



Government
of Canada

Gouvernement
du Canada



A BRAVE NEW **W**ORLD:

Where Biotechnology
and Human Rights Intersect

Chapter 1

The Current Domestic
and International
Human Rights Framework

Canada

A Brave New World: Where Biotechnology and
Human Rights Intersect

July 2005

This document does not reflect the official views or positions of the Government of Canada or the Department of Justice. The document does not constitute legal advice to the government or to individual departments. Rather, it is an overview of the international and domestic law, the law in other jurisdictions and academic commentary with regards to the human rights issues raised by selected applications of biotechnology. The description of law in this document is valid as of March 2005. Please ensure that the information contained herein is accurate and up-to-date before relying on it.

PERMISSION TO REPRODUCE

Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from the Government of Canada, provided that due diligence is exercised in ensuring the accuracy of the information reproduced; that the Government of Canada is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced, nor as having been made in affiliation with, or with the endorsement of, the Government of Canada.

For permission to reproduce the information in this publication for commercial redistribution, please e-mail: copyright.droitdauteur@communication.gc.ca.

Cat. No. Iu199-6/2005E-PDF
ISBN 0-662-41902-2

Also available in electronic format on the Internet at:
<http://biotech.gc.ca>

Table of Contents

1.1 Introduction	1-1
1.2 Human Rights Law in Canada	1-1
1.3 International Human Rights Law	1-3
1.4 Relationship between Domestic and International Human Rights Law	1-4
1.5 Human Rights and Relevant Concepts	1-4
1.6 Conclusion	1-8

The Current Domestic and International Human Rights Framework

Elisabeth Eid and Katherine van Heugten

1.1 Introduction

The objective of this paper is to identify and analyze human rights issues relating to biotechnology within the current human rights framework and to identify areas where the current human rights framework does not adequately address the issues. Therefore, it is essential to have a general understanding of domestic and international human rights law and existing and evolving human rights concepts. The following is an overview of the major human rights instruments and concepts that will be considered throughout this paper.

1.2 Human Rights Law in Canada

In Canada, the main domestic sources of human rights law are the *Canadian Charter of Rights and Freedoms* (“*Charter*”),¹ the *Canadian Bill of Rights* (“*CBR*”)² and human rights legislation.³

Canadian Charter of Rights and Freedoms

For the purpose of identifying and analyzing human rights issues related to biotechnology, the most significant source of human rights law in Canada is the *Charter*. It outlines the fundamental rights and freedoms that are constitutionally guaranteed to individuals in Canada. With respect to the biotechnology applications discussed in this paper, the most relevant rights and freedoms include: 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;⁴ the right to be secure from unreasonable search and seizure;⁵ and equality rights.⁶

The *Charter* does not apply to all types of activities. Pursuant to section 32(1), the application of the *Charter* is limited to Parliament and the federal government with respect to all matters within federal authority, as well as the governments and legislatures of the provinces and territories with respect to all matters within their jurisdiction. The *Charter* does not apply to purely private action.

Further, the rights and freedoms set out in the *Charter* are not absolute. Rather, they are guaranteed under section 1, “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷ The courts have developed a multi-step test for justification under section 1 of the *Charter* whereby the government must demonstrate that the objective of the statute or government action in question is pressing and substantial; that the infringement is rationally connected to the objective; that it impairs the right or freedom at issue as little as possible and that the infringement’s effect is proportional to the objective.⁸

¹ Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² S.C. 1960, c. 44.

³ See for example at the federal level, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Provinces and territories have comparable human rights legislation.

⁴ *Supra* note 1 at s. 7.

⁵ *Ibid.* at s. 8.

⁶ *Ibid.* at s. 15(1).

⁷ *Ibid.* at s. 1.

⁸ This test was originally set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 and was refined in *Egan v. Canada*, [1995] 2 S.C.R. 513. The third part of the test was reformulated in *Dagenais v. Canadian Broadcast Corp.*, [1994] 3 S.C.R. 835.

