Human Rights and Resource Development Project

How Human Rights Laws Work in Alberta and Canada

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Foreword

This paper is the second publication to come from the Human Rights and Resource Development Project, the purpose of which is to explore the relationship between two important areas of law: human rights, as they are protected by law in Alberta, and the legal regime pursuant to which natural resources, such as oil and gas, are developed in the Province. The two non-profit organizations that have undertaken this project – the Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law – are dedicated to legal research, publication and education. Thus, we do not take positions regarding the factual controversies, which lie behind some of the conflicts over resource development in Alberta. Nevertheless, our work on the Project proceeds from the assumption that those controversies are serious enough that it is crucial for the relevant law on these matters to be as clearly articulated and as widely understood as possible.

This paper was informed by several publications written by staff of the Alberta Civil Liberties Research Centre and is intended to provide an overview of the key human rights laws that apply in Alberta. The author has worked in the area of human rights and civil liberties for a number of years. Several people contributed very helpful comments on drafts of the paper: Janet Keeping, Jennifer Koshan, Monique Ross, and Nickie Vlavianos.

We want to express thanks to our own organizations for supporting our desire to undertake the Human Rights and Resource Development Project and to the Alberta Law Foundation for providing the funds to make it all possible.

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1.0 Introduction

Human rights have always been important, and human rights law is constantly developing. Sometimes recognized human rights law principles do not evolve fast enough to reflect what many people believe they should be. Individuals often assert that a situation or action infringes their human rights. It may actually do so in a general sense, but the law may not have evolved to support a legal claim that someone's human rights have been violated. In any kind of legal approach to a problem, it is important to establish whether an individual has a legal right that will be recognized by the courts. This is sometimes referred to as a "substantive right". For example, one might assert that he or she has the right to a healthy or clean environment. If this is recognized in law, then a legal remedy will be available. If it is not, then perhaps a political or moral argument can be made, but no legal remedy will be available.

Once it is established that a human rights violation is covered by the law, it becomes important to know what procedures must be followed in order to obtain redress or remedy from the legal system. This paper seeks to set out the procedures that are in place for individuals to obtain legal remedies when they believe that their legal rights have been infringed. In particular, it focuses on human rights violations, and the legal processes available to Albertans and Canadians under domestic and international human rights law.

2.0 What is Human Rights Law?

Human rights are held by <u>all</u> humans. A person claiming his/her human rights means that he/she has a justified claim to being treated in a respectful way.[1] The foundation of human rights is the belief that everyone is born with equal rights and dignity. In other words, all human beings are equal.

There are two generally recognized categories of human rights: civil and political rights and economic, social and cultural rights.

Civil and political rights include various freedoms and legal protections (sometimes called civil liberties), including:

- Freedom of conscience and religion;
- Freedom of expression;

[1]Brian Orend, *Human Rights: Concept and Context* (Peterborough, Ont.: Broadview Press, 2002) at 24 [Orend].

- Freedom of movement and association;
- Freedom to vote and to run for office;
- Legal protection against violence; and
- Various due process rights, such as the right to be considered innocent of a crime before one is proven guilty.

Economic, social and cultural rights include those rights that seek to protect peoples' physical, material, social and economic well-being. These include:

- The right to work;
- The right to rest and leisure;
- The right to adequate food, clothing, housing and medical care;
- The right to basic education; and
- The right to clean air and water.

"Human rights" must be differentiated from "human rights law". A justified claim to human rights can be a moral one or a legal one. Legal human rights are those which are actually written into laws and which, when violated, have concrete legal remedies.[2] On the other hand, moral human rights may or may not be written into laws. Contemporary human rights advocates seek to have current moral human rights evolve into guaranteed legal rights.[3] Over time, society's moral sensibilities change and human rights law often follows.

3.0 How Does Human Rights Law Work?

Canadians are subject to and protected by both domestic and international laws. This is the case with civil liberties and human rights laws. In general, there are four types of laws that protect or limit our human rights and civil liberties:

- provincial human rights laws;
- constitutional and federal human rights laws;

[2]Orend, at 24.

[3]Orend, at 24.

- unwritten constitutional and other conventions that deal with human rights issues; and

- international human rights law.

In addition, other provincial and federal legislation, such as the *Criminal Code of Canada*,[4] contain provisions dealing with violations of human rights and related crimes.

At any given time, in any given situation, some or all of these types of human rights laws may apply to Canadians. These laws vary, in that they apply to different types of people in different circumstances and the remedies available to the complainant differ depending on the applicable law. The most complex and generally unfamiliar of the types of human rights laws is international human rights laws.

The chart in the appendix entitled "Application of Human Rights Law to Canadians" provides a summary of various types of human rights law and how they apply to Canadians. When reading this paper, it may be useful to refer back to the chart to determine where the particular procedure fits into the human rights law scheme.

It is important to note that human rights laws are not absolute. In each of the types of laws listed above, there are defences or exceptions. These exceptions reflect that we live in a democratic society where we must also respect the rights of others. In a democratic society, your rights and freedoms shall be limited only so far as necessary to respect the rights and freedoms of others. However, deciding what kinds of limits can be justifiably imposed on a particular right is not always an easy decision. For example, we have a right to freedom of expression, so we may say what we like, but this may be limited by issues such as public safety or freedom from discrimination (e.g., hate speech).

Consequently, in any given case, even if it is proven that a person's human rights have been violated, the government or other party violating those rights will have the opportunity to show that the limits were justified.

4.0 Alberta Provincial Human Rights Legislation

4.1 Background

Each province has a provincial body that protects individuals against discrimination. In Alberta, the Human Rights and Citizenship Commission is responsible for

[4]R.S.C. 1985, c. C-46.

administering the *Human Rights, Citizenship and Multiculturalism Act* (HRCMA).[5] This act was originally passed in 1972 and was amended in 1980 and 1996. The 1996 amendments followed a lengthy provincial consultation process and a report by a review panel. The HRCMA was republished with new section numbers in 2000.

4.2 Discrimination

In one respect, the HRCMA is broader than some other human rights laws, because it applies not only to the actions of the government, but also to the private sector in Alberta. On the other hand, the HRCMA is much more limited because it only protects us from discrimination on certain grounds and only in connection with five activities.

The HRCMA does not define "discrimination", but the Commission has published guidelines that define discrimination as "unjust practice or behaviour, whether intentional or not, based on race, religious beliefs, colour, gender, physical and/or mental disability, marital status, family status, source of income, age, ancestry, place of origin or sexual orientation and which has a negative effect on any individual or group."[6]

4.3 Areas and Grounds

The HRCMA prohibits discrimination in five areas:

- employment and employment advertising;
- tenancy;
- services customarily available to the public;
- notices (including newspaper ads, posters, publications, etc.); and
- trade union membership.

The HRCMA provides protection from discrimination based on the following grounds:

> "race, physical disability, ancestry, religious beliefs, mental disability, place of origin, colour, marital status, source of income, gender (which includes sexual harassment and pregnancy) and family status."

[5]R.S.A. 2000, c. H-14.

[6]Alberta Human Rights and Citizenship Commission, Information Sheet, *Stereotyping, Prejudice and Discrimination.*

In the *Vriend*[7] case, the Supreme Court ordered that the ground "sexual orientation" also be read in to the preamble and sections 2, 3, 4, 7, 10 and 16 of the *Individual's Rights Protection Act* (now called the HRCMA). This means that those sections must be read to include protection from discrimination based on sexual orientation.

Because age is defined as 18 and over in HRCMA section 44, people under 18 who are discriminated against on the basis of age are not protected under the legislation. However, they are protected from discrimination on the other grounds, such as on the basis of race and religion. Further, age is not a protected ground in all areas.

4.3.1 Employment – Sections 6, 7, 8

The HRCMA provides that everyone is entitled to equal treatment in employment. The HRCMA prevents employers from refusing to hire a person because of his or her race, religious beliefs, colour, gender, physical disability, mental disability, marital status, family status, age, ancestry, place of origin, source of income. Discrimination on the basis of sexual orientation is also illegal because of the *Vriend* decision.

An employer is responsible for maintaining a workplace that is free from harassment (unwanted attention) and discrimination. If he or she fails to do so, he or she may be held legally responsible.

Subsection 7(3) of the HRCMA does provide a defence to discrimination in the employment setting. In certain cases an employer may have legitimate reasons for not wanting to hire an individual. For example, a nursing home may advertise for male nurses to attend to the personal care needs of an elderly male patient. This discrimination would be considered a bona fide (good faith) occupational requirement and would be permitted under the HRCMA.

4.3.2 Tenancy – Section 5

Tenancy refers to the rental of commercial or residential accommodation. No person can be denied accommodation on the basis of any of the grounds listed in the HRCMA except age. Age discrimination is not protected under tenancy. So, if a landlord wants to rent only to people in their 20s and 30s, this is permissible under the legislation. All people must be treated equally regarding the amount of rent, leases, rules and regulations.

[7] *Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.).

4.3.3 Services Customarily Available to the Public – Section 4

Services customarily available to the public include: restaurants, bars, taverns, service stations, public transportation, public utilities, schools, hospitals and stores. Again, discrimination in this area is protected under all of the grounds except age.

4.3.4 Notices, Signs, Statements and Symbols – Section 3

This provision was substantially amended in 1996. It now provides that no one can publish, issue, display or cause to be published, issued or displayed before the public any statement, notice, sign, symbol emblem or other representation that:

(a) indicates discrimination or an intention to discriminate against a person or class of persons; or

(b) is likely to expose a person or class of persons to hatred or contempt.

4.4 Defences Available under the HRCMA

In addition to the bona fide occupational requirement defence under employment (subsection 7(3)), a person who discriminates may also rely on the defence of "reasonable and justifiable" under HRCMA section 11. This means that if there is a prima facie (on the face of it) situation of discrimination, the respondent may be permitted to discriminate if he or she can establish that the discrimination was reasonable and justifiable under the circumstances.

4.5 Reasonable Accommodation

Employers, shop owners, and landlords are obligated to adapt or adjust facilities, services, or employment requirements to meet the needs of an individual or a group protected by human rights laws. For example, certain restaurants and shops may be required to make their facilities wheel chair accessible. However, the person's right not to be discriminated against must be balanced against the employer's (or service provider's) right to conduct business in a safe and cost-effective manner. If this person could establish that accommodating the needs of another person would result in undue hardship, the employer or service provider would be able to rely on the defences under the HRCMA.

