HUMAN RIGHTS PROTECTION IN CANADA

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SUMMARY
I. INTRODUCTION.- II. EVOLUTION OF HUMAN RIGHTS PROTECTION.- III. COMPARISONS WITH THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS.- IV. FEDERAL REGIME.- V. PROVINCIAL RIGHTS PROTECTION SCHEMES.- VI. WHAT IS AND IS NOT COVERED BY HUMAN RIGHTS LEGISLATION.- VII. COMPLAINTS ABOUT THE HUMAN RIGHTS ENFORCEMENT PROCESS.- VIII. CHANGES IN BUREAUCRATIC PROCESSES.- IX. CONCLUSION.

KEY WORDS
Human rights; Canada; Bill of Rights; Canadian Charter of Rights and Freedoms; Provincial human rights legislation; Human rights commission; Non-discrimination; Equality; Enforcement; Bureaucracy; International commitments.

ABSTRACT
Human rights in Canada were not directly protected by law until after the Second World War. They are imperfectly protected today. At first, various provinces created human rights codes. The first national bill of rights was adopted in 1960, but it was weak and not entrenched in the constitution of Canada. The article describes the impact on human rights law of the creation of the Canadian Charter of Rights and Freedoms in 1982. Provincial laws must be tailored to satisfy the standards of the Charter. The author analyzes some recent cases involving violations of human rights. The article also describes the unique context of human rights protection in Quebec and the changes in some provinces that intend to make more
effective the process of enforcing rights. The article concludes by noting recent controversies about violations of human rights involving detention of a Canadian citizen overseas, and possible abuses of the rights of prisoners in Afghanistan.

I. INTRODUCTION

For the first eighty or so years of Canada’s existence —between 1867 and the end of the Second World War— the protection of human rights, as well as the content of those rights, was based on the practice and principles derived from the United Kingdom. Unlike in the United States, where a robust bill-of-rights culture emerged early in that country’s history, in Canada our judges played a modest role and were generally reluctant to address issues of human rights except as an incidental matter. We still talk about this period of Canadian legal history by asking whether the courts had formulated, at most, an “implied bill of rights,” but the discussion is now mainly theoretical¹.

At the outset, I should note one of the most important facets of the Canadian constitution: its federal arrangement, which divides legislative jurisdiction in Canada. Since Confederation (in 1867), each level of government (the federal or national government in Ottawa, on one hand, and the governments of each province, on the other), enjoys full jurisdiction over different areas or subject-matter of law-making. Thus, for example, the federal government has the exclusive power to make laws in relation to the Canadian military or foreign affairs. By contrast, each province has jurisdiction over the matters of health and education (The list of powers conferred on the federal government are contained in s. 91 of the Constitution Act, 1867, while provincial powers are set out in s. 92 of that Act).

¹ For a contemporary view of the debate over an implied bill of rights, see the remarks of the Right Honourable Beverly McLachlin, C.J.C., “Human Rights Protection in Canada: Past Achievements, Current Challenges” (13 March 2008, Speech at Dominican University College, Ottawa) available online at: http://www.collegedominicain.ca/pdf/13mar08%20ChiefJustice.pdf. While umpiring disputes involving federalism, the courts occasionally had an opportunity to vindicate certain human rights, such as freedom of religion or expression. For example, by striking down a provincial law aimed at restricting the property rights of a particular religious sect, the court could incidentally protect the group’s fundamental rights. In other cases, such as Union Colliery v. Bryden, [1899] A.C. 580, when the Judicial Committee of the Privy Council struck down a provincial law that prohibited anyone of Chinese origin from working in mines, the effect was to protect a certain group against discrimination. But the legal reasoning of the Privy Council was framed around the issue of whether the province had acted beyond its competence when the law was made. The Privy Council held that the provincial law interfered with jurisdiction over “naturalization and aliens,” an area of exclusive federal competence.
There is no specific mention, in either s. 91 or s. 92, of the subject matter of “human rights.” But the topic does not, or this reason, fall outside all legislative jurisdiction. Instead, each level of government in Canada claims some powers to legislate in this area. For the federal government, the source of authority rests in the “peace, order, and good government” clause contained in the preamble to s. 91. On the part of the provinces, the constitutional basis for their exercise of power over human rights arises out of a very broad construction of s. 92(13): the assignment to the provinces of responsibility to make laws regarding “property and civil rights within the province”.

