Discrimination and Equality Rights in Canada

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Discrimination and the Law Before the Enactment of Anti-Discrimination (Human Rights) Laws

(a) The Constitutional Position

Canada's basic constitutional document - the British North America Act of 1867 (now called the Constitutional Act 1867) - makes no reference to the equality rights of individuals.[1] In addition, the premable to that document declares that the new federal union would have "a constitution similar in principle of that of the United Kingdom", which incorporates the doctrine of Parliamentary sovereignty. Until recently, the most influential assertion of this doctrine was that of A V Dicey:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[2]

Although some aspects of the details of this definition have been criticized in the United Kingdom[3] and in the Commonwealth,[4] the essential result was that courts would not question laws enacted by Parliament on the grounds that they were unwise or discriminatory. The best illustration of this is provided in two decisions of the Judicial Committee of the Privy Council[5] (JCPC) concerning Canada.

In 1899 the JCPC was concerned with a challenge[6] to legislation enacted by the Legislature of British Columbia, which forbade "Chinamen" from working underground in mines. The JCPC held that "courts of law have no right whatever to inquire whether [the] jurisdiction has been exercised wisely or not". Similarly, some four years later,[7] the Committee was faced with a provision in the British Columbia Elections Act denying the franchise to "Chinamen, Japanese and Indians". They declared that "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic upon which their Lordships are entitled to consider". It is not surprising therefore, that in 1914[8], the Supreme Court of Canada upheld the validity of an Act of Saskatchewan which prohibited white women from residing or working in "any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman". Although in the *Bryden case* the legislation was held invalid on the ground that it infringed federal jurisdiction over "naturalization and aliens", it is quite clear from all three cases that, as long as Parliament and the provincial legislatures did not exceed their legislative jurisdiction as set out in the British North America Act, discriminatory legislation could not be challenged on the ground that it was unconstitutional. In Canada this constitutional position was not changed until the coming

into force of s. 15, the equality rights provision of the Constitution Act 1982, on 17 April 1985.[9]

(b) Racial Discrimination and the Civil (Common) Law

As early as the seventeeth century, English courts applied a duty upon innkeepers and common carriers to provide service to all members of the public without discrimination, unless there was some reasonable or lawful excuse for the refusal. However, this duty was narrowly construed. It was not extended to lodging or boarding houses'[10], nor to public taverns'[11], nor to places of entertainment[12], nor to restaurants.[13]

In addition, even though the common law did recognize a cause of action for discriminatory denial of access to inns, the compensation ordered was so inadequate that pursuit of the remedy was not encouraged. The leading case is *Constantine v Imperial Hotels Ltd.*[14] Constantine was a West Indian cricketer who booked a reservation at the hotel for himself and his family. Upon arrival, however, they were denied access in a contemptuous and insulting manner. Allegedly, the management told the plaintiff that "they would not have niggers in the hotel because of the Americans staying here". Although the trial judge held that the plaintiff had suffered "much unjustifiable humiliation and distress", he felt bound by previous decisions and awarded damages of £5.

The limitation of the common law protection against discrimination in Canada can be illustrated by the decision of the Supreme Court of Canada, in 1939, in the case of *Christie v York Corporation.*[15] Christie was a black man who was denied service in a beer tavern on the ground that the waiter had been instructed "not to serve coloured people". The appellant sued for damages. Four of the five judges of the Supreme Court held that the respondent could refuse service on the ground that "the general principle of the law of Quebec was that of complete freedom of commerce", and that it could not be argued "that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order".[16]

Another area of activity with respect to which Canadian courts might have held that discrimination was contrary to public policy, but did not, was real property transactions.[17]

In these circumstances,[18] then, it is no wonder that legislatures, with no aid from the judiciary, had to start to enact anti-discrimination legislation, the administration and application of which have largely been taken out of the courts and given to statutory human rights commissions.

The Rise and Spread of Human Rights Legislation

In Canada the first half century after Confederation witnessed an increase in the number of statutes which discriminated against certain people.[19] Most of these were still with us until World War II. It is only since that time that all these laws have been repealed, probably partly as a reaction to the horrors of racism exhibited just before and during World War II, partly because of the coming to independence of tens of African and Asian former colonies, and

partly because of the lead of the United Nations, both to bring about de-colonization and to draft new standards condemning racial discrimination.

