

ARTICLE

MSM BLOOD DONATION BAN: (IN)EQUALITY, GAY RIGHTS AND DISCRIMINATION UNDER THE *CHARTER*

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CITED: (2010) 15 APPEAL 136-149

INTRODUCTION

“Blood. It’s in you to give,” proclaims Canadian Blood Services (“CBS”), on their official website and in their advertising campaigns; that is, unless you are a man who has ever had sex with another man, even once, since 1977.¹ If you are a sexually active gay or bisexual man, or a male who has ever engaged in sexual acts with another man (regardless of your sexual orientation) then you are banned for life from donating blood.² CBS states that the reason for this ban is that men who have sex with men (“MSM”) are at a greater risk for being infected with HIV.³ The organization does not identify risky sexual behaviours that actually increase the chances of HIV infection; rather, it creates a policy that makes a sweeping generalization about a group of people (gay men) based upon a perceived characteristic of that group (engaging in non-monogamous or promiscuous sexual behaviour). In short, CBS discriminates on the basis of sexual orientation, one of the acts against which the equality provision in s. 15(1) of the *Canadian Charter of Rights and Freedoms*⁴ (“*Charter*”) is intended to guard.

* Many thanks to Professor Gillian Calder for her feedback on this and earlier versions of this paper. I am grateful for her encouragement, guidance and support for my engagement with this issue, and for constantly challenging me to think more deeply about it. I would also like to thank Chris Tait for offering direction in the research process, and Chloe Hamza, Heather Cruickshank, Christy Guthrie, Anne Stebbins, Sacha Ivy and the Appeal Editorial Board for their editing assistance. A final thank you is owed to the anonymous faculty reviewer for his or her feedback that challenged me to strengthen my arguments throughout this piece.

1. Canadian Blood Services, *Record of Donation*, online: Canadian Blood Services – Société Canadienne du sang – Donor Questionnaire <[http://www.blood.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/Can-I-Donate/\\$file/01127-F020831-E.pdf](http://www.blood.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/Can-I-Donate/$file/01127-F020831-E.pdf)> (last accessed 12 January 2010) [*Record of Donation*].
2. Canadian Standards Association Criteria, reprinted in Adrian Lomaga, “Are Men Who Have Sex With Men Safe Blood Donors?” (2007) 12 Appeal 73 at 78.
3. Canadian Blood Services, “Media Questions and Answers – Why do you not allow gay men to donate blood?”, online: Canadian Blood Services – Société Canadienne du sang – Questions and Answers <http://www.blood.ca/centreapps/internet/uw_v502_mainengine.nsf/page/Questions%20and%20Answers?OpenDocument&CloseMenu#HT3> (last accessed 12 January 2010).
4. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15(1) [*Charter*].

Despite the claims of some scholars that a *Charter* challenge to Question 18 of the Record of Donation⁵ would succeed,⁶ I argue that if brought before the courts today, CBS's discriminatory blood donation policy would likely withstand *Charter* scrutiny. The courts' approach to equality under s. 15(1), combined with the reification of monogamy through institutionalized homophobia, enables and perpetuates discrimination on the basis of sexual orientation that is informed by fears of non-monogamy or promiscuity. To make this argument, I will first examine gay and lesbian rights claims that have been successfully litigated under s. 15(1) of the *Charter* to show that cases are most successful when courts are asked to engage in formal rather than substantive equality reasoning and when the claim asks for recognition of a right instead of redistribution of public funds. I will then turn to s. 15(1) jurisprudence and scholarship to argue that the current framework is inadequate to capture a substantive understanding of discrimination that would be necessary to find that CBS's policy violates s. 15(1). I will conclude by considering the ways in which advocates may begin to break out of the formal equality gridlock by speaking the language of substantive equality.

I. LITIGATING SEXUAL ORIENTATION

In order to understand why this particular s. 15(1) claim would not be successful, it is necessary to understand the limitations of the success that gay and lesbian rights claims have had in the past. Although not originally enumerated in the prohibited grounds of discrimination when the equality provision came into force on April 17, 1985, the Supreme Court of Canada ("SCC") established sexual orientation as an analogous ground in 1995 in *Egan v. Canada*⁷ ("*Egan*"). Since then, litigation of gay and lesbian rights claims under s. 15(1) of the *Charter* has been seemingly successful. Gays and lesbians have sought and won inclusion of sexual orientation as a prohibited ground of discrimination in provincial human rights codes,⁸ status as spouses for the purposes of spousal support,⁹ and the right to marry,¹⁰ among other seeming victories. An examination of these cases, however, reveals that courts are only willing to accept certain arguments related to homosexuality. I will argue that courts reify monogamy and exclude arguments that require recognition of the validity of non-monogamous behaviour. To make this argument I will examine the courts' reasoning in *M. v. H.*, *Egan* and *EGALE Canada Inc. v. Canada (Attorney General)*¹¹ ("*EGALE*"). I will also show that litigation of a gay and lesbian rights claim under s. 15(1) is most successful when it asks the court to engage in formal rather than substantive equality reasoning, and in particular when the values in the claim overlap with those of the majority and do not challenge deeply held social norms and institutions.¹² A further

5. The question on the *Record of Donation* asks, "Male donors: Have you ever had sex with a man, even one time since 1977?" A positive answer results in a lifetime deferral from giving blood. See Canadian Standards Association Criteria, as cited in Lomaga, *supra* note 2 at 78.

