and endorsed the use of systemic remedies, including imposed hiring quotas, for its redress.\textsuperscript{45}

It was during the three-year moratorium that Professor MacKinnon’s two \textit{Signs} articles\textsuperscript{46} began circulating in law school classes, feminist conferences, and statute audit circles. Professor MacKinnon was invited to address a National Symposium on Equality Rights in Toronto just before the coming into force of section 15. There, she delivered a paper entitled \textit{Making Sex Equality Real}\textsuperscript{47} which core analysis echoes her “Difference and Dominance” chapter in \textit{Feminism Unmodified}.\textsuperscript{48} From there, she was recruited by the Federation of Women Teachers’ Associations of Ontario to work on \textit{Tomen}, the first section 15 case filed when the moratorium expired.\textsuperscript{49} In that case, a six-woman team theorized a substantive equality argument and amassed an evidentiary record in defence of all-woman organizational structures as vehicles to advance women’s equality.\textsuperscript{50} Professor MacKinnon was also invited to serve on LEAF’s National Legal Committee from 1987 to 1991, when the most important wave of equality cases in the post-Charter era reached our Supreme Court.

\textbf{PART II: THE CONTRIBUTION}

Twenty-five years later it is impossible to recapture the jolt of first encounters with Professor MacKinnon’s two \textit{Signs} articles\textsuperscript{51} and the speeches she published in \textit{Feminism Unmodified}.\textsuperscript{52} In Canada, the embrace of substantive equality in feminist legal circles had not yet settled into a coherent theory or legal strategy, and then, suddenly, dominance theory drew the pieces together and, with its embrace by the paid and pro

\textsuperscript{48}. Catherine A. MacKinnon, \textit{Difference and Dominance: On Sex Discrimination, in Feminism Unmodified: Discourses on Life and Law} 32 (1987). This chapter was delivered first as a speech in 1984.
\textsuperscript{49}. The \textit{Tomen} case is comprised of multiple legal proceedings in administrative, human rights, and constitutional law. Margaret Tomen challenged the existence of the only all-woman labour union in the country on the basis that its single sex organizational structure was sex discrimination contrary to human rights legislation and the Charter. For a comprehensive history and critical analysis of the legal proceedings, see Karen Schucher, \textit{Contesting Women’s Solidarity: Human Rights Law and the FWTAO Membership Case} (2006) (LLM thesis, York Univ.) (on file with Library and Archives Canada).
\textsuperscript{50}. For the argument advanced and the record compiled to support that argument, see MARY EBERTS, FLORENCE I. HENDERSON, KATHLEEN A. LAHEY, CATHARINE A. MACKINNON, SHEILA MCLINTYRE & ELIZABETH J. SHILTON, \textit{The Case for Women’s Equality: The Federation of Women Teachers’ Associations of Ontario and the Canadian Charter of Rights and Freedoms} (1991).
\textsuperscript{51}. MacKinnon, \textit{An Agenda for Theory, supra note 46}; MacKinnon, Toward Feminist Jurisprudence, \textit{supra} note 46. _
\textsuperscript{52}. \textit{Feminism Unmodified, supra} note 48.
bono lawyers at LEAF, defined the approach that thereafter animated sex equality litigation in Canada.

Let me remind you of the purest distillation of the theory. Under a formal equality approach, MacKinnon argued, the “underlying story” of sex-based social, economic, political, and legal differences between the sexes is:

[O]n the first day, difference was, on the second day, a division was created upon it, on the third day, irration instances of dominace arose. Division may be rational or irrational. Dominance either seems or is justified. Difference is.54

By contrast, the underlying story of the dominance approach to (in)equality that has been imported into the substantive equality advocacy of LEAF is:

[O]n the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, because the systematically differential delivery of benefits and deprivations required making no mistake about who was who. Comparatively speaking, man has been resting ever since.55

This approach was built from observing and aggregating the particulars of women’s lives under conditions of male domination, conditions infused and inflected by multiple other relations of domination—race, class, disability, religion, and so on.56 For women, these multiple relations of domination converge in patterns of inequality including:

unequal pay, allocation to disrespected work, demeaned physical characteristics; targeting for rape, domestic battery, sexual abuse as children, and systemic sexual harassment; depersonalization, use in denigrating entertainment, and forced prostitution . . . . [I]n an historical context characterized by disenfranchisement, preclusion from property ownership, exclusion from public life, and a sex-based poverty and devaluation of women’s contributions in all spheres of social life . . . .57

The quoted passage comes from LEAF’s factum in Andrews, the first section 15 case heard by the Supreme Court of Canada.58 You should recognize MacKinnon’s thinking and cadence here. She was a key player in formulating the Andrews argument

53. Sherene Razack’s history of LEAF emphasizes the degree to which a very small number of predominantly white and middle-class feminists shaped both the lobbying that secured the current text of section 15 and, thereafter, litigation strategy. RAZACK, supra note 42. A clear majority subscribed to a substantive equality approach compatible with dominance theory. The lack of diversity within LEAF compromised its credibility within the broader women’s community until LEAF took significant steps to correct the problem. Over the years, as personnel changed, the approach to substantivism sometimes varied. However, promotion of a formal equality approach has never been LEAF’s strategy.

54. MacKinnon, supra note 48, at 34.

55. Id. at 40.

56. For the first example of this aggregated methodology leading to the construction and application of dominance theory, see CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).


which I will discuss later.

The dominance approach has a methodology. Do not start with law as it is, especially equality law as it is, and try to fit women’s claims into it. Women are subordinated in and to and by male law, including liberal equality law. Start with the reality of women’s lives under conditions of enforced systemic inequality, unpack inequality’s dynamics and distributions and rationalizations, and determine how law is implicated. Then, demand that equality guarantees redress — not just for those lived inequalities, but end law’s complicity in enabling and legitimating them.

As an illustration, consider LEAF’s parliamentary brief supporting draft legislation to restrict pretrial production to defence counsel of a vast range of confidential personal records documenting a sexual assault complainant’s medical, counseling, child welfare, corrections, and other history, a tactic intended to intimidate complainants and to troll for credibility-eroding arguments. The brief’s table of contents reflects the methodology developed by Professor MacKinnon. Its subheadings summarize the constitutional equality argument for parliamentary committee members who might not have troubled to read the full document and who needed a simple tutorial to understand why protection of complainants’ records was an equality issue subject to constitutional law.

