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# Environmental Justice and the *Charter*

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# Outline

1. A few words about Environmental Justice
2. Sections 7 and 15 of the *Charter*
  - Is there a shared purpose?
  - What is covered?
  - Who is protected?
  - What is the evidentiary burden?
3. Some concluding thoughts

# Environmental Justice

## **Environmental justice has several dimensions...**

- Distributive or substantive justice
- Procedural justice
- Recognition

## **...and manifests in different, often overlapping ways**

- Geospatial or proximate burdens
- Inequitable access to environmental protection (benefits and services)
- Body burden or chronic pollution
- Inadequate means of accessing justice

# *Key Charter Rights*

## **Section 7**

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

## **Section 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.

# Shared Purpose?

## Section 7 – Shared purpose of safeguarding basic environmental rights

- Ensure state's actions do not unreasonably increase risk of death, interfere with people's right to make important decisions, and safeguard freedom over state imposed harm (which should include environmental rights (see Boyd & Collins)
- *Canadian Pacific, SCC 1995* « I would agree with the Law Reform Commission of Canada...[that] `... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.”

# Shared Purpose?

## Section 15 - Shared purpose of promoting equality

- To promote substantive (versus formal) equality
  - “The purpose of s. 15(1) is to ... promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration” (*Law v. Canada*, 1999)
  - “[Section 15] instantiates a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.” (Eldridge)
- Explicitly cognizant of *power differentials*, takes into account *the effects* of laws, requires a *contextual* analysis

# Scope (what?)

## Section 7

- Applies to government versus private actions (s. 32)
- Broadly defined (laws, regulations, policies, practices, activities, conduct executed pursuant to statutory authority)
- Could include siting and permitting decisions, standard-setting, environmental assessment, funding decisions, tax policy, risk-assessment, cost-benefit analysis, etc.

# Scope (what?)

## The s. 15 test:

- (1) Does the law create a distinction based on an enumerated or analogous ground?
- (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

## 'Law' is broadly construed

"...if you have to find a "law" under s. 15 before the section is triggered, then "law" should be given a very liberal interpretation and should not be confined to legislative activity. It should also cover policies and practices even if adopted consensually." (*Douglas Kwantlen*, p. 50)



# Scope (what?)

## An underinclusive law can be successfully challenged

“...this Court has long recognized that the purpose of s. 15(1) encompasses both the prevention of discrimination and the amelioration of the conditions of disadvantaged persons. Accordingly, there has been an equally longstanding recognition that an underinclusive ameliorative law, program or activity may violate the constitutional equality interest.” (Lovelace, SCC, 2000)

# Scope (what?)

Could a failure to act (eg. failing to protect from environmental harm) be actionable under s. 15? Maybe

*Eldridge, SCC 1997* - Focus on failure to provide for particular need (i.e. those who need a benefit to enjoy equality) versus a distinction in law

*Vriend, SCC 1998* – Focus on the failure to legislate / underinclusivity

“It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner.”  
(Vriend, SCC)

# Scope (who?)

## Section 7

- General application

## Section 15

- Enumerated and analagous grounds

# Scope (who?)

## Enumerated grounds include:

- Race
- National or ethnic origin
- Colour
- Religion
- Sex
- Age
- Mental or physical disability

## Analogous grounds include:

- Sexual orientation
- Marital status
- Off-reserve aboriginal status / "Aboriginality-residence"
- Citizenship

### **Socio-economic status is not a recognized ground under s. 15**

Repeated failure of the Court to accept poverty / income as an analogous ground is problematic, because a major determinant of environmental risk in Canada is income

# Evidentiary burden

## Section 7:

- requires proof of a « sufficient causal connection » between state action and harm
- threshold is risk of increased harm
- jurisprudence on environmental harms has shown causation to be a significant hurdle
- especially challenging for chronic pollution or emergent concerns (eg. wind turbine cases)

May be more hope for cases where proof of harm is well established (eg. lead, mercury, asbestos, particulate matter etc.)

# Evidentiary burden

**But importantly** ... kind of evidence allowed in *Charter* cases is broad:

- Adjudicative and legislative fact evidence (socio-economic context of laws)
- Liberal approach to admissibility of latter
- Expert and experiential witnesses
- Changing social science evidence had a determinative impact in *Bedford* and *Carter*

The experience of one individual's rights being violated is sufficient to strike down legislation

# Evidentiary burden

- “Sometimes the proof of a constitutionally adverse effect of law can be a matter of reasoned argument and common sense. Science and empirical inquiry will usually play a critical role, but, in some circumstances, common sense should come into play if science has yet to provide a conclusive resolution.” (A. Young, 2014 at p. 630)
- Eg: Does advertising increase consumption of cigarettes?
  - RJR-McDonald – 1995
  - In the face of scientific uncertainty, the court relied upon « powerful common sense observation»
  - The Court’s approach suggests that « common sense may be more significant than a scientific measurement of causality in some cases » (Young)

# Evidentiary burden

## Section 15 is about establishing a distinction

« Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).” (*Withler*, SCC para 62-3) (emphasis added)

“Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.” (*Withler*, para. 64) (emphasis added)



# Evidentiary burden

**Contextual factors are relevant in determining whether the distinction leads to discrimination**

“In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. » (Wilson J. in Turpin)

# Hope springs eternal

## *Lafarge Canada Inc v. Ontario (ERT) 2008 (ONSC)*

- -"...there was a failure on the part of the Directors to take into account 'environmental consistency'. In the context of the [EPA], the Tribunal was of the view that consistency means that facilities should be regulated as necessary to limit environmental effects to a consistent level as across Ontario. ...It was within the realm of reasonableness for the Tribunal to conclude that it would be discriminatory to the community of Bath to potentially expose its residents to the effects of a tire burning process while at the same time considering not permitting it anywhere else in the province."

## *Lockridge v. Ministry of the Environment (Director)*



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