

Implementing International Human Rights into Domestic Law & Policy — the Canadian Experience

2012 年 10 月

October, 2012



TAIWAN FOUNDATION
for DEMOCRACY

財團法人臺灣民主基金會

CONTENTS

Agenda	III
Biography of the speakers.....	VII
Overview of Canada	1
Equality and non-discrimination.....	13
Right to culture and cultural diversity.....	27
Fundamental freedoms	44
Fair trial rights	55

國際人權法在國內法律與政策之落實-加拿大經驗談
“Implementing international human rights into domestic law & policy – the Canadian experience”

議程

Agenda

第 1 天（第 1 組） DAY 1 (Group 1)

地點：法務部 5 樓大禮堂

Venue： Auditorium, 5th floor, MOJ

101 年 10 月 16 日 星期二		Tuesday, October 16, 2012	
時 間 (Time)		主 題 (Topic)	
9:00am – 9:20am		報到 Registration	
9:20am – 9:30am		開幕致詞 Opening remarks	
9:30am – 10:45am		加拿大政治及法律制度之概述 Overview of Canada's political & legal system 加拿大落實國際人權條約方法之概述 Overview of Canada's approach to implementation of international human rights treaties 加拿大人權架構之概述 Overview of Canada's human rights framework	
10:45am – 11:00am		休息 Break	
11:00am – 12:15pm		平等權與反歧視權利之意義（公政公約、經社文公約及 CEDAW） Equality and non-discrimination Meaning of the rights (ICCPR, ICESCR, CEDAW)	
12:15pm – 1:30pm		午餐 Lunch	
1:30pm – 2:45pm		平等權與反歧視加拿大之落實方法－總論 Equality and non-discrimination Canada's approach to implementation – general	
2:45pm – 3:00pm		休息 Break	
3:00pm – 4:30pm		平等權與反歧視加拿大之落實方法－案例研究 Equality and non-discrimination • Canada's approach to implementation – case studies: ○ Persons with disabilities 身心障礙者 ○ Women 女性	
4:30pm – 4:45pm		本日重點總結 Summary of key highlights for the day	
4:45pm		結束 End of Day 1	

第 2 天 (第 2 組) DAY 2 (Group 2)

地點：法務部 5 樓大禮堂

Venue： Auditorium, 5th floor, MOJ

101 年 10 月 17 日 星期三		Wednesday, October 17, 2012	
時 間 (Time)	主 題 (Topic)		
9:00am—9:30am	報到 Registration		
9:30am—10:45am	加拿大政治及法律制度之概述 Overview of Canada's political & legal system 加拿大落實國際人權條約方法之概述 Overview of Canada's approach to implementation of international human rights treaties 加拿大人權架構之概述 Overview of Canada's human rights framework		
10:45am—11:00am	休息 Break		
11:00am—12:15pm	文化權及文化多樣性權利之意義（公政公約及經社文公約） Right to culture and cultural diversity • Meaning of the rights (ICCPR, ICESCR)		
12:15pm—1:30pm	午餐 Lunch		
1:30pm—2:45pm	文化權及文化多樣性加拿大之落實方法－總論 Right to culture and cultural diversity • Canada's approach to implementation – general		
2:45pm—3:00pm	休息 Break		
3:00pm—4:30pm	文化權及文化多樣性加拿大之落實方法－案例研究 Right to culture and cultural diversity • Canada's approach to implementation – case studies: <ul style="list-style-type: none">○ Migrant workers & immigrants 移工及移民○ Aboriginal peoples 原住民族○ Accessibility for persons with disabilities 身心障礙者之可近性		
4:30pm—4:45pm	本日重點總結 Summary of key highlights for the day		
4:45pm	結束 End of Day 2		

第 3 天 (第 3 組) DAY 3 (Group 3)

地點：法務部 5 樓大禮堂

Venue： Auditorium, 5th floor, MOJ

101 年 10 月 18 日星期四 Thursday, October 18, 2012	
時 間 (Time)	主 題 (Topic)
9:00am – 9:30am	報到 Registration
9:30am – 10:45am	加拿大政治及法律制度之概述 Overview of Canada's political & legal system 加拿大落實國際人權條約方法之概述 Overview of Canada's approach to implementation of international human rights treaties 加拿大人權架構之概述 Overview of Canada's human rights framework
10:45am – 11:00am	休息 Break
11:00am – 12:30pm	基本自由權之意義 (公政公約) Fundamental freedoms • Meaning of the rights (ICCPR) 基本自由權加拿大之落實方法－案例研究 • Canada's approach to implementation – case studies: <ul style="list-style-type: none">○ freedom of expression 發表自由○ freedom of peaceful assembly 和平集會自由
12:30pm – 1:45pm	午餐 Lunch
1:45pm – 3:00pm	公平審判權利之意義 (公政公約) Fair trial rights • Meaning of the rights (ICCPR) 公平審判權利加拿大之落實方法-總論 • Canada's approach to implementation –general:
3:00pm – 3:15pm	休息 Break
3:15pm – 4:45pm	公平審判權利加拿大之落實方法-總論 (續) Fair trial rights • Canada's approach to implementation –general(cont'd): <ul style="list-style-type: none">○ Right to an interpreter 享有通譯之權利
4:45pm – 5:00pm	本日重點總結 Summary of key highlights for the day
5:00pm	結束 End of Day 3

主講人簡歷

加拿大司法部資深法律顧問艾琳·布雷迪(Erin Brady)及羅莉·莎簡特(Laurie Sargent)之個人簡歷。



艾琳·布雷迪是加拿大司法部人權部門的資深法律顧問，她從西元 2000 年起即在司法部工作，並於 2001 年取得安大略省律師執業資格。在進入司法部之前的 1999 至 2000 年間，艾琳是加拿大最高法院院長拉馬(Lamer)及法官勒貝爾(LeBel)的助理，在 1997 至 1998 年間，則擔任聯邦上訴法院法官史東(Stone)的助理。她的學歷包括：麥基爾大學英國文學學士，達爾豪斯大學法學

士及劍橋大學法學碩士，專攻國際人權法與比較人權法。艾琳的主要業務範圍包括民主的權利、宗教與自由表達權、平等權及國際人權法。



羅莉·莎簡特是加拿大司法部人權部門的代理資深法律顧問，她從西元 2002 年起即在司法部工作，羅莉於 1998 年自麥基爾大學國家計劃畢業，自 2001 年起加入安大略省律師監管會。在麥克米蘭賓區 (McMillan Binch) 律師事務所的多倫多分所服務之後，羅莉於 1999 至 2000 年間擔任最高法院法官勒赫瑞斯·杜貝 (L'Heureux-Dubé) 的助理。之後她擔任世界銀行、瓜

地馬拉最高法院及加拿大國際開發署在司法改革與人權方面問題的顧問。羅莉的主要業務範圍包括：平等權、加拿大憲章第 2(b)條表現自由、第 7 條生命權、人身自由與安全，以及國際人權法，特別是聯合國身心障礙者權利公約。

身為司法部人權部門的資深法律顧問，羅莉及艾琳之工作職掌如下：就國內及國際人權法在立法及政策之發展以及在政府被告之案件對加拿大政府提出建議；對加拿大政府官員就國內及國際人權義務進行訓練；參與加拿大就人權之落實情形向聯合國所準備的報告及加以說明；對於聯合國條約監督機構及美洲人權委員會受理之個人申訴案件為加拿大作答辯之準備；就聯合國及美洲國家組織在人權決議與新條約之磋商方面擔任加拿大之顧問及代