A key question surrounding the rights expressed in the *Charter* is the extent to which they impose positive obligations on the government. This question is particularly relevant to the ‘right to health’ debate. The existence of a positive right, which could translate into a positive obligation upon the state, suggests a duty to support the right claimed by taking positive measures. A negative right, in general terms, simply requires the government not to interfere with the right.⁹

However, it should be noted that this positive versus negative distinction is not clearly demarcated and often breaks down upon further analysis. Some traditionally negative obligations may require the positive expenditures of funds by the government. For example, the government incurs substantial costs to respect the right to a fair trial, which is traditionally viewed as a negative right.

The reluctance or willingness of the courts to impose positive obligations on the government has been varied. For example, in *Dunmore v. Ontario*,¹⁰ the Supreme Court of Canada (“SCC”) imposed a positive obligation on the government of Ontario to protect the freedom of association rights of a group of agricultural workers pursuant to section 2(d) of the *Charter*. In *G.(J). v. New Brunswick (Minister of Health and Community Services)*,¹¹ the SCC found that the government had an obligation under section 7 of the *Charter* to provide funded legal counsel under certain circumstances in child wardship proceedings. In the health care context, a positive obligation was imposed directly or indirectly on the government pursuant to section 15 of the *Charter* in both *Eldridge v. British Columbia (Attorney General)*¹² and *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*,¹³ which are discussed in detail in the following chapter.

In contrast, the SCC found that section 7 of the *Charter* did not impose a positive obligation on the state to provide adequate living standards to individuals in *Gosselin v. Quebec*.¹⁴ The majority of the Court examined the relevant jurisprudence and found that it did not suggest section 7 placed positive obligations on the state. Rather, section 7 has been interpreted as restricting the state’s ability to deprive individuals of their right to life, liberty and security of the person.

Underscoring this positive versus negative rights dynamic is the debate surrounding the appropriate balance between the courts and elected branches of government. The central question being: to what extent should the courts interpret the *Charter* so as to impose positive obligations on the government that would effectively interfere with public policy choices or compel financial allocation?

Canadian Bill of Rights (“CBR”)

The *CBR* is a “quasi-constitutional” federal statute that only applies to federal legislation. If a federal law cannot be construed or applied consistently with the *CBR*, the *CBR* will override it, unless the federal law explicitly states otherwise.¹⁵ The rights and freedoms set out in the *CBR* are similar to those found in the *Charter*, which has for all practical purposes largely displaced the *CBR*. The most notable differences are the protection of property rights in the *CBR*,¹⁶ which were specifically excluded from protection under the *Charter* and the right to a fair hearing in s.2(e) of the *CBR*.

Human Rights Legislation

Human rights legislation exists at both the federal and provincial levels. The *Canadian Human Rights Act*¹⁷ is very similar to provincial human rights legislation, which principally prohibits discriminatory practices based on listed grounds of discrimination, including disability or handicap.¹⁸ The application of human rights legislation is different than that of the *Charter*, as generally, the former applies to both government and private actions, albeit within particular contexts, such as discrimination in employment, accommodation or services. The protections set out in these statutes will be specifically addressed in Chapter 5 – Genetic Information and Privacy in the context of discrimination based on a genetic characteristic.

⁹ T. Friesen, “The Right to Health Care” (2001) 9 Health L. J. 205.

¹⁰ [2001] 3 S.C.R. 1016.

¹¹ [1999] 3 S.C.R. 46.

¹² [1997] 3 S.C.R. 624.

¹³ [2002] B.C.J. No. 2258 (B.C.C.A.) leave to S.C.C. granted [2002] S.C.C.A. No. 510.

¹⁴ [2002] S.C.J. No. 85.

¹⁵ *R. v. Drybones*, [1970] 2 S.C.R. 574 at 579; *Hogan v. The Queen*, [1975] 2 S.C.R. 574 at 584; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 238.

¹⁶ *Supra* note 2 at s. 1(a).

¹⁷ *Supra* note 3.

¹⁸ *Supra* note 3.