II. EVOLUTION OF HUMAN RIGHTS PROTECTION

So long as Canada embraced the theory of parliamentary supremacy, as well as the same mode of constitutional thinking that prevailed in the U.K., many violations of human rights were without recourse or remedy. They were simply not illegal. In 1940, when a black patron was refused service in a bar because of his race, he sued the tavern owner on the basis of the common law tort of humiliation2. The Supreme Court of Canada ultimately dismissed the man’s claim by invoking the principle of freedom of contract or commerce: merchants are free to deal or not (as they choose) with any particular member of the public.

In the aftermath of the Second World War, human rights became a central issue internationally. And Canada was not only one of the first signatories to the Universal Declaration of Human Rights in 1948, but in fact one of the principal drafters of that document was a Canadian: John Humphrey, a professor of international law at McGill University in Montreal3.

After 1948, Canada took seriously the task of making universal human rights a part of Canadian law. The Universal Declaration was merely that: declaratory. It did not indicate what practical steps a government should take to ensure that human rights are protected. How to implement them was left up to each country to decide.

Canadian provinces became the first level of government to move to protect individual human rights. In 1944, Ontario enacted the Racial Discrimination Act. This prohibited the publication, display, or broadcast of anything indicating an intention to discriminate on the basis of race or religious belief. The thrust of this legislation was that racial and religious discrimination were, for the first time in Canada, declared to be contrary

to public policy, and that human rights should not be subordinated to the interests of commerce, contract, or property.

Saskatchewan adopted the first bill of rights in Canada in 1947\(^4\). It included anti-discrimination provisions and also proclaimed fundamental political rights such as the right to vote, freedom of religion, speech, assembly, and freedom from arbitrary arrest or detention. Though this bill of rights was ambitiously worded, it lacked an effective enforcement procedure—one of the weaknesses typical of early human rights legislation. With few or no staff to administer these regimes, the statutes lacked bite.

The first federal (and nation-wide) attempt to frame a general law that would include enumerated human rights was the Bill of Rights adopted by Parliament in 1960\(^5\). Its major features included:

- guarantees of life, liberty, and security of the person
- the right to enjoyment of property, unless deprived thereof by due process of law
- right to equality before the law and the protection of the law
- freedom of religion, speech, assembly, association, and the press
- these rights and freedoms exist without discrimination on the basis of race, national origin, colour, religion, or sex.

But the main drawback of the Bill of Rights was its limited application and effect:

- First, the document itself was an ordinary statute passed by Parliament in Ottawa. It did not itself form part of the Constitution of Canada. The Prime Minister at the time (John Diefenbaker) could not convince the provinces to co-operate in the constitutional amendment that would incorporate this document into the Canadian constitution. Therefore it was not really “entrenched” (no arraigado).
- Moreover, the Bill of Rights applied only to federal laws (i.e., those passed in Ottawa) and did not apply to laws or regulations enacted by the provinces.
- Third, the Bill of Rights as a statute conferred only limited remedial powers on the courts. In the event of a challenge to a law under the Bill of Rights, a judge’s duty was “to construe and apply the law so as not to abrogate any of the rights or freedoms recognized in the Bill of Rights.” In other words, parliamentary supremacy remained the most important principle, and judges were reluctant to limit legislative sovereignty without a stronger and more precise constitutional mandate.

The Bill of Rights, which remains on the books today (i.e., it is an active

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\(^4\) S.S. 1947, c. 35.
\(^5\) S.C. 1960, c. 44.
law) has been rarely used. The occasions where a court used this statute were rare. The most celebrated was *R. v. Drybones*. 

Ironically, the general judicial reluctance to wade into the waters of human rights protection meant that individual governments turned away from the courts and towards instead administrative agencies to do this work. Ontario led the way again, when in 1962 it set up a commission and full-time staff to administer and enforce its strengthened and comprehensive anti-discrimination laws. The other nine provinces and the various territories followed suit.

