

CONFÉRENCE COMMÉMORATIVE

DR. BERNIE VIGOD

MEMORIAL LECTURE

DISCRIMINATION AND THE LAW IN CANADA

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Permit me to start by thanking the Atlantic Human Rights Centre and the Friends of Bernie Vigod for inviting me to deliver this Second Dr. Bernie Vigod Memorial Lecture. At the outset, I would like to pay tribute to four people associated with this lecture series and with the Centre. First, of course, is the man in whose memory the lecture series was established, Dr. Bernie Vigod, who died so young, but who accomplished so much in so many different ways in forwarding human rights. I am greatly honoured that his widow, his parents and his brother are here tonight. I must also pay tribute to the man who was involved in the administration of this Centre from the beginning, but who died too soon to see its development, Dr. Lodhi. Third, I want to pay my respects to the man who has been a Chief Commissioner of a human rights commission longer than anyone else in Canada and who was the inspiration at St. Thomas University for the Centre, Dr. Noel Kinsella, now Senator Kinsella. Fourth, but to anyone who knows her, by no means ever last, is the first Bernie Vigod Lecturer, one of the most intelligent and vivacious contributors to the promotion of human rights, Dr. Rosalie Abella.

I. Discrimination and the Law Before the *Constitution Act, 1867*

Before Confederation, race relations in the territories that became Canada commenced with slavery. There were a few slaves, both black and Amerindian, in New France as early as the seventeenth century.¹ The British settlers (largely from the thirteen colonies to the south) brought slaves with them. Even before then, slaves were brought into Nova Scotia from the time of the founding of Halifax.² Many Loyalists who came into the Atlantic region after the American Revolution brought slaves with them, although freed black Loyalists immigrated as well.

At the same time it must be acknowledged that there was opposition to the practice. The coming of the end of slavery was spurred by legislative action in Upper Canada in 1793,³ by judicial action in Lower Canada just after the turn of

*Justice of the Court of Appeal of Ontario. Dr. Bernie Vigod Memorial Lecture delivered at the Faculty of Law, University of New Brunswick, 1 November 1991. The lecture is also being published by the Atlantic Human Rights Centre.

¹For a detailed study of slavery in New France see M. Trudel, *L'esclavage au Canada français: Histoire et conditions de l'esclavage* (Québec: Les presses de l'Université Laval, 1960). For a detailed history of blacks in Canada see R. Winks, *The Blacks in Canada* (New Haven: Yale University Press, 1971). On this point see Winks, at 22.

²D.H. Clairmont and D.W. Magill, *Nova Scotia Blacks: An Historical and Structural Overview* (Halifax: Institute of Public Affairs, Dalhousie University, No. 83, 1970) at 6.

³S.U.C. 1793 (2nd Sess.), c. 7. This Act merely prohibited the further introduction of slaves into the province and provided that children of female slaves born thereafter would attain freedom at age 25.

the century,⁴ and by some combination of both in Nova Scotia by about 1810.⁵ In New Brunswick, it appears that the legality of slavery was challenged in 1800 but, by a decision of 2-2 of the full bench, was sustained.⁶ Nevertheless, it appears that during the decade before the *Emancipation Act* of 1833,⁷ it had virtually disappeared as a practice in all the British North American colonies.⁸

After the abolition of slavery in the British North American colonies there was for some time considerable sympathy for the slaves fleeing the slave-holding territories in the United States. At the same time, however, as some Canadians were attempting to help freed slaves to resettle in Canada, others were discouraging them, and many forms of action, both official and private, resulted in restrictions of opportunities for those blacks who had come to Canada. A number of attempted settlement schemes failed because of a variety of adverse circumstances.⁹ Partly as a result of these factors, and partly because of the attraction of returning to familiar places and friends and families, many black settlers returned to the United States after the end of the American Civil War.

Those that remained faced encouragement and support from some whites, but hostility and discrimination from others.¹⁰ As will be indicated later, there was

⁴In 1795 a Montreal judge refused to recognize the status of "runaway slave", and, in 1798, Chief Justice Monk of the Court of King's Bench in Montreal released two slaves and declared that he thought slavery did not exist in Lower Canada: Trudel, *supra*, note 1 at 301-2, and Winks, *supra* note 1 at 100.

⁵See Ida C. Greaves, *The Negro in Canada* (Orillia: Packet Times Press, 1930) at 19-20.