4.6 Remedies

Unlike Canada's criminal law, which has punishment as one purpose, the HRCMA is not meant to punish offenders; it is intended to provide relief for victims of discrimination. Since the HRCMA is not meant to punish, large monetary awards are not usually made. For example, in a case of sexual harassment, the Human Rights Panel[8] may order the employer, landlord or service provider to:

- apologize;
- establish a sexual harassment policy;
- post notices which say sexual harassment is illegal;
- pay an individual for lost wages and psychological harm; and/or
- reinstate an employee to a position.

4.7 The Complaints Process

Complaints can be made by completing a form or sending a letter to the Commission. The person making the complaint is called the complainant. The respondent (the person against whom the complaint is being made) will be notified about the complaint. Next, a staff person will attempt to find a solution that is agreeable to both parties. This process is called conciliation. In an agreement is not possible, then the Commission will investigate the complaint. If, after the investigation it is determined that the HRCMA was violated, then the Commission officers will attempt to negotiate a settlement. If a settlement cannot be reached, a Human Rights Panel may be directed to hear the case. The case will be brought before a panel of commissioners who will make a decision. The decision of the Human Rights Panel can be appealed to the Court of Queen's Bench.

Thus, provincial human rights law applies to individuals and the provincial government to protect against discrimination on specified grounds in five areas or activities. This is only one legal tool available to protect human rights. The following materials discuss others.

[8]A special panel set up to hear cases that are not settled by the Human Rights and Citizenship Commission.

5.0 Canadian Charter of Rights and Freedoms

5.1 Introduction

Over history, the Canadian government has generally respected the rights and freedoms of some Canadians; however, these rights and freedoms were not always enshrined in law. In fact, only in the past forty years have efforts been made to encode civil rights and liberties in law. Civil rights were initially given recognition in the *Canadian Bill of Rights* and later entrenched in the *Canadian Charter of Rights and Freedoms*.[9]

The *Canadian Bill of Rights* became law on August 10, 1960.[10] Because it was not entrenched in the Constitution, the *Bill of Rights* was not a very powerful piece of legislation. It was an Act of Parliament and thus more susceptible to alteration than the Constitution. In other words, the *government could change the Bill of Rights quite easily*. The *Bill of Rights* still applies today but only to matters falling under federal jurisdiction.

Some other provinces, including Alberta, have also passed their own Bills of Rights. These documents continue to be in force. The *Alberta Bill of Rights*[11] provides protection of a number of rights similar to those listed in the Charter. The one notable exception is the addition of the protection of a right to the enjoyment of property in section 1, which is not covered under the Charter.

5.2 The Charter

The Charter was passed in 1982. It is part of the Constitution of Canada and can only be changed by an amendment to the Constitution. It is very difficult to make formal amendments to the Constitution. For this reason, it is a very powerful document.[12]

Section 52 of the Constitution states that "the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". This statement makes it clear

[9]*Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982 being Schedule B of the Canada Act 1982 (UK), 1982, c.11 [Charter].

[10]D. Gibson & T. Murphy, *All About the Law-Exploring the Canadian Legal System* (Toronto: Nelson Canada, 1996) at 30 [Gibson and Murphy].

[11]R.S.A. 2000, c. A-14.

[12]Any proposed change to the Charter must receive the approval of the Senate, the House of Commons and at least fifty per cent of the Canadian population.

that the Charter is part of the supreme law of the land, and any law that contradicts the Charter is invalid.

5.2.1 Rights and Freedoms Protected under the Charter

The Charter guarantees certain rights and freedoms. A right is a legal claim to something which the state must grant and which can be enforced by a court. For example, when you are arrested, you have the right to a lawyer. A freedom is an opportunity to do something without interference from the state. For example, we have the freedom to practice our choice of religion, or no religion at all.

All of our rights and freedoms must be tempered with the limits which are needed to protect our democracy. This means that our freedoms and rights are not absolute. For example, the right to freedom of expression under the Charter may be limited by hate laws, by obscenity laws, by anti-discrimination laws and by civil limits on our rights such as tort liability for defamation. Some of these limits are discussed below.

The Charter provides protection for certain fundamental freedoms and rights. Each will be considered briefly.

5.2.1.1 Fundamental Freedoms (Section 2)

Section 2 provides guarantees of the following:

- freedom of conscience and religion;
- freedom of thought, belief, expression, including freedom of the press and other media of communication;
- freedom of peaceful assembly; and
- freedom of association.

Without the right to freedom of religion and freedom of expression, a person might be persecuted for belonging to an unpopular religious group or for speaking out against the government. For example, in 1933, Quebec passed a by-law prohibiting Jehovah's Witnesses from distributing their literature without the permission of the police department.

Freedom of expression, thought, belief and opinion is a freedom that Canadians have enjoyed for many years. We have the right to speak out on issues without fear of

repercussion. This right does not exist in all countries. In some countries, people who criticize the government are jailed or tortured.

Freedom of assembly and freedom of association means that we can belong to any group, join trade unions and gather in peaceful groups without fear of repercussion, with very few exceptions.

5.2.1.2 Democratic Rights (Sections 3 to 5)

The following democratic rights are protected under the Charter:

- the right to vote;
- the right to require the state to hold an election at least every five years; and
- the right to seek political office.

The right to vote is a right some Canadians have enjoyed for many years. However, in the past, the government has denied some groups this right. For example, Canadians of Japanese and Chinese origin were denied the right to vote until after World War II. Aboriginals were denied the right to vote until 1960 (unless they gave up their status as "Indians") and women were not permitted to vote in federal elections until 1918.

There are still some restrictions on this section. People under the age of eighteen, for example, are not permitted to vote. As well, only Canadian citizens can vote.

5.2.1.3 Mobility Rights (Section 6)

The following rights are guaranteed under Charter section 6:

- the right to enter, remain in and leave Canada;
- the right to move and take up residence in any province; and
- the right to pursue the gaining of a livelihood in any province.

This part of the Charter confirms the right of Canadians to move and seek work in other provinces. This section is not without limits. For example, if you are a member of a certain profession and obtain credentials in one province before moving to another province, you may have to pass a test based on your new province's standards before you can practice your profession. Mobility rights are guaranteed only to citizens of Canada.

5.2.1.4 Legal Rights (Sections 7 to 14)

Legal rights protected under the Charter include:

- the right to life, liberty and security of the person; and
- the right to a fair trial when charged with a crime.

These are extremely important sections of the Charter. Without these sections Canadians could be jailed without a reason, denied legal counsel or denied the right to a fair trial.[13]

The right to life, liberty and security of the person has been interpreted to include the right to personal autonomy,[14] the right to privacy, the right to choose where to establish one's home,[15] and the right to physical and psychological integrity.[16]

5.2.1.5 Equality Rights (Section 15)

Charter section 15 guarantees equality to individuals regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Section 15 is referred to as the equality rights section. It prohibits the government from discriminating against individuals.

Subsection 15(1) states:

> "15(1) 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, mental or physical disability."

Several cases have interpreted the meaning of various terms used in subsection 15(1). "Every individual" has been interpreted to mean that this section only applies to individuals and does not apply to corporations.[17] "Before and under the law" indicates that the law applies equally to everyone. "Before the law" means that everyone has equal access to the courts. "Under the law" means that legislation applies equally to everyone.

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[13]There are some unwritten or common law provisions that may protect you in these situations (e.g., the right to habeas corpus – a legal action to determine the lawfulness of a person's detention).

[14]*Blencoe* v. *B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307.

[15]*Godbout* v. *Longueil (City)* (1997), 219 N.R. 1 (S.C.C.).

[16]*New Brunswick (Minister of Health)* v. *G. (J.)*, [1999] 3 S.C.R. 46.

[17]See *Re Surrey Credit Union and Mendonca* (1985), 67 B.C.L.R. 310 (S.C.) and *Mund* v. *Medicine Hat* (1985), 67 A.R. 11 (Q.B.).

The use of "in particular" means that the areas of discrimination identified are merely examples. For example, although sexual orientation is not listed it has been held to be a protected ground or an "analogous ground."[18] In order to determine whether a group falls under an analogous ground, the court will see if the group is "discrete and insular." In order to determine this, the court will look at the following factors:

- Is the group lacking in political power?
- Has the group suffered because of stereotyping, historical disadvantage or vulnerability to social and political prejudice?

In deciding a discrimination claim, the court will make three broad inquiries:

- whether the law, program or activity imposes differential treatment between the claimant and others;
- whether the differential treatment is based on enumerated (listed) or analogous grounds; and
- whether the law, program or activity has a purpose or effect that is substantively discriminatory.

The court will make a comparative analysis and will consider the surrounding context of both the claim and the claimant.[19]

Section 15 does not guarantee that equality rights are absolute. There are some exceptions, especially under the age category (e.g., retirement age).[20] In addition, subsection 15(2) allows for the existence of affirmative action programs. Subsection 15(2) states:

> "15(2) Subsection (1) does not preclude any law, program, or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."

The purpose of affirmative action programs is to try and improve the position of historically disadvantaged minority groups. Affirmative action programs attempt to resolve inequality by imposing a rule that gives an advantage to a group that has been discriminated against. These programs can also include preferential hiring practices, the removal of barriers and/ or recruitment outreach.

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[18] *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

[19] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[20] *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229.

5.2.2 Preliminary Requirements

There are three preliminary requirements before a court will hear a Charter action. First, the action must be against the government (either a law passed by the government or a government action). The situation must be one where some official or law operating with government authority has violated a right.[21] The Charter applies to actions of the government at all levels. Section 32 states that the Charter applies to Parliament and to provincial legislatures and to federal and provincial governments. The Charter does not cover private relations between individuals.[22] The Charter does apply to regulatory agencies set up by provincial governments, such as those to regulate resource development and the environment. The Charter also applies to public schools, school boards, and the provincial Ministers of Education.[23]

Second, the issue presented to the court must be justiciable. This means that the court must be requested to rule on a legal question and not a political one.

Third, the person or group launching the court action must have standing to bring a challenge; the person or group must show that either their rights are directly affected, or the court can decide that it is in the public interest for the court to hear the case.

5.2.3 Has a Right Been Infringed?

Once it has been established that a situation falls within the domain of the Charter, the next step is to determine if the government action or body has infringed a right specified in the Charter. This is done in two steps. The first step involves analyzing the impugned law by looking at its purpose and effect. The next step is to determine the meaning or content of the right or freedom being infringed. By analyzing both the law and the right or freedom in this manner, the court is able to determine if the impugned law has infringed a Charter right or freedom.

5.2.4 Is the Infringement Justified?

Once it has been determined that an infringement has occurred, the courts must then decide if the law can be justified under section 1 of the Charter. Section 1 of the Charter is used to balance the right or freedom of the individual against the purpose and objective

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[21]C. Coombs, & J. Coombs, *Law: Fundamental Rights and Freedoms* (Toronto: IPI Publishing Ltd., 1989) at 28.

