

## Framework 2.3 – Human Rights in Canada

### The Historical Development of Human Rights

**Human rights** are those rights that are considered essential for any human being in a society. Due to their importance, the state must take responsibility for their protection. One way of protecting human rights is through anti-discriminatory laws. **Discrimination** occurs when a person is treated unfairly for no valid reason. This is often due to **prejudice**, which is prematurely forming an opinion based on inadequate knowledge due to reasons that are not valid, such as racism or a stereotype. A **stereotype** is a characteristic that is observed in one member of a group and then attributed to the entire group. Human rights legislation prohibits discrimination and helps protect against it.

#### *The Early History of Human Rights in Britain and France*

Our current concepts of human rights were shaped by actions taken centuries ago. The British **Magna Carta**, which was an early constitutional-type document signed in 1215, provided for equal treatment before the law.

The British **Bill of Rights**, passed in 1689 required that all future monarchs would be subject to parliament and its laws and included rights and freedoms that had been won since the Magna Carta, such as freedom from cruel punishments.

In 1789, France passed the **Declaration of the Rights of Man**, which guaranteed the rights to liberty, property, and security, resistance to oppression, freedom of religion, and freedom of speech.

Britain's **Slavery Abolition Act**, passed in 1833, abolished slavery throughout its empire.

Both the British and French belief systems and cultures were at play at the time of Confederation and have been considered for social and political purposes ever since. However, it was the British rights and freedoms that were formally adopted when Canada inherited the British common law system.

#### *The Impact of World War II on Human Rights*

Following the atrocities that occurred during the Second World War, the United Nations General Assembly proclaimed the **Universal Declaration of Human Rights** in 1948. The UDHR included fundamental freedoms as well as legal, equality, economic, social, and cultural rights. All member states were committed to protecting the rights of its citizens and to respect the rights of all human beings. Most nations have since incorporated the rights and freedoms guaranteed by the UDHR into their own constitutions.

#### *Canadian Legislation Passed since the UDHR*

Since the proclamation of the UDHR in 1948, the following significant pieces of legislation were passed in Canada:

- 1951 – federal fair accommodation and fair employment practices acts
- 1960 – Canadian Bill of Rights
- 1975 – human rights legislation enacted in all provinces by this date
- 1976 – Canada ratifies the International Bill of Rights, applicable to international law
- 1977 – Canadian Human Rights Act
- 1982 – Canadian Charter of Rights and Freedoms

## Human Rights Abuses in Canadian History

Canada has a good record of respecting human rights, but not a spotless one. In 1914, shortly after the outbreak of the First World War, Parliament passed the **War Measures Act**, which granted extraordinary powers to the government during war or invasion. Many of these powers involved the infringement of human rights, justified as necessary for the protection of the country. For example, the government had the power to make arrests without laying charges, detain people indefinitely, and seize and sell private property. The Act defined immigrants from Austria-Hungary, which included Ukrainians, as “enemy aliens”, thousands of whom were then **interned** in work camps during the war. This form of racial discrimination occurred again during the Second World War when the War Measures Act was invoked to intern thousands of Japanese-Canadians in British Columbia and Italian-Canadians in Ontario. The rights and freedoms of these citizens were infringed until the end of the war in 1945. Unfortunately, there had been no human rights legislation in place to offer protection at that time. In addition to the passage of human rights legislation, the War Measures Act was replaced in 1988 by the **Emergencies Act**, which shares the same intent as its predecessor, but includes more power for Parliament to monitor its use by the executive branch of government.

There have been many other instances of legal and systemic discrimination in Canada, based on gender, ethnicity, and religious affiliation. For example, in **Christie v. York Corp. (1940)**, the Supreme Court of Canada ruled against a patron of a Quebec pub who was refused service due to the fact that he was black. In the absence of any legislation protecting Christie from such discrimination, the Court was forced to base its decision on the principle of freedom of commerce. Another example was the inequality that existed between the civil rights of men and women during the early part of Canadian history. Under the British common law, women had been considered to be “persons only in terms of pains and penalties, and not rights and privileges”. This meant that women did not originally have the rights to vote or hold public office. It was not until 1919 that women earned the right to vote in federal elections and not until 1929, with the Judicial Committee of the Privy Council’s decision in **the Persons Case** (Edwards v. A.G. of Canada), that women were finally considered “persons” under the law and therefore able to hold public office. Shortly thereafter, in 1930, Cairine Reay Wilson became the first woman to be appointed to the Senate in Canada.

## Human Rights Protection in Canada Today

As we have discussed, the Charter applies only to **public** laws and agencies, including those administered by the federal Parliament and provincial legislatures. **Private** relationships are afforded similar protection by federal and provincial human rights legislation and the commissions and tribunals that were set up to administer them.

### *Federal Human Rights Legislation*

The **Canadian Human Rights Act (CHRA)**, operating since 1978, applies to departments and businesses that fall under federal jurisdiction, such as the armed forces, crown corporations, chartered banks, radio and television stations, railroads, and airlines. It prohibits discrimination on 11 grounds, including race, ethnic origin, religion, age, sex, sexual orientation, and disability.

## *Provincial Human Rights Legislation*

The provinces and territories have all passed slightly different human rights legislation that cover provincially regulated industries and institutions, such as restaurants, retail stores, schools, and hospitals. For example, the **Ontario Human Rights Code** prohibits discrimination on 16 grounds.

