

**[CH HEAD]**Chapter 3: “Rights without the Sword Are but Mere Words”: The Limits of  
Canada’s Rights Revolution

Dominique Clément

**[A]**Introduction

Is pornography free speech? Are housewives entitled to any assets if they seek a divorce?

Is equality about treating people the same or providing everyone with the same opportunities? The following article provides a brief overview of some of the core themes of Canada’s rights revolution, defined herein as the creation of a state apparatus for protecting human rights and the emergence of a grass roots human rights movement.

Human rights are, by their very nature, statist. This does not mean that human rights are derived from the state. In fact, human rights claims have a powerful *moral* force in our community. Nonetheless, human rights are not fully realized until they are recognized and enforced by the state. Thus, to play on Hobbes’ famous phrase, rights without the sword are but mere words. In the following article we explore the origins of the modern human rights state in Canada in an international context, and consider the obstacles and limits to a statist conception of human rights.

In 1960, four Black freshmen from the Agricultural and Technical College in Greensboro, North Carolina sat down at a Whites-only lunch counter in Woolworths and refused to move until they were served. Their singular act of defiance against a culture of oppression inspired thousands across the United States, and a wave of sit-ins soon swept across the South. Over time, the American Civil Rights Movement of the fifties and sixties has become the stuff of legend. Most Canadians today would undoubtedly

recognize references to Martin Luther King, *Brown v. Board of Education*, or the National Association for the Advancement of Colored People. But who would be as familiar with Frank Scott, *Switzman v. Elbling*, or the Jewish Labour Committee? Unbeknownst to many Canadians today, a similar rights revolution took place in Canada, often led by the same minorities who felt the sting of discrimination. In small-town Dresden, Ontario, one of the most segregated communities in Canada in the fifties, African Canadians fought for the right to be served at Morley McKay's diner, which, until 1956, only served Whites. At one point, a Black man was seriously concerned that he might be attacked by the restaurant owner, who was wielding a large meat cleaver and appeared to be having trouble controlling his notorious temper.<sup>1</sup> Only after a protracted struggle would African Canadians in Dresden eventually secure the right to eat anywhere, irrespective of their skin colour.

Mobilizing the state to act as guarantor of human rights is one of the central themes in the history of the Canadian human rights movement. A powerful grass roots movement, often led by the same people who were targets of violence and discrimination, was ultimately successful in securing numerous state human rights policies and laws. Yet, despite the incredible achievements of the past three generations, the rights revolution was no panacea. Many leading human rights advocates have historically proffered a limited conception of rights by either being blind to discrimination against other people in their community, or focusing on civil and political rights to the detriment of social rights. Moreover, while the value of early human rights legislation should not be overlooked, it is critical to appreciate the limits of these reforms in both their content and

application. The history of the rights revolution in Canada is in many ways a testament to the limits of human rights activism and human rights law.

### [A]What Is a Human Right?

“The language of rights is used in so many circumstances, to defend so many lines of argument, that it is now a debased form of rhetoric.”<sup>2</sup> As Beth Gaze and Melinda Jones have suggested, we lack a clear understanding of human rights. It has evolved into a vague discourse which is used to defend everything from free speech to making war on oppressive regimes.

Within the vast international literature on human rights, scholars generally place human rights claims into two distinct categories.<sup>3</sup> *Civil* and *political rights* refer to those rights necessary to the functioning of a liberal capitalist democratic state, including private property, due process (e.g., fair trial), speech, religion, association, assembly, and free press. *Economic, social, and cultural rights* (referred to hereafter as social rights) are primarily associated with the modern welfare state. Health care, education, and abortion, for example, are considered by many people today as human rights. These conceptual divisions have been an integral part of contemporary debates over human rights. In 1948, the United Nations’ General Assembly (with the Soviet block, South Africa, and Saudi Arabia abstaining) passed the Universal Declaration of Human Rights (UDHR). The UDHR, however, was little more than a statement of vague principles. When the time came to create a treaty to bind states to a series of human rights principles, the United Nations was forced to create two distinct covenants.<sup>4</sup>

Defining and applying human rights norms is a difficult process. Despite being quick to blame other countries for their poor human rights record, the United States did not ratify the 1966 International Covenant on Civil and Political Rights until 1992 (and only with numerous reservations attached). The United States has yet to ratify its sister document, the International Covenant on Economic, Social and Cultural Rights. Canada ratified both covenants in 1976, but the Charter of Rights and Freedoms, an American-style Bill of Rights which was added to the Canadian constitution in 1982 and has since become an icon of Canada's human rights system, is almost silent with regards to social rights. If Canada could be said to have a rights culture, it is arguably limited by a conception of rights as liberal, individualistic, and favouring civil and political rights over social rights.<sup>5</sup>

The most common argument against social rights is that the right to vote or to due process does not require positive state action, whereas it would be unrealistic to bind the state to provide, for example, all of its citizens with adequate housing. Social rights require the state to actively distribute resources in order for people to participate equally in their community. Yet, as Isaiah Berlin, one of the most famous liberal thinkers of the twentieth century, once suggested: "To offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom."<sup>6</sup> It is not impractical to impose economic obligations on the state; after all, consider the huge costs involved in maintaining a justice system. We choose not to provide adequate housing to all Canadians, not because we lack the resources, but for political and economic reasons.

Historical studies in Canada on the human rights movement often assume that human rights activism is inherently progressive. But the devil is in the details, and the application of human rights norms should be examined critically. For instance, human rights claims often come into conflict. In theory, free speech is a noble ideal, but it must be applied in a particular cultural context to have meaning. Does a commitment to gender equality require us to censor pornography, or is this a violation of free speech? These debates often pit honest defenders of human rights against each other. John Dixon, a former president of the British Columbia Civil Liberties Association (a group dedicated to defending free speech), once quipped about his organization's relationship with the women's movement: "It was very soon the case that we got to be called unconscious exploiters only on our luckiest days."<sup>7</sup> Rights discourse also encourages activists to conceive of social change as legal change. As Michael Mandel suggests, the courts have historically been a poor forum for promoting systemic social change, and tend to be anti-statist, right wing, and pro-business.<sup>8</sup> Human rights activism can also be elitist. Rainer Knopff and F. L. Morton have argued that the courts can be hijacked to promote the interests of a well-trained, educated minority who pursue social change through the courts because they are incapable of mobilizing enough support to promote change through the political process.<sup>9</sup> Clearly, human rights discourse should not be embraced uncritically, but should be appreciated for the obstacles and limits to equality inherent in their application.

