

## Week 2 - January 14 - Canadian sources of rights and freedoms

### 2.A. Charter of Rights and Freedoms;

- Huge part of our Canadian identity
- Created in 1982 and has a broad application to government and people related to government.
- All over Canada. It embodies the values that make Canada distinct.
- Police officers, agents of the state, are greatly under scrutiny due to the Charter; in ways of how they treat people. (usually offenders of the law)
- Prosecutors are other bodies of the government whose tasks are slowed by the Charter. Because Defence Counsel can always bring up Charter grounds to give criminals so much rights.
- Some believe Charter grants rights to those who don't deserve it.
- It is part of the Constitution which therefore makes it supreme and of great importance in our government.
- It was created as an amendment of the original Canadian Constitution in 1982 and was part of repatriation of Canada's constitution and replaced the Bill of Rights (awarded rights but didn't challenge government actions).
- Charter was meant to bring consultation of equality seeking groups. Embodies compromises amongst a number of stakeholder groups not only people who are involved in creating laws.
- Can only be altered by constitutional amendment which requires federal government and a majority of the provinces to agree on the amendment.. That has resulted in some compromises in the Charter that some are meant to give provinces more flexibility. Such as section 33 the notwithstanding clause.
- Contains a set of civil liberties which deserve immunity or special protection from state action. Such as the human rights that are so fundamental to the point the government should not be allowed to interfere upon.
- Does not confer power on Parliament or legislatures, in fact it denies power to them.
- Because of the standard the Charter sets, there is an interesting dynamic within our government in which our Minister of Justice in the federal level and provincial counterparts have a responsibility to ensure that the laws that they pass meet Charter compliance. *This guarantees that the government can't enact laws against the protections listed by the Charter.*
- The Charter can only provide so much safeguard as it is interpreted to provide by other players in the system;
  1. Such as the independence of the judiciary ; different from the US, because our judges are appointed not elected. Therefore there is a presumption of independence.
  2. The democratic character of our political institutions
- National unifying rights, Language rights, Minority rights, Freedoms, Aboriginal rights, Life liberty security rights, equality rights.
- The primary remedy for a conflicting law is being struck down by the Courts. And therefore can no longer operate.

- Two provisions in the Charter that offer two last measures that a government can justify a non-Charter compliant law and that's by;
  1. demonstrably justified in a free and democratic society. (justification).
  2. provinces indicate an override for a Charter violation (s33)
- Often you will see a dialog between the government and the courts. The Courts give the government the choice to either redraft the legislation to make it more Charter compliant, be an exception for the Charter or simply not do anything about it.
- A court decision explains why a legislation is not Charter compliant, and provide reasons.
- The Charter is a living tree, a progressive jurist said this is not a static document. Cannot only exist as it exist.

### **The Components of the Charter;**

- 1. Justification
- 2. Fundamental freedoms; Freedoms of speech, thought, association, etc.
- 3-5 : Parametres around vote in Canada
- 6: mobilit
- 7-14: Procedural rights that people are granted when charged criminally, Legal rights
- 15. Biggest accomplishment; guarantee of equality; before the law and under the law; the idea is that any enactment or statute is meant to include those equality guarantees. Show what the drafters felt that should be guaranteed within statutes. (2) equality guarantee (2-1) not discriminatory to differentiate between 2 if goal is to repair conditions that have create disadvantages for some groups
- 16-23 are language rights
- 24; remedy given by courts when a charter right was violated
- 25 and onwards : Application of the Charter : to whom the law applies
- S.33 : you can create something that you know is not complying with the charter ex: life liberty and security of a person and equality rights
- guarantees are not meant to diminish aboriginal rights or royal prerogatives
- 32; application
- 33; provision that says you can create something that is non-compliant ; notwithstanding clause. The laws that can be of such would be fundamental rights, life right and security of the person and equality rights

### **2.B Seminal Charter jurisprudence**

#### **Law v. Canada 1999;**

- Case about Canada pension plan
- - No violation of the charter, there was a disadvantage but not substantive
- - Paragraph 2 of the decision
- - Equality rights sec 15 of the charter found at paragraph 51 of the decision
- - Paragraph 53: what is human dignity?

- - Paragraph 64: misconception of stereotype
- it's a federal law that creates a means of social insurance that people can then benefit it at a certain age.
- Anyone who is employed, a percentage to their salary goes to the CPP; when you hit retirement age you get a minimum amount of money that the government has saved for you when you retire serve to fit your standard of living.
- It is possible to receive it earlier than retirement age, however must prove disability, or surviving spouses. Child bearing circumstances.
- Young women left widowed by her husband, wanted to receive his CPP insurance money.
- But she was told that the operation of the legislative scheme, entitlement became non-existent if you were under 35 without children and abled bodied. She was all of those things.
- Her husband and her owned a business that failed, without any source of income However she was not able to obtain the money due to her young age, and she brought a claim that it was discriminatory.
- At the end of the day; SCC said there was no violation to the Charter but that there was a disadvantage created for Nancy. In part, based on their belief of young people, much more resilient to move in their career, they can find work and return to being functioning members in the society. This legislation is meant to be applied to older people, who are disabled or have dependent children.

Section 15 of the *Charter* guarantees to every individual the right to equal treatment by the state without discrimination. It is perhaps the *Charter's* most conceptually difficult provision. In this Court's first s. 15 case, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R 143, at p. 164, McIntyre J. noted that, as embodied in s. 15(1) of the *Charter*, the concept of equality is "an elusive concept", and that "more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition". Part of the difficulty in defining the concept of equality stems from its exalted status. The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the *Charter* is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.

- what does equality mean; fairness across the board;
- make sure people are treated the same, they talk about one of the judges in the past,

**Paragraph 42; What is the purpose of the s. 15(1) equality guarantee?** to promote "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". The provision is a guarantee against the evil of oppression, he explained at pp. 180-81, designed to remedy the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping.

**Paragraph 43;** Similarly, La Forest J., concurring with respect to the proper approach to s. 15(1), stated that the equality guarantee was designed to prevent the imposition of differential treatment that was likely to “inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned”, and that was likely to decrease their “confidence that they can freely and without obstruction by the state pursue their and their families’ hopes and expectations of vocational and personal development”

the fundamental purpose of s. 15(1) is the protection of human dignity. McLachlin J. stated the overarching purpose of s. 15(1) as being “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance”.

Para 48: ‘Similar observations were made in Miron, supra, by McLachlin J. and in Egan, supra, by L’Heureux-Dubé J. and Cory J., all of whom found that the fundamental purpose of s. 15(1) is the protection of human dignity. Cory J. stated in Egan, supra, at para. 128, that the equality guarantee “recognizes and cherishes the innate human dignity of every individual”. As he explained, at para. 179, “the existence of discrimination is determined by assessing the prejudicial effect of the distinction against s. 15(1)’s fundamental purpose of preventing the infringement of essential human dignity”. Similarly, in Miron, supra, at para. 131, McLachlin J. stated the overarching purpose of s. 15(1) as being “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance”.’

Para 51 of decision: ‘All of these statements share several key elements. It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which affects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.’

- Human dignity; An individual or group's sense of self-respect and self-worth, physical and psychological integrity and empowerment. Living to the fullest without harming any other around you and being encouraged to do so by the society that you live in.
- Paragraph 53; The Court defines human dignity as; When an individual or third party feels

self-respect or self-worth.

- When we talk about equality law we talk about impact that third party actions will have on someone's feeling of self-respect.

- It's concerned with physical or psychological integrity; like in s7 of CCRF;

It's about our psychological well-being, not just physical. Having the liberty to fulfill our psychological and physical well-being.

In law, they say human dignity is that sphere that no one should be interfering with. It's not only about your physical health but as well as your psychological health. Which is a very affirmative concept for someone who believes they have experienced a violation.

Ex: Right to abortion,

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. **It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.** Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

### **How do you measure someone's dignity;**

Nancy Law, appears before the court and says I am being treated differently by this piece of legislation and feel like I am being treated discriminated against. The Court, then ask her, well is your human dignity affected and she says well of course. They say now we have to measure it because we need to have some means whether some form of human dignity has been affected or not. **How?**

Human dignity is something very hard to determine. So the Court said human dignity involves a 2-part analysis (subjective analysis and an objective analysis).

1. Subjective analysis: The person will stand in front of the Court and say their human dignity has been affected.
2. Objective analysis: which

The Court will take their own measure to whether someone's dignity has really been impacted. It is the judges who measure human dignity.

Throwing the human component into the analysis; which is to what extent do your predominantly white older upper-class male (judges) have in terms of insight about someone else's definition of breach of dignity.

Related concept: Differential treatment that impacts on a group or individual's human dignity but also is supported in part by being based on stereotypes rather than on someone's merits.

A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess.

In Equality law, you can't simply say in a Court I've been treated poorly whereas the rest of Canada has been treated very nicely. The Court wants to see if you can establish a comparator group; a group that you may compare yourself to holding the same attributes as you have been treated differently than you.

**Para 61:** 'I should like to emphasize that I in no way endorse or contemplate an application of the above perspective which would have the effect of subverting the purpose of s. 15(1). I am aware of the controversy that exists regarding the biases implicit in some applications of the "reasonable person" standard. It is essential to stress that the appropriate perspective is not solely that of a "reasonable person" -- a perspective which could, through misapplication, serve as a vehicle for the imposition of community prejudices. The appropriate perspective is subjective-objective. Equality analysis under the Charter is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1).'

### **Charter's Application:**

How do you know to whom a law applies?

- Most often you look at the language of the law itself
- Usually at the beginning; it says it applies to "x" people, or to "whom it concerns regarding "x" attributes"
- But in the Charter; we look at the language of each right

For example: sec 6 states; "Every citizen" right being granted to all citizens of Canada.

section 7 applies to everyone, not only Canadians.

Academic debates whether the Charter applies to things like corporations? or to things like edifices? The language of the provisions answer that.

The language generally includes every living human being within Canada (whether legally or not) would be permitted to invoke Charter protections. However some rights to require citizenship such as ; right to vote, right to stay in Canada and leave and return, language rights, permanent residency..

The CCRF does not apply extraterritorially?

It applies to the Parliament and government legislator of Canada and of each province

### **What the Charter cannot do?**

**Cannot compel a government to do something that it otherwise has not enacted any laws about. So if there something like legislative silence, no law in Canada that speaks to a right to Housing, you cannot go to a provincial government and say well the Charter says I have to right to security of the person I think that means you should enact a law applying to everyone regardless to their income level being able to live in a safe place.**

**However, if there has been some type of legislative action that raises question about differential treatment, that's fair game for a Charter analysis.**

ex: Case about gay man, Alberta Charter didn't include legislation regarding sexual orientation. But the... (summary found in Public law book)

### **Formal Equality**

Formal equality assumes that equality is achieved if the law treats all persons alike. However, when individuals or groups are not identically situated (for example a black woman versus a white man), the formal equality model tends to perpetuate discrimination and inequality, because it cannot address **real inequality in circumstances**.

In fact, by treating different individuals as equals despite unequal access to power and resources, formal equality creates an illusion of equality while allowing real economic, legal, political and social disparities to grow.

### **Substantive (Real) Equality**

Achieving substantive equality requires that the effects of laws, policies, and practices, be examined to determine whether they are discriminatory.<sup>[19]</sup>

Substantive equality requires that the roots of inequality be identified, the goal of equality of opportunity be established, and that a legal mechanism be established that will achieve this goal in a principled way. "Substantive equality" (i.e. equality of opportunity) is different from "equality of results" in that the mechanism for achieving the goal involves removing the barriers associated with the group's "special characteristics" rather than securing an equal result.

Substantive equality provides no guarantee that members of a particular group will achieve equality of results, only that they will have the opportunity. In other words the role of individual merit and initiative is not displaced.

### **Eldridge v. British Columbia: About Substantive Equality!! In circumstances; between a deaf and a hearing person.**

1997; It was a decision regarding are hospitals a government entity or how do we figure out what is a government entity? Is whether a provincial government's failure to provide funding for sign language interpreters for deaf person when they receive medical services violate section 16 of the CCRF?

Medical care is provided by hospitals but funded by bc government through two pieces of legislation. Neither of those pieces of legislation pay for sign language interpretation for the deaf. The applicants in this case were born-deaf and they said that their inability to communicate with doctors and other health-service providers not only impacted their human dignity but also increased the risk of misdiagnosis and improper treatment.

The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of [s. 15\(1\)](#) of the [Charter](#). On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.

Because they weren't able to communicate properly with their healthcare provider, they weren't able to receive the same back and forth of their diagnosis. Their health was compromised and not benefiting the same as a hearing person was.

#### **What the government said (opposite)para. 72:**

- look the healthcare is free and everyone has access to it and we don't have an obligation to ensure that disadvantage members of society have their resources to take full advantage of these benefits. So the government was very well resting on **formal equality**.

Court described that as an impoverished and poor view of section 15 (**equality right**).

Benefit provided by the State, once provided they are obliged to do so in a non-discriminatory manner. The Court is going to respect the deaf applicants and believe they should be able to obtain sign language interpreters.

Once it is accepted that effective communication is an indispensable component of the delivery of medical services, it becomes much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their healthcare providers is not discriminatory. In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.'

**- Paragraph 40: questions that courts have to do, to see if the charter applies**

Entity being the fabric of government and the reason why they say that hospitals are part of the fabric of government is because they are receiving funding from the government. And the government makes determinations as to which services were to be funded and which weren't.

The Court says; the rationale is obvious, government should not be permitted to avoid their obligations by sending their policy off to third party arrangements. The Court wants the government to live section 15 in all of its extensions and it is not on their view to say that there should be a third party provider.

**Typical remedy at paragraph 94;**

In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the [s. 15\(1\)](#) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*.