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

Overview of Canada

**Training for Taiwanese officials
October 2012**

Erin Brady and Laurie Sargent
Department of Justice Canada

Presentation Outline

- Canada's political and legal system
- Canada's approach to implementing international human rights treaties
- Overview of Canada's human rights framework

Canada's Political System and Type of Government

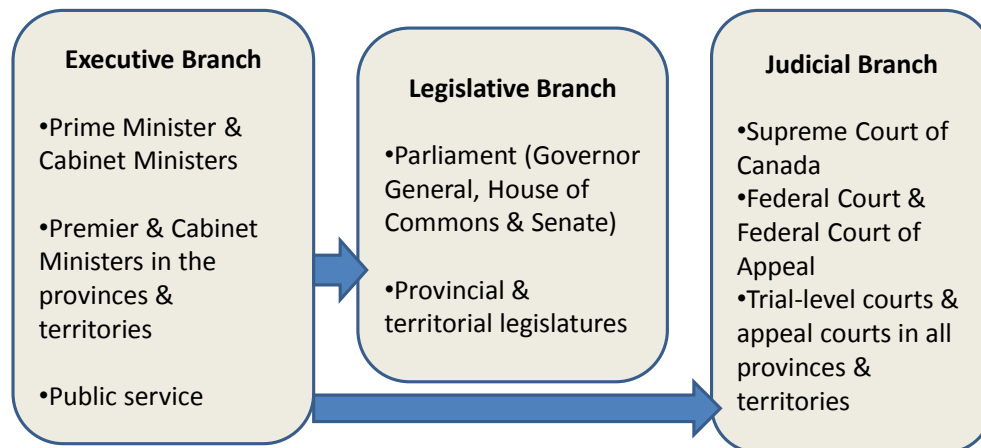
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Canada's Political System

- A constitutional monarchy
- A federal system of government
 - 10 provinces, 3 territories, 1 federal government
 - Canada's constitution divides legislative jurisdiction between the federal and provincial governments
 - Jurisdiction over human rights is shared
- A parliamentary system based on the British model
- A representative democracy

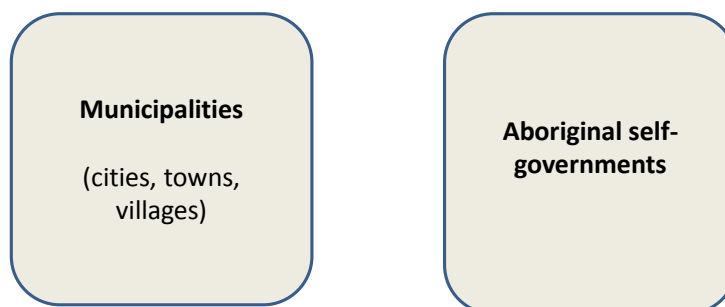
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Three branches of government in Canada



5

Other government bodies in Canada



6

Canada's Legal System

7

Canada's Legal System

➤ Derived from various European systems, including:

- English **common law** (judge-made law) and **statutory law** (legislation)
- In the province of Quebec, **civil law** based on the French Napoleonic Code

8

How is legislation made in Canada?

- A Minister asks officials to develop a policy proposal.
- Officials develop policy in consultation with legal counsel in the Department of Justice, who review it for consistency with human rights standards, and other interested departments. External consultations with interested parties may also occur.
- The proposal is submitted to Cabinet for approval. In the document submitted for Cabinet approval, human rights issues associated with the proposal must be identified.
- Legal counsel in the Department of Justice draft the legislation (a bill), and also review it for consistency with human rights.

9

How is legislation made in Canada?

- A Minister introduces the bill in the House of Commons, where it is debated and examined by a committee. The committee may invite experts and interested stakeholders, including civil society organizations, to address it. Amendments may be made to the bill. Members vote on the bill.
- The bill follows a similar process in the Senate.
- After the bill is passed by the House of Commons and Senate, it is submitted to the Governor General for Royal Assent (final approval).

10

Canada's Approach to Implementing International Human Rights Treaties

11

United Nations human rights treaties to which Canada is a party

International Covenant on Civil and Political Rights (ICCPR)(1976)

- 1st Optional Protocol (individual complaint mechanism) (1976)
- 2nd Optional Protocol (abolition of death penalty) (2005)

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976)

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1970)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1981)

- Optional Protocol (individual complaint mechanism)(2002)

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1987)

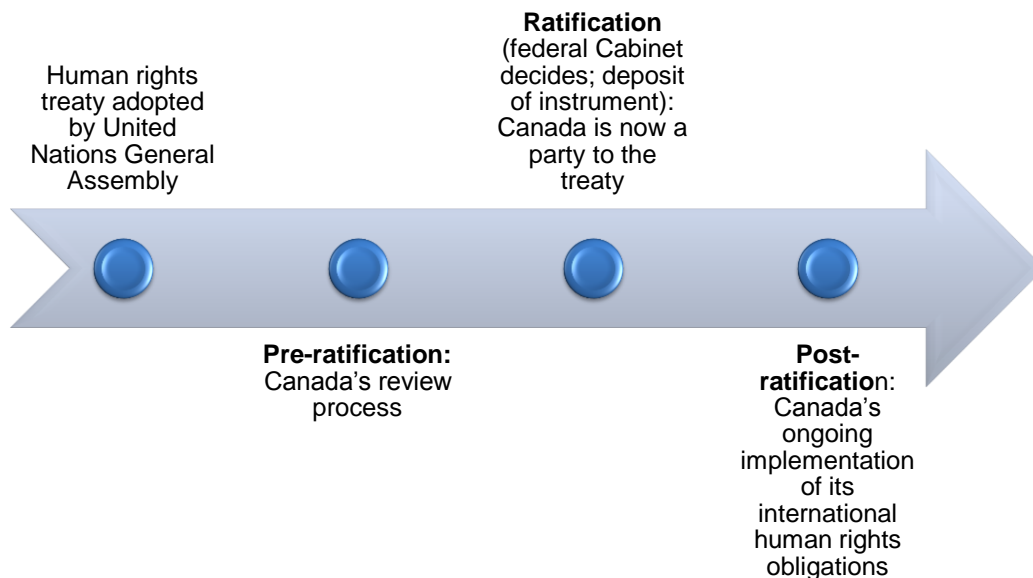
Convention on the Rights of the Child (CRC) (1991)

- Optional Protocol (children in armed conflict) (2000)
- Optional Protocol (sale of children, child prostitution and child pornography) (2005)

Convention on the Rights of Persons with Disabilities (CRPD) (2010)

12

From becoming a State Party to implementing obligations ...



13

Pre-ratification Process in Canada

- Canada's practice is to become a State Party to a human rights treaty only once it is satisfied that it complies with its provisions.
- Treaties generally leave room for states to choose how to implement their obligations; legislation is usually not the only option.
- Canada's pre-ratification process includes:
 - **Examining existing laws, policies, programs and practices** for consistency with the obligations under the treaty;
 - **Identifying gaps** where there is no existing measure that implements the obligation in question;
 - **If there are gaps or inconsistencies, consider changes to laws or policies.** Or, consider whether **reservations and interpretive declarations** may be required, where permitted by the treaty.
- This exercise involves all affected federal government departments, provinces and territories. It may also include Aboriginal self-governments.
- Civil society, Aboriginal organizations and other interested parties may be consulted to seek the views of Canadians before ratifying a treaty. The views of Parliamentary committees are also considered.

14

Implementation in Canada – Ratification

- Once the consultation and review process is completed, the federal Cabinet decides whether Canada should ratify.
- The formal support of provinces and territories will usually be sought, since federal, provincial and territorial governments share responsibility for implementing human rights treaty obligations.
- Treaties are also tabled in Parliament before Canada becomes a party.