[A]Early Human Rights Campaigns

One of the most blatant violations of individual rights in Canadian history unfolded in the nation's capital in 1946. A young Russian cipher clerk from the Soviet embassy in Ottawa, armed with evidence of a spy ring operating in Canada, decided to try his luck as a defector. Based on Gouzenko's accusations, the federal government responded by invoking the draconian War Measures Act to detain dozens of *suspected* spies. Most historians and the popular media refer to the October Crisis of 1970 as the only time war powers have been used in peacetime in Canada; in fact, it was the second. The War Measures Act, a statute barely two pages long passed in 1914, provides the federal government, and by extension the cabinet, with dictatorial-like powers. A few cabinet members authorized the Royal Canadian Mounted Police (RCMP) to hold a group of people incommunicado, with no access to family or lawyers, trapped in tiny cells with little lighting and under suicide watch by an RCMP guard at all times. The suspects were vigorously interrogated, some for up to five weeks, and then brought before a royal commission which had been implemented specifically for the purpose of circumventing the judicial system. Their testimony was later used against them and others in court. One of the detainees, Emma Woikin, was so traumatized by her incarceration that, when she was finally brought before a judge, all she could do was repeat over and over again, in a flat and unnatural tone, "I did it ."<sup>10</sup>

As late as the 1940s, the term "human rights" had yet to gain popular currency in Canada. Instead, Canadians were possessed of civil liberties, those fundamental rights gained on the battlefield of Runnymede and with the death of kings who denied their people the right to practice their own religion or arbitrarily imprisoned their subjects. In the United States, the Supreme Court has historically been responsible for protecting

individual rights from the state by invalidating government legislation that offends the Bill of Rights. In contrast, the Canadian constitution of 1867 did not contain a declaration of rights. Parliament, not the courts, would be the ultimate guarantor of people's rights.<sup>11</sup> Thus, in 1946 the Minister of Justice, J. L. Ilesley, could justify his government's decision to suspend the rights of suspected spies by appealing to the principle of parliamentary supremacy. Fundamental freedoms were "privileges which can be and which unfortunately sometimes have to be interfered with by the actions of Parliament or actions under the authority of Parliament."<sup>12</sup> By the 1940s, however, many Canadians reacted to appeals to parliamentary supremacy with increasing skepticism.

The Gouzenko Affair and similar examples of gross violations of civil liberties by the state prompted people to fight back. Human rights laws simply did not exist by the 1940s. It was a fact of daily life in Canada that everyone did not enjoy the same rights. While the federal government laid the groundwork for detaining suspected spies in 1946, thousands of Canadian citizens of Japanese descent were deported to Japan in the aftermath of the Second World War (WWII).<sup>13</sup> Immigration policies were explicitly racist until 1962 and restrictive covenants (restrictions on the ethnic, racial, or religious mix in a neighbourhood) were common. During WWII, Canada was among the world's least hospitable destinations for Jewish refugees, allowing barely 5,000 to enter during the course of the war. Blacks and many other minorities who sought to enlist were rejected by recruiting centres. Women did not get the vote in Quebec until 1940, and several minority groups, including Aboriginals, were denied the right to vote until well after the war. Without the franchise, individuals could not hold public office or serve on a jury. Minorities were regularly denied licences to operate businesses. Anti-semitism,

segregation amongst Blacks and Whites in Nova Scotia and Southern Ontario schools, limited economic opportunities for women, and widespread discrimination against Aboriginals was a basic reality of life in Canada.

Early human rights campaigns were undertaken by many of the same people who experienced discrimination. Jews, in particular, were at the forefront of leading many of the early human rights campaigns. The Jewish Labour Committee (JLC), formed in 1936, established offices across Canada and worked alongside organized labour to promote tolerance towards all minorities.<sup>14</sup> By the 1940s, the labour movement had become one of the leading forces in the human rights movement, a position that represented a significant shift in its attitudes towards racial minorities. For most of the first half of the twentieth century, labour had been a strong proponent of closed borders. Labour leaders portrayed immigrants and racial/ethnic minorities, most notably the Chinese in British Columbia, as low wage strike-breakers who threatened the power of organized labour.<sup>15</sup> Changes within the labour force and the realization that racism was a significant obstacle to working class unity had a profound impact on the labour movement (over two million immigrants entered the country between 1946 and 1961, many of whom filled the ranks of unions).<sup>16</sup> Racial minorities were also active agents in challenging their own marginalization. In 1946, for instance, a group of Chinese Canadians formed the Committee for the Repeal of the Chinese Immigration Act to lobby for the removal of a ban on Chinese immigration to Canada.<sup>17</sup> Racial and religious minorities found allies among the country's white, Anglo-Saxon elite. A collection of civil liberties associations, the first in Canadian history, emerged in the 1930s and by the 1940s played a key role in campaigning for the implementation of human rights legislation.<sup>18</sup>

Many of the early campaigns centred around two objectives: a Bill of Rights entrenched in the constitution, and anti-discrimination legislation for employment, services, and housing. A breakthrough occurred in Saskatchewan in 1947 when the Co-Operative Commonwealth Federation, led by Tommy Douglas, passed the country's first Bill of Rights (as a statute applicable only in that province). In Ontario, the JLC and the Civil Liberties Association of Toronto successfully mobilized dozens of organizations to lobby for legislation banning discrimination. Their efforts bore some fruit in 1951 when the Conservative government of Leslie Frost passed the country's first Fair Employment Practices legislation, followed soon after by a Female Employees Fair Remuneration Act and a Fair Accommodation Practices Act. Within five years similar laws were enacted in five other provinces.<sup>19</sup> Another landmark achievement of the early human rights movement was the enactment of a federal Bill of Rights in 1960 under the Conservative government of John Diefenbaker. The Bill of Rights, which purported to empower judges to veto legislation that violated fundamental freedoms such as free speech or due process, was a radical departure from a political tradition in which the courts did not challenge legislation passed by Parliament unless it was beyond the government's jurisdiction.