(a) The History

The first anti-discrimination legislation started to be enacted during the 1930s[20] but it was not until near the end of World War II that modern human rights legislation started to spread. In 1944 the Province of Ontario enacted the Racial Discrimination Act[21] which prohibited the publication or displaying of signs, symbols, or other representations expressing racial or religious discrimination. The Act was brief, and limited to one specific purpose, and it was not until 1947 that the first detailed and comprehensive statute was enacted: The Saskatchewan Bill of Rights Act.[22]

The Saskatchewan Act did not deal only with anti-discrimination legislation, but with the fundamental freedoms as well. Moreover, it purported to bind the Crown and every servant and agent of the Crown. Enforcement of this legislation was through penal sanctions: the imposition of fines, perhaps injunctive proceedings, and imprisonment. There was no supervision for any special agency charged with administration and enforcement of the Act that was left to the regular enforcement of police and courts as would apply with respect to any other provincial statute that includes prohibitory provisions, such as the liquor or vehicles Acts.

Experience soon showed, as it had in the United States, that this form of protection - although better than none, and having a certain usefulness by way of indicating a government's declaration of public policy - was subject to a number of weaknesses. First, there was a reluctance on the part of the victim of discrimination to initiate the criminal action if complaint to the police had failed to result in a prosecution and it always appeared that the police did not act. Second, there were all the difficulties of proving the offence to the criminal standard of proof, ie beyond a reasonable doubt (and it is extremely difficult to prove that a person has not been denied access for some reason other than a discriminatory one). Third, there was reluctance on the part of the judiciary to convict - a reluctance probably based upon a feeling that some of the prohibitions impinged upon the traditional freedom of contract and the right to dispose of one's property as one chose. Fourth, without extensive publicity and education, most people were unaware that such legislation existed for their protection. Members of minority groups, who were the frequent victims of discrimination, tended to be somewhat sceptical as to whether the legislation was anything more than a sop to the conscience of the majority. Fifth, and this was as important a factor as any, the sanction (in the form of a fine or even if it were imprisonment) did not help the person discriminated against in obtaining a job, a home, or service in a restaurant, hotel, or barbershop.

To overcome the weaknesses of quasi-criminal legislation, Fair Accommodation and Fair Employment Practices Acts were enacted. These new types of human rights provisions were copied from the legislative scheme first introduced on this continent in 1945 in the State of New York.[23] The New York legislation was an adaptation of the methods and procedures that had proved effective in labour relations. These Acts provided for assessments of complaints, for investigation and conciliation, for the setting up of commissions or boards of inquiry where conciliation proved unsuccessful and - but only as a last resort - prosecution and the application of sanctions. The first of this new legislation, the Fair Employment Practices Act,

was passed in Ontario in 1951[24] and within the next decade and a half most of the provinces enacted similar statutes. The first Fair Accommodation Practices Act was enacted by the Province of Ontario in 1954[25] and again most of the other provinces followed within the decade.[26]

The Fair Employment and Accommodation Practices Acts were an improvement over the quasi-criminal approach, but they still continued to place the whole emphasis in promoting antidiscrimination legislation on the victims, who were obviously in the least advantageous position to help themselves, as if discrimination were solely their problem and responsibility. The result was that very few complaints were made and very little enforcement was achieved.

The next major step was taken by Ontario in 1962 with the consolidation of all human rights legislation into the Ontario Human Rights Code[27] to be administered by the Ontario Human Rights Commission, which had been established a year earlier. By 1975, every province in Canada had established a Human Rights Commission to administer antidiscrimination legislation and, in 1977, the Canadian Human Rights Act established a federal commission.[28] With minor variations, all the legislation is similar except that Saskatchewan and Quebec have additional protections.[29]

(b) The Scope

All of the human rights acts in Canada prohibit discrimination on racial grounds, in the wide sense of "racial" defined in the United Nations Convention on Elimination of all Forms of Racial Discrimination. Thus, both "race" and "colour" are referred to in all the Acts. Other terms, relating to one's ancestry or racial origin, include: "national extraction", "national origin", "place of birth", "place of origin", "ancestry", "ethnic origin", and "nationality", with the last term used in Manitoba, Ontario and Saskatchewan. All prohibit discrimination on grounds of "religion" or "creed" or both.

In addition to the racial grounds, all jurisdictions have legislation prohibiting discrimination on grounds of "sex" and, all but Alberta and Nova Scotia, on grounds of "marital status" or "family status"; all but British Columbia, Alberta, Nova Scotia and Newfoundland, prohibit discrimination on the ground of "age", and five - Manitoba, Newfoundland, Prince Edward Island, Quebec and Yukon - prohibit discrimination on the basis of "political opinion", "belief" or "convictions". Four jurisdictions - Manitoba, Ontario, Quebec and Yukon - prohibit discrimination based on "sexual orientation". In addition, the Quebec Act adds "language" and "social condition" as prohibited grounds of discrimination, while four - Manitoba, Ontario, Prince Edward Island and Nova Scotia - add "source of income". The federal and Northwest Territories Acts include, as prohibited grounds of discrimination, "a conviction for which a pardon has been granted". Discrimination on the grounds of physical or mental handicap or disability is now prohibited in all jurisdictions and, in addition, the federal and Prince Edward Island Acts include "dependence on alcohol or a drug."

