

# Human Rights Today and Tomorrow

Michelle Falardeau-Ramsay, Q.C.

## Introduction

Thank you for the kind introduction and thank you for the honour of inviting me to be the 1999 Distinguished Lecturer on Human Rights.

When I look at the list of those who preceded me at this podium, I am indeed honoured and just slightly overwhelmed at the task of delivering the Tenth Dr. Bernie Vigod Memorial lecture.

It has been just over 11 years since Dr. Vigod tragically left us but his vision of a more humane civil society remains as vibrant as ever. This lecture series helps preserve that vision and I hope to be able in my small way tonight to associate my thoughts with Dr. Vigod's ideal.

## Theme

As we prepare to leave this century and move into the next, I am encouraged on how far we have come in terms of human rights in this country.

And as I look around this room tonight I have confidence that human rights will not only be sustained but will flourish in the 21st century. You, the young people, have inherited the spirit and tradition of Bernie Vigod and will take his ideals to a higher plane. Think of yourselves as pioneers, transplanting the best accomplishments in human rights from this century and seeing them flourish in the next.

At the beginning of this century there was no universal equality: only certain people could vote; colour, race and religion too often distinguished classes of society and erected barriers; women, in the eyes of the law, were not persons.

During the last 20 years, Canada has turned into a diverse and dynamic country. The development of human rights and equality must reflect that evolution. We must also go further and see that our experience can influence events in an ever-shrinking world.

To have attained today's level of equality in Canada required time, patience and perseverance. Still, I am constantly surprised at how long it took and how much more there is to do.

For example, just the other day women officers, active and retired, gathered in Cornwall, Ontario to celebrate their role in the Royal Canadian Mounted Police. The celebration was the 25th anniversary of the first woman Mountie. Imagine, the first

woman enters the federal police force in the mid-1970's, two-and-a-half decades after the Universal Declaration on Human Rights is adopted and proclaimed.

I am also reminded of the story of Annie Langstaff who was truly an example of this long, patient road to equality. Annie was a stenographer in Montreal who became the first woman to study law. Three years later, in 1914, she attempted to write her Bar exams but was refused admission to the examination room. Annie went a step further and appealed to the Quebec Superior Court but her case was defeated. The court rejected her request for two reasons: Ms. Langstaff had not sought the permission of her husband or, lacking that, the permission of a judge, as was provided by the Civil Code at that time. Besides, the court said, the law covering the Quebec Bar allowed only men to be admitted to the profession, not women. A higher court struck down her case again and Annie Langstaff never did become a lawyer.

It is a sad story but also an inspirational one. The efforts of this young woman prompted legal reforms so that finally, in 1942--28 years later-- women were allowed to write their exams and enter the legal profession on an equal footing with men. Last week, Beverley McLachlin became the first female chief justice of the Supreme Court of Canada. As I said, we have come far but it has taken a long time.

It was only last year that we celebrated the 50th anniversary of the Universal Declaration of Human Rights. The Declaration talks about "the equal rights of men and women" and states that everyone is entitled to enjoy these rights without discrimination on the basis of such factors as race, religion and sex. It also states that "human rights should be protected by the rule of law."

When the Declaration was adopted in 1948, most of the world's citizens lived under either dictatorships or colonial rule. The vast majority were neither "free" nor "equal". It is particularly ironic that 1948 was the same year in which the national party of South Africa, flush from an election victory, began erecting the pillars of apartheid. In 1948, most of Latin America was ruled by military or quasi-military dictatorships; virtually all of Africa was still under colonial rule; and thousands of prisoners languished in Stalin's gulag.

In spite of this, at its very core, the legacy of the Universal Declaration, and the international conventions and covenants which sprang from it, is the recognition that governments have a positive duty to protect and promote human rights.

It's important to note, especially here in this provincial capital, that John Humphrey of New Brunswick played a leading role in drafting the Declaration. In fact it was him who described the document as "The Magna Carta of the World". Despite his hard work and the importance of the final United Nations endorsement, it was almost another thirty years before the goal of enshrining rights in law became a reality here in Canada.