Canada's early human rights campaigns paralleled similar developments on the international scene. The Charter of the United Nations included a mandate to promote human rights and the United Nations General Assembly had passed the UDHR in 1948. Within a generation the United Nations had established a human rights commission to monitor various human rights treaties developed in the wake of the UDHR. Canada's human rights movement predated international developments, but the international community provided domestic activists with greater ammunition for making human

rights claims at home. Activists could exploit Canada's international commitments to pressure the state to implement human rights policies.

At first glance, these achievements appear to have placed important limits on the state. In theory, the courts were now in a position to act as a check on the actions of both the state and private citizens who violated individual rights. Certainly no one would dispute that human rights activists had achieved a significant victory with the creation of laws clearly delineating people's rights. More importantly, a new culture of rights was emerging. As James Walker notes, rights discourse and the role of the state had traditionally favoured the discriminator; the rights to freedom of speech or association were interpreted to mean the right to refuse service to certain peoples or to express prejudicial ideas. In contrast, anti-discrimination legislation "represented a fundamental shift, a reversal, of the traditional notion of citizens' rights to enroll the state as the protector of the right of the victim to freedom from discrimination. It was, in fact, a revolutionary change in the definition of individual freedom."<sup>20</sup> Racial hierarchies were challenged as immoral, women demanded equal pay, and religious minorities spoke out against state repression.

The reality, however, was that these were baby steps. Anti-discrimination legislation went largely unused; a decade after their implementation in Ontario only two complaints had been sustained.<sup>21</sup> Early anti-discrimination legislation signalled a new era of state intervention to protect minorities; yet it was weakly enforced and many people hesitated to embrace this new role for the state, which they saw as legislating morality. After the passing of the Ontario Racial Discrimination Act in 1944, which prohibited the display of discriminatory signs, Ontario Premier George Drew emphasized that "the best

way to avoid racial and religious strife is not by imposing a method of thinking, but by teaching our children that we are all members of a great human family.”<sup>22</sup> Judges, who found it difficult to conceive of discrimination as a criminal act, were reluctant to convict. Fines did not help victims find new jobs and most minorities were unaware of the existence of the legislation.<sup>23</sup> Perhaps the most damning indictment of early human rights legislation, however, was the lack of any recognition of discrimination faced by women. None of the early anti-discrimination laws, and even the Ontario Human Rights Code of 1962, did not include sex discrimination. Early human rights campaigns simply did not prioritize gender discrimination and male activists were often blind to discrimination against women.

As for the federal Bill of Rights, with the exception of a single case in the late 1960s, it was never used to invalidate government legislation. It was a vague and limited statute that contained only the most elementary civil and political rights. Frank Scott, perhaps the country’s most notably constitutional scholar in this period, disdained the law: “That pretentious piece of legislation has proven as ineffective as many of us predicted.”<sup>24</sup>

In many ways, the achievements of early human rights activists highlighted the weaknesses of the country’s early human rights regime. Frank Scott, for instance, defended the rights of two popular targets of repression (Communists and Jehovah’s Witnesses) in a series of famous civil liberties cases in the 1950s. Maurice Duplessis, the autocratic Premier of Quebec who claimed that the Bible was sufficient protection for human rights, waged a virtual war against unpopular minorities. Communists were easy targets in the heydays of the Cold War, and Jehovah’s Witnesses, whose religion led

them to viciously attack the Roman Catholic Church (often on people's doorsteps), were hardly popular in a vastly Catholic province. In *Switzman v. Elbling* (1957), Scott convinced the Supreme Court of Canada to invalidate a Quebec law that allowed the province to padlock any premises suspected of promoting communism (without warrant or the need for any evidence). The law, passed in the 1930s, had long been considered one of the most offensive violations of civil liberties in a generation; it was so vague that it was used against unionists, Jews, Jehovah's Witnesses, Communists, and people on the political Left in general. Victims could only appeal to the Attorney General who, conveniently, was Duplessis (he was both Attorney General and the Premier). Scott was involved in two other important civil liberties cases: *Saumur v. City of Quebec and Attorney-General* (1953) and *Roncarelli v. Duplessis* (1959). In both cases, the court provided redress to Jehovah's Witnesses who were targets of repression and abuse in Quebec.

Still, as with the ground-breaking legislation of the fifties, these victories had limits. Although several judges referred to the sanctity of freedom of speech and religion, in the end their decisions had little to do with civil liberties. Instead, in *Switzman* and *Saumur*, the court ruled that the province had exceeded its jurisdiction under the constitution. The Bill of Rights was little help. In *Attorney General of Canada v. Lavell* (1974), the court refused to accept that a section of the Indian Act, which required women (but not men) to surrender their Indian status if they married a non-Indian, was a violation of the Bill of Rights' guarantee of equality under the law. The court essentially claimed that the government could discriminate against Aboriginal women as long as it discriminated against all Aboriginal women equally. A year later, in *Murdoch v.*

*Murdoch*, the court once again demonstrated the limits of these early achievements. After having worked most of her life on a farm, an abused farm wife claimed that she was entitled to half of her husband's assets after their divorce. The court disagreed. With a lone dissent by Bora Laskin, the judges concluded that her labour constituted the expected obligations of a farm wife and that she was entitled to nothing.

