How Do Judges Think About Identity? The Impact of 35 Years of *Charter* Adjudication

The Honourable Mr. Justice Richard Wagner

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INTRODUCTION

Thank you, Professor Oliver, for the kind introduction. Thank you also, Professor Dodek, for the invitation to speak at this important conference. You have gathered a truly impressive group of panelists doing innovative work. It is a privilege for me to participate. I hope that I can make a contribution to some of the new lines of inquiry that I have no doubt will emerge from these sessions.

This conference invites us to reflect on 150 years of constitutional history—and 35 years of *Charter*[1] history—with an eye to the challenges and possibilities to come. Where have we been, and where are we going? If there is one thing that has been a constant in our constitutional experience, I think that it is *identity*. So many of the most monumental and even divisive questions that this country has faced touch on what it *means* to bear a personal characteristic, to belong to a group, to speak a language, or to come from a place. Deliberation on these issues has unfolded in the courts alongside the broader public sphere. Struggles over rights—including legal struggles—are part of how identities have come to be defined.

In constitutional cases, judges are occasionally called upon to define the breadth and limits of identities in law. I am thinking of cases like *Powley*, which established "indicia" of Métis identity.[2] Judges must also weigh in on whether differential treatment on the basis of identity is justifiable in a free and democratic society. When it comes to identity, judicial reasoning has

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 *R v Powley*, 2003 SCC 43 at paras 30–33, [2003] 2 SCR 207.

evolved considerably. Questions of language, gender, religion, and sexual orientation have passed in and out of the constitutional spotlight. Along the way, judges have come to recognize that our decisions have a profound effect on how Canadians see and relate to each other and to themselves.

I think it is fair to say that the Supreme Court of Canada has not always acted with a full appreciation of that impact. When reflecting on the historical place of our Court in the currents of Canadian identity politics, what else comes to mind but *Edwards*.[3] Recently, I re-read *Edwards*, which is, of course, the 1928 "Persons" case. In it, our Court decided that summoning "qualified persons to the senate" meant summoning only "men."[4] In light of the Court's modern approach to identity and constitutional interpretation, *Edwards* is remarkable as much for its refusal to consider context as its short-sightedness. Last year's decision in *Daniels*[5] offers a striking contrast. The Court was tasked with delineating the scope of the word "Indian" in section 91(24) of the Constitution,[6] deciding whether it included Métis and non-status Indians. It did so with reference to the entire historical, philosophical, and linguistic context.[7] This context included the shared experience of the horrific Indian Residential Schools.[8] Indeed, the decision began with an acknowledgement of the Court's place in the trajectory of reconciliation.[9]

Thirty-five years of *Charter* adjudication have driven a fundamental change in how judges think about identity generally. Both *Edwards* and *Daniels* illustrate the kind of line-drawing that the Court is sometimes called on to do when legal decisions touch on identity. It is not surprising that the Court's approach would evolve over decades of adjudicating *Charter* claims! Of course, the advent of the *Charter* is not the only thing that has changed in the nearly nine decades since *Edwards*.

It might be a little unfair to pick on *Edwards*. Au cours des années qui ont suivi, la Cour suprême a développé ce à quoi nous référons maintenant

3 *Edwards v Canada (Attorney General)*, [1928] SCR 276, [1928] 4 DLR 98, rev'd (1929), [1930] AC 128, [1930] 1 DLR 98 (UKPC) [*Edwards* cited to SCR]; The Honourable Justice Robert J Sharpe, "The Persons Case and the Living Tree Theory of Constitutional Interpretation" (2013) 64 UNBLJ 1.

4 *Edwards*, *supra* note 3 at 276.

5 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 [*Daniels*].

6 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91(24).

7 *Daniels*, *supra* note 5 at para 19.

8 *Ibid* at para 30.