⁶See T.W. Smith, "The Slave in Canada" (1899) Collections of the Nova Scotia Historical Society at 97-105 and W.A. Spray, *The Blacks in New Brunswick* (Fredericton, N.B.: Brunswick Press, 1972), at 23-6. I am indebted to Prof. Donald Fleming, Acting Director of the Atlantic Human Rights Centre, for drawing my attention to accounts of this trial in J.W. Lawrence, *The Judges of New Brunswick*, (Fredericton: Acadiensis Press, 1983) at 70, 76 and 268-9. Apparently the slave owner, although successful, challenged one of the two judges who held against him to a duel. Although Judge Allen declined, he did confirm his own moral and legal stand by freeing his own slaves. Also, one of the legal counsel for the slave challenged one of those acting for the slave owner, to a duel. This was accepted, the pistol duel took place in front of the courthouse, both missed and, although both indicated a desire to try again, their seconds negotiated a reconciliation.

⁷*An Act for the Abolition of Slavery Throughout the British Colonies: for promoting the Industry of the Manumitted Slaves; and for compensating the Persons Hitherto entitled to the Services of such Slaves* (U.K.), 3 & 4 Will. 4, c. 73.

⁸*Supra*, note 5 at 19-20.

⁹Winks, *supra*, note 1 at 130-31 and 204-05. For a fuller anecdotal account see D.G. Hill, *The Freedom-Seekers: Blacks in Early Canada* (Agincourt: Book Society of Canada, 1981) c. 5. Probably the most successful black settlement in Canada was on Vancouver Island. See Winks, *supra*, note 1, c. 9; J.W. Pilton, *Negro Settlement in British Columbia* (M.A. Thesis, U.B.C., 1951); C. Kilian, *Go Do Some Great Thing* (Vancouver: Douglas & McIntyre, 1978).

¹⁰For an account of the many tribulations see Hill, *ibid.*, c. 6, 8, 9, and 10.

nothing in the law to prohibit discrimination. Nevertheless, the legislatures did not enact discriminatory laws against blacks, except for the way in which schools legislation was applied to establish segregated schools.¹¹ Legal challenges to this segregation failed,¹² and separate schools for black children continued in Windsor until 1888, in Chatham until 1890, and in Amherstburg until 1910.¹³ The legislation, however, remained on the statute books until 1964, when Professor Harry Arthurs drew attention to it in a note in the *Canadian Bar Review* of 1963.¹⁴ Segregated schools were also a feature of black education in the nineteenth century in Nova Scotia and to a lesser extent because of a smaller population, in New Brunswick. Segregated schools continued in Nova Scotia until the 1960s.¹⁵

II. Discrimination and the Law Before the Human Rights Codes

1. The Constitutional Position

Apart from some provisions protecting the English and French languages in s.133, and others protecting certain rights to religious schools in s.93, the *Constitution Act, 1867*, makes no reference to equality rights. More importantly, the Judicial Committee of the Privy Council decided early in our constitutional history that discrimination was not a basis for invalidating legislation. In *Union Colliery v. Bryden*,¹⁶ the court dealt with a challenge to British Columbia legislation forbidding "Chinamen" from working underground in mines. The Judicial Committee 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*,¹⁷ 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

¹¹Hill, *supra*, note 9 at 102-03 and 153-59.

¹²*Ibid.* at 156. For citations of the relevant cases see Arthurs, *infra*, note 14.

¹³*Ibid.* at 154-55 and 157.

¹⁴41 Can. Bar Rev. 453.

¹⁵Winks, *supra*, note 1 at 362-89, 364-65 and 386.

¹⁶[1899] A.C. 580.

¹⁷[1903] A.C. 151.

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*,¹⁸ 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”.

2. Discriminatory Laws

(a) Immigration

Although, as will be discussed later, administrative measures were frequently resorted to for the purpose of restricting non-white immigration, the only Canadian immigration statute to provide specifically for racial restriction was the *Chinese Immigration Act*, first enacted in 1885.¹⁹ The first Chinese immigrants had arrived in British Columbia during the Fraser River gold rush, in the late 1850s, mostly from California, where they had joined the Gold rush of 1849.²⁰

At first, since their numbers were quite small and, since they seemed on the whole to work mines abandoned by whites, no great opposition to their presence manifested itself.

However, opposition to the presence of the Chinese population reached the new British Columbia legislature as early as 1872, and by 1876 the legislature passed a resolution to the effect that “it is expedient for the Government to take some steps (at as early a date as possible) to prevent this Province being overrun

¹⁸(1914), 49 S.C.R. 440.