#### [A]The Age of Rights: Activism and the Human Rights State

The creation of the welfare state was a milestone in the evolving role of the state in Canada. True, social rights were not entrenched to the same degree as civil and political rights. Ontario's anti-discrimination legislation banned employers from refusing jobs to African Canadians, but it did nothing to alleviate the poverty facing racial minorities or recognize employment as a human right. Nevertheless, such welfare state programs as unemployment and health insurance protected citizens from fluctuations in the market economy. The expansion of the welfare state represented a challenge to traditional conceptions of rights as civil and political rights.

A cultural shift was underway by the sixties. James Walker, for example, has identified three stages in the movement for racial equality. The first phase, "equal citizenship," sought to end legal distinctions among citizens in areas such as immigration and the franchise; the second phase involved demands for "protective shields" which led to anti-discrimination legislation; and the third phase, "remedial sword," involved state policies designed to "correct systemic conditions that produce discriminatory results even in the apparent absence of overt prejudicial acts."<sup>25</sup> Each phase was informed by changing common sense notions about race and the nature of prejudice. Anti-

discrimination legislation campaigns were guided by a belief that discriminatory acts were the result of individual aberrant behaviour, or psychological problems attributed to pathological individuals. These individuals influenced popular notions of what was right and moral (like a contagious disease). The solution, therefore, was to stop the disease at its source, and mobilize the state to prevent individual acts of discrimination.

In the sixties and seventies, the move towards “remedial sword” policies in the form of proactive human rights commissions or funding for education programs paralleled another shift in ideas about the nature of prejudice. Instead of focusing on the threat of pathologically prejudiced individuals, human rights activists increasingly raised concerns about systemic racism. In Toronto, for instance, although the Canadian Civil Liberties Association (CCLA) refused to support employment quotas (requiring employers to hire a minimum number of minorities or women), it recognized that two decades after the passing of the Fair Employment Practices Act, certain professions remained bastions of white male Christians. Firemen were a perfect example. Toronto’s fire department in the mid-seventies employed only two non-whites, less than 0.2% of the workforce. As a solution, the CCLA called on the city to implement new hiring practices, such as recruiting in minority areas and advertising in the ethnic press, or requesting non-white leaders to recruit candidates.<sup>26</sup> Meanwhile, feminists spoke about the “glass ceiling,” the disabled demanded a rethinking of “normal” or ableness, and gay liberationists challenges ideas about sexuality and the family. These developments were informed by a belief that prejudice could be unspoken and systemic, rather than simply the overt act of individuals.

The rights revolution entered a new phase in the sixties with the rise of a powerful grassroots human rights movement. It is fair to say that by this time Canadians participated in social movements to a degree never before seen in history. Social movement activism defined the sixties and seventies. Civil disobedience, mass demonstrations, and the emergence of new collective identities were only some of the many forms of collective behaviour and contentious actions that characterized the social movement activism of the boomer generation.

At the same time, people began to *organize* in unprecedented levels. New student groups exploded on to the scene, led by the Combined University Campaign for Nuclear Disarmament, the Student Union for Peace Action, the Union général des étudiants québécois, and the Company of Young Canadians. Women's organizations proliferated. In British Columbia alone, women established more than a hundred advocacy groups (there were only 2 in 1969), 46 women's centres, 15 transition houses, and 12 rape crisis centres in the 1970s. The country's first organizations representing homosexuals appeared in Vancouver in 1964 (Association for Social Knowledge) and Toronto in 1969 (University of Toronto Homophile Association). Aboriginals were also highly active in mobilizing locally and at the national level. Between 1960 and 1969 four national Aboriginal associations and 33 separate provincial organizations were born. By the mid-1980s, the federal Secretary of State was providing funding to 3,500 community groups across the country.<sup>27</sup> Prisoners' rights groups became increasingly vocal and well organized; the Quebec Prisoners' Rights Committee, one of the most prominent in the country, sought the abolition of all prisons. Greenpeace was founded in Vancouver in

1971. Perhaps the only thread linking all of these disparate movements was a discourse of rights. Canada's rights revolution had finally come of age.

Once again, developments at home mirrored international trends. By 1996, there were no less than 295 registered human rights groups worldwide, almost half of which were formed since the seventies. Amnesty International was founded in 1961 and was awarded the Nobel Peace Prize in 1977. Human Rights Watch began to monitor compliance with the Helsinki Accords in 1978, a landmark achievement in which the Soviet Union, for the first time in history, agreed to a series of human rights principles in a treaty. The United Nations human rights regime also matured. The United Nations' Human Rights Committee and the Committee on the Elimination of Racial Discrimination came into being to enforce the covenant on civil and political rights and the International Convention on the Elimination of All Forms of Racial Discrimination. An Inter-American Commission and Court of Human Rights were instituted following the ratification in 1978 of the American Convention on Human Rights (representing South, Central, and North America). The European Convention of Human Rights came into effect in 1953, but it was not until the early 1970s that the institutions it created, particularly the court, began to play an important role in the implementation of the Convention.

Federal and provincial legislation to protect human rights was implemented in Canada. Privacy Acts were passed in most jurisdictions by the 1980s; they protected individuals from such actions as unnecessary police wiretaps or insurance companies disclosing information about their clients. British Columbia became the first province to prohibit sex discrimination in 1969 and, in the same year, linguistic rights were

reaffirmed with the passage of the federal Official Languages Act. Children were recognized as having their own rights as well. Quebec's Youth Protection Act of 1977, for instance, guaranteed youths the right to be consulted about switching foster care parents and to consult a lawyer before judicial proceedings, while the Ontario Child Welfare Act of 1978 protected the privacy of adopted children. Restrictions on women serving on juries were removed by the 1980s, as were requirements for women to leave the civil service after they were married. Mental patients also became rights-bearing citizens; in some jurisdictions, they were included in minimum wage laws and greater restrictions were placed on forcible confinement. The first major land-claims treaty was signed in 1975 between the Quebec government and the James Bay Cree to develop hydro power, and revisions to the Indian Act placed First Nations on more equal footing with other Canadians. Female Aboriginals, for instance, could now retain their status after marrying non-Aboriginals. Prisoners were granted the vote for the first time in Quebec in 1979.