The Acts address themselves to equality of access to places, activities, and opportunities. All Acts prohibit discrimination in employment; in the rental of dwelling and commercial accommodation; in accommodations, services, and facilities customarily available to the public; and in the publishing and/or displaying or discriminatory notices, signs, symbols, emblems or other representations. In addition, New Brunswick, Nova Scotia, British

Columbia, Manitoba, and Saskatchewan prohibit discrimination in the selling of real property. The Quebec Act appears to be the most comprehensive:

> s. 12. No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.
>
> s. 13. No one may in a juridical act stipulate a clause involving discrimination.

Equality Rights in the Constitution Act of 1982

(a) The Main Provision

There are four rights in the main equality rights provision:

> *Equality Rights*
>
> s. 15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the elaboration of these equality rights in the Charter, one of the first questions that could be raised is whether the four clauses in s. 15(1) will be given a wider application than that given to such foreign provisions as the American Equal Protection Clause. It is too soon to tell, except that thus far the courts have not gone into any detailed discussion as to any possible differences between the four clauses. Unquestionably, "equality under the law" and the right to "equal benefit of the law" were added to the "equality before the law" clause of s. 1(b) of the Canadian Bill of Rights, and the "equal protection" clause from the American XIVth Amendment, because of women's reactions to the limited interpretations given by the Supreme Court of Canada (SCC) to the "equality before the law" clause in s. 1(b) of the Canadian Bill of Rights.[30]

(b) Additional Equality Rights Provisions

(i) *Affirmative Action*

In Canada s. 15(2) of the Charter provides, explicitly, that affirmative action is not a violation of s. 15(1):

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Thus, it should not be necessary in Canada to go through the evolution that occurred in the United States from the *Bakke case*[31] which held that racial quotas in medical schools' admissions criteria were invalid, through the *Weber case*[32] upholding

affirmative action under a collective agreement, to *Johnson*[33] which upheld a voluntarily-adopted affirmative action program giving preference to hiring and promoting women.

Although there are few cases on point so far, it would seem that the onus is on the party seeking to invoke s. 15(2) to prove that it applies.[34]

(ii) *Equal Rights of Women and Men*

As mentioned earlier[35] women's lobbying groups had a great influence on the drafting of s. 15 of the Charter. Even after having achieved the inclusion of the "equality under the law" and "equal benefit" clauses in s. 15, they sought to prevent any possibility of the judiciary giving gender discrimination a lesser scrutiny than any other prohibited ground by insisting on an overriding clause proclaiming equality between women and men. Thus, in Charter s. 28 they obtained what women's lobbying groups in the United States did not, ie, an "Equal Rights Amendment":

> s. 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

(iii) *Multicultural Rights*

Section 27 of the Charter provides:

> s. 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Although s. 27 can be taken to be a reflection of Art 27 of the ICCPR, it is clearly within Canada's history of group rights protection and codifies the official policy of multiculturalism proclaimed by the federal government in 1971.[36] Although it is drafted as an interpretation provision, this does not detract from its importance.[37] In fact, the SCC has already given it an important role in buttressing conclusions that the Charter envisages a pluralistic society, which tolerates a wide divergence of religious practices[38] but which also justifies such restrictions on freedom of expression as those which prohibit "hate literature".[39]

(iv) *Group Rights*

From the beginning in 1867, Canada's Constitution has included protection for group rights, rather than individual human rights. Thus, s. 133 of the Constitution Act 1867, provided protections for the English and French languages in legislatures and courts, while s. 93 provides protection for separate denominational schools. However, neither protection applied equally to all jurisdictions.[40] The Charter protects and expands these group rights.[41]

Before leaving this topic it should be pointed out[42] that although group rights have been discussed here as part of equality rights, they are *not* of the same essence as individual human rights of equality. A group right, such as language, is granted to

individuals *as* members of a specially protected group. A person asserts an individual's right to equality, on the other hand, *despite* being a member of a definable group. This is not to imply that either right is more important, but merely to point out that they are essentially different.

(c) Who is Bound? State Action or Private Action?