15

Implementation in Canada – Post-ratification

- Canada implements its human rights treaty obligations through a variety of means, including one or more of the following:
 - *Canadian Charter of Rights and Freedoms*
 - New, amended or existing legislation
 - Policies and programs
 - Other actions

16

Implementation in Canada is an ongoing process

- Treaties are not self-executing in Canada, nor are they directly enforceable in Canadian courts (only domestic laws are).
- Government officials support implementation through legislative and policy development that takes into account Canada's international human rights obligations.
- Canadian courts also look to Canada's international human rights obligations to interpret Canadian laws, including the *Charter*, because Canadian legislators are presumed to have intended to enact laws consistent with Canada's international obligations.

17

Overview of Canada's Human Rights Framework

18

General framework

- The executive, legislative and judicial branches of government at the federal, provincial and territorial levels share responsibility for protecting human rights in Canada.
- Civil society, non-governmental and Aboriginal organizations also play a role in promoting and protecting human rights.

19

Constitutional and legal protections

- Human rights are constitutionally entrenched in the *Canadian Charter of Rights and Freedoms*.
- Canada's *Constitution Act, 1982* contains unique protections for the rights of Aboriginal peoples of Canada.
- Human rights are protected through many types of legislation at the federal, provincial and territorial levels. For example, legislation on:
 - Anti-discrimination (called "human rights legislation" in Canada), prohibiting discrimination on grounds including race, national or ethnic origin, religion, sex, sexual orientation, marital or family status, age, and disability, by public and private sector employers and service-providers
 - Access to information and privacy
 - Labour and employment standards
 - Social security
 - Official languages
 - Youth criminal justice
 - Immigration and refugee protection
- The common law (judge-made law) also contains human rights protections, such as procedural fairness, property rights and protection of one's reputation.

20

Programs, policies and other actions

- Human rights are also protected in Canada by a large number of programs, policies and other actions at the federal, provincial and territorial levels.
- Programs, such as:
 - National Child Benefit
 - First Nations and Inuit health program
 - Labour Market Agreements for persons with disabilities
 - Canada Student Grants Program
- Policies, such as:
 - Gender Based Analysis in policy development
- Other actions, such as:
 - Federal-provincial-territorial working groups on particular issues
 - Human rights training, public education and awareness campaigns

21

Redress for human rights violations

- Various modes of redress are available in Canada, depending on the right infringed and the remedy sought.
- Authorities with jurisdiction to provide redress include the courts, bodies created to administer particular legislation (commissions, boards, tribunals – for example, the Canadian Human Rights Commission, and the Canadian Human Rights Tribunal) and ombudspersons.
- Police commissions exist at federal, provincial and territorial levels to review complaints against the police.
- There are a wide range of remedies that may be available, from striking down legislation (under the *Charter*) to declarations, injunctions, compensation, damages, costs, etc.

22

Implementing human rights in a federal system

- Mechanisms exist to ensure the federal government, provinces and territories are aware of the approaches taken throughout Canada on human rights issues, and to promote coordination.
- An example is the Continuing Committee of Officials on Human Rights:
 - Composed of federal, provincial and territorial officials who meet regularly by conference call and in person
 - Ensures consultation and coordination among governments with respect to signature, ratification and implementation of international human rights treaties
 - Encourages information exchange among governments on human rights issues and facilitates preparation of human rights reports to the UN

23

Resources

- Canada's human rights reports to the United Nations: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>, including Canada's Core Document: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/core-eng.cfm>
- *Canadian Charter of Rights and Freedoms*: <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>
- *Canadian Human Rights Act*: <http://laws-lois.justice.gc.ca/eng/acts/h-6/>
- Canadian court cases: <http://www.canlii.ca/en/index.php>

24

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



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.

7

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...



15

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



16

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?

19

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.

20

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

21

21

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

The poster features the word "no" in large, bold, white lowercase letters on a dark purple background. To the right of the letter "o" is a small, light-colored rectangular area containing several lines of small, illegible text, which appears to be a list or a series of statements. Below this area, the words "DATE RAPE" and "VIOLENCE" are visible in a smaller font.

[illegible]

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.

23

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)?

24

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.

25

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.

26

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>.

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

Right to culture and cultural diversity

**Training for Taiwanese officials
October 2012**

Erin Brady and Laurie Sargent
Department of Justice Canada

Presentation Outline

- Cultural rights at international law
- How Canada implements cultural rights and supports cultural diversity – General
- How Canada implements cultural rights and supports cultural diversity – Case studies:
 - Integration of immigrants
 - The rights of Aboriginal peoples
 - Accessibility of cultural goods & services for persons with disabilities

Cultural Rights at International Law

3

Cultural rights at international law

- There is no one right to culture at international law; rather, there are many international instruments that protect different aspects of culture and confer rights on individuals in relation to culture.
- Here is one way to organize and think about the various aspects:
 - ***Rights relating to culture*** (e.g., protection of creative activity and the conditions under which it flourishes)
 - ***Rights to a culture and to its survival*** (e.g., participation in a minority culture; participation in the culture of one's State; the right to benefit from scientific advances; preservation of cultural heritage)
- There is no single definition of the word "culture" in international law; most international instruments dealing with culture do not define it.

4

Cultural rights at international law

- **UNESCO** *Universal Declaration on Cultural Diversity* defines culture as:

“the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”

5

Cultural rights at international law - interpretation

- Cultural rights are set out in a number of treaties. We will focus today on the ICCPR and ICESCR.
- Treaty provisions often use language that is broad 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 are implementing the provisions (may establish agreement of parties on proper interpretation);
 - Decisions of international or domestic courts interpreting the provision or a similar provision; also, expert academic commentary;
 - General Comments of the UN treaty bodies (e.g., Human Rights Committee General Comment No. 23 on ICCPR, Article 27) (non-binding);
 - Views of the UN treaty bodies in individual communications (non-binding);
 - International declarations, resolutions, and other instruments, and commentary of other UN expert mechanisms (e.g., UN Special Rapporteurs) (non-binding).

Cultural rights at international law - ICCPR

International Covenant on Civil and Political Rights (ICCPR)

- **Article 27:** Right of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture, practice their own religion or use their own language, in community with other members of their group.
- Other provisions that protect aspects of culture and support cultural diversity:
 - **Right to equality and non-discrimination** on grounds including race, colour, language, religion, national or social origin (Articles 2 & 26)
 - **Freedom of religion, expression, peaceful assembly and association** (Articles 18-22); **right to political participation** (Article 25)
 - **Prohibiting advocacy of national, racial or religious hatred** (Article 20)

7

Cultural rights at international law - ICESCR

International Covenant on Economic, Social and Cultural Rights (ICESCR)

- **Article 15:** Right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to the protection of the moral and material interests resulting from scientific, literary or artistic production of which one is the author.
- Other provisions that protect aspects of culture and support cultural diversity:
 - **Right to equality and non-discrimination** on grounds including race, colour, language, religion, national or social origin (Article 2)
 - **Right to education** (Article 13)

8

Cultural rights at international law – Other sources

Convention on the Rights of the Child (CRC)

- Child's ethnic, religious, cultural and linguistic background to be considered when child placed in alternative care (Article 20)
- Aims of education to include respect for child's cultural identity and different civilizations (Article 29)
- Right of child to participate in minority culture (Article 30)
- Right of child to rest, leisure, play, recreation and to participate in cultural life (Article 31)

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

- Obligation to eliminate racial discrimination in all its forms; right to participate in cultural activities without racial discrimination (Article 5)