[22]As noted above, provincial human rights codes are intended to cover these type of relations.

[23]D. Poirier, Education Rights of Exceptional Children in Canada (Calgary: Carswell, 1988).

of the impugned law. The government may rely on section 1 as a defence where its actions have been found to violate the Charter.

Section 1 declares that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The court has developed a test to decide what constitutes a "reasonable limit" that can be "demonstrably justified in a free and democratic society." The test is called the "Oakes test" because it was developed in a case called *The Queen* v. *Oakes*.[24] Before applying the test, the court must examine the government's objective in the legislation (i.e., the problem the government wants to solve). The objective served by limiting the right must be of sufficient importance ("pressing and substantial") to warrant overriding a constitutionally protected right. The more serious the infringement, the more important the objective has to be to justify the infringement.

Second, the court will examine whether the means are reasonable and demonstrably justified. This is called the proportionality test. The proportionality test involves three components. The first component of the proportionality test is to determine if there is a "rational connection" between the government's objective and the means used to attain it (i.e., the legislation has to be connected to the objective of the government). Second, the means must impair the Charter rights as little as possible. Third there must be proportionality between the effects of the limiting measure of the objective.

5.2.5 What is the Appropriate Remedy?

The next step in a Charter case is to determine what the appropriate remedy will be under the circumstances. If an individual feels that the government has violated his/her rights, that individual needs to demonstrate to a court that the law somehow violates or contradicts the Charter.

As noted, the Charter allows the court to declare a law of "no force and effect." The courts can strike down the law if it is found to be inconsistent with the Charter. The Court may also sever the law. Severance is the appropriate remedy when part of the law is held to be unconstitutional. A court will hold that only the bad part of the statute should be struck down or severed from the good part. The court may also read in new language to a law. For example, in the recent *Vriend*[25] decision the court held that the words "sexual orientation" should be read in to the Alberta *Human Rights Citizenship and Multiculturalism Act*.

[24][1986] 1 S.C.R. 103.

[25]*Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.).

The courts can also read down the law. Reading down should not be confused with reading in. "Reading down" legislation means that the Court gives an interpretation to certain words in the legislation that makes it comply with the Charter. The Court orders this interpretation even though the words may be capable of other meanings.

One way of enforcing Charter provisions is to provide the complainant with a remedy as set out in section 24. Subject to the important qualifications that a remedy be appropriate and just in the circumstances, there is no limit to the remedy that may be ordered under section 24. Section 24 provides that:

> "24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

The courts can also nullify or stop some law or act, for example, by dismissing a charge, quashing a search warrant or excluding evidence. Courts may also award damages.

5.2.6 Section 33 of the Charter

Section 33 is one of the most controversial sections in the *Charter*. It is commonly referred to as the "notwithstanding clause." It allows provinces and the federal government to override other sections in the *Charter*, including those rights and freedoms discussed above. This can be done when legislation specifically states it is exempt from one or more of the *Charter* provisions. For example, in 2000, Premier Ralph Klein used the notwithstanding clause in legislation providing for marriage only of persons of opposite sexes.[26]

5.2.7 Procedure under the Charter

In general, the direct challenge of a government law or action under the Charter comes before the courts in two possible ways. First, a person being charged with a criminal offence may seek to rely upon the Charter to argue that the law is unconstitutional or that the actions of the police offended the person's Charter rights. If an accused person successfully argues that a law is unconstitutional, and the court selects to strike down the

[26] *Marriage Act*, R.S.A. c. M-5, s. 2.

law, the accused may not be convicted of the offence. If government (i.e., police or other persons in authority) violates an accused person's rights when dealing with that person, the court may choose from a wide variety of remedies (see Charter section 24).

The second method for challenging a government law or action under the Charter occurs when an individual applies directly to the court (in Alberta, the Court of Queen's Bench) for a declaration that the law or action infringes the Charter. Assuming that the individual has standing, the matter is justiciable and the case involves a government law or action, the court will have jurisdiction to hear the Charter case. If the claimant is successful, the court can then choose to declare the law to be null and void or can select from the other remedies noted above under "5. What is the appropriate remedy?"

Because a Charter challenge involves dealing with a law or government action, the Attorney General of the applicable province or Canada is notified and has the opportunity to defend the impugned law or action during the court proceedings.

5.3 International Human Rights Law and the Charter

5.3.1 International Human Rights Law as an Interpretation Aid

International human rights laws are often used by Canadian courts as tools to help interpret domestic legislation, including the Charter.

Since the implementation of the Canadian Charter, the reference to international law in cases has increased tremendously. Considering the similarity of the language contained in the Charter to that found in other international instruments, this result is not surprising.[27] Although the Charter makes no express reference to international conventions, the language of the Charter is rich with references to other models of human rights legislation, both domestic and international. Several sections within the Charter were inspired by the *International Covenant on Civil and Political Rights* and the *European Convention*.[28]

In a dissenting opinion in *R.* v. *Big M Drug Mart*, Belzil, J.A. strongly supported the use of international documents to help define certain sections in the Charter:

> "Thus it can be seen that the Canadian Charter was not conceived and born in isolation. It is part of the universal human rights movement …. The Charter can be divided into two parts, one dealing with fundamental human rights in harmony with the International Covenant, the other

[27]Kindred H. et al., International Law Chiefly as Interpreted and Applied in Canada 5th ed. (Toronto: Emond Montgomery Pub. Ltd., 1993) at 204 [Kindred].

[28]Kindred, at 204.

> dealing with matters peculiar to Canada. It is of course in the first part that s. 2 of the Charter must fall. That these fundamental freedoms were entrenched in the Charter in conformity with Canada's commitment in the International Covenant cannot be doubted …"[29]

During the first eight years of the Charter's existence Canadian courts cited international human rights instruments and jurisprudence in 150 reported cases.[30]

In the context of interpreting and applying the human rights of the Charter, the Supreme Court of Canada has clearly stated that customary and conventional international law are both useful and relevant. In *Reference Re Public Service Employee Relations Act (Alta.),* the Supreme Court of Canada examined the relationship of international law to domestic law in an effort to define the freedom of association of workers. The Supreme Court stated that various sources of international human rights law, including customary norms, must be relevant sources when interpreting Charter provisions.[31]

The presumption that Parliament does not intend to legislate in breach of Canada's international obligations applies to both conventional and customary international law.[32] Even though this presumption exists, Canada may still enact statutes that contradict the country's international obligations.[33] A statute is not void simply because it violates international laws.[34] However, given two possible interpretations, the one regarding a state's international obligations is to be favoured. This is possibly the oldest justification for using international instruments to interpret domestic legislation.[35]

Consequently, judges will often use international agreements if there is an ambiguity or uncertainty in domestic legislation. For example, in *Re Mitchell and the Queen,* the Ontario Court of Appeal concluded that sections 9 and 12 of the Charter are ambiguous, thereby permitting reference to the *International Covenant on Civil and Political Rights*

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[29]Reference Re Public Service Employee Relations Act (Alta.) (1984), 5 D.L.R. (4th) 121 at 149 (Alta. C.A.).

[30]See W. Schabas, *International Human Rights Law—A Manual for the Practitioner* (Calgary: Carswell, 1991) [Schabas], Appendix II for a chronological list of Canadian cases in which international human rights law is cited.

[31]Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313.

[32]A. Bayefsky, International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation (Toronto: Butterworths, 1992) at 67 [Bayefsky].

[33]Pierre-André Côté, *The Interpretation of Legislation in Canada*, (Quebec: Les editions Yvon Blais Inc., 1991).

[34]*Arrow River & Tributaries Slide & Boom Company* v. *Pigeon River Company*, [1932] S.C.R. 495.

[35]M.A. Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985) 23 U.W.O. L. Rev. 9 at 13.

as an aid to interpretation.[36] Similarly in *R.* v. *Rahey*, the court referred to the *European Convention* and the jurisprudence of the European Court of Human Rights in order to resolve ambiguity in subsection 11(b) of the Charter.[37]

5.3.2 International Law and Incorporation into the Charter

Many of the rights and freedoms guaranteed under international law are reflected in various sections of the Charter. The inclusion of these rights and freedoms has led to a debate about whether international law is incorporated as part of the Charter. B. Schwartz and G. Mackintosh have analyzed the arguments both for and against the conclusion that the Charter incorporates international law.[38] One argument is that the inclusion of the word "law" in Charter subsections 11(d)[39] and 15(1)[40] means that Canadians can invoke the Charter in order to assert their rights under international law.[41] Second, the phrase "principles of fundamental justice" in Charter section 7[42] includes the rule of law, which in turn includes the rule of international law.[43] These arguments, if accepted by a court, would permit an individual to rely upon rules of international law that would normally be unenforceable[44] or overridden.[45] Under the authority of the Charter, the international law would act as a shield against governmental action that would ordinarily be authorized under Canadian law.[46]

The arguments against the position that the Charter incorporates international law are numerous. First, there are concerns that courts invoking international law through the

[36](1983), 150 D.L.R. (3d) 449.

[37][1987] 1 S.C.R. 588, 78 N.S.R. (2d) 183.

[38]B. Schwartz and G. Mackintosh, "The Charter and the Domestic Enforcement of International Law" (1986), 16 Man. L.J. 149 [Schwartz and Mackintosh].

[39]Charter s. 11(d) reads (in part): "Any person charged with an offence has the right … (d) to be presumed innocent until proven guilty *according to law* in a fair and public hearing by an independent and impartial tribunal" [emphasis added].

[40]Section 15(1) reads in part: "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 …." [emphasis added]

[41]Schwartz and Mackintosh, at 154-157.

[42]Section 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[43]Schwartz and Mackintosh, at 156-7.

[44]Enforcement of international human rights in Canada is discussed below.

[45]Schwartz and Mackintosh, at 159.

[46]Schwartz and Mackintosh, at 159.

Charter could become involved in legislating, which is the jurisdiction of Parliament and the legislatures.[47] Second, opponents argue that international law is too vague and is more moralistic than certain.[48] Third, if we permit international law to be incorporated through the reference to "law" in the Charter, we could incorporate any type of law, such as American law, in the same way.[49] Fourth, parliamentary supremacy would be diminished because international law would not have to go through the same process as domestic law (readings, committees, the Senate) before it became binding.[50] Fifth, provincial autonomy would be threatened if a complainant could rely upon a federally ratified treaty to challenge the actions of a provincial government.[51]

There are numerous other arguments and counter arguments for the incorporation of international law through the Charter.[52] It is not a well-settled area. Unfortunately, there are no legal decisions that indicate clearly whether the Charter incorporates international law, or the general relationship between the Charter and international law.