**III. COMPARISONS WITH THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

Partly because of the relative ineffectiveness of the *Bill of Rights* (1960), the process of mega-constitutional reform initiated by the federal government in the late 1970s (under the leadership of Prime Minister Trudeau) included a proposal to adopt a *Canadian Charter of Rights and Freedoms* that would go much further than the *Bill of Rights*, not only with respect to the rights that would be specifically included, but also with respect to application: the *Charter* applies to all laws and actions by governments at all levels, whether they are federal or provincial. In addition, the *Charter* gives the courts broad powers to strike down, sever, or narrowly interpret laws that have been found to violate the *Charter*’s guarantees. In other words, the *Charter* was fully entrenched in Canada’s revised constitution. It has led, as expected, to a large volume of litigation in the courts over the past 27 years. Various federal and provincial laws have been struck down by the courts on the ground that they violated a right or freedom contained in the *Charter* and that, moreover, the violation could not be sustained un-

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7 See s. 32(1) of the *Charter*, which states that it applies to Parliament and to provincial legislatures as well as to federal and provincial governments. [In Spanish s. 32(1) reads: “La presente Carta se aplica
   (a) al Parlamento y al gobierno de Canadá con respecto a todos los asuntos que son jurisdicción del Parlamento, incluso los que conciernen el Territorio del Yukón y los Territorios del Noroeste; y
   (b) a la legislatura y al gobierno de cada provincia, para todo lo que sea jurisdicción de dicha legislatura.”]

8 See s. 82 of the *Constitution Act, 1982*, which states that “The Constitution of Canada [of which the Charter is a part] is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

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der the “exceptional” or “saving” grounds laid out in s. 1 of the Charter. It is safe to say that over the last generation the Charter has fundamentally changed the relationship between government and citizens. Canadians have increasingly come to see themselves as “rights holders” and, in the words of Canada’s chief justice, the Charter has been “absorbed into the national imagination”

The implementation of the Charter did not erase the need for provincial human rights regimes. Importantly, while the Charter is the yardstick against which the validity of government laws or actions are measured, that still leaves room for laws that are designed to ensure that discrimination, for example, does not operate in other contexts, such as employment, accommodation, or the provision of publicly available services.

The latter aspects of social life are governed by the principles and enforcement mechanisms of provincial and territorial human rights laws or codes. In addition, if the employer, for instance, is a so-called federal enterprise, such as a publicly owned corporation like Canada Post, then the federal Human Rights Act applies.

To a large extent, although each of the fourteen human rights codes (passed by ten provinces, three territories, and one federal government) are somewhat different, and they use different systems for investigation, adjudication, and enforcement, the underlying principles are the same. The system is driven by complaints. Either individuals lodge a complaint with the relevant commission that they have been discriminated against, or the commission itself can do this on the basis of its own investigation. If a complaint is found to be legitimate, the commission first generally tries to conciliate the difference between the complainant and the respondent. If conciliation fails, a tribunal may be formed or an adjudicator appointed to hear the case and make a binding decision. In addition to their administrative functions, human rights commissions also play a role in fostering human rights and educating the population about the importance of the principle of non-discrimination.

At the federal level, in addition to the commission, there is a separate and independent Human Rights Tribunal Panel, whose members are appointed by the federal cabinet. Unlike the courts, which are charged with applying the Charter and its various guarantees in relation to government laws, human rights tribunals (at all levels) are specialized tribunals—they are supposed to be administrative bodies, not courts, although they have some quasi-judicial functions. They are not bound by the same rigid rules of evidence that govern courts. Nor are human rights tribunals charged

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with striking down laws that offend the principle of equality: rather, those tribunals have extensive powers to fashion appropriate remedies for solving a dispute between private parties and for addressing the particular social problem that underlies a complaint of discrimination.

Although they have different sources in law, the fact is that courts enforcing s. 15 of the Charter (the guarantee of equality) and human rights tribunals applying human rights legislation (e.g., at a provincial level) have overlapping concerns in many areas. Both judges and tribunal members are charged with ensuring that the principle of equal concern and respect has real meaning in Canadian life.

Section 15(1) states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[Todos son iguales ante la ley y ésta se aplica igualmente a todos, y todos tienen derecho a la misma protección y al mismo beneficio de la ley, independiente de toda discriminación, especialmente de discriminación fundada en raza, origen nacional o étnico, color, religión, sexo, edad o deficiencias mentales o físicas.]

The foregoing list of prohibited grounds of discrimination in s. 15 was roughly the same as the lists contained in human rights legislation at the time the Charter was adopted (i.e., 1982). Therefore, one might have thought that the Charter would nicely mesh with human rights legislation.

Subsequent events showed some rifts. For example, soon after 1985, when the Charter’s equality provision came into effect, a particular section of Ontario’s human rights code was challenged on the grounds of sexual discrimination. That section barred sex discrimination complaints from being filed by sports organizations. A 12-year-old female athlete challenged this section as denying her the equality rights guaranteed under s. 15(1) of the Charter. The provincial court of appeal upheld the challenge and found that the section was of no force or effect.