¹⁹S.C. 1885, c.71. This act had been preceded by the *Immigration Act* of 1869 (S.C. 1869, c.10) and 1872 (S.C. 1872, c.28). Although these had been designed partly to protect European immigrants – e.g., s.3 of the act of 1869 required the number of allowable passengers to be related to the size of the vessel, and ss 11 and 12 required the protection of immigrant women from seduction by sailors – they also provided for restrictions on the physically and mentally handicapped (s.11 of the act of 1869), and the destitute (s.16 of the Act of 1869) and the exclusion of “criminals and other vicious” immigrants (s.10 of the Act of 1872).

²⁰For a sympathetic account see J.F. Kranter and M. Davis, *Minority Canadians: Ethnic Groups* (Toronto: Methuen, 1978) at 60ff. For an unsympathetic account see F.W. Howay (described as “Judge of County Court of Westminster, President of Art, Historical and Scientific Society”), *British Columbia from the Earliest Times to the Present* (Vancouver: S.C. Clarke, 1914) vol.II at 567ff. For a later unsympathetic account see T. MacInnes, *Oriental Occupation of British Columbia* (Vancouver: Sun Publishing, 1927).

with a Chinese population to the injury of the settled population of the country."²¹ In 1878 the legislature resolved that no Chinese could be employed on provincial public works,²² and the following year a Select Committee requested federal authorities to "restrict the further immigration of these undesirable people."²³

Protests against the use of Chinese labour and against the presence of the Chinese continued in the early 1880s. In 1884 the British Columbia legislature passed three restrictive statutes, one of which prohibited further Chinese immigration. This act was disallowed as interfering with federal jurisdiction over immigration.²⁴ In early 1885 the British Columbia legislature re-enacted the disallowed act, adding a \$50 tax on every Chinese immigrant, but this was again disallowed.²⁵ Finally, in 1885, following the report of a Special Commission on Chinese Immigration,²⁶ which had held sittings during 1884, Parliament enacted the *Chinese Immigration Act*.

The long title of the act gives its real purpose: *an Act to restrict and regulate Chinese immigration into Canada*, and the preamble indicates its extension to include provision for "a system of registration and control over Chinese immigrants residing in Canada". The number of Chinese immigrants on ships was restricted to one per fifty tons of tonnage, while a \$50 entry duty on every Chinese immigrant was imposed. Those already in Canada were exempted from the duty, "but every such Chinese person who desires to remain in Canada, could obtain, within twelve months ... and upon payment of a fee of fifty cents, a certificate of such residence". In 1900 the federal government raised the duty to \$100 and, in 1903, it was raised to \$500.

In 1923 a new *Chinese Immigration Act* was enacted²⁷ which, because of its effectiveness in discouraging Chinese immigration, has been called the *Chinese Exclusion Act*.²⁸ The restrictions were not only insulting, they were so broad and

²¹B.C., *Legislature Journals* at 46 (1876). See Howay, *supra*, note 20 at 570. There is also evidence that the Chinese residents were also actively discouraging further immigration. See Chuen-Yan Li, "Chinese Attempts to Discourage Emigration to Canada: Some Findings from the Chinese Archives in Victoria" (1973) 18 B.C. Studies 33.

²²S.B.C. 1878, c. 35.

²³B.C., *Legislature Journals*, (1879), 20, 47, 55, XXIV.

²⁴S.B.C. 1884, c. 3, see G.V. LaForest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: s.n., 1955) at 89.

²⁵*Ibid.*

²⁶*Report of the Royal Commission on Chinese Immigration, Minutes of Evidence* (Ottawa, 1884).

²⁷S.C. 1923, c. 38.

²⁸Kranter and Davis, *supra*, note 20 at 63.

so open to arbitrary determination that Chinese immigration effectively ceased. It is estimated that from 1923 until 1947,²⁹ when the 1923 act was finally repealed, only some forty-four Chinese immigrants had entered Canada legally.³⁰

Meanwhile, although no special statute was enacted, restrictions were applied to other Asiatics by other means. Japanese immigration did not commence in any numbers until the mid-1880s and even then, most Japanese did not stay long.³¹ However when, in 1907, a large number of Japanese immigrants came to Canada because of United States restrictions to Hawaii, and a riot against both Chinese and Japanese broke out in Vancouver, the Canadian government was moved to enter into negotiations with the Japanese government, ending in a "Gentlemen's Agreement" of 1908,³² whereby the Japanese government agreed to permit only: returning immigrants and their wives and children; immigrants engaged by Japanese-Canadians for personal or domestic service; labourers under specific Canadian government contract or contracts with Japanese-Canadian farmers. An annual quota of 400 persons was fixed for all but the first group. In 1924 this agreement was modified to 150. In 1928 a further limitation was introduced to include women and children within the quota.³³