9 *Ibid* at para 1.

comme étant la « jurisprudence de la déclaration ou de la charte des droits implicite ». Dans ces décisions, la Cour utilisait n'importe quel outil à sa disposition, que ce soit le fédéralisme ou une notion vague de la primauté du droit, pour protéger les libertés individuelles. À titre d'exemple, dans les arrêts *Saumur c City of Québec*[10] et *Roncarelli c Duplessis*[11], la Cour a invalidé un règlement et l'action administrative en découlant, jugeant qu'ils brimaient les minorités religieuses. Ces arrêts faisaient partie des premières tentatives de la Cour de s'assurer que tous, peu importe la religion ou l'identité, puissent jouir du droit à l'égalité et leur participation au sein de la société.

Cela dit, ces arrêts n'ont pas directement et clairement soulevé la question de l'identité comme telle. Faute d'une charte ou d'une déclaration des droits de la personne explicite, la Cour ne pouvait se prononcer sur les effets de ces lois sur des individus en particulier. Certains ont, à tort ou à raison, alors qualifié d'activiste cette jurisprudence de la déclaration ou de la charte des droits implicite[12]. Or, depuis l'adoption de la *Charte canadienne des droits et libertés*, il n'y a plus aucun doute. Les juges n'agissent pas alors de façon antidémocratique en intervenant lorsque des actions législatives ou exécutives ne respectent pas les dispositions de la *Charte*[13]. Ce sont les citoyens qui ont choisi, par le biais de leurs représentants élus, de se lier à un ensemble de normes fondamentales qui sont censées refléter les valeurs morales de la société canadienne. La Cour a la responsabilité et le devoir d'interpréter la *Charte* d'une manière à protéger les droits et libertés des Canadiens, incluant le droit de participer pleinement à la société, indépendamment de l'identité de ses citoyens. Si je suis accusé d'activisme judiciaire en respectant mon serment d'office, alors je n'ai aucune difficulté à plaider coupable.

The Court's current thinking about identity is undoubtedly the cumulative effect of these and other factors. Nevertheless, I propose to trace what I see as an evolution in judicial reasoning about questions of identity.

Earlier, I mentioned that the Court sits squarely in the currents of Canadian identity politics. For example, in *Cunningham*, the Court decided that those with overlapping Aboriginal identities will sometimes have to

10 [1953] 2 RCS 299, [1953] 4 DLR 641.

11 [1959] RCS 121, [1959] 16 DLR (2e) 689.

12 Voir par ex l'honorable Ian Binnie, « Judging the Judges: "May They Boldly Go Where Ivan Rand Went Before" » (2013) 26:1 Can JL & Jur 5 à la p 6.

13 *Vriend c Alberta*, [1998] 1 RCS 493 au para 142, 156 DLR (4e) 385, juges Cory et Iacobucci [*Vriend*].

choose between them.[14] The human impact of these types of decisions is partly measured in how people see themselves and each other. With our expanding means of communication, this human impact becomes immediate and more direct. There has never been a time when the media has been more involved in covering judicial affairs. Social media, too, has fostered a growing engagement with the Court's decisions. In fact, many panelists here wield a great deal of clout in the Canadian twitterverse. I am told that Adam Dodek is a Canadian Twitter celebrity, which is very famous indeed. But he has a long way to go to catch up to his colleague Michael Geist's followers. Do not worry, Adam, so does the Court!

Experts in political science, sociology, and history are better placed than me to analyze the effects that all of this has on identity—both the perceptions and the politics. Instead, I hope to use my time today to offer some insight into a topic I feel more suited to discuss: a judge's perspective on questions of identity.

One area of *Charter* jurisprudence in particular reveals a great deal about how judges *think* about identity: the guarantee of substantive equality enshrined in section 15. Struggles over how to think about identity have been close to the surface here. Each case squarely raises the question: when is a distinction based on a personal characteristic inappropriate, unjust, or unjustifiable?[15] The Court's efforts to answer these difficult questions offer a transparent display of consensus building, collapse, and course corrections. These give rise to three observations about how judges think about identity.