Here in Canada, that recognition led to an increased awareness of the need for human rights protection.

Generally, the specific rights enshrined in human rights statutes in Canada are equality rights: that is, the right to be treated equally without regard to such factors as sex, race, age, religion and so on. The emphasis on equality rights in Canadian society has been so great that in the Canadian context, the terms "human rights" and "equality rights" are often seen as interchangeable.

## Human Rights in Canada

Although the first human rights statute in Canada, the Saskatchewan Bill of Rights, preceded the Universal Declaration by a year, it took nearly three decades before all Canadians were covered by human rights legislation.

Indeed, even though Canada supported the Universal Declaration, human rights commissions were not established until the 1960s and 70s. By the mid-1970s, every Canadian province--including New Brunswick--had a human rights law. But there was no human rights law covering areas of federal responsibility, such as the federal government, the RCMP, the Canadian forces, banks, airlines, railroads and telephone companies. The constitutional division of powers between the federal and provincial governments led to anomalies. An employee or customer of a Bay store in downtown Fredericton could obtain redress if he or she was a victim of discrimination, because stores fall under provincial jurisdiction. But if the same customer or an employee of the Royal Bank down the street was subjected to exactly the same type of discrimination, there was no recourse, since banks are federally regulated.

To close that gap, Parliament passed the Canadian Human Rights Act in 1977. Today, the Act prohibits discrimination in employment and the provision of services on 11 specific grounds, including race, religion, disability and sex. About a million employees are covered by the Act and anyone living in Canada is also covered as the Act relates to federal and federally regulated services.

The following year - in 1978 - the Canadian Human Rights Commission was set up to administer the Act. Today, the commission is an important part of this country's human rights system. I will tell you a little more about our Commission's role in a few minutes.

The Canadian Human Rights Tribunal was also established with the specific mandate to adjudicate human rights complaints.

The Tribunal is a quasi-judicial body and is independently appointed. It is not part of the Commission. Tribunal decisions can be appealed to the Federal Court of Appeal and

the Supreme Court. The binding nature of tribunal decision is a unique feature of the Canadian system, and one that differs, for example, from the Ombudsman's approach.

Another layer of human rights protection was added in 1982, with the coming into force of the Canadian Charter of Rights and Freedoms. Inspired by the Universal declaration and covenants and conventions which followed, the Charter provides guarantees of political rights, fundamental freedoms and equality rights. It is different from the Canadian Human Rights Act and most provincial human rights laws in three ways:

It covers the broad range of fundamental human rights issues as well as equality rights;

It applies only to Acts of government, so the private sector is excluded and:

The Charter provisions can only be enforced through the courts. There is no separate adjudication procedure.

Both the Charter and the Act have contributed to the development of human rights jurisprudence and to defining what is meant by discrimination and equality rights.

### The Canadian Human Rights Commission

Before I talk about the impact of tribunals and courts on human rights developments, I would like to give you a brief overview of our work at the Canadian Human Rights Commission.

There are four main functions of the Commission:

Handling discrimination complaints from members of the public;

Monitoring and auditing compliance with the Employment Equity Act. This Act requires employers to provide employment opportunities for women, Aboriginal peoples, persons with disabilities and members of visible minorities;

Monitoring the state of equality rights in Canada and reporting to Parliament on an annual basis; and

Promoting awareness of human rights through public education and training.

The Commission has a full caseload with 1,500 signed complaints dealt with last year. Of that number, nearly one-third relate to discrimination based on grounds of disability. Racial discrimination and sexual discrimination are second and third and make up about 20 per cent each of the complaints.

You might say, those percentages for racial and sexual discrimination seem low so the equality situation must be improving. That is not entirely the case. Discrimination does not need to be overt to potentially violate human rights legislation.

For instance, we often receive complaints from women, disabled people and members of minority groups who are told they are "personally unsuitable" for a given position. Or they might be told they lack "leadership qualities" or "would not be comfortable" in certain work situations. Sometimes, those assessments are fair.