Immigration from the Indian subcontinent began at the end of the 19th century. the largest number seems to have arrived in 1907, when about 700 were expelled from Seattle and surrounding communities. These were among those attacked in the riots of that year.³⁴ By 1909, the Canadian government required that immigrants had to reach Canada via a single continuous journey.³⁵ Since almost no ship sailed directly from India to Canada, very few came thereafter.³⁶ When, in 1914, a ship arrived in Vancouver with several hundred Sikhs, they were not permitted to disembark and, after several months, returned to India.³⁷

²⁹S.C. 1947, c. 19, s. 4.

³⁰S.W. Kung, "Chinese Immigration into North America" (1962) 68 *Queen's Quarterly* 612.

³¹Kranter and Davis, *supra* note 20 at 64; K. Adachi, *A History of the Japanese Canadian in British Columbia, 1877-1958* (Vancouver: History Committee of the National Japanese Canadians Citizens' Association, 1958) at 1-3. Also see the *Report of the Royal Commission on Oriental Immigration* (Ottawa, 1902).

³²Adachi, *ibid.* at 3-4.

³³*Ibid.*

³⁴Kranter and Davis, *supra*, note 20 at 86. Also see T. Ferguson, *A White Man's Country* (Toronto: Doubleday, 1975) at 2-7.

³⁵T.H. Baggs, "The Oriental on the Pacific Coast" (1926) 33 *Queen's Quarterly* 318.

³⁶Kranter and Davis, *supra*, note 20 at 86, referring to Ferguson, *supra*, note 34 at 7. The statistics bear this out: 2,623 immigrants in 1908, 5 in 1910, 37 in 1911, 3 in 1912.

³⁷M.A. Ormsby, *British Columbia: A History* (Vancouver: Macmillan, 1971) at 350, cited in Kranter and Davis, *ibid.* at 86. See also E. Nichol, *Vancouver* (Toronto: Doubleday Canada, 1970) at 134-39.

Finally, in the 1950s, agreements were reached with the new governments of India, Pakistan, and Ceylon to admit 150, 100, and 50 immigrants respectively from each country, plus spouses, unmarried children under twenty-one, and fathers over sixty-five, mothers over sixty. Also, for the first time, immigration offices were opened in these countries.³⁸

In 1952 a new *Immigration Act* was enacted,³⁹ but the above-mentioned restrictions were continued. Section 61 provided for the Governor in Council to make regulations for prohibiting, amongst others, immigrants by reasons of: (g)(i) "nationality, citizenship, ethnic group, occupation, class or geographical area of origin". Regulations along this line continued until the adoption of the *Canadian Bill of Rights* in 1960, although the power was not removed until the *Immigration Act* of 1977.⁴⁰

(b) The Franchise

The first restriction was in relation to the Chinese. In 1875, the British Columbia legislature denied them, as well as native Indians, the vote.⁴¹ This denial was extended, in 1895⁴² and 1896,⁴³ to include the Japanese, and in 1907 to include "Hindus".⁴⁴ As mentioned earlier, this legislation was upheld by the Judicial Committee in 1903.⁴⁵ Some six years later Saskatchewan, also, denied the franchise to the Chinese.⁴⁶ It must be emphasized that all these denials applied to *citizens* as well.

The federal Parliament adopted these restrictions in 1920, by denying the franchise to anyone who was barred by provincial legislation⁴⁷ although, as early

³⁸ F. Hawkins, *Canada and Immigration: Public Policy and Public Concern* (Montreal: McGill-Queen's University Press, 1972) at 101.

³⁹S.C. 1952, c. 42.

⁴⁰S.C. 1976-7, c. 52.

⁴¹S.B.C. 1875, No. 2, s. 1. See generally J. Garner, *The Franchise and Politics in British North America 1755-1867* (Toronto: University of Toronto Press, 1969).

⁴²S.B.C. 1895, c. 20, s. 2.

⁴³S.B.C. 1896, c. 28.

⁴⁴S.B.C. 1907, c. 16.

⁴⁵*Cunningham v. Tomey Homma*, [1903] A.C. 151.

⁴⁶R.S.S. 1909, c. 3, s. 11.