Meanwhile, human rights activists, including the Jewish Labour Committee, sought improvements to the anti-discrimination laws passed in the fifties. Ontario introduced the first Human Rights Code in Canada in 1962 (by 1977, every jurisdiction in the country had introduced a Code). Unlike previous anti-discrimination laws, human rights codes were far more expansive; they consolidated all existing human rights legislation into one statute which dealt with discrimination in employment, services, and housing. Whereas the fair practices legislation of the fifties mainly focused on racial, ethnic, and religious discrimination, human rights codes included a host of new categories such as gender and political opinion (an innovation introduced by

Newfoundland in 1969). One of the most frustrating aspects of the early anti-discrimination laws was the lack of an effective enforcement mechanism; the Minister of Labour had to agree to create an ad hoc commission to investigate a complaint. In contrast, human rights codes were enforced by standing commissions with full-time government staff who educated the public and helped victims of discrimination advance their claims. Human rights violators could, among other options, be forced to pay a fine, provide a service, apologize to an employee, or re-hire someone. Human rights commissions remain a mainstay of the state's human rights program today, although in 1984 British Columbia enjoyed the dubious distinction of being the first province to disband its human rights commission (it was re-established in 1994 only to be disbanded, again, in 2002).

These developments set the stage for the ultimate manifestation of the human rights state: the Charter of Rights and Freedoms passed in 1982. The Charter did more than create a legal framework for defending human rights; it represented a significant cultural shift. Common sense notions about racial hierarchies, gender roles, and the role of the state had to change before the Charter could be embraced by Canadians. Parliamentary supremacy was all but abandoned. As early as 1970, a Special Committee on the Constitution concluded that “parliamentary sovereignty is no more sacrosanct a principle than is the respect for human liberty which is reflected in a Bill of Rights.”<sup>28</sup> Granted, section 33 of the new constitution allowed governments to immunize laws from legislative review, a remnant of a political tradition in which the legislature was supreme. Yet, certain parts of the Charter were protected from section 33 (specifically, democratic rights such as the right to vote and hold office, as well as mobility and language rights),

and it quickly became apparent that political leaders would only employ the controversial section to their peril (section 33 has only been used once outside Quebec).

Canada's rights culture, however, still had limits. Social rights had been realized through a variety of state policies, from health care to labour legislation. Yet, social rights lacked the status of civil and political rights. The protections contained in the Charter, for instance, were primarily civil and political rights. With the exception of language rights, clauses which could be characterized as "social rights," such as multiculturalism, have proven to be weak and ineffective. Unlike countries such as South Africa, Canada's constitution continues to offer no clear commitment to social rights.

Social rights advocates have enjoyed their own victories over time. Through the Charter, for example, people who are deaf have successfully fought for the right to have sign-language interpreters in hospitals. The experience of the labour movement, however, is one example of how social rights are not easily enforced in Canada. The Supreme Court of Canada has been hostile to any suggestion that the Charter's guarantee of freedom of association includes the right to strike or collective bargaining. The court ruled in 1987 against organized labour in a series of challenges to provincial and federal wage controls and prohibitions on strikes. Although Chief Justice Brian Dickson acknowledged that the "role of association has always been vital as a means of protecting the essential needs and interests of working people," the court did not accept that freedom of association meant the right to strike.<sup>29</sup> This did not prevent the court from extending freedom of association to the right to advertise and the right of two companies to merge. In fact, only a year earlier, an Ontario judge ruled that a union could not use its members' dues to support a political party even though such a restriction would not apply to a

professional organization or a corporation (the Supreme Court of Canada overruled the decision in 1991). Given the labour movement's dismal experience with the Charter, legal historian Michael Mandel concluded that "the whole idea of the Charter can be seen as a legitimation of the basic inequalities of Canadian society, of which the subordination of labour to business is one of the most basic."<sup>30</sup>

The Charter is only one of many examples of how various institutions in Canada promote a limited conception of rights. Non-governmental organizations (NGOs) are often guilty of focusing too much on civil and political rights, and fail to take into consideration the underlying socio-economic factors that lead to rights violations.<sup>31</sup> Irwin Cotler, a future federal Minister of Justice, suggested in the early 1990s that at the time "a disproportionate number of NGOs deal with matters pertaining to political and civil rights, while the cause of economic, social and cultural rights appears to be under-represented among the NGOs."<sup>32</sup>

Take, for instance, one of the largest and most influential human rights organization in the country: the Canadian Civil Liberties Association (CCLA). With more than 5,000 members in the early 1980s, the Toronto-based CCLA (which was founded in 1964) had evolved into one of the largest and most established advocacy groups in the country. By the turn of the twenty-first century, the CCLA has intervened in the Supreme Court of Canada more times than any other organization in the country, except for the Women's Legal Education Action Fund. Throughout its entire history, the CCLA and other like-minded organizations have promoted a limited conception of human rights. No issue best exemplifies the association's rights philosophy than Ontario's infamous "man in the house" rule.

