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The effectiveness of non-
discrimination and equality
protections in Canada and in
Europe: combating racism and
guaranteeing substantive
equality

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Abbreviations

CDEG	Steering Committee for Equality between Women and Men
CDDH	Steering Committee for Human Rights
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CHRA	Canadian Human Rights Act
<i>Charter</i>	Canadian Charter of Rights and Fundamental Freedoms
ECRI	European Commission against Racism and Intolerance
ECHR	European Convention on Human Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Governmental Organisation
SCC	Supreme Court of Canada
s.	section

1 Introduction

In the context of today's globalised, multi-ethnic modern societies, robust protections from discrimination and guarantees of equality become all the more important. In order to have any real meaning, freedoms to move, work and live across borders necessitate corresponding protections against the exclusionary effects of discrimination on the one hand, and positive action on the part of states to create the conditions for the enjoyment of substantive equality on the other.

Despite the existence of formal guarantees and protections, evidence of the persistence or re-emergence of racial intolerance and racially-motivated violence has prompted a closer examination of the causes of the problem and consideration of possible mechanisms for addressing the phenomenon. In Canada, a country which prides itself on its multicultural, progressive, generally tolerant image, racism and unfair treatment are reported in large numbers, and particularly among Aboriginal peoples. In Europe, racial and ethnic discrimination, while never totally eliminated, seemed to resurface at a time when the continent became increasingly diverse as a result of migration and movement. While Europe speaks of union, of integration and of flexibility across borders, the 1990s were a decade that witnessed a rise in direct and indirect discrimination and racially motivated violence, matched with a move to the right in many European governments, and more restrictive policies affecting immigrants and refugees.

At an international level, concerns about the rise in intolerance and discrimination were expressed at the 2001 World Conference on Racism. In the opening Declaration of the conference, participants stated that they were "[a]larmed by the emergence and continued occurrence of racism, racial discrimination, xenophobia and related intolerance in their more subtle and contemporary forms and manifestations, as well as by other ideologies and

practices based on racial or ethnic discrimination or superiority.”¹ It is against this background and within this context that the importance of equality becomes all the more acute.

In response to their purported concern at the dismal reality of modern-day racism and its various manifestations, world leaders and governments issue statements of hope and optimism reflecting a vision of society which would embrace the richness of diversity rather than actively working against it. Indeed, the Declaration made prior to the 2001 World Conference against Racism expressed such laudable sentiments:

Instead of allowing diversity of race and culture to become a limiting factor in human exchange and development...we must discern in such diversity the potential for mutual enrichment...For too long such diversity has been treated as a threat rather than as a gift. And too often that threat has been expressed in racial contempt and conflict, in exclusion, discrimination and intolerance.²

Against the backdrop of statements of tolerance and diversity, the World Conference pledged that it should provide the standards, structures and remedies to “ensure full recognition of the dignity and equality of all.” Some efforts have been made in attempts to find ways to combat racism but the reality is perhaps less hopeful, and indeed even in Europe and Canada, two areas of the world that portray themselves as models of democracy and human rights, there are gaps in the existing mechanisms to deal with racial intolerance.

This paper will examine efforts in both Canada and Europe to guarantee non-discrimination and equality, and particularly, their strategies as regards racial discrimination. The scope of this analysis will be limited to examining the effectiveness of protections provided for by the European Convention on

¹ Report of the World Conference against Racism, 2001, available at: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.Conf.189.12.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.Conf.189.12.En?Opendocument).

² “Tolerance and Diversity: A Vision for the 21st Century”, available at <http://www.unhchr.ch/html/racism/index.htm>, quoted in S. Fredman, “Introduction” in S. Fredman, ed., *Discrimination and Human Rights: The Case of Racism* (Oxford: Oxford University Press, 2001) at 1.

Human Rights (ECHR),³ including its recently adopted Protocol No. 12, and will not address other measures in Europe such as those provided for within the system and structure of the European Union. The analysis will neither address the international system of guarantees or standards developed by the United Nations or its various mechanisms or instruments. The paper will rather compare and analyse the differences in approach adopted by the Canadian model and by decisions of the European Court of Human Rights to combat racial discrimination. In so doing, an attempt will be made to assess the relative effectiveness of the different models adopted in tackling racism and in creating the conditions for substantive equality. It will also attempt to identify gaps in view of the strategies chosen in the respective jurisdictions. While courts or jurisdictions around the world have adopted varying approaches to non-discrimination and equality for different historical, cultural, philosophical, or legal reasons, the attempt here will be to assess the strategies developed by the Council of Europe and by the Canadian Supreme Court in their efforts to bring substantive meaning to the concept of “equality” in the fight against racial discrimination.

As a final proviso, it is perhaps important to acknowledge that while Canada is a nation state, and the Canadian Supreme Court has only to contend with a national jurisdiction and with the provinces and territories of Canada, the ECHR is dealing with the potential jurisdiction of all 47 members of the Council of Europe. One could therefore question the appropriateness of comparing such seemingly different jurisdictions with their vastly different scopes of application. However, irrespective of the nature of the judicial structures at hand, what is important to consider is the approach that a legal system chooses to adopt in attempting to tackle discrimination and racism. In any event, whether we are dealing with a whole group of countries in a region, or with the diversity of peoples within one nation state, equality is a guarantee for all and an internationally recognised human right, enshrined in all major human rights instruments. We, as members of the international

³ 4 November 1950, E.T.S. No. 5 (hereinafter “ECHR”).

community, have the duty and obligation to respect equality and to create the conditions for its real exercise, whether we are in Ottawa, Strasbourg, or further afield. Equality is about belonging, and no matter where one is physically located, this fundamental human right and need is critical to one's sense of inclusion and participation in a free and democratic society.

2 Defining the concepts

Before proceeding to examine how non-discrimination and equality are protected in Canada and in the context of the ECHR, the definitions of “equality”, “discrimination”, and “racism” will first be briefly explored. While the meanings of these concepts could be analysed at length, only a brief consideration will be presented here, reserving analysis of how discrimination and equality have been interpreted in the Canadian and European paradigms to subsequent chapters.

2.1 The concept of “equality”

Although the notion of “equality” is widely enshrined in legal form across the world in both domestic and international human rights documents as well as in various domestic statutory provisions, the more one delves into the concept, the more difficult and complex it becomes to define it or to identify a common understanding or meaning. As one commentator has noted, “we all have an intuitive grasp of the meaning of equality and what it entails..” and “[y]et the more closely we examine it, the more its meaning shifts”.⁴ The formal principle of equality derived from Aristotle states that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.”⁵ While such formal or strict conceptions of equality would suggest that equal treatment guarantees equality, it is clear that in many cases, equal treatment can perpetuate inequalities. Similarly, a law which on its face may appear equal, when applied to all in the same manner, can have the effect of negatively

⁴ S. Fredman, *Discrimination Law* (Oxford University Press: New York, 2002) at 1.

⁵ Aristotle, *Ethica Nichomacea*, translation by W.D. Ross (London: Oxford University Press, 1925), Book V3 at 1131a-6, cited also in *Andrews, infra*, note 52 at 166.

impacting certain categories of people who, owing to disadvantage and vulnerabilities, will be further excluded.⁶

One main limitation of the concept of equality is also that “it promises more than it can deliver.”⁷ The nature of our societies as market economies, open to competition, means that “absolute” substantive equality is impossible, and perhaps even undesirable. As German scholar Susanne Baer has written about the history of the totalitarian Reich, one must be careful not to go too far in creating exactly the same position for all, warning against “the nightmare of the equality state of total conformity”.⁸

The concept of “substantive equality” will frequently be referred to in this paper, and particularly in connection with the development of the Canadian jurisprudence on equality. According to the Chief Justice of the Supreme Court of Canada (SCC), “substantive equality”, simply put, “connotes actual, genuine equality – equality that makes a difference in the lives of ordinary men, women, and children”.⁹ In contrast with formal Aristotelian equality, substantive equality is founded on the principle that all human beings are of equal worth and are possessed of the same innate human dignity, which the law must uphold and protect, not just in form, but in substance.¹⁰ The Canadian model of equality developed since the adoption of the *Canadian Charter of Rights and Freedoms*¹¹ encapsulates the concept

⁶ For an overview of the historical development of the concepts of equality before the law and equal protection of the laws and non-discrimination by means of the law, see the analysis presented by Professor Eide in A. Eide & T. Opsahl, “Equality and Non-Discrimination”, written communication presented in Proceedings of the 7th International Colloquy on the European Convention on Human Rights at 103, cited in L. Weiwei, “Equality and Non-Discrimination Under International Human Rights Law”, Norwegian Centre for Human Rights, Research Notes 03/2004, available at: <http://www.humanrights.uio.no/forskning/publ/publikasjonsliste.html>.

⁷ See Rt. Hon. B. McLachlin, “Equality: the Most Difficult Right” (2001) 14 S.C.L.R. (2d) 17 at 20.

⁸ *Ibid.* at 20.

⁹ *Ibid.* at 18.

¹⁰ *Ibid.* at 21.

¹¹ *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, enacted by the *Canada Act 1982*, U.K. 1982, Chap. 11 [hereinafter “*Charter*”].

of “substantive equality”, and its meaning will be explored in detail in a later chapter as well.¹²

Although “equality” is a difficult concept to agree on in terms of definition and exact meaning, one point that is important point to make, particularly in Europe, is that assimilation is not equality. On the contrary, equality is about recognising difference, acknowledging and respecting its existence, without ascribing any negative association or seeking to eliminate it. Although acknowledgement, recognition and tolerance of difference involves a more difficult, time-consuming process than merely seeking to assimilate those who are not “like us”, equality necessarily includes some degree of effort made on all sides to live together, to cooperate, and to exercise mutual respect for one another as individuals, but also as members of a group or society. As one author has written in referring to the ideas of Jurgen Habermas, “[w]hile injustice involves a constraint of freedom and a violation of human dignity through a process of oppression and domination, justice involves the institutional conditions necessary for the development and exercise of individual capacities for collective communication and cooperation.”¹³ As such, while equality might quite fairly be described as a difficult, nebulous concept to define and to strive toward, what is clear is that some degree of cooperation and solidarity to one another as equal members of the human race, recognised as such, lies at the heart of the attainment of equality.

¹² It is worth acknowledging here that while the concept of “substantive equality” will be addressed in particular as regards *Charter* jurisprudence, it is not a new idea conceived of in Canada. Liberal German scholars of the Weimar Republic held that equality is not only about avoiding formal distinctions, but involves fighting against inappropriate, unjust or irrelevant distinctions. The new Federal Republic in Germany referred to substantive equality, or “material equality” as the Grundnorm of the 1945 German constitution. In addition, in the famous American case of *Brown v. Board of Education*, 344 U.S. 141 (1952), the Court reflected the concept of substantive equality. In recent years the concept has also been embraced in South Africa and in Israel. See McLachlin, *supra* note 7 at 21.

¹³ A. Mooney-Cotter, *Race Matters: An International Legal Analysis of Race Discrimination* (Aldershot: Ashgate, 2006) at 4 and in note 6, referring to J. Habermas, *Between Facts and Norms*, 1998, at 8.

2.2 Discrimination and racism

A definition of discrimination can be found in all important human rights instruments, although wording may differ. Generally speaking, discrimination is understood as an unlawful way of treating people differently from others on the grounds of race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.¹⁴ Perhaps a more pragmatic definition, reflecting as well the consequences of discrimination and exclusion, is that suggested by Anne-Marie Mooney Cotter: “[d]iscrimination is the withholding of from the oppressed and subordinated what enables them to exercise private and public autonomy.”¹⁵

As some authors have noted, non-discrimination and equality are two sides of the same coin, and are indivisible.¹⁶ As has been explained, “efforts to combat them must be rooted in the same fundamental principle.”¹⁷

As is the case with equality, this is little consensus on what the concepts of racism or racial discrimination encompass. At the international level, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) refers to racial discrimination as differences in treatment linked to “race, colour, descent or national or ethnic origins.”¹⁸ The very notion of “race” is one that is problematic, and increasingly it is recognised as itself being a social construct, rather than referring to any objective characteristics.¹⁹ Racial conflicts today are thus conflicts between socially constructed groups, and the conflicts “reside not in some immutable

¹⁴ I. Westendorp, “Double Discrimination; Racism and Sexism Combined” in F. Coomans et al., eds., *Rendering Justice to the Vulnerable, Liber Amicorum in Honour of Theo van Boven* (The Hague: Kluwer Law International, 2000) at 299-300.

¹⁵ Mooney Cotter, *supra* note 13 at 4.

¹⁶ P.-H. Imbert, Foreword to *Non-Discrimination: a human right: Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights, Strasbourg, 11 October 2005* (Strasbourg: Council of Europe Publishing, 2006) at 5.

¹⁷ *Ibid.*

¹⁸ ICERD, available at <http://www.ohchr.org/english/law/cerd.htm>, Article 1.

¹⁹ Fredman, *supra* note 2 at 10.

difference rigorously coded by our genes but in our social institutions. We can change these institutions; we need only have the political and moral will to do so.”²⁰ Racism is therefore about trying to legitimate domination and subordination, about polarisation of opposites. It reflects the language of “we” and “they”, “Self” and “Other”, where the “Other” or “they” are synonymous with inferiority, subjugation, and in the most extreme of cases, are even rendered sub-human.²¹ As Rudyard Kipling once wrote, “All the people like us are We, And everyone else is They.”²²

Racism has historically been defined as “the belief that race is the primary determinant of human capacities, that a certain race is inherently superior or inferior to others, and/or that individuals should be treated differently according to their racial designation.”²³ Although historians disagree on when the whole concept of “race” emerged, the broader concept of racism and its consequences is captured by one author who explains the phenomenon as a “system of oppression, a nexus of racist beliefs, whether explicitly, tacit or unconscious, practices, organizations and institutions that combine to discriminate against and societally marginalize a class of people who share a common racial designation, based on that designation.”²⁴

Racism can be understood, and certainly felt by those victim to its effects, as a whole system that works to undermine an individual’s or a group’s ability to belong, to be recognised as equal in society, and as equally deserving of respect or dignity.

It is clear from the difficulty inherent in attempts to define racism and racial discrimination that the phenomena are indeed complex. While this paper will address attempts to combat racism and racial discrimination in

²⁰ J. L. Graves, Jr., *The Emperor’s New Clothes- Biological Theories of Race at the Millennium* (New Jersey: Rutgers University Press, 2001) at 155-156, cited in P. Justesen, “Equality for Ethnic Minorities- International and Danish Perspectives” (2003) 10 *International Journal on Minority and Group Rights* 1 at 10.

²¹ *Ibid.*

²² Rudyard Kipling, *We and They*, 1926

²³ Mooney-Cotter, *supra* note 13 at 7-8.

²⁴ *Ibid.* at 8. Also see Mooney-Cotter’s analysis of the different subcategories of racism which she defines as individual racism, structural racism, and ideological racism at 9.

evaluating strategies adopted in both Canada and in Europe to guarantee equality and protect against discrimination, the causes of racism will not be explored in depth. As has been pointed out in a publication of the Council of Europe on strategies to tackle racist and xenophobic violence in Europe, while there is considerable literature on the subject of racism and xenophobia in general, there is relatively little writing attempting to explain the causes of violence beyond mere description of the phenomena.²⁵ Arguably, this lack of emphasis on what lies at the origin or heart of discrimination and racism is part of the problem; it may be that by seeking to better understand how such intolerance festers, feeds and grows, we will be in a better position to remodel or adapt existing strategies, legal or otherwise, for combating racial discrimination. Although the scope of this paper is limited, to the extent possible in a final chapter, an attempt will be made to suggest how to complement or complete existing judicial strategies.