⁴⁷S.C. 1920, c. 46, s. 30.

as 1885, the federal *Electoral Franchise Act* had already excluded native Indians, and persons "of Mongolian or Chinese race".⁴⁸

The voting restrictions in British Columbia on the Chinese were not removed until 1947⁴⁹ and, on the Japanese, not until 1949.⁵⁰ At the federal level, the franchise restrictions were removed from both groups in 1948,⁵¹ but not from the native peoples until 1960.⁵²

There were franchise restrictions on the basis of religion as well. For example, the British Columbia legislature denied the franchise to the Doukhobours from 1919⁵³ to 1953,⁵⁴ while the federal franchise was denied to them from 1938⁵⁵ to 1955.⁵⁶

(c) Other Discriminatory Laws

The denial of the franchise had a much wider effect than just that. Exclusion from the voters' list also led to exclusion from municipal elections,⁵⁷ elections of school trustees,⁵⁸ and even from jury service.⁵⁹ It also led to the denial of licences such as those to sell liquor,⁶⁰ of becoming a member of the Law Society of British Columbia,⁶¹ or practicing pharmacy,⁶² all because a requirement for eligibility was to be on the voters' list under the *Provincial Elections Act*.

⁴⁸S.C. 1885, c. 40, s. 2.

⁴⁹S.B.C. 1947, c. 28.

⁵⁰S.B.C. 1949, c. 19.

⁵¹S.C. 1948, c. 46, s. 6.

⁵²S.C. 1960, c. 7. See R.H. Bartlett, "Citizens Minus: Indians and the Right to Vote" (1980) 44 Sask. L. Rev. 163.

⁵³S.B.C. 1919, c. 25, s. 2.

⁵⁴S.B.C. 1953, c. 5, s. 4.

⁵⁵S.C. 1938, c. 46, s. 4.

⁵⁶S.C. 1955, c. 44, s. 4.

⁵⁷R.S.B.C. 1924, c. 72, s. 4.

⁵⁸R.S.B.C. 1924, c. 226, s. 42(1).

⁵⁹R.S.B.C. 1924, c. 123, s. 4.

⁶⁰*Liquor Licence Act*, 1899, S.B.C. 1899, c. 39. This act included a specific prohibition against any person of the "Indian, Chinese, or Japanese race" being issued a licence (s. 36).

⁶¹Rules of the Law Society of British Columbia, no.39.

⁶²Pharmacy By-laws, s. 15.

In addition, sales of British Columbia Crown lands made it a condition that Asiatics not be employed.⁶³ An attempt was made in 1890 to deny Chinese employment underground in mines, but was invalidated on the ground that the legislation was in contravention of federal jurisdiction over aliens.⁶⁴ In contracts awarded by the British Columbia Department of Public Works the contractor was required not to employ any Asiatic "directly or indirectly, upon, about or in connection with the works".⁶⁵ Without listing all of the restrictions, because of space limitations, it might be added that as late as 1936, by legislation,⁶⁶ elderly Chinese and Japanese were denied the right to apply for admission to the British Columbia Provincial Home.

Lest one think that British Columbia was alone, remember that in 1912 Saskatchewan prohibited white women and girls from working in Chinese-owned restaurants and laundries,⁶⁷ while Ontario in 1914 prohibited them from working in Chinese business places.⁶⁸

3. 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*.⁶⁹ Christie was a black man (described by counsel for the respondent as "not extraordinarily black") who was a season subscriber to hockey games in the Montreal Forum, where the respondent operated a beer tavern. The appellant had previously, while attending hockey games, bought beer in the tavern. On the evening in question he had entered the tavern with two friends and ordered three steins of beer. The waiter declined to serve him and stated that he was instructed "not to served coloured people". When the manager affirmed the reason for the refusal, the appellant telephoned the police, to whom the manager repeated his refusal. Thereupon the appellant and his friends left the premises. Four of the five judges of the Supreme Court held that the respondent could refuse service to Christie 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

⁶³This restriction was challenged, but upheld, in *Brooks, Bidlake and Whital Ltd v. A.-G. for B.C.*, [1923] A.C. 450. The restrictions did not apply to Japanese because of a treaty with Japan.

⁶⁴*Union Colliery of B.C. v. Bryden*, [1899] A.C. 580.

⁶⁵Common Form of Public Works Contract, Clause 45, quoted in H.F. Angus, "The Legal Status in British Columbia of Residents of Oriental Race and Their Descendants" (1931), 9 Can. Bar Rev. 1. See this article for a detailing of many of these restrictions.

⁶⁶R.S.B.C. 1936, c. 228.

⁶⁷S.S. 1912, c. 17.

⁶⁸S.O. 1914, c. 40.

⁶⁹[1940] S.C.R. 139.