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

- Obligation to modify social and cultural patterns of conduct to elimination discrimination against women (Article 5)

Convention on the Rights of Persons with Disabilities (CRPD)

- Right of persons with disabilities to participate in cultural life, recreation, leisure and sport on an equal basis with others (Article 30)

UN Declaration on the Rights of Indigenous Peoples (non-binding)

9

Cultural rights at international law

What does the right to participate in a minority culture mean? **(ICCPR, Article 27)**

“protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.” (UN Human Rights Committee, General Comment No. 23) (non-binding)

- protects persons belonging to a group sharing in common a culture, religion and/or language
- culture may consist in a particular way of life associated with land and the use of its resources (e.g., fishing, hunting, living on reserves), especially in the case of indigenous peoples
- “existence” of minority is based on objective criteria, not on official state recognition
- extends to non-citizens belonging to minority groups
- requires states not to interfere; states may also need to take positive measures to protect minority's identity and members' right to enjoy and develop their culture

10

Cultural rights at international law

What does the right to take part in cultural life mean? *(ICESCR, Article 15)*

- extends to everyone, not just persons belonging to a minority group
- cultural life may include a strong communal dimension, particularly in the case of indigenous peoples
- includes the right to participate in, have access to, contribute to cultural life
- requires states not to interfere; also requires states to take positive measures, subject to progressive realization standard in Article 2
- subject to limits that may be necessary in a particular case (e.g., negative cultural practices that infringe other human rights), if the limit is compatible with the nature of the right and for the purpose of promoting the general welfare in a democratic society (Article 4)

- See for example the Committee on Economic, Social and Cultural Rights, General Comment No. 21 (non-binding)

11

How Canada Implements Cultural Rights and Supports Cultural Diversity – General

12



"Canada's Citizens", by Kanika Lawton, Pinetree Secondary School, Coquitlam, British Columbia.

Description: This pencil crayon drawing shows images representing the different people, cultures and ethnic backgrounds found in Canada. The artist has depicted Mathieu Da Costa and Samuel Champlain in the middle. The colourful background includes images of many Canadian landmarks, such as Parliament Hill.

13

Cultural diversity in Canada

- As a multicultural society, cultural diversity is viewed as a core Canadian value and part of Canadian identity.
- Some demographic information about Canada:
 - Three founding peoples (Aboriginal peoples, English and French)
 - Two official languages (English and French)
 - 147 different mother tongue languages reported (2006 Census) – Chinese languages are the third largest mother tongue group (3% of population).
 - Over 200 different ethnic origins reported (2006 Census) – largest groups are the English, French, Scottish, Irish, German, Italian, Chinese, Aboriginal, Ukrainian, Dutch, South Asian and Scandinavian. Since the 1970s, most immigrants have come from Asian countries.
 - 615 First Nation communities, representing more than 50 cultural groups and 50 Aboriginal languages
 - 20% of Canadians are foreign-born.
 - The majority of Canadians identify as Christians – largest religious affiliation is Catholic, followed by various Protestant churches. The numbers of Muslims, Jews, Hindus, Sikhs and members of other religions, as well as people who report no religious affiliation, are growing.
- Demographic projections show increasing diversity.

14

Implementation in Canada

Constitutional protections:

- **Constitution Act, 1982, section 35:** “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” Treaty rights include rights that now exist or may be acquired by way of land claims agreements. Aboriginal and treaty rights are guaranteed equally to men and women.
- **Charter, section 25:** Charter guarantees “shall not be interpreted so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada”.
- **Charter, section 27:** “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”



15

Implementation in Canada

Constitutional protections (continued):

- **Charter, sections 16-23:** Official languages – various rights relating to the equal status and use of English and French, including the right to use English or French in proceedings in courts established by Parliament, the right to receive federal public services in English or French, and minority official language education rights.
- **Charter, section 15:** Guarantees the right to equality and non-discrimination. Prohibited grounds of discrimination include race, national or ethnic origin, colour and religion. Section 15 permits targeted “ameliorative programs” (affirmative action) aimed at improving the situation of disadvantaged groups.
- **Other Charter rights** that support cultural rights and cultural diversity: freedom of conscience and religion, expression, peaceful assembly & association (section 2); right to vote and stand for election (section 3).
- **Charter, section 1:** The government may justify a limit on Charter rights where it pursued an important objective in a proportional manner. Accommodation of a wide variety of beliefs, and respect for cultural and group identity, are values that guide courts in applying section 1.



16

Implementation in Canada

Constitutional protections (continued):

- **“Unwritten constitutional principle”** of the protection of minorities, which underlies Canada’s entire constitutional order.
- **Constitution Act, 1867, section 93**: protection of minority religious education rights. **Charter, section 29**, states that nothing in the Charter abrogates or derogates from these rights.

17



Implementation in Canada

Legislative protections:

- **Equality and anti-discrimination legislation** (e.g., *Canadian Human Rights Act*; *provincial human rights codes*): Prohibits discrimination by public and private sector employers and service providers, on grounds including race, national or ethnic origin, and religion. Requires employers and service providers to meet their duty to reasonably accommodate difference (e.g., religious practices), meaning they have taken measures to eliminate disadvantages to employees or clients that result from a rule or practice that has an adverse impact on protected individuals or groups. Accommodation is to the point of undue hardship.
- **Employment equity legislation** (e.g., *federal Employment Equity Act*): Promotes representation in the federal public and private sector workplaces of certain historically disadvantaged groups, including “visible minorities” and Aboriginal persons. Requires employers to report on plans and achievement of goals.

18



Implementation in Canada

Legislative protections (continued):

•**Canadian Multiculturalism Act:** Reaffirms multiculturalism as a fundamental Canadian value and sets out the federal government's multiculturalism policy. Requires federal government to report annually on multiculturalism initiatives.

•**Citizenship Act:** Defines eligibility for Canadian citizenship and guarantees equal rights and responsibilities whether citizenship is acquired by birth or naturalization.

•**Immigration and Refugee Protection Act:** Defines eligibility for immigration to Canada. Affirms the fundamental principles of non-discrimination and universality in immigration. The successful integration of permanent residents into Canada is one of its goals.



19

Implementation in Canada

Legislative protections (continued):

•**Official Languages Act:** Ensures respect for English and French as the official languages of Canada, and equality of status and equal rights and privileges as to their use in all federal institutions. Supports the development of English and French linguistic minority communities. Advances the equality of status and use of English and French within Canadian society.

•**Quebec Charter of the French Language:** Establishes French as the official language of the province of Quebec and guarantees rights to its use in Quebec.

•**Nunavut Official Languages Act:** Establishes Inuit language, English and French as official languages of the Nunavut territory and guarantees rights to their use in Nunavut.



20

Implementation in Canada

Legislative protections (continued):

- **Broadcasting Act:** Requires the broadcasting system to reflect the linguistic duality and multicultural and multiracial nature of Canadian society, and the special place of Aboriginal peoples within Canadian society. Requires that programming in languages other than French and English be made available. Establishes the Canadian Broadcasting Corporation (CBC) as the national public broadcaster.
- **Copyright Act:** Protects the rights of creators of literary, artistic, musical and dramatic works, and promotes access to these works.
- **Patent Act:** Provides protection for inventions.



21

Implementation in Canada

Policies and programs, including:

- Programs to preserve and strengthen Aboriginal languages and culture across Canada.
- Programs to preserve and strengthen minority official language communities in Canada.
- Funding to support the work of Canadian artists, writers, musicians, film makers, performers, etc.
- Museums, galleries and archives to preserve and promote Canada's history and cultural heritage.
- Public education through the school system and the media.