²⁵ R.Oakley, *Tackling racist and xenophobic violence in Europe: Review and practical guidance* (Strasbourg: Council of Europe Publishing, 1996).

3 Legal responses to racism and discrimination in Canada

“Canada is a peculiar country. We are a nation full of immigrants—that hates immigrants.”

— Irving Abella, author and history professor at York University in Toronto

Before turning to a consideration of how protections for equality rights and non-discrimination have evolved in Canada through the courts’ interpretation of the relevant provisions of the *Charter*, the context of racism and racial discrimination in Canada will first be explored. The intention here is not to present a comprehensive overview of the history of racism in Canada, but rather to understand how the law was used prior to the advent of the *Charter* to perpetuate inequalities in Canada, rather than to redress them. This more dismal, lesser known aspect of the evolution of the Canadian approach to equality is also important to consider, not only historically as one phase in the development of our interpretation of equality rights, but also to help understand why inequalities persist. The legacy of some of these policies or approaches still afflicts disadvantaged Canadians today, explaining why our task in guaranteeing true equality for all remains far from complete.

3.1 Context and evolution of legal responses to racial discrimination in Canada

Canada is indeed a multiracial, multicultural society, whose citizens trace their ethnic origin and ancestry to all regions of the world. Canada officially embraced the concept of “multiculturalism” in the

Multiculturalism Act of 1988,²⁶ and presents itself as an open and tolerant society that has adapted well to the major population changes it has experienced since Confederation in 1867. Nevertheless, despite the face of Canada today and its image at home and in the world, the story of equality rights in Canada begins with a policy of exclusion and the use of the law to reinforce inequality.

3.1.1 Active discrimination and the politics of exclusion

The country we now refer to as Canada was evidently not a “*terra nullius*” before the arrival of the first colonials from France and England. The First Nations peoples, an extremely diverse group of several hundred cultural traditions and languages, dominated the territory now referred to as Canada for thousands of years. Other Europeans followed the French and English, and eventually many other peoples of diverse origins from Asia and Africa arrived to make Canada what it is today, a composite of people of different races and cultural groups. Clearly Canada is not unique as a multiracial territory, though much has been made of its political choices in opting for a “multicultural” model of social integration rather than that the so-called “melting pot” approach favoured by the United States.²⁷ In contrast to its larger southern neighbour, Canada claims to have chosen an approach that “puts more emphasis on maintaining and celebrating the unique traditions of its component groups.”²⁸

Despite these laudable claims of respect for and celebration of diversity, the prevailing conception of equality in Canada in the nineteenth and early twentieth century was that of treating “likes” alike and “unlikes” alike as a means to perpetuate discrimination. The Chief Justice of the Supreme Court of Canada (SCC), the Right Honourable Beverley McLachlin, has summarised what she characterises as the “first phase” of Canada’s legal

²⁶ For the full text of the Multiculturalism Act, see online: http://www.pch.gc.ca/progs/multi/policy/act_e.cfm.

²⁷ Rt. Hon. B. McLachlin, “Racism and the Law: The Canadian Experience” (2002) 1:1 *Journal of Law & Equality* 7 at 9.

²⁸ *Ibid.*

treatment of race and ethnicity as a period of both active discrimination and passive tolerance of inequality.²⁹ She goes on to specify that it was assumed by most people, including the judges of the SCC at the time, that it was legitimate, perhaps even desirable, to impose burdens and withhold benefits on the basis of race and ethnicity.³⁰

As a potent example of how Canada's legal system was used to subordinate certain minority groups until relatively recently, one need only consider the abhorrent treatment of Aboriginal peoples in Canada. Aboriginal peoples were confined to reserves unless they had special permits to leave, were forbidden to enter public houses and were denied the right to vote until the 1960s. Aboriginal children were also victimised in large numbers and taken away from their families to be placed in "residential schools" where they were forbidden to speak their own languages or practice their traditions. Far from "celebrating the unique traditions of its component groups", the Canadian government, until as late as the mid-1970s, implemented a policy of "civilising" Aboriginal children in institutions run by religious organisations, where widespread severe physical, psychological and sexual abuse devastated generations of children and marred Aboriginal self-development and culture, to say the least.³¹

Regrettably, Canada's experience with inequality extends to many other groups of Canadians, including oriental Canadians, many of whom came to work as labourers on the Canadian railway. Prime Minister Macdonald proclaimed at the time that this "alien race..would not and could not be expected to assimilate with our Aryan population".³² The government also imposed what is commonly referred to as a "Chinese Head Tax", forcing all

²⁹ *Ibid.* at 14.

³⁰ *Ibid.* at 9 & 14.

³¹ For more information about the treatment of Aboriginal peoples and about residential schools in particular, see the Canadian government's Report of the Royal Commission on Aboriginal Peoples, online:< http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm10_e.html>. The last federally-run residential school in Canada, in the province of Saskatchewan, only closed in 1994. See the website of the Canadian Department of Indian and Northern Affairs Canada. Online:<http://www.ainc-inac.gc.ca/gs/schl_e.html>.

³² J.W.St.G. Walker, "Race", *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Canada: Wilfred Laurier UP, 1997) at 58.

Chinese people entering Canada to pay a tax that amounted to an enormous sum at the beginning of the 1900s, while it took away the right to vote from Chinese, Japanese and East Indian Canadians.³³ This overt discrimination against Asian Canadians continued through to World War II with the internment of Japanese Canadians in concentration camps, and the confiscation of their property.³⁴

African Canadians were likewise victims of the discrimination of Canadian law. Slavery was abolished in Canada in 1833, but Black Canadians were often segregated and excluded by law from schools, hospitals, the labour market, housing, as well as from a whole host of other opportunities.³⁵ In the infamous case of *Christie v. York Corporation*, a Black man living in Montreal in the 1930s was denied a drink at a bar on the grounds that the bar no longer served “coloured” people.³⁶ The SCC dismissed Christie’s claim, ruling that the law could not interfere in the business choices of a tavern owner. In so doing, the Court rejected the possibility that it could infringe on an individual’s “personal choice” to be racist. Other groups also suffered from racial and ethnic discrimination, and anti-Semitism and legalised discrimination against Jewish Canadians continued until the end of the Second World War.³⁷

As Chief Justice McLachlin suggests, beyond overtly active discrimination, this first phase was also characterised by “passive tolerance of inequality”, where discrimination was seen as the personal choice of the individual and the law would not interfere. Arguably, such passive tolerance was all the more insidious, and only served to entrench, and even protect, racial discrimination in Canada.³⁸

³³ *Ibid.* at 25.

³⁴ *Ibid.* at 20.

³⁵ *Ibid.* at 124.

³⁶ *Christie v. York Corporation*, [1940] S.C.R. 139.

³⁷ McLachlin, *supra* note 27 at 14.

³⁸ *Ibid.* at 15.

3.1.2 Removing the barriers to equality of opportunity: *de jure* equality

Following the end of the Second World War and the proclamation of the United Nations' Universal Declaration of Human Rights in 1950,³⁹ awareness in Canada about the equal worth of all human beings began to grow, and ideas began to emerge that questioned the ethic of exclusion that had characterised much of the Canadian experience with diversity to that point. Eventually, a model of equality of opportunity emerged, which granted basic entitlements to everyone, regardless of race, gender or other personal characteristics. Through the removal of discriminatory legal and institutional barriers, *de jure* equality began to be guaranteed in Canada, and in the decades following the 1950s, the federal government and all provinces adopted human rights codes.⁴⁰ In 1960, Canada enacted a declaratory statement of human rights in the *Canadian Bill of Rights*.⁴¹ Gradually, jurisprudence developed, mandating equal treatment in the vast majority of cases and setting out limited scenarios where unequal treatment might be acceptable, such as in the case of a *bona fide* occupational requirement.⁴²

While the advances of the 1950s, 1960s and 1970s were significant and posed a challenge to the mindset of active policies of exclusion as well as the ethic of passive acceptance of racial discrimination, they were not enough. "Equal opportunity" was a monumental first step, though it became evident that if things were gradually changing for those communities traditionally disadvantaged, the pace of change was too slow to bring those who were locked in lower-level positions and underrepresented in the professions any closer to true equality. Many argued at the time that more proactive, assertive measures were required. In her 1984 report on the Status of Women, Rosalie Abella, today a judge of the Canadian Supreme

³⁹ *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

⁴⁰ McLachlin, *supra* note 27 at 15-16.

⁴¹ S.C. 1960, c.44.

⁴² McLachlin, *supra* note 27 at 16.

Court, called for the adoption of an employment equity program to end discrimination in salaries and wages. She argued that

[i]t is not that individuals in the designated groups are inherently unable to achieve equality on their own, it is that the obstacles in their way are so formidable and self-perpetuating that they cannot be overcome without intervention. It is both intolerable and insensitive if we simply wait and hope that the barriers will disappear with time. Equality in employment will not happen unless we make it happen.⁴³

Justice Abella's words set the tone for the next stage of equality jurisprudence in Canada and remain particularly powerful and relevant. As will be discussed below, the Courts eventually moved beyond formal or *de jure* guarantees to equality, and toward a more proactive use of the law that sought to positively create conditions for the achievement of substantive equality in Canada.

3.1.3 The advent of the *Charter*

The suggestion in Justice Abella's words is that governments and courts should take a more active role in making equality happen, through positive action or what have been termed, mainly in the United States, "affirmative action programmes". While "affirmative action" measures have been much more restrained in Canada than in the United States, governments in Canada have adopted other policies aimed at enhancing the position of racial minorities and women.⁴⁴

Beyond positive measures or programmes, the primary tool that marked this next phase of the Canadian experience with equality was the advent of the

⁴³ Canada, Commission of Inquiry, Report of the Commission on Equality in Employment (Ottawa: Minister of Supply and Services, 1984) (Commissioner: R.S. Abella) at 254, cited in McLachlin, *supra* note 27 at note 31.

⁴⁴ As examples, see the Employment Equity in Canada – Progress: 1987-2000, online: <<http://www.hrsdc.gc.ca/en/lp/lo/lsw/we/review/progress.shtml>>. One very important initiative is that undertaken by the Canadian Public Service Commission to provide assistance to managers and human rights professionals in the implementation of employment equity in the workplace. See online: <http://www.psc-cfp.gc.ca/ee/index_e.htm>.

Charter. As will be discussed at length in the following chapter, from an early stage, the SCC moved away from formalistic concepts of equality to look beyond the surface to how differential treatment actually affects those most vulnerable in Canadian society. In so doing, the *Charter's* equality provisions became more than abstract words in a constitutional text, and really came to embody the “substantive equality” approach with its emphasis on the innate human dignity of every person in society. While the *Charter* has undoubtedly had a significant impact on issues of racial and ethnic discrimination, in a later chapter its limitations will also be considered in analysing its effectiveness as a tool in combating racism in Canada.

3.2 Non-discrimination and equality guarantees: the *Charter of Rights and Freedoms*

As presented above, the law was at times used in Canada during the nineteenth and early part of the twentieth century to reinforce inequality rather than to curb discrimination. Thankfully, Canada’s legal responses to fundamental human rights have evolved since then, and emphasis will now be placed on the most recent phase in this evolution, namely, when the law in Canada began to positively seek to enhance the equality and dignity of every individual through what has been termed “substantive equality”.⁴⁵

Although many Canadian statutes include anti-discrimination provisions, the main legal instruments prohibiting discrimination are the *Charter*, the federal and provincial human rights acts and various employment equity acts.⁴⁶ The *Criminal Code* also contains provisions prohibiting hate propaganda.⁴⁷ For the purposes of this paper, analysis will be limited to

⁴⁵ McLachlin, *supra*, note 27 at 9.

⁴⁶ See for example the *Canadian Human Rights Act* (CHRA) which came into force in 1978 and the *Canada Employment Equity Act* 1995 for legislation at the national level.

⁴⁷ R.S.C. 1985 c. C-46, online: < <http://www.canlii.org/ca/sta/c-46>>.

examining protections provided under the *Charter* and the development and evolution of the notion of equality by the Canadian Supreme Court in its interpretation of the equality provisions of the *Charter*. In examining the impact of the *Charter* in guaranteeing meaningful, substantive equality in Canada, gaps in the existing system will be explored and regard will be had to broader measures that could be adopted in seeking to eradicate racial discrimination. In so doing, recognition will be given to the limits of the law, and to the need for a more holistic, comprehensive approach to address intolerance in Canadian society.

3.2.1 The content of equality and non-discrimination guarantees provided by the *Charter*

In 1982, the *Charter* became part of the Constitution of Canada and therefore part of the supreme law of the land.⁴⁸ As such, it can only be repealed by constitutional amendment, which in Canada is a very complex undertaking. The *Charter* guarantees fundamental freedoms such as freedom of conscience and religion, freedom of expression and freedom of association, democratic rights, mobility rights, legal rights and language rights. Three separate provisions of the *Charter* deal with equality rights: s. 15, the general equality rights section; s.27, a declaratory section that provides for Canada's multicultural heritage; and s. 28 which deals with equality based on sex. The main provision guaranteeing and formulating the concept of equality is s.15.

Section 15(1) of the *Charter* came into force on 17 April 1985 after a three-year implemented delay and provides that:

⁴⁸ Section 52(1) of the *Constitution Act* states that “[t]he Constitution 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.”

- (1) Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(1) comprises four different formulations of the concept of equality: we are equal before the law, equal under the law, entitled to equal benefit of the law, and to the equal protection of the law. One of the reasons for clearly setting forth these four aspects of the principle was to depart from formerly restrictive interpretations of the phrase “equality before the law” in the interpretation and application of the Canadian Bill of Rights.⁴⁹

While the notwithstanding and override clauses of the *Charter* will be discussed in a later section below, it is important to note that no protection is absolute and the *Charter* clearly sets forth this limitation.

The scope of the *Charter's* reach is limited to government or state action, and does not include private action. Section 32 provides for the *Charter's* application to the Canadian Parliament and government of Canada, as well as to the governments and legislatures of each Canadian province. Claims of discrimination in the private sector, including in the employment context, are dealt with by anti-discrimination legislation or human rights statutes. The limits of the *Charter* to address inequality or discrimination in a meaningful, comprehensive way will be addressed in Chapter 5 in assessing the effectiveness of existing measures of protection in combating discrimination and racism in Canada.

3.2.2 Evolution of the interpretation of equality by the Supreme Court of Canada

Equality rights came into effect on 17 April 1985, whereas the first equality cases reached the Canadian Supreme Court in 1989. Since that

⁴⁹ McLachlin, *supra* note 7 at 17.

time, the interpretation of what “equality rights” mean in the Canadian context has significantly developed and evolved, albeit not without disagreement. Indeed, the complexity of the concept once prompted Chief Justice of the Supreme Court of Canada, Beverley McLachlin to refer to equality as “the most difficult right”.⁵⁰ Ten years later Justice Iacobucci of the Supreme Court also described the difficulty in defining the concept:

The quest for equality expresses some of humanity’s highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary is to transform these ideals and aspirations into a practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.⁵¹

The development of this transformation of an ideal into a practice “meaningful to Canadians” will be traced below, with particular attention placed on how the concept has evolved and broadened over the last 25 years of Canadian Supreme Court jurisprudence.