After setting out LEAF’s expertise in litigating equality claims, including claims focused on criminal sexual offence laws, the brief broke down how inequality infused the development and application of sexual assault doctrine and procedure, how reforms in 1992 (Bill C-49) sought to redress specific discriminatory components of law, and how new discriminatory practices emerged to evade reforms that restricted defence access to complainants’ sexual history. The subheadings were as follows:

(a) Inequality in Law;  
(b) Inequality in Sexual Assault Law;  
(c) Sexual Violence as a Practice of Inequality;  
(d) Legislation to Curb Inequality in the Operation of Sexual Assault Law;  
(e) Bill C-49: Reforming Sexual Assault Law to Conform with All Charter Guarantees;  
(f) Defence Requests for Access to Complainants’ Records: (i) End-Run Around Anti-Discrimination Features of Bill C-49; (ii) New Defences for a New Class of Defendants;  
and (iii) Targeting Equality-Promoting Services.

60. Id. at 2-3 (emphasizing that, until very recently, all laws were enacted, enforced, interpreted, and applied exclusively by white, propertied men, while women could not vote, hold public office, practice law, or sit on juries; most laws pre-date the advent of modern human rights norms and Canadian equality guarantees).
61. Id. at 3-5 (noting that men, the group responsible for ninety-nine percent of all sexual offences, wrote and enforce sexual-assault laws without regard for the experience and perspective of women and children, the primary targets of male sexual aggression, in what remains a pervasively sexually unequal culture; by default, they reflected and normalized the unequal rights, roles, and sexual standards assigned by men to women). This section is illustrated with examples of bias in law and procedure.
62. Id. at 5-7 (documenting that the more powerless an individual, the more vulnerable to sexual exploitation and violence, particularly by individuals s/he knows who occupy positions of power, authority, or trust in relation to her or him, and that such power insulates many abusers from exposure and legal sanction).
63. Id. at 7-8 (discussing judicial resistance to criminal reforms of 1976, 1983, and 1992 and defence tactics to evade them).
64. Scott & McIntyre, supra note 59, at 8-11 (discussing in detail the equality-driven amendments responsive to judicial invalidation in 1991 of statutory restrictions on sexual history evidence as unconstitutional infringements of fair trial rights).
65. Id. at 13-14 (noting that feminist activism and reforms generated more reporting and prosecution of sexual assaults committed by privileged and powerful men who, in turn, devoted uncommon resources to
The third part of the brief offered a detailed substantive equality critique of the case law on disclosure of personal records and an extended explication of the constitutional equality principles and imperatives underpinning proposed legislative reforms responsive to that case law. This portion of the argument also analyzed several specific inequality issues raised by broad defence access to such confidential records, such as the inherent unreliability of some of the records pursued, inequalities exploited in legal proceedings, discriminatory premises underlying disclosure requests or production orders, and discriminatory impacts on persons living with recurring physical or mental health problems.

The structure of the brief perfectly captures MacKinnon's method: start with the material particulars of inequality to determine what an equality guarantee mandates, not the other way around. In my view, this profound shift in focus, once articulated, is actually the easy part, and LEAF litigation teams — working in and through collective processes with Catharine — got pretty good at it. The harder part is exiting the passive professional voice that describes inequality as if it has no author or internal logic or beneficiary or collaborators — that educates courts about women's inequality descriptively without pointing fingers. Going only half way to the descriptive leaves women “othered,” the objects of legal study, pinned in the legal mind as “different.”

Rape, spousal terrorism, femicide, prostitution, sex tourism and trafficking, the pornification of all media, lack of reproductive autonomy, unequal pay, job segregation, poisoned work environments, misogynist “jokes,” political marginalization, lack of credit and credibility — the dominance approach insists on tracking these manifestations and practices of sex inequality in the unexpurgated version back to their source — that is, to dominators and domination. This is where many legal feminists lose their nerve and where Professor MacKinnon never has.

Before offering a sampler of section 15 cases argued during Professor MacKinnon's years of partnership with LEAF, let me paint her jurisprudential impact in broad strokes.

First, more women's issues were framed squarely as equality challenges —

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66. Id. at 14-15 (noting that many disclosure requests focus on records of rape crisis centres, hospital sexual assault centres, and feminist therapists).

67. Id. at 20-21 (e.g., where the author of the records, a doctor, probation officer, or counselor, may be the abuser or where the records were generated by institutions such as Aboriginal residential schools that were premised on supremacist ideologies about the cultural inferiority of residents).

68. Id. at 21-22 (such as complainants' ignorance of their right to refuse to produce confidential records to police as a condition of having their assault report processed).

69. Scott & McIntyre, supra note 59, at 22-24 (such as arguments for access to records that invoked evidentiary rules that were repealed on the basis of their discriminatory premises, including corroboration, recent complaint, and sexual reputation rules).

70. Id. at 24-26 (showing compounding effects of discrimination-based pursuit of records on discrimination-based violation, and underlining adverse effects on therapeutic treatment of the threat of disclosure of therapy records).

71. For a critique of Canadian equality jurisprudence for going only half way, see Sheila McIntyre, Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination, in MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER 99, 100 (Fay Faraday et al. eds., 2006).

72. I am grateful to Professor Radha Jhappan for introducing me to the term “pornification” and for discussions we have had about the socio-political trends it encompasses.
substantive equality challenges. For instance, reproductive choice cases were litigated under section 15, not under constitutional guarantees of liberty or privacy. Efforts by criminal defence lawyers to expand admissibility at trial of so-called “evidence” of complainants’ actual, ascribed, or invented sexual history were countered by invoking the equality guarantees, not complainants’ rights to privacy or security of the person. Likewise efforts to have unrestricted pre-trial access to complainants’ personal records were opposed by reference to constitutional equality rights, not to privacy rights.