22

How Canada Implements Cultural Rights and Supports Cultural Diversity – Case Studies

23

Integration of immigrants

- Canada's overall approach is based on encouraging the economic, social and cultural integration of newcomers, and ensuring that the broader Canadian society is welcoming and accommodates diversity.
- Constitutional and other legal human rights protections apply to everyone in Canada, including immigrants, refugees and migrant workers. The Charter contains a few rights that are reserved for citizens only (democratic rights; mobility rights; minority official languages school rights).
- Immigrants are encouraged to become Canadian citizens.

24

Integration of immigrants

➤ Measures to **integrate immigrants and refugees** into society include:

- **Access to social services**, including education, social security, housing and health care.
- **Settlement services**: There is an extensive network of organizations that provide counselling and settlement assistance to immigrants and refugees in communities across Canada. Services include language training and preparation for employment.
- **Local Immigration Partnerships**: A form of community collaboration for newcomer settlement and integration, that encourages locally-driven planning to assess needs, coordinate services and improve outcomes for immigrants and refugees. Partnership councils include representatives from schools, health centres, ethnocultural groups, police services, libraries, employers and business councils, social services, various levels of government, and newcomers.
- **Foreign Credentials Referral Office**: Provides immigrants trained outside of Canada with information and referral services to facilitate the assessment and recognition of their credentials, and improve their participation in the Canadian labour market.

25

Integration of immigrants

➤ Measures to **foster a welcoming society** that accommodates diversity include:

- **Equality and anti-discrimination legislation**
- **Anti-racism laws, policies and programs**: Include criminal laws prohibiting hate propaganda; laws requiring judges to consider whether an offence was motivated by bias or hate based on race, colour, or ethnic or national origin as an aggravating factor in sentencing; laws prohibiting the importation into Canada of publications that constitute hate propaganda; laws prohibiting the broadcasting of abusive comments or pictorial representations that are likely to expose individuals or groups to hatred on the basis of race, national or ethnic origin, colour or religion; bias-free policing policy.
- **Public education**: Schools teach children about the importance of respect for diversity; public education campaigns by human rights commissions on anti-discrimination and cultural diversity; government-sponsored public awareness programs that promote intercultural and interfaith understanding; training of government officials on diversity and cultural awareness.

26

The rights of Aboriginal peoples

What do Aboriginal rights in Canada's Constitution mean?

FACTS: *Ms. Van der Peet, a member of the Sto:lo First Nation, was charged with selling salmon which her partner had caught under the authority of a fishing license which only allowed the holder of the licence to catch fish for food. The law prohibited the sale or barter of fish caught under such a licence. Ms. Van der Peet challenged the law in court as violating her Aboriginal right to sell fish, which she said was protected by section 35 of the Constitution Act, 1982.*

27

The rights of Aboriginal peoples

"The doctrine of aboriginal rights exists, and is recognized and affirmed by section 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."

Supreme Court of Canada, *R. v. Van der Peet* (1996)

"The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of section 35 of the Constitution Act, 1982."

Supreme Court of Canada, *Beckman v. Little Salmon/Carmacks First Nation* (2010)

28

The rights of Aboriginal peoples

OUTCOME:

- The Supreme Court of Canada held that in order to be an Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.
- The practice must have developed before the arrival of Europeans in North America. It can evolve over the years after contact, but a practice that has evolved into modern forms must trace its origins back to the pre-contact period.
- In assessing a claim, the courts must take into account the perspective of Aboriginal peoples themselves, and approach the rules of evidence in light of evidentiary difficulties inherent in adjudicating Aboriginal claims.
- In this case, the Court found that Ms. Van der Peet did not demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed before contact with the Europeans. It was therefore not constitutionally protected.

29

The rights of Aboriginal peoples

OUTCOME (continued):

- Aboriginal rights can be extinguished in two ways: by voluntary surrender to the government, or by constitutional amendment.
- Aboriginal rights can be regulated or limited by the government, but only if the government can show an important objective (e.g., the conservation and management of a limited natural resource), and that the means chosen are consistent with the special trust relationship between the government and Aboriginal peoples.
- The Supreme Court of Canada has held that governments have a duty to consult with and, where necessary, accommodate Aboriginal peoples prior to taking actions that would have an adverse impact on section 35 rights.

30

Accessibility of cultural goods & services for persons with disabilities

FACTS: *Mr. Vlug, who is deaf, tried on several occasions to watch sporting events and newscasts on CBC television. While some of these programs had closed captioning (a simultaneous transcription of the audio portion of the program, normally displayed at the bottom of the television screen), other programs did not. Mr. Vlug brought a complaint of discrimination on the ground of disability in the provision of services, under the Canadian Human Rights Act. In his complaint, Mr. Vlug emphasized that television captioning would enable the deaf and hard of hearing to be included in the community and share in a common cultural history.*

31

Accessibility of cultural goods & services for persons with disabilities

OUTCOME:

- The Canadian Human Rights Tribunal held that the CBC's failure to make television programming accessible to the hearing impaired was discriminatory. The lack of captioning meant that persons who are deaf or hard of hearing were not able to enjoy television programs on an equal basis with others.
- The Tribunal ordered the CBC to caption all of its television programs. The Tribunal did not accept that accommodating the hearing impaired would place an undue financial or technical burden on the CBC.
- The Tribunal encouraged the CBC to consult with the deaf and hard of hearing community in determining the best way of delivering captioning services.
- The Tribunal also ordered the CBC to pay Mr. Vlug \$10,000 for pain and suffering.

32

Accessibility of cultural goods & services for persons with disabilities

Other measures that promote accessibility include:

- Exceptions in the *Copyright Act* for persons with perceptual disabilities, to enable them to make an accessible version of certain copyrighted works
- Mandatory accessibility standards for public spaces and buildings (*Accessibility for Ontarians with Disabilities Act*)
- Mandatory accessibility standards for websites and web content in some jurisdictions
- Programs promoting the participation of persons with disabilities in sport, including the Paralympic Games and the Special Olympics

33

Resources

- UN Human Rights Committee General Comment No. 23 (ICCPR, Article 27): <http://www2.ohchr.org/english/bodies/hrc/comments.htm>
- UN Committee on Economic, Social and Cultural Rights General Comments No. 17 & No. 21 (ICESCR, Article 15): <http://www2.ohchr.org/english/bodies/cescr/comments.htm>
- Canada's human rights reports to the United Nations: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>
- Canadian immigrant settlement services: <http://www.cic.gc.ca/english/departement/partner/bpss/index.asp>
- *R. v. Van der Peet*, [1996] 2 S.C.R. 507: <http://scc.lexum.org/en/1996/1996scr2-507/1996scr2-507.html>
- *Vlug v. CBC*, [2000] C.H.R.D. No. 5: <http://www.canlii.ca/en/ca/chrt/doc/2000/2000canlii5591/2000canlii5591.pdf>
- Accessibility for Ontarians with Disabilities Act: <http://www.mcass.gov.on.ca/en/mcass/programs/accessibility/index.aspx>

34

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

Fundamental freedoms

Training for Taiwanese officials
October 2012

Erin Brady and Laurie Sargent
Department of Justice Canada

Presentation Outline

- Fundamental freedoms at international law
- How Canada implements fundamental freedoms – Case studies:
 - Freedom of expression
 - Freedom of peaceful assembly

Fundamental Freedoms at International Law

3

Fundamental freedoms - Purposes

- Freedom from interference with what is profoundly personal – one's thoughts, ideas, beliefs and opinions
- Necessary for the full development of the human person
- Foundational to a free and democratic society; necessary for the exercise of democratic rights and political participation
- Recognize that human flourishing and the achievement of individual goals may be impossible without the aid and cooperation of others

Religion

Peaceful Assembly

Expression

Association

4

Fundamental freedoms at international law - interpretation

- Fundamental freedoms are set out in a number of treaties. We will focus today on the ICCPR.
- Treaty provisions often use language that is broad 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 are implementing the provisions (may establish agreement of parties on proper interpretation);
 - Decisions of international or domestic courts interpreting the provision or a similar provision; expert academic commentary; *travaux préparatoires*;
 - General Comments of the UN treaty bodies (e.g., Human Rights Committee General Comment No. 34 on ICCPR, Article 19) (non-binding);
 - Views of the UN treaty bodies in individual communications (non-binding);
 - International declarations, resolutions, and other instruments, and commentary of other UN expert mechanisms (e.g., UN Special Rapporteurs) (non-binding).