Nevertheless, even the rights and freedoms recognized as part of international law but not found in the Charter continue to exist after its enactment.[53] According to Charter section 26:

> "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

The "other rights" suggested in section 26 could refer to customary international human rights norms or other rights found in international conventions which are not mentioned or reflected in the Charter. To paraphrase A. Bayefsky, customary human rights law may be applied to fill in the gaps in areas of Canadian law where the common law has not been settled and a conclusive statute or constitutional provision does not exist.[54]

There is a presumption at common law that Parliament and the provincial legislatures do not intend to act in breach of international law. Thus, when statutes are being interpreted, courts try to interpret them as far as possible consistently with international

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[47]Schwartz and Mackintosh, at 160.

[48]Schwartz and Mackintosh, at 161.

[49]Schwartz and Mackintosh, at 161.

[50]Schwartz and Mackintosh, at 162.

[51]Schwartz and Mackintosh, at 163.

[52]See, generally, Schwartz and Mackintosh.

[53]M. Cohen & A. Bayefsky, "The Canadian Charter of Rights and Freedoms and International Law", (1983) 61 *Can. Bar Rev.* 265 at 280 [Cohen and Bayefsky].

[54]Bayefsky, at 17.

law.[55] M. Cohen and A. Bayefsky argue that Charter section 26 suggests that the Charter also be interpreted consistently with rights existing under customary international law.[56]

Clearly, then, international human rights law plays an important role in assisting the court to interpret the Charter. In addition, there is room to argue that customary international human rights laws may apply directly in cases where our domestic laws do not deal with a particular issue.

6.0 What is International Human Rights Law?

Along with the domestic human rights law, there is another body of law from which Canadians may obtain legal remedies. Laws made by federal, provincial and municipal governments of Canada, as well as cases decided by Canadian judges, make up the domestic law of Canada. International law consists generally of conventions or treaties and customary international law. Conventions[57] that have been entered into by various world states and then ratified by Canada, as well as cases decided by international tribunals – such as the U.N. Human Rights Committee – make up the conventional international law recognized by Canada. Customary international law is that body of legal concepts that are so well recognized around the world, they are generally accepted as applying universally. Some people refer to the two different types of international law as "hard" (conventions and treaties) and "soft" (customary international law).

International human rights law plays a very important role in Canada. In some cases, international law has become part of the domestic law of Canada, because Parliament or the provincial legislatures have passed legislation that expressly incorporates the wording of an international treaty.[58] In other cases, where international law has not expressly become part of Canada's law, Canadian courts may refer to international law in deciding cases.

The following sections deal with the key international human rights declarations, treaties and conventions that apply to Canadians. Next, customary international human rights law is discussed.

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[55]Cohen and Bayefsky, at 280-1.

[56]Cohen and Bayefsky, at 281.

[57]International agreements or covenants and treaties.

[58]See for example, the *Geneva Conventions Act*, R.S.C. 1985, c. G-3 [Geneva Conventions Act].

6.1 The Universal Declaration of Human Rights

At the end of the Second World War, the international community began to think about ways to prevent future wars from occurring. There was great concern about the terrible abuses of human rights that had taken place during the Second World War. In response to the human tragedies that had occurred during the Holocaust, forty-five nations created an organization pledged to promote "universal respect for and observance of human rights and fundamental freedoms." That organization, the United Nations, was formed in 1945.[59]

On December 10, 1948, the United Nations passed an extremely important human rights document: the Universal Declaration of Human Rights.[60] The UDHR contains broad provisions dealing with areas of human rights and recognizes the important role that respect for human rights plays in the establishment of peace throughout the world. December 10th continues to be celebrated as International Human Rights Day.

The basic content of the articles contained in the UDHR is as follows:

"**Article 1**: All human beings are born free and equal in dignity and rights.

Article 2: Everyone is entitled to all of the rights in the UDHR regardless of race, color, sex, language, religion and origin.

Article 3: Everyone has the right to life, liberty and security of the person.

Article 5: No one shall be subject to torture or to cruel, inhuman or degrading punishment.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled to a fair trial by an independent tribunal.

Article 11: Everyone has the right to be presumed innocent.

Article 18: Everyone has the right to freedom of thought, conscience and religion.

Article 19: Everyone has the right to freedom of opinion and of expression.

Article 23: Everyone has the right to work and to free choice of employment.

Article 24: Everyone has the right to rest and leisure, including reasonable working hours and holidays with pay.

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[59]For more information on the United Nations see their website at: http://www.un.org/.

[60]*Universal Declaration of Human Rights*, Signed December 10, 1948, G.A. Res. 217A(III), U.N. Doc A/810, at 71, reprinted in U.N.Y.B. 465 [UDHR].

> **Article 25**: Everyone has the right to an adequate standard of living, including food, clothing, housing, social services and immediate care."

As noted earlier, it is important to understand that human rights are not absolute. Article 29(2) of the UDHR states that people have duties towards others. For example, having rights also means being fair to others – to each other, to our families and to the community we live in. In a democratic society, your rights and freedoms shall be limited only so far as necessary to respect the rights and freedoms of others. However, deciding what kinds of limits can be justifiably imposed on a particular right is not always an easy decision.

Because it is a declaration (and not a convention capable of being ratified),[61] the UDHR is morally but not legally binding on the nations that voted for it. In other words, the United Nations cannot order a country to obey a law set out in the UDHR. Nonetheless, the UDHR sets a standard for all nations to work towards and, as discussed below, it has come to be generally considered as customary international law by some scholars.

Moreover, there are other international documents that have mechanisms for dealing with human rights complaints when one's rights under the UDHR have been violated. These are discussed immediately below.

6.2 International Conventions

Canada has entered into many forms of international agreements. The types of agreements include international agreements between heads of states, intergovernmental agreements, and exchange of notes.[62] Some of these agreements are informal and not legally binding on states. However, if agreements are treaties or conventions, they usually require ratification to be binding on the government and individuals. In Canada, we tend to refer to international agreements related to peace, neutrality, arms control and United States-Canada water problems as "treaties". Otherwise, we generally refer to these agreements as "conventions".[63] However, there is no hard and fast rule.

The human rights Conventions that Canada has signed onto include: the International Covenant on Economic, Social and Cultural Rights,[64] the International Covenant on Civil

[61]For information on ratification see Alberta Civil Liberties Research Centre, *Volume III—Background to International Human Rights Law* (1997).

[62]Kindred, at 86

[63]Kindred, at 87.

[64]16 December 1966, U.N. Res. 2200A (XXI), (entered into force 3 January 1976) [ICESCR].

and Political Rights,[65] and the Optional Protocol to the Covenant on Civil and Political Rights.[66] Together with the UDHR, they form what is frequently called "The International Bill of Rights." The Conventions codify and expand upon the rights mentioned in the UDHR. The Optional Protocol provides the mechanism by which individuals can complain to the United Nations about violations of civil and political rights. Each Convention requires state parties, such as Canada, to report periodically to a committee of human rights experts on the progress they have made in fulfilling the mandate of the Conventions.[67]

Canada has ratified these Conventions and therefore individuals within Canada have a right to make complaints to the United Nations Human Rights Committee once they have shown that all legal resources have been pursued unsuccessfully in Canada. Canadian citizens have used the complaints procedure successfully.[68]

6.3 Procedures for International Conventions

There are several steps involved before a treaty convention becomes legally binding on individuals and governments in Canada. Each step is discussed below. The steps may be summarized as:

1. Formalities – signing or acceding to the treaty
2. Ratification
3. Publication and Registration
4. Entry into Force
5. Reservations
6. Implementation into Domestic Canadian Law

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[65]19 December 1966, 999 U.N.T.S. 171, arts. 9 –14 Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

[66]*Optional Protocol to the Covenant on Civil and Political Rights*, 16 December 1966, U.N.G.A. Res. 2200A (XXI), (entered into force 23 March 1976) [Optional Protocol].

[67]For information on reporting obligations, see Alberta Civil Liberties, *Volume I, Basic Guide to International Human Rights Law* (1996).

[68]See, for example: *Lovelace* v. *Canada* [24/1977] S.D. Vol. 1, p. 83; A/3640 (1981) p. 166 and *Quebec Language Law Case* (1993), U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989.

6.3.1 Formalities – Signing or Acceding to the Treaty

The procedure for becoming bound by treaties or conventions is complex. Typically, the process is put into motion after members of a negotiating conference (attended by representatives of each state) draft a treaty or agreement. At the end of the conference, there is a signing ceremony, where each representative signs a document that includes the authentic text of the treaty.[69] This signature alone usually does not bind the state to the treaty. This requires ratification, which is discussed below. The *Vienna Convention on the Law of Treaties*[70] sets out some of the formal requirements for treaty signing.

Multilateral treaties usually require the subsequent approval of the state, through ratification or other acceptance process. These treaties usually state that they will remain open for signature at a particular place for a particular period of time. However, multilateral treaties often permit states that did not originally sign the agreement to become bound by it through accession. The acceding state thereby agrees to be bound by the treaty. In some cases, the signatory states must agree to the accession by the new state.

Even after a state has signed a treaty, further steps usually need to be taken before the treaty will enter into force.[71] As Kindred points out, "even after a treaty has been formally concluded, it may not come into force for a long time".[72] For example, a United Nations convention may state that a specific minimum number of signatures is required to bring it into effect. This does not mean, however, that a state that has signed but not ratified a treaty has no obligations. Article 18 of the Vienna Convention requires that once a state has indicated that it intends to be bound by a treaty, it must "refrain from acts which would defeat the object and purpose of the treaty."

6.3.2 Ratification

While some agreements come into force once they are signed, the majority of treaties and conventions come into effect only after they have been ratified. The process of ratification involves some type of formal confirmation by individual signatory states.[73]

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[69]Kindred, at 88-9.

[70](1969) 1155 U.N.T.S. 331 [Vienna Convention].

[71]Kindred, at 89.

[72]Kindred, at 89.

[73]Kindred, at 89.