Remedy

I have found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a denial of [s. 15\(1\)](#) of the [Charter](#) and is not a reasonable limit under [s. 1](#). [Section 24\(1\)](#) of the [Charter](#) provides that anyone whose rights under the [Charter](#) have been infringed or denied may obtain “such remedy as the court considers appropriate and just in the circumstances”. In the present case, the appropriate and just remedy is to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* (now the [Medicare Protection Act](#)) and the *Hospital Insurance Act* in a manner consistent with the requirements of [s. 15\(1\)](#) as I have described them.

tells the government to meet the standards of the Charter; typical remedy. This leaves out a number of options for the government to rectify upon. Giving the government options frustrates Human right advocates because they want the court to tell them what to do cause God knows what the government will do instead. However it is not the Courts role to dictate how to accomplish that, statutorily the court is not entitled to do so.

they simply declare that the act was unconstitutional, 6 months given to figure out what to do.

#### **Technicalities within charter:**

- Section 1: ability to justify a charter breach in a free and democratic society.

Case: Oakes (the test)

The burden of proof regarding a charter breach rest on the party asserting the breach. Show how you have been restricted from that right. The burden of persuasion then shifts on to the government to support the challenge law under section 1.

Reasonable limits; the government can only justify its conduct if that conduct itself is something that is set out in a piece of law somewhere.

Law is rationally/logically connected to the reason of its existence. Government has to show that a law impairs the Charter right no more than it is necessary to accomplish the objective. Could be the least drastic means of impairment and must not have a disproportional effect to the individuals facing the charter breaches.

What Court does; weighing exercise; The breach is occurred but are there other reasons the law is in existence. Are all the logical links for the breach there. The government to justify the breach under section 1, must show the objectives of that law. It's not entirely clear what purpose a law might have. plus certain type of purposes can be interpreted differently than others.

### **Case 3: Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381, 2004 SCC 66**

- Used section 1 of CCRF to justify government's inability to remedy human rights discrimination.
- Only time section 1 was applied.
- Makes people uncertain for future prospects of human right litigation
- Issue; what sort of government financial crisis is efficient to justify limiting a right or freedom guaranteed by the Charter
- Pay equity guarantees= Concept that guarantees men and women get equal pay for equal work
- However, the reality certain kind of works more occupied by men and others by women.
- Pay equity ensures that women are compensated at the same level as their male counterparts are in similar work.
- Here; Adjusting hospital wages for newfoundland employees in areas typically staffed by women so that the means by which they were payed were comparable to salaries in male dominated jobs.
- Here; the Newfoundland government signing a pay equity agreement for a retroactive amount for women employees for 24 million dollars. Already an acknowledgement that they have not been paying both genders the same in hospital work.
- A pot of money was understood to be going for the women
- But before they could, government made a legislation that deferred the commencement of those payments to 3 years and did not create any mechanism to compensate women for those added numbered years.
- Employee union said this singled out women for budget cuts, = constituted differential treatment under section 15
- lower court agreed there was a breach, government successfully determined it as justifiable under section 1 in a free and democratic society.

#### **Discussion:**

1. Why is it important for the women to be paid for the work that they did?

VS.

2. Why was it important for the government to be able to postpone their obligations?

#### **Union made strong arguments saying that the government is renegeing on its agreement to pay those women;**

1. it undervalues their work and
2. when they pay women less than men it is acceptable
3. states aren't fully responsible for remedying state discrimination

#### **Government said instead;**

1. They didn't have enough money
2. Being able to deliver on Canada's most basic social program described as health and welfare.

#### **Court says;**

1. Understand that work is important for human dignity and
2. they explore why the government delayed the payment
3. They go into how many bed hospitals were being closed, how many layoffs, how many wages have been frozen, how much medical coverage
4. they agree with the Newfoundland government that the financial crisis was complaining of was in fact a crisis plus great importance
5. it's unrealistic that there are unlimited funds for everyone in this province;
6. comparing with the deaf in Eldridge (parag 87) the size of the debt illustrate the discrimination faced by female hospital workers, significant one, however comparing to the other, they didn't ask anything from the government of BC in Eldridge, so here wouldn't make sense
7. The fiscal measures did more good than harm, Newfoundland as a whole benefited.

#### **Remedies:**

- Charter is constitutional, it is the supreme law in Canada, any law declared against the charter will be Null.
- Section 24 from charter: actions that already occurred only, deterrence, and public interest

#### **Case 4: The Charter 25 years later: The good, the bad, and the challenges**

Justice Mchlaunong

1. She offers some responses about the charter and her opinion
2. Builds a just society, ability to rely on it means strength of minority rights
3. Re-enforces tolerance from those who are different from us
4. Rights to those detained by the state are better protected
5. mechanism that help our nation of diverse group live together
6. Protection of minorities as much as majority s15
7. Democratic rights at sec2 freedom of expression .. basic society
8. Charter has created more equal and just in Canada
9. People don't imagine that they themselves are covered by these rights
10. Protection for criminalized people and minorities; however Canada has higher incarceration rates than most countries after the Charter
11. It should not allow for governments to hand off difficult questions and shuffle everything to the Courts
12. We want the government to be able to tackle these questions as a democratic entity
13. It made criminal trials longer and more complex; hear from defence counsel
14. Real tension in charter that it is seems to be supporting individual rights and not on collective rights
15. Decisions are too long
16. She is a believer in the charter and finds it just

#### **Case 5: Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28**

How do you know a person who experienced a breach, then after a number of years is made

whole?

- Lawyer walking around in downtown Vancouver to and from work
- Time where Jean Chretien was in Vancouver for multinational conference, plus protest, RCMP received notice that Chretien was going to be thrown a pie at
- They thought the lawyer looks suspicious, and they grabbed him and threw him in jail, search stripped him.
- Came out, and said this should never had happened and that this breached a number of procedural rights awarded to him under s8 and onwards
- Due to this breach, he believes he should be awarded money from the government

**Court says;**

- acknowledging the damages can be awarded against the state if other remedies aren't appropriate.
- There are 3 functions;
  1. damages,
  2. compensation (what the victim losted, eg; not being able to go to work the next day, psychological distress requiring therapy and pay for that therapy, is it general humiliation, embarrassment),
  3. vindication, notion that when these guarantees are breached, they not only harm the person but the general public because our society functions best when we have compliance with these laws and the government respecting them. So we want to vindicate these rights, and making awards of financial damages.
  4. Also deterrence, to ensure the government doesn't repeat similar behaviours in different cases in the future.
  5. Also countervailing factors; instead of payment remedies, other remedies are available, and we don't want someone to endanger good governance and only take what they are suppose to in good faith without the threat of money

**This case stands for a belief in interpreting new remedies; lawyer was however awarded 5000\$ cause he was not seriously impacted by the act of the RCMP. Starting point of 5000\$ to compensate the damage.**

**Promise that the Charter represents in its written form and the challenges upon interpreting it and whom it applies and under what circumstances and available remedies.**

Charter applies to government and government entities. Not within private sectors such as you and a shop owner when he detains you from shoplifting in his shop.

The complainant has the burden of proof when wanting to invoke a charter breach upon him, so he must prove how he was restricted from a charter right and breach of his or her human dignity.

The Charter is a living tree, capable of growth and progressive interpretation.

### **Week 3 - January 21 -Canadian sources of rights and freedoms, cont'd**

#### **3A Human rights Legislation**

Let's say you get a phone call from a woman, single mother who went to apply for an apartment. When she emails the landlord she indicates that she is a single mother of an autistic child and then the landlord tells her not to bother with the application as he does not accept problem children in his building?

1. Charter does not apply to the landlord
2. Landlord made a number of assumptions that can't be all true about the child without having met them
3. Assumption that the building cannot accommodate for different people in the building
4. HR protections are to prevent agents, and ourselves from making those kinds of assumptions about people and denying benefits what other people are entitled to based on false assumptions
5. HR states why we should all be treated equally

#### **Ontario Human Rights Code;**

##### **In the preamble, we talk about:**

1. human dignity,
2. worth of every person,
3. and creation of a climate of understanding and respect.
4. Goal is not simply to remedy discrimination but to set out a standards and expectations to prevent discrimination.
5. Facilitate the kind of treatment that this piece of law envisions.

##### **The means by this legislation is treated:**

- SCC looking at the OHRC, not quite constitutional but almost.
- Each province and territories have their own version of Human rights code.
- Does not mean they exist in isolation from each other
- They are meant to inform the way that parallel pieces of legislation should be
- Looking for persuasive decisions interpreting the services section in the OHRC, I would be looking at similar case law such as Manitoba HRC
- Complement each other
- To find discrimination under the OHRC, you simply have to prove differential treatment = Unique form of impact of discrimination
- Have robust jurisprudence on how to manage discrimination and they don't require someone to show an economic impact but simply an impact on your human dignity

- Powerful means of compensation and unlike most legislation
- Has to be interpreted in accordance with the Charter
- It can be amended in the legislator by mere procedure such as in 2001, 2012 to include protections. (moves more fluidly than the Charter by the years)
- Creates a ceiling that parties can't contract out of.

For eg; That landlord were to sign leases with all of the tenants saying you are not allowed to bring anyone here with a disability. It's not a defence for the landlord in Court to say hey but they signed to and agreed. These are basic protections that you cannot contract out of. doesn't matter what you sign on.

- Legislation that governs a multiplicity of relationships between government parties and private parties( like landlord)
- Series of protections that correspond to a number of protected grounds; 1) equal treatment services goods, gender identity and expression
- **Limitation; if the ground you are seeking for is not listed then you cannot invoke protection under the HRC, unlike the Charter**
- Broad interpretation though; for services like police stopping you in traffic light, volunteer work, university...
- Disability has a unique character in that it is so prone to stereotypes that often people will treat people differently because they think or know they have a disability.

eg; a police officer were to stop someone who was speaking in a slurred manner and not demonstrating sharpest motor skill, and the police officer says putting you in jail, or act in a discriminatory manner that it doesn't matter whether the man has a disability or not because the police officer made an assumption that lent itself to differential treatment.

- It's no defence to say ya I made a wrong assumption but they were other legitimate reasons as to why I treated them differently.
- If discrimination is only one of the components of differential treatment, that is enough to render the other party liable.
- Tribunals tackles any type of motivation that falls under the legislation
- The complainant has to prove on a balance of probabilities the discrimination on the base of the enumerated grounds in the HRC. The respondent has to provide a legitimate reason for the action.

**Section 5 of OHRC: Protection against discrimination in accommodation, that includes equal treatment on how to enter a lease and how a landlord treats you. = different number of enumerated ground. +employment (situations like interviews, internships were not yet awarded the work) +having record of offences +poisoned work environment**

- Discrimination can be a single incidence, or a prolonged series of actions.

- Let's say a workplace; where people make racist jokes or sexualized comments and your boss says oh no worries they are just joking.
  - The code acknowledges that if the complainant hit their maximum of what they can hold the workplace becomes poisonous and resign not by choice.
  - Harassment; unwelcoming conduct known to be offending. saying something known to be offensive or reasonably known
  - What should an employer know without even seeing signs from the complainant that is unacceptable.
  - Really set out how a person can be set liable.
  - it extends to workplaces.
- Section 7; Sexual harassment in workplace and accommodation protection legislation such as sexual solicitation by a person that confers or denies you a benefit; to protect persons from being threatened to not receive a certain benefit.

eg; a teacher giving you a better mark

- Prevents from people using their superior power in work, or economically to use that against you sexually. Neither can they retaliate you (giving you a failing grade)
  - Remedies imbalances of power
- Reprisals protection (8) being treated differently for making a complainant previously and remaining in the environment.
- Accommodation; **2.** (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance.
1. show the discrimination (let's take landlord eg;)

Landlord didn't permit me to apply because I have an autistic child.

Grounds that can be brought up;

1. Family status as being a single mother
2. Disability brought up by the child

- Section 9 Infringement protection

eg; the advertisement of the building; like sublet apartment; you email the person; they don't the child, the email from the owner cc'd the landlord, then the landlord seeing that refuses to permit this; the complaint being brought against the landlord so they indirectly infringed on a right under sec9

- 17(2) Responding party can only escape liability by showing that accommodating would

be an undue hardship for them in the form of financial bankruptcy or there being no other way of dealing with that request and a bonafide reason as to why they were treated differently without suggesting any discriminating facts.

- Scenario is different when regarding disability; section 17.
- Why is the legislator putting a limit by the means by which we are all expected to accommodate other people?

eg; store with no wheelchair ramp. so taking the steps to make their shop accessible to the general public is something that they cannot financially afford. So there; the tribunal will say you have demonstrated undue hardship and we are not going to expect you to fix that. But, big institutions like u of Ottawa they have a different capacity to say they can't because it is obvious that they can.

### **Ontario Human Rights Commission; s27+**

- Paralleled by commissions at the federal level of canadian hr acts, + quebec
- historically the commission was the gatekeeper of complaints
- you can't go straight to the tribunal; firstly have to convince the commission about the case
- The Ontario legislature decided few years ago that that's not the kind of access to the justice they want people in this province to enjoy
- The commission now plays an educational role
- Policy making body very frequently
- Less good at litigating, but have the power to get involved.

### **What do you do to make a complaint?**

- Section 32; Human rights tribunal (administrative body) that receives complaints, then adjudicates on them.
- Tribunal does not have powerful to litigate over a year old complaints or litigated elsewhere.

### **After making the complaint;**

- Section 45.2- What the tribunal can order; (more detailed than CCRF; cause it says what you can or not do)
1. Monetary compensation, including compensation for injury to dignity, feelings and self-respect.
  2. Restitution, which is other than monetary compensation; eg; let's say at the discrimination you were denied a promotion, well as restitution you get it now, or getting your job back
  3. Orders to make letters of apology, frequently feels very important, ensure deterrence of that discriminatory conduct in the future.

- However this does not include the payment of the complainants legal services; getting a lawyer, paying the lawyer. Because that's not how the provision has been interpreted.