First, judges recognize that identity is contextual and complex, and not simply a catalogue of personal characteristics. But a commitment to a thick understanding of identity sometimes conflicts with the practical demands of judicial decision-making. Second, we recognize that different identities—including a judge's own—provide different perspectives on the law and its effects. Seeing things from another perspective is both an obligation and a work in progress. Third, how we think about identity has fundamental implications for the health of our democracy, as informed by the *Charter*. Democratic principles ought to inform our thinking about identity as well. It may be that the Court Challenges Program will

14 *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 86, 94, [2011] 2 SCR 670 (the choice pertains to the legislative scheme under which a person falls).

15 The Right Honourable Beverley McLachlin, PC, "Equality: The Most Difficult Right" (2001) 14 SCLR (2d) 17 at 21.

precipitate a new period of equality litigation. In each of these areas, I believe that the academic community can be of assistance.

I. IDENTITY IS CONTEXTUAL, NOT A CATALOGUE OF PERSONAL CHARACTERISTICS

Personal and group characteristics are the starting point of *Charter* equality jurisprudence. But identity is not about labels. It is a shorthand for how people see themselves, how others see them, and how those two things interact in peoples' lives. In other words, it flows from the *experience* of their personal and group characteristics. Experience is what separates identity from a mere catalogue of attributes.

Unwillingness to think about identity in terms of *experience* accounts for the shortcomings of several notorious *Bill of Rights*[16] cases. In *Bliss*, for example, the Court held that discrimination on the basis of pregnancy was not discrimination on the basis of sex.[17] A Court more attuned to how people actually experience their identities would not have found the connection between the two so elusive. By contrast, the Court shifted the focus to experience early in its *Charter* equality jurisprudence. Consider the example of disability. *Eaton* explained discrimination, *not* with reference to personal characteristics, but with reference to what it is actually like to live with those characteristics in a society built around "mainstream" attributes and assumptions.[18] The focus on experience also informs how the Court has dealt with *age* discrimination. Age is a unique type of identity, as the Court highlighted in *Gosselin*. It divides people at a moment in time. But age unites people over the long-term because it is something that everyone experiences.[19] When the Court eventually faces a question touching on transgender identity, these two propositions will provide essential frames of reference: that identity is not fixed, but changing, and that identity is not innate, but contextual.

16 *Canadian Bill of Rights*, SC 1960, c 44.

17 *Bliss v Attorney General of Canada*, [1979] 1 SCR 183, 92 DLR (3d) 417; for subsequent discussions, see *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321; *Vriend*, *supra* note 13 at para 85; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 167, 56 DLR (4th) 1 [*Andrews*].

18 *Eaton v Brant* (*County*) *Board of Education*, [1997] 1 SCR 241 at para 67, 22 OR (3d) 1.

19 *Gosselin v Quebec* (*Attorney General*), 2002 SCC 84 at para 32, [2002] 4 SCR 429, citing Peter W Hogg, *Constitutional Law of Canada* (looseleaf), vol 2 (Scarborough, Ont: Carswell, 1997) at 52–54 [*Gosselin*].

This brings me to the challenge. Is there such a thing as too much context? Certainly, identities are incredibly complex. But judges occupy an institutional role that creates a real tension here: how do we distill an issue to the essential question to be decided, without verging into essentialism? How does a nuanced conception of identity practically translate into a workable and coherent body of jurisprudence? Reasonable minds can differ over the appropriate balance between taking context seriously and making it manageable.

