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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

Parliament and Government of Canada" and to "the legislature and government of each province ... in respect of all matters within the authority" of the respective legislative body. This wording was specifically changed from the version proposed as late as 24 April, 1981, which used the words "and to" in place of the words "in respect of". The intent to restrict application of the Charter to legislative and government action seems clear.[36] Second, section 15 refers to equality under and before the law, and to equal protection and benefit of the law. The intent to refer only to inequality arising out of any application of the law appears clear. Third, every jurisdiction in Canada has an anti-discrimination (human rights) statute, and all of these apply to the Crown, i.e., to executive action. Therefore, section 15 will clearly apply when a discriminatory act is committed by legislative action, and the jurisdiction concerned does not have an overriding clause in its Human Rights Code, as do Alberta, Quebec, and Saskatchewan. With respect to executive or governmental action, section 15 and the various antidiscrimination statutes will overlap. With respect to private discrimination, it would appear that the Human Rights Codes will apply, although they cannot contravene section 15.

Section 27 purports to give constitutional rank to the principle of "bilingualism within a multicultural" context declared by the government of Canada in 1971. Because, by the nineteenth century, it had become evident that the French-speaking inhabitants of Canada could not be assimilated and because later immigrants (whose descendants now number about twenty-eight percent of the population) claimed equality of status with the two "founding" peoples (i.e, those descended from French and British immigrants), whose "founding" status was in any event later than that of the native peoples, the official government policy became one of protecting the ethnic pluralism of the country. It has been described as a cultural mosaic, in contrast to the American melting pot. Even though Canada's mosaic may be rather vertical, to the advantage of those of British stock, nevertheless section 27 of the new Charter now gives constitutional status to what was merely proclaimed government policy. Section 27 could play a role in interpretation of section 15, to the extent that ethnocultural groups can show disadvantage. Furthermore, it could form the basis of claims for the benefits coming from government funding of culturally related programs, if these benefits are not equal in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It might be added that s. 27 was referred to by the Ontario Court of Appeal in Reference re The Education Act and Minority Language Education Rights (June, 1984, unreported) to support its conclusion that s. 23 of the Charter contemplates participation of the language minority in the management of minority language education facilities.

(2) Language Rights

Sections 16 to 20 of the Canadian Charter provide that English and French shall be the "official languages" of Canada and of New Brunswick. Until the Constitution Act of 1982, the only constitutional language protection was afforded by section 133 of the Constitution Act, 1867 and section 23 of the Manitoba Act. Section 21 of the Charter preserves this situation with respect to Manitoba and Quebec. Section 133 of the Constitution Act of 1867 is extended to apply to New Brunswick. Sections 16 to 20 not only extend the official languages requirement to that province, but they are more extensive than section 133. They apply not only to courts and legislative bodies, but to the whole gamut of government services, and section 20 requires that communication be permitted in the official language chosen by "any member of the public". In essence, these provisions reflect the protection afforded by the Official Languages Act[37] at the federal level.[38]

Section 22 requires little elaboration beyond its terms. It does not require that any other language be given official status, but it certainly does not preclude it; and it could give rise to a political argument that official status should be extended, e.g., to the language of the aboriginal peoples, at least in the northern territories.

The major change concerning language rights is to be found in section 23, which sets forth the requirement that "minority language educational rights" be provided.

It will be noted that section 23 rights are restricted to citizens who have themselves received instruction in English or French (subsection (1)) either in the province in which they still reside (para. (1)(a)) or in any other part of Canada (para. (1)(b)), or whose other children have received or are receiving such instruction (subsection (2)), to have their children receive primary and secondary school instruction in that language. This right which, by subsection (3) applies "where numbers warrant", includes the right to public funding or "minority language instruction" (para. (3)(a)) as well as "minority language educational facilities" (para. (3)(b)).

It is impossible to forecast what kind of judicial supervision will be required to enforce section 23. Under what circumstances will busing suffice? When will public authorities have to construct separate school buildings? Will merely separate classrooms suffice? What is the number necessary to meet the test of "where numbers warrant"? Certainly Canadian courts will have to consider the American court experience with supervision of busing for purposes of desegregation.

Two points have been determined by our courts under this section. One, by the Ontario Court of Appeal, I have mentioned earlier. The other in the Quebec Language Charter case, where the Supreme Court of Canada held that the provision in Quebec's Language Charter, which would deny the rights in section 23 to parents who received their English language education outside of Quebec, is invalid. Unlike Chief Justice Deschênes, who held that the evidence before him was not sufficient to indicate that this restriction was a reasonable limit under section 1 of the Charter for the purpose of protecting the French language in Quebec, the Supreme Court seemed to base its decision on the historical fact that s. 23 was enacted for the purpose of overcoming such provisions as that impugned in the Quebec Language Charter.