Second, doctrine not previously viewed through an equality lens was reconceptualized and litigated on the basis of substantive equality principles. The rules of standing were challenged as inconsistent with constitutional equality guarantees on the basis that they privileged access to the courts by individual litigants claiming personal injury to recognized private legal interests over litigants asserting claims against government in the public interest, often asserting injuries historically unrecognized by laws that map the interests of the privileged. Constitutional remedies law was also transformed to map substantive equality principles. Encouraged by LEAF, and over strong government objections, the Supreme Court of Canada endorsed the novel remedy of ordering state benefits extended to groups unconstitutionally excluded in breach of section 15. The Court rejected formal equality arguments restricting its remedial options to striking down exclusions explicitly contained in a statute or striking down benefits for all in the case of exclusion by omission. It held that the substance of the exclusion dictates remedy, not the technique of drafting it.

Third, LEAF challenged the public/private distinction, intervening successfully in private law cases to argue that judges must apply the common law in a manner that conforms to the Constitution’s equality guarantees. The insulation of private relations from constitutional scrutiny was challenged, exposing the implication of law’s public/private distinction in women’s oppression. LEAF also intervened in several cases.

73. See, e.g., R. v. Sullivan, [1991] 1 S.C.R. 489 (Can.) (sex equality argument against criminal proceedings for harm to fetus during birth process prior to its being born alive); Daigle v. Tremblay, [1989] 2 S.C.R. 530 (Can.) (civil injunction to prevent pregnant woman from terminating pregnancy infringes women’s rights to equality and equal right to security of the person); Borowski v. Canada (Att’y Gen.), [1989] 1 S.C.R. 342 (Can.) (sex equality argument against constitutional recognition of fetal personhood). Intervener facta for all three Supreme Court of Canada appeals can be found at www.leaf.ca/legal/search.html#target.


family law disputes to argue that family law legislation must be interpreted in light of constitutional equality guarantees so that women’s economic inequality within marriage and in the labour market would be taken into account in determining quantum of spousal support, parental rights, and division of assets upon marriage breakdown.  

Finally, the language in LEAF’s facts and legislative briefs was less abstract, less legalistic, less filtered for judicial comfort; it was more concrete and fact driven, more demanding, more urgent, less hedged. Legal training socializes practitioners to tame their language and arguments to professional norms, to worry about angering or alienating judges or attracting ridicule from professional peers. It schools us to tailor arguments so that they will appear “reasonable” to those above, rather than to advocate for what is necessary and nonnegotiable to those below.

For instance, arguing against the constitutional recognition of fetal personhood, LEAF noted that a typical characteristic of fetal rights advocates like the appellant is to ignore the rights of the pregnant woman:

[T]he woman registers as a void insofar as her own rights or even existence are concerned. When . . . her existence is acknowledged [it is] viewed as a clear threat. She is seen as separate from her own foetus, and menacing to it, either by presenting a hostile environment to its development or by actively refusing some proposed medical intervention. She is a force to be either erased or controlled, managed or circumscribed in the interests of the foetus.

In another fetal rights case, Daigle v. Tremblay, the LEAF factum argued:

Women often do not control the conditions under which they become pregnant. Up to the present day, the context of social inequality has denied women control over the reproductive uses of their bodies. Women have been socially disadvantaged in regard to control of sexual access because of the particular socialization they receive, lack [of information], inadequate or unsafe contraceptive technology, social pressure . . . custom, poverty and enforced economic dependence, sexual coercion, and the ineffective enforcement of laws against sexual assault. Nor do women control the social consequences of their pregnancies. Women’s role in childbearing has provided a particular occasion and pretext for women’s disadvantagement, including the exclusion of pregnant women from

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80. See Borowski v. Canada (Att’y Gen.), [1989] 1 S.C.R. 342 (Can.). Mr. Borowski, an anti-abortion activist, sought public interest standing to challenge Canada’s abortion laws on the basis that their legalization of abortion under highly restrictive conditions violated the constitutional right of the fetus to security of the person. His claim would have required judicial recognition of fetal personhood for the first time in Canadian law. By the time his standing claim reached the Supreme Court of Canada, it was moot; the abortion law he was challenging was struck down as unconstitutionally restrictive of women’s security of the person in R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.).


82. Daigle v. Tremblay, [1989] 2 S.C.R. 530 (Can.). Tremblay coerced Daigle to forego using birth control when they cohabited. He was also physically abusive. Daigle left him and discovered she was pregnant. When Tremblay learned she was seeking an abortion, he secured a civil injunction to stop her. He succeeded at trial and on appeal. During the hearing of the final appeal at the Supreme Court of Canada, the Court was advised she had secured an abortion. Nonetheless, the Court struck down the injunction, the fetal rights, and father’s rights claims on which it rested. Id.
and stigmatization of women in society and work.

... In sex equality terms, this case presents an attempt by a man to control the life of a woman by forcing her, through government intervention, to become a mother.

... A woman’s relation to the foetus is unique and inseparable: what happens to it, happens to her. He who controls it, controls her, as this case makes abundantly clear. Indeed, this case is an example of an attempt to control the woman through controlling the foetus. Several justices [in the courts below] misconstrue this case as a conflict between the mother and the foetus. It is a conflict between a woman and a man over that woman’s body, life, and relation to her foetus. 83

During her years at LEAF and well beyond, Professor MacKinnon’s insistence on the urgency of action, on never losing sight of the body count from sex inequality, and on never forgetting for whom feminist equality advocates are working and to whom we are accountable emboldened everyone involved in LEAF litigation.

I am not saying Canadian feminist legal activists would have achieved none of these breakthroughs had we not worked with Catharine during the formative years of section 15 litigation. I hope my review of Canadian legal history illuminates the domestic context in which her contributions were made possible. As well, the ideas, arguments, and texts of each factum or brief were shaped by the collective brainstorming of teams of stellar feminist legal thinkers and veteran litigators, not by a single mind or pen. However, Catharine’s ideas and voice and distinctive way of connecting the dots from dominance in men’s laws to subordination in women’s lives are clearly recognizable in LEAF documents from 1987 onward. 84 Without her direct involvement in LEAF’s work, I think the dominance approach would have stood as but one school of thought in Canadian equality theory. Instead, because LEAF occupied the equality litigation field, LEAF’s embrace of MacKinnon’s dominance approach became THE approach to equality rights that for about fifteen years distinguished Canadian jurisprudence and served as the model for equality law in other nations. Long after Catharine stopped working directly with LEAF, that approach shaped the bulk of LEAF’s advocacy. While LEAF’s strengths have ebbed along with other components of contemporary feminism, the facts from that era continue to be studied as paradigms of equality analysis.