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.⁷⁰ 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.⁷¹

At the end of the Second World War a decision concerning a racially restrictive covenant not to resell land to “Jews, or to person 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.⁷² Subsequently, however, another restrictive covenant, prohibiting the sale of land to any person of “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.⁷³

III. Human Rights (Anti-Discrimination) Laws

1. Removal of Discriminatory Laws

In the 122 years since Confederation our human rights concerned with equality have been fundamentally transformed in two ways. In the first place, it has come to be recognized that the promotion of some kinds of human rights requires government intervention and not just government abstention. In the second place, we are finally realizing that human rights must be extended to everyone in our

⁷⁰ *Rogers v. Clarence Hotel*, [1940] 2 W.W.R. 545.

⁷¹ *King v. Barclay and Barclay's Motel* (1961), 35 W.W.R. (N.S.) 240.

⁷² *Re Drummond Wren*, [1945] 4 D.L.R. 674.

⁷³ *Noble and Wolf v. Alley*, [1951] S.C.R. 64.

society, regardless of such individual's race, colour, religion, ethnic origin, sex, age, or handicap unrelated to job performance.

The statesmen of 1867 would probably have defined their civil liberties as including the freedoms of speech, press, religion, assembly, and association, the rights to *habeas corpus*, to a fair and public trial, and perhaps also such freedoms as freedom of contract, and such rights as that to property. It must be clear that the most important prerequisite for the promotion of these civil liberties is restriction upon excessive government interference, but ultimately recognizing the supremacy of Parliament.

Within the first half century after Confederation, the fallacy of relying upon this traditional approach was exposed. For one thing, the electorate did not include women until after World War I. For another, since legislatures are dependent upon majorities, we have seen that they could not always be relied upon to protect minorities.

Where the law was not positively restrictive of full civil liberties, its role was, as Anatole France put it, that of majestic impartiality. It forbade the rich and the poor equally to beg in the streets. The law presumed equality of standing between giant corporations and individual employees, and so asserted freedom of contract. The law assumed that rugged individualism, or at least private charity, would enable abandoned or orphaned children, deserted or widowed mothers, and the economically, physically or mentally handicapped, to forge their own bright futures.

It would *not* be an exaggeration to describe the transformation in the status of women and children during the past century as being that from chattels or things to human beings. Men had all the rights in 1867 and very few responsibilities to their wives or children. Late in the nineteenth century reform started with restrictions on female and child labour, and the introduction of compulsory school attendance. The franchise was extended to women after World War I.⁷⁴ The protection which widowed mothers and orphaned children had under the laws of Quebec, against being disinherited, was extended to the common law provinces. The disadvantaged position of illegitimate children and adopted orphans was overcome by legislation which equated their rights to those of natural born children.

All these special legislative protections were further supplemented by governments taking it upon themselves to provide such social security measures as compensation for loss of job or limb or life, and assistance to the elderly, or the handicapped. What we have learned is that *some freedoms must be restricted by increased responsibilities to guarantee the rights of others.*

⁷⁴ Alberta was first: S.A. 1916, c. 5; Quebec came last: S.Q. 1940, c. 7.

This statement leads me to discuss the other way in which I have described human rights as having been transformed since Confederation, and this was to assure human rights to *everyone* in our society.

In Canada, as I mentioned earlier, the first half century after Confederation witnessed an increase in the number of statutes which discriminated against certain people. 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 decolonization and to draft new standards condemning racial discrimination.

2) The Rise and Spread of Human Rights Legislation

The first minor changes came during the 1930s,⁷⁵ 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.⁷⁶ 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*.⁷⁷

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 sanctions: 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.

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

⁷⁵For 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).

⁷⁶S.O. 1944, c. 51.

⁷⁷S.S. 1947, c. 35.

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.⁷⁸ 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 1951,⁷⁹ 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 1954,⁸⁰ and again most of the other provinces followed within the decade.⁸¹

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.

⁷⁸N.Y. Public Laws of 1945, c. 118, added to Article 12 of Executive Law 1909; now see Article 15 of Executive Law of 1951.

⁷⁹S.O. 1951, c. 24.

⁸⁰S.O. 1954, c. 28.

⁸¹For more details see my book *Discrimination and the Law* (Toronto: De Boo, 1982) c. 2, rev'd. ed. by Wm. Pentney, 1985.

The next major step was taken by Ontario in 1962 with the consolidation of all human rights legislation into the *Ontario Human Rights Code*,⁸² 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.⁸³ 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*.⁸⁴ 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.⁸⁵

3) 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 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 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."

⁸²S.O. 1960-61, c. 92.