3.2.2.1 The move away from formal equality

*Andrews*⁵² was the first s.15 ruling, issued by the Supreme Court in 1989. At issue in *Andrews* was whether provincial legislation in British Columbia imposing a citizenship requirement on entry to the legal profession contravened s. 15 of the *Charter*. The British Columbia Court of Appeal had applied a formal equality test in its consideration of s.15, finding that similarly situated persons were entitled to similar treatment, while different treatment of persons differently situated was justified. The Supreme Court of Canada upheld the BC Court’s decision to strike down the citizenship requirement as it was discriminatory, although it rejected its formal equality analysis. One of the issues before the Court was whether any distinction of

⁵⁰ *Ibid.*

⁵¹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at 507 [hereinafter “*Law*”].

⁵² *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6(QL) [hereinafter “*Andrews*”], considering *Barristers and Solicitors Act*, R.S.B.C. 1989, c.26, s.42.

any kind in law is *prima facie* discriminatory. In writing for the Court, Justice McIntyre described the concept of discrimination as follows:

..discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁵³

In *Andrews* the Court thus determined that to find a provision in contravention of section 15 requires essentially two elements:

1. inequality, or a distinction based on personal characteristics with respect to treatment and/or impact in the formulation or application of the law, and;
2. discrimination, evidenced by an effect of prejudice to a disadvantaged individual or group, as determined by the enumerated grounds and/or those non-enumerated grounds analogous to them.

The Supreme Court therefore made clear in *Andrews* that not all distinctions will be found to be “discriminatory”, and indeed, some legislative classifications are necessary for the governance of modern society. Indeed, the purpose of section 15 was not to eliminate all distinctions in laws, but rather only those that are discriminatory.⁵⁴

The Court stated that the test for discrimination was not whether a rule has been applied uniformly to everyone, since the rule might have quite

⁵³ *Andrews, supra*, note 52 at 174, para. 37 (QL).

⁵⁴ M. Hurley, “Charter equality rights: interpretation of s.15 in Supreme Court of Canada decisions”, revised March 2007, Background Paper BP-402E, Library of Parliament Parliamentary Information and Research Service (Ottawa: Queen’s Printer for Canada, 2007) at 2.

different effects on different persons.⁵⁵ In so doing, the Supreme Court explicitly recognised that equal treatment does not necessarily result in inequality, and identical treatment may frequently produce serious inequality. This departure in *Andrews* from strict “formal equality” tests which had been applied since the coming into effect of s.15 of the *Charter*⁵⁶ represented a major shift in the Canadian jurisprudence and the start of what has been termed the “substantive equality” approach adopted by the Canadian Supreme Court.

The approach initially introduced in *Andrews* was further expanded and developed through subsequent decisions of the Supreme Court. In *R. v. Turpin*,⁵⁷ the Court examined the issue of the constitutionality of *Criminal Code*⁵⁸ provisions which at the time permitted accused persons only in the province of Alberta to elect trial by judge alone on a murder charge. The Court found that while there was a denial of equality in law, it was not based on an enumerated or analogous ground as found in s. 15 of the Charter, and thus was not a distinction “with discrimination”. The Court reinforced one of the main principles enunciated in *Andrews*, namely that the test for discrimination is not whether a rule has been uniformly applied to all. It went on to explain the need to examine the broader context for purposes of establishing a section 15 violation based on analogous grounds:

...it is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independently from the particular legal distinction being challenged.⁵⁹

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 2, and note 2.

⁵⁷ *R. v. Turpin*, [1989] 1 S.C.R. 1296, [1989] S.C.J. No.47 (QL) [hereinafter “*Turpin*”].

⁵⁸ Now R.S.C. 1985, c. C-46.

⁵⁹ *Turpin*, *supra*, note 57 at para. 45(QL).

Following *Andrews* and some of the important decisions that applied its broader contextual approach, the next definitive phase in the development of equality jurisprudence in Canada was marked by a division among the Court in an important trilogy of cases in 1995.⁶⁰ Although the approach developed in *Andrews* and later in *Turpin* was applied to a certain extent in these cases, there were important variations that reflected the differences of opinion in s.15 claims among the members of the Supreme Court.⁶¹ The principle of human dignity was introduced during this phase, later resurfaced in subsequent cases and ultimately emerged as a guiding principle of the Canadian model. In *Miron v. Trudel*, the Court stated that the “overarching” purpose of section 15 is “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.”⁶² This same statement was taken up in the Court’s subsequent rulings,⁶³ and the role of human dignity in s.15 analysis was later confirmed in the landmark decision of *Law v. Canada (Minister of Employment and Immigration)*.

3.2.2.2 Toward a model of human dignity

Through 1998, until the *Law* decision clarified the Court’s approach, divisions among the Court remained largely unresolved and it was unclear which direction the Supreme Court would decide to take in its interpretations of s.15. *Law* was a unanimous decision of the Supreme Court which marked a significant development in Canadian equality jurisprudence. The *Law* decision consolidated existing principles concerning the purpose of s.15 and the Court’s approach to the provision, recalling that in evaluating a claim of discrimination, a Court should find: (i)

⁶⁰ *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

⁶¹ Hurley, *supra* note 54 at 5 and G. Beaudoin, & E. Mendes, *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham: LexisNexis Butterworths, 2005) at 931-2.

⁶² *Miron v. Trudel*, [1995] 2 S.C.R. 418, para. 131.

⁶³ See *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

distinction(s) in treatment; (ii) on the basis of an enumerated or analogous ground; and (iii) that amount(s) to discrimination.⁶⁴

The most important innovation of *Law*, however, lies in the reformulation of the evaluative framework that courts are to adopt in assessing claims made on the grounds of s.15.⁶⁵ Most notably, the Court underscored the pivotal role of “human dignity”, the element emphasised by Justice L’Heureux-Dubé in a minority ruling in *Egan v. Canada*.⁶⁶ In *Law*, the Court described “human dignity” as follows:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking in account all of the circumstances regarding the individuals affected and excluded by the law?⁶⁷

Law also emphasised the importance of contextual considerations, which aid in assessing whether s.15 has been infringed, and whether legislation demeans the claimant’s dignity, *inter alia*:⁶⁸

- (a) pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue;
- (b) the link, if any, between the ground on which the claim is based and the actual need, capacity or circumstances of the claimants or others;

⁶⁴ Hurley *supra* note 54 at 6.

⁶⁵ *Ibid.*

⁶⁶ *Egan v. Canada*, *supra* note 60 at para. 39.

⁶⁷ *Law*, *supra* note 51 at para. 53.

⁶⁸ Beaudoin & Mendes, *supra* note 61 at 934.

- (c) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group; and
- (d) the nature and scope of the interests affected by the impugned law.

The definitive shift in Canadian jurisprudence to an emphasis on the role of human dignity in s.15 cases is evidenced by its recurrence in cases that followed *Law*. The word “dignity” does not appear at all in the reasons set out in *Andrews*, and although previous cases made occasional references to dignity,⁶⁹ the concept appears 29 times in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,⁷⁰ and 44 times in *M. v. H.*,⁷¹ two important equality cases dating from the late 1990s.⁷²

In summarising the main features of the model of equality developed in *Law* and expanded in subsequent cases, it is important to highlight that the Supreme Court made clear that equality rights cases must be approached in a manner that is both contextual and purposive. In *Law*, Justice Iacobucci noted that from the outset, equality jurisprudence had adopted a contextual approach,⁷³ and that having accepted that one must take into account the effects as well as the purposes of a law, the Court recognised that it is essential to assess the manner in which the law operates in broad historical, social and political contexts.⁷⁴

⁶⁹ See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [1997] S.C.J. No.86 (QL), at para. 54, *Miron v. Trudel*, [1995] 2 S.C.R. 418, [1995] S.C.J. No. 44 (QL), at para. 132. Cf. the dissenting reasons of Wilson J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No.122 (QL). See also Justice L’Heureux-Dubé’s minority opinion in *Egan v. Canada*, *supra* note 60, at para. 39.

⁷⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] S.C.J. No. 24 (QL).

⁷¹ *M. v. H.*, [1999] 2 S.C.R. 3, [1999] S.C.J. No. 23 (QL).

⁷² Beaudoin & Mendes, *supra* note 61 at 935, note 38.

⁷³ *Law*, *supra* note 51 at paras. 23-41.

⁷⁴ Beaudoin & Mendes, *supra* note 61 at 934.

3.2.2.3 The notwithstanding and override clauses

Section 33 of the Charter is what is commonly referred to as the “notwithstanding” clause which provides an “opt-out” to Canadian provinces for five-year periods:

33. Parliament or the legislature of a province may expressly declare in an act of Parliament or of the legislature...that the act or a provision thereof shall operate notwithstanding a provision included...in...Section..15 of this Charter.

Section 1 of the Charter is also an override clause and provides that the “[t]he Canadian Charter of Rights and Freedoms set out is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

It is therefore clear that fundamental freedoms and equality rights can be subjected to these limitation clauses and that the right to freedom from racial discrimination is not absolute. The *Charter* has been criticised for allowing this opening, and indeed one commentator has suggested that the Canadian *Charter* “may be used to strengthen inequalities, by weighing in on the side of power, and undermine popular movements.”⁷⁵

Section 1 has two functions however in terms of the burden of proof for justifying limitations. First, it guarantees the rights and freedoms set out in the *Charter’s* provisions; and second, it sets out the exclusive justificatory criteria, outside of s.33 of the *Charter*, against which limitations on those rights and freedoms may be measured. The onus of proving that a limitation is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to impose the limitation and such limits are clearly meant to be exceptions. The standard of proof imposed on the party seeking to impose the limitation is “a preponderance of probabilities”: a

⁷⁵ Mooney-Cotter, *supra* note 13 at 135.

standard falling below “beyond a reasonable doubt”, but nevertheless one that is rigorously applied.

In examining whether a limitation can be justified, the SCC adopts a two-step procedure:

- 1) has the right been violated? and
- 2) can the violation be justified under section 1?

It is important to note that the burden of proof is such that the onus of establishing a *prima facie* infringement is on the person alleging the violation (question #1), while the onus of justifying the reasonable limit (question #2) is on the party invoking section 1.

This test, commonly referred to as the “*Oakes* test” given its origin in a seminal case of the Supreme Court, sets forth two criteria which must be satisfied for the limitation to come within the ambit of s.1:

- 1) the objective of the limiting measure must be sufficiently important, and the concerns must be pressing and substantial to justify overriding a constitutionally protected right; and
- 2) the means must be reasonable and demonstrably justified according to a proportionality test, which balances the interests of society against those of the individual. This proportionality test encompasses three elements:
 - a. the measure must be carefully designed to achieve the stated objective, and must not be arbitrary, unfair or irrational;
 - b. the measure should impair the right as little as possible; and
 - c. proportionality must exist between the effect of the limiting measure and its objectives.⁷⁶

⁷⁶ *R. v. Oakes*, [1986] 1 SCR 103 [hereinafter “*Oakes*”].

3.2.2.4 Positive measures

Subsection 15(2) of the *Charter* reads :

- (2) Subsection [15(1)] does not preclude any law, program or activity that has as its object 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.

This provision allows the government to ameliorate the conditions of disadvantaged groups and also avoids the difficulties that many Americans had with so-called “reverse discrimination” claims. It is also important to note that while the SCC has not outright required the government to take proactive steps to fight disadvantage in a specific area, the idea of substantive equality may require governments to take steps to ensure that all obtain the equal benefit of the law.⁷⁷

⁷⁷ J. Hendry, “The Idea of Equality in Section 15 and its Development” (2002) 21 Windsor Y.B. Access Just. 153 at 174.

4 Legal responses to racism and racial discrimination in Europe

As has already been discussed, racism is a multi-faceted concept and is a scourge that can take many forms and may be expressed in a number of ways. No country in Europe is immune. On the contrary, the present-day reality is that discriminatory attitudes and racist violence are on the rise in many European countries and the resurgence of racist ideologies and religious intolerance is contributing to tension in our societies.⁷⁸ Outbreaks of racial violence have also plagued several European countries, and have included incidents of physical assault, arson and murder. Hatred of “foreigners” has led to the murder of members of the Turkish, Roma and Iranian communities in Germany, and to racially motivated attacks against asylum seekers, Jews, Africans and Vietnamese.⁷⁹ In France, people of Moroccan, Algerian, and Tunisian origin and from various Asian communities have been the particular targets of racism and racial harassment.⁸⁰ As the Council of Europe has itself reported, such manifestations of intolerance and racism “[strike] deeply against integration, and against the ideals of fairness, equality and tolerance for which European society perceives itself to stand.”⁸¹

This troubling tendency in Europe has been linked to challenges within European labour markets, related social dislocations, the ability of right-wing parties to capitalise on their citizenries’ insecurities and fears, and the “scapegoating” of “immigrants” or “foreigners” for social and economic

⁷⁸ Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm#EXPLANATORY%20REPORT> [hereinafter “Explanatory Report”] at para.7.

⁷⁹ F. Brennan, “The European Race Directive: A Bridge So Far?”, in R. Walden, ed., *Racism and Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 147-148.

⁸⁰ *Ibid* at 148.

⁸¹ Oakley, *supra* note 25 at 131.

problems currently besetting Europe and its states.⁸² This division of human beings into “us” and “them” is a simple, convenient way for politicians to place the blame for their failings and for economic challenges, squarely onto those perceived or portrayed as “other”. Racist, anti-Semitic and xenophobic language has infiltrated political discourse.

In the words of a publication of the European Union highlighting that 2007 is the “European Year of Equal Opportunities for All”, the talents and skills of some people continue to be restricted or wasted because of stereotypes or discrimination.”⁸³ Surveys have also indicated that most Europeans believe that a person’s ethnic origin, disability or age can be an obstacle to finding a job, even when they have the same qualifications.⁸⁴ Yet despite clear evidence of discrimination, denial of the existence of racism in Europe, particularly among political establishments, compounds the magnitude of the problem and the difficulty in finding an appropriate response.⁸⁵

It is against this background of very real and pressing challenges that the responses created by the system of the ECHR will be examined, with a view to identifying where gaps may exist, and how we can better understand how to move forward toward the guarantee of equality in a Europe that is arguably in dire need of more rigorous protections.

⁸² *Ibid.*

⁸³ Community Action Programme to combat discrimination, “Equal Rights in Practice”, 2007, Issue 7, at p.1.

⁸⁴ See “Equality and non-discrimination – Annual Report 2006”, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.4, September 2006 at p. 31.

⁸⁵ See also Justesen, *supra* note 20 at 37-38, who writes about the failure to recognise discrimination as a problem in Danish society, or indeed as one of the causes for the lack of integration and for the high unemployment among ethnic minorities.