Jennifer Smith was a thirty-year-old single mother trying to raise four children in Toronto after having been deserted by her husband.<sup>33</sup> She was taking courses to complete her high school degree and had been on welfare since the mid-1960s. Smith received an unexpected letter in 1970 informing her that her welfare was being cut off because she was no longer living as a single person.<sup>34</sup> Single women suspected of having a male in the house were routinely denied access to welfare. The government simply assumed that men, as breadwinners, would provide for women. The man in the house rule clearly discriminated against women, assuming a sexual relationship implied a financial one, and the abruptness with which recipients could be denied welfare raised the potential for numerous procedural abuses. There were also serious concerns about the tactics employed by the welfare office in determining whether women were living as single persons. During some surprise visits, inspectors would demand to know about the most intimate aspects of a recipient's relationships and in some cases drew conclusions based on such flimsy evidence as the presence of open beer cans or a raised toilet seat.<sup>35</sup>

Smith was typical of single mothers in the seventies and eighties who were victims of a welfare system eager to cut costs. Recipients lived well below the poverty line, receiving an estimated 60 percent of the basic amount required to lead a healthy and functional lifestyle.<sup>36</sup> As one CCLA study suggested, a “person accused of the most heinous crimes enjoys more discernible protection of his domestic privacy than does an innocent recipient of public welfare.”<sup>37</sup>

The CCLA helped Smith secure her benefits. Unfortunately, the man in the house rule was more resilient and lasted until 1986 when the Ontario government, concerned that the regulation violated the newly entrenched Charter of Rights and Freedoms,

decided to eliminate the regulation.<sup>38</sup> What is significant, however, is that in all its years of advocacy on behalf of welfare recipients, at no time did the CCLA suggest that welfare recipients had a right to better benefits. The amount of welfare individuals received was never an issue; the group was solely concerned with the procedures for distributing benefits. In other words, the CCLA was only concerned with the *administration* of welfare and the equitable treatment of welfare recipients, not the amount or the nature of state support.

Such a conception of rights is inherently limited, if not outright contradictory. In many ways, negative rights (civil and political rights) *derive* from positive (social) rights, and to deny the latter is to undermine the former:

Rules, regulations, laws, and other forms of coercion, manipulation, and threat are all limitations upon one's negative freedom—some justified, some not. These are familiar restrictions. Lack of training, accommodation of needs, or realistic opportunities are also restrictions; they are limitations upon one's positive freedom, one's capacity to exercise one's freedom to do or become what one wishes. Both kinds of freedom open the door to options and choices, but only positive freedom captures the actual capability to achieve or bring about what one chooses. Since the importance of negative freedom presumes one's abilities to do or become something, if one so chooses, the value of negative freedom must be derivative from positive freedom.<sup>39</sup>

The idea of social rights has had many advocates. Anti-poverty groups and disability rights activists, for instance, have long demanded that that state recognize their social rights. In the sixties and seventies, however, when the key building blocks of the

modern human rights state were established, the state did not embrace the notion of social rights. Human rights codes were a significant breakthrough but, despite their broad mandate, human rights commissions dealt almost exclusively with employment discrimination (86% of the Ontario commission's case load involved employment in 1979–80).<sup>40</sup> Moreover, human rights commissions had a mandate to promote awareness but they were not proactive: commissions had to wait for individuals to file complaints. Thus, although the staff of the Ontario Human Rights Commission may have sympathized with the lack of ethnic minorities in the Toronto fire department, they could do nothing unless someone could prove that individuals had been victims of discrimination. But there are few things more difficult to prove than discrimination in hiring, since most employers do not inform applicants that they were denied a job because of their race or gender. Human rights codes conceived of human rights in terms of individual rights, and there were no provisions for collective remedies. Most human rights codes, for instance, did not allow for class action lawsuits on behalf of aggrieved minorities.

Human rights codes were never designed to deal with systemic inequalities. With the exception of Quebec and Alberta, human rights codes did not take primacy over other pieces of legislation. Quebec's Charter of Human Rights and Freedoms, in fact, stands out in many other ways from other human rights codes. When it was passed in 1975, the Quebec Charter included several progressive sections dealing with the needs of the elderly and children. But, as always, this innovation had limits. Despite repeated attempts by the Ligue des droits de l'homme, the government refused to recognize the right for elderly people to have affordable medication or the rights of prisoners to have healthy

food. Many of the people intimately involved with human rights commissions have recognized these limitations. According to a 1975 report commissioned by the Ontario Human Rights Commission, the oldest and largest commission in the country:

The most pervasive discrimination today often results from unconscious and seemingly neutral practices which may, none the less, be as detrimental to human rights as the more overt and intentional kind of discrimination. These practices perpetuate the discriminatory effects of past discrimination, even when overt acts of discrimination have ceased. Unfortunately, the Commission does not have the power, under the present Code to deal effectively with such practices despite their clearly discriminatory consequences.<sup>41</sup>

Canada's rights revolution, for all its impressive achievements, faced immense obstacles. The achievements of the human rights movement were ultimately overshadowed by a culture of rights that was individualistic, liberal, and concerned primarily with civil and political rights.<sup>42</sup>

## [A]Conclusions

Canada's rights revolution should be seen as the beginning, not the end, of the campaign for liberty and equality. There has often been a significant gap between the rhetoric of human rights and the implementation of human rights policies. This is not to deny the remarkable achievements of the twentieth century. In a generation, human rights activists helped transform the role of the state from an active agent of oppression into a tool for combating discrimination. Parliamentary supremacy no longer informs most of the political debates surrounding human rights, and an impressive state system for defending

human rights was created. Today, it is illegal, and for most people morally repugnant, to deny Aboriginals work or services on the basis of their race. And yet, does the right to free speech, assembly, or to vote apply equally when Aboriginals are represented disproportionately among prisoners, the unemployed, and people who commit suicide? The history of human rights activism is as much about the limits of rights discourse as it is about the potential for human rights to promote equality and tolerance.

#### [A]Acknowledgements

I would like to extend special thanks to Eric Sager (University of Victoria) for his feedback on an early draft of this article.

#### [A]Notes

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<sup>1</sup> Ross Lambertson, "The Dresden Story: Racism, Human Rights, and the Jewish Labour Committee of Canada," *Labour/Le Travail* 47 (Spring 2001): 75.

<sup>2</sup> Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (Sydney: The Law Book Company Ltd., 1990), 9.

<sup>3</sup> It is also common to see references to a third "generation" of rights in the human rights literature, specifically collective or developmental rights.

