

Implementing international human rights into domestic law & policy : The Canadian experience

Equality and non-discrimination

Training for Taiwanese officials
October 2012

Erin Brady and Laurie Sargent
Department of Justice Canada

Presentation Outline

- Equality and non-discrimination at international law
- How Canada implements the rights to equality and non-discrimination – General
- How Canada implements the rights to equality and non-discrimination – Case studies:
 - Exercise by persons with disabilities of their voting rights
 - Violence against women (sexual assault)– criminal procedure

Equality and non-discrimination at international law

Equality & Non-discrimination

Indifference is injustice's incubator;

It's not just what you stand for, it's what you stand up for; and

We must never forget how the world looks to those who are vulnerable.

Rosalie Abella, Supreme Court of Canada Justice, 2011 speech to Empire Club of Toronto



SPEAK UP STOP DISCRIMINATION

Equality and non-discrimination rights at international law - interpretation

- Equality and non-discrimination rights are set out in a number of human rights treaties.
- Treaty provisions are often quite general and sometimes ambiguous – they require interpretation in good faith and in accordance with their “ordinary meaning” in their context and in light of the treaty’s object and purpose.
- Where can we look for more guidance about what a treaty provision means?
 - Periodic reports by States parties on how they’re implementing the provisions (may establish agreement of parties on proper interpretation);
 - Decisions of international or domestic courts interpreting the provision in question or a similar provision; also expert academic commentary;
 - General Comments of treaty bodies (e.g. HRC General Comments 3 and 18 on equality between men and women and non-discrimination) (non-binding) ;
 - Views of the HRC or CEDAW in individual communications (non-binding);
 - International declarations, resolutions, etc. and commentary of other UN expert mechanisms (e.g. UN Special Rapporteurs, etc.) (non-binding).

Equality & non-discrimination at international law

International Covenant on Civil and Political Rights (ICCPR)

- **Article 2(1)** – Obligation to respect and to ensure to all individuals the rights recognized in the Covenant, without distinction of any kind including based on listed grounds.
- **Article 3** – Obligation to ensure the equal right of men and women to the enjoyment of all Covenant rights.
- **Article 26** – General recognition of right to equality of all persons before the law and to protection from discrimination. Obligation to prohibit discrimination by law and guarantee to all persons “equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- **Other references to equality:**
 - Before courts and tribunals (Art. 14(1))
 - Equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution (Art. 23(4))
 - Universal and equal suffrage (voting rights) and equal access to public service(Art. 25)

Equality & non-discrimination at international law

International Covenant on Economic Social and Cultural Rights (ICESCR)

- **Article 2(2)** – Obligation to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- **Article 3** – Obligation ensure the equal right of men and women to the enjoyment of all ESC rights.
- **Article 7(1)** – Work and employment - Equal remuneration for work of equal value “without distinction of any kind”; women are also guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

Equality & non-discrimination at international law

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

- A non-discrimination treaty that obliges states to pursue a general “**policy of eliminating discrimination against women**” in all aspects of life, including by:
 - changing laws to prohibit discrimination against women;
 - ensuring protection of women’s equality rights through competent national authorities;
 - ensuring public authorities do not engage in discrimination against women;
 - Prohibiting discrimination in the “private sector” (by any “person, organization or enterprise”); and
 - amending criminal laws which “constitute discrimination against women”.
- **Article 1 – Definition of discrimination** : any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Equality & non-discrimination at international law

But what does “discrimination” mean? Discrimination involves a difference in treatment (distinction, exclusion or restriction):

- **May be direct** (e.g. law prohibits persons under 18 from voting) or **indirect** (e.g. lack of wheelchair access to polling stations for persons with mobility impairments) – includes a failure to accommodate diversity of the human condition (e.g. religion, disability, sex, etc.).
- **Based on a prohibited ground:** race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Note: *“Other status” means the list of prohibited grounds is not closed. “Other status” may include age, disability, citizenship, marital status and sexual orientation.*
- **That impairs the equal enjoyment of rights and freedoms** (e.g. certain individuals are denied the opportunity to vote; access to public education for certain groups is impaired; legal or other barriers means that certain groups do not have equal access to employment opportunities or equal conditions of employment...).

