

Looking Forward: The Impact of Section. 15

The speakers in this section discuss the future impact of the equality provision of the Charter. The first speaker calls for a “vision of equality” that will inform our understanding and implementation of Charter equality. The second speaker discusses how changes to the make-up and priorities of our society will both influence and be influenced by the now central role of equality rights in Canada.

What you will find in this section:

- Speaker Summaries and Viewing Notes
- Key Terms
- General Discussion Questions
- Clip-specific Discussion Questions
- Activities for Civics and Law classes
- Resource Links
- Curriculum Expectations



Speaker Summaries and Viewing Notes

Mr. Bill Pentney (Senior Assistant Deputy Minister, Department of Justice, Former Counsel Canadian Human Rights Commission) **(2:22 minutes)** Mr. Pentney suggests that it is up to Canadians to nourish a vision of equality that might encourage the technical aspects of the equality provision to blossom. Mr. Pentney suggests that we find the “spirit” of equality that s. 15 is meant to capture and articulate that spirit in a way that guides technical interpretation. Flowing from this, Mr. Pentney wonders if we shouldn’t do more to develop the institutional tools to realize that vision of equality.

- *This section is a good way to provoke students to consider how equality might be better protected in the future. Students can be prompted to discuss the difference between the “spirit” of equality and the technical language found in s. 15.*

The Right Honourable Joe Clark (Former Prime Minister, Former Leader of the Opposition) **(4:35 minutes)** Mr. Clark suggests that the *Charter* has the potential to influence the international community, and he cautions that it is not just a guarantee of rights but also a statement of values. He outlines several issues of democracy and diversity that he feels will test the *Charter* in coming years. In particular current immigration patterns and demographic changes have the potential to significantly test the equality provisions of the *Charter*. In his opinion the *Charter* has moved questions of equality from the margins to the center of discussion of rights protection.

- *This section can prompt a discussion of how current changes in both security issues and the increasing diversity of our society will affect, and be affected by, the equality provision in the Charter.*



Key Terms in this Section

Equality
Vision of equality
Technical doctrine
Onus
Proof
Approaches to litigation
Institutional tools
Diversity
Demographics
Immigration
Security concerns
Civil society
Human Dignity



General Discussion Questions

- What issues do students think will be the focus of equality cases for the future? Will the kinds of equality cases change?
- Do equality cases push changes in societal values, or are they a reflection of changes in societal values?



Clip Specific Discussion Questions

Mr. Pentney

- What does Mr. Pentney mean by the distinction between the wording and spirit of s. 15?
- How does the fact that s. 15 was a provision created by a committee affect our understanding of the law?
- Why does Mr. Pentney think we need to focus on increasing the availability of institutional tools to deal with equality issues?

Mr. Clark

- What are the practical concerns regarding the demographic changes that Mr. Clark speaks of?

- Do students think these future changes in Canada's diversity will affect the interpretation of the *Charter*?
- Is the *Charter*, and s. 15 specifically, dynamic and flexible enough to deal with these changes?
- How would the "vision of equality" that Mr. Pentney speaks about help judges and parliaments to interpret the *Charter* in a way that accounts for the demographic changes that Mr. Clark points to?



Activities

The Meaning of Equality (Spirit vs. Wording)

Suitable for:
Civics 10
Law 11 or 12

- Students can attempt to articulate on their own what they think "equality" should mean in our society.
- Students can then attempt in small groups to come to a compromise definition of equality.
- Finally students can create a class-wide definition which they are all happy with. Ask students to reflect on the overall definition, and compare it to their original individual definitions. Ask students whether the final definition is better or worse than their personal definitions and why.
- Ask students to reflect on and discuss the process of compromising to come to one definition. Relate this to the process of creating a workable definition of equality or a *Charter* that satisfies all Canadians.
- (optional) Have students read the "Equality Backgrounder" (Page 7) and ask them if they think their definition captures the key elements of the historical understanding of equality.

Using the Equality Provision of the Charter - Worksheets

Suitable for:
Law 11 or 12

- Watch the clips and distribute the Equality Backgrounder sheet. (Page 7)
- Have students complete the Worksheet on Mr. Pentney's clip (Page 9) and the Worksheet for Mr. Clark's clip (Page 8) after viewing both the clips.
- Discuss and compare answers.