<sup>4</sup> There are several useful introductory texts on the debates over the nature of human rights and civil liberties, including: Maurice Cranston, *What is a Human Right?* (New York: Basic Books, 1973); Jerome Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly* 20:2 (1998); Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press Ltd., 2000); Brian Orend, *Human Rights: Concept and*

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*Context* (Peterborough: Broadview Press, 2002); Jack Donnelly, *Universal Human Rights in Theory & Practice* (New York: Cornell University Press, 2003).

<sup>5</sup> Gary Teeple provides a useful overview of the historical evolution of human rights and how rights entrench class inequalities. Gary Teeple, *The Riddle of Human Rights* (New York: Humanity Books, 2005).

<sup>6</sup> Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969), 124.

<sup>7</sup> John Dixon, "The Porn Wars," in John Russell, ed., *Liberties* (Vancouver: New Star Books, 1989), 26.

<sup>8</sup> Michael Mandel, *The Charter of Rights and the Legislation of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994).

<sup>9</sup> Rainer Knopff and F. L. Morton, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

<sup>10</sup> Dominique Clément, "The Royal Commission on Espionage and the Spy Trials of 1946–9: A Case Study in Parliamentary Supremacy," *Journal of the Canadian Historical Association* 11 (2000); Dominique Clément, "Spies, Lies and a Commission, 1946–8: A Case Study in the Mobilization of the Canadian Civil Liberties Movement," *Left History* 7, 2 (2001).

<sup>11</sup> Although there is no reference to civil liberties or human rights in the British North America Act, section 92 refers to property and civil rights (section 92 delineates the jurisdiction of the provinces). However, the courts interpreted "civil rights" narrowly and limited the provinces' responsibilities under this section to contract and property law. Unlike the United States, therefore, the term "civil rights" has different connotations

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north of the border. It is more common to use the term “civil liberties” when discussing free speech or freedom of association.

<sup>12</sup> NAC, John Diefenbaker Papers, series 3, v. 82, p. 65434, copy of St. Laurent speech before the House of Commons, 1947.

<sup>13</sup> Technically, Canadian citizenship did not exist before 1947 and people in Canada held British citizenship. Nonetheless, the federal government’s decision to deport its own citizens was virtually unheard of and was vigorously challenged in the courts, although in the end the Judicial Committee of the Privy Council in England supported the government’s actions with only minor reservations.

<sup>14</sup> For a history of the Jewish Labour Committee and the role of minorities in securing anti-discrimination legislation, refer to Ruth Frager and Carmela Patrias, “‘This Is Our Country, These Are Our Rights’: Minorities and the Origins of Ontario’s Human Rights Campaigns,” *The Canadian Historical Review* 82, 1 (March 2001).

<sup>15</sup> Bryan Palmer, *Working Class Experience: Rethinking the History of Canadian Labour, 1800–1991* (Toronto: McClelland & Stewart Inc., 1992), 266.

<sup>16</sup> Lambertson, “The Dresden Story,” 48–9.

<sup>17</sup> Stephanie D. Bangarth, “‘We are not asking you to open wide the gates for Chinese immigration’: The Committee for the Repeal of the Chinese Immigration Act and Early Human Rights Activism in Canada,” *Canadian Historical Review* 84, 3 (2003).

<sup>18</sup> Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930–1960* (Toronto: University of Toronto Press, 2005).

<sup>19</sup> Manitoba (1953), Nova Scotia (1955), New Brunswick (1956), British Columbia (1956), Saskatchewan (1956), and Quebec (1964). The first Fair Accommodation

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Practices Act was passed in Ontario in 1954, with Saskatchewan (1956), New Brunswick (1959), Nova Scotia (1959), Manitoba (1960), and British Columbia (1961) passing similar legislation. British Columbia enacted a more restricted statute in 1961 while Quebec avoided passing fair accommodation practices legislation entirely, but the government of Quebec did add a section to the Hotels Act to forbid discrimination in hotels, restaurants, and camping grounds. Walter Surma Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: De Boo, 1982), 27–8.

<sup>20</sup> James Walker, "The 'Jewish Phase' in the Movement for Racial Equality in Canada," *Canadian Ethnic Studies* 34:1 (2002).

<sup>21</sup> Toronto Star, 3 August 1961.

<sup>22</sup> Quote in Walker, "The 'Jewish Phase' in the Movement for Racial Equality in Canada."

<sup>23</sup> Walter Tarnopolsky examines the history of early anti-discrimination legislation in Tarnopolsky, *Discrimination and the Law in Canada*.

<sup>24</sup> Frank Scott to Gordon Dowding, 20 September 1964, vol. 47, NAC, Frank Scott Papers, MG30, D211.

<sup>25</sup> Walker, "The 'Jewish Phase' in the Movement for Racial Equality in Canada," 1.

<sup>26</sup> Library and Archives of Canada (LAC), Canadian Civil Liberties Association Papers (CCLA), R9833, f. 14, v. 10, Submission to Ontario Human Rights Commission Re. Review of Ontario Human Rights Code, January 1977.

<sup>27</sup> For further information on the Secretary of State's funding programs, refer to Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937–1982* (Vancouver: UBC Press, 2008).

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<sup>28</sup> Canada, 1972. *Special Joint Committee of the Senate and House of Commons on the Constitution of Canada—First Report*, 18–19.

<sup>29</sup> Reference Re. *Public Service Employee Relations Act* (Alta.), [1987] 1 S.C.R. 313.

<sup>30</sup> Mandel, *The Charter of Rights and the Legislation of Politics in Canada*, 260.

<sup>31</sup> For a sample of critiques raised about the activities of human rights NGOs, refer to Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002); James Ron, Howard Ramos, and Kathleen Rodgers, "Transnational Information Politics: NGO Human Rights Reporting, 1986–2000," *International Studies Quarterly* 49, (2005); Teeple, *The Riddle of Human Rights*.

<sup>32</sup> Irwin Cotler, "Human Rights as the Modern Tool of Revolution," Kathleen E. Mahoney and Paul Mahoney, eds., *Human Rights in the Twenty-First Century: Global Challenges* (London: Martinus Nijhoff Publishers, 1993), 19.