### Quebec's Charter of Human Rights and Freedoms:

1. Includes a number of protected grounds and Canadian HR acts.
2. Progressive and has a long list of protected grounds.
3. Two years within its making it included sexual orientation, published by the provinces online
4. It is against discrimination of people's economic status or social conditions. section 10

Situation in Montreal; poor people were receiving tickets. Why were homeless people being policed under municipal bylaw breaches. People advocating for them; stated the protected grounds of social conditions; this was affirmed by the Quebec commission. Concluded; That the police was not neutral or in good faith, and targeted at cleaning the streets. Result; change in policing

Right to section 39 - section 46 Qualified rights ; exist in a Utopian society Eg; right to attention from parents for a child, right to develop their own cultural interest, right to information as extended by law. = very meaningful rights, however can be overridden by the Qc government

Application of usage of this Charter; Commission at section 71; third party body:

1. Can receive the complaints
2. Number of tools; Settlement, public education programs, investigation on their own initiatives or following a complaint, powerful mechanism than the OHRC, proactive steps of non-discrimination.
3. The commission also has an interesting ability at section 80 to take something to the tribunal despite the sentiments of the parties involved; concept mirrored in criminal jurisprudence, eg; crown attorneys developed policies about domestic violence. If a party of domestic violence later says they change their mind, deemed so important that the Crown capable of continuing with those charges regardless if the complainant wished to withdraw their complaints.

### Canadian Human Rights Act:

1. Longest list of protective grounds
2. **Attempts by Parliament to include protection for gender expression = unsuccessful**
3. Applies to federal undertakings
4. Physical office base
5. Something in the territories would be litigated by the CHRA
6. Only one to include; prohibited hate speech, section **13** = encompasses messages electronically all hateful message

7. Unfortunately this section was deemed unconstitutional and against freedom of speech in s2 of CCRF
8. But there are criminal law protection
9. section **16** ; Special program protection; you can treat people differently if the purpose was to remedy historically disadvantaged groups.

eg; men golf club not allowing women to join because men have been discriminated against before in the past

10. sec25 type of definitions
11. CHR Commission investigates, seeks to get things resolved before litigating;
  - A. How to get people to acknowledge that they have been discriminated against?
  - B. How to get the parties to meet in mediation?
  - C. What kind of things could we offer at the early stage that would make it attractive for the parties to walk away
  - D. How to encourage others to make a complaint?

Canadian Human Rights Tribunal; at 53(2); we have some broad remedies around making right opportunities and privileges available to the person being discriminated against. Compensating them for any expenditures that they faced, getting their wages repaid. However legal services payment does not fall under those forms of compensation.

(e) and (3); monetary amounts, ceiling, not exceeding 20,000\$ for any pain and suffering that the victim faced as a result of discrimination. And = 20,000\$ if the other party engaged in the discrimination willfully or recklessly.

-If you can show the person treated you badly wilfully or recklessly

-They don't have the ability to deal with the complaint if it is dealt with elsewhere; because we have a number of pieces of legislation that deal with people's employment circumstances. You often find lawyers taking complicated analysis to see if the discrimination can be dealt with elsewhere like under the Public Service Labour Relations Act. Cause if it can, then you should go there first as stated by the CHR Act. then come back and litigate under the CHR Act.

Notion of putting a price tag on discrimination

It is unlike the OHRC, as it has a ceiling of monetary compensation.

### **3.B Guest lecture by Paul Saurette, Professor, School of Political Studies, University of Ottawa, on conservatism and reproductive rights**

#### **Reproductive Rights and Abortion - R. v. Morgentaler, [1988] 1 S.C.R. 30 (read pages 56, 171) Case**

In Canada it is substantially different than from the US. Very politically salient. Continuing to change history of abortion in Canada.

- Stretching before colonization
- Last 100 and 50 years has it begun to be criminalized.
- Hasn't always been opposed.
- Prior to the 1920's
- American Medical Association
- Was legal all throughout NA within those 100 years.
- While the US legalized abortion 15 years before Canada.
- The backlash never came to Canada by our conservative members.

1960's The UK first western country; into NA

- Liberalizing their
- Colorado was first to legalize abortion in case of rape or incest.
- by 1973, third of American states have legalized abortion
- Roy Wade ; sued the state in Texas for prohibiting abortion. The SC found that the prohibition of abortion in Texas was unconstitutional
- 1- protection women's health and 2- protection fetal health
- The State has no right to intervene, only between the physician and the patient. The State can intervene only if it has to do with women's health. Can restrict abortion within the third trimester. Nullification of every law against abortion.
- Webster; replacing the trimester system, can be regulated by the State if not making undue hardship on the women. Not fully criminalizing abortion. They go after clinics that lead to nullifying abortion.

### **R. v. Morgentaler, [1988] 1 S.C.R. 30 (read pages 56, 171)**

1. 251 CC passed by Pierre Trudeau. Abortion committee by liberating it. Still
2. Was to determine whether the continuing the pregnancy would be detrimental to the women's health.
3. After opening a new clinic with two more doctors in Toronto;
4. This criminalization was ruled unconstitutional
5. However, there was a due to protecting fetal life.
6. 1.46

Abortion has not always been charged criminally, but was a need. It's a diverse as an entity. The legal history is complicated. Use to be liberal, however more in US than in Canada. Important reasons why that is? Religious rate, constitutional make-up?

Human rights is a constructed thing.

Abortion is complicated, especially in the US, story that begins in multiple levels politically and judicial levels. (+ federal). What happens in the States can mount up to a national concern.

Unpredictable; we don't have an abortion in law because there was a tie vote in the Senate Chamber of Canada, the Speaker does not break it, the bill simply fails.

Move surprisingly fast, there was not a lot

People matter; history of abortion. Largest reason banned in the 50's in the US; because of a guy named Horatio, became a player in the AMA. His actions had a profound impact, not predetermined and highly surprising.

What matters' is not what you argue but how you argue, how you react? those are subject to

Traditional arguments:

1. My body I can do what I want; right to liberty, freedom. Right to choose. Right to privacy. American version
2. Security of the person
3. Physical integrity
4. Series of practical realities. Women had to face health risk while waiting for approval. Plus it was unequal. TAC. Canadian version

Opposing arguments:

1. Right of the fetus, right to life and liberty.
2. That being has the same rights, and should be protected.
3. It's a sin, religious argument
4. Unnatural argument
5. Murder;
6. Old people, conservative people. mostly male-lead. Shaming women. Giving a personality to the unborn child. Making it seem extremely violent.

1. Education; convincing, make people change their minds
2. Resonating; what do I know about you, to guess what you already and package what I have to what you'd want. Beer commercial.
3. Not trying to drive legislation
4. Anti-abortion have stopped using religious arguments. Because that would alienate the population.
5. They have changed their spokesperson and put up instead young women in senior position. Because image impacts how your argument will be taken. Also, it's the pro-women position, more pro-women than feminist. The story they tell are very different.

## Week 4 - January 28 – Charter guarantees and complex identities

### 3.A Sections 7 and 15 of the Charter

#### Bedford v. Canada, 2010 ONSC 4264 (S.C.J.); Canada (Attorney General) v. Bedford, 2012 ONCA 186; Canada (Attorney General) v. Bedford, 2013 SCC 72

- Ended in December leaving the provisions still active and giving the government a one year grace to figure out how to regulate prostitution.

- The CC sets three provisions prohibiting how sex work is regulated; Communication, Keeping a Common-Bawdy House, and Living under the avails.
- What is the impact on those people's lives;
- It is implied that sex work is illegal, but it is not. Also implied that these sex workers are victims.
- Are the purposes of the laws legitimate and achieve what they are suppose to? What is the impact of those provisions on affected people's lives.
- Whole range of people who will be within the community of sex work.
- When it came to policing; section 213 CC would prohibit communication of sex work outdoors publicly. These street workers were deemed vulnerable. They would charge street workers of solicitation.
- A sex worker would have to go online; choose specific dark places to avoid police scrutiny. And be in partnership. Sex workers were forced to work alone, live alone, having partners. Anyone living with them, even if they were not involved in the sex industry, they could be charged living under the avails. They had to prove exploitation for them to escape liability.
- Public was interpreted very broadly; could be a classroom, a hotel lobby, on the internet.
- It is very important for them to have proper communication in order to avoid harm, rip off's and integrity.
- The dangerous people who would attack them are not their clients; but their predators because they know that's a vulnerable society.
- All the manners for these employees to take precautions was criminalized
- Sex workers were prevented from working within their own home, hotel room more than once, in any form of bawdy-house.
- 3 provisions criminalized forms of prostitution; however the exchange of money for sex directly was never criminalized.
- Government says: sex work is risky and not our problem if those provisions inhibit proper sex work.
- The Charter right s7 and s15 were presumed breached by the criminal code's provisions inhibiting sex work.
- 3 women were the faces of the Bedford case; they were detained throughout the provisions; they couldn't discuss their work properly;
- AG of Ont defended the law in 2006

- Coalition composed of Christian Legal Fellowship, they believe that sex work is immoral and conceded before the Court of Appeal; it is
- Government's position; sex work is dangerous, risky to the health; it is unsafe because of what the act is, not because of the laws made against it.
- Lots of experts, advocates, etc..put out evidence
- Laws prevented a safe method for sex workers to avoid harm and danger which breached their s7 right
- 210; 212; living on the avails provisions, avoids sex workers to prevent them from having bodyguards, doorman, screening their clients. There's was nothing that allowed these workers from taking steps to protect themselves.
- What is the impact of the law on that person's well-being?
- Laws must not be arbitrary; as in you can't make a law for no reason; it must have a purpose that should be reached; can't be interpreted too broadly, more than it should; make sure that the provisions are grossly disproportionate, they can't outweigh the benefits of those laws.

Bedford;

- They challenged the provisions as being contrary to the right of freedom of expression (2); lower court level judge agreed because it is at the core of our Constitution.
- She said these laws are of no effect in Ontario.
- In the CA of Ont,
- Federal/Provincial AG appealed the decision; normally 3 members, this time 5.
- not being able to get jobs outside of the sex industry
- hard to be in a relationship
- prone to violence
- they kept being stigmatized
- 3 fold argument; communication, choosing their client, not being stigmatized
- the purpose of those laws was to prohibit nuisance and put up a safer environment
- The Communication provision; 3 of the 5 judges upheld that provision; they said that prostitutes are social problems; organized crimes; drug related problems; intoxication
- At paragraph 319; if the law is only one of a number of factors, it does not necessarily
- SC issued a unanimous decision stating that there is no doubt that those laws are unconstitutional because they prohibit safe steps to take to perform a legal act. (comparison made with wearing a helmet while biking)
- CA made strong argument to deny rights; however SC said .. (158)
- One year grace for the government to figure out how to regulate the act of prostitution
- Federal government was clear that they are going to come up with a new model without sitting down with the groups concerned.

**3.B Guest lecture by Emily Symons, Chair, Prostitutes of Ottawa-Gatineau Work, Educate and Resist (POWER) on sex work, the Bedford case, and stigmatisation**

## Week 5 - February 4 - LGBTQ rights and homonationalism

### Guest lecture by Leslie Robertson, Lawyer, Galldin Robertson, and Kathryn Trevenen, Associate Director, Institute of Women's Studies, University of Ottawa

Issue of Queer and Trans Rights, LGBTQ as a way of talking about some of the limits and possibilities of rights discourse. Thinking critically about what we mean when we make claims for rights and advocate for rights for other people, and what we expect to have happened. We need to be incredibly careful when people start giving us what we think is going to be about Rights talk. Often a way of both government and courts to simplicity assure us that they're mechanisms for these things. Not worry about poor people, LGBTQ people they have rights. Some of these things might actually be true, but availability of people to actually access justice using those rights are often extremely limited.

#### LGBTQ rights;

- where do these ideas come from?
- Queer theory: Early-constructionism of same-sex desire. Because if there was never something wrong with something, then we wouldn't need laws governing it, or the oppression of people doing it!
- We see in 18-19th; early construction and explanation for same-sex desire fall into 3 main categories;
  1. Sin(against God)
  2. Crime(against God and the nation, an offense against the State)
  3. Illness for having desire for same sex love and desire.

Same sex desire was defined as the acts that it involved. The crime of sodomy could be committed by people who we think are straight people. Any sexual act, at various points, through the 18th-19th century; were viewed as sodomy practiced by straight people. Two same-sex people participating in such a conduct; is a crime against God and the State because you are having non-reproductive (perverted sex). Non-reproductive sex of any kind; etc..

That idea shifts away from acts of sodomy as a crime or sin that anyone can commit, to an act that is an expression of an innate identity. Basically it defines a person at that time who commits the act, as who he or she is. That person would be defined as a pervert then, not just a homosexual.

**Innate Identity:** A component of inner identity (the inner truth of you, idea of something that you are born with). It's not the act, but who you are as a person that's a crime. If you are a homosexual then it defines everything about you. Which means everything you do, like, have a hobby in; defines you as a homosexual. Marginalization. Stigmatization! Individualization!

eg; A man figure-skating or a women playing hockey! So the things people do defines you. So being a queer, whatever you like, eat, listen to etc.. is cause you're a queer.

Foucault: "The 19th century homosexual became a personage, a past, a case history, and a

childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and a possibly mysterious physiology. Nothing that went into his [sic] total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions. The sodomite had been a temporary aberration; the homosexual was now a species."

At that point the state feels like they have to regulate laws about them because their was a constructionism of homosexuality.

In the 19th Century; the beginnings and advocacy for LGBTQ, and arguments about this idea that homosexuals are not criminals and should not be incarcerated. Challenges to laws that criminalize sodomy. Then in the 40's and 50's, have a further evolution of this right movement called the homophile movement. Which consisted of a couple of key organizations; Britain, Canada and the US. **Universal HR argument, that we are all people. Gay and straight. We are all the same, we are not perverts. We want to be good citizens like you! etc.. Liberal tradition! Plus stating we are the =.**

60's-70's: Gay and Lesbian Liberation Movement; made a more radical move to say we are not all the same, we can't help the way we are, it is our choice. "Out and Proud". They deserve rights as specifically who they are. They wanted to be the freaks that they are.