Professor MacKinnon was closely involved in theorizing and drafting ten LEAF facta and assisted in the crafting of nine others. This record includes Andrews, which set the direction of section 15 jurisprudence; 85 eight cases dealing with laws related to male sexual violence; 86 four dealing with women’s reproductive autonomy; 87 four hate...
propaganda cases; and one case each on public interest standing, remedies, and the right of raped woman to sue police for misconduct of rape investigation. I will briefly discuss four of these cases.

Andrews v. Law Society of B.C.

Andrews v. Law Society of British Columbia was the first section 15 decision to reach the Supreme Court of Canada. The case was a challenge to the requirement of Canadian citizenship as a prerequisite to admission to the bar of British Columbia. Citizenship was not an enumerated prohibited ground within section 15. The Court determined that the equality guarantees should be read the same way as the antidiscrimination guarantees in human rights statutes. Hence, it held that section 15 prohibits both direct and adverse effect discrimination by government actors and, thus, that challengers need not prove discriminatory intent on the part of legislatures or government bureaucrats in order to make out an infringement of section 15. Relatedly, it affirmed that the focus of a section 15 analysis should be discriminatory effects.

The principle section 15 reasons, authored by Justice William McIntyre, were adopted by the entire Court. Justice McIntyre acknowledged the “well known” shortcomings of the Court’s Bill of Rights decisions and explicitly repudiated a formal equality approach to section 15 as “seriously deficient,” too “mechanical” and capable of upholding substantively bad laws, so long as they are even-handedly applied to all. Instead of the blindfolded justice called for by formalists, he urged a contextual approach to the guarantee. Justice McIntyre emphasized that identical treatment of social unequals can produce real inequality and that, likewise, sometimes differential treatment

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93. Id. at 164, 173, 175.

94. Id. at 173.

95. Id. at 170.

96. Id. at 166.

is required to achieve "true" equality. The essence of equality, he held, is the accommodation of difference. 98

Two formalist approaches had been urged on the Court. The first, proposed by a distinguished Canadian constitutional scholar, Professor Peter W. Hogg, would have required every legal distinction drawn on enumerated ground to be demonstrably justified under section 1. Justice McIntyre reasoned that this approach left too much work for section 1 and stripped section 15 of meaningful substance. Because all laws draw distinctions, government line drawing per se was insufficient to establish an infringement of section 15. 99 Hence, only state-authored distinctions that "discriminate" required justification. In defining "discrimination," he rejected the Aristotelian "treat likes alike" approach and the "similarly situated" versions of formal equality. 100 He also repudiated the approach adopted by the British Columbia Court of Appeal which combined a similarly situated approach to the guarantee 101 with built-in limits on section 15 akin to the "rational basis" and "valid federal objectives" standard that had marked Bill of Rights jurisprudence. Justice McIntyre rejected any injection of internal limits on the equality guarantee through the incorporation of a reasonableness test into section 15 for three reasons. First, it contradicts the internal architecture of the Charter where justification of Charter infringements is to be left to section 1 and where the government bears the onus of justifying the limitation of rights. Second, it leaves little work for section 1. Finally, it places too high a burden on challengers who lack government resources and knowledge about the reasoning underlying the policy choices that limit constitutional rights. 102

Having rejected a formal equality approach, the Court accepted LEAF's arguments in favour of a "third approach," which finds the meaning of "discrimination" in the purpose of the guarantee as reflected by its enumeration of prohibited grounds of discrimination. LEAF had argued that the expansively worded guarantees were intended to promote the substantive equality of the "powerless, the excluded, [and] the disadvantaged" — that is, those "individuals and groups which historically have had unequal access to social and economic resources, either because of overt discrimination or because of the adverse effects of apparently 'neutral' forms of social organization premised on the subordination of certain groups and the dominance of others." 103 In this approach, the enumerated grounds reflect historical bases of subordination. Hence, legal distinctions that reflect and reinforce the disadvantage of groups identified by these grounds are discriminatory infringements of section 15 which the state must demonstrably justify to a rigorous standard of scrutiny. Differentiation aimed at amelioration of disadvantage promotes equality as explicitly indicated by section 15(2)

98. Id at 164, 169.
99. Id. at 178, 181.
100. For an excellent explanation of the limits of both formal approaches, see William Black & Lynn Smith, The Equality Rights, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 14-1, 14-7 to 14-12, 14-19 to 14-20 (Gerald Beaudoin & Errol Mendes eds., 3rd ed. 1996).
102. Andrews, 1 S.C.R. at 182.
and so does not infringe the guarantee.\textsuperscript{104}

The Court unanimously adopted LEAF’s approach and then established a framework for recognizing nonenumerated grounds of discrimination under the open-ended language of section 15. This framework, too, embraced criteria that resonate with a dominance approach. The Court held that new grounds must be analogous to those enumerated in the sense that they will apply only to groups subject to “stigmatization” and “stereotyping,” “lacking in political power,”\textsuperscript{105} “marginalized in political processes,” and “vulnerable to having their interests overlooked and their rights to equal concern and respect violated.”\textsuperscript{106}