In the Canadian Charter there is a specific provision dealing with this issue, s. 32(1):

> s. 32(1). This Charter applies -
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislation and government of each province in respect of all matters within the authority of the legislature of each province.

In 1986, in the *Dolphin Delivery case*[43] the SCC held that the Charter applied to "governmental action" and did not apply to private litigation. For the court McIntyre J held that the Charter applies to the legislative, executive[44] and administrative branches of government, to both legislation and the common law, but "only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom".[45] It is interesting that, unlike the USSC decision in *Shelley v Kramer*[46] the SCC held that the Charter did not apply to court orders. They were not, McIntyre J asserted[47] elements of governmental action even though, obviously, they were bound by the Charter, as by all law.

The most important discussion of this distinction and of the distinction between those institutions that can be brought within the test of "governmental action", and those which cannot, is to be found in four decisions of the SCC concerning mandatory retirement, all rendered on 6 December 1990. One was an appeal from Ontario, concerning universities,[48] while three were from British Columbia, concerning a university,[49] a hospital[50] and a community college.[51] Although the SCC unanimously agreed that mandatory retirement was contrary to s. 15(1), there was division both as to whether the institutions, all of whom received the bulk of their funds from government, came within s. 32(1) of the Charter and as to whether, even if there was a contravention of the age discrimination provision of Charter s. 15(1), it was a reasonably justifiable limit under s. 1. A majority held that only the community college could be considered as constituting a government entity and a slightly different majority held that the retirement policies were protected by Charter s. 1.

If 540 type-script pages can be summarized in one brief paragraph, I would say that La Forest J, for the majority, made a distinction between the community college and the other three institutions, not only because it was government-funded and created by statute, but also because its governing board was less independent of government than those of the other three institutions. The last-mentioned characteristic, ie autonomy, as well as the need not to apply the Charter to all activities in the country, seemed to be the most important factor to the majority in finding that universities and the hospital board were not part of government.

(d) Who is Protected?

(i) **Canada**

A. *"Individuals"*

Although the SCC has not yet had an opportunity to pronounce upon this issue, the jurisprudence in the courts below has been fairly consistent that s. 15 does *not* apply to corporations.[52] The SCC has held[53] that one does not compare an individual with the Crown to determine equality issues.

B. *Enumerated and Non-Enumerated Grounds*

From the beginning, lower courts did not restrict the protected groups to those enumerated in s. 15(1).[54] However, in 1989 in *Andrews v Law Society of British Columbia,*[55] and more particularly in *Re Workers' Compensation Act, 1983 (Nfld)*[56] the SCC held that s. 15 applied only to "enumerated and analogous" grounds.

(e) Must Intent Be Proved?

(i) **Canada**

In Canada, the Supreme Court, in *R v Big M Drug Mart Ltd,*[57] came down early and explicitly in favour of looking at both the intent or purpose of the law as well as, if necessary, its effects. This approach has been re-emphasized and applied subsequently.[58]

(f) What is the Onus?

Although there was some academic suggestion early on[59] that the American 3-level scrutiny might be considered, even if adapted, in Canada, there was also argument that it was inappropriate.[60] In any case, the courts below the SCC were not concerned so much with levels of scrutiny or with validity of legislative intent as with an assessment through a three-step process by which the party alleging a s. 15 infringement must:[61]

(1) identify the class allegedly suffering denial of an equality right as well as the class to which it should be compared;

(2) demonstrate that the two classes are similarly situated in relation to the purposes of the law; and

(3) show that the difference in treatment is discriminatory in the sense of a disadvantageous or invidious purpose or effect of the impugned law or action.

However, the SCC rejected the "similarly situated" test in the *Andrews case*[62] as being inappropriate because it would permit such unsupportable distinctions as those arising from Nazi laws against Jews or Canadian laws forbidding alcohol consumption by aboriginal people.[63] The rejection of the similarly situated test has recently been re-affirmed.[64]

Nonetheless, the third-step of the "similarly situated" test has been retained by the SCC, although never acknowledged as being part of it. In other words, both *Andrews*65 and the *Newfoundland Workers' Compensation Act case*[66] have emphasized that a distinction is not enough - there must also be "discrimination". However, unequal treatment arising solely from different provisions in federal legislation for residents in different provinces[67] or merely from the exercise of provincial powers by different provinces,[68] does not constitute "discrimination" for purposes of s. 15.

In the earlier reference to the *McKinney case*[69] it was pointed out that any limitations on equality rights in Canada are dealt with under s. 1 of the Charter. The result will probably be that, unlike the rather rigid 3-level scrutiny in the United States, in Canada there will be more of a continuum, which will be determined on a case-by-case basis.