1. The idea that Courts and Governments, at least in the history of LGBTQ rights have never granted rights! These are rights that have always been fought for but never granted. In terms of having children, having a job, being part of society at large, being protected from violence and hate-speech!

It's easier to forget how hard people have fought for rights! And be careful because these rights can be rolled back. The way that laws and rights evolved in terms of the criminalization of queer folks and in terms of the protection at the contemporary scene. The RCMP developed the fruit machine. A machine kind of like a polygraph to bring out the queers. Read your pupil dilation. Faux-science! Tested a whole bunch of people who got fired and discriminated against in society.

Stonewall Riots; 1969; NY; at the Stonewall bar; a gay and transbar that had been targeted by the police, arrest a bunch of people and beat them up. This was like sort of an early manifestation of the gay liberal movements. Protest started by coloured people and trans people. The marginalized people such as a Drag Queens. It was a successful pushed back. Lead to awareness regarding violence from police against queer and trans folks. Collective momentum effect, of a bunch of people coming together and saying we don't deserve this bad treatment.

- 1987 sexual orientation included in the OHRC.
- And in 1982 it was included in the CCRF.
- Legal challenges alongside gay liberation movements.
- 2003 Same-sex marriage
- 2000 Little Sisters case in Vancouver

### **Pitfalls and Limitations of Rights:**

Dean Spade argues that people that can approach courts and governments are often very privileged people. The time and the process to get something through court is a very specific kind of processes available to people with enormous resources or collectives of people working together;

1. Like in Bedford; organizations, activists etc..(Collective effort)
2. SUAV

### **Jasbir Puar makes a really important argument about LGBTQ rights after 9/11 “terrorism”:**

1. Homonationalism involves the incorporation of some “homonormative subjects” into the project of Empire or Nation. Who are “homonormative subjects” = these people who fits the norm, a family person with kids, good job, follows family traditions but the only wrong thing is that you are a gay couple. Stereotypically those who don’t challenge the norm of heterosexual. Morally upstanding gay as opposed to the pervert gay; family oriented; no fuss making; white male able-bodied, wealthy, well-behaved, employed. “The good Canadian citizen” Also not publicly displaying affection. You are going to be rewarded as being a productive member of society and worth to the state and be given rights and outraged if something happens to you. Not just the State “representing homonormative subjects”; but instead the popular pop culture. Not engaging in freaky public sex! Similar to being a neoliberal citizen; productive citizens who believe in capitalism! Are given resources, and are encouraged to thrive and reproduce and raise families because of neoliberal beliefs!
2. The flip side of the homonormative subject is the re-marginalized, re-stigmatized queer that obviously isn’t that privilege to get rights. Moreover, those people are targeted not to thrive, not to reproduce(have children or adopt), are given much less resources. Obviously, non-productive and not encouraged! Puar argues that some people are queered as a means of making them more disposable and outside of this productive economy of life and citizenship. What does it mean to “queer” a subject? = being labelled, targeted, they are a particular groups of people as not being productive or being 2nd class. Some are given rights and freedoms whereas others their rights are very limited. Basically giving “formal rights” to those people. Moreover, acting as though they’re protecting gay rights and saying “oh let’s boycott Russia cause they don’t give them rights etc.. Uganda.” However, in actuality they are taking away those rights such as health services or employment opportunities because of being less than homonormative. They are being queered mainly on the basis for not being in conform with neoliberalism. Then linked to an argument to take away their rights!Hypocritical move; it’s not like a russian refugee would be so welcomed here in Canada!
3. Pinkwashing; States uses their treatment of gay people to assume a moral superiority. As against Middle Eastern countries. Common narratives;
  - Oversimplifies how the US treats its queer folks versus Iran
  - US is still to this day, is not properly treating its queer folks (+Israel)

Religious organizations are highly supported institutions!

### **Homonationalism and the Limits of Rights**

1. Homonationalist critique highlights the ways that rights are often granted to some people while other people are targeted for marginalization/criminalization.
2. Lady Gaga video creates that homonationalist are those perfect national citizens who aren't racist or have no prejudice.
3. Dean Spade builds on this critique to argue that rights don't always conquer oppression because rights aren't given to everyone.
4. This is all covering up for marginalization and criminalization for other queer subjects.

**Neoliberalism:** Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. **Idea of this person who's most deserving of rights and resources, and protection from the State regardless of their sexuality, race and religious manifestation.**

Lisa Duggan: Neoliberalism as being linked to four key qualities:

1. Private property;
2. Personal responsibility; anti-collectivism
3. Individualism,
4. Austerity

Women and coloured people do not fit within neoliberal groups because they are believed to not be as productive, talented and that's why they're not being allowed to thrive. Dean Spade looks at the limits of liberal equality rights and the problematic culture of neoliberalism. There are two law reforms; in "trans rights" to argue that the two most common types of law reform - anti-discrimination laws and hate crimes laws - do not actually improve the "life chances" of the people these laws claim to protect. Limits of right talks. Dean Spade talks about what kind of rights we should be enforcing instead, or the actual solutions. Courts and Police are the primary sources of violence against trans people. It focuses on individualized instead of systemic understanding of oppression and collective oppression. "Anti-discrimination law focuses solely, then, on seeking out individual aberrant actors with overtly biased intentions.<sup>38</sup> Meanwhile, all the daily disparities in life chances that shape our world along lines of race, class, disability, national origin, sex, and gender remain untouchable and affirmed as non-discriminatory or fair." Many people who experience discrimination don't have access to legal resources to fight anti-discrimination laws. **Two main arguments for LGBTQ rights:**

1. Who has access rights; very small group of people. Need more collective strategies.
2. Rights talks should be regarded with high suspicious and critical analysis; often used to justify further marginalization.

## Week 7 - February 25 – Emerging rights, balancing rights

**7.A Guest lecture by Lisa Addario, Legal Counsel, Public Service Alliance of Canada, on family status discrimination**

**7.B Resolving competing rights**

### **1. Emerging rights; Johnstone v. Canada Border Service Agency, 2010 CHRT 20**

It is one of the cases where the definition of what family status entails continues to be under some debate. The government and Fiona Johnstone both have very different definitions of what family status discrimination is.

Fiona is a Canadian Border Service Agency officer, working in an airport terminal in Pearson airport. She was married to another CBSA officer. They both faced the same rigorous demands of the work place. They had two children. Fiona brought her complaint to the CHRC after her second child. The discrimination began in the infancy of their children. Pearson has a very complex shift plan (24h), also unpredictable (night shifts, afternoon shifts...). She knew she would have rotated shifts, overnights or etc..3 days on and another week 3 days off. Before her first maternity leave she asked for a full-time static shift. She needed it for her children. She was able to ask for child care arrangements from her family members. Not from daycare because there are no overnights or weekends available services. While she wanted to maintain her status in the workplace, so her pension wouldn't be diminished but unfortunately she was deprived of a promotion and proper income. However, all they gave her was a part-time static shift. Fiona took those hours with diminished training and opportunities. She found that the CBA does accommodate for other employees based on religion and health. And those were provided with full-time static plan shifts and some on a permanent basis. So she filed a discrimination complaint in the workplace on the ground of family status.

Studies show in the US that women who leave on maternity, they receive a 25% diminishment at work due to their leave.

The tribunal noted that they had a particular history with the CBSA regarding HR. They pointed out that 10 years prior to Fiona's case, another female CBSA agent had filed a complaint on the same basis of discrimination due to lack of accommodation. The tribunal issued a decision and told CBSA knew that messed up and didn't solve their issues.

The CBSA defended itself on the fact that they accommodate for others:

1. It's a choice to have kids.
2. So we don't have to accommodate for a person's choice of lifestyle.
3. They sought to remove the responsibility to accommodate for parents.
4. Family status is only whether you are single, married, other family members around you, divorced and has nothing to do with the obligations that emerge from having a child or with

the other members.

5. Why invest in someone such as Fiona who won't maximize their work when they return from maternity leave.

A woman from Carleton School of Business, took it a step-further to state that it is a no-brainer that workplaces should accommodate for such issues in order for good business sense. The greater diversity in the workplace for better attraction the stronger your business will be. Unless accommodations are made for working mothers, there will be fewer women in the workplace and society will suffer from having less or no children. It is naive to say that childcare issues is solely a result of choice when that employee is faced with housing and feeding a family. She then asked, although theoretically a person has a choice, there is only one and legally and morally acceptable option and that is to care for your child in a diligent way. A person should not choose between raising a family and meaningful work that she or he is trained for and demonstrated their ability in that work.

Expert Dr says; The single most difficult factor in accommodating for childcare is unpredictability. Unpredictability makes it almost impossible to find day-care services.

The tribunal goes to say that they disagree with the claims brought by CBSA. Family status encompasses a parent's obligation to take care of their child, to take care of a person's own parents, sick partner. The underlying purpose of the Act is to provide all individuals a mechanism to make for themselves the lives which they are able and wish to have and meet their duties. For each one to live their life to the fullest, so long as it does not infringe on someone else's rights. The tribunal adds that has the CBSA made effort to accommodate for Fiona, can they prove that if they have Fiona work full-time instead of part-time results in a Bona fide occupational requirement. So if Fiona doesn't work part-time, and works full-time will the workplace disintegrate and fall apart? That's the threshold CBSA has to prove. And show undue hardship threshold. Obviously, there is no record that shows that accommodating would cause undue hardship + since the last complaint there was no improvement. Fiona was granted back her lost wages, 15,000\$ (ceiling of compensation) in damages suffered and full 20,000\$ (due to the recklessness of the CBSA) as compensation, full-time static shift plan. The federal government is now appealing it despite the lack of evidence that they showed for Bona fide occupational requirement, undue hardship, tribunal view on family status, and the obvious discrimination between parenting officers and non-parenting officers.

## **2. Competing Rights; Right claims made that make an impact on another person's rights:**

Example: New Law School being accredited in BC. The issue is that the law school which is based on the Catholic faith which will make its prospective law students to sign a contract agreeing not violate the sanctity of marriage between a man and a women (No same-sex marriage, or pre-marital relationships).

1. They are discriminating against homosexual students.
2. Religious freedom however is the right of the University.
3. Freedom of expression

**A.** No rights are absolute or limitless. Rights have limits such as section 7 which has its own built-in limitation about when those rights can be limited. Section 1 which permits the government to justify a violation of a right (when it fits a valid policy objective and meets other standards of minimally impairing other rights and rationally linked to the objective) whilst being proportional to the free and democratic society. Section 33 the override provision that the government may use to a certain proportion of the Charter.

Example:

1. Right to freedom of expression; but not allowed to make child pornography for many societal reasons and values.
2. In HR litigations, discrimination can be condoned if an employer can show a bonafide requirement for them to engage in that conduct, similarly an undue hardship.
3. Professor who needs dog in class, student allergic to dog. For the professor: it's a right to accommodation in the workplace for his disability. For the student: right to receive services for pre-existing medical conditions.

**B.** Some rights might be considered more important in terms of hierarchy; that's competing rights.

General idea: Rights exist on an even scale.

Rights interfering with other rights, mostly triggered by claims made under gender, creed, sexual orientation and disability.

**The answer to competing rights: No case law**

1. Have to go through the process on a case by case basis. Rights are always interpreted under the light of the underlying facts.
2. You can't say oh it makes sense doing x,y, z.
3. Encourage that both sets of rights and interest be considered.
4. Look at the extent of the interference, (is it something causing a huge burden or a minimal interference on the other person's rights) cause that can guide your decision.

The commission put out a scheme to solve competing rights claims. They use the example of the Professor who needs a seeing eye-dog in the classroom, but a student is allergic to dogs. How do you resolve that situation?

For the professor: it's a right to be employed and accommodated in the workplace for his disability.  
For the student: right to receive services in a non-discriminatory fashion that fits his needs for pre-existing medical conditions.

Not something like a breast-feeding women in a store will disturb clients. The basis of your complaint

cannot be for the goal of business. You can't use customer preference.

**R. v. N.S., 2012 SCC 72: involves procedural rights in the Charter; rights of the accused to a fair trial and rights of freedom of religion for the complainant.**

Muslim women who wears a niqab, she had come to the police because she was sexually-assaulted by her cousin and uncle as a young child. The cousin and uncle asked the court to mandate that she remove her niqab while testifying. It is important to see the demeanour of a person in court, or else how can we assess the demeanour and the risk of not being able to assess someone's demeanour can gravely impact another person's right for being unfairly convicted. The Court said if they really believe how much she is sincere to her religion to allow her to wear the niqab in Court. (so we will let you wear it if we believe how much faithful you are)

Freedom of religion pitted against fair trial. s7 vs s11D.

Group of judges in the SCC; When you are faced with these kind of situations (criminal judge), you must apply a 4 fold test:

1. Would requiring her to remove the niqab interfere on her right to freedom of religion? In order to rely on the Charter's protection section 2a; you must show a sincere religious belief. The voi-dire judge concluded based on the facts that she would remove the niqab for driver license or border security, that her belief wasn't that strong. The SC said it isn't about the strength of their belief, but the sincerity. Might be some inconsistency, but not about 100% adherent all the time.
2. Would permitting witness to wear the niqab would affect an unfair cross-examination and credibility; The accused said that allowing testimony by a person within a niqab prevents an effective cross-examination. And interferes with the assessment of credibility. The court concluded; we agree that there is a strong connection with the ability to see the face of the witness and a fair criminal trial. But also, not always apply because the evidence might be uncontested and so doesn't matter if you can see a person's demeanour or not.
3. Is there a way to accommodate both rights without infringing one of them.

Possible accommodations: Female only court. Testifying from closed circuit television, or she be in another room, and testify from behind a one-way screen.