Fundamental freedoms in the ICCPR

International Covenant on Civil and Political Rights (ICCPR)

- **Article 18:** Freedom of thought, conscience and religion. Includes the freedom to have a belief or a religion and to manifest it through worship, observance, practice and teaching.
- **Article 19:** Freedom of opinion and expression. Includes the freedom to seek, receive and impart information and ideas of all kinds.
- **Article 20:** Requires states to prohibit by law war propaganda and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- **Article 21:** Freedom of peaceful assembly.
- **Article 22:** Freedom of association, including the right to form and join trade unions.
- **Justifiable Limits:** Articles 18-22 permit the state to limit some aspects of the fundamental freedoms, according to the specific criteria set out in each article.

Fundamental freedoms at international law

Other sources

Covenant on Economic, Social and Cultural Rights (ICESCR)

- Right to form and join a trade union, including protection of certain trade union activities (Article 8)

Convention on the Rights of the Child (CRC)

- Freedom of expression (Article 13); freedom of religion (Article 14); freedom of association and peaceful assembly (Article 15); role of the mass media and access to information from diverse sources (Article 17)

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

- State obligations in respect of hate propaganda (Article 4); right to exercise fundamental freedoms without discrimination on the basis of race, colour, national or ethnic origin (Article 5)

Convention on the Rights of Persons with Disabilities (CRPD)

- Freedom of opinion and expression, including access to information on an equal basis with others (Article 21)

7

Freedom of expression in the ICCPR

What does freedom of opinion and expression in ICCPR, Article 19 mean?

Scope of the right:

- Protects the communication of ideas and opinions of all kinds, including ideas that may be deeply offensive, subject to limits set out in Article 19(3)
- Extends to many different forms of expression, including speech, writing, images, art, sign language, dress, internet-based communication, commercial advertising, etc.
- Includes freedom of the press and media of all kinds, and the right to receive media output
- Protects against compelled expression of an opinion
- Includes the right of access to information held by government

- See Human Rights Committee General Comment No. 34 (non-binding)

8

Freedom of expression in the ICCPR

What does freedom of opinion and expression in ICCPR, Article 19 mean?

Justifiable limits on freedom of expression:

- Must be provided by law; the law must be sufficiently precise and publicly accessible
- Must serve a purpose listed in Article 19(3) (respect of the rights or reputations of others, protection of national security or public order, protection of public health or morals)
- Must be necessary for achieving this purpose; this includes the principle of proportionality (limits must not be overbroad)
- Limits on political discourse may be more difficult to justify
- No limits on freedom of opinion are allowed (Article 19(1))
- Articles 19 and 20 are compatible with and complement each other

- See Human Rights Committee General Comment No. 34 (non-binding)

9

Freedom of peaceful assembly in the ICCPR

What does freedom of peaceful assembly in ICCPR, Article 21 mean?

Scope of the right:

- Includes the right of persons to gather together with other persons intentionally and temporarily for a specific purpose
- Protects only peaceful assemblies (e.g., non-violent assemblies)
- Closely linked to freedom of opinion and expression

Justifiable limits:

- Must be imposed in conformity with the law
- Must serve a purpose listed in Article 21 (national security, public safety, public order, protection of public health or morals, protection of the rights and freedoms of others)
- Must be necessary in a democratic society for achieving this purpose

10

How Canada Implements Fundamental Freedoms – Case Studies

11

Implementation in Canada - General

Constitutional protections:

- **Charter, section 2:** “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.”
- **Charter, section 1:** “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.”



12

Implementation in Canada – Expression and peaceful assembly

Canadian jurisprudence:

Charter, section 2(b), Freedom of expression

- Canadian courts have interpreted freedom of expression very broadly to protect any activity or communication that conveys or attempts to convey meaning.
- All content is protected, no matter how offensive or unpopular (e.g., hate speech, pornography, defamatory speech), subject to limits that can be justified under section 1.
- Expression that takes the form of violence is not protected.
- Expression in certain public locations may not be protected (i.e., public property or government-owned property whose function is not compatible with freedom of expression).
- Protects individuals from laws or government actions that interfere with freedom of expression, either in purpose or effect.
- Save for exceptional circumstances, it does not guarantee access to government-held information, or require the state to take positive action to help individuals exercise their freedom of expression.



13

Implementation in Canada – Expression and peaceful assembly

Canadian jurisprudence:

Charter, section 2(c), Freedom of peaceful assembly

- There are not many Canadian court cases interpreting freedom of peaceful assembly; given the strong connection with freedom of expression, these cases are often examined instead under section 2(b) freedom of expression.
- Protects the physical gathering together of people, including the right to participate in peaceful demonstrations, protests, parades and meetings.
- Protects the right to peaceful assembly; Canadian courts have held that it does not protect riots and gatherings that seriously disturb the peace.



14

Implementation in Canada – Expression and peaceful assembly

Canadian jurisprudence:

Charter, section 1, Justifiable limits

- Canadian courts have held that governments may justify a limit on *Charter* rights, including the fundamental freedoms, if they can show that the limit:
 1. Is prescribed by law;
 2. Pursues a sufficiently important objective; and
 3. Is proportional to that objective, meaning that it is rationally connected to the objective, impairs the right no more than reasonably necessary to achieve the objective, and has benefits that outweigh the negative effects on the right.
- Canadian courts have found that limits on political expression are generally the most difficult for governments to justify, because of the importance of free expression to democracy.

15



Implementation in Canada – Expression & peaceful assembly

Legislative protections:

- **Access to information legislation** at the federal, provincial and territorial levels, which promote the exercise of freedom of expression and transparency in government by providing individuals with a right of access to records under the control of a government institution.
- The right of access is subject to certain specific, limited exceptions where access is not permitted because of an overriding public interest in keeping the record confidential – for example, records containing personal information; records containing legal advice that is subject to solicitor-client privilege; records containing trade secrets of a third party.
- Such legislation also generally provides for the review and oversight of government decisions on whether to disclose records by an independent body (e.g., the Information Commissioner of Canada).

16



Implementation in Canada - Case study

FACTS:

- In mid-October 2011, Mr. B. and a group of protesters began camping overnight in a public park in downtown Toronto (Canada's largest city), as part of the global "Occupy Movement". The movement advocates for a more participatory form of democracy, greater social equality, and reform of the global financial system. The camp included some 300 tents and other structures, 25 portable toilets, and took up most of the park grounds. The protesters' activities were peaceful.
- One month later, the City of Toronto served the protesters with a Trespass Notice under applicable legislation. The Trespass Notice required the protesters to remove their tents and structures. It also stated that the protesters were prohibited from putting up tents or other structures in any city park, and from gathering in any city park between the hours of midnight and 5:30 a.m. The City said it was acting to protect the ability of other people to use the park, to protect nearby residents and businesses from disturbance, and to protect the park from damage.
- The protesters went to court, challenging the Trespass Notice as violating all of their section 2 *Charter* rights.