The Aboriginal Peoples

In Canada, Indians have a special status under federal jurisdiction. Section 91(24) of the Constitution Act 1867 gives the federal Parliament exclusive jurisdiction with respect to "Indians, and Land reserved for the Indians."

The Indian Act[70] is mostly inapplicable to Indians who leave the reserves and, until recently, to Indian women who married non-Indians and to their issue. They were excluded from the Act's coverage upon such marriage. This distinction from Indian men who intermarried (and did not lose their status), was held not to constitute an infringement of the "equality before the law" clause in s. 1(b) of the Canadian Bill of Rights.[71] When the Human Rights Committee under the ICCPR found this to be a contravention of Art 27 of the Covenant,[72] the Canadian Parliament moved to repeal the discriminatory clause, and s. 35 of the Constitution Act, 1982, was amended to extend aboriginal and treaty rights "equally to male and female persons". Also s. 35 of the Constitution Act, 1982, extends constitutional protection to all "aboriginal peoples" by defining such peoples to include "the Indian, Inuit and Metis [being of mixed Indian and non-Indian descent] peoples of Canada".

The new constitutional protections are very limited and undetermined. Thus, although s. 25 merely assures, as is explained in the marginal note thereto, that "aboriginal rights and freedoms [are] not affected by the Charter", these rights and freedoms are not specified, beyond declaring that they include (1) any recognized by the Royal Proclamation of 1763 (Canada's first Imperial Constitution); and (2) any that may now exist or may be acquired by way of land claims agreements.

The symbolic significance of the Royal Proclamation was described in *Calder v A-G for BC*[73] as follows:

> Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire.

The actual requirements of the Royal Proclamation have been summarized as follows:

> The Proclamation reserved certain lands to the Indians and provided that Indian lands could not be purchased or otherwise alienated except by way of surrender to the Crown, and then only according to procedures prescribed in the Proclamation for obtaining agreement of the Indians.[74]

However, its significance to the Indian people is much greater:

> It has been suggested that in addition the Proclamation extends, by implication if not expressly, to a considerably broader range of rights . . . such . . . as the recognition of aboriginal peoples as nations, the implied necessity of mutual consent to alteration of their relationship with the Crown, the protection of aboriginal rights, and an implied right to self government in areas not ceded to the Crown.[75]

Whatever be the extent of these rights, they are supplemented with a provision outside the Charter, s. 35, which by itself constitutes Part II of the Constitution Act of 1982. Besides defining "The aboriginal peoples of Canada", this provision recognizes and affirms "the existing aboriginal and treaty rights" of these peoples (sub s. (1)). It would be beyond the scope of this review to try to outline what these aboriginal rights[76] or treaty rights[77] are, except to note that they now have constitutional status and therefore should override any inconsistent federal or provincial laws.

Section 37 of the Constitution Act of 1982 required the holding of a constitutional conference within one year after the coming into force of the Act, which conference was to include in its agenda matters affecting aboriginal peoples and required the Prime Minister to invite representatives of those people to participate. The first such conference was held in Ottawa on 15 and 16 March, 1983. Predictably, it did not complete the task of refining the definition of these rights, although certain technical amendments to the aboriginal rights provisions were agreed upon. Section 25 was amended to substitute a new para [b] to make clear that what is protected are "any rights or freedoms that now exist by way of land claims agreements or may be so acquired", while s. 35 had a similar clarification to provide that "treaty rights" include "rights that now exist by way of land claims agreements or may be so acquired" and that the rights "are guaranteed equally to male and female persons". In addition, ss. 35.1 and 37.1 were added. Section 35.1 commits the Government of Canada to the "principle" that a conference of first ministers and representatives of the aboriginal peoples of Canada will be convened "before" any amendments are made to s. 91(24) of the Constitution Act 1867, or to ss. 25 and 35 of the Constitution Act 1982. Finally, s. 37.1 required two further constitutional conferences concerning "constitutional matters that directly affect the aboriginal peoples of Canada" by April 1985 and April 1990. However, no further conferences have been held since 1985, that one having ended in utter failure, and s. 37.1 was repealed.

Endnotes

1. Nevertheless, some guarantees of equal rights for the main minority groups were provided for by s. 93 of the British North America Act (BNA Act) of 1867 in providing for separate schools for Catholic minorities in Ontario and Protestant minorities in Quebec, and by s. 133, which protected the use of the English and French languages in the federal Parliament and courts and the courts and Legislature of the Province of Quebec. For leading text on Canada's Constitution see P W Hogg, Constitutional Law of Canada, 2 vols 3rd ed, Scarborough: Carswell, 1992.