Equality & non-discrimination at international law

- Distinctions may nevertheless be permitted if based on **reasonable and objective criteria**, and if the aim is to achieve a purpose which is compatible with the ICCPR (or whatever instrument has been relied upon). (See HRC General Comment 18)
- The Human Rights Committee has found a number of distinctions based on listed grounds to be based on reasonable and objective criteria (e.g. mandatory retirement at age 60 for pilots; different benefits for married spouses as opposed to unmarried cohabiting spouses) and therefore not discriminatory. However, the Committee has emphasized that this is a fact-specific and contextual inquiry, which takes into account culture, tradition and evolving social norms and values in the country in question.

How Canada implements
the rights to equality
and non-discrimination –
General

How Canada approaches implementation of the rights to equality and non-discrimination - General

Constitutional protections:

- **Charter section 15** – Constitutional guarantee of equality rights and non-discrimination. Prohibited grounds of discrimination include: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability). Section 15 permits targeted “ameliorative programs” (affirmative action) aimed at improving the situation of disadvantaged groups. The government may justify a limit on equality rights where it pursued an important objective in a proportional manner (section 1).
- **Charter section 28** – “Notwithstanding anything in the Charter, all rights and freedoms guaranteed in the Charter are guaranteed equally to male and female persons.”



How Canada approaches implementation of the rights to equality and non-discrimination - General

Legislative protections:

- **Equality and anti-discrimination legislation** (e.g. *Canadian Human Rights Act; provincial human rights codes or laws*) – prohibits discrimination on listed grounds by employers and service providers, in public and private sectors.
- A distinction in treatment is not discriminatory if it was adopted for a rational purpose, in good faith, and is reasonably necessary for the purpose it was adopted.
- The justification analysis requires employers or service providers to show they have met their **duty to accommodate**, meaning they have taken measures to eliminate disadvantages to employees, prospective employees or clients that result from a rule, practice or physical barrier that has or may have an adverse impact on protected individuals or groups.



How Canada approaches implementation of the rights to equality and non-discrimination - General

Legislative protections, cont'd

- Anti-discrimination laws are generally enforced through the independent commissions and tribunals established under these laws. Individuals who claim to be victims of discrimination may file complaints with the appropriate commission or tribunal. If necessary after investigation and/or other forms of dispute resolution, a board of inquiry or human rights tribunal determines the legal merits of the complaint.
- If a discriminatory practice is found to have occurred, the tribunal will make an appropriate order (enforceable through the courts). The person who has engaged in the discriminatory practice may be ordered to cease such practice, to take measures to reverse the effects of discrimination, such as rehiring the victim, to pay compensation or to adopt an affirmative action program. Decisions of boards of inquiry or tribunals are subject to judicial review.
- **Employment equity laws** (e.g. federal *Employment Equity Act*) – promote representation in the federal public sector and federally-regulated private sector employers of certain historically disadvantaged groups (women, “visible minorities”, Aboriginal persons and persons with disabilities). They require employers to report on plans and achievement of goals.



How Canada approaches implementation of the rights to equality and non-discrimination - General

Other implementation measures:

- **Social and economic policies** – Many government programs are aimed at improving the economic conditions of vulnerable groups (e.g. employment insurance benefits including maternity (up to 15 weeks) and parental (up to 35 weeks) leave; tax credits for persons with disabilities; training and other programs aimed at increasing employment and business opportunities for Aboriginal people; funding for shelters for women who are victims of domestic violence; etc.)
- **Gender-based analysis** of policies and programs – Status of Women Canada and others have created tools to help officials to design policies and programs to take into account the different perspectives and experiences of women and men. There is also increasing use of a “diversity lens” for policy development that takes into account the perspectives of groups who may experience discrimination in society.
- **Public education** – schools teach children about the importance of respect for diversity and equality; information about legal rights, benefits and programs is made available on government websites, through human rights commissions, and by a variety of NGOs...



How Canada approaches implementation of the rights to equality and non-discrimination - General

- **Canadian jurisprudence:** Canadian courts have developed a concept of “substantive” or “real” equality (as opposed to formal equality) that offers at least as strong protections as international law. While equality often means treating everyone the same, it is recognized that sometimes it requires accommodating differences to ensure equal protection and benefit of the law:

The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration...