But other times, they are the result of a cultural bias, stereotypes about people because they are a certain race, sex or age, or because they have a disability. Sometimes the Commission feels that phrases like "you aren't right for the job" really mean "you aren't the right race for the job". But we must dismiss a number of these complaints because there is simply not enough evidence to show that the comment was the result of the person's sex or race or disability.

But in other complaints, it becomes clear there is an underlying, sometimes unconscious, bias that has come into play. There may be other factors within the employment system itself that create barriers to certain groups or individuals. This is what we call "systemic" discrimination.

The systemic nature of discrimination is one of the main reasons for the Employment Equity Act, the major tool used by the Commission to eliminate employment barriers and increase opportunities for the four traditionally disadvantaged groups mentioned earlier.

Employment equity is about ensuring that people have an equal opportunity for employment and advancement despite their membership in a traditionally-disadvantaged group. It is about breaking down the barriers that create systemic discrimination, by reviewing employment systems and ensuring that those barriers are eliminated. It is also about widening the pool of potential candidates to ensure that qualified members of all groups are included.

Most complaints filed with the Commission are either dismissed or settled. If that doesn't happen and we feel there are sufficient grounds to go further, we can refer the case to the Canadian Human Rights Tribunal. About two per cent of our complaints reach the tribunal stage.

Let me talk about this higher level of scrutiny that helps to shape human rights in Canada.

## Tribunals and Courts

As I described earlier, we have both the Act and the Charter as the foundation of this country's approach to human rights. It is the Tribunal and the courts that are having an impact in interpreting those pieces of human rights legislation and establishing important principles in human rights law.

For example, some of the complaints my Commission dealt with in the past have changed policies or set important legal precedents.

One of the most significant cases was that of *Bonnie Robichaud v. Canada*. In 1987, the Supreme Court of Canada, in a unanimous decision, ruled that the Department of National Defence must share responsibility for the actions of one of its supervisors who had sexually harassed Ms. Robichaud. The Robichaud decision is significant because it established the duty of an employer to provide a harassment-free workplace. The impact of that ruling resounds every day in Canada.

There are other milestones:

The ruling in the *Central Alberta Dairy Pool* established the principle of reasonable accommodation;

The 1987 case involving the group *Action Travail des Femmes* against CN Rail. Systemic discrimination was clearly recognized and an employment equity programme was ordered.

The case of *Haig & Birch* established sexual orientation as a ground of discrimination in the Canadian Human Rights Act and

The *Eldridge* case in British Columbia. Here the Supreme Court of Canada recognized that deaf people have the right to free interpretation services in order to communicate with health professionals.

## Pay Equity Case

Let me turn to a more current case to illustrate the impact of tribunals and courts on human rights. This is the case dealing with the principle of equal pay for work of equal value. The subsequent implementation agreement reached by the government and its unions at the end of October is the largest human rights settlement to date.

Last month the Federal Court upheld the interpretation adopted by the human rights tribunal in its ruling a year earlier. In other words, the court ruled section 11 of the Canadian Human Rights Act, that deals with pay equity, is quasi-constitutional legislation and should be given broad and liberal interpretation.

At the Commission we welcomed this ruling by Mr. Justice John M. Evans. It meant that after nearly fifteen years a long-standing complaint by federal government workers was finally being addressed.

This agreement is a landmark in the development of pay equity in Canada. It confirms that equal pay for work of equal value is a fundamental human right, as Parliament

established in 1977 when it included pay equity in the Canadian Human Rights Act. I am therefore delighted that the parties have moved forward to resolve this case.

The case is also important in determining that governments who adopt laws on equality must also respect those same laws in practice.

On a larger scale, the ruling establishes that the basic policy of Canada is one of non-discrimination and that same philosophy should filter down throughout Canadian society. This pay equity case also highlights the need for systematic remedies to systematic problems.

