THE CHANGING FACE OF HUMAN RIGHTS IN CANADA

Michelle Falardeau-Ramsay

INTRODUCTION

This is a fascinating time for those interested in human rights, a time of rising hopes and great change. It is also a time of disappointment and frustration for some individuals and groups, who see the grand promise of equality etched out in the *Charter of Rights and Freedoms* and human rights laws, but who have not yet experienced it in their daily lives.

I would like to share some thoughts with you about the human rights situation in Canada. The subject I will address is: "the changing face of human rights." In particular I will focus upon changes in relation to ethnic diversity and sexual orientation.

As you know, many areas of the law tend to reflect the accepted views of the majority at any given point in time. These areas of the law are operating just as they should when they give effect to the beliefs or values of society. These are expressed through the judge's opinion of what the "reasonable person" would think, or what the contemporary "community standards" would be. The law in these areas is a follower most of the time, not a leader.

In human rights law, as we all know, the law is expressly meant to lead on many issues. The idea of human rights is not always to protect the rights of the majority because, by and large, the majority can look after itself through the sheer weight of numbers. Human rights laws are enacted to protect those who are least able to look after themselves. These laws are meant to express some of the deepest and most cherished values of our community. That is why the *Charter* marked such a watershed in Canadian law, because it articulated these rights and freedoms in a fundamental constitutional document.

The *Charter* also gave the courts the power to enforce these values in a more direct way than ever before. And you all know what has happened since: courts have struggled with new and difficult questions touching on the most controversial issues of public life. The courts have sought to balance rights with responsibilities, and in doing so they have struggled to balance the twin demands that lie at the heart of human rights today. On the one hand, there are the demands for change, real change, and soon; but these must be balanced against the equally fervent demand for careful and rational thought before taking a new course, particularly anything that might cost money or disrupt our habits.

In a way, the Canadian Human Rights Commission, and its counterparts throughout the country, have been involved in this perilous balancing act for many years. In my opinion, in recent years the issues have become tougher and more complex as the boundaries of human rights expand and we develop a deeper understanding of their methods. At the same time the competing demands of more groups for shrinking resources increase, and the rapid pace of change naturally causes some people to long for the "good old days."

Human rights laws are meant to lead rather than to follow; they are about change. In what follows, I would like to explore some of the dimensions of this change, and to reflect upon the lessons we have learned, by examining the challenge of ethnic and racial diversity, and the emergence of sexual orientation as a human rights issue.

ETHNIC AND RACIAL DIVERSITY

In speaking to an audience that is familiar with the law, one is always comforted to find "the case" to rely on. If this were an American audience, I would point to *Brown v. the Board of Education*,[1] in which the U.S. Supreme Court gave meaning to the constitutional guarantee of racial equality, and set in motion a chain of events that has not ceased to this day. The thing I notice about this case is that it seems all so very tidy, in theory at least if not in practice as the school desegregation history shows. The case involved a clear choice between two visions of equality, and it offered the Court an opportunity to strike at a clearly defined evil: racial segregation in public institutions. Once the evil was labelled, the remedy for it was clear: desegregation "with all deliberate speed," and by mandatory court order if necessary.

When I look for the Canadian equivalent, I am struck by the untidiness of our situation. We do not yet have our bright and glorious precedent, our *Brown v. the Board of Education*. There are several reasons for this. Other than toward Aboriginal peoples, there is no system which so clearly sets out to subject a racial group in our society to different treatment. And as Canadians have learned in recent years, the situation of Aboriginal peoples is complex, and no one solution is readily apparent because the problems are different for groups across the country.

I do not mean to suggest that our legal, social and political systems treat all persons with equal concern and

respect, or that the claims of discrimination in the justice system are not well-founded. What is clear, I think, is that the discrimination which is experienced in the justice system, in employment and elsewhere, is both complex and subtle. Overt acts of racial hatred do occur in Canada — as cross-burnings, synagogue desecrations and racially-motivated assaults show. But these are not widespread occurrences.

The fact that Canada has become racially and ethnically more diverse in recent years is obvious. The fact that this will continue for the foreseeable future is also obvious. What is less clear is whether the social, political and legal structures in Canada are now capable of adapting to the challenges which have accompanied this change. I would like to outline some of these changes, and some of these challenges, with reference to a few cases.