(3) The Aboriginal Peoples

In Canada, as in the United States, Indians have a special status under federal jurisdiction. Unlike the United States, however, where this jurisdiction seems[39] to spring from several constitutional sources, including the treaty power, the rather vague reference in Article 1, section 8, of the U.S. Constitution to regulating "Commerce ... with the Indian Tribes", the power to dispose of United States territory and property, and even national defense, the Canadian provision, in section 91(24) of the Constitution Act of 1867, is explicit in giving the federal Parliament jurisdiction with respect to "Indians, and Land reserved for the Indians".

The Canadian provision has been interpreted to apply more widely than the text would indicate: the Judicial Committee of the Privy Council held that it included Eskimos.[40] The Indian Act,[41] enacted pursuant to section 91(24) of the Constitution Act of 1867, does not refer to Eskimos (Inuit, as these people call themselves) and not even to all Indians, because the Indian Act is mostly inapplicable to Indians who leave the reserves,[42] to Indian women who marry non-Indians, and to their issue. The women are all excluded from the Act's coverage upon such marriage.[43] Although the distinction between Indian men who intermarry (and do not lose their status) and Indian women who

intermarry (and do lose their status) was held not to constitute an infringement of the "equality before the law" clause in section 1(b) of the Canadian Bill of Rights,[44] there is now reason to believe that under the new equality rights provisions in section 15, combined with section 28, the Supreme Court may come to a different conclusion.

However that issue may be resolved under the new Charter, there is a specific provision that extends constitutional protection to all "aboriginal peoples", who are defined by section 35 of the Constitution Act of 1982 as including "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 section 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 and (2) any that may be acquired by way of land claims settlement.

Concerning the first source, i.e., the reference to the Royal Proclamation of 1763, Canada's first imperial constitution, its symbolic significance was described by Hall J., in the leading decision of the Supreme Court of Canada on Indian title, the Calder case,[45] as follows:

> This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne J. in St. Catharines Milling case[46] at p. 652 as the "Indian Bill of Rights": see also Campbell v. Hall. 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.[47]

Professor Lysyk summarized the actual requirements of the Royal Proclamation 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 occupying those lands.[48]

However, as suggested earlier, Professor Lysyk indicated that the significance to the Indian people of the Royal Proclamation 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. Several spokesmen for native organizations developed this theme before the Parliamentary Committee, drawing from the Proclamation such principles 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.

Whatever be the extent of these rights, they appear to be supplemented with a provision outside the Charter, section 35, which by itself constitutes Part II of the Constitution Act of 1982. As mentioned earlier, besides defining "the aboriginal peoples of Canada", this provision recognizes and affirms "the existing aboriginal and treaty rights" of these peoples (subsection (1)). It would be beyond the scope of this review to try to outline what these aboriginal rights[50] or treaty rights[51] are, except to note that even though they have never been very precisely defined by the courts, they now have constitutional status and therefore should override any inconsistent federal or provincial laws.[52]

For a more ample and precise definition of aboriginal and treaty rights, we must await subsequent constitutional developments. The first constitutional conference at which agreements were to be sought is required by section 37 of the Constitution Act of 1982 to be held within one year after the coming into force of the act. Subsection (2) of this section requires that: (1) this conference include in its agenda an item respecting constitutional matters affecting aboriginal peoples and (2) the Prime Minister invite representatives of those people to

participate in the discussions on that item. 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 paragraph [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 section 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". In addition, amendments to sections 35 and 37 were agreed to, although they await the appropriate amending process under section 38, to provide for further conferences on these matters.

1 For the application to Quebec of s. 133 of the B.N.A.Act, see Attorney-General of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016. For the application of s. 23 of the Manitoba Act, see Attorney-General of Manitoba v. Forest, [1979] 2 S.C.R. 1032.

2 [1899] A.C. 580.

3 [1903] A.C. 151.

4 (1914), 49 S.C.R. 440.

5 [1940] S.C.R. 139.

6 Rogers v. Clarence Hotel, [1940] 3 D.L.R. 538 (B.C.C.A.).

7 King v. Barclay and Barclay's Motel (1961), 35 W.W.R. (N.S.) 240.

8 Re Drummond Wren, [1945] O.R. 778, 4 D.L.R. 674.

9 Noble and Wolf v. Alley, [1951] S.C.R. 64, 1 D.L.R. 321.

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

11 S.O. 1944, c. 51.

12 S.S. 1947, c. 35.

13 N.Y. Public Laws of 1945, c. 118, added to Article 12 of Executive Law 1909; now see Art. 15 of Executive Law of 1951.