4.1 Non-discrimination and equality guarantees in the European Convention on Human Rights

During the 1990s several legal responses to evidence of existing racism and intolerance emerged throughout Europe. What distinguished these mechanisms from previous attempts to deal with racism however, was the recognition that combating racial intolerance in Europe cannot be confined to purely national measures in a region that has increasingly developed integration and cooperation among its members for decades.⁸⁶

Although several instruments exist in Europe to address discrimination and racism,⁸⁷ as mentioned in the introduction to the paper, the scope of this analysis will be limited to those protections provided for by the system of the Council of Europe, and more specifically, those provided in the ECHR and its Protocols. The comparison with the protections and guarantees provided for by the Canadian *Charter* will consider the effectiveness of

⁸⁶ M. Bell, "Setting Standards in the Fight Against Racism: A Comparison of the European Union and the Council of Europe", in J. Niessen & I. Chopin (Eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden: Brill Academic Publishers, 2004) at 213. See also G. Bindman, "Europe Against Racism: An Uncertain Future", in S.V. Konstadinidis, ed., *A People's Europe – Turning a Concept into Content* (Suffolk: The Book Company, 1999) at 90. Bindman explains that in 1995, Mr. Padraig Flynn, European Commissioner charged with special responsibility for coordinating the Commission's activity against racism, described in a speech to the press the evils of racism as a "European-wide problem which calls for a European response."

⁸⁷ See Part II of Niessen & Chopin, *supra* note 86 at 93-210 on European Union Anti-Discrimination Legislative Measures. See also M. Bell, *supra* note 86 for a discussion of strategies undertaken by the European Union; T. Hervey, "Putting Europe's house in order: racism, race discrimination and xenophobia after the Treaty of Amsterdam" in D. O'Keefe and P. Twomey (eds), *Legal issues of the Amsterdam Treaty* (Hart Publishing, Oxford, 1999), at 329. For information about other initiatives of the European Union designed to combat racism, see "Equal Rights in Practice", Issue 7, Spring 2007, a publication reviewing the Community Action Programme to combat discrimination, and the initiatives of the 2007 European Year of Equal Opportunities for All. Also see www.nondiscrimination-eu.info. See also "Equality and non-discrimination – Annual Report 2006", European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.4, September 2006. See also D. Caruso, "Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives", (Summer 2003) 44 Harv. Int'l L. J. 331.

Article 14 of the European Convention as well as possibilities for the recently adopted Protocol No. 12.

4.1.1 The mechanisms of the ECHR

The ECHR has been described as the “flagship” of the human rights standards of the Council of Europe, the organisation created in 1949 as the first post-war European international organisation.⁸⁸ While there are many other European instruments or treaties that may address discrimination, one of the main features and positive aspects of the ECHR is that it gives individuals the right to bring human rights complaints before an international judicial organ, namely the European Court of Human Rights in Strasbourg.⁸⁹

Since the adoption of the ECHR in 1950, its protection of civil and political rights has gradually developed and even strengthened through the development of the case law, but also through legislative changes sparked by judicial decision that have improved the human rights protections offered by the ECHR.⁹⁰ In 1986, the Vice-President of the European Commission on Human Rights spoke about the influence of the ECHR on the development of human rights, and also compared its relative importance to the American Supreme Court’s jurisprudence in interpreting the Bill of Rights: “[a]s a matter of fact, the system has been so effective in the last decade that the European Court of Human Rights has for all practical purposes become Western Europe’s constitutional court. Its case law and practice resembles that of the U.S. Supreme Court.”⁹¹ Despite such

⁸⁸ J. Schokkenbroek, “Stronger European protection against discrimination: the new Protocol No. 12 to the European Convention on Human Rights”, in E. Klein (Hrsg.), *Rassistische Diskriminierung-Erscheinungsformen und Bekämpfungsmöglichkeiten*, Tagung in Potsdam, 29./30. September 2000 (Berlin: Berlin Verlag Arno Spitz GmbH, 2002) at 175.

⁸⁹ *Ibid.* at 175-176.

⁹⁰ *Ibid.* note 88 at 176.

⁹¹ J. A. Frowein, Recent Developments Concerning the ECHR, in *Laws, Rights and the European Convention on Human Rights* 11 (J. Sundberg ed. 1986), cited in G. Kleijkamp,

unbridled optimism however, as will be seen below, the influence of the ECHR in addressing problems of racial discrimination has, until now, been quite limited.

4.1.2 The content of Article 14 of the ECHR

The prohibition of discrimination as laid down in Article 14 of the European Convention on Human Rights reads as follows:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Although the drafters of the ECHR took the Universal Declaration of Human Rights of 1948 as their model, Article 14 is very different from Article 7 of the Universal Declaration which established a general principle of equality before the law.⁹² While Article 14 is intended to guarantee effective implementation of the fundamental rights protected by the Convention, it does not grant an independent right to freedom from discrimination.⁹³ The article has an accessory or derivative character and therefore prohibits discrimination only in the enjoyment of the rights already enshrined in the Convention.⁹⁴ A claim of discrimination based on Article 14 is therefore only admissible if there is a link between the alleged unequal treatment and another, independent right protected by one of the substantive Convention provisions.

“Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights” (Fall 2002) 12 *Transnational Law & Contemporary Problems* 307 at note 11.

⁹² Article 7 reads: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”. Online: <<http://www.un.org/Overview/rights.html>>.

⁹³ P. Van Dijk & G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, (The Hague: Kluwer Law International, 1998) at 711; M. Bell, *supra* note 86 at 216. See also Explanatory Report, *supra* note 78 at para. 1.

⁹⁴ A. H.E. Morawa, “The Concept of Non-Discrimination: An Introductory Comment”, European Centre for Minority Issues (2002) 3 *Journal on Ethnopolitics and Minority Issues in Europe* 1; Weiwei, *supra* note 6.

The absence of an explicit, independent right to freedom from discrimination has been criticised, and some commentators have noted that this absence suggests that the Convention lags behind developments in non-discrimination and equality at the global level, citing the number of international treaties that include such provisions.⁹⁵ Indeed, the Explanatory Report of the Council of Europe to Protocol No. 12, the protocol adopted by the Committee of Ministers in 2000 and discussed in detail below, recognises that “the protection provided by Article 14 of the Convention with regard to equality and non-discrimination is limited in comparison with those provisions of other international instruments.”⁹⁶

Prior to the advent of Protocol No. 12, to be discussed below, beyond Article 14 there was no reference to the principle of non-discrimination elsewhere in the EHCR, nor any specific article on equality. Article 14 is cross-referenced in Article 16 however, which states that: “Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.”⁹⁷

⁹⁵ See P. Thornberry, “The Anti-Discrimination Provision of the European Convention on Human Rights” in *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 2001) at 308-309 who comments that “[t]he minimal provision in the European Convention [for minority rights] is ill-matched with European constitutional arrangements to benefit particular groups.” He concludes that in “in ‘positive’ minority rights, it may be argued that general international law contains more than the Convention, despite the greater scale and depth of the problems dealt with.” See also F. Buonomo, “Protocol 12 to the European Convention on Human Rights”, (2001/2) 1 *European Yearbook of Minority Issues*, 425-33 at 425.

⁹⁶ Explanatory Report, *supra* note 78, at para. 1. The Report makes reference to other international treaties and protections provided for non-discrimination and equality, namely, Articles 1 and 7 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights.

⁹⁷ Articles 10 and 11 are on freedom of expression and freedom of assembly, respectively.

4.2 Interpretation of non-discrimination in the jurisprudence of the European Court of Human Rights

4.2.1 The accessory nature of Article 14

The jurisprudence of the European Court of Human Rights put aside any doubts about whether Article 14 has its own significance independently of the rights and freedoms protected in the Convention, and whether in relation to those rights and freedoms, Article 14 grants any sort of autonomous, rather than accessory protection. The *Belgian Linguistic Case* was clear on both of these points:

..the guarantee of Article 14 of the Convention ‘has no independent existence in the sense that, under the terms of Article 14, it relates solely to rights and freedoms set forth in the Convention’; nevertheless a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question, may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature.⁹⁸

In other words, it is not sufficient for a litigant to demonstrate that they have suffered differential treatment on the basis of one of the grounds enumerated in Article 14; they must first establish that the activity to which the differential treatment relates falls within the ambit of another Convention right. The Court is therefore required to first deal with the substantive issue and cannot apply Article 14 independently from any of the other rights and freedoms guaranteed by the ECHR.⁹⁹

As regards the second question, while initially violations of Article 14 presupposed violations of another article of the Convention,¹⁰⁰ in the

⁹⁸ *Case Relating to Certain Aspects of the Laws on the Use of Languages in Belgium* [hereinafter “*Belgian Linguistic Case*”], Judgment, 23 July 1968, European Court of Human Rights Ser. A No. 6.

⁹⁹ See *Gaygusuz v Austria* [1996] 23 European Human Rights Reports (EHRR) 264, 380.

¹⁰⁰ In *Isop v. Austria*, Appl. No. 808/60, Article 14 was not applied as the right to a fair trial under Article 6 was not infringed.

Grandrath Case,¹⁰¹ the Commission took the view that Article 14 does not depend on a finding of a violation of another article of the Convention. In *X. v. Germany*,¹⁰² the Commission examined the case under Article 14 on the basis that “it is sufficient that the subject-matter falls within the scope of the Article in question.” The Court has repeatedly held that while the application of Article 14 does not presuppose a violation of one of the other articles of the ECHR, the facts at issue must fall “within the ambit” of one or more of the rights of the Convention.¹⁰³ While it is clear that Article 14 has a limited scope of application, a Judge of the Court has written that

this is in part compensated, *inter alia* by the broad interpretation of the substantive provisions (for example, the interpretation of the Court concerning the notion of private and family life under Article 8 of the Convention) which extends the requirement of non-discrimination to a variety of situations which would have been excluded under a literal, and thus more restrictive reading of the Convention.¹⁰⁴

Nevertheless, the subsidiary nature of Article 14 means that the Court often has not proceeded to examine issues of discrimination if it has already found a violation of another part of the Convention, even in cases when the complaint itself contained a discrimination claim.¹⁰⁵ In *X. & Y. v. The Netherlands*, the Court ruled that “an examination of the case under Article 14 is not generally required when the Court finds a violation of one of the former Articles taken alone.”¹⁰⁶ As an example, in the *Dudgeon* case, the Court explained its decision to ignore the claim made under Article 14:

¹⁰¹ *YBECHR*, 8, 324 (admissibility); Commission Report and Decision of Committee of Ministers, *YBECHR*, 10, 626 and 694, referenced in footnote 11 of P. Thornberry, *supra* note 95 at 300.

¹⁰² *X. v. Germany* (1976), 19 Yearbook 276, quoted in M. Tsatsa-Nikolovska, “Protection Against Discrimination under the European Convention on Human Rights” in *Non-Discrimination: a human right*, *supra* note 16 at 26.

¹⁰³ See *Abdulaziz, Cabales and Balkandi v. the United Kingdom*, Judgment of 28 May 1985, *Inze v. Austria*, Judgment of 28 October 1987, *Karlheinz Schmidt v. Germany*, Judgment of 18 July 1994, *Van Raalte v. The Netherlands*, Judgment of 21 February 1997, *Petrovic v. Austria*, Judgment of 27 March 1998, *Haas v. The Netherlands*, No. 36983/97, §41, ECHR 2004.

¹⁰⁴ Tsatsa-Nikolovska, *supra* note 102 at 28.

¹⁰⁵ See *Smith v. Grady v UK* [1999] 29 EHRR 493. See also F. Buonomo, *supra* note 95 at p. 425.

¹⁰⁶ *X & Y. v. The Netherlands*, 8 E.H.R.R. 235, 242 (1985). See also *Kroon v. The Netherlands*, 19 E.H.R.R. 263, 287 (1995); *X, Y and Z v. U.K.*, 24 E.H.R.R. 143, 172

Once it has been held that the restriction on the applicant's right to respect for his private sexual life gives rise to a breach of Article 8 by reason of its breadth and absolute character...there is no useful purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right.¹⁰⁷

As a result of this approach, jurisprudence on discrimination under Article 14 is relatively scarce, a fact which certainly does not reflect the experience of discrimination and racial intolerance in Europe.

As such, it is clear that Article 14 is not a general protection against discrimination, and differential treatment which falls outside the scope of the Convention cannot amount to a violation of Article 14. In *De Meester v. Belgium*, the Court held that

the discrimination complained of by the applicant relates to the freedom to apply for a position in the judiciary, a freedom which (...) the Convention does not protect. Consequently, Article 14 of the Convention is not relevant to the instant Case.¹⁰⁸

As regards indirect discrimination, the case law of the European Court provides little guidance on its interpretation of what this means. Indirect discrimination is generally understood to mean a situation where a direct distinction, based on seemingly "neutral" grounds, has the actual effect of distinguishing on the basis of such a ground.¹⁰⁹ In earlier decisions, the Court failed to consider *prima facie* instances of indirect racial

(1997); *Airey v. Ireland*, 2 E.H.R.R. at 318, *Marckx v. Belgium*, Judgement of 13 June 1979.

¹⁰⁷ *Dudgeon v. the United Kingdom*, judgment of 22 October 1981 no. [7525/76](#), Series A no. 45, at 26.

¹⁰⁸ *De Meester v. Belgium*, Appl. 8493/79, D&R 25 (1982), p. 210 (217).

¹⁰⁹ Gerrards gives the example of a rule providing that part-time workers not be granted a year-end bonus. On the face, it is a seemingly neutral rule, distinguishing on the basis of working time. However, given that most part-time workers are women, the rule has the actual effect of arguably discriminating on the basis of gender. See J. Gerards, "The Application of Article 14 ECHR by the European Court of Human Rights", in Niessen & Chopin, *supra* note 86 at 12.

discrimination.¹¹⁰ Recent cases seem to reflect at least some recognition of the concept of indirect discrimination, although they also indicate that the Court will apply a strict burden of proof standard for applicants in cases of alleged indirect discrimination.¹¹¹

4.2.2 Distinctions and proportionality

It is clear that not all differences in treatment will be considered to constitute discrimination under Article 14. In the *Belgian Linguistics Case*, the Court noted that while Article 14 is phrased in very general terms (particularly in French, which reads “*sans distinction aucune*”), it does not forbid every difference in treatment. Rather, it noted that “the principle of equality of treatment is violated if the distinction has no objective and reasonable justification”. The justification for differential treatment must also be evaluated in relation to the aim and effect of the measure, with regard being had to the principles which normally prevail in democratic societies. However, it is not enough that the differential treatment pursue a legitimate aim; there must also be reasonable proportionality “between the means employed and the aims sought to be realised”.¹¹² In its 2002 judgment in *Willis v. the United Kingdom*, the European Court of Human Rights stated that “[A] difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aims sought to be realised.’”¹¹³

¹¹⁰ See reference to *Abdulaziz, Cables and Balkandali v UK* [1985] 7 EHRR 471, 504, in footnote 10 of M. Bell, *supra* note 86 at 220.

¹¹¹ See *Kelly and Others v. UK*, ECHR 4 May 2001, European Human Rights Cases 2001/40, where the Court held that “[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.”

¹¹² Cited in P. Thornberry, *supra* note 95 at 301.

¹¹³ *Willis v. the United Kingdom*, Eur. Ct.H.R., Appl. 26042/97, judgment of 11 June 2002, para. 39. See also Opinion of the European Court of Human Rights on draft Protocol 12 to the European Convention on Human Rights, Doc 8606, 5 January 2000, para.5.

To summarise, the applicability of Article 14 requires positive answers to the following questions:¹¹⁴

- 1) Do the facts fall within the ambit of one or more of the other substantive provisions of the Convention?
- 2) Was there a difference of treatment? and
- 3) Did the difference of treatment concerns persons or groups of persons placed in analogous position? and
- 4) Did the difference of treatment have a reasonable justification? That is, did the differential treatment pursue a legitimate aim and was there a reasonable relationship of proportionality between that aim and the means employed to attain it?