⁸³S.C. 1976-77, c. 33.

⁸⁴The *Saskatchewan Human Rights Code*, R.S.S. 1978, c. S-21.1.

⁸⁵S.Q. 1975, c. 6.

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 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.”

IV. The *Constitution Act, 1982*, and the Human Rights Codes

Not until the *Constitution Act, 1982*, was the constitutional position of equality rights in Canada changed from that set out in *Union Colliery v. Bryden*⁸⁶ and *Cunningham v. Tomey Homma*.⁸⁷ I do not intend to discuss the equality rights in the new *Charter of Rights and Freedoms*, rather, I want to discuss two ways in which the courts have elevated the status or increased the effect of Human Rights Codes since the enactment of the new *Charter*.

The first of these concerns the proof of discrimination by showing discriminatory effects, rather than by requiring proof of intent. Since the decision of the U.S. Supreme Court in *Griggs v. Duke Power* (1971)⁸⁸ boards of inquiry under the Human Rights Codes started to apply the “effects” definition of discrimination, but at first the courts did not.⁸⁹

Early in its *Charter* interpretation the Supreme Court, in *R. v. Big M Drug Mart Ltd.*,⁹⁰ came down explicitly in favour of looking at both the content or purpose of the law as well as, if necessary, its effects:

⁸⁶ *Supra*, note 16.

⁸⁷ *Supra*, note 17.

⁸⁸ 401 U.S. 424.

⁸⁹ See the lower court decisions in the *O'Malley* and *Bhinder* cases, *infra*, notes 91 and 92.

⁹⁰ This approach has been re-emphasized on at least two subsequent occasions, again not dealing with discrimination – *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 752 concerning the impact of freedom of religion on provincial Sunday closing laws and *R. v. Smith*, [1987] 1 S.C.R. 1065 at 1070-71 which held invalid the minimum requirement of 7 years for importation of narcotic drugs. It has also been re-emphasized in two cases concerned with antidiscrimination laws – *C.N.R. v. C.H.R.C.*, [1987] 1 S.C.R. 1114 at 1134-38 and *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 90.

... [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. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

The result of *Big M* was that the interpretation of Boards of Inquiry was affirmed in two Supreme Court of Canada decisions: *Ontario Human Rights Commission and O'Malley (Vincent) v. Simpsons-Sears*⁹¹ and *Bhinder and The Canadian Human Rights Commission v. The Canadian National Railway*.⁹²

In the *O'Malley* case McIntyre J. gave⁹³ the unanimous decision of the Court. The crucial passages pertinent to this paper are:

... The *Code* aims at the removal of discrimination... Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

...

Furthermore, ... we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination... [T]he courts below were in error in finding an intent to discriminate to be a necessary element of proof.

...

...[T]he concept of adverse effect discrimination... arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force... An employment rule honestly made for sound economic or

⁹¹[1985] 2 S.C.R. 536.

⁹²[1985] 2 S.C.R. 561.

⁹³*Supra*, note 91 at 549 and 551.

business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently for others to whom it may apply. From the foregoing I therefore conclude that the appellant showed a *prima facie* case of discrimination based on creed before the Board of Inquiry.

In the *Bhinder* case the Court split, but obviously not on the issue of the relevance of proof of "effects" discrimination. Mr. Justice McIntyre for the majority held that, since s.14(a) of the *Canadian Human Rights Act* provides that a refusal or inclusion proved by the employer to be a *bona fide occupational requirement* is not a discriminatory practice, and since the respondent met that burden of proof, the complaint must be dismissed. On that point Dickson C.J.C. and Lamer J. dissented. The explanation for their dissent may be found in the following passage:

Interpretation of s.14(a) of the *Act* must be consistent with advancing the 'broad purposes' of the *Act* as established in s.2. In other words, the *bona fide* occupational requirement defense must not be given such wide parameters as to defeat the very purposes of the *Act* in which it is included.⁹⁴

Perhaps the most important development in the view that courts have taken of human rights legislation is with respect to conflicts between such legislation and any other. Without going through all the steps in that evolution, one could illustrate the result with reference to the four most recent decisions on point. The first of these is *Insurance Corporation of B.C. v. Heerspink* (1982),⁹⁵ where the Supreme Court held, by a 6 to 3 majority, that sale of insurance coverage was "a service customarily available to the public". With respect to a possible conflict between the *B.C. Human Rights Code* and the *Insurance Act*, Lamer J., on behalf 3 of the 6 in the majority, asserted:

When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.