6. See, for example, Lomaga, *ibid.*

7. [1995] 2 S.C.R. 513 [*Egan*].

8. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*].

9. *M. v. H.*, [1999] 2 S.C.R. 3 [*M. v. H.*].

10. See for example *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 CarswellBC 1006 (C.A.) (WeC) [*EGALE*].

11. *Ibid.*

12. Andr  e Lajoie, "When Silence Is no Longer Acquiescence: Gays and Lesbians under Canadian Law" (1999) 14 Can J.L. & Soc. 101 at 120.

requirement of success is that the claimant seeks recognition of a right rather than redistribution of public funds.¹³

The Court in *M. v. H.* was asked to consider whether M and H (a lesbian couple) were spouses for the purposes of the spousal support provisions of Ontario's *Family Law Act*.¹⁴ The majority found that the definition of spouse was in violation of s. 15(1) and could not be justified under s. 1. Canadian legal scholar Judy Fudge reasons that the case was successful because "*M. v. H.* neither involved the expenditure of public funds nor challenged the hegemony of heterosexual marriage."¹⁵ The majority justices were very clear that their decision was intended *only* for the purposes of spousal support and did not apply to any other definition of spouse in the Act.¹⁶ They also clarified that they were *not* being asked to determine whether or not same-sex partners could marry, nor whether the Act must treat same-sex partners the same as unmarried opposite-sex partners for all purposes.¹⁷ They insisted that their decision had no impact on "marriage *per se*."¹⁸ The justices were quick to engage in formal equality reasoning and acknowledged that same-sex couples (like opposite-sex couples) often form "long, lasting, loving, intimate relationships" which are able to be "conjugal" and may give rise to financial interdependence.¹⁹ If not for the opposite-sex requirement in the legislation then same-sex relationships like M and H's satisfied the definition of "spouse" in the impugned provisions. As a result, the opposite-sex requirement was declared to be of no force and effect and was suspended for six months to allow the Ontario government to change the legislation. The Court reiterated "twenty-one times in as many paragraphs that the remedy favour[s] reducing the expenditure of public money."²⁰ The majority was comfortably able to find discrimination in *M. v. H.* because it merely required comparing this monogamous dyadic lesbian relationship to a monogamous dyadic heterosexual relationship and finding them to be the same. Marriage as a heterosexual monogamous institution was not threatened by the claim in *M. v. H.*, since the Court was able to limit the application of its decision to spousal support.

The judgment in *M. v. H.* stands in stark contrast to *Egan*, wherein the majority held that excluding same-sex couples from old age pensions violated s. 15(1) but was justified under s. 1. As Judy Fudge demonstrates, *Egan* ultimately failed because it involved both the expenditure of public funds and challenged the hegemony of heterosexual marriage.²¹ The majority reasons delivered by LaForest J. in *Egan* emphatically rejected the notion that same-sex couples could qualify as spouses. They stated that because procreation is central to the institution of marriage, same-sex couples cannot marry and are therefore rightfully denied the old age security pensions that are designed to support and provide security for

13. Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age", (1995) 212 *New Left Review* 68.

14. R.S.O. 1990, c. F. 3, s. 29.

15. Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Tom Campbell, K.D. Ewing & Adam Tomkins, eds., *Skeptical Essays on Human Rights* (New York: Oxford University Press, 2001) at 342.

16. *M. v. H.*, *supra* note 9 at para. 55.

17. *Ibid.*

18. *Ibid.* at para. 52.

19. *Ibid.* at para. 58.

20. Fudge, *supra* note 15 at 342.

21. *Ibid.*

married couples into old age. In the majority's strong defense of the institution of marriage as heterosexual, one can sense an affront to this deeply valued social institution:

[M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.²²

Unlike *M. v. H.*, the claim in *Egan* clearly challenged the heteronormativity of marriage and sought the redistribution of public pension funds; as such, it did not succeed.

Eight years later, however, social values had shifted sufficiently to allow for the inclusion of gays and lesbians in the deeply valued social institution of marriage, but success still required using formal equality arguments. The path to same-sex marriage began with various s. 15(1) challenges at the provincial court level to the common law definition of marriage. The definition comes from *Hyde v. Hyde and Woodmansee*,²³ in which Lord Penzance stated, "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."²⁴ In the British Columbia challenge in *EGALE*,²⁵ Prowse J.A. endorsed a substantive approach to equality while finding a s. 15(1) violation through formal equality reasoning. Prowse J.A. agreed with the reasons of Mr. Justice Blair in *Halpern v. Canada*²⁶ that "[i]f heterosexual procreation is not essential to the nature of the institution, then the same-sex couples' sexual orientation is the only distinction differentiating heterosexual couples from homosexual couples in terms of access to the institution of marriage."²⁷ Since the rules of formal equality dictate that like persons should be treated the same to the extent that they are alike, then all couples were allowed to marry regardless of their ability to procreate. The success of the case can again be attributed to the fact that it sought recognition of a right rather than the redistribution of public funds and because it was argued in a formal equality manner.