## *Human Rights Commissions and Tribunals*

Commissions have been established by the federal, provincial, and territorial governments to investigate human rights complaints and work toward the resolution of any violations. The **Ontario Human Rights Commission**, for example, settles about 70% of all complaints brought before it through mediation in which a third party assists the disputing parties through informal discussions. If the commission cannot resolve a particular matter, it may refer it to a tribunal, such as the **Human Rights Tribunal of Ontario**, for a formal hearing. In general, tribunals play a similar role to the courts, but with a more limited scope; in this case the tribunal would only hear matters related to the protection of human rights. Another difference between tribunals and courts is that tribunals offer more procedural flexibility, as the parties are not required to follow strict rules of evidence when they present their cases.

## *Procedures in Tribunals*

Later in this course, we will be looking at criminal procedure in depth. One important difference between criminal courts and tribunals is the standard of proof required. In criminal law, charges must be proven **beyond a reasonable doubt**. In civil law, including human rights tribunals, a complaint must be demonstrated on a **balance of probabilities**, meaning it simply must be more believable than not. If discrimination is proven, it is then up to the respondent to show that there was a **bona fide** (good faith) reason for it and that to act in a non-discriminatory fashion would have caused **undue hardship**. Another important way that civil and criminal procedures differ is in the remedies that are available. Penalties handed down after a determination of unlawful discrimination include monetary compensation or a requirement that the respondent make the changes necessary to correct the problem.

## *Ombudsmen*

The offices of federal, provincial, and territorial ombudsmen were created to hear complaints from citizens about **actions of the government that are seen as unfair**. An ombudsman can make recommendations to resolve problems and sometimes reports directly to Parliament or the relevant provincial legislature.

## *The Canadian Charter of Rights and Freedoms*

The Charter is the source of protection of human rights when public laws or bodies are involved. Since it is entrenched in the constitution, it is paramount to any federal or provincial legislation. Therefore, the afore-mentioned human rights legislation, agencies, and commissions are all subject to the provisions of the Charter. In one famous case, a provision of the Ontario Human Rights Code that allowed sexual discrimination in sports was struck down as a violation of the equality rights contained in s.15 of the Charter. This decision established the right of girls to play on boys' hockey teams (**Blainey v. Ontario Hockey Association**).

## *The Scope of Human Rights Protection in Canada*

There are still some grey areas with respect to what is or should be included in our legal concept of human rights. For example, some would argue that human rights should be extended to protect citizens against the detrimental effects of poverty, such as homelessness, malnutrition, and social alienation.

## *Equality and the Canadian Charter of Rights and Freedoms*

Canadian society is made up of a wide variety of people with diverse backgrounds, interests, needs, and lifestyles. Although the nation can take pride in this diversity, individuals often feel or find that they are placed at a disadvantage. If these individuals seek legal redress, they will typically rely on s. 15 of the Charter which guarantees equality rights:

- 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.
- (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.

The meaning of "equality" is constantly evolving, as courts redefine and reinterpret it in their decisions. Long ago in Western society, equality rights were extended only to certain groups, such as adult males or land owners. Eventually, equality in our society came to be defined as treating everyone the same regardless of the circumstances. This is referred to as "**equality before the law.**" However, this type of equal treatment, which does not recognize individual differences, can result in discrimination. The "**equal protection and equal benefit**" guaranteed by s.15 may require that individuals receive different treatment. This concept changes the focus from **equality of treatment** to **equality of results.**

Section 15 lists the following **grounds** of discrimination; race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. However, the Supreme Court of Canada has **added to this list** by recognizing a number of "analogous" grounds, including marital status, off-reserve Aboriginal band member status, and sexual orientation. For many years, a national non-profit organization called the **Court Challenges Program of Canada (CCP)** provided financial assistance for those interested in pursuing court challenges to identify new forms of discrimination in the areas of equality as well as minority languages. Stephen Harper's Conservative government cut off funding for the program in 2006, and it consequently stopped receiving new applications. In 2008, funding for the CCP was partially restored for the purpose of backing court challenges to protect minority language rights; it is now known as the Language Rights Support Program.

Subsection 15(2) legitimizes **affirmative action programs**, which may on their face appear discriminatory for creating advantages for specific groups of people, but which have been put in place to correct **historic or systemic inequality.**

### *Determining Violations of s.15 Equality Rights*

The Supreme Court of Canada developed a three-criteria test to determine whether a government action has violated s.15 of the Charter:

- 1) Does the action **deny** an equal benefit or **impose** an unequal burden on an individual or group?
- 2) Is the action discriminatory according to the enumerated or analogous **grounds**?
- 3) Is the action discriminatory on the **facts** of the case?

Once a determination of discrimination is made, the government has the opportunity to justify the violation as a reasonable limit under s.1 of the Charter. In the landmark case, **Vriend v. Alberta, 1998**, the Supreme Court of Canada found that a legislative omission can be the subject of a Charter violation and specifically that Alberta's Individual's Rights Protection Act (IRPA) violated s.15 of the Charter by excluding sexual orientation as a ground for discrimination. They further determined that the violation was not a reasonable limit as per s.1. The court then decided that sexual orientation should be "**read into**" the offending section of the IRPA, as opposed to striking down the legislation. This means that the existing wording is reinterpreted to include the necessary scope or meaning, which saves the government the trouble of having to amend or re-enact the legislation.