2. A V Dicey, Introduction to the Law of the Constitution, 10th ed by E C S Wade, London: McMillan. 1961, 39-40.

3. Sir Ivor Jennings, The Law and the Constitution, 5th ed, University of London Press, 1960, Chapter IV; R F V Heuston, Essays in Constitutional Law, 2nd ed, London: Stevens, 1964, Chapter I; G Marshall, Parliamentary Sovereignty and the Commonwealth, Oxford: Clarendon, 1957, Part III and Appendices I-III; T B Smith, Studies Critical and Comparative, Edinburgh; Green, 1962, Chapter IV; J D B Mitchell, Constitutional Law, 2nd ed, Edinburgh: W Green & Son, 1964, Chapter IV.

4. O Dixon, "The Law and the Constitution" (1935), 51 Law Q Rev 590; D V Cowen, "Legislature and Judiciary, I" (1952) 15 Modern L Rev 282; (1953) 16 MLR 273; H R Gray, "The Sovereignty of Parliament Today" (1953), 10 U of Tor LJ, 54; E McWhinney, "The Union Parliament, the Supreme Court, and the 'Entrenched Clauses' of the South Africa Act" (1952) 30 Can Bar Rev 692; W S Tarnopolsky, The Canadian Bill of Rights, Toronto: Carleton Library Series, 1975, Chapter III.

5. The Judicial Committee of the Privy Council was the ultimate court of appeal for the British Empire and continued as such for Canada until abolition of such appeals in 1949.

6. Union Colliery of British Columbia v Bryden [1899] AC 580.

7. Cunningham v Tomey Homma [1903] AC 151.

8. Quong-Wing v The King (1914) 49 SCR 440.

9. Section 32(2) of the Constitution Act provided for a three year delay for the coming into force of s. 15, the main equality rights provision. The reason for this delay was to give the various legislatures three years to try to bring their laws into accordance with the requirements of s. 15.

10. Thompson v Lacy [1820] 3 B&Ald 283; Dansey v Richardson (1854) 3 E&B 144. For a discussion of the situation at common law see A Lester and G Bindman, Race and Law in Great Britain, Harvard University Press, 1972, c 1.

11. Sealey v Tandy [1902] 1 KB 296.

12. Webb v Fagotti Bros (1898) 70 LT 683.

13. Ultzen v Nicols, [1894] 1 QB 92; Orchard v Bush & Co [1898] 2 QB 284.

14. [1944] 1 KB 693.

15. [1940] SCR 139.

16. A year later the British Columbia Court of Appeal held that the principles established by the SCC in the Christie case were applicable in the common-law provinces as well - Rogers v Clarence Hotel [1940] 3 DLR 538. Similarly, in 1961 the Alberta Court of Appeal, without written reasons, upheld a lower court decision that the plaintiff was not a "traveller" and the motel, which did not serve food, was not an "inn" and so was not bound by the English common law applicable to inns - King v Barclay and Barclay's Motel (1961) 35 WWR (NS).

17. A restrictive covenant prohibiting the sale of land to any person of a "Jewish, Hebrew, Semitic, Negro, or coloured race or blood", was upheld by courts in Ontario. Before the case reached the Supreme Court of Canada, the legislatures of Ontario and Manitoba passed amendments to their property legislation providing that such covenants are invalid. Despite this evidence of the view of legislatures about public policy, the Supreme Court did not choose the egalitarian route, but rather held the covenant invalid because it did not relate to the use of land and was also void for uncertainty - Noble and Wolf v Alley [1951] SCR 64.

18. The following summation from Lester and Bindman pp. 70-71, supra, 10, illustrates the limitations of the common law:

> The victim of racial discrimination would . . . would have no redress if he were denied most types of employment, or were refused work at the level for which he was qualified, or were paid at sub-standard wages, or were given inferior working conditions, or were denied training or promotion earned by length of service and on merit, or were made redundant, solely because of his race or colour. He could obtain no assistance from the courts if he were refused a house or flat which was available and which he could afford, or if he were denied the services of an estate agent; and he could not prevent the publication or public display of blatantly discriminatory advertisements . . . As for commercial services and facilities, he could claim damages if arbitrarily denied accommodation in a hotel, or transport by a common carrier, but would have no remedy if excluded from other public places . . . or facilities . . or if he were offered these services and facilities only upon discriminatory terms.

