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THE RIGHT TO EQUALITY:

FREEDOM FROM MAJORITIES

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1. DISCRIMINATION AND THE LAW BEFORE THE CONSTITUTION ACT, 1982

(1) The Constitutional Position

Although the British North America Act (now Constitution Act, 1867) does not include a bill of rights, it does contain provisions protecting certain minority rights. Thus, section 93 protects certain collective religious rights to the establishment of separate schools, even though it does not apply to all religious groups nor, to the same extent, to all provinces. Section 133 protects Canadians' rights to the use of the English and French languages in judicial and legislative institutions at the federal level and in Quebec and section 23 of the Manitoba Act makes the same provisions for Manitoba, although these provisions, too, do not apply equally to all Canadians since they touch only Quebec and Manitoba.[1]

Apart from these provisions the Constitution Act, 1867 makes no reference to individual equality rights. More importantly, the Judicial Committee of the Privy Council decided early in our constitutional history that discrimination on racial grounds was not a basis for invalidating provincial legislation. In Union Colliery v. Bryden,[2] the court dealt with a challenge to British Columbia legislation forbidding "Chinamen" from working underground in mines. The Judicial Commitee made it clear that it was not concerned

whether the exercise of legislative power was "discreet", and that "courts of law have no right whatever to inquire whether [the] jurisdiction has been exercised wisely or not". Similarly, in Cunningham v. Tomey Homma,[3] the Judicial Committee was faced with a provision in the British Columbia Elections Act denying the franchise to "Chinamen, Japanese and Indians". The court 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". Although in the former case the legislation was held invalid on the ground that it infringed federal jurisdiction over "naturalization and aliens", it is quite clear from both cases that as long as provincial legislation was not beyond the jurisdiction of the province, it was valid, even though it discriminated on racial or any other grounds.

It is not surprising, therefore, that in 1914 the Supreme Court of Canada, in the case of Quong-Wing v. The King,[4] upheld the validity of a Saskatchewan Act prohibiting white women from residing or working in "any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman". As long as Parliament and the provincial legislatures did not exceed their legislative

jurisdiction as set out in the British North America Act, racially discriminatory legislation would not be challenged on grounds of constitutionality.

Nevertheless, one should point out that federalism can provide protection for minority and equality rights in at least three different ways. In the first place, by giving large minorities control of regions. The French language is protected in Canada, not so much by the Constitution, as by the existence of the Province of Quebec, where a French-speaking majority dominates. Moreover the very necessity of dealing with the government and people of a French-speaking province enforces at least a certain minimum of bilingualism on the federal Parliament and the federal public service. Second, since in a federal state every person is at the same time a citizen of a province and of the country as a whole, and since legislative jurisdiction relating to the various human rights is divided between the two orders of government, neither order alone can totally determine the limits on rights. Third, it is not easy for any one government, even when acting within its jurisdiction, to be more restrictive of civil liberties than another, because there is the ever present possibility of comparing the status of civil liberties within one province with that in another. Moreover, with eleven governments and First Ministers, even if the same political party were dominant in each province,

which has probably never occcurred, the rivalry between these heads of government provides a certain check on the oppressiveness or arbitrariness of any one government.

(2) Racial Discrimination under the Common Law and the Civil Law

The leading decision is that of the Supreme Court of Canada, given in 1939, in the case of Christie v. York Corporation.[5] Christie was a black man who was a season subscriber to hockey games in the Montreal Forum, where the respondent operated a beer tavern. Although the appellant had previously bought beer in the tavern, on the evening in question the waiter declined to serve him and stated that he was instructed "not to serve coloured people". When the manager affirmed the refusal, 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".