With the benefit of hindsight, I think that this balancing act animates some of the divisiveness of the section 15 jurisprudence and commentary.[20] One battleground of the 1990s was the restriction of section 15 to listed and analogous grounds. Justice L'Heureux-Dubé resisted the use of categories to define discrimination.[21] She reasoned that focusing on abstract categories was too distant from people's real experiences of discrimination.[22] This, in turn, made it more difficult to see the effect of multiple and overlapping grounds.[23] Nonetheless, the analogous grounds approach carried the day. It focused the inquiry into context and experience. An analogous ground is one based on "a personal characteristic that is…changeable only at unacceptable cost to personal identity."[24] The essential inquiry is the magnitude of the choice—or non-choice—that someone would *experience* when it comes to *changing* the relevant personal characteristic is the essential inquiry. It made all the difference in *Corbiere*, for instance. The Court decided that although "*place of residence*" was not an analogous ground, residence on- or off-reserve is. To the extent that it is a choice, living on- or off-reserve is fundamentally more profound than ordinary decisions about where to live.[25]

The 2000s saw the rise and eventual demise of the "mirror comparators" approach to discrimination. Defunct since *Withler* in 2011,[26] this approach required courts to identify a "comparator" group that mirrored the group making the claim in every respect except for the personal characteristic

20 See e.g. Christopher D Bredt & Adam Dodek, "Breaking the *Law's* Grip on Equality: A New Paradigm for Section 15" (2003) 20 SCLR (2d) 33 at 34; Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669 at 674–79.

21 Peter W Hogg, *Constitutional Law of Canada* (loose-leaf), 5th ed, vol 2 (Toronto: Carswell, 2007) at 55-21.

22 *Egan v Canada*, [1995] 2 SCR 513 at 551–52, 124 DLR (4th) 609, L'Heureux-Dubé J, dissenting.

23 *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554 at 645–46, 100 DLR (4th) 658.

24 *Corbiere v Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1, McLachlin & Bastarache JJ.

25 *Ibid* at paras 15, McLachlin & Bastarache JJ, 62, L'Heureux-Dubé J, dissenting but not on this point.

26 *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 63, [2011] 1 SCR 396 [*Withler*].

on which the claim is based in order to establish differential treatment.[27] I think that this too is a product of the institutional tension between context and clarity. Equality is a fundamentally comparative question.[28] I can understand why mirror comparators might have been seen as a practicable way of cutting to the heart of the issue. As it turned out, they were not. The Court agreed with robust academic criticism[29] of mirror comparators. By isolating a single distinction, their use tended to obscure the contextual impact of intersecting grounds of discrimination.[30]

Le recours aux groupes de comparaison s'est révélé une tentative infructueuse de trouver un équilibre entre les décisions qui sont à ce point austères qu'elles ferment les yeux sur l'expérience humaine, et celles qui plongent au cœur de cette expérience. Évidemment, l'expérience de la discrimination varie — parfois dramatiquement — en fonction des motifs de discrimination interreliés. À titre d'illustration, l'expérience d'une femme de faire partie d'une minorité visible peut être totalement différente de celle d'un jeune homme portant les mêmes caractéristiques. Si l'un d'eux n'est pas citoyen, ou se distingue par une orientation sexuelle différente, ces expériences seraient d'autant plus différentes.

The Court has committed to addressing such intersecting forms of discrimination.[31] But with each intersecting ground, complexity increases too. A promising avenue for further academic inquiry is the development of workable ways to help courts navigate this complexity. Mirror comparators were not the right tool for the job. They failed to capture the nuance of identity. But to be practical, the analytical tools that we use to understand identity must also work within the institutional confines of litigation. They must be feasible in light of the rules of evidence. They must bring the issues of law and principle into sharp focus. *Too much* emphasis on the context and circumstances of particular groups has a downside. It makes it difficult to articulate a rationale that reaches beyond the four corners of a case. Some measure of generality is a pre-condition for providing certainty and clear guidance to governments, lower courts, and future claimants.

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27 *Ibid* at para 49; *Hodge v Canada* (*Minister of Human Resources Development*), 2004 SCC 65 at para 23, [2004] 3 SCR 357.