1.3 International Human Rights Law

Four sources of international law exist: (1) conventions or treaties; (2) customary international law; (3) general principles of law; and (4) judicial decisions and scholarly writings.¹⁹ Of these four, it is generally agreed that the two primary sources of international law are conventions or treaties and customary international law. Conventions or treaties are binding agreements that define particular obligations of states that are parties to them, while customary international law is universally binding on states and arises from widespread state conduct that is believed to be legally required (“*opinio juris*”).²⁰

A secondary source of international law is the body of law known as ‘soft law’. The term ‘soft law’ is used to refer to such instruments as draft treaties, declarations and resolutions. Rather than being formal sources of law having legally binding force, these instruments are seen as evidence of state practice, which may translate over time into emerging international norms.²¹ In most cases, the subject matter of such instruments is not thoroughly developed or agreed upon such as to allow for transformation into a treaty.²² This body of principles or instruments is particularly significant to the identification and analysis of human rights issues related to biotechnology, given that biotechnology is a relatively new topic on the international stage.

One of the most significant steps towards moving human rights law to the forefront of international law was the inclusion post WWII of the protection of human rights as one of the purposes of the United Nations, followed by the adoption of the International Bill of Rights.

The following three documents are often referred to as the International Bill of Rights: (1) *Universal Declaration of Human Rights*,²³ [hereinafter *UDHR*]; (2) *International Covenant on Civil and Political Rights*,²⁴ [hereinafter *ICCPR*] and (3) *International Covenant on Economic, Social and Cultural Rights*,²⁵ [hereinafter *ICESCR*].

Although the *UDHR* is a declaration, and therefore not technically binding, it is generally accepted that many of the provisions in it have risen to the status of customary international law. Most of the rights outlined in the

UDHR were later codified in the *ICCPR* and the *ICESCR*. The *ICCPR* includes provisions relating to the right to life, privacy, religion, expression, a fair trial and political participation. These rights are often referred to as first-generation rights, which protect individuals from state interference.

The *ICESCR* includes provisions relating to work, trade unions, social security, standard of living, health, family and education, etc. In accordance with the Covenant, these rights are to be progressively realized in light of available resources. Many of the rights outlined in the *ICESCR* are referred to as second-generation rights, which impose positive duties on states. However, some can be characterized as first-generation rights.

Canada is party to the *ICCPR* and the *ICESCR* as well as the main other human rights treaties including the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*. Treaty bodies, usually referred to as “Committees”, have been established pursuant to the various human rights treaties with mandates to monitor state compliance with the obligations under the treaties. Probably the best known example is the UN Human Rights Committee established to monitor the *International Covenant on Civil and Political Rights*. Other examples include the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women.

The primary role of these bodies is to review domestic implementation by those states that are party to the treaty through examining periodic national reports and with respect to some treaties, rendering opinions on individual complaints. The bodies may also produce “General Comments” which serve to interpret the provisions of the treaty and clarify state obligations pursuant to the treaty.

¹⁹ Article 38, *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945); J.H. Currie, *Public International Law* (Toronto: Irwin Law Inc., 2001) at 80.

²⁰ Currie, *ibid.* at 84.

²¹ *Ibid.* at 99.

²² A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 44.

²³ GA Res. 217 (III) UN GOAR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948)

²⁴ 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976)

²⁵ 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976)

The views of the Committees and their “General Comments” are not binding on states but can carry considerable persuasive force.

Canada is also a member of the Organization of American States and by virtue of this membership, subject to the *American Declaration on the Rights and Duties of Man*. Individuals may submit complaints to the Inter-American Commission on Human Rights alleging violations by Canada of the Declaration. The decisions of the Commission on such complaints are not binding on Canada but have considerable persuasive force. Decisions of the Commission on provisions of the Declaration serve as an important source of interpretation of the provisions of the instrument.

Canada is not a member of the Council of Europe but has observer status with the organization. Canada is not party to the human rights treaties adopted by the Council of Europe and thus they are not binding on Canada. However, such instruments and how they have been interpreted may be of interest in informing interpretations of the *Canadian Charter of Rights and Freedoms*, as well as domestic legislation.