<sup>33</sup> Due to access to information regulations, Jennifer Smith's real name has been concealed.

<sup>34</sup> Alan Borovoy to John Yaremko, 4 January 1971, LAC, CCLA, R9833, vol. 15, f. 2.

<sup>35</sup> NAC, June Callwood Papers, MG31 K24, vol. 18, f. 6, extracts from a letter from the CCLA to John Yaremko, Minister of Social and Family Services, 15 June 1970.

<sup>36</sup> The Toronto Social Planning Council estimated that the average family of four required \$3,000 annually to meet basic needs, but only received 60 percent of this amount, even after increases through General Welfare Assistance (Ontario) in 1967. Canadian Civil Liberties Association, *Welfare Practices and Civil Liberties—A Canadian Survey* (Toronto: Canadian Civil Liberties Education Trust, 1975).

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<sup>37</sup> There were several reasons, practical and psychological, why women with an illegitimate child did not want to name the father. For instance, in several cases the women in question had married or moved in with another man and did not want to involve the father of one of her children in her life. In the study conducted by the CCLA, 37 women stated they were told to name the father and 32 did so. Canadian Civil Liberties Association, *Welfare Practices and Civil Liberties—A Canadian Survey* (Toronto: Canadian Civil Liberties Education Trust, 1975).

<sup>38</sup> Globe and Mail, 19 September 1986.

<sup>39</sup> Jerome Bickenback, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993), 37.

<sup>40</sup> Daiva Kristina Stasiulis, "Race, Ethnicity and the State: The Political Structuring of South Asian and West Indian Communal Action in Combating Racism," Ph.D. diss. (University of Toronto, 1982), 267.

<sup>41</sup> Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario*, July 1977, 33.

<sup>42</sup> Makau Wa Mutua examines the link between liberalism and the evolutions of "universal" human rights ideas in Makau Wa Mutua, "The Ideology of Human Rights," *Virginia Journal of International Law* 36 (1995–6): 591.

## [A]Glossary

**Civil liberties (civil and political rights).** Civil and political rights are those rights necessary to the functioning of a liberal capitalist democratic state, including private

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property, due process (e.g., fair trial), speech, religion, association, assembly, and free press.

**Human rights (social, economic, and cultural rights).** Economic, social, and cultural rights are primarily associated with the modern welfare state and include such rights as health care, education, and multiculturalism.

**Human Rights Code.** First implemented in Ontario in 1962, human rights codes prohibit discrimination in employment, services, and accommodation on the basis of numerous groups including, but not limited to, race, gender, religion, and age. Human rights commissions, composed of full-time salaried government employees, enforce the legislation.

**Indian status.** Aboriginals who are covered under the federal Indian Act are considered to have “Indian status.” Indian status provides Aboriginals with a unique legal status in Canada.

**Parliamentary supremacy.** According to the famed British legal philosopher A. V. Dicey, the “principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

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[A]Further Reading

Bangarth, Stephanie. *Voices Raised in Protest: Defending North American Citizens of Japanese Ancestry, 1942–49*. Vancouver: UBC Press, 2007.

This book examines the removal and deportation of persons of Japanese ancestry during the Second World War by highlighting how its meaning and impact diverged in Canada and the United States.

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

In the first major study of post-war social movement organizations in Canada, Dominique Clément provides a history of the human rights movement as seen through the eyes of two generations of activists.

Clément, Dominique. "The October Crisis of 1970: Human Rights Abuses under the War Measures Act." *Journal of Canadian Studies* 42:2 (Spring 2008).

An important article on the human rights abuses that took place under the War Measures Act.

Lambertson, Ross. *Repression and Resistance: Canadian Human Rights Activists, 1930–1960*. Toronto: University of Toronto Press, 2005.

A significant publication that looks at human rights activists in Canada from 1930 to 1960.

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MacLennan, Christopher. *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929–1960*. Montreal: McGill-Queen's University Press, 2003, 1996.

In *Toward the Charter*, author Christopher MacLennan explores the origins of this dramatic revolution in Canadian human rights, from its beginnings in the Great Depression to the critical developments of the 1960s.

Tarnopolsky, Walter Surma. *Discrimination and the Law in Canada*. Toronto: De Boo, 1982.

A seminal work by Mr. Justice Walter Surma Tarnopolsky, a leading jurist, human rights activist, and internationally respected constitutional expert.

Walker, James. "The 'Jewish Phase' in the Movement for Racial Equality in Canada." *Canadian Ethnic Studies* 34, no. 1 (2002): 1–23.

An important article by a leading Canadian historian who specializes in human rights inquiries.

#### [A]Relevant Websites

Canada's Rights Revolution: A History

[www.HistoryofRights.com](http://www.HistoryofRights.com)

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A teaching and research portal on human rights and social movements in Canada. The site includes primary documents, narrative overviews, lists of key events and individuals, further reading, and key links.

#### Censorship in British Columbia

[www.bclibrary.ca/bcla/ifc/censorshipbc/intro.html](http://www.bclibrary.ca/bcla/ifc/censorshipbc/intro.html)

This website contains a list of books, magazines, newspapers, and some music materials that have been subject to censorship challenges in British Columbia, including materials that have been banned nation-wide by the government of Canada.

#### Supreme Court of Canada

[www.scc-csc.ca](http://www.scc-csc.ca)

Recent cases are available on-line, as well as biographical data on all Supreme Court of Canada justices, past and present.

#### United Nations Human Rights Treaties

[www.bayefsky.com](http://www.bayefsky.com)

Bayefsky.com was designed for the purpose of enhancing the implementation of the human rights legal standards of the United Nations. Accessibility to UN human rights norms by individuals everywhere is fundamental to their successful realization. The information provided herein encompasses a range of data concerning the application of the UN human rights treaty system by its monitoring treaty bodies since their inauguration in the 1970s.