LEGACIES AND IMPLICATIONS OF HUMAN RIGHTS LAW IN CANADA

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ABSTRACT

The following article traces the historical evolution of human rights in law, political culture, social movements and foreign policy in Canada. It also documents the remarkable diversity of rights-claims by drawing on opinion polls, newspaper coverage and position papers of non-governmental organizations. Canadians' conceptions of rights have expanded so fast – and in such a short period of time – that human rights commissions are struggling to adapt. As a result, there is a backlash against human rights laws that threatens to undermine the system.

RÉSUMÉ

L'article qui suit retrace l'évolution historique des droits de la personne dans le droit, la culture politique, les mouvements sociaux et la politique étrangère au Canada. Il documente également la remarquable diversité des revendications de droits, en s'appuyant sur les sondages d'opinion, la couverture de presse et les prises de position des organismes non gouvernementaux. La conception des droits des Canadiens s'est développée si vite – et dans un si court laps de temps – que les commissions des droits de la personne ont du mal à s'adapter. En conséquence, il y a un retour de bâton contre les lois des droits de la personne, ce qui menace de saper le système.

In the same month Canadians celebrated the thirtieth anniversary of the *Charter of Rights and Freedoms* a host of new human rights claims garnered international headlines. The Ontario Human Rights Tribunal ruled that the province was discriminating against transgendered people by refusing to recognize a male to female gender change without written proof of a vagina. The government was given 180 days to "revise the criteria for changing sex designation on a birth registration." Around the same time that Jenna Talackova was expelled from the Miss Universe Canada beauty pageant because she was born a man, a bill to add gender identity and gender expression to the Canadian Human Rights Act reached second reading in Parliament. Meanwhile, the Ontario Human Rights Commission raised the possibility that requiring a job applicant to reveal their Facebook password was a human rights violation. In another case, the Federal Court ordered the Canadian Human Rights Commission to consider whether or not the federal government is discriminating against First Nations children by providing less per-capita funding for education, health and welfare services.[1]

Rights-talk in Canada has evolved dramatically over the past two generations. Until recently, Canadians largely spoke of rights solely in terms of fundamental freedoms and discrimination against racial, religious and ethnic minorities. The following article traces the evolution of human rights in Canada with a particular focus on law, political culture, social movements and foreign policy. It documents the remarkable diversity of rights-claims in Canada today by drawing on opinion polls, newspaper coverage and the positions advanced by non-governmental organizations. Canadians' conceptions of rights have

expanded so fast – and in such a short period of time – that human rights commissions are struggling to adapt to a host of unexpected issues. Meanwhile, human rights commissions in Canada are facing a backlash that threatens to undermine the most sophisticated human rights legal regime in the world.

1944 TO 1962: CIVIL LIBERTIES IN CANADA

Until the 1960s Canadians spoke of rights as *civil liberties*. The first civil liberties organizations were created in the 1930s. They fought for what they defined as fundamental freedoms: free press, free speech, religion, association and assembly as well as the right to vote and due process. In the 1940s they also campaigned for tolerance towards racial, ethnic and religious minorities. It was a narrow vision that reflected how most Canadians conceived of rights. For example, there were no self-identified "human rights" associations and the federal government was a reluctant human rights advocate in international affairs. Canada initially abstained in a vote on the Universal Declaration of Human Rights and only grudgingly agreed to support it in the General Assembly vote in 1948. John Humphrey, the Canadian who drafted the Declaration, described his government's position as "one of the worst contributions" and "a niggardly acceptance of the Declaration."[2] Canadian foreign policy was far more concerned with protecting state sovereignty rather than human rights.

After the Second World War, Canadians began to talk seriously about a national bill of rights. A series of Parliamentary committees were instituted in 1947, 1948 and 1950. These discussions, which ultimately came to nothing, focused almost exclusively around fundamental freedoms as well as racial, ethnic and religious discrimination.[3] No one, for instance, suggested that the constitution should enshrine equal rights for women. What is notable about postwar public discourse in Canada is that the term "human rights" was rarely employed. Even amidst widespread debates during the war about government abuse of rights, it was rare for commentators to use the term "human rights."[4]

Canadians' limited conception of rights was reflected in law. The first anti-discrimination statute was Ontario's 1944 *Racial Discrimination Act*, which prohibited the display of discriminatory signs and advertisements. Saskatchewan passed a provincial Bill of Rights in 1947. The statute recognized the rights to free speech, assembly, religion, association, and due process, while at the same time prohibiting discrimination on the basis of race, religion, and national origin. Beginning in 1951 in Ontario, most provinces introduced a series of fair employment and fair accommodation practices acts: essentially bans on racial, ethnic and religious discrimination. None of these pioneering pieces of legislation banned sex discrimination. There were, however, beginning in Ontario in 1951, a series of equal pay laws passed in most jurisdictions. And in 1960 the federal *Bill of Rights* banned sex discrimination in employment. In the end, these laws failed to achieve even their own limited mandate.[5]