4. If no accommodation is offered do the benefits outweigh the negative impact. Since the practice is presumed to be important to the person claiming it, that would be state interference and telling a woman what to do with her body and discouraging women to participate in the justice system entirely. Although the right to a fair trial is a fundamental pillar to our legal system.

Conclusion: Where the liberty of the accused is at stake (going to jail). Where the witness evidence is central to the case. And where her credibility is vital for the possibility of a wrongful conviction must weigh heavily in the balance favouring removal of the niqab.

#### Dissent:

1. Minority decision by J. Lebel and Rothstein; This appeal shows the tension and changes of evolution of contemporary Canadian society and the growing presence in Canada of new cultures, traditions, religions and practices. They ask if the wearing of the niqab is compatible with the right of the accused, but also with the constitutional values of openness and religious neutrality and contemporary democratic but diverse Canada. Which of course is shade covering with the proposed Charter of values in QC, ensuring religious neutrality by prohibiting religious presentation.
2. Nor should wearing a niqab be dependent on the nature or importance of the evidence, as this would only add a new layer of complexity to the trial process. A clear rule that niqabs may not be worn at any stage of the criminal trial would be consistent with the principle of public openness of the trial process and would safeguard the integrity of that process as one of communication. Nevertheless the criminal process itself is also designed to ensure that the accused is given a fair trial, to safeguard the constitutional presumption of innocence and, hopefully, to avert wrongful convictions. The adversarial model is based on interaction between the prosecution, the plaintiff, counsel for the parties, witnesses and, finally, the judge and, where applicable, the jurors. This model of justice imposes a significant personal burden on witnesses and parties.

#### The take-away:

Points made by Rosalie J. regarding demeanour evidence when faced with a witness wearing a niqab.

- We are talking about something that we can deal with by other means. It really should only be an issue if the identity of the witness is at stake. Otherwise that very conundrum that you raise that she choose between religious rights and their ability to bear witness against an aggressor. It is no answer to think of measuring someone's religious belief because past religious behaviour change. It is like hanging a sign in the courtroom that says religious minorities are not allowed to participate in the justice system.
- "Demeanour" has been broadly described as "every visible or audible form of self-expression manifested by a witness."
- Trial judges often rely on many indicators *other than* facial cues in finding a witness credible, including certitude in speaking, dignity while on the stand, exhibition of disability, exhibition of anger, exhibition of frustration, articulate speaking, thoughtful presentation, enthusiastic language, direct noninvasive answering, non-glib answering, exhibition of modesty, exhibition of flexibility, normal (as in as expected) body movement, cheerful attitude, kind manner, normal exhalation, normal inhalation.
- It really doesn't matter if you can see the bottom half of someone's face in order to determine for yourself whether a person is lying or not. Lots of other factors that trial judges rely on. Courts regularly accept the testimony of people whose demeanour can only be partially observed. (such as those with interpreters, medical conditions, or speech impairment) So why are we not allowing this woman wearing her niqab in court. The weight to be convinced or not, but not if the testimony is admissible in court or not depending on what they are wearing.

Moreover:

- The onus should be on the accused in order to why the niqab should be removed.
- If you force someone to remove their niqab it will result in inconsistent demeanour because of the great discomfort they will be put in especially when watching the accused talking comfortably in what they want to wear.
- Demeanour is not the only to the truth.
- Asking NS to remove it would be invading her privacy, and feel powerless in front of the accused's.

**Assemblée Nationale Quebec, Bill No. 60: Charter Affirming The Values Of Secularism And The Religious Neutrality Of The State, As Well As The Equality Of Men And Women, And The Framing Of Accommodation Requests, November 7, 2013,**  
<http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-60-40-1.html>

The Bill wants to prohibit religious dressing in public sectors. You can wear it if it is tiny (such as a small cross around your neck), but no yarmaka, or headscarf, any adornments manifesting religious belief. Plus faces must not be covered. Separation from religion and the state and that will lead to less tolerance for religious based claims. Religious garments are not worthy of protection.

-freedom of expression-freedom of religion-creed-ethnicity-sex

Qc's bar association: State neutrality regarding secularism.

HRC: Charter will increase conflicts and litigations, violence.

This will impact the ability and encouragement for certain communities to access public service and working there. Increasing violence in Qc.

## **Week 8 - March 4 – Key concepts in human rights jurisprudence**

### **8.A Forum for human rights claims, the duty to accommodate, and exceptions to human rights coverage**

#### **Seneca College v. Bhaduria, [1981] 2 S.C.R. 181 (paras. 183-193)**

Very qualified (Phd, certified teacher with years of experience) applicant of Indian ethnicity was not granted an interview after ten applications, and she found out that less qualified applicants were granted the position that she applied for. This really caused issues of low self-esteem, it harmed her dignity because of the discrimination on her ethnicity. So she filed a lawsuit (common law claim).

The SCC discussed whether despite the fact that the Ontario HR Code sets out what you can do about discrimination and where it can be litigated, if you can exercise an independent right to litigate it in the Courts.

Lower Court dec by Bertha Wilson J.: If we have a right at law, then that is a right that we should be able to exercise in all areas of civil proceedings. The SCC disagreed with the lower court decision and said we have this really specific legislated scheme and you have to file a complaint with the HR Tribunal. So Bhadauria was not able to file her claim before the courts.

The difference between pursuing a claim before a Court and a HR Tribunal:

- Enforcement
- Remedies
- HRC have ceilings for remedies. (10,000\$). So if Bhadauria was able to make a claim in Court she probably would have claimed more than in a HR Tribunal.
- Her damages could have been lost of wages, and obtained the position if her case was enforceable. And for a person with such qualifications, she would have claimed a lot more than 10,000\$.

2006; Amended HRC, now you can pursue Human Rights claims in a Court of law.

### **Lane v. ADGA Group Consultants Inc., 2007 HRTO 34**

In the OHRT, it expands our understanding of the duty to accommodate.

The duty to accommodate: Making the same opportunity accessible for all demographics of people (people who are differently abled). This is substantive equality instead of formal equality).

Someone has to raise an issue that they need to be accommodated. When you self-identify that you need accommodation you tend to be stigmatized. Lane got fired for disclosing his mental disorder to a supervisor.

After asking for the accommodation the management would then see what they could without undue hardship, (not costing too much to bankruptcy, or harming others at a greater level) however firstly the management will require more information that proves the real need of the accommodation. In a situation of medical accommodation, the note of a medical professional. Bonafide requirement sets out the reason of why the employer does not need or cannot accommodate.

Accommodation is a responsibility with limits to it; such as undue hardship (not costing more to accommodate or if the safety of the other employees will be harmed if the accommodation takes place) and bonafide requirement (what the employer sets out of what he needs in an employee however the disabled person cannot meet; such as reliability).

Paul Lane, had 13 years experience in his field and at the late age of 41 was diagnosed with Bipolar

disorder. The tribunal acknowledges that this disability can be managed very much. Paul applied for a job with ADGA in August 2001, he got accepted but did not provide the information of his mental disability. Two days after his acceptance he told his management about it and asked to supervise his behaviour because of his disorder and it would be much helpful for him. He also pointed out that due to his illness he might have to take some days off.

ADGA; The supervisor got on the internet and googled the disorder, she sent what she found to her manager and called a meeting with Paul on the following day. They told him that they were going to terminate him because they couldn't tolerate the probable events that might occur due to his disorder and any absence from the workplace.

ADGA say they don't have other reasons, they simply cannot accommodate or tolerate it.

The tribunal concluded after hearing from experts; how can the disorder be managed in a supportive environment. However there are no policy regarding mental disability and how to understand it. The tribunal said they really need to build this in the fabric of the workplace.

Absolutely no policy in the workplace regarding disability, which was a failure from their part. Had ADGA taken appropriate steps, it would have actually understood that bipolar disorder has a lot of stereotypes such as being unreliable, and so don't disclose about their disorder.

ADGA said he lied and didn't disclose creative and fast work process had ADGA learned that if they had a policy regulating this issue. Full blown manic episodes could be avoided with early intervention, like people in the workplace can supervise and detect any sudden behaviour and support that person. And cumulative effect of their manic episode. The more manic episodes you have, the more frequent they will occur which can lead that he or she may no longer work.

Lane's claim for loss wages were only made for a number of months because his doctor found within the month of August of the following year that he would be too unwell to work. The tribunal implies that there are some connections between crisis like situations in someone's life and their ability to stay very well.

The tribunal considering the relevant legal principles in s5, s11 and s17:

- s5 right to be free from discrimination in employment because of disability.
- s11: Constructive discrimination. Where there are qualifications or exclusions of a group of persons who fall under a protected ground It is not discrimination if the requirement is reasonable and valid as a bonafide requirement. This would have applied to ADGA if they had previously mentioned their requirements that they need someone who can work 365 days a year, reliable etc...
- s17 duty to accommodate, distinction made where someone who is incapable of fulfilling the essential roles of a job is not being discriminated against if they're being treated differently. However the tribunal has to be satisfied that the needs of the person cannot be accommodated without undue hardship.

SCC definition of disability: Lheureux dube; Disability or a handicap may be the result of a physical limitation, an ailment, social construct, perceived limitation or a combination of all of these factors

\*Social construct example: You're in a wheelchair, you're a cripple you should be in a nursing home, you have no legal contribution to society and can't do any form of work.

Disability is not something that is always appropriate to use. In that social construction, there is some sort of oppression on that person. Broad definition, it's a perceived limitation.

After proving differential treatment on a protected ground, ADGA has to prove that there could be undue hardship under s11 or bonafide reasons that Paul not being able to fulfill what they needed.

The point is not to simply remedy discrimination, but to ensure that they prevent it in the future. Also; there's a difference between procedural and substantive component in the duty to accommodate. The tribunal ask did you do everything possible and the appropriate steps to breathe life into the procedural component to accommodate so it would be more likely to believe ADGA that it could not accommodate for Lane. Obviously an internet search is not appropriate and they showed nothing that proves why they could accommodate; no training, no policy, no steps were taken. Instead of terminating him, they could have put him on leave and discuss with a lawyer what they could have done.

In terms of remedies, he got 35,000\$ for damages. So it was appealed. He received lost wages for only a number of weeks. 10,000\$ for anguish.

ADGA ; why did the Commission had to hear from experts regarding mental disability; it was relevant to understand why Paul Lane did not disclose his disorder in the first place. SCC said mental disabilities often create stereotypical behaviours in people. Court said such a person has no limitation in their everyday activities other than the perceived limitation people place on them.

ADGA should have taken the procedural duty to accommodate; which involves getting all the information from Paul Lane where it is readily available. That assumes that he is seeing a medical practitioner, but not everyone wants to be in the medical model and rather be independent in their own care. Information about the employee's medical condition, ability to work, capabilities for alternate work, chances of recovery, if he needs to work at home, part-time. Which is what doctors can provide.

Failure to accommodate without risking safety leads to liability.

This case set out a really clear map of what to do when it comes to being confronted with request for accommodation. Is there a HR issue?

It's a disadvantage for those with disability because they have the burden to ask for the accommodation, work hard to get it and if they don't then it is their fault and not the employer?

## **Vancouver Rape Relief Society v. Nixon et al., [2003] 22 BCLR (4th) 254 (BC SC)**

This case is about whether the VRRS which is a group for women who went through violence from men, if they can exclude a certain group of people depending on what their determination of what a women is.

### **The difference between gender and sex:**

- Gender: is what you identify yourself as
- Sex: is what you biologically are

Nixon has lived her life as a women for the most of her life. However she did use to be a man, because of that she faced problems with the VRRS. She once had sex reassignment surgery a very long time ago. And her birth certificate reflected her female gender. She had experienced physical and emotional abuse from a male intimate partner. She ended up in VRRS so she could return the favor of the help and support she received from women throughout her abuse. VRRS asked its volunteers to adhere to a strict political belief in regards of abortion, abuse, womanhood, lesbian right, choose who their sexual partners is. Nixon agreed with their beliefs with no problems. One of the VRRS facilitators asked her if she had always been a women, she responded by saying no, I was born as a man. Because of that she was terminated. The legal issue was whether sex includes gender identity and gender presentation. The tribunal appropriately interpreted the statutory exemption under the Code. The VRRS relied on the provision of the HRC in BC, that says "It's an exception of remedying for some historical discrimination". So for VRRS; women have been disproportionately abused physically and emotionally by men and continue to do so, therefore we have the right to exclude certain groups of people from our services if they do not fit the type of people we want to support. Because of that provision, VRRS felt it was permitted to choose who is allowed to participate here and who a women is based on their own policy.

Only those who have been unambiguously female by birth, and anatomically and psychologically and experientially female who can participate in rape relief activities other than fundraising which is open to men.

Nixon because she is medically and psychologically a women she cannot be defined as a man by the VRRS just cause she was not always a women.

The Court; disassemble some concepts of Nixon in a way are at odds of what a real HR analysis could be.

Reviewing court; to the BC Court of Appeal level; Kimberly Nixon's application failed there as well. She was not able to get a court level body to determine she was discriminated against by the VRRS. The lower court; characterizes Nixon not as a women but as a male to female transexual, which is not

affirmative of her life experience. The fact that she was a woman at the time of the application does not disregard the fact that she was a man at one time in her life. VRRS was allowed to take this into account when they decided to exclude her.

VRRS does not provide for any gender identity so long as they are 100% women. Does not involve harm to Nixon's dignity (dignity test: both subjective and objective).

- Subjective test: Nixon truly felt it impacted her dignity; in the way she carries herself as a woman, how she sees herself as a woman.
- Objective test: exclusion by a small obscure self-defining society does not have the same impact on dignity as a legislative scheme that excludes does.

Any stereotyping or prejudice arising from legislative exclusion has state approval and wide public acceptance. Difference between how you are being discriminated by a small community or State. That's not right though!