4.2.2.1 Application of the test in practice

As a result of the accessory nature of Article 14, the first element of the test, namely, the requirement to bring the facts within the ambit of one of the other substantive provisions of the Convention, often leads to rather creative technical machinations to bring alleged discrimination under one of the other provisions of the ECHR.¹¹⁵

As regards the third aspect of the test on analogous grounds, the Court has held that it is up to the applicant to come forward with relevant information leading to the conclusion that his or her case is an analogous case.¹¹⁶ Beyond that, this comparative element requires analysis of whether the cases at hand are equal or unequal in the relevant respects. A yardstick must therefore be developed, and the difficulty is in establishing the correct criteria for comparison. The Court has often held that for the comparability test to be meaningful, the criteria should be related to the goal of the

¹¹⁴ See M. Tsatsa-Nikolovska, *supra* note 102 at 30.

¹¹⁵ See *Thilimennos v. Greece*, ECHR 6 April 2000, European Human Rights Cases 2000/45.

¹¹⁶ *Fredin v. Sweden (no. 1)*, judgment of. 18 February 1991, Series A no. 192, p. 15, §§ 43-47.

provision which prescribes equal treatment. To the extent that this is the case the comparability test is often subsumed into the justification test and glossed over.¹¹⁷

In some cases, the European Court has begun to introduce a hierarchy of values, such that “very weighty reasons” would have to be advanced in order to justify a difference of treatment on grounds of sex given the importance placed on equality between men and women in society.¹¹⁸ In the case of race, in *Cyprus v. Turkey*, the Court endorsed the previously expressed view of the Commission that “special importance should be attached to discrimination based on race...”¹¹⁹ Despite the fact that race has been argued as being a ground that should meet strict scrutiny, the Court has managed to avoid dealing with claims of discrimination on these grounds. In practice, most claims of racial discrimination have been lost by the lack of proof of *prima facie* discrimination and have not even reached the level of objective justification scrutiny.¹²⁰

4.2.3 From formal to substantive equality

It is also important to note that the guarantee under Article 14 has also moved beyond strict conceptions of formal equality (“equal treatment of equal case”), toward a more substantive conception (“unequal treatment of unequal cases”).¹²¹ In *Thlimmenos v. Greece*, the Court held that “the right not to be discriminated against...is also violated when States without

¹¹⁷ Van Dijk & G. J. H. van Hoof, *supra* note 93 at 721-722. For examples of this passing over of the comparability aspect, see *Dudgeon v. the United Kingdom*, judgment of 22 October 1981 no. 7525/76, Series A no. 45. See also Gerards, *supra* note 109 at 17-18. Gerards also discusses the possibility of a test of disadvantage as an alternative to the comparability test at 26.

¹¹⁸ In some cases, the European Court has begun to introduce a hierarchy of values, such that “very weighty reasons” would have to be advanced in order to justify a difference of treatment on grounds of sex given the importance placed on equality between men and women in society. See Fredman, *supra* note 2 at 31.

¹¹⁹ *Cyprus v. Turkey*, 10 May 2001, par. 306.

¹²⁰ See O. M. Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (The Hague: Kluwer Law International, 2003) at 146-147 and note 668.

¹²¹ *Ibid.* at 32.

an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.¹²²

4.2.4 The doctrine of margin of appreciation

As one author has explained, “[t]he European Convention does not claim to impose uniform approaches to the myriad of different interests which arise in the broad field of fundamental rights protection. Instead, it seeks to establish common minimum standards to provide a Europe-wide framework for domestic human rights provisions.”¹²³ Given that primary responsibility lies with the states who must comply with the provisions of the ECHR, the Court developed the margin of appreciation doctrine to reconcile varying approaches within the national governments with the need to ensure the effective operation of the Convention.¹²⁴ The notion of margin of appreciation grants states a certain degree of discretion regarding the specific manner in which they implement the rights provided under the ECHR, recognising that in particular regarding issues where no consensus exists at the European level, variations in the approaches may be acceptable.¹²⁵

As regards Article 14 and anti-discrimination, the margin of appreciation doctrine has been applied to allow states a certain degree of latitude in enacting their own criteria for implementation. National authorities therefore enjoy this margin of appreciation in “assessing whether and to

¹²² *Thlimmenos v. Greece*, *supra* note 115.

¹²³ G. Kleijkamp, *supra* note 91 at 323. For an in-depth consideration of the margin of application doctrine, see Gerards, *supra* note 109 at pp. 38-57.

¹²⁴ Kleijkamp, *Ibid* at 323-324. See also R. Bernhardt, “Thoughts on the Interpretation of Human Rights Treaties”, in *Protecting Human Rights: The European Dimension, Studies in Honor of Gerard W. Wiarda*, Koln 68 (1988) (stating that “[t]he notion of the margin of appreciation, if recognized and applied in a proper manner, is absolutely necessary in the implementation of the Human Rights Conventions”).

¹²⁵ See *Johansen v. Norway*, 23 E.H.R.R. 33, 67 (1997), stating that the margin of appreciation “will vary in the light of the nature of the issues and the seriousness of the interests at stake.”

what extent differences in otherwise similar situations justify a different treatment.”¹²⁶

One interesting case to note however, is that of *Nachova and Others v. Bulgaria*,¹²⁷ which involved the killing of a Roma conscript by the military police. The Chamber did not consider that racist attitudes had played a role in the victims’ death, despite its finding that the racial prejudice had been a causal factor in the excessive use of lethal power and the lack of an effective investigation. Nevertheless, the Grand Chamber found a breach of Article 14 taken together with the procedural obligation under Article 2 of the Convention for the national authorities’ failure to carry out an effective investigation, despite the fact that they had information to suggest that hatred-induced violence had taken place.

4.2.5 Prohibited grounds of discrimination

The grounds enumerated in Article 14 are not exhaustive, as the formulation makes clear, and as the Court has also confirmed in its case law.¹²⁸ As such, it is theoretically possible to bring many forms of unequal treatment before the Court as long as the requirement of connexity between the ground of discrimination and a characteristic of a person or group is met, though the possibilities are not unlimited.¹²⁹

¹²⁶ *Schmidt v. Germany*, 18 E.H.R.R. 513, 522 (1994); *Stubbings et al. v. United Kingdom*, 23 E.H.R.R. 213, 238 (1997); *Van Raalte v. The Netherlands*, 24 E.H.R.R. 503, 518 (1997).

¹²⁷ [GC], Nos. 43577/98 and 43579/98, ECHR-2004. See also M. Tsatsa-Nikolovska, *supra* note 102 at p. 32.

¹²⁸ *Engel et al v The Netherlands*, ECHR 23 November 1976, Series A, vol. 22, where the Court held that “the list set out in that provision is illustrative and not exhaustive, as is shown by the words ‘any grounds such as’ (in French ‘notamment’) (para.72).

¹²⁹ See discussion by Gerards, *supra* note 109 at 10-11 of the case law and its development in this area.

4.3 Protocol No.12

Protocol No. 12 to the ECHR was adopted by the Committee of Ministers of the Council of Europe on 26 June 2000. Protocol No. 12 entered into force on 1 April 2005, following the acceptance by ten member states to be bound by the terms of the Protocol, in accordance with the terms of Article 5.¹³⁰ The Protocol broadens the scope of the Convention regarding discrimination and is intended, contrary to Article 14 of the ECHR, to grant an independent right to equality.¹³¹ As the Secretary General of the Council of Europe declared in 2000, the adoption of Protocol No. 12 is a “sign of the times” and represents an important step in the fight against intolerance and racism: “[w]e should not forget that the opening for signature takes place at a time of worrying political developments. In today’s Europe the fight against racism and intolerance is an urgent necessity.”¹³²

Before turning to an analysis of the scope of the Protocol and its potential effectiveness, a brief consideration of its development and the background to its establishment will be presented below.

¹³⁰ The ten states who have deposited their instrument of ratification, acceptance or approval in accordance with Article 5 of Protocol No. 12 are: Albania, Armenia, Bosnia & Herzegovina, Croatia, Cyprus, Finland, Georgia, the Netherlands, San Marino and Serbia. See online: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols>.

¹³¹ *Protocol No. 12 to the European Convention on Human Rights and Fundamental Freedoms*, adopted on 4 November 2000, E.T.S. No. 177, Article 1 [hereinafter “Protocol No. 12”].

¹³² Council of Europe Press Release, “Twenty-Five States Sign up to Improve Protection Against Discrimination”, cited in F. Buonomo, *supra* note 95 at 427 and note 7.

4.3.1 Background to the adoption of the Protocol: building support for strengthened protections for non-discrimination and equality

Protocol No. 12 marks a significant advancement in human rights in Europe since it provides opportunities for enhanced action in the field of racism and discrimination. The impetus for a general non-discrimination provision came from the recognition within the Council of Europe that strengthening the Convention's protections would be warranted in light of challenges regarding intolerance and given the very limited scope or potential for further expansion of the case law on Article 14. In introducing the Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights in Strasbourg in December 2005, Pierre-Henri Imbert, Director General for Human Rights at the Council of Europe, declared that

[i]n the Council of Europe, we believe that discrimination constitutes an offence against human dignity. It is like poison, destroying the very fabric of our societies. Very often, the victims of discrimination belong to the most vulnerable groups in our societies, such as asylum seekers, immigrants, members of ethnic and national minorities, the elderly or persons with disabilities.¹³³

As the Explanatory Report to the Protocol explains, from the 1960s onwards, various ways of providing further guarantees against discrimination were proposed or studied, and the work carried out in the field of equality between women and men and in the area of combating racism and intolerance advanced the issue considerably.¹³⁴ Indeed, simultaneous efforts by the Steering Committee for Equality between

¹³³ Imbert, *supra* note 16 at 5.

¹³⁴ Explanatory Report, *supra* note 78 at paras. 2-5. See also F. Buonomo, *supra* note 95 at 426 and Schokkenbroek, *supra* note 88 at 177-184, who presents a detailed overview of the genesis of Protocol No. 12.

Women and Women (CDEG) to advance strengthened protections for equality between men and women on the one hand and by the European Commission against Racism and Intolerance (ECRI) to adopt more robust guarantees for issues of racism and intolerance on the other, converged in the late 1990s.¹³⁵ The Steering Committee for Human Rights eventually adopted a report in October 1997 for the attention of the Committee of Ministers concerning both the question of equality between men and women and that of racism and intolerance.

On the basis of this report, the Committee of Ministers gave the Steering Committee for Human Rights (CDDH) the mandate to draft an additional protocol to the ECHR broadening the field of Article 14 and containing a non-exhaustive list of grounds of discrimination. The draft protocol and its explanatory report were elaborated in 1998 and 1999 and eventually submitted to the Committee of Ministers, who adopted the text on 26 June at the 715th meeting of the Ministers Deputies.¹³⁶

4.3.2 The content of the provisions of Protocol No. 12 and the obligations imposed on States

The main operative provision of Protocol No. 12 is Article 1, which establishes a general prohibition of discrimination and reads as follows:

¹³⁵ *Explanatory Report, Ibid*, at paras. 4-9. Between the adoption of the ECHR and the adoption of Protocol Non. 12 in 2000, the Parliamentary Assembly put forward six recommendations asking the Committee of Minister to widen the scope of the prohibition on discrimination by means of an additional protocol, and yet these proposals were rejected on the basis of several recurring arguments. The arguments centred around three main objections: a general prohibition would introduce uncertainty into the Court's case law; extending the non-discrimination guarantee would extend the reach of the Court into areas which came within the private sphere; and finally, as a result of the Council of Europe enlargement and expanded non-discrimination protections, the Court's caseload would be overwhelmed by an increase in the number of applications, which would only add to the Court's existing backlog.

¹³⁶ Explanatory Report, *supra* note 78 at paras. 10-13.

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

It is clear from the wording of paragraph 1 that the protection against discrimination now extends beyond those rights and freedoms set forth in the Convention to include “any right set forth by law”. The basic concept or meaning of discrimination in this article is intended to be identical to that set forth in Article 14 of the Convention.¹³⁷

As regards the meaning of “non-discrimination”, the Explanatory Report refers to the case law of the European Court and to the fact that not every distinction or difference in treatment can be considered discrimination. Rather, it is only in situations where the distinction has no “objective or reasonable justification”, does not pursue a “legitimate aim” or where there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” that one can characterise the difference as discriminatory.¹³⁸

As regards the additional scope of protection offered by Protocol No. 12 however, the Explanatory Report specifies that Article 1 concerns cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;

¹³⁷ The Explanatory Report states: “[T]he meaning of the term “discrimination” in Article 1 is intended to be identical to that in Article 14 of the Convention. The wording of the French text of Article 1 (‘sans *discrimination* aucune’) differs slightly from that of Article 14 (‘sans *distinction* aucune’). No difference of meaning is intended; on the contrary, this is a terminological adaptation intended to reflect better the concept of discrimination within the meaning of Article 14 by bringing the French text into line with the English.” See Explanatory Report, *Ibid.* at para.18.

¹³⁸ *Abdulaziz, Cabales and Balkandali v. the United Kingdom supra* note 103 at para. 72.

- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, i.e. where a public authority is obliged by national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).¹³⁹

The report goes on to explain that the drafters of the Protocol felt it unnecessary to set out explicitly which of the four scenarios would be covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four cases are covered by Article 1, irrespective of which paragraph might be applied in the specific scenario.¹⁴⁰

The list of grounds set out in Article 1 of the Protocol is identical to that in Article 14 of the Convention. The commentary provided in the Explanatory Report to the Protocol notes although it there was a proposal at the time to include other grounds which have become relevant in today's society such as sexual orientation, age or physical or mental disability, ultimately this suggestion was rejected in favour of maintaining the existing, non-exhaustive list. It was felt that inclusion of any particular additional ground might give rise to *a contrario* interpretations as regards other grounds not listed, and that in any event, it is clear from the jurisprudence of the Court that the list has been extended to include other considerations.¹⁴¹

The preamble is intended as an aid to interpretation, and refers in the first recital to the principle of equality before the law and equal protection of the law. While this fundamental principle does not appear explicitly in the text of Protocol No. 12, the Explanatory Report explains that the non-

¹³⁹ Explanatory Report, *supra* note 78 at para.22.

¹⁴⁰ *Ibid.* at para. 23.

¹⁴¹ See for example, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal* on the grounds of sexual orientation. See also F. Buonomo, *supra* note 95 at pp. 430-431.

discrimination and equality principles “are closely intertwined”, and that the principle of equality requires that equal situations are treated equally and unequal situations differently, such that failure to do so will amount to discrimination unless an objective and reasonable justification exists.¹⁴² Finally, the third paragraph of the preamble refers to positive measures taken in order to promote full and effective equality, reaffirming that such measures will not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for such measures.¹⁴³

The Explanatory Report to Protocol No. 12 recalls the jurisprudence of the Court and the development of the doctrine of the margin of appreciation, already discussed above with regard to Article 14. More specifically, the Report notes that a certain margin of appreciation is afforded national authorities in assessing whether and to what extent differences in otherwise similar situations may justify a treatment in law.¹⁴⁴ The scope of the margin of appreciation will vary according to the circumstances, subject-matter and background in question.