28 *Andrews*, *supra* note 17 at 164.

29 *Withler*, *supra* note 26 at para 59, citing Margot Young, "Blissed Out: Section 15 at Twenty" in Sheila McIntyre & Sandra Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis, 2006) 45 at 63.

30 *Withler*, *supra* note 26 at para 58.

31 *Law v Canada* (*Minister of Employment & Immigration*), [1999] 1 SCR 497 at para 94, 170 DLR (4th) 1 [*Law*]; *Withler*, *supra* note 26 at paras 58, 63.

II. IDENTITY AND PERSPECTIVE

In addition to being shaped by context, identity is an inescapable part of how we see the world. It shapes our perspective. Identity is who we are and where we are coming from. It is fundamental to how we make sense of the world.[32] This is as true of those who are subject to laws as it is of those who make and adjudicate them. Justice Wilson posed the following question at a lecture in 1990: will women judges really make a difference?[33] We now know that the answer is an emphatic yes.

Perspective took centre stage in identity jurisprudence shortly after she and Justice L'Heureux-Dubé were appointed and began to make their mark on the same institution that decided *Edwards*. I have no doubt that it was an uphill battle, but these women drove an important institutional learning process. Over time, their decisions forced their colleagues to confront the following reality. Sometimes, the full contours of a legal question can best (or only) be seen from the perspective of those who are most affected. This applies to questions as profoundly gendered as abortion[34] and as facially neutral as the taxation of "business expenses."[35] This practical lesson showed up in the Court's equality jurisprudence, which recognizes that those who are subject to discrimination are the only ones who can see it clearly.

This jurisprudence requires that a discriminatory distinction be assessed from the perspective of a reasonable person in the claimant's position.[36] Analytically, perspective makes a very real difference. For example, the matter of perspective divided the Court on section 15 in *Canadian Foundation for Children and Youth*, a case challenging the constitutionality of the corporal punishment provisions of the *Criminal Code*.[37] *Canadian Foundation* was decided under an earlier approach to discrimination that assessed the impact of a

32 Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) 25 at 33.

33 Madam Justice Bertha Wilson, "Will Women Judges Really Make a Difference" (1990) 23:3 Osgoode Hall LJ 507.

34 *R v Morgentaler*, [1988] 1 SCR 30 at 171–72, 63 OR (2d) 281, Wilson J.

35 *Symes v R*, [1993] 4 SCR 695, 110 DLR (4th) 470, L'Heureux-Dubé J, dissenting.

36 *Quebec (Attorney General) v A*, 2013 SCC 5 at para 430, [2013] 1 SCR 61, McLachlin CJ [*Quebec v A*]; *Law*, *supra* note 31 at para 60; *Gosselin*, *supra* note 19 at para 28; *Martin v Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54 at para 106, [2003] 2 SCR 504; *M v H*, [1999] 2 SCR 3 at para 67, 43 OR (3d) 254.

37 *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*]; *Criminal Code*, RSC 1985, c C-46.

law or program on the claimant's "human dignity."[38] The claimants in *Canadian Foundation* argued that depriving children of the same protection against assault as adults sent the message that children are "less capable, or less worthy of recognition or value as a human being."[39] The majority in *Canadian Foundation* elected not to assess the affront to human dignity from the perspective of the child, but from the perspective of the person acting *on behalf* of the child.[40] The consequence of this shift in perspective, which Justice Binnie pointed out in dissent, may have made it more difficult to see the real harm to a child's dignity.[41]

Even though human dignity is no longer part of the test for a breach of section 15,[42] perspective still does important work. It helps to identify less-visible forms of harm to identity, including those targeting self-determination, self-worth, self-confidence, and self-respect.[43] Many would be difficult, if not impossible, to see clearly *without* adopting the perspective of the claimant.