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143



How Canada implements the
rights to equality and non-
discrimination – Case studies

How Canada implements the rights to equality and non-discrimination – Case studies

Equality and non-discrimination rights of persons with disabilities:

FACTS: *Mr. H., who uses a mobility aid (either a walker or wheelchair), went to vote at his designated polling station (an old church) in a federal election. When he got there, Mr. H. took the ramp to one of the church doors. The door was locked. When he went to another door, he found (after opening the door with difficulty) a set of stairs down to where voting was taking place. He called out for assistance, and an official came and took his walker down the stairs. Mr. H. then went down the stairs on “the seat of his pants”. He was able to vote, but was very upset by the experience. He wrote to Elections Canada (the agency responsible for administering the election) explaining the situation. When he didn’t get a satisfactory response, and when basically the same thing happened during the next election, Mr. H. brought a complaint of discrimination in the provision of services based on the Canadian Human Rights Act to the Canadian Human Rights Commission.*



How Canada implements the rights to equality and non-discrimination – Case studies

QUESTIONS:

- What is the differential treatment in question?
- On what prohibited ground(s) is it based?
- Does it impair the exercise of a right or freedom? Which one? What about the fact that Mr. H. actually managed to vote, despite the obstacles?
- What should Elections Canada have done differently to respect Mr. H.'s equality rights?
- In what circumstances, if any, could Elections Canada justify limits on equal access to voting locations or methods?
- What are the relevant provisions of international human rights law?
- What other issues arise in the context of voting by persons with disabilities, for example relating to visual impairments, hearing impairments, cognitive impairments, etc.?
- What does this example tell us about the need to take the situation of persons with disabilities into account in other areas of government activity?

How Canada implements the rights to equality and non-discrimination – Case studies

OUTCOME:

- The Canadian Human Rights Tribunal ordered by way of remedy that Mr. H. Be paid CDN \$10,000 for “pain and suffering, and made a number of systemic orders, including requiring Elections Canada to take certain steps to assess and ensure the accessibility of polling stations, to train its staff on accessibility issues and to develop a plan for “greater consultation with persons with disabilities” about accessibility issues.
- Elections Canada has made great efforts to improve its accessibility policies to ensure access for Canadian voters with a variety of disabilities to federal elections and has many best practices to share in this regard:
<http://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90505&lang=e>.
- Relevant international law provisions include: ICCPR Articles 2, 26, 25(b); see also the UN *Convention on the Rights of Persons with Disabilities*, Articles 5 and 29.

How Canada implements the rights to equality and non-discrimination – Case studies

“The Charter is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment. What s. 15 of the Charter can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied.”

Granovsky v. Canada (Minister of Employment and Immigration), 2000 SCC 28

How Canada implements the rights to equality and non-discrimination – Case studies

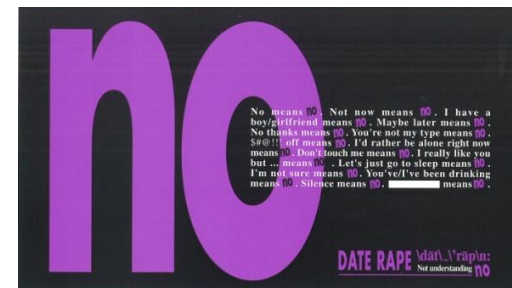
Women's equality and non-discrimination rights:

“Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights.”

R. v. Ewanchuk, [1999] 1 S.C.R. 330, per L'Heureux-Dubé J.

In 2009, about 4% of women over the age of 15 in Canada reported having been a victim of a sexual assault. While rates of criminal victimization of males and females are about equal, the types of crimes they experience are different. Women and girls are the most common victims of sexual assault and “other sexual violations” (representing 87% and 80% of incidents, respectively)...

Women in Canada: A Gender-based Statistical Report, 2011



How Canada implements the rights to equality and non-discrimination – Case studies

Equality and non-discrimination rights of women:

FACTS: *Ms. S. reported to the police that she was sexually assaulted by her former boyfriend and work colleague. She stated that he went with her to her apartment one evening on the pretext that she owed him some money. Once inside, he forced her to have sexual relations, hitting her several times after she refused his advances. Medical evidence of injuries arising from the sexual assault was inconclusive (Ms. S. didn't go to the doctor until 5 days after the incident). However, police and the Crown decided to press charges because Ms. S. told her version of events convincingly and consistently.*

At trial, the accused sought to lead evidence about Ms. S.'s previous sexual relations with him and with other men to raise a doubt as to whether she consented to the sexual activity in question. The Crown opposed the use of this evidence on the basis that it was being advanced solely to undermine her credibility by virtue of her prior sexual experience. The trial judge allowed the accused to lead the evidence and to cross-examine Ms. S. about her prior sexual activity. Ms. S. became very emotional and cried a lot during cross-examination, in which she admitted to various previous sexual relations. However, her testimony about refusing to consent to the accused's advances on the night in question remained consistent. The accused was acquitted by the jury.