The *EGALE* case in particular offers a clear picture of the limitations of gay and lesbian rights claims based upon formal equality reasoning. Importantly, the case also reveals the court's fear of non-monogamous behaviour. The Court in *EGALE* was willing to accept arguments that procreation was no longer at the heart of the institution of marriage. As such, the inclusion of gays and lesbians in the institution of marriage reveals that its essential requirement is not heterosexuality, but rather exclusivity.²⁸ In other words, marriage is an inherently monogamous institution.

22. *Egan*, *supra* note 7 at para. 21.

23. (1866), L.R. 1 P & D. 130 (H.L.).

24. *Ibid.* at 133.

25. *EGALE*, *supra* note 10.

26. 2002 CarswellOnt 2309 (Sup. Ct J) (WeC) [*Halpern*].

27. *EGALE*, *supra* note 10 at para. 90.

28. Gillian Calder, "Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage" (2009) 21:1 C.J.W.L 55 at 74.

The formal equality manner in which *EGALE* was argued reveals fears that challenging the monogamous norm of marriage would likely have resulted in failure. The *EGALE* factum for the trial decision²⁹ stressed monogamy, its success was founded on comparing same-sex relationships to opposite-sex relationships and finding them to be the same.³⁰ The factum stated that same-sex couples' reasons for wanting to marry were the same as heterosexual couples' reasons: romance, social recognition, financial and emotional security, legal protection, and strengthening their commitment to their relationship.³¹ It spoke briefly to the diversity of the couples seeking the right to marry in terms of age, ethnicity, religion, occupation, regional location, length of relationship and family form,³² but quoted only individuals who were all involved in monogamous relationships.³³ Avoiding the "taint of polygamy and other more 'deviant' forms of non-monogamy" was critical to the success of this case.³⁴ The SCC has confirmed that monogamy is now the essence of marriage, stating in *Reference re Same-Sex Marriage*³⁵ that "[m]arriage is the lawful union of two persons to the exclusion of all others."³⁶ Indeed, *EGALE* was successful because it used formal equality reasoning that avoided challenging the inherent monogamy of marriage.

I have argued that a gay and lesbian rights claim will more likely be successful when it asks the court to engage in formal rather than substantive equality reasoning. The more the values in the claim overlap with dominant opinion and do not challenge deeply held social norms the more likely the claim is to succeed. Finally, a claim is more likely to be successful when it seeks the recognition of a right rather than the redistribution of public funds.

At first glance the application of this framework to the MSM blood donation ban might seem optimistic. The claim seeks the recognition of a right rather than the redistribution of public funds. Furthermore, framing the claim in a formal equality manner premised on treating like risks alike might be successful. An affirmative response to Question 18 on the Record of Donation currently results in a lifetime deferral from giving blood. If all individuals who were at an increased risk for HIV infection were treated the same, then men who have sex with men would be deferred for six months or one year. Six months is the time period of deferral for anyone who has had sex with a person whose sexual history they do not know.³⁷ One year is the time period of deferral for women who have had sex with men who have had sex with men and for persons who have had sex with a sex trade worker.³⁸ Regardless, success using a formal equality approach in this context would undermine the ultimate goal of the claim because it would still result in sexually active gay men being excluded from donating blood.

29. *EGALE Canada Inc. v. Canada (Attorney General)*, 2001 BCSC 1365 (Factum of the Appellant), online: Equal Marriage for Same-Sex Couples <http://www.samesexmarriage.ca/legal/bc_case/egalefactum_appeal.htm> (last accessed 12 January 2009) [*EGALE* Factum].

30. Calder, *supra* note 28 at 75.

31. *EGALE* Factum, *supra* note 29 at para. 3.

32. *Ibid.* at para. 2.

33. *Ibid.* at para. 3.

34. Calder, *supra* note 28 at 76.

35. 2004 SCC 79, [2004] 3 S.C.R. 698 [*Reference*].

36. *Ibid.* at para. 1.

37. Canadian Standards Association Criteria, as cited in Lomaga, *supra* note 2 at 78.

38. *Ibid.*

A formal equality approach does not serve to question the underlying power structures that oppress sexual minorities and perpetuate social stigmas (such as non-monogamy being deviant or dangerous) that result in discrimination. Formal equality is a valuable tool for dismantling “the legal architecture of (formal) distinctions that so often map over socially entrenched, materially patterned and culturally normalized substantive inequalities.”³⁹ Indeed, formal equality is an effective tool for remedying formal inequalities. But because formal equality merely attempts to organize the world into things that are the same and things that are different, it makes invisible the complexity of social relations.⁴⁰ As a result, oppressive social structures are subverted to the equality claim and become invisible.⁴¹ Thus, formal equality erases the very structures that equality claimants seek to transform.

In *M. v. H.* and *EGALE*, formal equality functioned to accord public recognition to gay and lesbian relationships that conformed to the dominant monogamous dyadic conjugal relationship structure. Engaging in formal equality strategies in these cases, however, was a fundamentally assimilative endeavour. The line between legitimate and illegitimate relationship structures merely shifted, “implicitly authoriz[ing] the exclusion of a reconfigured group of outsiders.”⁴² Gays and lesbians whose relationships do not conform to the publically recognized, socially valued, legally reified monogamous dyadic conjugal form are beyond formal legal protection. The difference between monogamy and non-monogamy remains a relevant social distinction that justifies formal legal exclusion. Under the rubric of formal equality, gays and lesbians who engage in non-monogamy are considered to be differently situated based upon this “relevant” characteristic, justifying the application of different formal legal regimes.