Another illustration of how the Charter can determine the content of human rights legislation arose in the 1990s. The Supreme Court of Canada, in interpreting s. 15, determined that this section’s protection extends also to other grounds of discrimination, including sexual orientation. Thus gays and lesbians could invoke s. 15, even though sexuality was not specifical-

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ly mentioned among the Charter grounds\(^{11}\). Once this step (to introduce analogous grounds) was taken in the judicial construction of s. 15, the issue arose whether human rights legislation should also be read as including, e.g., sexual orientation. The argument made by many provinces was that their legislative regimes, including the range of prohibited grounds of discrimination, were intended to be exhaustive. In the late 1990s, however, the Supreme Court of Canada rejected that argument and held that, in a case of alleged discrimination against a gay college teacher in Alberta, the province’s human rights laws should be read “as if” sexual orientation was a prohibited ground\(^{12}\). In the result, the college employing the instructor was found to have violated provincial human rights law when it terminated his employment after discovering that he was gay.

Thus, the Charter itself has been used to elaborate or modify the types of protection that human rights codes can offer. These codes are subject to the “supreme law of the country,” i.e., the Canadian Constitution, and interpretation of what equality requires under the Charter can affect the contents and the work of human rights regimes.

Earlier I pointed out that a major feature to keep in mind when comparing Canadian human rights laws to the Charter is that the latter’s guarantees are not supposed to apply to the private actions of individuals or corporations\(^{13}\). The focus of Charter litigation is on the relations between governments and citizens. The judicial extension of the Charter to require human rights codes to include analogous grounds, however, demonstrates how Charter values or principles inform human rights work, even in the so-called private sphere.

In addition, it should be noted that a Charter challenge gives rise to legal proceedings in the form of a motion before a court (all courts at all levels in Canada are empowered to consider allegations that a particular law or government action has violated the Charter —there is no separate, specialized Constitutional Court). The parties to a Charter action thus incur legal fees and costs in order to pursue or defend these proceedings. Typically a Charter issue is adjudicated on a preliminary or interlocutory basis, with lawyers for the challenger bearing the onus of showing that there was a Charter violation. If this is established on the evidence, then the onus shifts to the defenders of the law (usually the government that enacted the measure) to show on balance that the law is nevertheless supportable by


reference to “reasonable limits” as set out in s. 1 of the Charter. To assess whether a violation is justified, the courts must resort to a complex balancing test to weigh the various policy interests of the government against the importance of the Charter right which has been breached.

Human rights tribunals similarly deploy balancing tests when applying human rights legislation. In this context, the tribunal is not trying to determine the reasonable limits of government action. Rather, the tribunal tries to determine, for example, whether that legislation allows for a bona fide occupational requirement or justification as a defence to what would otherwise be a discriminatory practice in employment. To illustrate this, consider the case of the requirement (under provincial law), that workers at a construction site must wear a hard hat. One of the workers, a Sikh, complains of discrimination on the basis of religion because this requirement means that he cannot wear the headgear required by his own religious convictions. Is the compulsory hard hat a bona fide occupational requirement because, even though the requirement might be discriminatory, concerns for worker health and safety outweigh the rights infringement? Human rights commissions in Canada have reached precisely this conclusion.

But it is important to note that the whole point of human rights codes is to provide a self-contained mechanism that will be resolve disputes by the competent commission or tribunal: in other words, to provide an alternative to going to court. In a leading case from 1981, the Supreme Court of Canada declared that the comprehensiveness of human rights legislation, with both its administrative and its adjudicative aspects indicated a clear legislative intention to restrict the enforcement of the codes’ prohibitions to those agencies created by the legislation itself—no supplementary enforcement responsibility devolves on the courts. Moreover, unlike legal proceedings, the initiation of a complaint under human rights legislation does not necessarily involve legal or administrative fees.