The ratification process is an internal constitutional process and differs from state to state.[74]

In Canada, ratification is exercised by the executive branch of the federal government.[75] More specifically, it is the Governor General in Council that issues the order to ratify international treaties and conventions. Provinces and territories do not have the power to enter into or to ratify international conventions.[76] To ratify an international convention, the Governor General in Council issues an Order in Council, which authorizes a representative of the Department of Foreign Affairs and International Trade to sign a legal document that indicates Canada is ratifying the convention.[77] This instrument is then delivered to the international body that serves as a repository for acceptance of the ratification documents.[78]

Canadian law does not require parliamentary approval for ratification.[79] However, the government may decide to seek parliamentary approval prior to ratifying important conventions. When this occurs, Parliament does not ratify the convention. Rather, there is a joint resolution of the House of Commons and the Senate before the Executive ratifies the convention.[80]

It has been the practice of the federal government prior to ratification to obtain the undertaking of each province and territory that it will take steps to pass implementing legislation regarding those aspects of the convention that deal with matters within provincial legislative jurisdiction.[81] For example, in 1978, Barry Strayer (then Assistant Deputy Minister of the Department of Justice) indicated that the provinces had provided

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[74]Kindred, at 89.

[75]*Statute of Westminster,* 1931 (U.K.), 22 Geo. V, c. 4, s. 3. See also: *Constitution Act,* 1967.

[76]D. Matas, "Domestic Enforcement of International Human Rights Instruments" (1987) Can. Hum. Rts. Y.B. 91 at 92 [Matas].

[77]Kindred, at 89.

[78]Often the United Nations serves as the official place for delivery of documents that indicate a country has ratified a convention.

[79]Kindred, at 89.

[80]Kindred, at 90. The Quebec government has taken the contrary position that the provincial government has the capacity to enter into treaties that deal with matters that are within exclusively provincial legislative jurisdiction. See Kindred, at 167-8.

[81]Bayefsky, at 50-1.

an "undertaking to implement the covenants to the extent that they would be within their jurisdiction"[82] prior to acceding to the ICESCR and the ICCPR.

6.3.3 Publication and Registration

Once an international agreement has come into force, it is registered with the Secretariat of the United Nations. Instruments that are registered with the Secretariat are published in the *United Nations Treaty Service*. In Canada, the Department of Foreign Affairs and International Trade maintains records on the status of all treaties affecting Canada. International agreements to which Canada is a signatory or party are contained in the *Canada Treaty Register*. After the agreements come into force, they are published in the *Canada Treaty Series*.[83]

6.3.4 Entry into Force

The date that a convention enters into force (becomes binding on the signatory states) varies according to the intention of the parties.[84] Some of the possible times that a convention enters into force include:[85]

- on ratification of the convention or a given period after the convention is ratified;
- immediately after or within a given period after signature (where ratification is not necessary); or
- upon ratification by a given number of states as stated in the treaty.

6.3.5 Reservations

From time to time, a state may sign an international agreement but may have some concerns about how certain provisions in the agreement will apply to that state. When this happens, the state may be unwilling to ratify the agreement as it stands. Rather than refusing to be bound by all of the agreement, the state may decide to exclude or modify the legal effect of the offending provision or provisions. This process is called "entering a

[82]Special Joint Committee of the Senate and the House of Commons, 1978, *Minutes of Proceedings*, No. 8. at 48.

[83]Kindred, at 90.

[84]Kindred, at 91.

[85]Kindred, at 91.

reservation". It often happens when a state is not involved in the process of negotiating a particular treaty and decides that it would like to accede that treaty. The acceding state will deposit its ratification with reservations.[86]

6.3.6 Implementation of Treaties or Conventions into Canadian Law

As stated previously, in Canada, the power to enter into international conventions is given solely to the executive branch of the federal government. Although the Governor General in Council may conclude a treaty, it cannot, however, make law.[87] This is the sole responsibility of the federal Parliament and the provincial legislatures. Thus, as stated by Kindred, "a treaty made by the federal government will bind Canada as a country, but its provisions do not affect internal law until they have been implemented by legislation."[88]

Once Canada has signed and ratified an international convention, yet before the legislation is implemented, Canada incurs international obligations to comply with the terms of the convention and to ensure that its legislation complies with the terms of the convention.[89] If a province enacts legislation that violates the convention, or if a province fails to amend its legislation to comply with the conventions, Canada will be placed in violation of its international obligations.[90]

Implementation of an international convention or treaty into Canadian law is very important. Whether an individual citizen can apply to a Canadian court and ask the judge to enforce a provision under an international convention depends upon whether or not the convention has been implemented into federal or provincial legislation. There are several possible methods that the Canadian government (or provincial or territorial government) can use to incorporate international conventions into domestic law.[91] The Department of

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[86]Kindred, at 92.

[87]Kindred, at 168.

[88]Bayefsky, at 168. Indeed, in *Bhadauria* v. *Board of Governors of Seneca College* (1981), 124 D.L.R. (3d) 193 (S.C.C.), the Supreme Court of Canada held that an unimplemented international agreement could not create independent rights at common law. See also: *Baker* v. *Canada*, [1999] 2 S.C.R. 817, where the majority of the Supreme Court of Canada held that the general rule is that unimplemented treaties are not part of Canadian law. Nevertheless, the court noted that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.

[89]Cohen and Bayefsky, at 285.

[90]Bayefsky, at 142. See also, Matas, at 92.

[91]Generally, individual states may choose the method of implementation of a treaty that they deem to be most appropriate, unless the treaty specifies a particular method. See: C. Tomuschat, "National Implementation of International Standards of Human Rights" (1984-85) C.H.R.Y.B. 31, at 39 [Tomuschat].

Foreign Affairs and International Trade outlined these methods in a letter to the Council of Europe on February 1, 1985. After stating that treaties must be implemented in order to make them effective in domestic law, the Department set out the following ways in which Canada may change domestic legislation in order to discharge its treaty obligations:

- by enacting the required legislation without express reference to the treaty;
- by legislation which makes reference to the treaty but without expressly enacting its provisions (may be done with or without annexing the text of the treaty); or
- by incorporating into law the treaty or the relevant provisions.[92]

While the most direct method of implementing international human rights law is through passing legislation that refers explicitly to the international convention, Canada has not passed much legislation that would fit this criterion. A recent example that illustrates this technique is the Geneva Conventions Act. In 1965, Canada ratified the Geneva Conventions, 1949, and passed implementing legislation, the Geneva Conventions Act. In the Geneva Conventions Act, the four Geneva Conventions were included in Schedules attached to the Act. Later, when Canada ratified the two Protocols Additional, the Act was amended and the two Protocols were added as Schedules V and VI.[93] Thus, these instruments were given direct legal effect in Canada when their entire texts were incorporated into Canadian domestic law.

At the provincial level, similar examples may be found. In Alberta, for example, a number of international conventions have been implemented through passing laws that append the international treaties as schedules to the legislation.[94]

If the human rights conventions are not expressly mentioned in domestic Canadian legislation, an issue arises as to whether they have been incorporated. For example, there are scholars who argue that the Charter contains many sections that were intended to give effect to or to implement Canada's international obligations.[95] According to Bayefsky, the legislative history of the Charter indicates that international human rights law was an important factor throughout the process of constitutionalizing a bill of rights in Canada. Further, she argues that the language and intent of several international human rights

[92](1986), 24 Can. Y.B. Int. L. 397 at 401-2.

[93]Kindred, at 136. They took effect on May 20, 1991.

[94]International Conventions Implementation Act, R.S.A. 2000. c. I-6; International Commercial Arbitration Act, R S.A. 2000, c I-5; International Child Abduction Act, R.S.A. 2000, c. I-4.

[95]For example, Bayefsky, at 63; Cohen and Bayefsky, 302-3; Matas, at 94-5. While these provisions do not give effect to entire conventions, individual provisions are arguably incorporated in various sections of the Charter.

provisions may be found in several sections of the Charter.[96] This view is supported by the fact that ratification of Canada's international treaties took place only after extensive consultation between the federal and provincial governments.[97] It is further supported by the fact that Canadian reports to international supervisory bodies indicate that a number of Canadian statutes and constitutional provisions were intended to implement Canadian human rights treaty obligations.[98] At the provincial level, governments issue statements that revisions have been made to existing legislation (e.g., provincial human rights legislation) in order to implement obligations under international covenants.[99] All of these reasons are used to support the conclusion that by "necessary implication", Canadian legislation has implemented our international human rights treaty obligations. If it can be said that the treaty obligations are reflected in Canadian legislation by necessary implication, Canadian courts will be bound.[100]

However, Canadian caselaw has not clearly supported the view that the Charter incorporates international human rights law by implication. The strongest statement in support of the implementation by implication theory may be found in a dissenting opinion in a Supreme Court of Canada decision. In *Reference re Public Service Employee Relations Act*,[101] Chief Justice Dickson spoke in dissent when he said:

> "A body of treaties … and customary norms now constitutes an international law of human rights …. The Charter incorporates many of the policies and prescriptions of the various international documents pertaining to human rights."

This would seem to support the view that the Charter incorporates international human rights law by implication. However, this was a dissenting judgment, which means that the majority of the Supreme Court of Canada was of the opposite view (although the majority did not comment on this exact point).

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[96]Bayefsky, at 49. For an overview of the influence of international law on the drafting of the *Charter*, see M. Cohen, "Towards a Paradigm of Theory and Practice: The Canadian Charter of Rights and Freedoms—International Law Influences and Actions" (1986) 3 C.H.R.Y.B. 47.

[97]Bayefsky, at 50. Indeed, the Continuing Federal-Provincial-Territorial Committee of Officials Responsible for Human Rights (formed in 1975) meets regularly and has the task of ensuring that international human rights treaties ratified by Canada are implemented.

[98]Bayefsky, at 53-60. Bayefsky points out, however, that some of these reports might exaggerate claims of compliance with international treaties or even misrepresent shortfalls in implementing legislation because Canadian officials try to protect the government from criticism.

[99]Bayefsky, at 60-1. Other examples of implementing legislation that does not expressly refer to international treaties include the *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.), c. 24; amendments to the *Criminal Code*, R.S.C. 1985, c. C-46 (e.g., see s. 7); and the *Emergencies Act*, R.S.C. 1985 (4th Supp.), c. 22.

[100]Schabas, at 20.

[101][1987] 1 S.C.R. 313 at 348-50.