**bb findlay, "Ruminations of an Activist Queer Lawyer" Thirdspace: A Journal of Feminist Theory & Culture, Volume 7, Issue 2 (Winter 2008) (in coursepack)**

## **8.B Class discussion on cases and concepts**

### **Week 9 - March 11 - Economic, social, and cultural rights**

#### **7.A Socio-economic rights under the Charter and internationally**

Section 7 and it encompasses different definitions of equality. Comparing it to a different Constitutional guarantee in South Africa. What do these rights and freedoms actually mean to guarantee for people in actuality? What is the definition of equality? Different definitions in s15 of the Charter, in HR legislation's, and a thin definition (not treating people differently)?

#### Equality of opportunity:

##### Housing:

1. Stable housing
2. Having a fixed address to enjoy other services such as employment
3. Physical and psychological well-being
4. Dignity; the way of living, having that privilege
5. Security
6. Removes the stigmatization of being homeless
7. Issue of identification because of no stable address
8. Being financially able to own a home, you can benefit from increasing your style of living
9. Having a family

10. Within dignity; having electricity, water, heat, etc..

Social Assistance: for those less fortunate

1. Some municipality communities offer housing depending on a person's family and economic situation
2. There's no HR legislation protecting the right to Housing
3. A form of survival for those incapable of working or receive housing; so it gives a minimum amount of money as substitute
4. A regime that is meant to provide the bare minimums
5. Kinds of equality of opportunity; everyone having the chance to access a better life
6. To prevent poverty in terms of economics

"Not simply people being treated the same by the State, but also the State having a positive obligation to provide things for people to increase their opportunity of equality down the road."

What are Charter guarantees in poverty and poverty-reduction schemes (treating young people differently from old people):

**Gosselin v. Quebec (Attorney General), 2002 SCC 84 (read paras. 164-170 and Justice Arbour's dissent)**

A social assistance scheme that provides a minimum amount of money meant to provide a monthly income for people to sustain their lives on. The scheme was designed so that anyone under the age of 30, only a third of what people over the age of 30 received in terms of income. The complainant raised were two Charter grounds:

1. Section 7 right of life, liberty and security
2. Section 15 equality right; discrimination against age due to her youth.

Based on the equality analysis (Case called law) she had to prove if:

1. There is differential treatment, and
2. Is the differential treatment on one or more grounds enumerated under section 15
3. Does the law have a purpose or a fact that is discriminatory in terms of these equality guarantees

Section 15(1) of the *Canadian Charter* provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds. In this case,

the first two elements are clear, and the analysis focuses on whether the scheme was discriminatory.

Outcome: Gosselin was not able to take any of the Charter protections.

She did not have a stable family life. She resided between either her biological mother's home or her number of foster parents throughout her childhood. She did not finish high school, or have success sustaining employment in the job market, she had alcohol abuse, physical and psychological disabilities and periods of depression. By the age of 18 she was supporting herself with the aid of social assistance. The welfare structure which could have covered her between the ages of 18 and 30 was one in which she could have obtained a greater amount of money than that one third if she participated in remedial programs. Gosselin engaged in 3 of them (educational program, on the job program) in good faith. Unfortunately when they came to an end, she was back to supporting herself with the one third, housing, moved back in with her mother and was using food banks. She was getting only a 188\$ in benefits of money each month.

She had very challenging life circumstances and needed a very robust social assistance. The scheme had a number of characteristics that the court found compelling. One of them was that:

1. Notion that the social assistance scheme was to facilitate young people re-enter the workforce at a much quicker rate than older people.
2. They wanted to avoid having young people depend on social assistance.
3. They would make it less available at least the program that would increase your income for those who haven't finished high school.

Gosselin complained on the basis of security of section 7 for the State's failure to help her: State failed to provide an adequate level of personal safety and security for her by refusing to give her the means or sufficient amount of money. She said that her health is being compromised by this scheme.

Majority:

1. In terms of section 7:

Section 7 does not talk about what the State has to give to the people. Thus far, the jurisprudence does not suggest that s. 7 places positive obligations on the state. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of their right to life, liberty and security of the person. Such a deprivation does not exist here and the circumstances of this case do not warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards. Not meant to say that the State is obligated when it comes to providing basic quality of life characteristics to people's lives.

2. In terms of section 15:

There is a differentiation between younger and older people. The section 15 breach doesn't satisfy the third test and so does not really impact Gosselin's human dignity because young people are not

vulnerable or undervalued by this scheme. In fact, it's an affirmation of their full potential rather than a denial to their dignity. It makes common sense to create an incentive to young people. This scheme actually speaks to the positive attribute of young people because it is so hopeful to their ability to return to work.

There is a failure on the part of Gosselin to prove a negative impact on her dignity. She keeps falling back to only 188\$ for a month because these remedial programs always come to an end. After that, she's forced to move back in with her mother and no one at the center can help her to find other programs. When she turns 27, and forced to live in a variety of rooming houses and faces various types of harassment and cannot work because of constant fear of getting fired. Hospitalized! Constantly unstable!! Difficulty with finding food. When she turns 30 she's allocated the full benefit. However, the court says that does not establish a denial of human dignity. Social assistance schemes are not meant to be perfect, some people will always fall through the cracks.

Justice L'Heureux-Dube: Presumptively excluding groups that clearly fall within an enumerated category from s. 15's protection does not serve the purposes of the equality guarantee. The enumerated ground of age is a permanent marker of suspect distinction. Any attempt to exclude youth from s. 15 protection misplaces the focus of a s. 15 inquiry, which is properly on the effects of discrimination and not on the categorizing of grounds. Furthermore, the perspective of the legislature should not be incorporated in a s. 15 analysis. An intention to discriminate is not necessary for a finding of discrimination. Conversely, the fact that a legislature intends to assist the group or individual adversely affected by the distinction does not preclude a finding of discrimination.

Living under the constant threat of poverty is psychologically harmful. The idea that you live under such terror where your next meal is going to come from is sufficient to say that this is not the kind of thing that the State should not facilitate towards other people.

Justice Bastarache: conservative view of s7 which is triggered by the State action when it deprives life, liberty and security of the person.

Louise Harbour: Section 7 should encompass that situation. This is about a level of social assistance that the State provides that is and should be adequate for a person's basic needs of sustenance. This is not about economic rights. These are rights that are so intertwined with one's basic health of the person and survival of one's life that they should be read into section 7. This differentiation between Positive right and negative rights is a false one because the Charter already places positive rights.

The Charter forces procedural right:

1. provide a child minimum amount of time
2. language rights
3. minority rights

#### 4. aboriginal rights

In general when there is State legislation over a matter (in a realm), the question now is have they done so in an adequate way? If the State is going to provide services it has to do so fully. Such rights should be considered like a prerequisites to those Charter rights. The legislation turned a blind eye on those people who fall through the cracks in the social assistance scheme.

#### **Government of the Republic of South Africa and Others v. Grootboom and Others, [2000] ZACC 19,**

Many more economics and social rights in South Africa Constitution than in Canada. The question: How do they get delivered. Section 26 in regards of housing:

1. Everyone has the right to access of adequate housing,
2. State must take reasonable legislative measures within its available resources to achieve the progressive realisation of this right.
3. Adequate housing

Irene Grootboom had gotten through apartheid when her land was dispossessed. In her province, there was a great number of poor people whom were left to squatting means no help or services whatsoever, no tap water, no management.

She was on a waiting list for subsidized low cost housing, and while she was waiting, she moved to a private land where she was then evicted from and could not move back to her old community. Her and others were living on a soccer field when she came to HR advocates. It was obvious that the State was not meeting its requirements.

The issue:

How to enforce socio-economic right enforced in the Constitution in light of a government that has fiscal limitations to it?

The Court said we are not going to set a burden on the State if the State can't reasonably meet it. We have to acknowledge that the foundational values in this new Charter are being denied to those who have no food or shelter and particularly for those who are living in extreme poverty the State must take immediate action. These rights in the Constitution must be satisfied now. The State must meet the rights guaranteed in the South African Constitution. The language in this Constitution is very interesting. Adequate housing is more than housing, it's about having sewage, electricity, access to finances, leverage some equity, being able to have freedom to manage your piece of land, about bylaws. Even for those who have money, the government still has obligations towards them.

Reasonableness of the government's action must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human

dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Outcome: She was moved to a shack in a township, remained on the list for housing after 15 years of this decision. She died from an illness before she could have moved in the home that she is constitutionally guaranteed.

At what value are these rights if they can't really be enforceable by the Courts.

Difference: Canada it's okay South Africa everyone must have equal access

## **7.B Class discussion on cases and concepts**

### **The Story of the "160 Girls" by Sasha Hart, Legal Counsel, the equality effect**

## **Week 10 - March 18 - The future of rights and freedoms in Canada**

### **11.A Entrenchment of rights**

1. Whose rights and freedoms are we talking about?
2. Who's making those laws?
3. What do these laws that we commonly know as good create violence for other people?
4. The categories that equality law has created are in essence a reproduction of stereotypes because they reduce people down to essentialized characteristics rather than the reality of people's lived experiences which may include compound discrimination, intersectional identities. Which we have heard in the case of same-sex marriage, sex-work being treated by the CA, Nixon case, serious inabilities to recognize what Nixon's lived experience was as a trans women.
5. Equality being a means of creating more sameness, people who assume to be brought into equality categories can demonstrate that they behave or look the same as a category that was already being validated by law which we heard in the lecture with Kathryn Trevanyn, homonationalism; heteronormativity; rights are dispensed to gay people whose lives are non-threatening to certain mode of life and how the government chooses to queer other people and exclude them from the centers of power in a contemporary society.

## READINGS:

### Dean Spade, "What's Wrong With Rights?" in *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (New York: South End Press, 2011) 79

Contemporary legal theorist and a lawyer living in the States. He's also a trans man who's been at the forefront of a movement in the States that really question rights discourse as to whether the reliance on rights litigation. Whether it actually delivers equality to the trans community in the US.

Dean talks about a different means of equality:

- Categorization; trans-gender should not be in the same category as homosexuality and gay rights. And it should be its own entity, and discussion.
- Deans Spade says: Let's not assume that the same way gay rights litigations will work for trans people.
- He talks about the realities of being a trans person in NA; how being a trans person can result in alienation from your social environment, from school, from your family, not being able to obtain employment, because your sexual identity doesn't match your gender. Moreover not being able to get proper work so getting involved with sex work. Trans people are subject to greater scrutiny from the State.

In Ontario, 50% of trans people have an annual income of 15,000\$ or less. (Absolutely not enough).

In light of people simply struggling to survive; there are two law reform strategies to create positive impact in their communities:

1. Anti discrimination laws to include gender identity and gender expression as a protected ground.
2. Hate crime laws that are enacted to include crimes motivated by gender identity and gender expression.

These strategies are meant to:

1. Establish the language for legal claims
2. Meant to affirm the dignity and human rights of trans people. A form of protection by law. Legal claims make it possible to receive remedies and compensation from someone who has discriminated against you. Sends a broader social message that trans people have rights. It increases trans people visibility and suggest that there is such a community.
3. There is a preventative message sent to society by having a protection against discrimination.
4. Similarly, State agents including law enforcement should be compelled to take violence against trans people more seriously than they do.

Do these laws actually improve the life chances by people who are protected by them. (**useful analytical tool, to ask ourselves about any protective ground in Canada**)

These laws don't actually eliminate the bias, prejudice, exclusion or marginalization that trans people continue to go through. Also, anti-discrimination laws are not properly enforced. Most of the people who experience discrimination can't afford logging a HR claims.

Anti-discrimination laws eradicate things like racism, transphobia. This chapter borrows a lot from critical race theories and critical race theorist perspective on the legal system. (Anti-discrimination laws can't attack things like racism or transphobia because they look at things from a very individualized perspective. One bad employer did something etc..)

**Solution:** Because we are individualizing these things, we are not actually looking at the structure or the system that perpetuate the discriminatory ideas and behaviours that continue to exist. The daily disparities and life chances that shape the world along the lines of race, disability, class, national origin, sex and gender remain untouchable and affirmed as non-discriminatory.

There's a pretension underlying human rights law that the plain field is equal. We really need to think about the structures that we all participate in and live in that continue to create things like racism, sexism and transphobia. There's a false assumption that gaining recognition will improve life chances and that our systems are otherwise fair. If we simply catapult trans people into this equal playing field by having discrimination against them be recognized under a piece of HR legislation, then we are fine. Must think to the lived circumstances of these people benefiting from these law protections. **who benefits when it comes to HR legislation? equality means sameness. The least marginalized people might benefit from HR legislation's, but that doesn't trickle down to the most marginalized people. (Heteronormative subject; live like normal, have kids, send them to school, high paying jobs, have a car..)**

Those who live at the margin of our community and share an essential life characteristic, they're not going to benefit from strategic rights benefits. Perfect plaintiff: white people with high-paying jobs. Lawful immigration status. Obviously, a trans person in NYC, who's involved in sex work won't be treated the same as (the perfect plaintiff) by the State in terms of litigation.

Dean Spade says; it's great when you hear trans people from a higher class winning in litigations but that doesn't impact those trans people who live in poverty.

He also ask us to question the structure underlying our beliefs about hate crimes and in so doing he talks about the prison industrial complex. **why is it a victory allowing gay people in the US military, when the military at heart is a killing machine.** He talks about hate crimes, and our reliance on them as strengthening the Criminal punishment system, but in fact what that really means to Dean Spade is strengthening a system that targets the very people that these laws are passed to supposed to protect. **So it's like a reproduction in the criminal system of racism, xenophobia, homophobia, sexism etc..**

Trans people are disproportionately poor and have difficulty accessing certain types of services. If you combine that with police harassment you get high levels of criminalization and prisons are very

intolerant to transgendered people. Why would we support Hate crimes, when really we know that it isn't in our interest to strengthen a system that disproportionately contains an extraordinary number of indigenous people, racialized people etc..