Finally, the courts working with the Charter have the power to declare

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14 Section 1 of the Charter states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”


17 See Bhaduria v. Board of Governors of Seneca College, [1981] 2 S.C.R. 183. This decision created the great stumbling block to civil actions in the courts that might seek the award of monetary damages for the violation of a plaintiff’s civil rights.
invalid (in whole or in part) a law that violates a Charter right or freedom. As noted above, the basis of this power is s. 52 of the Constitution Act, 1982. Individuals or groups who have established that their rights have been infringed can apply to the courts for a remedy under s. 24(1) of the Charter, which provides that anyone whose rights or freedoms have been infringed obtain an “appropriate and just” remedy. Since human rights complaints arise out of private actions or instances of discrimination, human rights tribunals are not charged with the power to strike down laws. Rather, human rights legislation confers broad remedial powers on the tribunals, but they are limited to making orders only as specifically provided in that legislation.

So far, it would be fair to say that, while the Charter is part of Canada’s constitution, human rights regimes represent a subordinate type of law. The Supreme Court of Canada has nevertheless tried to emphasize that human rights legislation is not so “ordinary” and that it can be interpreted to override other legislation. The Court has stated that, “according to rules of construction no broader meaning can be given” to the Ontario Human Rights Code “than the narrowest interpretation of the words employed.” But in human rights legislation, the Court recognized “the special nature and purpose of the enactment” and gave to it “an interpretation which will also advance its broad purposes.” To this extent, then, the Court has been willing to acknowledge that human rights legislation is quasi-constitutional and can override other legislation.

IV. FEDERAL REGIME

The Canadian Human Rights Act came into force in 1978. The federal government was a late adopter. It enacted this law only after all the provinces had previously set up human rights commissions. The federal regime applies to people working for the federal government or for a private company regulated by the federal government. It also applies to anyone who receives goods and services from any of those sectors. Thus, all federal government departments and all Crown corporations, such as the CBC, are

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18 Section 24(1) states: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” [In Spanish: “Toda persona, víctima de violación o de negación de los derechos o libertades que le son garantizados por la presente Carta, puede dirigirse a un tribunal competente para obtener la reparación que el tribunal considere conveniente y justa, habida cuenta de las circunstancias.”]

required to adhere to the Canadian Human Rights Act. Private companies, such as railroads, banks, national airlines, telephone companies, and radio or television stations must also comply with the Act.

If a person has a disability and a bank or a post office is not accessible (e.g., no ramp is provided for a customer who is bound to a wheelchair), then a complaint can be filed with the federal human rights commission. If a complaint of discrimination is lodged against the Royal Canadian Mounted Police or the Canadian military, this too must be directed at the federal human rights commission.

V. PROVINCIAL RIGHTS PROTECTION SCHEMES

Each province and territory has its own human rights regime, usually a statute called a Code or an Act. In Quebec, the instrument used is entitled a Charter. These cover organizations not included under the federal legislation, such as

- schools,
- universities,
- retail stores,
- restaurants, and
- places of manufacture.

Provincial human rights laws also prohibit discrimination in housing: a landlord cannot refuse to rent an apartment to someone because of that person’s race or religion. Thus, a complaint involving a school board, city or town government, or membership in a labour union or a profession regulated by the province should all be filed with the provincial human rights commission.

VI. WHAT IS AND IS NOT COVERED BY HUMAN RIGHTS LEGISLATION

In what circumstances might a complaint of an act of discrimination not be illegal? Consider the case of a potential employee, who is not hired because the employer disliked the earring worn by the job applicant an eyebrow. This might arguably be a discriminatory act, but is it illegal? Which prohibited ground is involved? If no such grounds are implicated, then the complainant is out of luck and a human rights commission would have no jurisdiction to take action.

Consider next the complaint made against Canada’s national air carriers (including Air Canada and WestJet) over those companies’ policies that have required obese passengers, who found it impossible or undignified to fit into a regular-sized seat, to purchase (at full price) a second, adjacent seat. Is this a type of discrimination prohibited by Canadian human rights
legislation and should the relevant tribunal order the airlines to change their policies? A recent decision from the federal National Transportation Agency has forced a change in Canada’s domestic airlines’ standard practices.

First, why the National Transportation Agency (NTA)? Why not the Canadian Human Rights Commission? As it turns out, the NTA has specific jurisdiction, because part of its statutory mandate is to intervene “when rates and conditions constitute an undue obstacle to the movement of goods and the mobility of persons, including those with disabilities”\textsuperscript{20}.

Under NTA guidelines, complainants (or “applicants”) must establish that there is an obstacle to the mobility of a person with a disability in the federal transportation network. The onus of proof then shifts to the respondent transportation service provider to prove that: the obstacle is not undue; and that the service provider has provided reasonable accommodation up to the point of undue hardship. In this context, “undue hardship” means that a service provider must show that it has determined there are no reasonable alternatives to better accommodate the person with a disability affected by the obstacle and that there are constraints that make the removal of the obstacle unreasonable, impracticable, or in some cases, impossible.