How Canada implements the rights to equality and non-discrimination – Case studies

QUESTIONS:

- What is the differential treatment in question?
- On what prohibited ground(s) is it based?
- Does it impair the exercise of a right or freedom? Which one?
- Are there competing human rights at stake? If yes, how should they be balanced?
- Would there be an equality rights issue if the police had refused to investigate Ms. S.'s complaint? Or if the prosecutor had refused to charge the accused based on the inconclusive medical evidence available?
- What are the relevant provisions of international human rights law?
- What does this example tell us about the need to take the particular experience of women into account in the development of the criminal law? And other areas of the law or policy?
- Are there other equality/diversity issues that should be taken into account (e.g. intersecting grounds of discrimination)?

How Canada implements the rights to equality and non-discrimination – Case studies

OUTCOME:

- The trial judge's ruling in the fact scenario is very unlikely to occur in Canada today.
- Section 276 of Canada's *Criminal Code* (first enacted in the 1980s and amended in 1992) prohibits an accused from leading evidence about a complainant's prior sexual history when it is used to support an inference that the person is more likely to have consented to the alleged assault or that she is less credible as a witness by virtue of her prior sexual experience.
- Parliament (based in part on input from women's organizations) recognized that the use of this type of evidence was making sexual assault victims reluctant to press charges. It was also leading judges and juries to rely on "myths and stereotypes" about how women behave, rather than actual facts about the case, in determining whether an accused was guilty.
- Canadian law recognizes the need to balance the accused's right to a fair trial – including to full answer and defence – and the complainant's rights to equality and privacy. Pursuant to s. 276, trial judges may admit evidence of sexual activity only for certain limited purposes, after a separate hearing to determine whether the evidence relates to one or more specific incidents, is relevant to an issue at trial and it has significant probative value that is not outweighed by prejudice to the administration of justice.

How Canada implements the rights to equality and non-discrimination – Case studies

OUTCOME, cont'd:

- The *Criminal Code* also allows the judge to order testimonial aids to assist vulnerable victims and witnesses in providing their testimony in criminal court. Testimonial aids include: allowing witnesses to testify from outside of the courtroom by closed-circuit television or behind a screen or other device that separates the witness from the accused; and allowing a support person, chosen by the witness, to be present and close to the witness when testifying.
- Handbooks and protocols have been developed to help police and others to respond appropriately to allegations of sexual assault and domestic violence. See for example the resources available at: <http://www.phac-aspc.gc.ca/ncfv-cnivf/sources/fem/guides-details-eng.php>.
- Relevant international law provisions include: CEDAW Articles 2(d) and (f), 5(a); ICCPR Articles 2, 3, 7, 14 and 26. See also: United Nations Declaration on the Elimination of Violence against women.

Resources

- UN Human Rights Committee General Comments 18 and 32: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.
- UN Declaration on the Elimination of Violence against Women: <http://www.un.org/documents/ga/res/48/a48r104.htm>.
- Canada's reports to UN treaty bodies: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>.
- Canadian Human Rights Commission: <http://www.chrc-ccdp.ca/default-eng.aspx>.
- Canada's Federal Disability Reports: http://www.hrsdc.gc.ca/eng/disability_issues/reports/.
- Status of Women Canada "GBA+": <http://www.swc-cfc.gc.ca/pol/gba-acis/index-eng.html>.
- Women in Canada: A Gender-based Statistical Report, 2011: <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=89-503-XWE&lang=eng>.
- For more information on Canadian initiatives relating to domestic violence, see: <http://www.canada.justice.gc.ca/eng/pi/fv-vf/index.html>.
- For more information on Canadian initiatives relating to victims of crime, see: <http://www.canada.justice.gc.ca/eng/pi/pcvi-cpcv/pub2.html#crim>.