One of the most significant changes in recent years is the increasing racial and religious diversity of our immigrant population. We all know that Canada is a nation of immigrants, and this is particularly true of Western Canada. These immigrants came with a variety of languages and religions, and they were expected to adapt to the prevailing Canadian norms and standards: to "fit in." More recent immigrants have also brought a host of languages and religions to Canada, but some of these are less easily absorbed into the mainstream of Canadian culture and social practice.

Sikhs, who are obliged by their religion to wear a turban, are one example of a group that has sought to "fit in" to the extent they can within Canadian society, without giving up their religion. And as you well know, this has made some people very uncomfortable.

To follow this example a bit further, many Canadians have questioned why a Sikh ought to be exempted from the Royal Canadian Mounted Police uniform requirement about hats. The furore was intense for a period of time. Yet the dictates of the *Charter* and human rights laws are clear: no one should be forced to choose between compliance with an employment rule and following one's religious beliefs, unless the conflict cannot be avoided by a measure of reasonable accommodation. In the R.C.M.P. example, the question was whether or not a Sikh officer could perform the duties of the job while wearing a turban, and the answer of the senior officers was that the head-gear would not interfere with police duties. From a human rights perspective, this settled the issue.

Yet many people genuinely felt that this was wrong: that "they" were forcing "us" to accept "their beliefs." Underlying much of the debate on this issue was a feeling that the newcomers had simply gone too far in pushing for respect for their different beliefs. While these feelings are understandable, they also pose a challenge to the human rights system. In this case, the lesson was clear: if human rights law is seeking to lead rather than to follow, this will call for a better effort to try to explain why certain changes are being implemented. I have found, for example, that many people did not know that the wearing of a turban is a mandatory requirement for some members of the Sikh faith. Once the case was explained as a matter of religious obligation rather than choice, then the only question often was: well, why should he be able to serve in the R.C.M.P.? And in a free society, and with a police force that realizes that it needs to be more representative in order to be more effective, the answer to that question is easy.

The other example that I would use to illustrate the challenges posed to human rights law by the growing ethnic and racial diversity of Canadian society is drawn from a case taken to a Human Rights Tribunal by the Canadian Human Rights Commission. The complaint involved an allegation of racial discrimination in employment: *Grover v. National Research Council.*[2] According to the evidence gathered by the Commission in its investigation, Dr. Grover was an acclaimed scientist in the field of optics. He worked with one supervisor for several years, and he appeared to be on the way up as a valued contributor. When a new boss arrived, however, Dr. Grover's career took a turn for the worse. He was isolated from many important projects in his field, treated differently than many co-workers, and ultimately denied a promotion it appeared he ought to have obtained. Now the problem here is that there was no explicit racial discrimination: no name-calling, no racially tainted jokes, no blatant racism. Yet something did not seem right about the sudden change in his situation.

A Human Rights Tribunal was appointed to inquire into the case, and after reviewing all of the evidence it concluded that Dr. Grover had been subjected to covert racial discrimination. The Tribunal accepted that racial discrimination "is not a practice which one would expect to see displayed overtly," and it found that its task was to examine the evidence to determine whether the explanations offered by the employer for its treatment of the complainant were genuine or merely pretextual. In the words of the Tribunal: "In weighing the evidence, one often has to assess circumstantial evidence in order to identify... `the subtle scent of discrimination.'" And in this case, the Tribunal found that there was no valid reason for the differential treatment of Dr. Grover; it rejected the budgetary and other explanations offered by the respondent as mere pretext.

The Tribunal ordered that Dr. Grover be promoted to the position he should have held, and that he receive backpay and legal costs. As well, in recognition of the fact that a remedy for the individual would not address the full scope of the problem it had identified, the Tribunal ordered the employer

to review its policies and programs in consultation with the Commission. This review is now underway.

This is a very significant case, and it illustrates both the advantages and the problems of the current human rights system. On the one hand, the alleged victim of discrimination had his hearing, his day in court, before a Tribunal with procedural flexibility and sensitivity to the problems of discrimination and the lack of overt proof. The remedy ordered by the Tribunal deals with both the individual harm and the systemic problems revealed by the evidence. On the other hand, however, the hearings in this case lasted over 30 days, spread out over an 18-month period. Also, the Commission's investigation and conciliation process was not successful in resolving the situation between 1987 and 1990. That, in itself, should cause one to ponder whether the administrative structures now in place are adequate to the task.