## The Canadian Diversity

Rulings and decisions are important indicators that reflect what is happening in our evolving society. I would like to take a few minutes to talk about the changes we see emerging in this rich society we call Canada.

The diversity we now enjoy in Canada should be seen as a formidable source of innovation and a valuable resource and not an obstacle that needs to be overcome.

Canadian society is being enriched every day by cultures and citizens of the global village. For example, the latest census shows that Canada had a total of 5-million immigrants in 1996. That's an increase of 14.5 per cent from 1991. More recent figures suggest that soon Chinese, not French, will be the second most popular language in Canada outside Quebec.

In religion today there is also a widening diversity in Canada. Every major world belief can be found as well as a growth in smaller spiritual orders.

Traditional employment patterns are also changing. About 46 per cent of the Canadian workforce is female, and nearly two-thirds of women with children under the age of 16 are employed.

Not only is our population diversifying but it is also greying. The number of seniors has more than doubled in 25 years. People over the age of 65 will represent 13 per cent of the population early in the next century. That will rise to one senior out of four people by the year 2031.

Finally, about 15 per cent of the current Canadian population have a certain type of physical or mental incapacity. The number is three times higher in the senior population.

It seems to me that this portrait of our society confirms an inevitable fact: there is no return to a white, Protestant Canada that some people may nostalgically cling to.

That is why it is even more important that the Canadian Human Rights Commission continue to play the leading role in sensitizing the public to the values of equality and acceptance and of protecting everyone's rights and liberties.

I have three underlying beliefs in carrying out this role:

First, the pluralism of our modern societies is an irreversible phenomenon;

Secondly, the Supreme Court of Canada appears to be resolved to eradicate discrimination in order to reach the ideal of real equality and;

Thirdly, on the doorstep of the 21st century, federal lawmakers seem more disposed than ever to make equality a real priority.

## Evolution of Human Rights

What was envisaged 22-years ago is not the reality of today. The designers of our federal human rights system made a basic assumption that once an inequality had been identified it would be quickly corrected. The Canadian Human Rights Commission was established to provide a quicker and more efficient alternative to the court system.

This complaint-based system put the onus on individuals to come forward and make their case. What developed was a complex, expensive and often slow process involving lengthy investigations, lawyers, tribunals and the courts.

What has emerged is not all bad. The concept that human rights law was a negative right--that is, where the individual had to bring forward a complaint -- has evolved into a positive right of equality. I mentioned the Eldridge case in British Columbia a few moments ago. The right of deaf patients to communicate with their doctors is something so obvious it should no longer have to be debated in a modern society.

Likewise with the Supreme Court ruling earlier this year on testing women for forest firefighting jobs in British Columbia. The Court held that the aerobic standard on applicants did not constitute a minimum standard necessary to perform the work and that it discriminated against women.

This case upholds a recent amendment to the Canadian Human Rights Act and sets out the reasoning and analysis behind section 15(2). The focus of the analysis also shifts to the duty of employers to develop workplace standards that reflect the requirements of substantive equality rather than the accommodation of "difference" after the fact.

The firefighting ruling is one of the most important decisions in equality law because it eliminates the difference between direct and indirect discrimination. The outcome also



impacts on the way we look at the issue of accommodation in the workplace and testing candidates for employment.

## Duty to Accommodate

This duty to accommodate is an important principle enshrined last year in the law. Up to that point, the principle of "reasonable" accommodation had long been recognized by Canadian Courts, but had not been explicitly stated in the Act. There was no obligation for employers to accommodate handicapped persons. Employers were only asked to take "reasonable" steps to eliminate disadvantages to employees or clients. The onus has now shifted and the duty to accommodate is statutory.

The duty to accommodate recognizes that substantive equality means respect for people's different needs resulting from such factors as disability, sex, age, family status, ethnic or cultural origin and religious belief. Accommodation helps ensure that the opportunities of all Canadians are not limited for discriminatory reasons.

Whether it is accommodating the handicapped or women fire-fighters, the employer must now show that he or she cannot fit that person into their workforce. The rule is to demonstrate that accommodation is possible; the exception is allowed only where accommodation might cause undue hardship.