Andrews was a decisive advance for substantive equality, with two caveats. First, although the Court clearly and explicitly repudiated a formal equality approach to section 15, it never articulated a clear test for determining what converts a legal distinction into “discrimination” contrary to section 15. In some passages, it identifies the purpose of section 15 as the prevention of state action that reflects or perpetuates social, political, economic, and historic disadvantage; in others, it characterizes as irrational line drawing based on “irrelevant” personal characteristics rooted in stereotypes. Second, the Court split evenly on whether strict or rational basis scrutiny should be adopted at the section 1 stage after an infringement of section 15 had been established.\textsuperscript{107} Both splits within the Andrews bench have ebbed and flowed through section 15 case law ever since. The high-water marks for the substantive approach, in my view, are the decisions in Vriend\textsuperscript{108} and Eldridge.\textsuperscript{109} With the Court’s much-criticized restatement of the framework for analyzing section 15 claims in its 1999 decision in Law v. Canada,\textsuperscript{110} a formal equality approach began to define the Court’s approach even while it continued to endorse a substantive approach rhetorically.\textsuperscript{111} In 2008, the Court acknowledged the widespread criticisms of the results of its Law framework and declared that it would return to the Andrews approach.\textsuperscript{112} Unfortunately, it offered no guidance on how its reasoning will change.\textsuperscript{113}

\textsuperscript{104} Id. at paras. 33-40.
\textsuperscript{105} Andrews, 1 S.C.R. at 154 (Wilson, J.).
\textsuperscript{106} Id.
\textsuperscript{107} Chief Justice Dickson and Justices Wilson and L’Heureux-Dubé supported rigorous scrutiny. Id. Justices McIntyre, Lamer, and La Forest endorsed relaxed scrutiny. Id. at 177 (McIntyre, J.).
\textsuperscript{108} Vriend v. Alberta, [1998] 1 S.C.R. 493 (Can.) (unanimous holding that a province’s deliberate and persistent refusal to include protection from sexual orientation discrimination in its comprehensive human rights statute violates section 15; sexual orientation read into the statute by way of remedy).
\textsuperscript{109} Eldridge v. British Columbia (Att’y Gen.), [1997] 3 S.C.R. 624 (Can.) (unanimous holding that a province’s refusal to fund sign language interpretation for deaf persons seeking universally publicly funded medical services infringes section 15; government ordered to make provision for funding sign interpretation).
\textsuperscript{110} Law v. Canada, [1999] 1 S.C.R. 497 (Can.).
\textsuperscript{111} For detailed analysis of the jurisprudence subsequent to the Law decision, see DIMINISHING RETURNS: INEQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Sheila McIntyre & Sandra Rodgers eds., 2006), and the uniformly critical essays collected in MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER, supra note 71.
\textsuperscript{112} See R. v. Kapp, [2008] 2 S.C.R. 483 (Can.) (finding that the modest scheme of exclusive fishing rights to honour constitutional Aboriginal rights obligations is not race discrimination against non-Aboriginals, contrary to the Charter).
R. v. Keegstra\textsuperscript{114} and R. v. Andrews & Smith\textsuperscript{115}

Keegstra, Andrews, and Smith were hate propagandists who challenged their criminal convictions for willfully promoting racial and religious hatred, arguing that the law under which they were prosecuted\textsuperscript{116} infringed their freedom of expression under section 2(b) of the Charter.\textsuperscript{117} Professor MacKinnon was on the LEAF team that sought to have section 319 upheld on substantive equality principles. LEAF argued that the willful promotion of religious or racial hatred does not fall within the scope of the freedom of expression guarantee for three reasons. Most importantly, it amounts to a “practice of discrimination” contrary to section 15 insofar as it promotes group-based hatred that “produce[s] exclusion, denigration and subordination[,] [s]tereotyping and stigmatization” of historically disadvantaged groups” that “shapes their social image and reputation, often controlling the opportunities of individuals members more powerfully than their individual abilities do.”\textsuperscript{118} Second, the legislation’s purpose is the promotion of the constitutional rights to equality and multiculturalism (section 27\textsuperscript{119}), while it curbs expression that falls outside of the purpose of the guarantee.\textsuperscript{120} Finally, LEAF urged the Court to find that the willful promotion of racial or religious hatred falls within the violence exception to constitutionally protected speech read into section 2(b) by the Supreme Court of Canada in earlier jurisprudence.\textsuperscript{121} LEAF argued that hate propaganda reinforces “systemic discrimination which keeps target groups in subordinated positions through the promotion of fear, intolerance, segregation, exclusion, disparagement, vilification, degradation, violence and genocide.”\textsuperscript{122}

\textsuperscript{114} R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.) (Keegstra was a high school teacher who taught his students virulently anti-Semitic theories as gradable content in their social science instruction).

\textsuperscript{115} R. v. Andrews (Andrews & Smith), [1990] 3 S.C.R. 870 (Can.) (Andrews and Smith were members of the Nationalist Party of Canada, a white supremacist group, who promoted white supremacy in the party’s newspaper).

\textsuperscript{116} They were prosecuted under the Canada Criminal Code, R.S.C. 1985, c. C-46, § 319(2) (formerly § 281.2). Section 319(2) provides that “[e]very one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group” is guilty” of a criminal offence and liable to a prison term not exceeding two years. The Code defines “identifiable group” as “any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.” Id. at § 318(4) (amended in 2004 to include distinction on the basis of sexual orientation). Section 281.3 (now 319(3)) provides four defences. Id. at § 319(3).

\textsuperscript{117} Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 2(b) (U.K.) (guaranteeing “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”).


\textsuperscript{119} Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 27 (U.K.) (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”).

\textsuperscript{120} Factum of the Women’s Legal Education and Action Fund, supra note 118, at paras. 33-35.

\textsuperscript{121} See Retail, Wholesale & Department Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Can.) (union challenge to an ex parte quia timet injunction against secondary picketing as breach of section 2(b)). In obiter remarks the Court held that, although section 2(b) does protect peaceful picketing, threats of violence or acts of violence do not fall within the protection of the guarantee. Id. at para. 20. See also Irwin Toy Ltd. v. Quebec (Att’y Gen.), [1989] 1 S.C.R. 927, 978 (Can.).