In *Slaight Communications Inc.* v. *Davidson*,[102] Chief Justice Dickson (speaking for the majority) emphasized the need to examine the content of Canada's international human rights obligations to determine the nature and scope of the rights guaranteed by the Charter and to assist in the interpretation under Charter section 1 of what can constitute pressing and substantial objectives justifying restrictions upon those rights.[103] Further, in *R.* v. *Keegstra*,[104] Chief Justice Dickson stated that: "[g]enerally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself."[105]

On the other hand, there are numerous cases (both before and after the advent of the Charter in 1982) that hold that Canada's international human rights treaties have not been implemented (but the provisions are simply just the same).[106] Further, it should be noted that there are several international human rights provisions that are excluded from the Charter. These include: the right to be free from arbitrary exile, the right to be free from slavery, the right to be free from torture, the right to own property, the right to education, and others.[107]

Whenever Canadian legislation does not explicitly implement international human rights conventions, it is not clear what precise legislative action is required in order to be certain that a particular piece of legislation has implemented international conventional law. Therefore, in the case of international conventional and treaty law, there is a lengthy process that must be followed before the convention or treaty is clearly applicable in a Canadian court.

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[102][1989] 1 S.C.R. 1038; (1989), 40 C.R.R. 100 (S.C.C.) [Slaight].

[103]Slaight, at 113 (C.R.R.).

[104][1990] 3 S.C.R. 697 [Keegstra].

[105]Keegstra, at 750.

[106]See, for example: *R.* v. *Milne*, [1987] 2 S.C.R. 512, at 527; *Re Warren* (1983), 35 C.R. (3d) 173, at 177 (Ont. H.C.); *Re Mitchell and R.* (1983), 150 D.L.R. (3d) 449, at 461 (Ont. H.C.); *Collin* v. *Kaplan*, [1983] 1 F.C. 496 (T.D.); (1982), *Vincent* v. *Minister of Employment and Immigration*, [1983] 1 F.C. 1057 (C.A.); *Evans* v. *Kingston Penitentiary* (1987), 30 C.C.C. (3d) 1 (Ont. H.C.); *Re Dixon and Manitoba Labour Board* (1981), 127 D.L.R. (3d) 752 (Man Q.B.); *Immeubles Claude Dupont Inc. c. Quebec (Procureur General)*, [1994] R.J.Q. 1968 (C.S.).

[107]J. Humphrey, "The *Canadian Charter of Rights and Freedoms* and International Law" (1985-86) 50 Sask. Law Rev. 13, at 15, 17 (hereinafter Humphrey).

6.4 Customary International Law

International law consists of more than conventions and treaties. There is a second body of international law – customary international law. The general rule, broken down into stages below, is that if an international standard or law has reached the status of being customary international law, it is adopted or incorporated automatically in Canada as part of the common law,[108] unless it conflicts with legislation or a fundamental constitutional principle, in which case it must be implemented (like treaties) in order to be binding.[109]

6.4.1 Identification and Sources

Customary international law is difficult to identify. This is because customary international law is not found in specific written treaties or other agreements. It may include non-binding conventions or parts of conventions or rulings of different United Nations bodies, such as the Human Rights Committee. Customary international law encompasses all of the laws or rules of international law that are accepted as law by a great majority of the United Nation's member states. If a law qualifies as international customary law, even if that law is contained in an international convention that only some states have ratified, that law will apply to all states. Indeed, customary international law can apply regardless of what might be contained in a treaty.[110]

In customary international law, international legal obligations arise over time from the consent and practice of states.[111] For example, Canadian and American courts have found that certain articles of the UDHR have the status of customary international law.[112]

Most authorities agree that two conditions must be made out to establish that a law is customary international law:[113]

- evidence of a sufficient degree of state practice; and

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[108]The common law is that body of law that relies on the decisions of judges and the reasons for their decisions. It is to be contrasted with statutory law or legislation (passed by Parliament or legislatures).

[109]K. Norman, "Practising What we Preach in Human Rights: A Challenge in Rethinking for Canadian Courts" (1991) 55 Sask. Law Rev. 289 at 293 [Norman].

[110]D. Baum, *Law and the World Community* (Toronto: IPI Publishing Ltd., 1989) at 117.

[111]Bayefsky, at 25.

[112]E.g., *Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) and *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 at 118 (hereinafter Reference re the Seabed and Subsoil) at 118-26.

[113]Kindred, at 115; Bayefsky, at 10.

- the practice must be accepted as law by the international community.

"State practice" means the actions of states that comply with the international law in question. A "sufficient degree of state practice" means that a large number of states act in compliance with the international law in question. The second condition means that states comply with international law because they believe that they have a legal obligation to do so, and not just because it suits the states' interests to comply with the law.[114] The requirements for finding that international law has become custom have been described by the Supreme Court of Canada as a finding of, "substantial uniformity or consistency, and general acceptance."[115]

The courts may look at a variety of sources when determining whether there is an applicable international customary law. For example, in *Reference re the Seabed and Subsoil,* the Supreme Court of Canada examined treaties, unilateral state proclamations, decisions of the International Court of Justice, deliberations of the International Law Commission, decisions of national courts, and writings of learned authors.[116] The International Law Commission also lists national legislation, diplomatic correspondence, opinions of national legal advisors and the practice of international organizations as sources for determining state practice.[117] In *Re Drummond Wren,*[118] the court referred to the United Nations Charter, the Atlantic Charter and the statements of various world leaders condemning racial discrimination in order to help define "public policy" for the purpose of striking out a provision in a legal document that prohibited the sale of land to "Jews or persons of objectionable nationality".

It is often the difficult role of the judge to determine whether a particular rule has become part of customary international law. For example, in *Re A.U.P.E.*,[119] the Alberta Court of Queen's Bench considered whether the right to strike in the public service was part of customary international law. The Court concluded that it was not. In determining whether the right to strike was part of customary international law, the court looked at reports of the Committee on Freedom of Association of the International Labour Organization Committee, International Labour Organization Conventions, the

[114]Bayefsky, at 10, citing Article 38(1)(b) of the *Statute of the International Court of Justice.* A state "complies" with the terms of international law when it acts consistently with its terms. Thus, a state is "in compliance" with an international convention when it obeys all the terms of the convention and does nothing contrary to its agreements under the convention.

[115]Reference re the Seabed and Subsoil, at 118.

[116]Bayefsky, at 11.

[117]"Report of the International Law Commission to the General Assembly", Doc A/1316 (1950), 2 Y.B. Int. L. Commn. at 368-372.

[118][1945] 4 D.L.R. 674 (Ont. H.C.).

[119][1980] A.J. No. 531 (Q.B.).

International Covenant on Economic, Social and Cultural Rights, and reports from an International Labour Conference.[120]

6.4.2 Examples of Customary International Human Rights Norms

Since customary international law is not found in any one specific source, it is difficult to identify those legal principles that are considered to be legally binding on all nations. However, there are some norms that have been identified by national and international bodies as customary. Since the focus of this report is on international human rights, this section will highlight customary international human rights laws.[121]

The following have been identified as violations of customary international human rights:[122]

- slavery and racial discrimination;[123]
- murder;[124]
- torture;[125]
- prisoners not being treated according to the standards for the treatment of prisoners as listed in the United Nations Standard Minimum Rules for the Treatment of Prisoners;[126]
- arbitrary detention;[127]

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[120]Bayefsky, at 11.

[121]It should be noted that these rights have not specifically been found to be part of customary international human rights law in Canadian courts.

[122]Per Bayefsky, at 13-16.

[123]*Barcelona Traction, Light and Power Co. (Belgium v. Spain)* I.C.J. Reports (1970) p. 3, at 32, paras. 33 and 34 (International Court of Justice).

[124]*De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 at 1397 (5th Cir. 1985) [De Sanchez].

[125]*Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *De Sanchez; Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); motion to reconsider granted in part and denied in part 694 F. Supp. 707 (N.D. Cal. 1988) [*Forti*].

[126]*Lareau* v. *Manson*, 507 F. Supp. 1177 (D. Conn., 1980), aff'd in part, modified and remanded in part 651 F.2d 96 (2d Cir. 1981) [Standard Minimum Rules were discussed at District Court level]; *Sterling* v. *Cupp*, 625 P.2d 123 (Or. Sup. Ct. 1981). For a discussion of the situation in Canada, see: Norman, at 289-309.

- being subjected to cruel, inhuman or degrading treatment or punishment;[128]
- slavery;[129]
- abduction by state officials or their agents, followed by official refusals to acknowledge the abduction or to disclose the detainee's fate;[130]
- genocide;[131]
- systematic racial discrimination (e.g., apartheid);[132] and
- a consistent pattern of gross violations of internationally recognized human rights is a violation of customary international law.[133]

According to Tarnopolsky J.A. of the Ontario Court of Appeal, the following human rights issues are part of customary international law:

- those that constitute threats to international peace;
- those that constitute apartheid or racial discrimination;
- those that show a reliable attested pattern of gross violations of human rights; and
- self-determination.[134]

Finally, as noted earlier, some argue that many, if not all, of the articles of the Universal Declaration of Human Rights have reached the status of customary international law.[135]

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[127]*Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); De Sanchez; *Forti*.

[128]*De Sanchez*. However, in *Forti* (1988), the California District Court held that cruel, inhuman or degrading treatment was not a violation of customary international law.

[129]*De Sanchez*.

[130]*Forti*, at 711.

[131]Restatement of the Foreign Relations Law of the United States, 3rd, Vol. 2, s. 702 at 161 (1986).

[132]Restatement of the Foreign Relations Law of the United States, 3rd, Vol. 2, s. 702 at 161 (1986).

[133]Restatement of the Foreign Relations Law of the United States, 3rd, Vol. 2, s. 702 at 161 (1986).

[134]Hon. Justice W.S. Tarnopolsky, "Human Rights, International Law and the International Bill of Rights" (1985-86) 50 Sask. Law Rev. 21 at 24.

[135]See Bayefsky, at 15-16, note 66; Humphrey, at 13.

7.0 Enforcing International Conventions and Customary International Law in Canada

7.1 General

Canada is a member state of the United Nations. Individual states are responsible for implementing (putting into service) international human rights law into their domestic legislation.[136] The United Nations Charter (Articles 55 and 56) makes it clear that all United Nations member states pledge to take action to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

There are many methods that individual states, such as Canada, use to promote and protect international human rights laws. Some of these have already been briefly touched upon in this paper, while others will be discussed below. These enforcement methods include:

- directly implementing international human rights laws by passing domestic legislation;
- reflecting international human rights principles in the Charter and in federal and provincial human rights legislation;
- using international human rights legal principles to assist in interpreting Canadian legislation;
- raising international human rights issues during litigation in domestic courts;[137]
- advocating for human rights protection in foreign policies and in diplomatic circles;
- reporting to the United Nations on progress in implementing United Nations Conventions and in enforcing legal remedies; and
- promoting the individual complaints mechanisms available in some human right conventions.

[136]R.P. Claude & B. Weston, ed., *Human Rights in the World Community* (Philadelphia: University of Pennsylvania Press, 1992) at 286 [Claude and Weston].