## Reforming Human Rights

As good as our system is, it can be better. The government recognized this when it appointed a distinguished Review Panel last Spring to carry out a yearlong consultation and study of the Canadian Human Rights Act.

The chair of the Review Panel is well qualified for this task. Honourable Gérard La Forest - from this city of Fredericton - is a retired Supreme Court Justice with extensive experience in human rights and equality cases. He is joined by three other expert panel members and a secretariat.

Their role is to assure that the aims and underlying substance of the Canadian Human Rights Act are in line with today's principles of equality and respect for human rights. The panel is due to report by April 2000.

Before public hearings began this fall, they published a consultation document to raise the very important questions that must be addressed in this review. This document is asking, for example, if the grounds for discrimination should be broadened to include social condition, political beliefs, and criminal conviction.

The Review Panel is asking, "does the aim of the law reflect the state of today's thinking on human rights?" I would say that it only reflects a part of the thinking. In my opinion,

two values at the heart of the guarantee of equality should be integrated into the legislation. These values are justice and dignity.

Elsewhere, as the Supreme Court recognized in the case of Vriend, equality is the true foundation of "a just society that permits everyone to live in dignity and harmony at the heart of our collective existence".

What's more, it seems to me that we must remember the concept d'« égalité réelle des chances » since the era - when equality was understood in its purely formal sense with no regard to people's own characteristics - is gone once and for all.

I don't wish to deny here the importance of assuring a balance between the rights of one group and the rights of an entire society. However, considering the "quasi constitutional" nature of the Act and its priority position over other federal regulations on rights, shouldn't we theoretically give priority to these rights and obligations that flow from these regulations and ensure that they must be in conformity with the principal of equality?

However this Review may turn out, I hope that the reforms undertaken by the federal government produce a rich and fertile reflection that can permit us to combat with greater efficiency the scourge of discrimination.

We at the Commission are optimistic that the legislative review will pave the way for change. We are looking forward to a strengthened legislation which would result in a more effective tool for achieving fairness.

We also suggest that the Panel's mandate be expanded. Last week, the government announced that it would review the pay equity provisions of the Act. I agree that, after 21 years of experience, section 11 of the Act should be examined. Pay equity was specifically omitted from the original terms of reference of the Review Panel since the matter was before the courts. Now that the issue has been resolved, the Review Panel could examine the issue with an eye to improving, not diluting, the law.

The Review Panel is hearing from employers, unions, the Commission and many experts as it travels across the country. It is also hearing from ordinary Canadians. Perhaps there we see how much has been done to improve human rights in this country and also how much more has to be accomplished.

One example is a blind man who appeared before the Panel last month at the Ottawa hearings. With his guide dog asleep at his side this man pulled out his wallet to show the Panel his credit cards. He said, "these cards are no good to me unless I have someone to help me read them." This individual and others with sight limitations have been trying to convince the banks to issue their credit cards in braille.

Financial institutions have taken some steps to meet the needs of this man and other visually impaired clients. As the result of two human rights complaints, the Royal Bank of Canada has instituted a new policy to improve its service. This includes accessible automated teller machines, monthly statements and publications in braille, large print, audio cassette or computer diskette. Other banks have followed suit and now also offer special automated teller machines.

## Human Rights and Globalization

While we conduct a review towards improving our own human rights laws and practices, it is important that Canada continue to play a leading role on the world stage.

The international community has recognized for a long time that human rights are indivisible and that economic, social and cultural rights cannot be separated from political rights, judicial guarantees or the rights of equality.

We must be aware of the numerous changes that have taken place around the world such as globalization and the great models of society that flow from it. These include the technology revolution, cultural diversity at the heart of societies, and the changing character of work. Globalization by itself does not represent a threat to human rights but the consequences, which flow from globalization, can raise doubts and fears.