19. For details of these see W S Tarnopolsky and W F Pentney, Discrimination and the Law, revised ed, Toronto: De Boo, 1985, Chapter 2.

20. For example, the Ontario Insurance Act was amended to forbid discrimination in assessing risks (SO 1932, c 24); the Manitoba Libel Act was amended to prohibit group libel (SM 1934, c 23).

21. SO 1944, C 51.

22. SS 1947, c 35.

23. NY Public Laws of 1945, c 118, added to Art 12 of Executive Law 1909; now see Art 15 of Executive Law of 1951.

24. SO 1951, c 24.

25. SO 1954, c 28.

26. For more details see Discrimination and the Law, supra n 19.

27. SO 1960-61, c 92.

28. SC 1976-77, c 33.

29. Saskatchewan has continued the protection for fundamental freedoms introduced in its 1947 Bill of Rights, RSS 1978, c S-21.1. Quebec, in its Charter of Human Rights and Freedoms, has enacted a comprehensive Bill of Rights which proclaims fundamental freedoms, legal civil liberties, egalitarian rights, and even economic and social rights, SQ 1975, c 6.

30. W S Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin, eds, The Canadian Charter of Rights and Freedoms: Commentary, Toronto: Carswell, 1982, chapter 13 at 407 to 423 and now absorbed in W S Tarnopolsky and W F Pentney, Discrimination and the Law in Canada, 2nd ed, Toronto: De Boo, 1985, chapter XVI, 16-8 to 16-11. For greater detail see K H Fogarty, Equality Rights and Their Limitations in the Charter, Toronto: Carswell, 1987, chapter 3, esp 89-134 and A F Bayefsky and M Eberts, eds, Equality Rights and the Canadian Charter of Rights and Freedoms, Toronto: Carswell, 1985, esp chapter 1 by A F Bayefsky and chapter 4 by M Eberts.

31. Regents of the University of California (Davis) v Bakke 438 US 265 (1978).

32. United Steelworkers of America v Weber 99 S Ct 2721 (1979).

33. Johnson v Transportation Agency, Santa Clara County California 107 S Ct 1442 (1987).

34. See, eg, Re Apsit et al and the Manitoba Human Rights Commission (1985) 23 DLR (4th) 277 (Man QB).

35. See the authorities listed in n 30, supra, the texts of Bayefsky, Eberts and Fogarty.

36. See Tarnopolsky and Pentney, supra, n 19 at 16-26 to 16-30.

37. Ibid, 16-30 to 16-33.

38. R v Big M Drug Mart Ltd [1985] 1 SCR 295 at 337-8; R v Videoflicks Ltd et al (1984) 14 DLR (4th) 10 at 41-3 (Ont CA), affd except as to remedy, as sub nom Edwards Books and Art Ltd et al v The Queen [1986] 2 SCR 713.

39. R v Keegstra [1990] SCR 697; R v Andrews [1990] 3 SCR 870; and Canadian Human Rights Commission v Taylor, [1990] 3 SCR 892.

40. The language protection only extended to the Parliament and courts of Canada, and the legislature and courts of Quebec. Subsequently, The Manitoba Act, 1870, 31-32 Vict c 3 (Canada), extended these guarantees to that province, but they were removed in the 1890's and not re-instated until the 1980's. For a recent description of this history see P W Hogg, Constitutional Law of Canada, 2nd ed, Toronto: Carswell, 1985, chapter 36. As far as denominational schools are concerned, the main protection was for whatever was the state of protection at the time that the province concerned entered the federation, and thus the protections varied considerably. In addition it was a protection for Roman Catholics and Protestants only and for no other religious groups - see the majority opinion of the Ontario Court of Appeal in Ref re an Act to Amend the Education Act (1986) 25 DLR (4th) 1.

41. For an assessment of the Charter's language rights provisions see J Woehrling, "Minority Cultural and Linguistic Rights and Equality in the Canadian Charter of Rights and Freedoms" (1986) 31 McGill LJ 50. Sections 16 to 20 expand the s. 133 rights of the English and French languages to "all institutions of the Parliament and government of Canada", and to communications with them, and extends these expanded rights to the province of New Brunswick. Section 21 preserves the s. 133 level of language protection in the provinces of Quebec and Manitoba, while s. 22 protects any other language right or privilege that might be "acquired or enjoyed either before or after the coming into force of this Charter". At this time one cannot even speculate whether there will ever be such a language right. Section 23 provides for minority language education rights for English and French linguistic minorities. In A-G Quebec v Quebec Association of Protestant School Boards et al [1984] 2 SCR 66, the SCC held that Quebec's Charter of the French Language, RSQ 1977, c 11, was invalid to the extent that it was inconsistent with s. 23 of the Canadian Charter in denying the minority language rights to people who had come into Quebec from another province. In the same vein, in Ref re Education Act of Ontario and Minority Language Education Rights, (1984) 10 DLR (4th) 491 the Ontario Court of Appeal unanimously held that s. 23 deserves a liberal interpretation and in effect creates a code for minority language education rights for Canada.