\textsuperscript{122} Factum of the Women’s Legal Education and Action Fund, supra note 118, at para. 28.
The Court rejected these arguments for narrowing the scope of section 2(b) to exclude hate propaganda and held that section 319 did indeed infringe section 2(b). The question became whether the infringement was a demonstrably justifiable limit on section 2(b) rights under section 1 of the Charter. LEAF urged the Court to reject the accuseds' self-presentation as victims of unjust state interference and to understand them as "aggressors in a social conflict between unequal groups." Government enactment of equality-promoting measures to curb the proliferation of equality-corroding conduct cannot be unconstitutional, LEAF asserted. The argument was not that equality rights trump speech rights but that the documented harms that hate propaganda does to the constitutional equality, multicultural, and expressive rights of those targeted, and to the credibility of society's constitutional commitments to equality and multiculturalism, outweigh the low value of hate speech to a democracy premised on the dignity and worth of all.

A narrow majority of the Court recognized that hate propaganda does serious harm to its targets and to society at large. Those targeted experience psychological harms arising from degradation and humiliation, moral harm to their fundamental human dignity, and civic and political harms such as withdrawal from social interactions or assimilative behaviour to reduce risk of exposure to "[t]he derision, hostility and abuse encouraged by hate propaganda." The harm to society arises from the influence of hate propaganda in promoting discriminatory attitudes against its targets and discord between cultural groups. The majority rejected the view that human reason is sufficient armor against the manipulations of propaganda. Prejudice may be engendered "subtley" and subconsciously: "Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth . . . ." The majority, thus, accepted that Parliament's objective, consistent with its embrace of international human rights obligations, was to reduce the threats to the dignity, equality, and safety of religious and racial minorities in Canada. It also found the definition of the offence and the codified defences narrowly and clearly tailored so as to prevent concerns about overbreadth and vagueness. Finally, it concluded that the provision's rights-enhancing objectives outweighed its adverse effects on limits on expressive activity "only tenuously connected" with the values underlying the guarantee of freedom of speech. Accordingly, section 281 was upheld.

R. v. Butler

Butler was a video store operator criminally charged with obscenity under section 159 (now section 163) of the Criminal Code. He challenged section 163 as a violation

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123. Id. at para. 41.
124. Id. at paras. 44, 49, 52.
126. Id. at para. 66 (citation omitted).
127. Id. at 140.
129. Canada Criminal Code, R.S.C. 1985, c. C-46, § 163(8) (formerly § 159). Section 163 prohibits the production, distribution or sale, or possession for the purposes of distribution or sale of any material "a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following
of his freedom of speech. Professor MacKinnon led the LEAF committee that invoked section 15 in defense of the obscenity provisions. The argument will be familiar to you: pornography is a practice of sex discrimination — “a systematic practice of exploitation and subordination based on sex that differentially harms” individual women and women as a group. The factum graphically describes the materials seized from Butler’s store as preface to explaining the continuing failings of the traditional, morality-based test of obscenity focused on sexual explicitness. In Canadian law, the traditional approach construed the core statutory definition of obscenity, “the undue exploitation of sex,” as a breach of community standards of decency. This approach, LEAF argued, obscured the harms of pornography to the status and treatment of women, because the only harms recognized by the law were those to the morals of consumers and society caused by pornography’s indecent or disgusting content. By ignoring the exploitation and degradation of women and the violence used in the making and use of pornography, obscenity law “often implicitly functioned as an instrument to legitimize and enforce women’s disadvantaged status.” The morality-based approach also led to inconsistency in application of the law.

LEAF urged, as it had in Keegstra, a harms-based approach to obscenity focused on the ways that pornography arises from and reinforces women’s inequality. This more constitutionally defensible approach was supported by recent Canadian obscenity case law that understood the breach of community standards to reside in pornography’s degrading and dehumanizing depictions of women and human sexuality. LEAF noted this approach is also supported by a significant body of legal and social science evidence that exposes the production and distribution of pornography as a “systematic practice of exploitation and subordination based on sex that differentially harms women” contrary to section 15 of the Charter. In this approach, the harm warranting criminalization is not indecency or distastefulness but “dehumanization, humiliation, sexual exploitation, forced sex, forced prostitution, physical injury, child sexual abuse, and sexual harassment.” In addition to such material harms, “[p]ornography also “diminishes the reputation of women as a group, deprives women of their credibility and social and self worth, and undermines women’s equal access to protected rights.”

LEAF argued that some pornography is a violent form of expression that falls outside the scope of the freedom of expression guarantee: “Direct physical violence to real people is inflicted in order to make some pornography, particularly visual pornography. Some women are coerced into pornography and sexually assaulted so that pornography can be made of them.” Hence LEAF submitted that “where physical

subjects, namely, crime, horror, cruelty and violence, [which] shall be deemed to be obscene.” Id.
131. Canada Criminal Code § 163(8).
134. Id. at para. 22.
135. Id. at para. 23.
136. Id.
137. Id. at para. 30.
harm becomes pornography, not only is the actual force or coercion outside the protection of section 2(b), but so is the resulting pornography.\(^\text{138}\) Likewise, LEAF argued that section 2(b) should not be read to protect pornography that portrays explicit sex and explicit violence, particularly rape, as pleasurable for the victim because social science shows that exposure to such materials increases male aggression against women and attitudes consistent with tolerance for violence against women.\(^\text{139}\) LEAF also argued that pornography which is inconsistent with women's section 15 and 28 equality rights and serves none of the values underlying section 2(b), and so should fall outside of the protection of the freedom of expression guarantee.\(^\text{140}\)

As it did in \textit{Keegstra}, the Court rejected both arguments for exempting violence-based, violence-promoting, or equality-eroding pornography from the protective reach of section 2(b) and found an infringement of the accused's expression rights. It appeared unpersuaded by or indifferent to research documenting the direct harms to women coerced into making pornography and sexually abused in its production. However, the Court upheld the law unanimously, rather than by \textit{Keegstra}'s bare majority. In effect, the Court adopted LEAF's approach, but in an analytically unsatisfactory way. First, it rejected the traditional approach and held that outlawing obscenity in order to preserve conventional moral values could not be constitutionally justified. The Court defined the gravamen of the criminal offence to be the violence, degradation, and dehumanization it markets. Hence, it found that the offence of obscenity is not sexual explicitness \textit{per se} but with the coupling of sex with violence, the depiction of explicit sex with children, or depictions that degrade or dehumanize women and risk promoting their abuse. The Court elaborated:

[D]egrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative . . . Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.\(^\text{141}\)

So defined, the Court concluded that criminalization of obscenity was constitutional to avoid harm to society, including the undermining of "other" constitutional rights and the democratic values they preserve.\(^\text{142}\) Citing with approval a 1978 government report on pornography, the Court characterized the harm to society as follows:

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce


\(^{139}\) \textit{Id.} at paras. 33-34.