A year later the British Columbia Court of Appeal held that the principles established by the Supreme Court of Canada in the Christie case were not confined to Quebec, but were applicable in the common-law provinces as well.[6] 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 principle of English common law applicable to inns.[7]

At the end of World War II a decision concerning a racially restrictive covenant not to resell land to "Jews, or to persons of objectionable nationality", gave an Ontario judge the opportunity to hold that such racially based grounds were contrary to public policy. The judge also held the covenant to be void for uncertainty and for being a restraint upon alienation.[8] Subsequently, however, another restrictive covenant, prohibiting the sale of land to any person of a "Jewish, Hebrew, Semetic, Negro, or coloured race or blood", was upheld as valid by a lower court and by the Ontario Court of Appeal. The Court of Appeal did not agree that there was a ground of public policy to render such covenants void. Before the case reached the Supreme Court of Canada, the legislatures of both Ontario and Manitoba passed amendments to their property legislation providing that such covenants were invalid. Despite this further evidence of the view of legislatures about public policy on racial discrimination and restrictive covenants, 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; it was also void for uncertainty.[9]

In the absence of judicially developed protection of equality rights, the provincial legislatures moved into the field and started to enact antidiscrimination legislation, the administration and application of which has largely been taken out of the courts.

(3) The Rise and Spread of Human Rights Legislation

For almost a century after the British Emancipation Act of 1833, the trend in Canada was to enact discriminatory legislation. The first minor changes came during the 1930s,[10] 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, which prohibited the publication or displaying of signs, symbols, or other representations expressing racial or religious discrimination.[11] 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.[12]

The Saskatchewan Bill did not deal only with antidiscrimination 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 sactions: the imposition of fines, perhaps injunctive proceedings, and imprisonment.

There was no provision 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.

Both the Saskatchewan Bill of Rights and the Ontario Racial Discrimination Act were quasi-criminal statutes in that certain practices were declared illegal and sanctions were set out. But 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, i.e. 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.[13] 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[14], 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 1934,[15] and again most of the other provinces followed within the decade.[16]

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,[17] 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.[18] With minor variations, all the legislation is similar except that Saskatchewan and Quebec have additional protections. Saskatchewan has continued the protection for fundamental freedoms introduced in its 1947 Bill of Rights.[19] 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.[20]

The consolidation of human rights legislation into a code to be enforced by administrative commissions was intended to ensure community vindication of the person discriminated against. Without active community involvement, people who suffer from discrimination may lack knowledge of the purpose and scope of the legislation, or may feel that the costs of vindication (in money and embarrassment) would be too great, or they may fear that the proclamation of human rights is not intended to produce tangible results but merely to soothe the consciences of the majority. The objects and purposes of Human Rights Commissions in administering human rights codes could not be better described than in the words of Dr. Daniel Hill, former director, then chairman, of the Ontario Human Rights Commission:

> "Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of free education, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people... Human rights on this Continent is a skillful blend of educational and legal techniques in the pursuit of social justice".[21]

(4) The Scope of Human Rights Legislation

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 only in Manitoba, Ontario and Saskatchewan.

In addition to the racial grounds, all jurisdictions have legislation prohibiting discrimination on grounds of "sex" and "marital status" or "family status" or "civil status"; all of them prohibit discrimination on the ground of "age", and five -- British Columbia, Manitoba, Newfoundland, Prince Edward Island and Quebec -- prohibit discrimination on the basis of "political opinion", "belief" or "convictions". In addition, the Quebec Act adds "language", "social condition" and "sexual orientation" as prohibited grounds of discrimination, while the Manitoba legislation adds "source of income". The federal Act includes, as prohibited grounds of discrimination, "a conviction for which a pardon has been granted". Discrimination on the ground of "physical handicap" is found in the

Acts of Manitoba and Nova Scotia, while New Brunwick, Prince Edward Island and Saskatchewan adopt the term "physical disability", and Alberta the term "physical characteristics". In the federal Act, as well as those of Ontario and Quebec, protection is provided for "handicapped" persons, which includes both "physical" and "mental" handicap.