The authors of the Universal Declaration of Human Rights obviously wanted to take into consideration the rights of people at the very moment when questions on the economic order were undertaken. Are we ready to take up the torch or have we decided that the motto of economic efficiency will dictate the way the world is managed?

This is a very important question. I believe that we must seriously discuss the role of human rights legislation under the international umbrella of the world economy. We have already made public our reservations on the economic legacy that we will leave future generations. We must also work consciously to give these same generations a solid legacy in human rights.

If we do not do this, I dare say that increasingly in the globalization to come, national borders will lose their importance and governments will continue to shrink. If all of this were to happen, the gains in human rights made up to this point would be seriously threatened.

As I said earlier this evening, I am counting on the young people in this room to continue the cause of human rights in the next century to ensure globalization and equality are synonymous and not in conflict.

In certain circles, one might believe the principle that a sound economic policy would not take into account human rights. I don't agree. I believe these recent world events

give us the opportunity to better understand the interdependence and above all the balance that exists between civil and political rights on one hand, and economic, social and cultural policies on the other.

The emergence of the global marketplace cries out for us to establish a system that puts this balance into practice for all countries. We need to address in a systematic way child labour, the status of women, sexual exploitation, labour standards and genocide.

Such an international network should be an integral part of the development engine of national institutions that protect and promote human rights. In our small way, Canada is doing that by supporting the efforts of countries less well organized and assisting them to establish or strengthen their own human rights organizations.

Canada sets example through words and action. Increasingly there is a link between trade and human rights that cannot be ignored as this country seeks to reach more and more markets around the world.

For instance, when the Prime Minister travelled to China last year, human rights was an important part of his agenda in discussions with leaders of that country. Not only in private but also in public speeches. A week after that visit the leaders of China's tiny democracy movement were rounded up and put on trial in secret. There are steps forward and some steps backwards but the effort is being made consistently and leaders of China will be reminded again and again of Canada's strong position on democracy and human rights.

## Equality and Education

We do not have to go far from home to witness how equality can be threatened by internal social and economic conditions.

Twenty years ago, for example, higher education was accessible to many more Canadians. Now many people who want to improve themselves cannot take on the huge debt in order to study. We risk living in a country where there are two classes of citizens: those who have access to higher education - with the knowledge, power and influence that go along with a degree - and those who are excluded from this opportunity.

The corollary of this exclusion is poverty. I fear that even here in Canada we are giving birth to a society where we will no longer be able to ease the ruinous effects of economic change, nor be able to help those persons and their families live on a equal footing, nor be able to assure equal opportunity.

When I began my career, although I was often confronted with the fact of being one of the first women lawyers in Quebec--for that I must again thank Annie Langstaff for

helping to make it possible-- I never had to overcome major obstacles that would have prevented me from jumping into a profession that was largely dominated by men.

Looking back, there were some annoying hurdles to overcome. I was one of only six women in a law school class of 200 and I was often asked if I was attending law school because I wanted to marry a lawyer. Then my first case in court was another challenge. A male colleague asked me - and he was serious - would I cry if I lost the case? Finally, when I wanted to go to the washroom in the lawyer's section of the Montreal courthouse, my male colleagues had to stand guard outside the door while I used the so-called "men's room". It seems no one ever thought that a woman's washroom would ever be needed. We have indeed come a long way!

## Conclusion

In the later part of this century Canada has made great progress at home and abroad in first establishing and then promoting human rights. From my lecture here tonight you can witness how much more there is to do. But we must also reflect how much better prepared we are to meet the next century than those who greeted the beginning of this century. Human Rights was a concept but something far from a reality. At this stage in our development there is no turning back.

I believe that if we continue our work at home and in the world community we will be reflecting the spirit of Dr. Bernie Vigod. His driving motivation was to ensure a vibrant civil society beyond the walls of St. Thomas University. He had a passion of conviction and uncompromising principles with an ability to clearly articulate those beliefs.

It is a testament that a decade later others such as myself are called on to keep those beliefs alive and further the cause of human rights in our world society. I have been honoured to contribute my small part to Dr. Vigod's eternal dream.