What this case reveals is that in facing the challenges posed by an increasingly diverse community, human rights enforcement structures are drawn into a situation much more complex and difficult to resolve than the one faced by Americans in 1954 when the *Brown* case was decided. The groups and the demands are more diverse, the discrimination is often more subtle and covert. As well, the systems are generally less able to deal quickly and decisively with the problems that arise. And the remedies that are available often focus upon the individual rather than the underlying problem.

In my opinion, human rights laws are one small part of the larger mix of laws, policies, education and promotion efforts which are necessary in order to meet the challenges posed by ethnic and racial diversity in a multicultural society. Effective employment equity laws, at a national and provincial level, are another vital plank in this structure. Education that is ongoing and honest is another. As well, governments must have the courage to speak out when public manifestations of racial intolerance emerge. We need only look to the recent events in Germany to see that this type of behaviour must be quelled quickly and forcefully in order to prevent its spread.

I would like to turn now to my second topic, where human rights laws appear to be leading the way without the many supporting structures that exist in other areas of human rights.

SEXUAL ORIENTATION

You may have heard that the Supreme Court of Canada recently decided, by a four to three majority, that a gay man could not claim discrimination on the basis of family status when he was denied a family benefit in employment. This case is one of several in which the assumptions and myths surrounding the situation of gay and lesbian persons, and their place in this society, have been re-examined. I believe that the changes which are occurring on this front are long overdue, but I am equally aware that these are matters of intense controversy in some quarters. I would like to outline some of the legal developments, and to explain the point of view of the Canadian Human Rights Commission on these matters.

Sexual orientation was not included among the list of prohibited grounds of discrimination when the *Canadian Human Rights Act* was enacted. Virtually from its inception, the Commission has called upon the government to amend the law to add sexual orientation. The basis for this recommendation is simple: it is founded on the belief that one's sexual orientation is and ought to be irrelevant to one's capacity to hold a job, obtain a bank account or get a seat on an airline. In this respect it is similar to the other grounds of discrimination listed in this Act, and as well, it is clear that widespread discrimination on the basis of sexual orientation has occurred in Canada. All of this led the Commission to support the inclusion of sexual orientation as a prohibited ground of discrimination.

This gained public support in 1985, with the Report of the Parliamentary Committee appointed to review the impact of the equality guarantee in the *Charter* on federal laws. The Committee recommended that sexual orientation be added to the law, and in its reply in 1986, the government gave the following specific pledge:

> The government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.

At that time, a comprehensive review of the Act was underway, and a full package of amendments was expected soon.

Since then the government has not introduced the promised changes to the law, and the courts have been invited to fill the gap. The first case along these lines was the decision of the Ontario Court of Appeal in *Haig and Birch v. Canada*.[3] This case involved a challenge to the constitutionality of the *Canadian Human Rights Act*, due to its failure to include sexual orientation in the law. The challenge was launched by two men who had suffered discrimination, but had been denied access to the complaint procedures under the law due to this shortcoming in the law. The Commission intervened in the case, to support the constitutional argument that the failure to include sexual orientation in the statute amounted to a denial of the "equal

protection and equal benefit of the law without discrimination."[4] However, the Commission argued that the ground should be "read into" the law for a temporary period, during which Parliament could amend the law in order to bring it into conformity with the *Charter*.

This case was argued before the decision of the Supreme Court of Canada in *Schachter v. Canada*,[5] but when that decision was released the Court of Appeal applied it to the facts of this case. Mr. Justice Krever found that the appropriate remedy in this particular case was to "read in" sexual orientation as a prohibited ground. Mr. Justice Krever rested his analysis on the following assumptions which, in my opinion, are unchallengeable:[6]

> The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice toward them. It also includes the enlightened evolution of human rights social and legislative policy in Canada, since the end of the Second World War, both provincially and federally.

Mr. Justice Krever concluded that in the face of this constitutional challenge, the only real remedies available were to strike down the law, but suspend the operation of that order, or to read the missing words into the statute. Krever J.A. decided that, applying the guidelines established by the Supreme Court in *Schachter*, the proper remedy was to read the words into the statute.