Seeing things from another perspective can be a challenging reasoning exercise. It is not one that is limited to section 15. Nevertheless, it is an obligation on all judges, even where it is not explicitly mandated by the jurisprudence. The role of perspective is perhaps most salient in the context of Aboriginal law. Translating between Indigenous and non-Indigenous legal traditions is a delicate exercise. It sometimes involves putting the unfamiliar in familiar terms in order to work through a problem. In the dialogue between legal traditions, there is always a risk that something will be lost in translation. But this risk can only be managed, not avoided. A similar challenge arises between civil and common law systems.[44] Even with all that practice, stepping into someone else's shoes in a *Charter* case is much easier said than done. This is so precisely because perspectives are

38 *Law*, *supra* note 31 at para 88.

39 *Canadian Foundation*, *supra* note 37 at para 50.

40 *Ibid* at para 53 (that perspective, according to the majority, should nevertheless take into account the subjective viewpoint of the child).

41 *Ibid* at paras 102, 107–108, Binnie J, dissenting in part; Judith Mosoff & Isabel Grant, "Upholding Corporal Punishment: For Whose Benefit?" (2005) 31:1 Manitoba LJ 177 at 184–85, 193.

42 *R v Kapp*, 2008 SCC 41 at paras 21–24, [2008] 2 SCR 483; *Quebec v A*, *supra* note 36 at paras 165, LeBel J, 329–30, Abella J.

43 *Quebec v A*, *supra* note 36 at para 139, LeBel J, dissenting on the existence of a section 15 breach; Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, translated by Joel Anderson (Cambridge, Mass: MIT Press, 1996).

44 The Honourable Charles D Gonthier, "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings" (1993) 21:3 Can Bus LJ 323.

formed by a myriad of unique experiences. In the equality context, asking judges to look at patterns of discrimination from a perspective that—let's face it—they often do not share is a difficult reasoning exercise.[45] But our equality jurisprudence insists on it, with good reason.

III. IDENTITY, EQUALITY, AND DEMOCRACY

With all of that in mind, I will conclude with a question: what is next for identity under the *Charter*? I would like to suggest that the link between identity and democracy deserves some attention. Democratic principles are fundamental to how we think about *justification*. Some of the most difficult *justification* questions are those where the law or program at issue goes to the heart of someone's individual or group identity. How can a law that implicates the core of someone's sense of self be justified? I think re-engaging with fundamental democratic principles may offer tools for a robust justification analysis in such difficult cases. I say re-engaging because, of course, in *Oakes* itself the Court interpreted the words "free and democratic society" under section 1.[46] The values and principles enumerated in *Oakes* to give content to those words are timeless: human dignity, the accommodation of difference, respect for identity, and faith in participatory political institutions.[47] But how societies think about democracy continues to evolve. It is worthwhile to check in with those developments every so often. I propose to do so briefly now.

On occasion, our Court has recognized that Canada is not just a democracy, but a *deliberative* democracy.[48] Democratic theory, too, has taken a "deliberative" turn.[49] The basic commitment of democracy is that decisions and laws ought to have the *consent* of those who are affected. The basic commitment of *deliberative* democracy is that decisions and laws ought to be *justifiable* to those who are affected. Justifiable in the deliberative

45 Peter W Hogg, "What is Equality? The Winding Course of Judicial Interpretation" (2005) 29 SCLR (2d) 39 at 57, n 64 [Hogg, "What is Equality?"].

46 *R v Oakes*, [1986] 1 SCR 103 at 136, 53 OR (2d) 719.

47 *Ibid*.

48 *Harper v Canada*, 2004 SCC 33 at para 14, [2004] 1 SCR 827, McLachlin CJC & Major J, dissenting; *Whatcott v Saskatchewan Human Rights Tribunal*, 2013 SCC 11 at para 75, [2013] 1 SCR 467 [*Whatcott*].