What is required to achieve actual equality in this claim is a truly substantive approach that contextualizes the position of gay men in society by recognizing and accommodating the diverse sexual identities and different approaches to relationships that exist within the gay community. Despite the court’s insistence that it guarantees substantive equality, its approach to equality both historically and presently allows an easy slip back into formalism, which defeats the ultimate goal of this claim. The next part of my paper seeks to examine the deficiencies of the court’s approach to equality that would serve to defeat a claim of this nature. I will argue that the court must identify and articulate the substantive values that s. 15(1) seeks to protect in order to allow for a truly substantive approach to equality.

II. CANADIAN COURTS’ APPROACH TO EQUALITY UNDER SECTION 15(1)

Equality is valued nearly everywhere but practiced almost nowhere. As an idea, it can be fiercely loved, passionately sought, widely valued, legally guaranteed, sentimentally assumed, or complacently taken for granted. As a reality, in lives lived or institutions run, it hardly exists anywhere.⁴³

39. Hester Lessard, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism” in Sheila McIntyre & Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis: Butterworths, 2006) at 295.

40. *Ibid.*

41. *Ibid.*

42. *Ibid.* at 296.

43. Catharine A. MacKinnon, *Women’s Lives, Men’s Laws* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005) at 44. Many thanks to Chris Tait for directing me towards this apt quotation.

In the same chapter of *Women's Lives, Men's Laws* from which the above quotation is taken, Catharine MacKinnon lauds Canada's promise of a substantive approach to equality. Canadian courts' commitment to substantive rather than formal equality, however, has been rhetorical.⁴⁴ In its first s. 15(1) decision, *Law Society of British Columbia v. Andrews*⁴⁵ ("Andrews"), the SCC laid a foundation for the pursuit of substantive equality; the test, however, was inherently deficient because it failed to articulate what substantive equality was meant to protect. *Andrews'* conception of equality as a comparative concept additionally served to undermine the court's commitment to substantive equality. The new equality framework articulated in *Law v. Canada (Minister of Employment and Immigration)*⁴⁶ ("Law") exacerbated the existing problems with the court's approach to s. 15(1) by articulating a singular, abstract notion of what equality is meant to protect: human dignity. Further, the SCC maintained that equality is a comparative concept. Finally, the framework articulated in *R v. Kapp*⁴⁷ ("Kapp") left us with problematic aspects of the *Andrews* and *Law* tests and failed to articulate the full range of wrongs caused by unequal treatment. We remain with a conceptually problematic framework that is unlikely to be applied substantively in a manner that will recognize discrimination of the type that is at play in MSM blood donation ban.

In other places and other times equality has been understood in a formal manner. Since Aristotle's *Ethica Nichomachea*, equality has been understood to mean that likes should be treated alike to the extent that they are alike and differently to the extent that they are different.⁴⁸ Formal equality (based upon this "similarly situated test") is prevalent in American equality jurisprudence surrounding the interpretation of the 14th Amendment,⁴⁹ and it disappointingly informed the interpretation of the equality guarantee in the *Canadian Bill of Rights*.⁵⁰ In *Bliss v. Attorney General of Canada*⁵¹ ("Bliss"), the similarly situated test was used to deny a pregnant woman unemployment benefits that she would have received had she not been pregnant. According to *Bliss*, the legislation treated all pregnant persons equally, and any inequality was created by nature rather than the legislation.⁵²

In 1989, the SCC sat poised to interpret what equality would mean for Canada, and its words were encouragingly distant from the reasoning in *Bliss*. In *Andrews*, the Court rejected a formalist approach and the similarly situated test.⁵³ McIntyre J. acknowledged that sometimes treating people the same may exacerbate inequalities, whereas accommodation of difference is "the essence of true equality."⁵⁴ He acknowledged that in order to achieve

44. Fay Faraday, Margaret Denike & Kate M. Stevenson, "In Pursuit of Substantive Equality" in Fay Faraday, Margaret Denike & Kate M. Stevenson, eds., *Making Equality Rights Real: Securing Equality Rights Under the Charter* (Toronto: Irwin Law, 2006) at 17 [*Making Equality Rights Real*]. In this introductory chapter the authors state that the "project of this book, then, is to re-examine the gap between the aspirations for substantive equality enshrined in our *Charter* and the failure to implement them in practice."

45. [1989] 1 S.C.R. 143 [*Andrews*].

46. [1999] 1 S.C.R. 497 [*Law*].

47. 2008 SCC 41, [2008] S.C. J. No. 42 (QL) [*Kapp*].

48. MacKinnon, *supra* note 43 at 45.

49. *Ibid.*

50. S.C. 1960, c-44, s. 1(b).

51. [1979] 1 S.C.R. 183.

52. *Ibid.* at 190.

53. *Andrews*, *supra* note 45 at para. 30.

54. *Ibid.* at para. 31.