Immigration and Equality Discussion

Suitable for:
Civics 10

- a) Mr. Clark spoke of Canada's changing demographics. Do students see Canada as a country that is being changed by immigration? Should equality rights be extended to new Canadians? Why or why not? Do students think all new Canadians will arrive with the same understanding of equality that the *Charter* promotes? What specific barriers exist (religious, cultural) to adopting an understanding of equality that is consistent with what has come out of the *Charter*? (think of the cultural clash that can exist with same sex rights). Should our current notion of equality evolve to incorporate the values of new immigrants to Canada.
 - b) Discuss with students the difference between the U.S. philosophy of the "melting pot" and the Canadian idea of "multiculturalism". How does this difference affect the way we treat those who are new citizens to our respective countries?
 - c) Have students brainstorm ways that new Canadians can be educated on the ideals of equality that are set out in the *Charter*. Is it difficult to walk the line between mere education and assimilation?
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Resources/Links

- Ontario Human Rights Commission: <http://www.ohrc.on.ca/>
- Human Rights Agencies in Canada <http://www.ohrc.on.ca/english/commission-links.shtml>
- Legal Dictionary: <http://www.duhaime.org/dictionary/dict-no.aspx#O>
- OJEN Legal Glossary: <http://www.ojen.ca>
- 2001 Census Consultation Guide Citizenship and Immigration Recent Trends <http://www.statcan.ca/english/freepub/92-125-GIE/html/cit.htm>
- Citizenship Test Study Questions: <http://www.cic.gc.ca/english/citizen/look/look-21e.html>



Curriculum Expectations

Civics Open Grade 10 (CHV2O)

- Distinguish between democratic and authoritarian forms of decision-making, and compare the benefits and drawbacks of each form when used in everyday contexts
- Describe fundamental beliefs and values associated with democratic citizenship
- Communicate their own beliefs, point of view, and informed judgments, and effectively use appropriate discussion skills
- Demonstrate an ability to organize information effectively
- Explain the causes of civic conflict, and identify the need for decision-making processes and strictures

Understanding Canadian Law, Grade 11, University/College Preparation (CLU3M)

Overall Expectations

- describe the rights and freedoms enshrined in Canadian law and explain how they are interpreted, how they may be limited, and how they are enforced in Canada and in Ontario
- describe historical and contemporary barriers to the equal enjoyment of human rights in Canada

Specific Expectations

Barriers to Human Rights

- evaluate the contribution of individual citizens and organizations in developing and increasing awareness of human rights issues
- describe the development of rights legislation in Canada (e.g., *Canadian Charter of Rights and Freedoms*, Ontario Human Rights Code)

Human Rights Legislation in Canada and in Ontario

- describe the rights and freedoms found in the *Canadian Charter of Rights and Freedoms*
- explain the role of the judiciary, especially the Supreme Court of Canada, in interpreting the *Charter* and the role of government in enforcing Charter rights

Canadian and International Law, Grade 12, University Preparation (CLN4U1)

Overall Expectations

- describe the historical development of human rights legislation in Canada
- demonstrate an understanding of the rights and responsibilities of individuals under the *Canadian Charter of Rights and Freedoms*
- explain the role of the legislature and the judiciary in defining, interpreting, and enforcing *Charter* rights in Canada
- analyze the conflicts between rights and freedoms and between minority and majority rights in a democratic society and describe the methods available to resolve these conflicts

Specific Expectations

Human Rights in Canada

- identify historical and contemporary barriers to the equal enjoyment of human rights faced by individuals and groups in Canada and analyze their effects.
- explain the evolution of Canadian human rights legislation from English common law to the Canadian Bill of Rights and then the *Canadian Charter of Rights and Freedoms*.