Several applications were made, starting in 2002, to the NTA by wheelchair-bound travellers, who objected to the practice of public carriers charging a disabled person for more than one ticket. There was also a complaint by a traveller who required a personal attendant to travel with him. And finally, the complaint was joined by a civil liberties lawyer from Alberta, who argued that her having to pay for more than one ticket, because of her obesity, was discrimination and contrary to human rights of accessibility and mobility.

The case was very slow in reaching resolution. It was complex, requiring extensive written pleadings, hearings, and expert evidence. The proceedings were stayed for 18 months while Air Canada completed a significant corporate restructuring, and adjourned for ten months to address delays in the filing of expert reports. The Agency also held four weeks of public hearings in 2005 and 2006 and the last evidence was filed in August, 2007.

In March, 2007, the Supreme Court of Canada confirmed in a decision called Council of Canadians with Disabilities v. Via Rail Canada Inc.,\textsuperscript{21} that the accessible-transportation provisions of the Canada Transportation Act are, in essence, human rights legislation. The Supreme Court also found that principles of the Canadian Human Rights Act must be applied by the

\textsuperscript{20} See Canada Transportation Act, S.C. 1996, c. 10.
\textsuperscript{21} [2007] 1 S.C.R. 650.
NTA when it identifies and remedies undue obstacles, including the principle of reasonable accommodation.

Moreover, in an earlier decision, the Federal Court of Appeal had held that a person who is obese may be disabled for purposes of air travel if unable to fit in an airline seat22.

Finally, in January, 2008, the NTA brought all these strands of law together and handed down its decision23. The tribunal ordered Canada’s domestic airlines to adopt a one person one fare policy for persons with severe disabilities who travel within Canada by air. The airlines were given one year to implement the policy. This means that, contrary to their former practices, the airlines may not charge more than one fare for persons with disabilities who:

- are accompanied by an attendant for their personal care or safety in flight, or
- require additional seating for themselves, including those determined to be functionally disabled by obesity for purposes of air travel.

Note that the tribunal made it clear that the decision does not apply to:

(a) persons with disabilities or others who prefer to travel with a companion for personal reasons; (b) persons with disabilities who require a personal care attendant at destination, but not in flight; and (c) persons who are obese, but not disabled as a result of their obesity.

The upshot of the tribunal’s decision is that the airlines have to develop screening mechanisms to determine eligibility under the one-person-one-fare policy. Obviously it would be undignified, in the case of obese travelers, to start measuring them in the ticket-purchase area. In the case of one U.S. air carrier, Southwest Airlines, the test is a simple, functional one: can the traveller lower the regular seat’s armrest24.

VII. COMPLAINTS ABOUT THE HUMAN RIGHTS ENFORCEMENT PROCESS

Earlier I noted that, in dealing with cases of alleged discrimination, hu-

23 For the text of the tribunal’s decision, see the NTA website at www.cta otc.gc.ca, which provides access to Decision No. 6 AT A 2008.
24 Traveling via public carriers seems to bring out the legal crusader in many of us and it bears mentioning that: (a) in September 2008, the federal government in Canada adopted an airline passengers’ bill of rights (nicknamed “flight lights”); and (b) there are plans afoot in the province of British Columbia to legislate a bill of rights for taxi passengers, among the provisions of which are requirements that the driver be courteous and provide a “quiet atmosphere, upon request.”
human rights commissions depend on a complaint-driven process. More recently, there have been some complaints about the cost, efficiency, and focus of the work of those commissions. The traditional process of waiting for a citizen to complain about an act of bigotry or discrimination put the onus on the individual to bring forward an allegation. Typically, to gather the evidence and marshal arguments, that complainant will require help from a lawyer, even though the system as originally envisioned did not contemplate the need for the complainant to obtain legal advice. Especially now that the Charter throws a long shadow over human rights legislation, legal advice would be prudent.

Second, an investigation can take months, if not years, and this exacts an emotional toll from the complainant.

Third, as the volume of complaints has grown, partly because human rights commissions have succeeded in educating the public about the importance of non-discrimination, those commissions have become heavily burdened by backlogs of cases.