49 See e.g. John S Dryzek, "The Deliberative Turn in Democratic Theory" in *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2002) 1; Simone Chambers, "Deliberative Democratic Theory" (2003) 6 Annual Rev Political Science 307.

democratic sense means that those affected would agree to decisions on their own terms, under conditions of meaningful dialogue.[50]

This notional dialogue has to take place under some essential conditions. In particular, participants are recognized as equally deserving of concern, respect, and consideration. It is not a coincidence that these are also the objectives of section 15, as set out nearly 30 years ago in *Andrews*.[51] Equality infringements treat people as "less worthy"[52] of the very recognition that is essential to deliberative democracy. The Court recognized this link in *Whatcott* when it acknowledged that one of the profound harms of hate speech is "forc[ing] a group to argue for their basic humanity or social standing, as a precondition for participating in the deliberative aspects of our democracy."[53]

Hate speech is an extreme example, but there is a broader insight here. Differential treatment on the basis of identity may signal to the person or group *affected* by it that they are somehow less worthy of recognition.[54] The signal can be louder in some cases than others. Laws that send such signals, whether in purpose or effect, undermine the essential conditions of democratic dialogue. They do so precisely *because* they compromise the *affected party's* status as a full participant in deliberative democracy. Thus, these laws or programs should be more difficult to justify democratically. In other words, such laws inherently tilt the field *against* the possibility of *deliberative* justification by denying equal recognition. They compromise the equal human dignity recognized as an essential *democratic* value in *Oakes*.

The concept of human dignity has had a troubled trajectory in the Court's equality jurisprudence.[55] As a means of identifying a section 15 breach, "human dignity" became a vague and irrelevant barrier for equality claimants.[56] But human dignity anchors equality in the fundamentally democratic aspirations of the *Charter*. It still has some work to do because it provides the essential conceptual link between equality and democracy.

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50 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, Mass: MIT Press, 1996) at 107–08; see also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 72–73 (participants in deliberation must be treated as "self-authenticating sources of valid claims" (*ibid* at 72)).

51 *Andrews*, *supra* note 17 at 171.

52 *Gosselin*, *supra* note 19 at paras 21–26.

53 *Whatcott*, *supra* note 48 at para 75.

54 See Taylor, *supra* note 32 at 36.

55 Hogg, "What is Equality?", *supra* note 45; Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNBLJ 19; Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013) 63 SCLR (2d) 261.

56 *Quebec v A*, *supra* note 36 at para 329, Abella J.

As section 1 states specifically, a *Charter* infringement must be justified as a reasonable limit in a free and democratic society. This is where I see human dignity perhaps playing a conceptual role in the justification analysis. Much like a limit on free expression becomes more difficult to justify when it lies at the core of section 2(b) protection, an equality infringement ought to be increasingly difficult to justify to the extent that it strikes at the heart of someone's individual or group identity—and with it their recognition as full participants in Canada's ongoing democratic dialogue. Ultimately, human dignity offers the language for casting the harms of inequality in democratic terms. The concept enables us to find common ground, provides a touchstone for the difficult work of consensus-building, and provides a common frame of reference for justifying difficult situations when the rights and freedoms the *Charter* guarantees are in tension with one another.

CONCLUSION

Over the past 150 years, the Constitution has enabled us to navigate difficult questions of identity. As I mentioned at the outset, there was some mixed early success. *Charter* interpretation, too, is a work in progress. Moving forward, there is a great deal of reason for optimism about the ways that identity has been incorporated into our notions of equality, human dignity, and democratic values that permeate the *Charter*. These notions also lay the foundation for looking beyond our own borders: we can welcome refugees and migrants with the confidence that our society is able, not only to manage our differences, but to thrive on them. Substantive equality ensures meaningful protections for those aspects of our identity that make us who we are and define our experiences. It ensures that those personal and group characteristics cannot be undermined in a way that compromises our right to equal and meaningful participation in our common political community.

With all that said, I wish you interesting and productive sessions this afternoon and tomorrow!

Thank you for your kind attention.