He found that this remedy was appropriate because the words to be added were defined with sufficient precision, and the budgetary and operational impact of this addition would not be significant. Finally, Mr. Justice Krever said this about the presumed intention of Parliament:[7]

> In this case the group to be added is significantly smaller than the group now benefitting. Given the evidence in the material before the court on this application of the commitment of successive Ministers of Justice on behalf of their governments to amend the legislation to add sexual orientation to the list of prohibited grounds of discrimination, it is surely safe to assume that Parliament would favour extending the benefit... of the Act to homosexual persons over nullifying the entire legislative scheme... It is inconceivable to me that Parliament would have preferred no Human Rights Act over one that included sexual orientation as a prohibited ground of discrimination. To believe otherwise would be a gratuitous insult to Parliament.

Mr. Justice Krever ordered that the Act "be interpreted, applied and administered as though it contained `sexual orientation' as a prohibited ground of discrimination in s. 3 of that Act."[8]

Since this decision, the Commission has been accepting and investigating complaints of discrimination on the basis of sexual orientation. We have received about 30 such complaints since August 6th, 1992. And the views of Mr. Justice Krever as to the intent of the government were vindicated when, on December 10th, the Minister of Justice introduced a Bill into the House of Commons to amend the *Human Rights Act*, and included in this Bill was a provision which would add sexual orientation to the list of prohibited grounds. Also included in the Bill is a definition of "marital status" which would restrict its scope to "cohabiting with an individual of the opposite sex in a conjugal relationship for at least one year."

This leads me to the second important decision in this area: *Attorney General of Canada v. Mossop*.[9] This case concerned a claim for bereavement leave by a federal employee, Brian Mossop. He claimed this leave when the father of his partner died, and under the collective agreement such leave was available upon the death of an "immediate family member." Mossop and his partner had lived together for over ten years. They had joint ownership of a house and joint bank accounts; they were beneficiaries of each other's wills, and they shared the daily responsibilities of running a home and maintaining a relationship. They had a sexual relationship. Their families and friends knew them as a couple.

For the Commission, they were members of a family, although perhaps not the "traditional family." As we all know, the traditional family does not exist for many Canadians today, and our view of the definition of family status is that it is broad enough to accommodate all sorts of long-lasting intimate personal relationships of mutual sharing and support. It is the view of the Commission that if an employer makes family benefits available to an employee, these benefits must be distributed in a non-discriminatory way.

A Human Rights Tribunal agreed with the Commission's approach to this complaint, which was filed on the basis of "family status," since at that time sexual orientation was not a prohibited ground of discrimination. This was overturned by the Federal Court of Appeal.

The Supreme Court of Canada rejected the Commission's appeal, by a four to three majority. The majority of the Court found that the claim of Mossop was so closely connected with his sexual orientation that it could not stand on family status. And since sexual orientation was not a prohibited ground of

discrimination when the case arose, the approach of the Commission and the Human Rights Tribunal could not be accepted.

Chief Justice Lamer traced the history of this case, and noted that after the *Mossop* case was argued before the Court, the *Haig* decision which added sexual orientation as a prohibited ground was released. The Court asked the parties whether they wished to make submissions on the relevance of *Haig* to the *Mossop* case, and the Commission and the other parties did so in November 1992. The Commission argued that the *Mossop* case could still stand as a family status case, since the major rationale for a narrower interpretation of the term "family status" was the absence of sexual orientation from the Act. With the *Haig* case, it was argued, this rationale was gone, and thus the Court should adopt a broad interpretation.

Chief Justice Lamer, however, appears to have thought that the Commission should raise a constitutional issue for the first time before the Court, in order to re-litigate the *Haig* case. We saw several problems with such an approach; first, the Court has traditionally been reluctant to accept constitutional arguments which were not raised below. Second, in order to raise such an issue, it would have been necessary to amend the complaint upon which the entire case was based, seven years after the complaint was first filed and after the case had been argued before the Tribunal and the Court of Appeal on another basis. The absence of an adequate record on the matter was also a concern. In the end, the Commission decided to pursue the matter on its merits, but a majority of the Court would not accept our arguments.

In her dissenting opinion, Madame Justice L'Heureux-Dubé states that Courts should defer to the decisions of expert bodies such as the Human Rights Commission or the Tribunal, on matters of law as well as of fact. As an aside, I would commend this opinion to any of you who are interested in the issue of judicial review of administrative agencies; in my opinion it is a masterful analysis of the competing policy and practical considerations which are at play in this area of the law.