1962 TO 1998: CANADA'S RIGHTS REVOLUTION

Canada experienced a genuine rights revolution beginning in 1962. In that year Ontario introduced its landmark *Human Rights Code*, which would eventually be copied in every other Canadian jurisdiction. And yet it was not until 1969 when two provinces, British Columbia and Newfoundland, added sex discrimination to human rights legislation. By the time the federal *Human Rights Act* was enacted in 1977 every jurisdiction had replaced failed anti-discrimination laws with comprehensive human rights legislation. Banning discrimination against women was the first step in a shift towards more expansive legislation that, over time, evolved to include pregnancy, disability, sexual orientation, political affiliation, income, addiction, marital status, and pardoned criminal conviction. Several jurisdictions also banned sexual harassment and hate speech, while recognizing equal pay for work of equal value. Systemic discrimination entered the human rights vernacular and the province of Quebec experimented with social and economic rights. The *Charter of Rights and Freedoms* provided constitutional recognition of, among others, multiculturalism, education, Aboriginal peoples and women's equality.

Human rights legislation in Canada was the most sophisticated in the world. Equality commissions in the United Kingdom, Australia and the United States, for example, had far more restrictive mandates and less effective enforcement mechanisms.[6] Despite the proliferation of human rights laws since the 1970s, including in Eastern Europe and South America, few of these models incorporated all the strengths of the Canadian system: professional human rights investigators; public education; research for legal reform; representing complainants before inquiries; jurisdiction over the public and private sector; a focus on conciliation over litigation; independence from the government; and an adjudication process as an alternative to the courts.

This period also saw a historically unique proliferation of social movements.

A new generation of civil liberties and – for the first time in history -human rights associations emerged beginning in the 1960s. The Ligue des droits de l'homme and the Newfoundland Human Rights Association, for example, adhered to the principles of the Universal

Declaration of Human Rights. They campaigned for a human right to housing, education and social assistance. Social movements led by women, Aboriginal peoples, people with disabilities, ethnic and racial minorities as well as a host of others embraced human rights as a vision for social change.

The rights revolution also transformed Canada's political culture. For many years, the principle of Parliamentary supremacy had been used as a justification to reject a bill of rights on the premise that courts should not overrule Parliament. By the 1970s this argument was being used less and less. A Special Joint Committee on the Constitution in 1970 explicitly attacked this principle, although the committee's hearings revealed that there was still some reluctance to move beyond Canadians' traditional notions of rights. Except for Manitoba, the provinces only considered fundamental freedoms as appropriate for the constitution, and most of the NGOs participating in the hearings shared this assumption. Within a decade, however, it was apparent that Canadians were using the language of human rights to articulate a host of grievances. The federal government's 1981 Special Joint Committee on the Constitution was the most widespread consultation on human rights in Canada at that time. A wide range of non-governmental organizations participated in the hearings. They wanted the *Charter of Rights and Freedoms* to recognize the right to, for example, language, learning, health care, education, minimum wage, self-determination, rest and leisure, meaningful work, abortion, day care, mobility, family reunification and cultural retention. What is significant is not that they were making these demands – workers had been fighting for more leisure time for generations – but that they were framing these grievances as *human rights*.

Even foreign policy was undergoing a rights revolution. A 1970 white paper recognized, for the first time in Canadian history, the need to incorporate human rights into multilateral and bilateral relations. Over the next two decades Canada acceded to several human rights treaties, began to incorporate human rights into decisions surrounding humanitarian aide, to participate in international human rights institutions, and to impose sanctions on human rights violators abroad.[7]

By the mid-1980s rights-talk in Canada had evolved far beyond what had been envisioned with the first human rights laws. To be sure, these developments were highly contested. Justice Rosalie Abella produced a royal commission report in 1984 that expressed dismay over the failure of human rights laws to address systemic discrimination, particularly those "practices we customarily and often unwittingly adopt [that] may have an unjustifiably negative effect on certain groups in society."[8] French Canadians and Aboriginal peoples raised the challenge of collective rights. Feminists were at the forefront of advancing a more nuanced understanding of discrimination: intersectionality. An intersectional analysis recognized that reducing discrimination to one factor, such as sex, failed to account for how some individuals experienced discrimination.[9] Someone might be discriminated against, not because she was a woman or a person with a disability, but because she was a woman with a disability.