In terms of what we could do; Dean Spade says **we should stop relying on rights, the value of naming experiences of discrimination cannot outweigh the damage that these systems continue to perpetuate. They do not help the most marginalized, they help only the least marginalized.** We should not ask what rights are there to help us, but what legal systems are available and what their impacts will be.

Solution: in regards to the trans community in NA; not trickle down social justice, which is the idea that if someone makes it to the SCC, and get a favourable decision, everyone gets that characteristic benefit from it. We need to talk about trickle up social justice, think about strategies that are going to improve the life chances of people who are most marginalized in our community.

The most marginalized should be kept in mind when thinking about strategies. Not necessarily litigation strategies, but community engagement. His solution involves working with the most marginalized people and ensuring that they have proper income, housing, access to services like health, education, social assistance, subsidized housing, id. Small but important changes. The solution is not through rights; because they're not necessarily useful or have much of an impact.

## **Week 11 - March 25 - Access to Justice**

### **11.A The cost of litigating rights and freedoms**

#### **How to actually get to court and how do you actually get a Court**

**-Having standing and being able to afford a lawyer is difficult**

#### **What to do if your rights have been breached and you want to have access to a court?**

- Must establish standing either through a lawyer or on your own
- How do you find out if you have Standing? Contact a rights establishment or even a counsel
- The lawyer may ask for a legal "retainer" for their services (payment ahead of time)
- There are also court fees and extra disbursements such as copying, faxing, etc.
- Legal aid only funds private certificates where someone's physical integrity is being challenged (ex. Divorce, family, immigration)

#### **How much does it cost if you call a lawyer:**

1. 160-500\$/hr

2. Retainer fee; varies from 1000-5000\$ for simply a legal opinion, or just reading your document
3. Court fee; printing fee

**Legal aid does not fund everything. It mainly funds cases where:**

1. someone's physical integrity is at issue,
2. Of course Criminal cases,
3. immigration law because of personhood can have their liberty interest impacted,
4. family law for cases involving domestic violence, children's wellness being at issue.

**Who has legal aid available to them: in Ontario**

1. Those who can't own a home or a car; cause then the Province will tell you to sell or wtv these assets to fund a lawyer
2. Have an annual income of 18,000\$ or under
3. To people living under a certain level of poverty
4. Cannot have more than 1500\$ savings in the bank, if so then you would be told to use it all

**READINGS:**

**New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46 (paras. 75-80 and 111) - how do we manage that given the obvious inequities between an individual who has experience with HR breach and a government body that has a lot of resources available to it. Roles of the lawyer when it comes to satisfaction of HR resolutions.**

Single mother who was living under social assistance, and had three young children. They were taken away from her and placed in the care of NB Minister of Health and Community Services through a temporary custody order in Nov 1993 that extended for a year and a half in June 1995. Mom wanted to contest the custody order that the government had made before the Courts but the problem was that there was no legal aid available to her when it was only a temporary order of guardianship. The Government said if we had permanently taken away your children, then we would have given you a lawyer to represent you. She had no means that she could do so herself. So she litigated this retroactively, after the children were returned to her on the basis that that legal aid scheme being a breach of both her s7 and s15 Charter rights. The SC took the case on, despite the fact that it was moot, because they believed it had sufficient importance.

**The issues at the SC:**

1. Whether relieving a parent of custody of his or her child restricts a parent the right security of the person. (same argument of State intervention over one's body; Dying with dignity; POWER; Abortion)
2. Is there because of the potential breach of s7, is there a constitutional obligation under the Charter to provide an individual with state funded counsel under certain circumstances.

**Response:**

1. Right to security of the person protects both physical and psychological integrity of the person; (Rodriguez, Morgentaler) this isn't simply about whether government put someone in jail or causes physical harm but about the amount of distress that you can experience with Government intervention. That doesn't include ordinary distress, or anxiety which would not be experienced by someone with reasonable sensibilities. The kind of psychological impact that the Court recognized within s7; serious and profound impact. Why it might believe that parenting falls within the psychological health realm.
2. The Court acknowledge that a parental interest is of a fundamental interest in our lives. Losing the companionship of a child would cause obvious distress. Similarly, State interference with parenting is a gross intrusion into a private and intimate sphere. A parent is often stigmatized as unfit if taken their child away from them. Parental status as defined by the Court is part of fundamental identity. There was an affirmation that the stigma and distress of losing one's child can give rise to a breach of security of the person but not under all circumstances.

**Example:**

When a child is killed by a police bullet, or taken into military. Parents are only able to invoke s7 breach, when the State has co-opted their parenting role or is prying into the intimacy's of the relationship.

Court says yes we do feel that s7 would have been infringed having the mother being unrepresented while contesting her childrens custody. But then the question is of course is that balancing equation that s7 requires, the ability to be deprived of those rights if it is in accordance with the principles of fundamental justice of society.

**Two aspects in compliance with the principles of fundamental justice:**

1. A child protection must be necessary for the child's best interest. So if the State can show that it is in the child's best interest to proceed with the application, then it is within those principles.
2. Must be a fair procedure for the removal of a child from a parent.

How it can be necessary to provide legal counsel as a constitutional protection for parents under these circumstances; the psychological integrity of both the parent and the child are at stake here. Complex proceeding, and we don't trust the capacity of a self-represented litigant in these circumstances.

Why counsel may be necessary under these circumstances:

At issue in this appeal is whether the custody hearing would have been sufficiently complex, that the assistance of a lawyer would have been necessary to ensure the appellant her right to a fair hearing. I believe that it would have been. Although perhaps more administrative in nature than criminal proceedings, child custody proceedings are effectively adversarial proceedings which occur in a court

of law. The parties are responsible for planning and presenting their cases. While the rules of evidence are somewhat relaxed, difficult evidentiary issues are frequently raised. The parent must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain. In this case, all other parties were represented by counsel. The hearing was scheduled to last three days, and counsel for the Minister planned to present 15 affidavits, including two expert reports. Finally, in proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case. There is no evidence here suggesting that the appellant possessed such capacities. The potential s. 7 violation in this case would have been the result of the failure of the New Brunswick government to provide the appellant with state-funded counsel under its Domestic Legal Aid program after initiating proceedings under Part IV of the *Family Services Act*.

Outcome: Accordingly, the least intrusive remedy would be to leave the policy intact, subject to a discretion vested in the trial judge to order state-funded counsel on a case-by-case basis when necessary to ensure the fairness of the custody hearing.

Dissent L'Heureux-Dube: Who's impacted by by these cases.

You can't look at equality guarantees or Charter guarantees in silos. You have to look at the interplay between them. You can't look at the s7 violation without thinking of the equality implications. We should be able to talk about the equality guarantee as an interpretive lens. Her belief is that it's the most important guarantee in the Charter.

This case raises issue of:

1. Gender equality: because single mothers are disproportionately affected by this child protection procedure. They are constantly taken to Court by the State for these issues.
2. Also impacts of other disadvantage groups. Indigenous people, disabled, etc..

This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings: see, for example, M. Callahan, "Feminist Approaches: Women Recreate Child Welfare", in B. Wharf, ed., *Rethinking Child Welfare in Canada* (1993), 172. The fact that this appeal relates to legal representation in the family

context for those whose economic circumstances are such that they are unable to afford such representation is significant. As I wrote in *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 853, “In Canada, the feminization of poverty is an entrenched social phenomenon.” The patterns of relationships within marriage disproportionately lead to women taking responsibility for child care, foregoing economic opportunities in the workforce, and suffering economic deprivation as a result: *Moge, supra*, at p. 861. Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women’s perspectives.

Without the lawyer, navigating them through that for over prejudices that plays out in the decision making realm. A positive decision which allows the constitutional protection of a lawyer in family matters, but it has not extended to other realms.

A fair procedure for determining whether a custody order should be extended requires a fair hearing before a neutral and impartial arbiter. The paramount consideration at the hearing should be the child’s best interests. This is recognized in s. 53(2) of the *Family Services Act*, which provides: **When disposing of an application under this Part the court shall at all times place above all other considerations the best interests of the child.**

For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody, it does so because there are grounds to believe that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child’s home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child’s best interests. There is a risk that the parent will lose custody of the child when in actual fact it might have been in the child’s best interests to remain in his or her care.

**British Columbia (Attorney General) v. Christie, 2007 SCC 21**

British Columbia's *Social Service Tax Amendment Act (No. 2), 1993* imposed a 7 percent tax on the purchase price of legal services ostensibly to fund legal aid in the province. C, a litigation lawyer, challenged the constitutionality of the legal service tax, claiming that the net effect of the tax was to make it impossible for some of his low-income clients to retain him to pursue their claims. The chambers judge found that the tax breached a fundamental constitutional right to access to justice for low-income persons and declared it unconstitutional to that extent. The majority of the Court of Appeal upheld the decision. The tax was to fund legal aid.

As a result of the tax, Christie's fees have been raised by 7%. Which makes it harder for my clients to pay their bills, on time or even at all. So the burden falls on me to pay the tax to the State. Moreover, it's going to cost me extra to set up an accountant to help with that and recover my losses, plus administration. This discourages low-income civilians from accessing justice. This added cost is fundamentally unfair.

**Issue:**

1. Does affective access to the Court necessitate legal services
2. Does the tax on legal services prevents people from accessing the Courts

Lower court agreed with Christie, stating yes there is a fundamental constitutional right to access justice and the tax Act should be struck down. But before the SC, there was a disagreement.

SC stated; there is no general constitutional protection for accessing justice by way of a right to Counsel. It doesn't apply across the board. This would cause a constitutionally mandated legal aid scheme for virtually all legal proceedings. Then the government would have to pay for all circumstances where individual interest are involved.

Rule of law; general relationship between citizens and the State does not include a right to Counsel. Unless for criminal proceedings as shown in s10;. They recognize that under certain crucial situations right to counsel is read into s7, but that's not a general idea.

Lawyers are a vital conduit through which citizens access the courts, and the law. They help maintain the rule of law by working to ensure that unlawful private and unlawful state action in particular do not go unaddressed. The role that lawyers play in this regard is so important that the right to counsel in some situations has been given constitutional status.

The issue, however, is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.

**11.B The form of litigating rights and freedoms**

How do you effectively access legal counsel in HR cases. Right to counsel there? if a human right is to be exercised or an infringement of s7. so being able to have a lawyer work with you.

### **Canada (Attorney General) v. Mowat, 2009 FCA 309**

Dona Mowat, was a member of the Canadian forces, made a complaint about them on the basis of discrimination on the grounds of sex, and sexual harassment. She retained a private lawyer to work with her. One of the intricacies of the case is that the Federal HR system; the Canadian HR commission is meant to assist people as counsel. It's the only body, meant to act like a free resource that acts in the public access.

You'll see people litigating on their own, the commission will join them as a party because they believe doing so will give strength to the complaint. However, Dona retained her own private counsel with the hope and belief that the Federal HR Commission would do the heavy-lifting because they're a public funding resource, but they didn't. Before the tribunal, only Dona complaint of sexual harassment was substantiated, and she received an award of 4000\$ plus interest for pain and suffering.

Now the federal regime has a ceiling of 25,000\$ for pain and suffering, but at the time of Dona Mowat, the statutory maximum was 5,000\$. The hearing was six weeks long, case record of more than 4,000 pages of transcript evidence and 200 exhibits. Dona Mowat, with her private counsel had incurred legal cost just under 2,000\$. The tribunal awarded 47,000\$ in legal cost plus interest. Very large amount in terms of cost. Tribunal said if they hadn't awarded her such, any victory would have been hollow. (need to compensate her for the cost that got her to this place)

**Issue before the FCA:** Whether the construction of the CHR Act, allowed for someone's legal cost to be compensated. So s53(2(c)) provision at issue, on a finding that's being substantiated the tribunal may order that the person or organization compensate the victim for any or all the wages deprived of, AND for any expenses incurred by the victim as a result of the discrimination practice.

So the supporters of Dona said if you have to pay out of pocket for the legal cost; then that should be read into as an expense that needs to be compensated in 53.2.

When it had been appealed; before the FC and FCA; it was the commission that was advancing why cost should be read into 53.2, Dona had declared bankruptcy, living in Newfoundland and didn't know that her case was being appealed before the FCA. So there was a massive failure by the Commission regarding its ability to communicate with her about something that was very important to her.

**Answer:** Before the FCA; you cannot read legal cost into the definition of expenses in 53.2. Because cost has a discrete meaning; what normally falls within legal cost and we can't presume that the Parliament meant to make a one sided regime where respondents can never recover cost.

Court said; If you read into s53.2c that someone who has experienced discrimination can have their legal cost covered, what does that mean in terms of a complaint that has not been substantiated, and the other party has had to defend itself if we were to read it into 53.2 we would be a one-sided regime, where complainants can recover cost but the other party can't.

The Court looked at parallel legislation, HRC of other provinces where they had a specific language for cost. You really could have been more explicit about it because otherwise you would have put it in the legislation as a whole. **Example of the cost that people have to incur under some of these regimes when it comes to exercising their HR.**

**Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), 2007 SCC 2**  
Charter claim against the federal gov; issues about what it cost to litigate against the government.

L is a small corporation that operates a bookstore catering to the lesbian and gay community. Book sales represent 30 to 40 percent of its business. L, which still struggles to make a profit, is engaged in litigation to gain the release of four books prohibited by Customs on the basis that they were obscene. Frustrated after years of court battles with Customs over similar issues, L chose to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. When this litigation began, L had already fought a protracted legal battle against Customs, which culminated in this Court's decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"), where it held that Customs' practices at the time infringed ss. 2(b) and 15 of the *Canadian Charter of Rights and Freedoms*. Custom officials were meant to treat their materials without bias. When it had gone to the SCC in 2000, there was no remedy set other than the declaration that there had been a Charter breach. 6 years after, the Minister of Justice had assured the Court that systemic problems in Custom practices have been properly addressed at the time of the hearing.