17

Implementation in Canada - Case study

QUESTIONS:

- Which fundamental freedoms do you think are most implicated in this case, and how are they implicated?
- What are the relevant international human rights treaty provisions?
- Does the Trespass Notice limit the protesters' freedom of expression and peaceful assembly?
- If so, do you think the limit is justifiable?
 - Are the objectives the government is pursuing sufficiently important to override the fundamental freedoms at stake?
 - Is the limit provided by law?
 - Is the limit necessary to achieve the government's objectives and proportional to those objectives?
 - Does the nature of the expression and the assembly in this case make the limit easier or more difficult to justify?

18

Implementation in Canada - Case study

OUTCOME:

- This case is about balancing the right to use public spaces for political protest and the rights of the broader society to use and enjoy public spaces for other purposes.
- The Ontario Superior Court found that the protesters were engaged in expressing political messages protected by the *Charter* right to freedom of expression, and that the tents and other structures they had erected formed part of that political message. The court concluded that the Trespass Notice interfered with the protesters' expressive freedom.
- The court accepted that the city's objectives were sufficiently important to limit the protesters' freedom of expression.
- The court also found that the Trespass Notice was proportional to the objectives. The protesters remained free to express their political message in other ways, including signs, postings on the internet, demonstrations and marches through city streets. They also remained free to gather in the park throughout most of the day. In addition, the Trespass Notice did not seek to limit the size of the protest.
- The court concluded that the Trespass Notice was a reasonable balancing of the rights of all who wish to use the park.

19

Implementation in Canada - Case study

OUTCOME (continued):

Other measures in place to ensure that peaceful protest can occur safely in Canada include:

- Police services receive training on human rights;
- When significant protests are expected, police services engage in community outreach and dialogue with potential demonstrators and other stakeholders before the event;
- In addition to judicial remedies under the *Charter*, there are other mechanisms in place to ensure accountability of government and police services in regulating protests. These include non-judicial mechanisms, such as Parliamentary oversight committees, statutory bodies created to administer particular legislation, police complaints commissions, ombudspersons, civil liberties organizations, inquiries and a free press.

20

Resources

- UN Human Rights Committee General Comments:
<http://www2.ohchr.org/english/bodies/hrc/comments.htm>
- M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2d ed.), 2005 – available in Chinese (2009 translated edition)
- Canada's human rights reports to the United Nations:
<http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>
- Federal Access to Information Act: <http://laws-lois.justice.gc.ca/eng/acts/A-1/index.html>
- *Batty v. City of Toronto*, 2011 ONSC 6862:
<http://www.canlii.ca/eliisa/highlight.do?text=batty&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onsc/doc/2011/2011onsc6862/2011onsc6862.html>

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

Fair Trial Rights

**Training for Taiwanese officials
October 2012**

Erin Brady and Laurie Sargent
Department of Justice Canada

Presentation Outline

- Fair trial rights at international law
- How Canada implements fair trial rights – General
- How Canada implements fair trial rights – case study (right to an interpreter)

Fair trial rights at international law

Fair trial rights - Purpose

- Aimed at ensuring procedural justice between the parties.
- Lie at the heart of the proper administration of justice and the rule of law, and at the core of judicial expertise.
- Where fair trial rights are not respected, the legitimacy of the justice system and decisions rendered by the courts may well be called into question. This can have a very negative impact on social cohesion and stability.
- Similarly, a public perception that the justice system is too heavily weighted toward the protection of the rights of criminals relative to those of victims and society can create problems.
- Fair trial rights therefore involve a delicate balance between individual and public interests.



Fair trial rights at international law - interpretation

- Fair trial rights are set out in a number of treaties, including the *International Covenant on Civil and Political Rights* (ICCPR).
- Treaty provisions are often 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 the Human Rights Committee (e.g. HRC General Comment 32 on ICCPR Article 14) (non-binding) ;
 - Views of the Human Rights Committee in individual communications (non-binding);
 - International declarations, resolutions, etc. and commentary of other UN expert mechanisms (e.g. UN Special Rapporteurs, etc.) (non-binding).

Fair trial rights at international law

ICCPR Article 14(1):

*In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a **fair and public hearing** before a competent, **independent and impartial** tribunal established by law. [...]*

- There are many elements of fair hearing (including fair criminal trial) rights protected by Art. 14 and 15 of the ICCPR, among other provisions, including a number of detailed protections applicable to criminal trials and a specific provision respecting youth accused of criminal offences.
- Due to time constraints, we will look at just a few of the key rights that participants indicated they wanted to hear more about, including:
 - Judicial independence and impartiality;
 - The importance of the public hearing, and the scope of justifiable limits on this guarantee;
 - The role of interpreter in ensuring a fair trial.

Independent and impartial tribunal

- **Independent** – There must be clear procedures adopted by law for the appointment of judges; objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of members of the judiciary and any disciplinary sanctions taken against them; legislated guarantees of security of tenure (term in office); the judiciary must not be the subject of political interference by the executive branch and legislature.
- **Impartial** - judges must not be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor improperly favour one party over another; the tribunal must also appear to a reasonable observer to be impartial. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. Concerns arise where “special courts” are set up to try particular categories of persons (e.g. terrorists); while Art. 14 does not prohibit military courts, they should only be used to try civilians in exceptional and justified circumstances and Art. 14 guarantees should still apply.

Fair hearing

- The specific guarantees found in paras. 14(2) and (3) are the minimum guarantees required for a fair criminal trial.
- The right to a fair hearing also means:
 - There should be no undue public pressure or influence on the court or jury.
 - Court proceedings must not be unduly delayed or long, for example due to a systemic lack of resources for the courts.
 - The overarching guarantee of equality and non-discrimination must be taken into account to ensure that “all persons shall be equal before the courts and tribunals” (Art. 14(1)) => no legal impediments to access by women, or on the basis of race, national or ethnic origin; barriers to access to the courts for persons with disabilities must be eliminated; court fees must not be excessive; regarding children, see Art. 12 CRC.
 - “Fair hearing” also encompasses the concept of “equality of arms” between the parties – while it does not require that parties be treated identically in all cases (e.g. there may be legitimate differences in procedural rules applicable to the prosecution and defence), there must be an equal opportunity to review and challenge evidence (disclosure).

Public hearing

- Public hearings ensure the transparency of legal proceedings, which safeguards the interest of the individual and of society at large. Access by the media and interested members of the public should be facilitated by providing notice of the time of hearings and adequate facilities for the public to attend.
- **Exceptions:** Art. 14(1) acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.
- Even where access to the trial is limited, the judgement, including essential findings, evidence and legal reasons must be made public, except where the privacy interest of children or persons engaged in matrimonial disputes are engaged.

Right to free assistance of an interpreter

ICCPR – Article 14(3)(f) – right of the accused in a criminal trial “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

HRC General Comment 32:

- This right applies to aliens as well as to nationals brought before the courts.
- It is a component of the right to equality before the courts and is of basic importance in cases in which difficulty in understanding the language used by the court may constitute a major obstacle to the right of defence.
- However, persons whose mother tongue is different from that used by the court are not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.

Summary of fair trial rights (criminal context)

Persons charged with criminal offences, including terrorism-related crimes, are entitled to the usual series of specific due process rights, including that all persons should be equal before the courts and tribunals, the right to be presumed innocent, the right to a hearing with due process guarantees, to be tried within a reasonable time, to be tried by a competent, independent and impartial court or tribunal, and a right to have a conviction and sentence reviewed by a higher court or tribunal in conformity with international human rights law. Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which both aim at ensuring the proper administration of justice, set out the bedrock norms applicable in all trials, whether of alleged terrorists or otherwise.