4.4 Positive measures: developing a proactive agenda in Europe

While it is generally accepted that certain improvements have been made in the system of the Council of Europe through the adoption of Protocol No. 12 and the existence of an independent right to non-

¹⁴² Explanatory Report, *supra* note 78 at paras. 14-15. As Buonomo, *supra* note 95 explains at p.p. 427-428, in case law related to Article 14, the Court has already made reference to the “principle of equality of treatment”, see e.g. Belgian Linguistic Case, Merits, *supra* note 98 at para. 10.

¹⁴³ This principle also appears in other existing international provisions, as well as in the Charter, as discussed in previous chapters. See e.g. Art. 1(4) of CERD; Art. 4(1) of CEDAW and Art. 4(3) of the Framework Convention for the Protection of National Minorities.

¹⁴⁴ Explanatory Report, *supra* note 78 at para. 19 and see also *Rasmussen v. Denmark*, judgment of 28 November 1984, Series, A., No. 87, para. 40.

discrimination, beyond negative prohibitions of discrimination, one must also consider whether positive obligations to take positive steps toward substantive equality exist as well within this framework.

Protocol No. 12, while not prohibiting positive measures taken by states to ensure full equality, (provided that such measures can be reasonably justified), does not impose any positive obligation to adopt such measures. As Buonomo explains, “[s]uch a programmatic obligation would sit ill with the whole nature of the Convention and its control system.”¹⁴⁵ Rather, the Preamble and the wording of Article 1 are meant to reflect a “balanced approach” that is a delicate compromise to the question of positive obligations, and which refers to the primary obligation on states not to discriminate against individuals. As such, Article 1 is mainly a negative obligation, though one cannot totally exclude the possibility that the duty to “secure” rights under paragraph 1 of Article 1 may entail positive obligations.¹⁴⁶ The example given in the Explanatory Report is one of clear domestic lacuna in domestic laws which are meant to protect from discrimination, and which would then need to be corrected or remedied.¹⁴⁷ The Report does go on to say that as regards relations between private persons, a failure to provide protection from discrimination in such relations might in some circumstances be “so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 could come into play.”¹⁴⁸

In any event, positive obligations flowing from Article 1 are likely to be limited, and any positive obligation in relations between private persons would concern, at the most, relations in the public sphere normally regulated by law for which the state has a certain responsibility (for example, access to restaurants, or to services which private persons may make available to

¹⁴⁵ Buonomo, *supra* note 95 at 428 and Explanatory Report, *supra* note 78 at para.25.

¹⁴⁶ Buonomo, *supra* note 95 at 429.

¹⁴⁷ Explanatory Report, *supra* note 78 at para. 26.

¹⁴⁸ *Ibid.*

the public such as medical care or electricity).¹⁴⁹ Purely private matters will not be regulated, and on the contrary, the Report makes clear that regulation of such matters would likely also collide with Article 8 of the ECHR, and with an individual's right to respect for his private and family life, his home and his correspondence.¹⁵⁰

¹⁴⁹ Ibid, at *paras.* 27-28.

¹⁵⁰ Ibid, at *para.* 28.

5 Comparing the Canadian and ECHR responses to racial discrimination: effectiveness and gaps

Given the foregoing analyses of the evolution of judicial interpretations of non-discrimination and equality rights in Canada and in Europe, how are the models faring in trying to cope with racism and discrimination in society? More specifically, how successful have the *Charter* and the ECHR been as tools for reducing disadvantage and curbing racial discrimination on the one hand, and for creating the conditions for equal enjoyment of all the guaranteed rights and freedoms on the other?

While a comprehensive analysis of all aspects of the two approaches will not be undertaken here, the intention is to highlight some key strengths and challenges of the respective models in analysing how they compare. Focus will be placed first on the potential, but also on the limitations of the law in addressing racial intolerance; second, on concerns about access to and possible exclusion from the mechanisms and protections of the law in both models; third, the balance between judicial restraint and judicial activism will be considered as a factor affecting the development of the legal models in Europe and in Canada; and finally the potential of the models to address the multi-dimensional nature of the many facets of discrimination and exclusion will be explored. In a final section, a concluding assessment of the relative potential of each model will be proposed.

5.1 The impact and limitations of the law

While the specifics of the legal responses provided by the *Charter* and the ECHR are important to evaluate, one can consider the limitations of

the law in addressing complex social problems in general. As the ECRI recognised in proposing the idea of a new protocol to address non-discrimination on the grounds of race, colour, language, religion or national or ethnic origin, the law alone cannot eliminate racism in its many forms.¹⁵¹ On the other hand, “efforts to promote racial justice cannot succeed without the law.”¹⁵² Any struggle for racial equality must encompass the law, and an effective court system to enforce standards for non-discrimination can make important inroads into the attainment of real equality.

It is essential to have adequate legal provisions and standards to influence conduct and outcomes so that any potentially discriminatory measure can be reviewed or avoided from the outset even before it becomes law. What is commonly referred to as “*Charter-proofing*” in Canada has already had an important impact in influencing policy, and the awareness of constitutional standards will hopefully continue to improve the nature of legislation and thereby reduce the need for challenges before the courts.¹⁵³ Given the limited jurisprudence on discrimination in the system of the ECHR however, it seems such preventative and proactive mainstreaming of discrimination standards is perhaps further off.

At the very least, the strengthening of formal protections from discrimination in the ECHR is a significant step forward in fighting the various manifestations of human rights violations which result from racism and xenophobia in Europe. However, the progress achieved does not mean that the system as a whole is fully satisfactory or that the advancement of standards prohibiting discrimination of persons belonging to various vulnerable groups is even.¹⁵⁴ As we know, the area of racial discrimination

¹⁵¹ See Explanatory Report, *supra* note 78 at para. 7.

¹⁵² *Ibid.*

¹⁵³ “*Charter-proofing*” is an expression in Canada used to refer to the fact that legislators and policy-makers will be careful that a proposed policy or law would be likely not to run into challenge on constitutional or *Charter* grounds. In this way the *Charter* has an effect at the very outset of the policy-making process, as does the jurisprudence of the Court. Legislators try to avoid having the legislation challenged on a ground already adjudicated by the Courts on the basis of the *Charter*.

¹⁵⁴ Weiwei, *supra* note 6 at 25.

has been arguably neglected in the ECHR system, and more monitoring, enforcement, and further development of anti-discriminatory measures is necessary. It is important for states to implement their international obligations and this requires collective efforts at both the regional and international levels but also by individual states.

It may also be that cooperation and exchange at the international level can strive to improve experiences within Canada and in Europe. A continuing exchange of judicial experience and expertise can mutually benefit both regional and national systems through the channelling of information and via networks of relevant actors. What has worked in some countries or areas may not necessarily work in others, though it is certainly useful to understand why certain strategies have not worked, what could be done differently, and what effects the courts have had in the struggle against discrimination and intolerance.

As such, despite the fact that the law is not the whole answer, discrimination and injustice can be undercut through the effective use of both the law and the courts. As discussed below, one can be hopeful that the advent of Protocol No. 12 will mark a significant shift in the effective and strengthened use of the ECHR as a legal tool for addressing racial intolerance.

5.1.1 The importance of enhanced protections: the contribution of Protocol No. 12

The adoption of Protocol No. 12 can be viewed as the reflection of broad political acceptance of the fact that discrimination and the emergence of new forms of discrimination and intolerance in European societies necessitate a strengthening of existing protections afforded by the ECHR.¹⁵⁵ Nevertheless, if one considers that the Universal Declaration of Human

¹⁵⁵ Schokkenbroek, *supra* note 88 at 188.

Rights quite clearly set out the notion of equal rights and their place at the heart of human rights protection, it took fifty years before the system of the ECHR was ready to accept a general and free-standing provision prohibiting discrimination that is far from revolutionary. Although it arguably does not raise existing standards against discrimination, the Protocol fills an important gap in the Convention's collective guarantees to bring the protections set forth in the ECHR up to par with many internationally entrenched guarantees.¹⁵⁶

Some commentators are quite optimistic about the possibilities and potential of Protocol No. 12, noting that taken together, sub-paragraphs 1 and 2 of Article 1 of the text provide a vision of the Protocol as “an umbrella guarantee” which also adopts a more comprehensive approach to legal protection against racial discrimination that is intended to apply throughout the law to all areas of public activity.¹⁵⁷ Indeed, it has been said that Protocol No. 12 will “significantly strengthen the capacity of the Convention to be utilised in combating racism..” and that “[t]he comprehensive nature of its non-discrimination guarantee provides a striking contrast to the ‘bits and pieces’ approach found in EU legislation.”¹⁵⁸ Judge Wildhaber of the European Court of Human Rights has explained that

[t]he non-discrimination provision has been to some extent a second-class guarantee over much of the period in which the Convention has been in force. The most recent developments promise to give a new charter of life to the protection against discrimination under the Convention and a development which may well lead the Court into the more complex issues of equality that arise in modern society.¹⁵⁹

One obvious benefit to the Protocol is that unlike Article 14, a claimant does not need to first make a claim on the basis of another right in the ECHR, as the right to non-discrimination is free-standing, and such right can be

¹⁵⁶ Imbert, *supra* note 16 at 5.

¹⁵⁷ See M. Bell, *supra* note 86 at 223 and 225. Bell in particular is more hopeful for Council of Europe mechanisms than for those provided for by the European Union.

¹⁵⁸ M. Bell, *Ibid.* at 232.

¹⁵⁹ Quoted in Tsatsa-Nikolovska, *supra* note 102, at 33-34.

invoked independently of other provisions of the Convention. As a result, the Court will no longer be able to dismiss an issue as not “within the ambit” of the Convention, which will also require the Court to finally undertake the “objective and reasonable justification” test in cases where racial discrimination is alleged.

One should clearly not expect the Protocol to be some sort of panacea nor to be a tool to redress all injustices committed on grounds of race or ethnic origin.¹⁶⁰ It does not amend or abrogate Article 14 which continues to apply, though there is clearly an overlap between the two provisions. It has also been suggested that the wording of the Protocol is somewhat timid, in that the word “equality” only appears in the Preamble, maintaining important differences with Article 7 of the Universal Declaration and Article 26 of the ICCPR.

Nevertheless, as has been the case with the interpretation of s.15 of the Canadian *Charter*, Protocol No. 12 is a relatively wide, flexible instrument and the interpretation of the scope of non-discrimination and meaning of equality within the framework of the Council of Europe will have to be developed over time through decisions of the Court. One would hope that the conception of non-discrimination will not be too cautious, and will grow to encompass more positive, proactive measures that will oblige states to correct and adapt legislation that poses a barrier to the realisation of real equality for those most vulnerable.

It will be particularly important for the future case law of the Court to explore the issue of proportionality. Until now, there has been a trend on the part of the Court to defer to national judicial authorities’ judgment of the proportionality of differential treatment, and the Court has showed itself to be very reluctant to second-guess states’ assessments. Continuing this trend with the advent of Protocol No. 12 would be counter-productive to the promise offered by formally expanding the Protocol on non-discrimination

¹⁶⁰ Schokkenbroek, *supra* note 88 at 188.

grounds. If the Court adopts a very timid and conservative approach, it is unlikely that the text of Protocol No. 12 will get us any further ahead in prohibiting discrimination, and in addressing the problem of racial discrimination more particularly.

Finally, there are concerns that Protocol No.12 will merely overburden the Court. However, as one writer has commented, an increase in the number of applications on the grounds of discrimination must be recognised as a problem in its own right, and not one merely of being concerned about backlog in the face of an increased caseload of the Court in Strasbourg.¹⁶¹ One cannot cite the more general problem of a lack of resources in Strasbourg as a substantive objection to the expanded scope of rights for non-discrimination and equality. As already mentioned, one may perhaps inquire why there is such a fear of increased “demand” in the face of an expanded non-discrimination clause, and what this implies for the state of equality rights in Europe at present. In any event, the Member States should increase the Court’s budget to allow it to exercise its important human rights protection function in Europe. The Ministerial Conference accepted politically that the caseload of the Court is a serious and urgent problem, and in its Opinion on draft Protocol No 12, the Court noted that the workload of the Court is a serious problem.¹⁶²

The existence of the Protocol does provide an important safeguard and tool to address certain forms of discrimination which have until now escaped serious judicial consideration. On the other hand, in order to have real meaning, every Member State should sign and ratify the Protocol, a goal still far from achievement.

¹⁶¹ Schokkenbroek, *supra* note 88 at 189.

¹⁶² See, in particular, Resolution No. 1 adopted at the Ministerial Conference. Conference texts available at: www.humanrights.coe.int. See also Doc. 8608, Online: <<http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc00/edoc8608.htm>> (December 6, 1999), para. 6.

5.1.2 The limited scope of the mechanisms

One of the primary criticisms lodged against the *Charter* and s.15 as an effective mechanism to combat discrimination is the fact that it only applies to the public domain. Although in *McKinney v. University of Guelph*,¹⁶³ the Court held that the term “law” in s.15 is not confined to statutory instruments such as laws and regulations but may also extend to government policies or contracts, this still excludes the entire domain of the private sector, an area arguably more difficult to tackle and where the fight against discrimination remains more nebulous. The SCC has confirmed this approach, noting that the focus of the *Charter* is as a judicially enforceable check on government, which is necessary to protect fundamental rights from the potentially unreasonable actions of politicians and public officials.¹⁶⁴ Some have seen this approach as too restrictive, though it has also been supported in light of concerns about the potentially limitless reach of the courts had they been empowered to also adjudicate the power of private interests.¹⁶⁵

Similarly, the ECHR imposes obligations on states and not on private individuals. Indeed, the whole logic of the enforcement mechanism through complaints against States Parties is premised on this system. As regards the scope of Protocol No. 12, it is clear that it does not address purely private matters, and that the extent of any positive obligations will be limited. While one cannot expect the ECHR and its Protocol to prevent all discrimination between private individuals, one could argue that at the very least authorities should have a duty to provide the victim of discrimination with a remedy that can be used to obtain redress.

¹⁶³ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 299.

¹⁶⁴ R. Sharpe, K. Swinton, K., & K. Roach, *The Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law Inc., 2002) at 96.

¹⁶⁵ *Ibid.*

5.1.3 The dignity approach: strengths and challenges

One of the main features of the Canadian model is to adopt a contextual approach, which recognises that in evaluating whether discrimination has occurred, it is essential to assess how the law operates in broad historical, social and political contexts. Broadening the scope of discrimination beyond formal conceptions of equality to include an analysis of the context or environment in which the law has been applied and how the law affects the claimant, while a more complex and difficult process, is one that brings us further along toward creating the conditions in which all persons enjoy equal recognition as members of Canadian society.

The Canadian approach places the focus squarely on the needs, and actual circumstances of the individual. That is, it considers whether the individual claimant has been particularly disadvantaged, or vulnerable, and does not exclude the possibility that such vulnerability or disadvantage can be the result of various factors, and not only because of direct prejudice or stereotyping. If we start to examine issues from the perspective of the claimants, we can hope to unravel the reasons for the claimants' vulnerability, and in so doing, hope to be able to redress injustices and inequality in a meaningful way. By understanding that a claimant may already be disadvantaged, and asking ourselves why, we can hope to understand how legislators should develop policies that further the constitutional goal of equality. In sum, equality in Canada is concerned not only with the letter of the law, but with its effects: we must look beyond how the law reads on its face, to see how the law affects the dignity of individual members of Canadian society, and particularly those most disadvantaged.