In addition, after more than a half-century of experience, the human rights enforcement process is still predicated on the idea that discrimination is best approached on an individualized, case-by-case basis. The process fails to address adequately those more pervasive, and more damaging, forms of systemic patterns and practices. From this point of view, human rights commissions need to overhaul their own approach and seek the powers to investigate social practices more broadly and to impose structural, rather than individualized, remedies.

Fifth, the framework of application for Canada’s human rights regimes has not significantly changed since the 1960s. New prohibited grounds of discrimination have been added, but human rights legislation continues to be limited to the workplace, to public services, and to the rental of housing. The next generation of social rights that have been widely discussed at the international level have not achieved recognition in the domestic Canadian context. Human rights legislation still does not contain guarantees to such basic human needs as food, shelter, social security, and health care.

Finally, a few widely publicized cases from the past two years have brought attention to those specific provisions of human rights legislation dealing with hate propaganda. One of these cases arose out of the republication, by a now-defunct magazine in western Canada, of the Danish cartoons that stirred up so much controversy because of the depiction of the

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25 For a summary of (and commentary about) this and other complaints that have recently been fielded by the Alberta Human Rights Commission, see Suzy Thompson, “Our Human Rights Commission” at:  
http://www.albertaviews.ab.ca/Thompson09.html
prophet Mohammed\textsuperscript{28}. The republication prompted a complaint to the Alberta human rights commission that the republished material offended the member of a minority group and exposed him to hatred, contrary to s. 3 of the province’s \textit{Human Rights, Citizenship and Multiculturalism Act}\textsuperscript{28}. Although the Alberta commission dismissed the complaint after an investigation, the case became notorious for indicating the potential reach of the human rights commissions over published material. Section 3 of the Alberta statute and similar provisions in human rights legislation in other provinces have chilled civil libertarians, who find it strange that public statements that would not be illegal under criminal law, nor would attract civil liability for defamation, might nevertheless be found by a human rights tribunal to constitute a violation of human rights. In the event of such violation, the tribunal could order damages to be paid, or even a public apology by the respondent. Journalists\textsuperscript{27}, as well as the Canadian Civil Liberties Association, have called this a “disturbing trend” that represents a significant threat to freedom of expression in Canada\textsuperscript{28}.

\textbf{VIII. CHANGES IN BUREAUCRATIC PROCESSES}

The lead to develop a more efficient and effective system of human rights protection in Canada is being taken by the province of Ontario. Complaints were being made almost twenty years ago about the severe backlog in resolving human rights disputes. Earlier this decade, the Ontario government began to study the problems; to engage in public consultation; and to overhaul the existing system. Previously, a complaint was filed with the Human Rights Commission. The Commission itself had to investigate the complaint; decide whether to pursue it; try a form of conciliation to resolve the dispute, if possible; and if that did not work, then refer the case to the human rights tribunal—which would often start the process of gathering evidence all over again.

\textsuperscript{28} The type of human rights provision in question is reflected in s. 13(1) of the \textit{Canadian Human Rights Act}, which states: It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

\textsuperscript{27} For the text of a 22 February 2008 news release from the National Association of Journalists, see: \url{http://www.newswire.ca/en/releases/archive/February2008/22/c5147.html}

\textsuperscript{28} See Alexandra Zabjek, “Defence of free speech must be absolute: advocate” (28 October 2008), available online at: \url{http://www2.canada.com/edmontonjournal/news/cityplus/story.html?id=448e1994_5d1d_4808_abca_aa7b1f096f66}.
To remove this duplication and to give complainants more control over their own cases, amendments to the Ontario Human Rights Code came into effect in 2008. The new system will still feature the Human Rights Commission, though its work will now focus on promoting a culture of respect for human rights in the province, through educational programs, policy research, monitoring, and analysis. The Commission is supposed to be freer to examine the extent of systemic discrimination, rather than to concentrate on discrete instances of discriminatory conduct. Claims of discrimination will now be filed directly with the Human Rights Tribunal, which will employ a battery of adjudicators, who will operate under procedures designed to make the process more open, accessible, timely, and effective. A third and new branch of the administration will be the Human Rights Legal Support Centre, which will help citizens with advice or, in some cases, actual legal representation. To contribute to the success of this new system, the Ontario government increased the Commission’s budget by 22% in 2007-08.