\(^{140}\) \textit{Id.} at paras. 35-55.

\(^{141}\) \textit{R. v. Butler,} [1992] 1 S.C.R. 452, para. 51 (Can.). This passage suggests that the Court acknowledged that "consent" to violation is simply a fictional trope of pornography conveyed by actors. It did not acknowledge that images of violation captured factual violation of women coerced into pornography or filmed in the process of being raped or otherwise sexually abused.

\(^{142}\) \textit{Id.} at para. 94.
male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.\(^{143}\)

The Court held that the objective of the law was to prevent harms to women and to society's fundamental commitment to equality. It concluded that social science data about the impacts of pornography, albeit conflicting, offered Parliament grounds for a reasoned apprehension that materials depicting violence, cruelty, and dehumanization of women desensitize consumers towards the degradation of women and may lead to antisocial conduct that victimizes women.\(^{144}\) It rejected libertarian arguments favoring restrictions on access to pornography over an outright ban on the basis that the social harms to women and to sex equality continue no matter how hard the material is to access. Finally, it held that the adverse effect of state curbs on expression that lies far from the values underlying the right to freedom of expression is outweighed by Parliament's objective. The Court's reasoning was explicitly grounded in equality principle. The reasoning makes no reference to section 15, conveying that pornography harms a social value, not a full-fledged constitutional right.

\(R. v. Seaboyer; R. v. Gayme\)^{145}

Seaboyer and Gayme were each charged with sexual assault under criminal laws that had been reformed in 1983 to comply with section 15 to eliminate numerous discriminatory provisions in the definition of several sexual crimes and in the evidentiary rules that applied to their prosecution.\(^{146}\) Among the reforms was a provision prohibiting evidence of "general" sexual reputation and strictly limiting the admissibility of a complainant's sexual history with men other than the accused.\(^{147}\) Seaboyer and Gayme challenged these provisions as infringements of their constitutional right to a fair trial. LEAF intervened to defend the provisions as measures that did not erode an accused's right to a fair trial but, rather, reduced the likelihood of acquittal by reason of discriminatory rules premised on discriminatory stereotypes about women and women's sexuality, rules rooted in and reinforcing of male dominance. The factum is a classic MacKinnon-inspired exposition of male violence as a practice of sex discrimination and of rape evidence rules as instances of perpetrator logic that legitimize male violence, deter reporting, and compromise trial proceedings contrary to the Constitution.\(^{148}\)

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143. Id. at para. 85 (citing STANDING COMM. ON JUSTICE & LEGAL AFFAIRS, Report on Pornography 18:4 (1978)).
144. Id. at paras. 109-10, 112.
146. For the history of the reforms and critiques of their substance, see CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE (Julian V. Roberts & Renate M. Mohr eds., 1994).
Although LEAF’s arguments inspired a memorable two-judge dissent, a seven-judge majority of the Supreme Court held that in some cases denial of access to sexual history evidence with third parties would infringe an accused’s constitutional fair trial rights. Despite granting LEAF leave to intervene to make section 15 arguments in the appeal, the majority completely ignored the Constitution’s equality guarantees when adjudicating the accused’s constitutional claim. 

Ironically, this omission created a legal opening for a national coalition of women to lobby the Federal Justice Department to enact equality-driven amendments to sexual offence law that completely bypassed the Seaboyer decision. The Seaboyer decision had effectively foreclosed reforms that created any blanket prohibitions on the admissibility of any category of sexual history evidence and required judges to have discretion to admit sexual history evidence unless its probative value was substantially outweighed by its prejudicial impact. Feminists, particularly front-line rape crisis advocates, were, in any case, opposed to any such reforms because their view was that a complainant’s sexual history with the accused or with other people — male or female — was never relevant to whether she had consented to particular sexual activity with a particular individual on a particular occasion.

Insofar as specific evidentiary reforms categorically barring some sexual history evidence had been constitutionally foreclosed, feminist activists adapted the substantive equality analysis underlying LEAF’s Seaboyer factum to press for a comprehensive overhaul of sexual assault law that would finesse the specificity of the Seaboyer ruling. The logic remained that rape is a practice of sex discrimination legitimated by discriminatory rape myths indulged by and entrenched in law. The core strategy was to codify definitions of consent and of non-consent so as to render reference to a complainant’s actual or imagined sexual history nonprobative to the determination of whether she consented to the specific activity subject to prosecution. Common rape myths about one, or some, or all women’s propensity to consent to some or all sexual activity and common rationalizations of male sexual aggression in the face of an absence of consent to sexual activity, particularly the rationalizations dignified by the so-called “mistake of fact” defence, were explicitly converted into mistakes of law which provide no legal defence to sexual aggression. In addition, the reforms narrowed the


150. Section 15 was excluded from the otherwise comprehensive list of “Relevant Legislation” prefacing the majority decision. See R. v. Seaboyer; R v. Gayme, 2 S.C.R. at paras. 15-18.

151. Id. at paras. 59-62.

152. For a detailed account of the feminist activism and legal strategy that achieved reforms effectively bypassing Seaboyer, see Sheila McIntyre, Redefining Reformism: The Consultations That Shaped Bill C-49, in CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE, supra note 146, at 293. See also Submission of the Women’s Legal Education and Action Fund for Bill C-49, LEAF, http://www.leaf.ca/legal/submissions/1992-billc49.pdf#target (last visited Mar. 19, 2011) (submitted to Parliament explaining and defending the reforms). This legislative brief was co-authored by Sheila McIntyre, Elizabeth Shilton, and Christine Boyle.