“full equality,” one must consider the impact of the law.⁵⁵ Furthermore, McIntyre, J. stated that not every distinction or differentiation in the law will amount to a breach of the equality guarantee — only those that discriminate. The Court subscribed to a concrete and contextual (rather than abstract and blind) approach to applying s. 15(1), which is consistent with a substantive approach to equality. Justice Wilson is the most explicit in her call for a contextual approach,⁵⁶ although McIntyre, J. implicitly calls for such an approach, stating that “[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies and also upon those whom it excludes.”⁵⁷ In *Andrews*, the Court distanced itself from a formal equality interpretation and called for a contextual, purposive approach to interpreting the *Charter* equality guarantee.

A truly substantive approach to equality has incredible potential to change past patterns of oppression. It allows, encourages, and requires law-makers to redress past oppressive relationships in society. Sheila McIntyre (a prominent scholar in Canadian equality jurisprudence) maintains that *Andrews*’ strengths are its rejection of formalism, its embrace of a purposive and contextual analysis and its focus on the effects of the impugned law “that bear some relation to social, political, or legal disadvantage.”⁵⁸ MacKinnon, too, is most encouraged by the Court’s purposive approach to interpreting s. 15(1) as intending to promote and actually produce social equality.⁵⁹ She states:

This does not sound like much, but it is everything: given social inequality, it requires that law has to move the world to be legal. It no longer leaves equality law standing neutrally in the face of an unequal world, sorting sameness from difference, reinforcing social inequalities by law.⁶⁰

I agree that *Andrews* offers direction for securing substantive equality, but I maintain that the decision was inherently deficient. Although McIntyre, J. stated that not every legal distinction will constitute discrimination, he nevertheless offers little direction for determining what does. Denise Réaume (another prominent Canadian equality scholar) notes that “some implicit grasp of the need for a substantive foundation for equality rights is only dimly apparent [in the judgment].”⁶¹ The second part of the two-part *Andrews* test asks whether or not the distinction creates a disadvantage through the perpetuation of prejudice or stereotyping,⁶² but tells us nothing about how or why distinctions based on stereotypes violate the principle of equality.⁶³ A broader articulation of the harms that flow from unequal treatment (that is unfair for reasons other than the perpetuation of prejudice or stereotyping)⁶⁴ are absent in the judgment. Without an understanding of what precisely is

55. *Ibid.* at para. 26.

56. *Ibid.* at para. 5.

57. *Ibid.* at para. 30.

58. Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” in Faraday, Denike & Stevenson, *Making Equality Rights Real*, *supra* note 44 at 102.

59. MacKinnon, *supra* note 43 at 55.

60. *Ibid.* at 54-55.

61. Denise G. Réaume, “Discrimination and Dignity” in Faraday, Denike & Stevenson, *Making Equality Rights Real*, *supra* note 44 at 127.

62. *Andrews*, *supra* note 45 at para. 43.

63. Réaume, *supra* note 61 at 130.

64. Sophia Moreau, “The Wrongs of Unequal Treatment” (2004) 54:3 U. T. L. J. 291 at 294 [Moreau, “Wrongs”].

harmed by unequal treatment, the Court's commitment to substantive equality was vulnerable to slipping into familiar formal equality reasoning.

A further critique of *Andrews* that contributes to understanding the Court's propensity to use formal equality reasoning lies in Justice McIntyre's assertion that equality is a comparative concept. The condition of equality, he states, "may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."⁶⁵ This assertion requires an equality claimant to choose a comparator group, which shifts the focus away from patterns of systemic inequality to a formal-equality-inspired analysis of sameness and difference with the comparator group.⁶⁶ Sheila McIntyre notes the Court's use of passive language, finding that it,

speaks generically of groups lacking political power, "disadvantaged groups", groups subject to "stereotyping" or "stigmatization", groups "excluded from the mainstream." ... There is no indication of who does the disempowering, stigmatizing, or marginalizing, of who enjoys entrenched political power, of how disadvantage and the inferiorizing stereotypes that legitimate second class status come about and whose hold on privileged entitlement such stereotypes shore up.⁶⁷

The comparator group requirement allows courts to avoid recognizing relationships of dominance and subordination, as well as active roles of oppressor vs. oppressed and of stigmatizers vs. the stigmatized. Regressing to a formal equality reasoning that is based upon comparing *x* to *y* is easy, since the underlying systems producing inequalities remain hidden.

The original deficiencies of *Andrews* were added to in *Law*. The SCC in *Law* attempted to pinpoint the substantive value underlying the right to equality that had been missing from the *Andrews* judgment. Speaking for the Court, Justice Iacobucci identified that the purpose of s. 15(1) is to prevent the violation of human dignity.⁶⁸ Iacobucci J. reaffirmed that equality is a comparative concept that requires the claimant to establish a comparator group.⁶⁹ He established a new three-stage test that focused on finding harm to the claimant's feeling of human dignity and articulated four contextual factors that may be taken into account at the third stage of this test to determine whether the law is discriminatory within the meaning of s. 15(1). The factors include: the existence of pre-existing disadvantage of the claimant group; correspondence between the grounds of the claim and the claimant's actual need, capacity, or circumstances; the ameliorative purpose or effect of the impugned law upon a more disadvantaged person or group; and the nature of the interest affected.⁷⁰ The Court problematically maintained that equality is a comparative concept and articulated only one substantive value to ground constitutional equality (harm to the claimant's feelings of human dignity).