Madame Justice L'Heureux-Dubé examined a great deal of research and social science evidence on the modern family, and she concluded that the traditional family unit no longer had a monopoly on the term in Canada. Therefore, she was prepared to defer to the Tribunal's decision on this matter, since it had adopted an interpretation of the term which it could reasonably bear. She ruled that the Commission's approach to this issue, by which a certain number of criteria could be examined in order to determine whether a family relationship existed, was an appropriate way of resolving the issue.

In the end, the *Mossop* decision did not finally resolve any major issues, since the majority of the Court went out of their way to emphasize that their decision did not address discrimination on the basis of sexual orientation. The Commission will review its current cases, and on the basis of the *Haig* decision it will continue to deal with cases based on sexual orientation.

All of this shows that the change in this area of the law has largely been driven by the courts rather than the legislatures, at least in the federal sphere. Sexual orientation is now listed as a prohibited ground of discrimination in seven jurisdictions: Quebec, Ontario, Manitoba, Nova Scotia, New Brunswick, British Columbia and the Yukon. The challenges which have come to the forefront recently have not been about the basic right to equal treatment in terms of getting or keeping a job. Instead, issues of equal entitlement to employment and other benefits has been the main point of debate.

The Canadian Human Rights Commission has adopted the view that if employee benefits are made available to persons in long-term, stable and interdependent relationships, these benefits ought to be made available regardless of the sexual orientation of the recipient. This is, in our view, simply a matter of fairness. And to those who argue that this will impose a crushing cost on employers or society at large, our response is that the facts simply do not bear this out. A recent study by a major benefits consulting group estimated the total costs associated with such a system to be approximately 1% of pension or benefits costs. Remember, too, that employees who claim family benefits generally are required to contribute more. Finally, it is important to realize that not all gay and lesbian individuals live in such relationships, and many of those who do will not choose to claim employment benefits either due to a fear of discovery or because it would not be economically advantageous to do so.

The interesting thing about these changes is that they are coming rapidly, but they are mainly being imposed from outside rather than adopted on a voluntary basis. This may contribute to some of the controversy which has accompanied these changes, but it also points to a failure to adapt to the changes which have been coming since 1985, with the coming into force of the equality guarantees. Many legal and benefits systems have not been generating these changes from within, and now they are being imposed from outside. In my opinion, though this was probably inevitable, it does create a certain amount of hostility and controversy that does not always contribute to a rational resolution of the challenges we face.

CONCLUSION

This brief discussion of two areas of rapid and profound change in the human rights field is only an introduction. There are many other areas to explore, and no doubt new challenges will emerge as soon as we have sorted out the current ones. I would like to close with some reflections about the changes I have discussed.

In my view, these very different areas share several things in common: the changes have occurred due, in large part, to the levers for change which the legal system now makes available to disadvantaged groups. And in today's world, we should all remind ourselves of the glory and the beauty of a system which can accomplish such changes without bloodshed and in accordance with the rule of law.

These changes point out that the legal system is but one part of a broader legal, social and political structure, and they also illustrate the need for all parts of the system to play a role in accomplishing lasting and meaningful social change. While the law may recognize and guarantee formal equality, equality in fact — equality which can be lived and felt by real people in their everyday lives — requires much more than mere legal pronouncements. It requires sustained and rational accommodation on the part of many interlocking systems in our society.

I believe that more than ever before, these systems recognize equality as an urgent imperative in this society, even if sometimes the struggle is long and hard, and the progress is uneven. I remain convinced that the face of human rights in Canada has changed for the better in recent years, and I believe that this will continue. There is no better time to re-dedicate ourselves and our society to the great hope of a world in which all are treated with concern and respect, free and equal in dignity and rights.

Michelle Falardeau-Ramsay, Q.C., Deputy Chief Commissioner, Canadian Human Rights Commission.

1. (1954), 347 U.S. 483.
2. [1992] C.H.R.D. No. 12.
3. (1992), 9 O.R. (3d) 495 (Ont. C.A.).
4. *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.
5. [1992] 2 S.C.R. 679.
6. *Haig and Birch, supra*, note 3 at 503.
7. *Ibid.* at 507.
8. *Ibid.* at 508.
9. (25 February 1993) (S.C.C.) [unreported].