The most contentious issue by far was sexual orientation. Quebec was the first jurisdiction to ban discrimination on the basis of sexual orientation (in 1977). And yet by the 1990s many provinces still refused to recognize sexual orientation as a human right. The Newfoundland Minister of Justice in 1990, for instance, feared that banning discrimination on the basis of sexual orientation would protect pedophiles, and insisted that such discrimination did not exist.[10] Alberta, in particular, became the battleground for competing notions of rights. One cabinet minister, reflecting the prevailing attitude within the provincial government, declared that the province would never ban discrimination if it meant allowing homosexuals to teach in schools. Another insisted that "two homosexuals do not constitute a family." The government even went so far as to introduce legislation in 1999 restricting common law marriages to heterosexual couples.[11] The Supreme Court of Canada ruled in 1998 that the Alberta *Human Rights, Citizenship and Multiculturalism Act's* omission of sexual orientation violated the Charter and ordered the government to interpret its legislation as if it included sexual orientation.

1998 TO 2012: EMERGING CHALLENGES

The scope of how people are using the language of human rights today is astounding. Opinion polls suggest that Canadians are becoming more receptive to expansive human rights claims. In a 1944 Gallup poll, for example, Canadians were divided on whether or not communists should have a right to free speech (a majority said no).[12] Three years later the residents of Dresden, Ontario voted *against* a proposed bylaw banning discrimination against racial minorities. Polling between the 1940s and 1970s on human rights was dominated by questions about fundamental freedoms, due process, race and religion. In the 1980s and 1990s, a growing number of polls framed sex, sexual orientation and disability as human rights violations. Opinion polls over the past ten years have linked human rights to prostitution, parental leave, family status, abortion, sexual orientation, euthanasia and same-sex marriage.

Meanwhile, NGOs are challenging how we think about human rights. EGALE, for instance, has adopted the position that young people should be free from sexual harassment and that there is a human right to "a safe learning environment." EGALE also insists on the inclusion of gendered identity or gender expression in human rights legislation, as well as equal marriage rights and benefits for sexual minorities. The Assembly of First Nations has framed clean water, natural resources, self-determination, culture, language, education, land and the environment as human rights. The Ontario Coalition Against Poverty wants recognition for the rights of disabled poor to better public and private services among other socio-economic rights. Vancouver Rape Relief has adopted the position that a man's ability to pay for sexual access to other humans often supersedes the right for a woman to not be involved in prostitution. From this perspective, prostitution is a violation of human rights, and women are uniquely vulnerable to this rights violation.

The media has also identified an expanding repertoire of rights-claims in Canada. Some of the most prominent recent coverage has included: a Sikh's right to refuse to wear a motorcycle helmet or hard hat; the right for employers to ask employees about mental disabilities, notably depression; sexual orientation and open access to men-only bars; schoolchildren with mental and physical disabilities; parental rights over children's education; racial and ethnic discrimination among the police; women denied the opportunity to compete in sports; sexual discrimination among college instructors; housing as a human right, including a right against evictions; age discrimination in employment; women in sports; prostitution; genetic characteristics as a basis of discrimination; internet access; and sexual harassment through social media.[13]

HUMAN RIGHTS UNDER ATTACKS

Human rights have become the dominant language Canadians use to address their grievances. Ironically, one of the implications of this development has been the emergence of a movement attacking the legitimacy of human rights law. Whereas the *Charter of Rights and Freedoms* has broad public support, human rights laws are under attack. "Human rights commissions" proclaimed the editors of the *Globe and Mail* in February 2008, "were never intended to serve as thought police. […] It's time to rein them in before further damage is done to Canadians' right to free expression."[14] The media's portrayal of human rights commissions has presented an image of overzealous, bureaucratic activists who have lost touch with Canadian values. While George Jonas of the *National Post* characterizes human rights commissions as a "complainants forum" for providing free counsel to complainants, Rex Murphy and Margaret Wente have dedicated dozens of columns in the *Globe and Mail* to what the latter has called "self-perpetuating grievance machines."[15] In response to a case involving a man with bipolar disorder who successfully launched a human rights complaint against an employer for dismissing him because he failed to show up at work (for three months), Wente suggested that human rights commissions were "more and more disconnected from common sense. They're taking on cases that would strike most of us as absurd. […] These bodies are fast losing their legitimacy."[16]