Although the Court articulated this substantive reason for why unequal treatment is wrong, Sophia Moreau argues that there are three additional wrongs of unequal treatment that the

65. *Andrews*, *supra* note 45 at para. 26.

66. McIntyre, *supra* note 58 at 103.

67. *Ibid.*

68. *Law*, *supra* note 46 at para. 51.

69. *Ibid.* at para. 55.

70. *Ibid.* at para. 88.

Law test fails to separately recognize. Its failure to do so, she states, makes the test “conceptually problematic and less able to recognize as discriminatory certain instances in which the claimant has indeed suffered one or more wrongs.”⁷¹ Moreau argues that the *Law* test rightly begins with the abstract ideal that the state should treat each individual with equal concern and respect and value every person’s inherent worth and dignity.⁷² The test, however, relies upon a subjective concept of dignity when it asks how a person *feels* when confronted with the impugned law, and it restricts findings of violation under s. 15(1) to instances when those feelings are caused by unfair unequal treatment. Moreau states that this is problematic because “although the test purports to be about the feelings of the claimant, the question on which it really turns is whether or not the treatment received by the claimant was unfair.”⁷³ Whether or not the unequal treatment in question is wrong (and should therefore be found to violate s. 15(1)) is only fully determined having regard to the three additional wrongs Moreau identifies: unequal treatment wrongs people when it is based upon prejudice or stereotyping, when it perpetuates oppressive power relations, when it leaves people without access to necessary basic goods, and when it diminishes an individual’s feelings of self-worth.⁷⁴ The *Law* test conflates these different conceptions of the wrong⁷⁵ and ultimately fails to offer “a comprehensive and explicit analysis of the kinds of treatment that amount to a violation of dignity”;⁷⁶ the test, therefore, is unlikely to recognize certain types of discrimination when they do exist.

A gay man who attempts to donate blood and is rejected because he is gay would most certainly *feel* as though his dignity had been harmed. To establish whether or not this treatment is in fact discriminatory, however, a court would likely justify the policy based upon the broader social objective of ensuring the safety of the blood supply under the second and fourth contextual factors of the *Law* test. The burden on the claimant to find a link between his treatment and his actual needs (the second contextual *Law* factor) has been identified as problematic because it shifts the analysis of the purpose of the legislation from s. 1 to s. 15(1). The government (unlike the claimant) has unlimited resources and is in the unique position to be able to know what the purpose of the legislation is since it enacted the law or policy. Furthermore, incorporating the broad objective of the legislation into the equality analysis shifts the focus of the inquiry away from the claimant’s lived experience of discrimination.⁷⁷

The previously-mentioned example is illustrative of the ease with which an equality claim can be defeated without a proper understanding of what s. 15(1) is meant to address. What then, does substantive equality aim to address? How does unequal treatment wrong people beyond the fact that it is unfair? Moreau finds that unequal treatment is arbitrary when it is motivated by or publicly justified in terms of prejudice or stereotypes. A stereotype does not correspond to an individual’s actual circumstances or abilities and serves to lessen an individual’s autonomy to define his abilities for himself.⁷⁸ Arbitrarily unequal treatment lim-

71. Moreau, “Wrongs”, *supra* note 64 at 294.

72. *Ibid.* at 319.

73. *Ibid.*

74. *Ibid.* at 297-314.

75. *Ibid.* at 318.

76. *Ibid.* at 319.

77. Fiona Sampson, “The Law Test for Discrimination” in Faraday, Denike & Stevenson, *Making Equality Rights Real*, *supra* note 44 at 256.

78. Moreau, “Wrongs”, *supra* note 64 at 298.

its an individual's "power to define and direct his life in important ways - to shape his own identity and to determine for himself which groups he belongs to and how these groups are to be characterized in public."⁷⁹ Thus, injury to dignity can be part of the explanation for why unequal treatment is wrong when based upon stereotypes or prejudice, but it does not offer the full explanation of the harm that is caused by this type of discrimination.⁸⁰

The stereotype that gay men practice sex in a manner that increases their risk of HIV infection is arbitrary. The ban is an antiquated policy implemented in 1983,⁸¹ when little was known about HIV and AIDS. At that time, gay men represented 61 percent of all new cases of AIDS and Haitian immigrants represented 37 percent.⁸² Since there was no test available to detect HIV and the safety of the blood supply was their paramount concern, the Canadian Red Cross Society (the predecessor of CBS) asked gay and bisexual men as well as Haitian immigrants to abstain from donating blood.⁸³ Categorical exclusion of these groups was the only way to maintain the safety of the blood supply.⁸⁴ CBS now uses three different tests for HIV that are between 99 and 100 percent effective.⁸⁵ The window period for infection has dropped from six to eight weeks to eleven days.⁸⁶ The risk of transfusion infection from HIV-infected blood is estimated to be one unit per 4.7 million donations.⁸⁷ Additionally, although MSM remain the group with the highest number of new cases of HIV infection at 39.6 percent, their rate of infection has dropped every year since 2001.⁸⁸ Tests that virtually guarantee that HIV-infected blood will be detected and will not enter the blood supply expose the arbitrariness of categorical exclusion of donations from gay men.