153. The logic underlying this approach comes from Lucinda Vandervort, Mistake of Law and Sexual
The availability of the mistake of fact defence in the case of mistakes not premised on errors of law about the meaning of consent. The feminist lawyers and community activists involved in the reforms also successfully lobbied for a statutory preamble characterizing sexual assault as a gendered crime and identifying among the objectives of the law (for purposes of constitutional justification) enforcement of women’s constitutional rights to fair trials, equality, and security of the person, as well as accuseds’ rights to a fair trial. Finally, the reforms prohibited admission of sexual history evidence to support an inference that the complainant is more likely to have consented to the sexual activity charged or is less worthy of belief. Before admitting sexual history evidence for purposes other than inferences based on these twin myths, judges are now statutorily required to take into account eight factors, including “the need to remove from the fact-finding process any discriminatory belief or bias,” and to issue written reasons for their admissibility or exclusion decisions.

The centerpiece of the reforms encapsulated in what Parliament tabled as Bill C-49 was a codification of a definition of consent and of circumstances in which no consent is recognized. These codified definitions were inspired by the MacKinnon-Dworkin pornography ordinance creating a civil remedy for the discriminatory harms of pornography. The ordinance defined pornography as “the graphic sexually explicit subordination of women through pictures and/or words” that also includes one or more of eight enumerated features drawn from the staples of pornography. These included, for instance, women presented “dehumanized as sexual objects, things or commodities,” “presented as sexual objects who enjoy humiliation or pain,” “presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault,” “presented in postures or positions of sexual submission, servility, or display,” and so on. The feminist lobby behind Bill C-49 likewise constructed the definitions of consent and the enumerated list of circumstances in which no consent exists to foreclose reliance on the most common rape myths and rationalizations deployed by accused men to raise a reasonable doubt about whether the complainant did consent or about whether the accused proceeded with sex without consent but with an “honestly mistaken” belief that the sexual activity was consensual.

"Consent" was defined as “voluntary agreement of the complainant to engage in

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155. The Preamble to the legislation is not incorporated into the text of the Criminal Code. It can be found in An Act to Amend the Criminal Code (Sexual Assault), S.C. 1992, c. 38 (Can.).
157. Id. at § 276(3)(d).
158. Id. at § 276.2(3)-(4).
159. For a summary of the analysis underpinning the Model Ordinance, see Catharine A. MacKinnon, Civil Rights Against Pornography, in WOMEN'S LIVES — MEN'S LAWS, supra note 84, at 299. The complete text of the Model Ordinance, including its definition of pornography, is in endnote 22 of the book. Id. at 493-97.
160. Id. at 494.
161. Id.
The idea is that consent is an action, something a woman positively does, not something a sexual aggressor thinks or imagines or wishes; and is an action she takes freely and consciously, not under coercion or while unconscious due to intoxication, medication, or sleep. So defined, neither silence nor failure to resist aggression amounts to consent. An accused who proceeds with sexual activity until stopped or persuaded that “no” does mean “no” commits an assault. The definition of consent remains gendered insofar as it implicitly assumes a male initiator and a female responder, but at least it requires initiation to be communicated prior to any sexual contact.

The legislation then defined non-consent to cover the most common self-serving so-called mistakes about consent, including those premised on a complainant’s actual or imagined sexual history. It foreclosed reliance on the belief (by accused men, judges, or juries) that “no” can mean “maybe” or “yes”; that unconscious women can consent (or are fair game and asking for it); that consent to some form of sexualized contact equates with consent to anything; that previous consent cannot be revoked at a later time; that consent can be granted by a third party; and that consent can exist where induced by abuse of power, authority, or trust. The mistake of fact defence was also restricted to exclude mistakes caused by self-induced intoxication, willful blindness, or failure to take “reasonable steps” to ascertain another’s consent. Several elements of the new law were challenged constitutionally, but none successfully.

None of these reforms have rid sexual offence proceedings of discriminatory substance or process. Indeed, a second wave of reforms was required to respond to the defence bar’s attempts to evade the post-Seaboyer reforms and their effective restriction on the admissibility of sexual history evidence and of the mistake of fact defence. Those reforms, as well, have only been modestly successful.

CONCLUSION

Catharine MacKinnon’s critique of formal equality jurisprudence and her
elaboration of inequality as a product of dominance, not difference, became available to Canadian feminist equality activists at precisely the moment when the entrenchment of Canada’s new Charter of Rights and Freedoms mobilized Canadian feminist equality advocates to participate proactively in defining the content of novel equality guarantees, in establishing a coordinated litigation strategy for giving them meaning, and in developing and broadly disseminating substantive equality approaches to specific locations in law and life of women’s inequality. MacKinnon’s analyses, especially of male sexual violence, have animated a substantial proportion of feminist legal argumentation focused on the interpretation of section 15 and the respective constitutional rights of men accused of sexual assault, the women who report the assault, and the women affected by the outcomes of such litigation. Her work has also been a significant influence in strategies to legislate reforms following litigation defeats.

The most directly influential of MacKinnon’s contributions to Canadian jurisprudence occurred as a result of her work on LEAF’s National Legal Committee and numerous specific case development subcommittees between 1987 and 1991. All of the cases discussed in this article were theorized and argued at the Supreme Court of Canada during this period. The twenty-plus years between 1987 and 1991 and the present amount to a very long time in a constitutional jurisprudence as young as that rooted in a Charter that was enacted only in 1982. Every one of the cases discussed in detail in this article, as well as most of those used as illustrations of MacKinnon’s broader influence on feminist Charter litigation, is still taught in the major textbooks in every law school in the country. With the exception of Seaboyer, where a MacKinnon-inspired equality argument lost, all these precedents remain good law. And Seaboyer was effectively overridden by MacKinnon-inspired, equality-driven legislated reform.

As well, MacKinnon’s substantive and methodological approach to theorizing systemic inequality problems remains the predominant approach among advocates representing marginalized and oppressed groups (as, of course, formal equality remains the approach of defenders of the unequal status quo). Her transformative impact on Canadian equality scholars, scholarship, jurisprudence, and legislated law reforms constitutes a remarkable legacy in a Canadian legal and political culture still in the early days of defining what will become enduring constitutional norms. It bespeaks not only the compelling intellectual, as well as legal power of her equality thinking, but a generous collegiality within an international feminist community.