[137]Claude & Weston, at 362.

Thus, there are three general categories of methods by which international human rights laws may be enforced within a particular state: (1) through actions taken by individuals and groups relying upon human rights laws that have been implemented into the domestic legal system; (2) through actions taken by other countries in the course of international relations; or (3) through actions taken by international bodies.[138] Governments, international organizations or agencies, or a private individual or group may raise the issue of domestic compliance with the provisions of international human rights law.[139]

Generally, enforcing international human rights law using traditional legal methods, such as using domestic courts to obtain a remedy, is difficult if not impossible. This is because international law relies heavily on voluntary compliance by individual states, and upon the influence that the international community (states and international organizations) and non-government organizations (such as Amnesty International) may exert on individual states.[140] Further, as pointed out by D. Matas, a state may pass legislation that implements international covenants, but may not apply it. In other words, the goal is ensuring compliance with international human rights law in fact and not just in form.[141]

However, as noted by R. Bilder, if available, the most effective way to implement or enforce international human rights law is through action within a state's own legal system. If Canadian domestic law provides an effective system of remedies for violations of international human rights law, the weight of Canada's legal system can be used to support compliance with international rules. Most human rights laws require that the states parties incorporate the relevant obligations into their national law, and that they provide domestic remedies. Further, international treaties often require nations to report to various international institutions that determine whether treaties are properly implemented into domestic law.[142]

Further, one country may exert diplomatic pressure on another by complaining about an alleged breach of international human rights law. Sometimes the pressure is informal, often referred to as “quiet diplomacy”. The advantage of quiet diplomacy is that it allows

[138]R. Bilder, “An Overview of International Human Rights Law” in H. Hannum, ed., *Guide to International Human Rights Practice* (Philadelphia: University of Pennsylvania Press, 1984) 3 at 13 [Bilder].

[139]Bilder, at 14.

[140]Bilder, at 13.

[141]D. Matas, “Domestic Enforcement of International Human Rights Instruments” (1987) Can Hum. Rts. Y.B. 91 at 99-100 [Matas].

[142]Bilder, at 13. Canada’s reporting obligations are discussed below.

for the offending government to save face. The disadvantage of quiet diplomacy is that it provides no penalty if the violator fails to comply with the request.[143]

Other situations may involve one state making a formal complaint about the actions of another state.[144] For example, one state may complain to the United Nations about the actions of another under Article 41 of the ICCPR.

Finally, enforcement of international human rights law can occur through the actions of various international organizations, such as Amnesty International. Additionally, some international institutions (e.g., the United Nations Security Council) consider human rights matters on their own initiative without any formal complaint by a state.[145]

The following material expands on the methods of enforcement of international human rights laws and discusses various methods and levels of enforcement, depending on whether the human rights law in question is an international convention or treaty, or part of customary international law.

7.2 Domestic Enforcement

7.2.1 Conventional International Law

How is international human rights law enforced in Canada? The particular method and level of enforcement depends upon whether the international law has been incorporated, whether the applicable rule is part of customary international law, whether federal and provincial governments have agreed to amend domestic law so that it is consistent with international human rights treaties, or whether the international human rights provisions have been relied upon by Canadian courts in some fashion.

7.2.1.1 Express Implementation

If a human rights convention or treaty has been expressly incorporated into domestic legislation, it can be enforced in the same way that domestic Canadian law is enforced. Often, the incorporating legislation provides remedies. For example, subsection 3(1) of the Geneva Conventions Act provides that everyone who commits a grave breach (e.g., torture, willful killing) is guilty of an indictable offence and can be liable to life

[143]Matas, at 104.

[144]Bilder, at 13.

[145]Bilder, at 14.

imprisonment. Thus, a person contravening this Act would be subject to criminal charges in the same fashion as a person who contravenes the *Criminal Code*.[146]

It should be noted that if a treaty is directly incorporated into domestic legislation, an issue arises as to how the courts should interpret the provisions of such legislation. The recent tendency of Canadian courts is to take "an international approach" to the interpretation of statutes that implement treaties.[147] This means that the primary goal must be to give effect to the intentions of the parties. The court must read the treaty as a whole to ascertain its purpose and intent and to give effect to it, rather than to rely on a literal interpretation which might not give effect to that purpose.[148]

7.2.1.2 Indirect Implementation

Although the law is not settled on whether international conventional law may be implemented through implication, enforcement of unimplemented international human rights law may still be possible, albeit indirectly. Many of the provisions of domestic laws (such as the Charter and provincial human rights legislation) have the same basic content as international laws. Under this legislation, an individual can obtain a remedy that will be enforced by Canadian courts. The practical result might be that the person's "international" human rights are being enforced. As D. Matas states, Canada is of the view that the current Canadian legal structure is already sufficient to comply with Canada's treaty obligations. He argues that this view, in large measure, is correct. Matas opines that while international human rights law emphasizes rights and principles, Canadian law traditionally emphasizes remedies. Therefore, if Canadian law has a remedy that prevents an international law from being violated, it has indirectly met its international human rights obligations.[149]

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[146]R.S.C. 1985, c. C-46.

[147]Kindred, at 182.

[148]*Re Regina and Palacios* (1984), 45 O.R. (2d) 269 (Ont. C.A.). See also: *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

[149]Matas, at 93. Matas also points out, at 94, that Canada's compliance with international human rights laws is more by circumstance than by design, as Canada makes no organized attempts at matching its domestic laws with its international obligations.

7.2.2 Enforcement of Customary International Law

It is less clear how customary international law is enforced in Canada.[150] Customary human rights law is generally considered to be part of the law of Canada, without the need for implementation, provided it does not conflict with domestic statutes, with the common law, or with the Constitution.[151] Theoretically, therefore, if a person believes that his or her rights under customary international human rights law have been infringed, he or she may apply to a Canadian court for a remedy. In this case, customary international law would be said to found a cause of action. The plaintiff would be applying to court for a remedy because s/he thinks that his or her rights have been violated. This is unlike the situation where the courts rely on customary international law to help them interpret the meaning of other legislation or human rights documents. Unfortunately, there are few Canadian cases that demonstrate the use of customary human rights law in this direct way.[152]

There are, however, United States cases in which the courts have held that an individual can apply to the court for a remedy in some situations where there has been a breach of international customary law.[153]

7.3 Other Methods of Enforcement

7.3.1 Enforcement and Application Through Interpretation

As noted earlier, there is a presumption that Parliament and the legislatures would not legislate in violation of Canada's treaty obligations.[154] Thus, when courts rely upon international law provisions to interpret Canadian laws, this serves as a method of ensuring that international laws are respected.

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[150]See, generally, D.F. Woloshyn, "To What Extent Can Canadian Courts be Expected to Enforce International Human Rights Law in Civil Litigation?" (1985-86) 50 Sask. Law Rev. 1 at 7-12 [Woloshyn].

[151]Bayefsky, at 17.

[152]Bayefsky, at 17. See, for example, *Penikett* v. *R.*, [1987] 5 W.W.R. 691 (Y.T.S.C.), where McDonald J. held that the petitioners did not have the right to bring an international human rights standard directly into the courtroom in support of an application for a declaration that the Meech Lake Accord's restrictions on eligibility for provincehood violated the ICCPR.

[153]See, for example: *The Pacquete Habana*, 175 U.S. 677, at 700 (1900); *Fernandez* v. *Wilkinson* 505 F. Supp. 787 (D. Kan. 1980) affirmed for different reasons (*sub nom. Rodriguez-Fernandez* v. *Wilkinson*) 654 F.2d 1382 (10th Cir. 1891). But see: *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, at 810-11 (1984), where Judge Bork held that customary law could not give rise to a cause of action, although it had the status of being part of the common law of the United States.

[154]*Schavernoch* v. *Foreign Claims Comm.*, [1982] 1 S.C.R. 1092.

7.3.2 Enforcement Through Force of International Opinion

Despite its binding effect, people often question the force of international law within a state's borders. This may in part be due to the perceived lack of enforcement mechanisms within international conventions. It is true that the United Nations General Assembly is only empowered to make recommendations about a state party's conduct in relation to its obligations under an international convention and that, for the most part, the international conventions do not contain specific penalties for non-compliance. However, as noted below, some international conventions do contain obligations for states parties to report their own progress in implementing the conventions to committees within the United Nations. These conventions may also contain provisions that allow one state to report another state's infractions where the second state has agreed to this procedure.

When light is shed on the practices or omissions of a state in relation to its commitments under an international convention, whether by virtue of a state reporting the violation to the particular United Nations committee responsible or in some other way, perhaps the most powerful United Nations enforcement mechanism comes into play: international pressure. If a state violates a provision of an international human rights convention which it has ratified, the United Nations Commission of Human Rights may pass a resolution condemning the state's behaviour and directing the state to do some act or refrain from doing some act so that it complies with its international obligations.[155] The international exposure, publicity, censure, and even trade sanctions that may result from such a resolution will often press the offending state into compliance with its obligations even though there may be no legally 'enforceable' penalty for non-compliance with the international convention.

The enforcement of international human rights through political pressure means that even if a particular international human rights norm is not formally incorporated into Canadian domestic law, individual rights may still be protected.

7.3.3 Canada's Reporting Obligations

As noted, under some international covenants, states parties are obligated to report periodically to international bodies on measures taken and on the progress made in implementing the obligations in the covenant. The process of periodically reporting to an international body has come to be recognized as a constructive means by which governments can seek to achieve a variety of objectives, including ensuring that international human rights law is followed.

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[155]See, generally: O. Schachter, "Compliance and Enforcement in the United Nations System" in Y. Lodico, ed., *Proceedings of the Annual Meeting—American Society of International Law Annual, 1990-1,* 428-447.

An initial report is usually required when a country ratifies an international treaty. At this point in time, the country is expected to review its domestic laws to ensure conformity with the treaty. Following the initial report, reports are usually submitted annually. Once a report is submitted, a committee will evaluate the report. The members of the committee are independent experts in the area of human rights, acting in an individual capacity. The committee will then determine if the state is meeting international standards, and if not, will decide what can be done in order to bring it in line with those standards.

The human rights treaties, which Canada has ratified and for which reporting obligations exist, are:

- the *International Covenant on the Elimination of all Forms of Racial Discrimination*;[156]
- the *International Covenant on Economic, Social and Cultural Rights*;
- the *International Covenant on Civil and Political Rights*;
- the *Convention on the Elimination of all Forms of Discrimination Against Women*;[157] and
- the *Convention on the Rights of the Child*.[158]

7.3.4 Individual Complaints

Individuals play a very important role in the enforcement of international human rights agreements. First, individuals have obligations to comply with international human rights agreements. While human rights agreements are primarily between governments and therefore impose obligations primarily upon governments, they can also impose duties on individuals. For example, war crimes, crimes against humanity and torture are crimes committed by individuals and for which individuals may be held accountable.[159]

Second, individuals can act to bring their governments into compliance with international agreements. For example, under the Refugee Convention,[160] Canada cannot expel a refugee to a country where his or her life or freedom would be threatened.