This arbitrary distinction harms gay men by limiting their power to shape their own identity and to decide how the group to which they belong is to be characterized in public. The stereotype that gay men practice unsafe sex that puts them at a higher risk of HIV infection results in gay men being publicly defined by another group's image of them. A gay man is less able to shape his sexual identity based upon his own sexual practices. His ability to publicly characterize the group to which he belongs as safe and responsible is thwarted. Ultimately, the public proclamation of the worthlessness of this very personal part of himself serves to weaken his sense of what is possible for himself.

The second reason Moreau identifies as why unequal treatment is wrong is because it perpetuates oppressive power relations, which deny individuals such "goods" as "the opportunity to participate as equals in public political argument [and] equal influence in certain

79. *Ibid.* at 299.

80. *Ibid.*

81. Lomaga, *supra* note 2 at 75.

82. *Ibid.*

83. André Picard, *The Gift of Death: Confronting Canada's Tainted-Blood Tragedy* (Toronto: Harper Collins Publishers, 1995) at 73 as cited in Lomaga, *ibid.*

84. Lomaga, *supra* note 2 at 75.

85. *Ibid.* at 79.

86. Canadian Blood Services, "Nucleic Acid Amplification Testing for HIV", online: <[http://www.bloodservices.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/PDF/\\$file/general_Document.pdf](http://www.bloodservices.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/PDF/$file/general_Document.pdf)> at 3 (last accessed 12 January 2010).

87. Lomaga, *supra* note 2 at 79.

88. Public Health Agency of Canada & Centre for Infectious Disease Prevention and Control, *HIV and AIDS in Canada: Selected Surveillance Tables to June 30, 2007* (Ottawa: Surveillance and Risk Assessment division, 2007), online: <<http://www.phac-aspc.gc.ca/aids-sida/publication/survreport/pdf/tables0607.pdf>> at 13 (last accessed 12 January 2010).

social contexts.”⁸⁹ She notes that these goods have value in and of themselves; denying them to someone harms that individual separately from whether or not that individual’s autonomy has also been lessened by this wrong.⁹⁰

By further entrenching heterosexist views about sexuality and relationships, the blood donation ban accords with this wrong. The ban premises heterosexual sex as safe and normal and stigmatizes gay sex as dangerous and deviant. This stigmatization leaves gay men without sufficient social influence, since it generates fear about their suitability for certain positions. Canada’s report on HIV/AIDS in 2003 revealed that 30 percent of adults in Canada would be uncomfortable working in an office with a person with HIV and 50 percent do not think that people with HIV should be allowed to serve in such public positions as dentists or cooks.⁹¹

As I have illustrated, these two conceptions of the wrong flowing from unequal treatment are precisely those that are at play in CBS’s MSM blood donation ban. The *Law* test fails to recognize these wrongs as discriminatory because injury to dignity is the singular conception of the harm caused by unequal treatment. The SCC further fails to address *Law*’s lack of a substantive underpinning in its most recent reformulation of the equality framework in *Kapp*.⁹²

In *Kapp*, the SCC addressed some of the problematic aspects of the *Law* test but left us with a framework that insists on equality as a comparative concept, one which is unlikely to recognize the wider range of discriminatory actions identified by Moreau. The decision acknowledged that the comparator group requirement had allowed formal equality reasoning to resurface in the post-*Law* period.⁹³ The Court’s comments, however, were limited to this acknowledgement and failed to address any of the comparator group concerns raised by academics in the literature the Court cited.⁹⁴ The Court seems to continue to require equality claimants to establish comparator groups, leaving us with an equality analysis that is vulnerable to a regression towards formal equality reasoning.

Encouragingly, the majority did recognize that the human dignity requirement established in *Law* was — as a legal test — burdensome on claimants, abstract, subjective and “confusing and difficult to apply.”⁹⁵ The Court seems to have removed this requirement from the test. In its place, however, the Court failed to articulate what their vision of substantive equality entails. The reasons merely state that s. 15(1) and 15(2) “work together to promote the vision of substantive equality that underlies s. 15 as a whole.”⁹⁶ *Kapp* implied that the *Law* test was never meant to stray from the approach established in *Andrews*,⁹⁷ but, as I argue

89. Moreau, “Wrongs”, *supra* note 64 at 305.

90. *Ibid.*

91. A. Anne McLellan, *Looking Forward: Focusing the Response* (Ottawa: Minister of Public Works and Government Services Canada, 2003) at 3.

92. *Kapp*, *supra* note 47.

93. *Ibid.* at para. 22.

94. Jonette Watson Hamilton and Jennifer Koshan, “The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges” *The Court* (15 April 2009), online: *The Court* <<http://www.thecourt.ca/2009/04/15/the-end-of-law-a-new-framework-for-analyzing-section-151-charter-challenges/>> (last accessed 12 January 2009).

95. *Kapp*, *supra* note 47 at para. 22.

96. *Ibid.* at para. 16.

97. *Ibid.* at para. 24.

above, *Andrews* is inherently problematic because it, too, failed to fully articulate the substantive wrongs that the equality provision is intended to protect.