Attacking human rights law has gone beyond mere rhetoric. British Columbia eliminated its human rights commission in 2002, severely restricted the mandate of the new tribunal, cut staff, and streamlined the process for dismissing complaints. Ontario introduced modest reforms in 2006 which, although nowhere near as regressive as British Columbia, eliminate the role of the Human Rights Commission in pursuing complaints and assisting victims. The Progressive Conservative Party of Ontario has raised the possibility of eliminating the human rights system, which is an idea no politician seriously contemplated a generation ago. Alberta passed a *Human Rights Act* in 2010 that permits parents to haul teachers before the Human Rights Commission for teaching about religion, sex, or sexual orientation. The Wildrose Party, which became the official opposition in April 2012, is committed to eliminating the Human Rights Commission and leaving it to the courts to adjudicate complaints. Saskatchewan set the precedent in 2011 when the government eliminated its Human Rights Tribunal and now requires victims to seek restitution in court. Without the tribunal, Saskatchewan will depend on judges with minimal (if any) experience in handling discrimination cases. These developments also shift the burden on pursing complaints to victims who are most often the most vulnerable, marginalized and lack the skills or resources to go to court. If the twentieth century was a period of human rights innovation, the twenty-first century may be an era of retrenchment, if not the complete dismantling, of Canada's human rights legal system.

NOTES

[1] XY v Ontario (Government and Consumer Services) [2012] HRTO 726; Shannon Corregan, "MP, Talackova Fighting for Basic Rights." *Victoria Times-Colonist*, 13 April 2012; Nicole Bogart. "Asking for Facebook Passwords a Violation of Human Rights: Commission." *Global News*, 27 March 2012; Heather Scoffield. "Federal Court Orders a New Hearing for First Nations Child Welfare." *Winnipeg Free Press*, 23 April 2012.

[2] Hobbins, A.J. 1998. "Eleanor Roosevelt, John Humphrey and Canadian Opposition to the Universal Declaration of Human Rights: Looking Back on the 50th Anniversary of the UDHR." *International Journal* 53: 325-342.

[3] Clément, Dominique. [2008] *Canada's Rights Revolution: Social Movements and Social Change, 1937-1982*. Vancouver: UBC Press.

[4] Clément, Dominique. [2000] "The Royal Commission on Espionage and the Spy Trials of 1946-9: A Case Study in Parliamentary Supremacy." *Journal of the Canadian Historical Association* 11:151-172.

[5] Clément, Dominique. [2010] "Human Rights Law and Sexual Discrimination in British Columbia, 1953-1984." in *The West and Beyond*, edited by S. Carter, A. Finkel, and P. Fortna. Edmonton: Athabasca University Press, Howe, R. Brian and David Johnson. 2000. *Restraining Equality: Human Rights Commissions in Canada*. Toronto: University of Toronto Press.

[6] Yalden, Maxwell. [2009] *Transforming Rights: Reflections from the Front Lines*. Toronto: University of Toronto. Reif, Linda. 2000. "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection." *Harvard Human Rights Journal* 13: 1-69.

[7] On human rights and Canadian foreign policy, see Clément, Dominique. [2012] "The Evolution of Human Rights in Canada: From "Niggardly Acceptance" to Enthusiastic Embrace." *Human Rights Quarterly*.

[8] Canada, [1984] *Report of the Commission on Equality in Employment*: 9.

[9] On intersectionality see Minow, Martha. [1997] *Not Only for Myself: Identity, Politics, and the Law*. New York: New Press. and Pothier, Diane. [2001] "Connecting Grounds of Discrimination to Real People's Real Experiences." *Canadian Journal of Women and the Law* 13: 37-73.

[10] Newfoundland House of Assembly, *Hansard*, nº8 [1990]: 30; Newfoundland House of Assembly, *Hansard*, vol. 16, nº88 [1990]: 22-4.

[11] Ibid.

[12] Canadian Institute of Public Opinion/Gallup. [1949] *Canadian Gallup Poll 191*.

[13] For sources on opinion polls, newspapers and NGOs, see Clément, Dominique, Will Silver, and Dan Trottier. [2012] "The Evolution of Human Rights in Canada." Canadian Human Rights Commission, Ottawa.

[14] Editorial. "Human Rights Commissions: Shake that role of policing ideas." *Globe and Mail*, 4 February 2008.

[15] George Jonas. "George Jonas on the Trouble with Human Rights Commissions." *National Post*, 8 April 2008; George Jonas. "Speech Commissars are the Problem." *National Post*, 5 May 2006; Margaret Wente. "A Day at the Theatre of the Absurd." *Globe and Mail*, 15 February 2008; Margaret Wente. "The Rights Revolution Run Amok." *Globe and Mail*, 26 February 2008. See also: Rex Murphy. "Coming to a Human Rights Commission Near You." *Globe and Mail*, 25 January 2006.

[16] Margaret Wente. "The Rights Revolution Run Amok." *Globe and Mail*, 26 February 2008.