The Canadian Charter of Rights and Freedoms

- explain what is meant by entrenching rights in a written constitution;
- analyze how rights and freedoms are protected under the *Charter of Rights and Freedoms* (e.g., fundamental freedoms; democratic, mobility, legal, equality, and language rights);
- explain the definitions of legal rights, fundamental freedoms, and democratic, language, equality, and mobility rights under the *Charter*;
- explain how citizens can exercise their rights under the *Charter* (e.g., by initiating *Charter* challenges in the courts to legislation or government action; by raising the *Charter* as a defence when charged with an offence)

The Legislature and the Judiciary

- explain how rights may be limited or overruled according to the *Charter* (e.g., section 1, section 33);
- evaluate the role of the courts and tribunals and, in particular, the Supreme Court of Canada in interpreting *Charter* rights;
- describe how *Charter* rights are enforced

Minority and Majority Rights

- demonstrate an understanding of the difficulty of balancing rights in a democracy;
- evaluate the political and legal avenues available for resolving conflicts (e.g., the courts, tribunals, referendums)

Equality Backgrounder

What is equality?

'Equality' though seemingly straightforward is actually a difficult concept to define, and opinions of what is captured by this term often fall along a spectrum of two opposing views of what the right obliges a government to do. Some people believe that the government must take a **positive obligation** to support equality. This means that the government must be *active* to ensure that all Canadians are treated equally. This is known as **substantive equality**. Others believe that the government has only a **negative obligation** to *avoid* discriminating in its actions. The latter perspective is referred to as a **formal equality**.

- **Formal equality** accepts statutory definitions on their face, as long as everyone in a given category is treated equally. For example, a tax benefit for all white protestant males would be permitted because the benefit treated all white protestant males equally even though women or those of other races or religions were treated unequally. This was the kind of "separate but equal" equality rejected by the U.S. civil rights movement, which targeted racially segregated bathrooms and water fountains in the southern states on the grounds that it lessened the dignity of those people who were forced to use them.

- **Substantive and contextual equality** goes beyond the letter of the law to ask whether a government program or statute is a means of perpetuating inequality rather than alleviating it. In the case of *Vriend v. Alberta*, decided by the Supreme Court in 1998, a gay man who was fired because of his sexual orientation asked the courts to find that the Alberta human rights legislation discriminated against him because it did not protect gays and lesbians from work-related discrimination. The Alberta government argued that the law treated those of all sexual orientations, gay or straight, equally because they would all be protected if fired based on a protected ground, such as their race. The Supreme Court disagreed, asking how the law actually affected people like Mr. Vriend in all their social circumstances. While the law did not appear to discriminate, its effect clearly did as gay men and lesbians experience systemic and wide-spread discrimination because of their sexual orientation while straight people do not. Substantive equality requires that when a government passes legislation or offer services, it must address inequalities in the text of the law, as well as any social and historic inequalities

More simply stated, with formal equality everyone is assumed to be equal and need only be given equal opportunity. Imagine the statue of Lady Justice with her blindfold. In formal equality Lady Justice is blind. 'She', the government, the justice system, and all public institutions, will judge people on what they have done, not on who they are or what they look like. Everyone is equal in the eyes of the law and will be treated equally by all government institutions. With substantive equality, however, we recognize that in fact everyone is not equal in society, so we must act to make them equal or interpret laws to take into account peoples' differences. Understanding this, Lady Justice will take off her blindfold and will provide a guiding hand to balance the scales of justice.



Worksheet: The Right Honourable Joe Clark

1. According to Mr. Clark, what two things will test the *Charter* most forcefully in Canada's future?

2. What does "draconian" mean? What types of draconian responses is Mr. Clark referring to? What is the historical context to his comments?

3. How has Canada's immigration changed since the 1970's? What are the trends in the United States?

4. How is the pace of demographic change different in Canada and the United States?

5. What does Mr. Clark mean when he says that we cannot predict the adversarial nature of new communities? What does this have to do with equality rights?

6. Mr. Clark quotes Justice Beverley McLachlin who claims that Section 15 is the most difficult right in the *Charter*. To what extent do you agree with this opinion?

7. Suggest how Canada's aboriginals will weigh in on the discussion.



Worksheet: Mr. Pentney

1. How does Section 15 read like the work of a committee?

2. What does Mr. Pentney imply is missing from Section 15?

3. Mr. Pentney argues that Canadians need to do two things with Section 15. Name these two things.

4. What is a Human Rights Commission, and how does it relate to the Charter and Section 15?

5. Suggest what Mr. Pentney means by the “technical doctrines,” “onus’s,” “proofs,” and “approaches to litigation” that are needed to reinvigorate Section 15.

6. What is his overall message about the *Charter* and equality? Do you agree with him?