Kapp encouragingly removed the harm to dignity requirement, shifted the analysis back to considerations of prejudice and stereotyping, and added disadvantage as a separate indicator of discrimination. The decision, however, must be interpreted broadly in order to recognize the additional wrongs of unequal treatment previously identified by Moreau.⁹⁸ In two SCC decisions that have interpreted *Kapp*,⁹⁹ the Court has “simply dropped all reference to disadvantage as an independent element.”¹⁰⁰ Moreau cautions: “[s]uch a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against.”¹⁰¹ In order to recognize discrimination based upon oppression or dominance of one group over the other (or based upon the denial of basic or necessary goods), Moreau insists that courts “must be careful to treat the three ideas in *Andrews*, ‘disadvantage,’ ‘prejudice’ and ‘stereotyping,’ as related but distinct ideas, rather than collapsing disadvantage into prejudice and stereotyping.”¹⁰² A careful and broad interpretation of the three conceptions of discrimination articulated in *Kapp* is required to substantively ground s. 15(1). Disadvantage in particular must be interpreted broadly and purposively to recognize the wider wrongs (perpetuation of oppressive power relations and denial of basic or necessary goods) caused by unequal treatment.

Under the *Kapp* framework, a challenge to the MSM blood donation ban would likely not succeed for the same reasons that it would likely not succeed under the *Law* framework: the Court insists that equality is a comparative concept and it has not separately recognized the wider wrongs caused by unequal treatment. While it is possible that a court may recognize the ban as discriminatory because it is based upon stereotype, it is more likely that *Law*’s second and fourth contextual factors (which *all* lurk within the *Kapp* decision as “relevant to the *Andrews* question of whether the claimant has suffered the right sort of disadvantage, prejudice or stereotyping, rather than to the *Law* question of whether the claimant’s dignity has been demeaned”)¹⁰³ would undermine a finding of discrimination. The court would likely not recognize the ways in which the ban perpetuates oppressive power relations, since this type of unequal treatment remains absent from its understanding of the equality guarantee. If the court continues to gloss over disadvantage as a separate wrong caused by unequal treatment then it will remain blind to discrimination that is based upon the unfair dominance of one group over another.¹⁰⁴ Additionally, the court’s insistence that equality is a comparative concept reintroduces the temptation to understand and apply equality in a formal manner. Non-monogamy will therefore continue to be a relevant difference that justifies differential treatment.

98. Sophia Moreau, “R. v. Kapp: New Directions for s. 15”, (2009) 40:2 Ottawa L. Rev. 283 at 292 [Moreau, “New Directions”].

99. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, 302 D.L.R. (4th) 577, [2009] 2 C.N.L.R. 102; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] W.D.F.L. 2957.

100. Moreau, “New Directions”, *supra* note 98 at 292.

101. *Ibid.*

102. *Ibid.*

103. *Ibid.*

104. *Ibid.*

CONCLUSION

As I have argued, a s. 15(1) challenge to CBS's discriminatory MSM blood donation ban would likely not succeed if brought before the Court. Because *Andrews*, *Law* and *Kapp* failed to establish a comprehensive conception of the substantive values that underlie the equality provision in the *Charter*, the Court's approach to equality remains without a substantive underpinning that will recognize all forms of discrimination where they exist. These cases, in combination with the Court's insistence that equality is a comparative concept, indicate that facial judicial reaffirmation of substantive equality approaches is undermined by a tendency towards formal equality reasoning. Previous gay rights claims litigated under s. 15(1) were successful only when they asked courts to engage in formal equality reasoning and when they sought recognition of a right. *M. v. H.*, *Egan* and *EGALE* show that formal equality strategies have reified monogamy as the dominant relationship form; *EGALE* in particular reveals the Court's fear of non-monogamous behaviour. Formal equality cannot transform the social structures that equality claimants seek to change because the structures are subverted and are made invisible by formal equality's concern with sameness and difference. In this case, a formal equality approach will not be successful because it would nevertheless result in the banning of gay men from donating blood. Confronting this fear of non-monogamy and contextualizing the position of gay men in society would be necessary to achieve success in a s. 15(1) challenge to the blood donation ban. A successful challenge to the MSM blood donation ban requires the Court to adopt a truly substantive equality approach that accommodates the different relationship structures and diversity of sexual expression within the gay community.

Sheila McIntyre urges advocates to "speak substantively" to overcome these barriers.¹⁰⁵ Former Justice L'Heureux-Dubé suggests that substantive equality is "a language like every other; an embodiment of the norms, attitudes and culture that are expressed through equality's rules of grammar and syntax, nuances, exceptions and dialects."¹⁰⁶ Advocates should therefore make explicit the links between inequalities and the homophobic laws and policies which produce those inequalities. McIntyre argues that using active descriptor words such as disenfranchised and disempowered "invites questions of authorship," and "disrupt[s] the privileged innocence and unreflectively supremacist habits that formalism authorizes."¹⁰⁷ The Court will be more likely to find discrimination where it sees the claimant as oppressed or subordinated rather than simply having been disadvantaged in some way that remains unlinked to the wrongs of unequal treatment. Explicit recognition of the links between gay oppression, judgments that reify monogamy and discriminatory government policies may eventually lead to the elimination of the blood donation ban and the future of a more equitable society.

105. McIntyre, *supra* note 58 at 110.

106. Claire L'Heureux-Dubé, "Conversations on Equality" (1999) 26 Man. L. J. 273 at para. 23.

107. McIntyre, *supra* note 58 at 112.