Although arguably the dignity approach of the Canadian Supreme Court has several merits, it too has various difficulties. It has been criticised for being too abstract or “emotive” a concept, too general to provide any guidance in

resolving equality legislation, or any instruction to legislators in designing public policy.¹⁶⁶ Some have said that it is just a way of replacing or changing the labels – it is not a technique for resolving problems, and “dignity” is just as contested a concept as the principle it is meant to help explain – equality. In addition, it may be that human dignity fails to capture the historical circumstances that equality rights are meant to address.

The jurisprudence of the ECHR hasn’t specifically undertaken the same type of “dignity-centred” analysis so it is difficult to compare these aspects. Suffice to say however that just as the Canadian approach can be criticised for offering few practical solutions or little guidance to legislators, the same may be said about the ECHR approach, which barely touches on issues of discrimination if can avoid doing so.

5.2 Access to the Courts

Although Canada has been fortunate to have a Supreme Court that has adopted a generally pragmatic approach to equality rights which has facilitated important advances, the problem remains that the *Charter* can only be of assistance if individuals have access to the courts. Better programmes need to be put into place to fund individuals and advocacy groups so that they may rely on the guarantees in the *Charter* and have the possibility to access the judicial process.¹⁶⁷

It is significant in light of the fact that we are far from eradicating discrimination on race and related grounds in Canada that so few cases on

¹⁶⁶ D. Greschner, “The Purpose of Canadian Equality Rights” (2002) VI: 2 Review of Constitutional Studies 291 at 317. See also E. Grabham, “Law v Canada: New Directions for Equality Under the Canadian Charter?” (2002) 22:4 Oxford Journal of Legal Studies 641 at 654.

¹⁶⁷ C. Ventura, “From outlawing discrimination to promoting equality: Canada’s experience with anti-discrimination legislation” International Migration Papers 6, Employment Department, International Labour Office, Geneva at p. 43.

these grounds have reached the courts.¹⁶⁸ In considering the causes of the relatively sparse body of jurisprudence in Canada on these grounds, some commentators have referred to the lack of resources for potential claimants which may create a barrier to litigation, and to the fact that some cases involve the rights of immigrants who may experience discrimination during the immigration process itself, rendering access to the courts particularly difficult.¹⁶⁹ Other factors may include distrust of the legal system, and, perhaps most importantly, the insidious, covert nature of racial discrimination in a society such as Canada in which few laws contain obvious distinctions based on race that could be subject to challenge. While arguably discrimination analysis under section 15 has undergone significant change and evolution for the better through the jurisprudence of the SCC, given the sparseness of case law in the face of continuing and renewed discrimination in Canada, it may be that we are not making as effective use of the legal tools we have at our disposal as we could. Indeed, it may be that the tools are only available to a select few in society, and that those who need them most to redress injustices, find them to be out of their reach.

As regards the situation in the Council of Europe, similar issues of access are a concern. The workload of the Court has grown exponentially, which has also meant that the backlog of the Court has grown considerably. From 1994-1998 the Court delivered 389 judgments, between 1999-2003 it rendered 3308 judgments, and in January 2004, over 65,000 applications were pending.¹⁷⁰

¹⁶⁸ W. Black & L. Smith, "The Equality Rights", in Beaudoin & Mendes, *supra* note 61 at 995.

¹⁶⁹ *Ibid.*

¹⁷⁰ Registrar of the Court, Press release No. 040 (January 27, 2004), cited in R. Wintermute, "Filling the Article 14 'Gap'" (2004) 5 E.H.R.L.O.R. 486.

5.3 The parameters of judicial concern: judicial activism versus judicial restraint

Beyond the problem of access to the courts and the sheer volume of applications pending within legal systems, one of the more important difficulties with the litigation of equality rights is the question of what issues the Courts are prepared to deal with once a claimant finally gets before the Court. The relative reluctance or willingness on the part of the Courts to deal in a comprehensive way with issues of racial discrimination and inequality relates to broader questions about the appropriate role of the Courts versus that of legislatures. Who should make fundamental decisions about the kind of societies we have and about how our societies should be transformed if they fall short of our vision of community? This is a long-standing debate in Canada, where the balance between the legislatures and the courts has been a fundamental question, particularly since the advent of the *Charter*. Should the law preserve the status quo, or should it rather be a vehicle for social change?¹⁷¹ Should the legislatures, democratically elected, make controversial social decisions, or should it be left to the Courts, who are free (at least in Canada) from the pressures that come with concerns about re-election and constituencies?

In the European system, there is an added element which makes judicial reluctance to tackle such issues all the more tempting. One of the most important consequences of the accessory nature of Article 14 has been that the Court almost never renders a substantive assessment of a discrimination complaint. Despite the fact that the number of decisions delivered by the Court has grown tenfold from 1980 to 1995 and that litigants often invoke Article 14, the Court seldom responds on that basis.¹⁷² While a violation of Article 14 was claimed in 212 cases which the Court resolved with final

¹⁷¹ See McLachlin, *supra* note 7 at 20.

¹⁷² M. Volcansek & J. Stack, *Courts Crossing Borders: Blurring the Lines of Sovereignty* (Durham: Carolina Academic Press, 2005) 92, 96.

judgment between 1991 and 2001, the Court found a violation of the provision only 15 times during this period.¹⁷³

The conclusion by the European Court that dealing with the Article 14 aspect would be superfluous where it has already found a violation of a substantive article is problematic to say the least. Arguably, for the Court to simply dismiss the discrimination aspect of the claim on the basis that it serves “no useful purpose” ignores completely that the Court may have a procedural obligation to answer all aspects of a case submitted to it. Beyond this procedural responsibility, decisions have implications that go beyond the particular concrete consequences in the individual case before it. The Court in avoiding discrimination claims also fails to assert its function in addressing human rights violations. This reluctance to pronounce itself on issues of discrimination may also be perceived as an unwillingness to deal with difficult or controversial questions. The consequence is that while it is difficult enough to get in the door at Strasbourg, once in the door you are unlikely to have your discrimination claim dealt with at all. It may be that Protocol No. 12 will change things for the better, but one can only be optimistic that the Court will not continue its timidity in dealing with difficult issues and looking for what can be seen as a “cop-out”.

It may be that antipathy toward judicial activism is even stronger in the system of the ECHR where an active position on the part of the European Court may be viewed as irreconcilable with its role as a subsidiary institution. There is even less acceptance given its status as a supra-national institution for an in-depth evaluation by the Court of national acts and measures. In cases where the Court does deal with a discrimination claim, the Court has arguably been too deferential to states’ claims, granting them a wide margin of appreciation. In any event, the failure of the Court to deal with complex problems of discrimination in a rigorous manner is to the detriment both of the individual claimants and to the development of non-discrimination protections in the whole system of the ECHR.

¹⁷³ *Ibid.* at 96.

The reluctance in Europe to a more robust system may also be attributed to the political climate and to the complexity of current discourse over issues such as religious freedoms, immigration, and the famed concept of “integration”. In Canada, where the political system is often slow to change, it has been the Courts who have arguably led the way in making real change. The *Charter* has been synonymous with social progress for many lawyers in Canada. Its equality jurisprudence is often heralded as a beacon for the potential that the law can offer in fostering substantive equality in a broader political system where parliamentarians are often restrained by short-term political interests, concerns about support ratings in their constituencies and the need to consider prospects for re-election in the face of an unpopular, albeit constitutionally correct (and socially progressive) decision. Indeed, it has often been argued that many of the most important socially progressive advances in Canada have been due to the intervention of the Courts. Of course, conservatives and pro-legislature advocates lament this fact, but issues such as equality between the sexes, abortion rights, the decriminalisation of marijuana, and the rights of same-sex couples have all been decided by Courts, before governments and the political structures were able to make any real active change. On the other hand, some have criticised the Court’s approach as being disappointing and overly modest, having seen in s. 15 the potential for a charter of social rights capable of remedying injustice on a more general scale.¹⁷⁴

Overall, in comparing the Canadian and European models and the respective courts’ willingness to deal with issues of equality, it seems that the Canadian approach allows for more optimism in dealing with discrimination claims. As we already know, the European Court has seldom found a violation of Article 14, and particularly as regards race. The recent judgments in *Nachova and Others v. Bulgaria* and *Moldovan and Others v. Romania* were the first decisions in which the Court has openly found

¹⁷⁴ Sharpe, *supra* note 164.

against member states for racial discrimination in particular.¹⁷⁵ Given that it is not possible to conceive that only two instances of racial discrimination occurred in the 50-year period since the ECHR came into force, it is difficult not to conclude that Article 14 has been a rather ineffective tool in dealing with racial discrimination, or indeed, with discrimination more generally.

5.3.1 Ameliorative equality: effecting positive change through the Courts

Through its jurisprudence, the Supreme Court of Canada has also identified in section 15 its “large and strong remedial component”. Beyond according equal benefit of the law and equal protection from the law’s burdens, as one Senator who participated in the drafting and framing of the Charter as a member of the Special Committee explained, “[s]ection 15 aims to remedy or prevent discrimination against suffering social, political and legal disadvantage in Canadian society.” As Chief Justice McLachlin has also explained, “[t]he first and arguably primary goal of modern equality law is to improve the situation of people belonging to groups that have traditionally suffered discrimination... We call this kind of equality, directed at actually improving the lives of individuals and society by reducing stereotypical discrimination, ameliorative equality.”¹⁷⁶

Of particular importance to making any real change in society in an attempt to address problems of discrimination, is the fact that the Canadian model of equality encompasses what has been termed a “dual approach”. More specifically, the first aspect of the approach is that of ensuring the propriety of government decision making, whereas the second aspect is that of rectifying disadvantage, regardless of whether or not that disadvantage arises from prejudice or stereotyping. Given that this thinking is what is behind the Court’s understanding of the purpose of s. 15, one can have

¹⁷⁵ *Nachova and Others v. Bulgaria*, Judgment of 6 July 2005; *Moldovan and Others v. Romania No. 2*, Judgment of 12 July 2005.

¹⁷⁶ McLachlin, *supra* not 7 at 24-25.

reason to be optimistic that the approach of the Canadian court is to work toward reversing the negative effects of discrimination. Despite this potential, however, some commentators have lamented the SCC's relatively modest use of the *Charter* to impose a positive duty to advance equality, suggesting that this failure has weakened the Charter's transformative potential.¹⁷⁷

As has been discussed above, while the ECHR and the advent of Protocol No. 12 have perhaps moved the Council of Europe mechanism toward a more substantive approach to equality, it still appears that the need for positive obligations is considered an exception and that the primary focus of the provisions is on negative obligations. While this may be understandable given that the European Court of Human Rights is a supranational institution, and one which is hard-pressed to impose too much on a Member State for fear of criticisms of encroachment upon sovereignty, the result is perhaps a less effective tool for making positive change. Given that one of the objections to signing and ratifying the protocol has been this fear of losing ever-more sovereignty to a Court that would impose measures on Member States and that would force them to incur financial burdens, the cautious approach of the Court in general to infringe on a state's margin of appreciation can be explained.

One panellist at the Seminar marking the entry into force of Protocol No. 12 opined that it is highly probable that the Court will limit extension of the scope of the Protocol as it has already done with Article 14. It was likewise noted that if the obligation to redress discrimination implies budgetary consequences for the State in question (for example, in the context of access to public services), the Court is more likely to grant the state a wider margin of appreciation.¹⁷⁸

¹⁷⁷ Hendry, *supra* note 77 at 180.

¹⁷⁸ *Non-Discrimination: a human right*, *supra* note 16 at 71.

5.4 Addressing multi-dimensional inequalities

As already discussed above, there are complex ways in which gender, residence, race, educational level, class background and nativity affect and shape patterns of social inequality, and often these factors overlap.¹⁷⁹ Racism and discrimination are woven right into the fabric of our social patterns and are increasingly difficult to unthread. As the 2006 Annual report on Equality and non-discrimination in Europe published by the European Commission reports, migrants and ethnic minorities living in deprived urban areas often face a double risk of being socially excluded and the victims of discrimination due to their local residence and due to their ethnicity.¹⁸⁰ In Oldham, in the north of England, the unemployment rate among Bangladeshi and Pakistani communities is at 40%, where members of these communities are placed in the worse types of housing and have become a target for neo-Nazi groups.¹⁸¹ Despite the highest of qualifications, Afro-Caribbean men in England are more likely than White men to be in lower valued jobs. Similar patterns are exhibited in other countries, and in Germany for example, resident “non-Germans” particularly those from the Turkish community, suffer from social exclusion such as low income, homelessness, unemployment and poverty, and fare far worse than West or East Germans on all accounts.¹⁸²

In Canada, similar concerns exist. Poverty among racialised communities in urban areas is twice that of other Canadians.¹⁸³ Between 1980 and 2000, while the poverty rate for non-racialised communities fell by 28%, poverty

¹⁷⁹ V. Satzewich, “Racism in Canada: Change and Continuity” (2004) 38:1 Canadian Dimension 20.

¹⁸⁰ See “Equality and non-discrimination – Annual Report 2006”, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.4, September 2006 at p. 31.

¹⁸¹ F. Brennan, *supra* note 79 at 152.

¹⁸² *Ibid.*

¹⁸³ G. Galabuzi, “The Contemporary Struggle Against Racism in Canada” (2004) 38:1 Canadian Dimension at 21-22.

among racialised families rose by 361%.¹⁸⁴ In addition, 33% of racialised workers and 51% of Black Canadians reported experiencing racial discrimination.

In light of this multi-dimensional character of exclusion, to be an effective tool at combating racial discrimination, a mechanism must be able to address and indeed, redress, significant vulnerabilities and the various sources of vulnerability for claimants and for particularly disadvantaged groups.

As regards the ECHR, given that the vulnerabilities surrounding racial discrimination often coincide with or overlap with other factors including disability, gender, age, and socio-economic status, the fact that the ECHR mainly focuses on civil and political rights rather than social rights, has been cited as one of the significant limitations to the non-discrimination guarantee.¹⁸⁵ The ECHR has been limited in its capacity to evaluate this multi-layered aspect of disadvantage, however it may be that through Protocol No. 12's broader potential for application, it will provide more of a breakthrough in substantive terms.

The SCC through its consideration of the prohibited grounds of the *Charter* has made some progress in recognising that artificially categorising inequalities ignores the unique way in which some individuals are disadvantaged. The traditional separate grounds have been criticised for their exclusionary and uni-dimensional approach to inequality and for the fact that they require claimants to choose between being female, gay, disabled, or from an ethnic or religious minority, despite the fact that their experience or identity may actually encompass several of these aspects. As Grabham suggests, “[i]n contrast to formal, categorized equality that provides an ‘either-or’ choice of grounds, substantive equality should work like a spotlight on social relations to clarify the complexity and inter-

¹⁸⁴ Ontario Council of Agencies Serving Immigrants, Report on State of Racism in Canada (2007) at pp.51-52, online:<www.ocasi.org>.

¹⁸⁵ See M. Bell, *supra* note 86 at 216.

relatedness of discriminatory dynamics.”¹⁸⁶ Justice L’Heureux-Dubé recognised this overlap in *Corbiere v. Canada*, where she addressed multidimensional inequalities:

The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognise that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new and different forms of stereotyping and prejudice.¹⁸⁷

It therefore appears that the Canadian model accounts for the reality of discrimination and exclusion in a more realistic and comprehensive way than does the ECHR. Given the limitations of the ECHR to date, and the seeming hesitation on the part of the Court to go beyond its relatively conservative understandings of discrimination, the Canadian model seems to be the more adaptive tool to changing forms of prejudice and exclusion.