Other provinces are likely to follow the Ontario model. Alberta, for example, announced last week the appointment of a new chair of its human rights commission. In his first public statement, he pledged that his first priority was to improve the commission’s “credibility, profile, and effectiveness.” The cabinet minister responsible for the Alberta commission admitted on the same day that the system of investigation and enforcement is “somewhat broken.” Changes à la Ontario can probably be expected.

IX. CONCLUSION

If statistics indicate anything, then human rights culture is alive and thriving in Canada, though not as well-served as one could hope. Extrapolating from the data kept by the Ontario and Alberta commissions, there are approximately 300,000 inquiries registered each year at the commissions across the country. Roughly 10,000 formal complaints are filed, although the total number of staff investigators is lamentably small—no more than a hundred in total.

The job of investigation and adjudication has left the various commissions with less time and resources to study the underlying forms and causes of discrimination. Because the traditional model is supposed to lift the

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29 The new framework was enacted in 2006, though it did not come into force until two years late: see Human Rights Code Amendment Act, S.O. 2006.
complaint from the shoulders of the complainant, so that the commission takes carriage of the case, in fact complainants often feel that they are denied any meaningful role in the process. If the commission decides not to pursue the complaint, the original complainant might have little recourse to the courts. If the complainant wants to become more involved, then it is often advisable to hire lawyers, which defeats the idea that human rights processes were better than court-based litigation, because of fewer formalities and less cost.

Finally, although some provinces are moving towards revamping their human rights commissions, the focus remains on discrimination in the traditional areas of employment, provision of public services, and rental housing. There are no signs on the horizon that the federal or provincial governments in Canada are prepared to enlarge the scope of protection in line with new discourses in international humanitarian law. Social and economic rights of the poor and dispossessed, including importantly the rights of first nations people in Canada, remain beyond the ambitions of our traditional human rights regimes. One of the sore points that struck the United Nations Committee on Human Rights as particularly deplorable, was the specific exemption from the Canadian Human Rights Act of any discrimination, so long as it could be justified under Canada’s Indian Act. In one of the most important developments in Canadian human rights law in the past decade, that exemption was finally (and only recently) removed by Parliament. Although it has recently been argued in my own province of Alberta that a human rights commission is a luxury that should be dispensed with in hard economic times, in fact it is exactly in periods such as this that human rights protection is most needed: it is easy to discriminate in hiring, for example, when there is a large pool of candidates. In addition, we need to remind ourselves as the skies darken that hard times bring on hard attitudes. Human rights legislation is supposed to encapsulate what equal concern and respect requires, not only as evinced by government, but among ourselves.

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31 This was one of the criticisms made by the United Nations Human Rights Committee in its fifth periodic report on Canada, published in 2005.
32 Section 67 of the Canadian Human Rights Act, which created this exemption, was included in the Act from its inception in 1978, supposedly as a temporary measure, so that the federal government could in due course consult with aboriginal groups about changing the Indian Act.
33 Act to Amend the Canadian Human Rights Act, S.C. 2008, c. 30, s.1. This received royal assent on 18 June 2008.
TÍTULO
LA PROTECCIÓN DE LOS DERECHOS HUMANOS EN CANADÁ

SUMARIO

PALABRAS CLAVE
Derechos humanos; Canadá; Declaración de derechos; Carta canadiense de Derechos y Libertades; Legislación provincial de derechos humanos; Comisión de derechos humanos; No discriminación; Igualdad; Aplicación; Burocracia; Obligaciones internacionales.

RESUMEN
Los derechos humanos en Canadá no fueron protegidos directamente por la ley hasta después de la Segunda Guerra Mundial. Y todavía hoy, su protección es imperfecta. Al principio, varias provincias crearon códigos de derechos humanos, siendo adoptada la primera declaración de derechos nacional en 1960, aunque débil y no arraigada en la Constitución de Canadá. El artículo describe el impacto en el derecho de los derechos humanos, de la creación de la Carta Canadiense de Derechos y Libertades en 1982. Las leyes provinciales deben elaborarse satisfaciendo los estándares de la Carta. El autor analiza algunos casos recientes referidos a infracciones de derechos humanos, y describe asimismo la situación extraordinaria de los derechos humanos en Québec y los cambios acontecidos en algunas provincias para hacer más efectivo el cumplimiento de los derechos. El artículo concluye con controversias recientes sobre infracciones de derechos humanos a raíz de la detención en el extranjero de un ciudadano canadiense, y de los abusos posibles de los derechos de los presos en Afganistán.