United Nations Counter-Terrorism Implementation Task Force website

How Canada implements fair trial rights – General

How Canada approaches implementation of fair trial rights - General

Constitutional protections:

- **“Unwritten constitutional principles”** – Judicial independence and access to the courts have been recognized as constitutional principles that will guide all decisions (e.g. recent decision finding that imposing significant court fees is unconstitutional).
- **Charter section 2(b)** – Right to freedom of expression – also protects the “open court principle” which requires any limits on access by the public or the media to be justified as proportionate to an important state purpose (e.g. protecting privacy, national security, and preserving order).
- **Charter section 7** – Overarching constitutional guarantee of the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice – applies to criminal trials and civil proceedings where life, liberty or security of the person is at stake (e.g. certain immigration proceedings involving detention). These include principles of procedural fairness/due process, including the right to a fair hearing before an independent tribunal, the right to know the case against you (including access to the evidence to be presented/disclosure), the right to present evidence, the right to written reasons that articulate and rationally sustain the decision, the right to State-funded counsel where circumstances require it to ensure an effective opportunity to present one’s case, etc.



13

How Canada approaches implementation of fair trial rights - General

Constitutional protections, cont’d

- **Charter section 11** – specific fair trial rights applicable during criminal proceedings, including: right to be tried within a reasonable time; protection against compelled testimony; right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; right not to be denied reasonable bail without just cause; right to trial by jury where the maximum punishment is five years or more (except for offences under military law tried before a military tribunal); etc.
- **Charter section 14** – Right to assistance of an interpreter where a party or witness “in any proceedings” doesn’t understand or speak the language in which the proceedings are conducted or is deaf.



14

How Canada approaches implementation of fair trial rights - General

Other means of implementation:

- **Legislation establishing courts** – Judicial independence is guaranteed in part by laws establishing courts, including provincial superior courts, the Supreme Court of Canada and other statutory courts. Constitutional guarantees may be used to challenge the validity of these laws if they are alleged to violate judicial independence (e.g. recent cases about security of tenure for judges of courts martial; challenges to the process for establishing judicial compensation).
- **Criminal Code** – In addition to setting out substantive criminal offences, the Code also sets out many procedural rules governing criminal trials, sentencing hearings, etc. The Code also allows the judge to order testimonial aids to assist vulnerable victims and witnesses in providing their testimony in criminal court.
- **Canada Evidence Act** – The CEA applies to all criminal proceedings and civil proceedings within federal jurisdiction. It deals with matters including: capacity of witnesses to testify; protection against self-incrimination; and the protection of certain types of privileged information (e.g. defence or national security information) from disclosure in public trial.



15

How Canada approaches implementation of fair trial rights - General

Other means of implementation, cont'd:

- **Youth Criminal Justice Act** – This Act sets out particular rules applicable to criminal proceedings against young offenders. These rules take account of the reduced level of maturity of such offenders, the need for heightened procedural protections, the emphasis on rehabilitation and reintegration of young offenders, and the need to hold young offenders accountable through interventions that are fair and in proportion to the seriousness of the offence committed. See: <http://www.canada.justice.gc.ca/eng/pi/yj-ji/ycja-lsjpa/ycja-lsjpa.html>.
- **Legal aid programs** – There is both criminal and civil legal aid available in Canada for persons who are unable to afford legal representation. The federal government is involved primarily in funding criminal legal aid, which is administered by the provinces and territories, who determine eligibility criteria (see: <http://www.canada.justice.gc.ca/eng/pi/pb-dgp/arr-ente/lap-paj.html>). Civil legal aid is generally only available for certain types of cases (e.g. family law matters).



16

How Canada approaches implementation of fair trial rights - General

Implementation of fair hearing rights generally:

- **Rules of civil procedure** – All civil court proceedings in Canada are governed by rules of civil procedure, generally set out in a combination of legislation and rules adopted by the courts. They are intended to ensure fairness between the parties. Recently, issues of electronic disclosure and “proportionality” in disclosure in civil trials has been a focus of reform efforts.
- **Common law principles of procedural fairness** – Even where the *Charter* doesn’t apply, common law rules of procedural fairness require basic fairness in all administrative decisions affecting the rights or interests of a person e.g. disclosure of the basis for the decision, the opportunity to present one’s case, the requirement that reasons for the decision be given.
- **Immigration and Refugee Protection Act (IRPA)** – The IRPA sets out procedural rules governing a number of different types of proceedings (e.g. refugee hearings, detention review, security certificate proceedings for non-citizens found to pose a threat to national security, etc.). Many of these proceedings are administrative in nature, but may be (and in some cases must be) subject to judicial review.



17

How Canada implements fair trial rights – case study (right to an interpreter)

Case study – the right to an interpreter in Canada

FACTS: Mr. T., a native of Vietnam, was charged with sexually assaulting a 15 year-old girl. His first language was Vietnamese. It was clear to the judge he did not understand English very well, so the judge appointed an interpreter. There was an issue regarding the victim's identification of the accused (she first said to the police he was "fat", but at trial he appeared thin). Over the course of the trial, the interpreter at times only summarized evidence in Vietnamese on this point and did not interpret one exchange between a witness and the trial judge at all. The accused was convicted. He appealed his conviction on the grounds that the identification evidence was flawed and that problems with the translation of the evidence violated his right to an interpreter, as guaranteed by s. 14 of the Canadian Charter of Rights and Freedoms.



Case study – the right to an interpreter in Canada

- Section 14 of the *Charter* guarantees the right to assistance of an interpreter where a party or witness “in any proceedings” doesn’t understand or speak the language in which the proceedings are conducted or is deaf.
- Canadian courts have said this right is an important aspect of trial fairness.
- It applies in criminal and civil proceedings where the court is required to observe the rules of natural justice.
- Section 14 is engaged where the accused does not understand or speak the language in which the proceedings are conducted.
- It is not engaged where the accused speaks and understands the language, but has some difficulty because of an accent or limited communications skill or some other similar reason, in understanding or answering questions.
- Courts and counsel have a responsibility to ensure that this right is being respected where they become aware of an issue.

Case study – the right to an interpreter in Canada, cont'd

- **Standard of interpretation:** the interpretation of legal proceedings must be continuous, precise, impartial, competent and contemporaneous. The standard is not one of perfection, but it must be of a high enough quality that justice will be done and will be seen to be done.
- **Costs of interpretation:**
 - In criminal cases, interpreter fees are generally borne by the State.
 - In civil matters between private individuals, where s. 14 has been found to apply, it is primarily up to the parties who need an interpreter, and not the Crown, to pay for the interpreter.
 - In immigration proceedings, the question whether s. 14 obliges the Crown or the courts to bear the costs of an interpreter in the event the person requesting an interpreter cannot afford one has been left open. It will likely depend on the importance of the individual rights at stake.
- **Outcome of Mr. T's case?** If the quality of interpretation during a trial does not meet the guaranteed standard, and has more than a trivial impact on trial fairness, this will generally result in the appeal being allowed and a new trial ordered.

21

Resources

- Canada's reports to UN treaty bodies, including on ICCPR: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>.
- *R. v. Tran*, [1994] 2 S.C.R. 951 (re: right to an interpreter in Canada): <http://scc.lexum.org/en/1994/1994scr2-951/1994scr2-951.html>
- Human Rights Committee, General Comment 32: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>
- M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2d ed.), 2005 – available in Chinese (2009 translated edition).