42. See the majority decision in Ref Re an Act to Amend the Education Act, supra, n 97 at 54-5, and Tarnopolsky and Pentney, supra, n 85 at 16-26 to 28.

43. Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd [1986] 2 SCR 573.

44. Earlier in Operation Dismantle Inc et al v The Queen et al [1985] SCR 441, the SCC had held that the Charter applies to decisions of Cabinet.

45. Dolphin Delivery, supra, n 43 at 599.

46. 334 US 1 (1948).

47. Supra, n 43 at 600-601:

> . . . I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter.

48. McKinney v University of Guelph [1990] 3 SCR 229.

49. Harrison v University of British Columbia [1990] 3 SCR 451.

50. Stoffman v Vancouver General Hospital [1990] 3 SCR 483.

51. Douglas/Kwantlen Faculty Ass'n. v Douglas College [1990] 3 SCR 570.

52. See eg, Mund v Medicine Hat (1985) 67 AR 11 (Alta QB); Smith, Kline v French Laboratories Ltd v A-G Canada (1985) 24 DLR (4th) 321 at 365 (FCTD); Re Aluminium Co of Canada Ltd and The Queen in right of Ontario (1986) 55 QR (2d) 522 (Ont Div Ct), but see E Gertner, "Are Corporations Entitled to Equality?: Some Preliminary Thoughts" (1986) 19 CRR 288.

53. Rudolph Wolff & Co v Canada [1990] 1 SCR 695 at 700-702.

54. A database count up to 17 August 1987, (see Appendix A to the brief submitted by LEAF in the SCC hearing of the appeal from the BCCA in Andrews, infra (n 145) showed that of all the s. 15 cases up to the level of courts of appeal, 123 were based on enumerated grounds, 40 concerned both enumerated and non-enumerated grounds, while 346 were based on grounds not enumerated in s. 15(1).

55. [1989] 1 SCR 143.

56. [1989] 1 SCR 922.

57. [1985] 1 SCR 295 at 334, per Dickson J:

> . . . [T]he legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no

need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.

58. See, eg, R v Edwards Books and Art Ltd et al [1986] 2 SCR 713 at 752, concerning the impact on freedom of religion of provincial Sunday closing laws and R v Smith [1987] 1 SCR 1045 at 1060, which held invalid the minimum requirement of 7 years imprisonment for importation of narcotic drugs.

59. See, eg, Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can Bar Rev 242 at 255.

60. See, eg, Fogarty, supra, n 30 at 296 to 308.

61. These three steps are most clearly set out in three Ontario Court of Appeal decisions: R v Ertel (1987) 35 CCC (3d) 398; R v Ramos Realty Inc (1987) OR (2d) 737; R v Turpin, Siddiqui and Clauzel (1987) 36 CCC (3d) 289.

62. Supra, n 55.

63. I have indicated my skepticism as to that argument - Catholic Children's Aid Society of Toronto v Tammy S (1989) 60 DLR (4th) 397, in the fn at 413.

64. McKinney, supra, n 48.

65. Supra, n 55.

66. Supra, n 56.

67. R v Turpin [1989] 1 SCR 1296 held that Criminal Code provision for a 6-person jury in Alberta (for historical reasons) did not result in discrimination in the province of Ontario, where a 12-person jury was required.

68. R v Sheldon S [1990] 2 SCR 254 at 286-92.

69. Supra, n 48.

70. RSC 1970, c I-6.

71. A-G Canada v Lavell [1974] SCR 1349.

72. Lovelace v Canada No. 24/1977, The Human Rights Committee, Selected Decisions under the Optional Protocol, 2nd to 16th Sessions, NY: UN, 1985, 83.

73. [1973] SCR 313, 394-5.

74. K M Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in Tarnopolsky and Beaudoin, eds., Canadian Charter of Rights and Freedoms: Commentary, Toronto: Carswell, 1982, ch 15, 473.

75. Ibid, 475.

76. Ibid, 476-84. D E Sanders, "Aboriginal Peoples and the Constitution" (1981), 19 Alberta L Rev 410.

77. Ibid, 484-7.