14 S.O. 1951, c. 24.

15 S.O. 1954, c. 28.

16 For more details see my book Discrimination and the Law, Toronto: De Boo, 1982, c. 2.

17 S.O. 1960-61, c. 92.

18 S.C. 1976-77, c. 33.

19 The Saskatchewan Human Rights Code, R.S.S. 1978, c. S-21.1.

20 S.Q. 1975, c. 6.

21 Human Relations, Ontario Human Rights Commission, June,

1965, 4. For further articles on the Codes and Commissions see I. A. Hunter, "Human Rights Legislation in Canada" (1976), 15 U. of Western Ontario L. Rev. 21. A. W. Mackay, "Equality of Opportunity: Recent Developments in the field of Human Rights in Nova Scotia" (1967), 17 U. of Toronto L. Jo. 176; D. Proulx, "Egalité et discrimination dans la charte des droits et libertés de la personne: étude comparative" (1980), 10 Revue du Droit, 381.

22 A.G. Canada v. Lavell et al., [1974] S.C.R. 1349, 1365-67 and 1372-73.

23 Lavell case, ibid., 1365. Also see Fauteux, C.J.C., on behalf of the majority in Smythe v. The Queen, [1971] S.C.R. 680, 687.

24 Bliss v. A.G. Canada, [1979] 1 S.C.R. 183. The other ground for rejecting the challenge was that the distinction was between pregnant women and everyone else not a distinction on the basis of sex.

25 For some of the numerous recent articles discussing current interpretation and suggesting new approaches, see J.A. Hughes, "Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine" (1979), 14 Harv. C.R.-C.L.L. Rev. 529; M.J. Perry, "Modern Equal Protection: A Conceptualization and Appraisal" (1979), 79 Col. L. Rev. 1023; L.A. Alexander, "Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique" (1981), 42 Ohio St. L.J. 3; J. Ely, Democracy and Distrust (Cambridge, Mass.: Harvard University Press, 1980); Symposium on "Equal Protection, The Standards of Review: The Path Taken and The Road Beyond" (1980), 57 U. fo D. Jo. of Urban Law, Issue No. 4.

26 For one of the earlier expositions of this test, see U.S. v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938). For later applications, see Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964). For more recent references to this test, see Regents of the University of California v. Bakke, 438 U.S. 265.

27 McGowan v. Maryland, 366 U.S. 420 (1961).

28 Geduldig v. Aiello, 417 U.S. 484 (1974); New Orleans v. Dukes, 427 U.S. 297 (1976); Cleland v. National College of Business, 435 U.S. 213 (1978). This test would appear to be similar to, although stricter than, the "valid federal [legislative] objective" test that the Supreme Court of Canada applied to the "equality before the law" clause of s. 1(b) of the Canadian Bill of Rights, see The Queen v. Burnshine, [1975] 1 S.C.R. 693; Prata v. Minister of Manpower and Immigration, [1976] 1 S.C.R. 376. It was refined by

McIntyre, J., in MacKay v. The Queen, [1980] 2 S.C.R. 370, 405-406, to a test of a "desirable social objective".

29 Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Webster, 430 U.S. 313 (1977).

30 Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

31 United Steelworkers of America v. Weber, 444 U.S. 889 (1979).

32 Brown v. Board of Education, 347 U.S. 483 (1954).

33 Evans v. Newton, 382 U.S. 296 (1966).

34 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

35 Shelley v. Kraemer, 334 U.S. 1 (1948).

36 For a discussion of s. 32, see K. Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, eds. Canadian Charter of Rights and Freedoms: Commentary, Toronto: Carswell, 1982, ch. 3.

37 R.S.C. 1970, c. O-2.

38 A. Tremblay, "The Language Rights", in Tarnopolsky and Beaudoin, supra, n. 36, ch. 14.

39 F. S. Cohen, Handbook of Federal Indian Law (Washington: U.S. Government Printing Office, 1942, reprinted New York: AMS Press Inc., 1972) ch. 5.

40 Reference re Eskimos, [1939] S.C.R. 104.

41 R.S.C. 1970, c. I-6.

42 Sections 4, 11, 12, and especially 109 to 113 inclusive.

43 Section 12(1)(b).

44 Lavall case, supra, no. 22.

45 Calder v. A.-G. for B.C., [1973] S.C.R. 313.

46 St. Catharines Milling Co. Ltd. v. The Queen (1888), 14 A.C. 46 (P.C.).

47 Supra, n. 45, 394-395.

48 K. M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada, in Tarnopolsky and Beaudoin, supra, n. 36, ch. 15, 473.

49 Ibid., 475.

50 Ibid., 476-484. D. E. Sanders, "Aboriginal Peoples and the Constitution" (1981), 19 Alta. L. Rev. 410.

51 Lysyk, supra, n. 48, 484-487.

52 Ibid., 487.