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 open to the public; and in the publishing and/or displaying of 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:

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

(5) Discrimination

All the Acts (except Quebec's) prohibit not only specific acts of denial of access, but also the act of "discrimination" as such, where these are based on one of the prohibited grounds. However, none of these statutes, except the Quebec Charter, provides a definition of the term "discrimination". The Oxford English Dictionary defines "to discriminate against" as: "to make an adverse distinction with regard to; to distinguish unfavourably from others".

The American definition of the word "discrimination" (as provided by Webster's New World Dictionary of the American Language) includes "3. A showing of partiality or prejudice in treatment, specific actions or policies directed against the welfare of minority groups." The term "discrimination" as used in human rights legislation in Canada is intended to mean: an action or policy showing partiality or prejudice in treatment directed against members of certain specific groups. Furthermore, although human rights legislation may be concerned with the motive or intent of the individual who has performed a specific, prohibited act, it is the overt action, not the thought, which is prohibited. And if the effect of an action is discriminatory, that action could be contrary to human rights legislation, even in the absence of discriminatory intent.

It is important, however, to look closely at two comments frequently made regarding antidiscrimination legislation. First, it is claimed that such legislation attempts to change thoughts, views, or attitudes. Though such changes may be desirable, and in fact may be the very object of human rights legislation, it is the overt act that the legislation prohibits. Second, it is sometimes argued that every action undertaken in favour of one group thereby indicates partiality or prejudice against another. Although this may be true in specific instances, it poses no problem in the overwhelming majority of cases, where the action can be proved to be "directed against" a person or a group "because of" membership in one of the groups specified in the legislation.

Although it is clear that the "discrimination" prohibited in the various human rights Acts in Canada is the kind of action that involves adverse or unfavourable distinction, no specific definition of the term is provided except in s. 10 of the Quebec Charter of Human Rights and Freedoms:

> "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, civil status, religion, political convictions, language, ethnic or national origin or social condition.

> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such a right."

Discrimination then, in the Quebec Charter, is: a distinction, exclusion, or preference, which is based on one of a number of specified grounds, and which has the effect of nullifying or impairing the right of every person to full and equal recognition and exercise of human rights and freedoms. Obviously, the human rights and freedoms referred to are those proclaimed in ss. 10 to 19 of the Quebec Charter -- the accommodations, goods, services, facilities, employment, and so on -- to which a person must have right of access, or from which he must have equality of opportunity to benefit.

This definition accords very closely with the one provided in the International Convention on the Elimination of Racial Discrimination, which has been ratified by Canada. The reference is to "any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms".

II EQUALITY RIGHTS, MINORITY RIGHTS AND THE CONSTITUTION ACT, 1982

(1) The Equality Rights

There are three equality rights provisions in the Canadian Charter of Rights and Freedoms -- ss. 15, 27 and 28. These are the provisions that probably received the greatest attention from lobbying groups, particularly women and associations of handicapped persons. In addition, if the experience in Canada since 1960, under the Canadian Bill of Rights, and in the United States since 1954, under the Fourteenth Amendment, are any guide, these are the provisions that are likely to be raised most frequently in litigation under the new Charter. This prediction, however, cannot be tested until after 17 April 1985 because, by section 32(2) of the Charter, section 15, the foundation provision, does not come into effect until three years after the Charter came into force. Although there is no similar delay with respect to sections 27 and 28, most of the impact of these sections will be determined within the context of the equality rights in section 15. Further, since sections 15 and 28 are individual rights provisions, while section 27 is a group rights provision, section 27 will be dealt with separately after a discussion of the other two.

Although section 15(1) may seem to be the camel that a committee produces when attempting to design a horse, the provision is understandable in light of the restricted

effect given by the Supreme Court of Canada to the "equality before the law" clause in section 1(b) of the Canadian Bill of Rights. First, in response to Mr. Justice Ritchie's judgment in the Lavell case,[22] wherein he implied a distinction between the "equality before the law" clause, and unequal treatment "under the law", section 15(1) includes protection for equality "under the law". Second, because majorities on the Supreme Court of Canada have rejected any adoption of the "egalitarian conception" set forth in the American Fourteenth Amendment,[23] the legislative draftsmen added a counterpart to the American "equal protection" clause. Third, because in a case[24] dealing with unemployment insurance benefits, Mr. Justice Ritchie rejected a contention that distinctions made with respect to pregnant women constituted discrimination on the basis of sex, on the ground that such distinctions "involved a definition of the qualifications required for entitlement to benefits," section 15(1) now also includes a clause providing for "equal benefit of the law."