5.5 Concluding remarks on the potential of the models

On the basis of the analysis of the different approaches, it appears that the Canadian model offers more in the way of protections and possibilities for positive action and for redress of injustices. Its approach centred on the dignity and perspective of the individual, taking into account the purpose and context of the impugned measure, facilitates an equality analysis that is more nuanced, and closer to the complexity and reality of experiences with exclusion. While there are hopes to be had for the potential of Protocol No. 12, much will depend on the approach that the Court takes to its interpretation. It can continue to be cautious, (overly) deferential to states, or it can set real standards that all states must adhere to and begin to

¹⁸⁶ Grabham, *supra* note 166 at 649.

¹⁸⁷ *Corbiere v Canada*, *supra* note 70.

mainstream into their policy-making processes. While *Charter* jurisprudence speaks of ameliorative equality, the ECHR system has not come that far in practice, and must now move to a much more robust sphere of activity if it hopes to make any substantial dent in the problem of racism in Europe. On the other hand, the Council of Europe needs to be mindful of the “wait and see” approach of many member states who are reticent to ratify the Protocol and subject themselves to what they see as a supra-national imposition on their sovereign rights to make distinctions they perceive as legitimate and objectively justified in their territories. Yet this concern about balancing national prerogatives with the need for international norms is common to many international instruments and structures and is not a new challenge or tension in the area of human rights standards. Now that the ECHR is strengthened in formal terms, it must start asserting its strength in real terms. Until then, the *Charter* mechanisms, despite their limitations and faults, remain the better tool to address inequities and to attempt to redress racial injustices and vulnerabilities.

6 Toward a holistic view of equality

Racial and cultural inequality continue in Canada as well as in the Member States of the Council of Europe, and we are far from the goal of eliminating discrimination based on race, colour, national origin or ethnic origin. Although formalising standards and developing legal tools with which to implement and enforce human rights is an essential step in the fight against racial discrimination and exclusion, having such protections “on paper” is but one part of the solution. Indeed, when protections exist only in law, but not in fact, one must question where the gaps lie, and why, in the face of such formal guarantees, real equality is not yet a reality.

The question then remains, how best can modern, liberal societies redress discrimination and create the conditions for substantive equality for all persons? The law and the potential protections afforded by legal interpretations of existing provisions have already been outlined above, but the remedies provided in law have their limitations. How do we realistically go about creating a more equal society where all belong, and where human dignity is not only a principle eloquently set forth in the jurisprudence of a country’s highest Court, but rather brought to life by the full exercise of an individual’s freedoms and rights? What is missing from our current structure and with the legal protections that do exist? We need to better understand what stands in the way of real equality in order to improve the likelihood of ending racial inequality and discrimination.

A few considerations to bear in mind when attempting to holistically design a strategy for equality are highlighted here, in recognition of the fact that the law is but one component in a broader system of justice, and is oftentimes, a very modest player in the overall framework.

6.1 Inclusion and decision-making

The involvement of those emanating from traditionally disadvantaged communities or groups in decision-making would be a step in the right direction, not only in terms of empowering those typically excluded, but also with a view to arriving at better responses or strategies. Strategies formed with the input of the most vulnerable can only reflect a more enriched conception of experience than policies developed in isolation, to the exclusion of the rest of society.

As discussed in the previous chapter, the law has been said to be a critical element in the debate for change, despite its limitations and faults, and that it can be a powerful tool to better society.¹⁸⁸ However, in order for law to be legitimate, and for citizens to accept and believe in its authority, it must be effective and recognise as equal all members of a society. As a corollary, it must provide for a process of inclusive input by all affected. As Mooney-Cotter has put it, “[w]hen creating laws, this means that input from various groups, including all races, is critical.”¹⁸⁹ Although we frequently use the language of “exclusion” to refer to discrimination, and “inclusion” to refer to equality, inclusion means a great deal more than equal protection of the law—true inclusion means that all members of society be represented in decision-making, and that the process for consultation include input from all groups not only to strengthen acceptance, but to improve the quality of the overall result.

Phil Fontaine, National Chief of the Assembly of First Nations in Canada quoted Patricia Monture, a Mohawk woman and legal scholar in an address about modern racism in Canada:

To combat racism, we must give up on monolithic, ethno-centric reality and believe that there is something to be learned and a better

¹⁸⁸ A. Mooney-Cotter, *supra* note 13 at p.3.

¹⁸⁹ *Ibid.*

society to be achieved by listening to formerly silenced people. Listening to the powerless may, in turn, lead to the understanding that some groups and group members have enjoyed disproportionate privilege, including the power to define, to appropriate, and to control the realities of others.¹⁹⁰

Such inclusion also requires a move away from conceptions of “Us” and “Them”, so that the “Us” or “Self” becomes decentralised and no longer perceived as what is the norm. Once we recognise that we are all equally deserving of protections, but also of opportunities as well as the conditions needed to enjoy those opportunities, we will be much further ahead.

Iris Marion Young has proposed that we need to move toward a richer understanding of equality and inequality that would promote the participation and inclusion of all groups in institutions and positions, noting that

[w]hile discriminatory policies sometimes cause or reinforce oppression, oppression involves many actions, practices and structures that have little to do with preferring or excluding members of groups in the awarding of benefits.¹⁹¹

Young’s proposal is therefore that we need to deal with structures of oppression and domination to reach true equality; the role of the law in ensuring that everyone has equal access to benefits is perhaps one part of the solution, but linking equality with non-domination allows us to take account of the history and context of inequality and the manner in which power is distributed.¹⁹²

¹⁹⁰ Fontaine, P., “Modern Racism in Canada”, 1998 Donald Gow Lecture, online: <http://www.hrsdc.gc.ca/en/lp/lo/lsw/e/we/special_projects/RacismFreeInitiative/speeches/Fontaine.shtml>.

¹⁹¹ I. M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) 194.

¹⁹² H. Charlesworth, “Concepts of Equality in International Law”, in G. Huscroft & P. Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Oxford/Portland: Hart Publishing, 2002) 137 at 147.

6.2 Awareness and recognition

As mentioned in Chapter 3, Canada's shameful history in intolerance, and its lack of respect for those it deemed less worthy of dignity and in particular its treatment of Aboriginal peoples, is a lesser known aspect of the country's normally celebrated image. Indeed, this ignorance is perhaps part of the continuing problem today.

As Ujjal Dosanjh, a former premier of the province of British Columbia pointed out, in a survey conducted by the Canadian Civil Liberties Association, 91 per cent of high school students were unaware that in the past the Canadian government had refused entry to black immigrants.¹⁹³ The same survey showed that 68 per cent of high school students did not know that the government had denied voting rights to Aboriginal Canadians.¹⁹⁴ The flip side of this ignorance is that often lack of awareness creates a lack of understanding of why the legacy of such treatment lives on in the form of disadvantage. That is, without awareness of the historical disadvantage perpetrated on some individuals or groups, it becomes very difficult for the rest of society to understand why such individuals may be worse off today. This breeds a culture of blame and the mentality that if "They" don't succeed or do as well in a society, it's "Their" own fault. Ignorance of the problem of racial discrimination, or indeed, passive acceptance of its existence, is an insidious enemy to weed out in the fight toward equality. One author cites the example in France of the denial of recognising racial or ethnic groups and the onus that is placed on the "Other" to integrate and to make do:

The general view is that in France you are either French or not. If you are not French in France, this is due to *your* failure to integrate. The trend is very much towards blaming tension between groups differently perceived on the basis of *their* failure to become French.

¹⁹³ The News in Review, Canadian Broadcasting Corporation (2000), online: <<http://www.cbc.ca/newsinreview/April%202000/Ujjal/visible.html>>.

¹⁹⁴ *Ibid.*

A related aspect of this problem is that of equating integration with assimilation. Rather than positively recognising racial or ethnic difference, the trend has been to attempt to vaguely tolerate some difference by seeking to ensure that minorities limit their distinctive types of behaviour in ways that are compatible or acceptable to pre-existing dominant cultural norms.¹⁹⁵ To go back to what was discussed at the very outset of this paper in exploring the definition of racism, this categorisation of persons into “us” and “them” is indeed a large part of the problem. While trying to change these categorisations is essential to making any meaningful change, these are not the types of challenges that can be addressed only by legal responses. Such change may take time, though in light of the current climate in Europe, this may be time we do not have and is most certainly time we cannot afford to waste. In any event, as Brennan explains, “a legal system must have a better means of considering the idea that ethnic or cultural differences should be welcomed rather than shunned.”¹⁹⁶

6.3 Developing a coordinated approach

Inequality and exclusion are the result of various factors, and in particular socio-economic inequities. Poverty usually implies a lack of security, problems with housing, health care, access to the law, and inevitably, problems with access to the protections of the law. Although there are variances within Canada and among the countries that are members of the Council of Europe, a large proportion of ethnic minorities consists of those who fall in a lower socio-economic bracket, and thus whose problems are compounded by racial and ethnic prejudice. Anti-discrimination laws cannot answer this problem on their own of course, although laws dealing with employment in both recruitment and working conditions, housing, and proactive positive action where necessary can help.

¹⁹⁵ Brennan, *supra* note 79 at 157-158.

¹⁹⁶ *Ibid.* at 158-159.

The possible consequences of various social welfare policy changes also need to be understood if we really want to tackle the insidious effects of exclusion in a holistic way. Policy-makers, community groups, NGOs, politicians, members of the legal community and judges need to reflect further on how to address, in a coordinated way, the broader socio-economic problems that disproportionately afflict those also affected by issues of racial discrimination.

Attempts to address racism and discrimination in a horizontal, coordinated way have been made in Canada in recognition of the fact that while we have made solid achievements legally speaking, *de facto* equality is not yet a reality, and trying to make it so will require a wide range of initiatives. The federal government has adopted what it terms “Canada’s Action Plan against Racism”, a six-point action plan which includes 1) assisting victims and groups vulnerable to racism, 2) developing forward-looking approaches to promote diversity and combat racism; 3) strengthening the role of civil society; 4) strengthening regional and international cooperation; 5) educating children and youth on diversity and anti-racism; and 6) countering hate and bias.¹⁹⁷ There are likewise a myriad of initiatives underway in Europe, both at the level of the Council of Europe and in the European Union. These initiatives, on their face, sound hopeful and promising. We must be vigilant however to ward against a scenario where a lot of money is thrown at anti-racism campaigns and plans, and yet, nothing changes. We need to be careful not to create campaigns to make us feel like we are doing something, when really they are for those who see themselves as “Us” and who already form part of the structures of authority, rather than for those who desperately need the resources and support the most.

¹⁹⁷ Government of Canada, “Canada’s Action Plan Against Racism” (2005), online: <http://www.canadianheritage.gc.ca/multi/plan_action_plan/pdf/action_e.pdf>.

In the end, although there may be advantages or relative weaknesses with both the Canadian and ECHR approaches, equality before and under the law cannot defeat racism. Social and institutional change is required and is the key to a truly egalitarian future. Strengthening social cohesion and defeating racism and discrimination requires coordinated action, and building partnerships between governments, the judiciary, and society. It requires commitment on the part of all actors. Most of all it requires sincere commitment to the idea that there are alternative claims of the truth.

As Michael Ignatieff, a Canadian-born writer and historian has commented in explaining why we have reasons to be hopeful in terms of creating a political community in which everyone has the right to belong:

Today, in our multi-ethnic, multicultural cities, we are trying to vindicate a new experiment in ethnic peace, and we have learned that the preconditions of order are simple: equal protection under the law, coupled with the capacity for different peoples to behave toward each other not as members of tribes or clans, but as citizens. We do not require very much in the way of shared values, or even shared lives. People should live where they want, and with whom they want. The key precondition is equality of rights; it all depends whether our differences can shelter under the protecting arch of a legitimate legal order.¹⁹⁸

Through Ignatieff's words, one can also imply another key point: although much is made about the difficulties of diversity, heterogeneity, and all the challenges related to living in multicultural societies, in fact, in today's world, we do not require very much in order to be able to live together. People need to be able to live together, to enjoy their possibilities for development equally, and to be able to celebrate their differences rather than assimilating to one version of the "truth" as defined by a dominant group. If such is the case, it may be that despite how some politicians like to present the threat of diversity, by spreading the word that it is indeed a richness to be embraced and fostered, we may be able to reduce fears, and by extension, fight intolerance, from the bottom-up.

¹⁹⁸ M. Ignatieff, *The Rights Revolution: CBC Massey Lecture Series*, (Toronto: House of Anansi Press Limited, 2000) at 141.

Supplement A

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000¹⁹⁹

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

Article 1 – General prohibition of discrimination

1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 2 – Territorial application

1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective

¹⁹⁹Text of the site reproduced here from the public site of the Council of Europe. See: <http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm>

on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4 A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5 Any State which has made a declaration in accordance with paragraph 1 or 2 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

Article 3 – Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 4 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 5 – Entry into force

1 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.

2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 6 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;

c any date of entry into force of this Protocol in accordance with Articles 2 and 5;

d any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 4th day of November 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Supplement B

Schedule B Constitution Act, 1982²⁰⁰

Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982

PART I Canadian charter of rights and freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* 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.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:
a) freedom of conscience and religion;
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
c) freedom of peaceful assembly; and
d) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

²⁰⁰ Text of the *Canadian Charter of Rights and Freedoms* reproduced from the public site of the Canadian Ministry of Justice. Available at: <http://laws.justice.gc.ca/en/Charter/index.html>

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
a) to move to and take up residence in any province; and
b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to
a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. 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.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention
a) to be informed promptly of the reasons therefor;
b) to retain and instruct counsel without delay and to be informed of that right; and
c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

- a) to be informed without unreasonable delay of the specific offence;
- b) to be tried within a reasonable time;
- c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- e) not to be denied reasonable bail without just cause;
- f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

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 or mental or physical disability.

Affirmative
action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object 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.

Official Languages of Canada

Official
languages of
Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official
languages of
New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of
status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and
French linguistic
communities in
New Brunswick

16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the
legislature and
government of
New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Proceedings of
Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of
New Brunswick
legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary
statutes and
records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick
statutes and
records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in
courts
established by

19. (1) Either English or French may be used by any person

Parliament	in, or in any pleading in or process issuing from, any court established by Parliament.
Proceedings in New Brunswick courts	(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.
Communications by public with federal institutions	<p>20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where</p> <p style="margin-left: 40px;">a) there is a significant demand for communications with and services from that office in such language; or</p> <p style="margin-left: 40px;">b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.</p>
Communications by public with New Brunswick institutions	(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.
Continuation of existing constitutional provisions	21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.
Rights and privileges preserved	<p>22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.</p> <p style="text-align: center;"><u>Minority Language Educational Rights</u></p>
Language of instruction	<p>23. (1) Citizens of Canada</p> <p style="margin-left: 40px;">a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or</p> <p style="margin-left: 40px;">b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,</p> <p>have the right to have their children receive primary and secondary school instruction in that language in that province.</p>

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

- a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

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.

Exclusion of evidence bringing administration of justice into disrepute

(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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Other rights and freedoms not affected by Charter

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.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent

with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.(93)

Application to territories and territorial authorities

30. A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies
a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation **34.** This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

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