⁹⁴*Supra*, note 92 at 569. It has to be noted that more recently, in *Alberta (H.R.C.) v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489, a majority of the S.C.C. (Dickson C.J.C. and Wilson, L'Heureux-Dubé and Cory JJ.) held that *Bhinder* was wrong in holding that there is no duty to accommodate in a case of adverse effect discrimination. In the latter case the court has to consider whether the employer could have accommodated the employee adversely affected, without undue hardship.

⁹⁵[1982] 2 S.C.R. 145.

...[T]he *Human Rights Code*, when in conflict with “particular and specific legislation,” is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.

Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.⁹⁶

Some three years later, in *The Winnipeg School Division v. Craton*⁹⁷ the Supreme Court was concerned with a conflict between the *Manitoba Human Rights Act*, which prohibits discrimination on the basis of age without an upper limit, and a mandatory retirement provision in the *Public Schools Act 1980*. Mr. Justice McIntyre, writing for the Court, said:

... I am in agreement with Monnin C.J.M. where he said... : “Human rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.” This is in accordance with the views expressed by Lamer J. in ... *Heerspink* ... Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, or amended, or repealed by the legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.⁹⁸

Finally, in the *O'Malley* case, McIntyre J. again returned to this topic to declare:

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in ... *Heerspink* ...) and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect.⁹⁹

Similarly, although in the *Bhinder* case the Chief Justice dissented on the *bona fide* qualification issue, he agreed as concerns the status of the *Canadian Human Rights Act*. Specifically he stated his agreement with the Hearing Tribunal “that

⁹⁶*Ibid.* at 157-58.

⁹⁷(1985), 21 D.L.R. (4th) 1.

⁹⁸*Ibid.* at 5-6.

⁹⁹ *Supra*, note 91 at 547.

federal legislation is inoperative to the extent it conflicts with the *Canadian Human Rights Act*".¹⁰⁰

In summing up, with reference to these four Supreme Court cases, could one suggest that human rights legislation has now achieved, by judicial decision, the status of the *Canadian Bill of Rights* – “not quite constitutional but certainly more than the ordinary”,¹⁰¹ at least to the level “that legislation is inoperative to the extent it conflicts with” such legislation?

Finally, it is interesting to note that the interpretation of discrimination issues under the Human Rights Codes may play an important role in interpretation of equality rights under the *Charter*. Thus in *Andrews v. Law Society of B.C.*,¹⁰² McIntyre J. referred to the evolution of the law under the Human Rights Codes as providing some guidance for determining what “discrimination” means in s.15 of the *Charter*. It is interesting to consider the differences:

... To begin with, discrimination in s.15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the *Charter* is not so limited. The enumerated grounds in s.15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s.15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a “continuing framework for the legitimate exercise of governmental power” and, at the same time, for “the unremitting protection” of equality rights: see *Hunter v. Southam Inc.* ..., [1984] 2 S.C.R. 145 at p.155.

It should be noted as well that when the Human Rights Acts create exemptions or defences, such as a *bona fide* occupational requirement, an exemption for religious and political organizations, or definitional limits on age discrimination, these generally have the effect of completely removing the conduct complained of from the reach of the Act. ... “Age” is often restrictively defined in the Human Rights Acts.... Where discrimination is forbidden in the Human Rights Acts, it is done in absolute terms, and where a defence or exception is allowed, it, too, speaks in

¹⁰⁰ *Supra*, note 92 at 574. The Chief Justice referred with approval to these observations of McIntyre J. in *C.N.R. v. C.H.R.C.*, *supra*, note 90.

¹⁰¹ *Supra*, note 99.

¹⁰² (1989), 56 D.L.R. (4th) 1 at 16-18.

absolute terms and the discrimination is excused. There is, in this sense, no middle ground. In the Charter, however, while s.15(1), subject always to s.1(2), expresses its prohibition of discrimination in absolute terms, s.1 makes allowance for a reasonable limit upon the operation of s.15(1). A different approach under s.15(1) is therefore required. While discrimination under s.15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Act, a further step will be required in order to decide whether discriminatory laws can be justified under s.1. The onus will be on the state to establish this. This is a distinct step called for under the Charter which is not found in most Human Rights Acts, because in those Acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights.

Finally, in conclusion, let me say that we have come a *long, long* way. However, we need only remind ourselves of the work that Bernie Vigod was involved in when he died *or* observe racial tensions in such cities as Halifax, Montreal, Toronto or Vancouver *or* witness violence against women in secluded places *or* consider gender bias in our schools and work places, to realize that, although we have created the tools, we need greater resources and a continuing commitment to use them effectively.