[156]7 March 1966, C.T.S. 1970/28; U.N.T.S. Vol. 660 p. 195.

[157]18 December 1979, C.T.S. 1982/31, U.N.T.S. Vol. 1249 p. 13.

[158]20 November 1989, C.T.S. 1992/3, U.N.T.S. Vol. 1577 p. 3.

[159]Matas, at 114.

[160]Convention Relating to the Status of Refugees, (1954) 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, (1967) 606 U.N.T.S. 267.

Individuals can make government compliance with this Convention easier by helping refugees, arranging their shelter and employment, and by making refugees welcome.[161]

Third, individuals can directly seek remedies from the United Nations or other organizations. At the United Nations, there are two major procedures available for individuals to complain against states for human rights violations. First, individuals can send communications to the United Nations Human Rights Commission or to its Subcommission on the Prevention of Discrimination and the Protection of Minorities. This procedure does not, however, permit individual claims to be considered. Instead, it provides for a compilation of violations by individual states.[162]

The second individual complaints procedure can have a more direct impact on an individual. Canada is among approximately 50 nations that permit its citizens to complain to an authority outside of its borders about individual human rights violations committed by it. Canada has ratified the ICCPR and the Optional Protocol, which permit individuals to make complaints directly to the United Nations Human Rights Committee.

Pursuant to this procedure, the United Nations Human Rights Committee must first look at whether the complaint is admissible for consideration before it.[163] The requirements for admissibility are contained in Articles 1, 2, 3 and 5(2) of the Optional Protocol and may be summarized as follows:

1. The communication must not be anonymous.

2. The complainant's government must be a party to the Optional Protocol.

3. The complainant must claim to be a victim of a violation of the rights set out in the ICCPR.

4. Normally, the complaint must be submitted by the alleged victim or by his or her representative. However, the Committee may accept a communication on behalf of a person who is unable to make one.

5. The person making the communication cannot be abusing the right of submission under the Protocol.

6. The communication cannot be incompatible with the provisions of the ICCPR.

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[161]Matas, at 115.

[162]Kindred, at 598.

[163]See: A. deZayas, J. Moller & T. Opsahl, "Application by the Human Rights Committee of the International Covenant on Civil and Political Rights under the Optional Protocol" (1986) 3 C.H.R.Y.B. 102 [deZayas].

7. The same matter is not being examined under another international procedure.

8. The individual has exhausted all available domestic remedies.

The Human Rights Committee meets three times per year to hear individual complaints. If the Committee determines that a complaint is admissible, it considers the merits of the complaint. The impugned state party is asked to submit (within 6 months) explanations or statements clarifying the matter and any remedy that the state party has provided. Once the state party's comments are received, the complainant is given the opportunity to comment on them.

The Committee then formulates its views and forwards them to the State Party and the complainant. The entire procedure usually takes between two to three years.[164]

While this procedure sounds onerous, it has been used successfully by a number of Canadians.

Two other procedures are also available to individuals who believe that their international human rights have been violated. These two procedures have been established under the *International Convention of the Elimination of All Forms of Racial Discrimination,* and *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

Individuals who believe their rights under by these two Conventions have been violated may write to the appropriate Committee asking for consideration of their case. The committees acting under these two Conventions, however, cannot receive communications which concern states that have not recognized their authority. As far as Canada is concerned, it has ratified these Conventions, and has recognized the competence of the committee established under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* Canada has not yet recognized the competence of the committee established under the *International Convention of the Elimination of All Forms of Racial Discrimination*.

7.3.5 Non-Government Organizations

There are several non-governmental organizations that participate in the enforcement of international human rights law throughout the world. Many of them use publicity to bring human rights violations to light. For example, Amnesty International is a worldwide movement, independent of government, that focuses on: obtaining the release of prisoners of conscience; obtaining fair and prompt trials for all political prisoners,

[164]deZayas, at 109.

bringing an end to the death penalty, torture and other cruel, inhuman or degrading treatment and punishment for all prisoners; and bringing an end to extra-judicial executions and disappearances.[165] Amnesty International also works on behalf of refugees in cases where return to their home country will put them at risk of human rights violations. The techniques used by Amnesty International include letter writing campaigns, petitions, postcards and other human rights education activities.[166]

Another non-governmental organization that promotes human rights around the world is Human Rights Watch. It is an umbrella organization that monitors and reports on abuses of internationally recognized human rights in 70 countries around the world and defends freedom of thought and expression. It includes: Americas Watch (Latin America); Helsinki Watch (Turkey and the former Soviet Union); Asia Watch (Asia and the Far East); Africa Watch and Middle East Watch. It also includes the Arms Project, the Women's Rights Project, the Prison Project and the Fund for Free Expression. Human Rights Watch and Amnesty International have consultative status at the United Nations and can attend working sessions and lobby countries directly.[167]

Other international non-governmental organizations dedicated to human rights which have consultative status with the United Nations include the International Commission of Jurists (Geneva), the International Federation of Human Rights (Paris), the International League for Human Rights (New York), and the Minority Rights Group (London).[168]

The International Committee of the Red Cross also has a role to play in the protection of international human rights. This organization tends to operate behind the scenes rather than publicly in order to achieve its goals. Moreover, various professional groups, such as lawyers, artists and scientists, have developed international human rights units to support colleagues who speak out against public policy.[169] Finally, there are several groups in many countries that speak out about human rights in their own societies. These groups include the American Civil Liberties Union, the Canadian Civil Liberties Association and the Alberta Civil Liberties Association.

Non-governmental organizations usually operate to assist in the enforcement of human rights in one or several of the following ways:

- by educating people about the content of their rights;
- by disseminating information about rights abuses;

[165]Amnesty International Canada, Youth and Student Activism in Amnesty International, pamphlet.

[166]Amnesty International has over 500,000 members in over 150 countries.

[167]Human Rights Watch, *World Report*, 1994 (New York: Human Rights Watch, 1993).

[168]Claude & Weston, at 362.

[169]Claude & Weston, at 362-3.

- by advocating for or taking up the claims of persons whose rights are alleged to be violated;
- by influencing the development and drafting of human rights laws;
- by lobbying to influence public policy;
- by providing legal and medical aid to the victims of human rights abuses;
- by showing commitment to assist with the difficulties encountered by other countries; and
- through moral condemnation or praise.[170]

As D. Matas states, often the enforcement of international human rights by non-governmental organizations is more successful than the system available through the United Nations. For example, people acting for Amnesty International in the field will forward a complaint to its headquarters in London for investigation and action. On the other hand, a local office of the United Nations will not forward a complaint to the United Nations in Geneva, where the complaints are handled – the complainant must contact the Geneva office directly. Second, while Amnesty International restricts the type of complaint that it will take to gross violations of human rights, the United Nations is even more restrictive. Third, Amnesty does its own human rights facts finding and investigates complaints, but the United Nations does not investigate complaints – the complainant must provide his or her own corroboration. Fourth, while Amnesty publicizes the cases of prisoners of conscience, the United Nations complaint system is entirely confidential until the end of the case. Fifth, the Amnesty International procedures are much quicker than are United Nations procedures. Finally, while Amnesty International is impartial, the United Nations is politicized.[171]

Although it appears that Amnesty International (or other non-governmental organizations) is preferable to the United Nations, it should be noted that each organization has a very important role in the promotion of human rights. They complement each other. The United Nations helps to elaborate international standards.

[170]Claude & Weston, at 364-370. See also: L. Wiseberg, "Human Rights Non-governmental Organizations" in Claude & Weston, at 372-382.

[171]Matas, at 107 to 111.

Non-governmental organizations provide remedies.[172] They also provide fact-finding, publicity and impartiality.[173]

7.4 Summary

The progress that has been made in the area of international human rights law in recent decades has been significant. The vivid memory of the atrocities of World War II led to the creation of the United Nations. As a result, states now pledge to accept and promote universal respect for human rights and fundamental freedoms. The UDHR and other and international human rights conventions provide the world with universally accepted standards.

The need, however, for more effective ways of ensuring respect for human rights is as great as it ever was. Canada has signified its commitment to human rights by ratifying several United Nations Conventions that deal with human rights. Living up to human rights principles represents a challenge for each country, including Canada. Canada has attempted to meet this obligation by encoding these principles in the Constitution and other federal laws, and in our national and provincial human rights legislation.

8.0 Conclusion

There are three bodies of human rights laws upon which an aggrieved person may be able to rely in order to obtain a remedy: provincial human rights legislation, constitutional law, including the Charter, and international human rights law. In some situations, more than one body of human rights law may apply. In others, it may be that the law has not yet evolved sufficiently to recognize a particular human right and to provide a remedy. However, the law is constantly evolving as society changes, and as people present novel arguments and issues to the courts and other tribunals. Thus, human rights law can have a profound effect on society.

[172]Matas, at 111.

[173]Matas, at 113.

Appendix A
Application of Human Rights Law to Canadians

Law or Legislation	To whom does it apply?	Whom does the law protect?	What rights are covered by the law?	Where will one go for assistance?
International Bill of Rights Other International treaties or custom	federal and provincial governments	Canadians	basic human rights and civil liberties	after all legal avenues do not work in Canada, make individual complaint or communication to the United Nations
Canadian Charter of Rights and Freedoms	federal, provincial and municipal governments	Canadian citizens or individuals (see wording of individual sections)	basic human rights and civil liberties	Canadian courts are permitted to provide Charter remedies
Provincial human rights legislation	provincial governments and private citizens	people in the particular province	freedom from discrimination in particular settings (e.g., employment and tenancy) under particular grounds (e.g., race and religion); settings and grounds vary between provinces	various provincial human rights commissions administer the legislation
Canadian human rights legislation	federal government and private businesses under federal jurisdiction (e.g., banks)	people dealing with the federal government or businesses under federal jurisdiction	freedom from discrimination in particular settings (e.g., employment and tenancy) under particular grounds (e.g., race and religion)	Federal Human Rights Commission
Criminal Code of Canada and related legislation	individuals in Canada	individuals in Canada	war crimes provisions; hate crimes provisions; harassment and assault laws; sentencing provisions which apply to crimes involving discrimination	Courts/police

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