In the second case; **what happened within one year after the 1st decision**; in 201, another series of titles were detained by customs and four of them were titled as obscene. LS appealed the categorization of those four books; and made a request for a larger systematic review about Canada's custom activities. The cost of that appeal was estimated at about 300,000\$ and the systemic review at about 1 million \$. L then at the commencement of this second piece of legislation; asked the court for an order for an advanced cost against the Government. L you've already found them to be discriminatory, but we continue to be targeted, and we have the burden to continue litigating this a second time, and we don't feel like we have to pay out of pocket to fund this litigation. We would like the court to do what's an extraordinary remedy and make the other side pay the legal cost first and see the outcome of the litigation. **They were not granted this remedy.**

Court talks generally about what legal cost mean; everyone is responsible for their own legal cost, until a determination of the issues. Despite the fact, that L had said this is an issue of importance particularly to communities in Canada whose reading material may not accord with what custom officials may not define as normative. The SCC that doesn't entitle you to preferential treatment to regards of cost. Similarly, a losing party that raises a serious legal importance will not necessarily bear

the other party's cost. There are circumstances where advanced cost can be granted but they are done so under exceptional circumstances. The test then of when advanced cost can be granted is set by the SCC; 3 fold:

1. Party seeking interim in the mean time, genuinely cannot afford to pay the litigation and no other realistic option exist to bring the litigation. An applicant has to show that they explored all other possible funding options (L should look at private funding, loan applications, other means of raising the money, if they can't then they must show that to the Court.) Court said we can't allow for unstructured use of taxpayers money, we must be able to put some structure around the legal work.
2. Want to know that the claim is on its face meritorious(deserving reward).
3. We want to know that the issues raised by the applicants for advanced cost transcend individual importance and are a public importance.

The SCC took a view that was really at odds by the way dissenting judge described Little Sisters; neighborhood bookstore. This is about a business, not of great public interest. The detaining of the four books doesn't mean that it is evidence of discriminatory targeting. No evidence that the books are integral to L's operations. It's not within the public importance to have these matters litigated. All it will mean is that Custom has not met it's official obligation at all. Not about the integrity of the government at large.

Justice Binnie: Over more than a decade, Little Sisters has borne the brunt of the battle on this branch of expression and equality rights. In 1996, it financed a two-month trial and two subsequent successful appeals to establish the existence of systemic *Charter* violations at Canada Customs. That case vindicated (at least in principle) the rights generally of the lesbian and gay community, not just Little Sisters. We are told that the costs award in *Little Sisters No. 1* covered only 60 percent or so of actual costs. The present issue is whether the rights established in principle have (or will) become rights in reality. In the circumstances, Little Sisters should not have to prove that there is no one else in Canada with a potential interest in the subject matter with pockets deep enough to take up the cause.

**Apart from money what are the other cost in challenges in litigating vs the govern: Feel good case Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45** ability of sexworkers of the downtown Vancouver area to litigate as a group instead of as individual like in Bedford, Valery Scott etc..

**SUAV:** Sexworkers United Against Violence. Society run by current or former sexworkers in Vancouver. Women; the majority who are aboriginal, have health challenges, disability and in poverty. In commencing their claim against the federal gov for many of the same Criminal Code provisions that were put at issue, the suav organization had put affidavits before the Court from 90 current or past sexworkers and challenged the Criminal Code provisions by:

1. s2d; freedom of association, because these prevent sex workers from working together,

2. s7 right to security of the person, prospect of getting imprisoned, preventing them from taking the proper steps to ensure their health and safety within their work.
3. 2b freedom of expression, communication illegal when it could serve to increase safety.
4. s15 equality rights because the provision discriminate against a disadvantaged group; (Not raised in Bedford)

The litigation was commenced as a group. Immediate point that was raised by the Government on a preliminary motion. **Can a group challenge the constitutionality of Criminal law through public interest standing?**

When the preliminary motion was raised by the Fed government, the group then added an individual as a claimant. Sheryl Kiselbach; individual claimant.

This case comes to answer: What are the most practical ways to challenge the legalities of State actions? A lot of people who look at SUAV, and think how can we use this under different circumstances, and build on this to be more affective.

SCC; Issued a unanimous decision that the sexworkers in that organization were able to litigate as a group.

In determining whether to grant standing in a public law case, courts must consider three factors:

1. whether the case raises a serious justiciable issue;
2. whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and
3. whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court.

what is the plaintiff's ability to bring forward a claim? or individual? Does the claim transcend the interest of those most affected by the challenged law or actions. **(how do we ensure that the people who are the most detrimentally impacted are then able to benefit from litigation and does the plaintiff have a great interest)**

Why does the government want this to be an individualized claim? They say; We only have so many courts and we don't want our scarce judicial resources be compromised by hearing multiple creations of the same case. **Idea: fine bring forward a case, but not various claims of the same thing at once in BC.** Similarly, we don't want groups to be able to interfere with the law by basically acting as busybodies. At the same time, we need to facilitate challenges to the law, we also need to create mechanisms by which people could challenge the law and be able to hold the State accountable and think about practical and effective ways to challenge the legality of State actions.

1. There is no dispute here that these issues are issues justiciable, they're clear constitutional issues that are adversely affecting a great number of women.
2. No dispute about the proposed groups interest, they have a strong engagement with those issues having worked with past and current sexworkers for a number of years, no busy bodies.

3. Whether there was a reasonable or effective means of bringing the matter to Court; the government rested on its case. You shouldn't have groups litigating this because anyone who's being charged criminally for an offence related to sexwork can without a problem challenge the legality of the matter individually instead of a group.

This isn't about an individual being charged or being able to bring a Charter ground. It's a comprehensive challenge and it can't be duplicated by an individual challenge. It's also different from the Bedford case because it raises different issues from different perspectives. The SCC acknowledges that this case is sexworkers working on the street who have different lived experiences than Terry Bedford who works from a home or in a brothel. Differences in privacy and safety; for someone who is a party in a litigation such as Sheryl Kieselbach; and a witness.

The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such a challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

**An ability for groups to litigate Charter breaches when it comes to criminal code provisions. It's not clear whether that ability to litigate in a group can extend to other arena. You are able under the OHRC to file a complaint as a group but one of the conversations I have with POWER; you have to file as a group, make your case, bring your evidence and that evidence has to come in the name of individuals who may not otherwise want to be known by the police to avoid having violence against you.**

## **11.B Guest lecture by Cynthia Stirbys, Doctoral Student, Institute of Women's Studies, University of Ottawa, on indigenous perspectives**

- First Nations women in Canada seek freedom, not through restrict notions of equality but through sovereignty and nation-building. Until the diversity of First Nation traditional culture and values becomes the core element in any legislation, policy involving indigenous matters in Canada; First Nation women's inherent right to equality and civil rights and freedoms and for children will always be undermined.
- Gender, race, power and representation matters with respect to who is seen deserving of full citizenship in Canada. Civil rights and feminist approaches within civil rights are limiting the chances of equality. eg; 1982 Charter bolstered women's rights except that it didn't do the same for Indigenous women.
- Truth is based on colonial ideology.
- Federal continue to through the way of loopholes and legislation to overtake indian land and resources. Federal bureaucrats do not acknowledge how truth based on their particular ideology does not leave space for non-homogenous cultures resulting in an imposition of neocolonial government power over First Nation's. Such as the CCRF; does not represent the non-white people!
- Anyone outside of the majority of people is undermine, marginalized and have their rights limited. Such as First Nation women and children.

### **Civil Rights and Freedoms Before Contact**

Governance structures of FN people were well established before colonial governance. Missionaries and settlers did not understand that the society of FN was put to secure social structure in order to maintain regulating a common-purpose.

### **No Hierarchy, No patriarchy in most Governance structures.**

In egalitarian societies women are/were : ALL members

- Valued
- Respected
- Protected from violence or discriminatory practices
- Colonial text such as Jesuit; prove that egalitarian societies existed and kept the women and children in high regards and equal to men. Women had the final word. The division of power btw the men and the women was properly defined so as to allow all members of society have an equal role. Common understand! Core value of respect was at the basis of their governing structure.

### **Indian Act and International Covenants**

- In contact, when colonizing FN lands, Nation-State government didn't even consider the diversity of Indians nor did they accommodate the previous diff types of Indigenous governance. Instead they treated them all the same, and decided to control all of them because they were depending on Aboriginal land and resources as a means of building wealth

as a new Nation. The political agenda thus began and simultaneously dismantled FN government structure and seized control of land and resources.

- Once all FN were assimilated, there could be no aboriginal complaints on the lands. The legal instrument to ensure success was the making of the Indian Act.
- 91-24; gave Federal jurisdiction over all FN people and their lands.
- Marginalize Indian women and their children from the beginning
- Remove Indian's women's authority and role in Governance because they were seen as inferior and viewed as property in the eyes of the patriarchal government.
- Moreover, if they a woman married a non-Indian, she lost her status as an Indian.
- The life of an Indian women and children changed with every mandate in the Act as it removed them from their traditional roles and responsibilities.
- All registered indians were treated as minors with no access to privileges and citizenship.
- The Indian Act was meant to "civilize" the Indian through enfranchisement which meant that Indian men were put on a 3-year probationary period to determine whether they were literate in Eng or in French which neither was their main languages, and of good moral character and free of debt. So enfranchisement; Indian women were not included in this offer or even considered, or have a say for their husband.
- Women had no say; and they were automatically enfranchised without their approval afterwards.
- The Indian Act was constantly amended without consultation of the First Nation people.
- Politicians of the past and of the present who uphold the race-based doctrines in the Indian Act invoke their superiority over the culture of the FN, especially the women.
- Each amendment reduced women representation, hoping that they would give up their FN status.
- The Federal government kept its discriminatory practice which limited the civil rights and freedoms of Indians because they were regarded as non deserving like the rest of the people and decided to continue making new legislation which would further the limitation.

#### **Bill C-31: in 1985**

- To delegate any discriminatory act in the Indian Act.
- Achieve more goals;
  1. Restore status for those who lost it because of enfranchisement and gender-based discrimination.
  2. Eliminate patrilineal eligibility for Indian status and replaced it with gender-neutral eligibility.
  3. Enable bands to assume control of their band membership.
  4. Prevent anyone from gaining or losing status through marriage
- In fact the bill removed the civil status from both women and men, thus assimilating the Indian population into mainstream society.
- This bill was not liberating and First Nations true aspirations were not considered through this bill.

## CCRF S15

- Ironically, bill c-31 was enacted to align the Indian Act with s15- the equality rights section of the CCRF.
- Canada patriated its Constitution in 1982 and the Charter was necessary because sovereignty for Canada was incomplete btw 1867 and 1982. Had no authority to amend its own Constitution before 1982.
- Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and in particular without discrimination.
- It sounds promising; but **S32 & 33** are the most problematic.

Because;

- It talks about protection from discriminatory practices from the government but not from another individual.
- And **33**, the notwithstanding clause (override clause) that could potentially override parts of the Charter and “Knowingly..discriminate” through legislation. Chretien; talks about this and says he saw this as a tool that could be used against the Courts to legalize hate crimes and child pornography. Dangerous clause..
- Becomes the loophole; to exempt the Indian Act from Charter scrutiny.
- Despite FN women challenging authority and fighting for their rights; government continued to discriminate and marginalize FN women because of their culture. +single mothers, more prejudice (Compound discrimination, acknowledge by the SCC, so seen that the Charter is limiting and could not protect FN women)

Indian Residential Schools; ended in 1996, morphed into the child welfare system. In the 60’s the child welfare began removing children from their families because Federal government did not find that children are being assimilated fast enough in Indian Residential Schools. Without taking in consideration, their families, their mothers, their culture and tradition. Doing such would weaken their society They were put in school with very poor conditions. Many would get sick and die. The judicial system forces both F&P system re-enforces the discriminatory differentiation btw FN and Canadians by keeping them separated from the rest.

## CHRC

- Section 67 of the CHRA exempted the Indian Act from its provision, until the section was repealed in November, 2008.
- There is no guarantee for a “coherent set of equality rights principles in an indian act setting”
- Jesuit Relations: Jesuit texts revealed the practice of rendering difference by essentializing modes of representation according to race, gender, culture and nationality.”
- Prof Joanne St. Lewis: Examination of equality cases show First Nations women experience “compound discrimination”.

**Bill c-3:**

- Is a second attempt to remove the discriminatory practices from the Indian Act
- But the consequences of the First Bill -31 have not been adequately addressed.
- Bill c-3 is prompted by the Civil Law suit, by Jacob. The CA of BC, ruled on Dec 6 2009; that a violation of the equality provision under s15 of the CCRF had indeed occurred by discriminating against women and men and who could be registered as an Indian. Court gave Parliament time to amend the registration part.
- Bill c-3 looks much like -31 except that it now has a different name

**Feminism and the law:**

Rights work where people are in a position to press for them;

For others they give only the caricature of Justice -Elizabeth Wolfcast

Equality becomes about sameness and not what it truly means

**The Good life and colonial discourse:**

The various positions taken by Aboriginal women and Aboriginal groups are not significantly different in their basic assumptions. For the most part, the social values they seek to entrench are the same: sexual equality, freedom of speech, etc. The differences lie in the paths chosen to secure those values and in the speeds safest to achieve them.

- Jason situated Aboriginal women in a like category of her same oppression
- Example of Sexual Equality: White feminism fighting for abortion rights whereas first nation women fight to keep their children as the government was taking them away from them.

Liberal society bestows “power on reason and on its own reason which in effect seems to stymie

**A FINAL DISCUSSION: THE CHARTER AND FIRST NATIONAL WOMEN ASPIRATIONS**

- Enfranchisement is not equality
- Justice is based on interpretation of law
- CCRF has not yet met First Nations women`s aspirations.
- Manipulation of law to disguise the discrimination against the Indigenous people, and in particular Indian women.
- Indian women had nothing but living under the same oppression as the Indian Act

poor because that is how their social net was made.