Thus, it is clear that section 15(1) governs every possible application of the law to individuals, although it should be expected that some distinctions will be permitted. The section 1 reasonable-limitations provision applies. As a result, some distinctions will fall while others will be upheld. Along these lines, it might be useful to consider

the way that the U.S. Supreme Court has applied the equal protection clause of the Fourteenth Amendment. The Court applies three levels of "scrutiny".[25] The highest, strict scrutiny, applies to race, color, and religion. Distinctions made on these grounds are considered inherently suspect. As a result, unless the government can show "an overriding state purpose, which could not be achieved in a less prejudicial manner", the distinction will fail.[26] Probably because the U.S. Supreme Court has had to consider statutes which were intended to protect women from turn-of-century working conditions, sex was not included as an inherently suspect basis of distinction; hence the U.S. Equal Rights Amendment proposal. In Canada, given modern conditions and section 28 of the Charter, sex must be considered to be inherently suspect. Also, because for many years various Human Rights Codes have included these as prohibited grounds of discrimination and because of section 27 of the Charter, national and ethnic origin must also be included as such a proscribed criterion.

At the opposite end of the scale from strict scrutiny, the U.S. Supreme Court has applied minimal scrutiny to distinctions made on such ground as indigence, residence, ability to pay taxes, and similar economic and social characteristics.[27] With respect to such distinctions, a valid legislative purpose is presumed. Therefore, unless the

one challenging the law can show that it has no rational relationship to a legitimate legislative purpose, the distinction stands.[28] In the case of section 15(1) of the Charter, such a test could be suggested for distinctions which are not listed in that provision.

In recent years the U.S. Supreme Court has evolved what has come to be known as intermediate scrutiny for distinctions made on the basis of sex and legitimacy. Under this test, the government must show an important governmental objective in order for a distinction to be held valid.[29] In Canada, under section 15(1), age and mental or physical disabilities are listed. Since bona fide qualifications and requirements are more readily evident with respect to these grounds, they might be considered subject to an intermediate scrutiny test rather than be considered inherently suspect.

Because of subsection (2) of section 15, there appears to be no question in Canada but that affirmative action programs do not contravene the equality clauses in subsection (1). Even though in the United States both the Bakke[30] and Weber[31] cases were decided on the basis of the Civil Rights Act of 1964, rather than the equal protection clause of the Fourteenth Amendment and the Bakke case invalidated only strict quotas, without affecting the plethora of measures which constitute affirmative action,

there was enough suspicion in Canada that the courts might find such programs to contravene equality clauses that the draftsmen decided to be absolutely certain.

Finally, one could suggest that section 15 will not be applied to private action, but rather will be restricted to government action. It is true that the equal protection clause of the American Fourteenth Amendment has arguably had limited application to private action; but this may be explained by the fact that when this interpretation was developed, i.e., after 1954 when racial segregation was held to contravene the equal protection clause,[32] there were no antidiscrimination (civil rights) acts in fifteen of the states and very little legislation in this area at the federal level. Even so, the U.S. Supreme Court extended state action to only a few areas, such as privately owned but municipally managed parks,[33] private restaurants in publicly owned facilities,[34] and restrictive covenants because of the state (court) action involved in their enforcement.[35] When the Civil Rights Act of 1964 was passed, it applied not only in the federal sphere but also in all the states. Thus, resort to the Fourteenth Amendment became less crucial.

In Canada's case, one might expect that section 15 will not apply to private action, for three reasons. First, section 32(1) states that the Charter applies "to the