1.4 Relationship between Domestic and International Human Rights Law

In Canada, treaties are not self-executing. Rather, in order to have direct legal force at the domestic level, treaty obligations must be incorporated through enacting legislation by either the federal or provincial legislatures, depending on which has jurisdictional competence over the subject matter of the treaty obligation.²⁶ Human rights treaties are generally ratified on the basis of existing domestic legislation and policies rather than through incorporating legislation.

Although unincorporated human rights treaties may not form the basis of an action in domestic courts, they can be an important source of interpretation for both constitutional and ordinary legislation. For example, in relation to *Charter* rights, the SCC has stated that international obligations may inform the interpretation of the content of *Charter* rights.²⁷

Moreover, the SCC stated in *Baker v. Canada (Minister of Citizenship and Immigration)*²⁸ that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review of administrative action.

Given the important role human rights treaties may play in interpreting *Charter* rights and freedoms, as well as ordinary legislation, such treaties will be considered in relation to the human rights issues raised by biotechnology.

1.5 Human Rights and Relevant Concepts

Human Dignity

There is no right to human dignity; rather it is considered a human rights concept. The concept of human dignity occupies a central legal, moral and ethical role in modern human rights law. It appears in the preambles of all three instruments that comprise the *International Bill of Rights*. The preamble to the *UDHR* refers to the “dignity and worth of the human person,”²⁹ while the preambles to the *ICCPR* and the *ICESCR* note that human rights “derive from the inherent dignity of the human person.”³⁰

Traditionally, human dignity was identified as the foundation from which other human rights flowed and not as a right as such.³¹ However, in recent years at the international level, violations of human dignity have increasingly been relied upon as a legal and moral basis unto itself.³² This is most evident in recent biomedicine instruments. For example, in UNESCO’s *Universal Declaration on the Human Genome and Human Rights*,³³ human dignity appears in several articles of the Declaration and plays a central role in defining and regulating the human genome.

²⁶ Currie, *supra* note 19 at 205.

²⁷ Dunmore, *supra* note 10; *Granovsky v. Canada* (Minister of Employment and Immigration) [2001] 1 S.C.R. 703; *United States v. Burns*, [2001] 1 S.C.R. 283; *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3. [1999] 2 S.C.R. 817.

²⁸ *UDHR*, *supra* note 23.

²⁹ *ICCPR*, *supra* note 24; *ICESCR*, *supra* note 25.

³⁰ Law Reform Commission of Canada, *Human Dignity and Genetic Heritage* (Study Paper) (Ottawa: Law Reform Commission of Canada, 1991) at 24.

³¹ D. Bell, “Human Cloning and International Human Rights Law” (1999) 21 *Sydney Law Review* 202.

³² *Universal Declaration on the Human Genome and Human Rights*, 1997, G.A. Res. 53/152, 53rd Sess. (1998).

Human dignity is also a key part of the Council of Europe's *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*.³⁴ In the Explanatory Report accompanying the Convention, it states that human dignity is the "essential value to be upheld"³⁵ and that all provisions in the Convention must be interpreted bearing in mind the goal is to protect human rights and dignity.³⁶ Moreover, the Explanatory Report states that respect for human dignity is central to the provisions respecting scientific research,³⁷ consent to research³⁸ and the provision respecting the sanctity of the human body.³⁹

The term 'human dignity' does not appear in the *Charter*. However, human dignity is a fundamental value that underlies and informs human rights norms found within the *Charter*, particularly the rights enunciated in sections 2, 7, 8 and 15.⁴⁰ In fact, human dignity plays a central role in the equality analysis formulated by the SCC. The SCC elaborated on its conception of human dignity, particularly in the context of equality, in *Law v. Canada*,⁴¹ where the Court stated:

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition...the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respected 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.⁴²

Privacy

At its earliest form, privacy was described as "the right to be let alone."⁴³ The cornerstones of the modern understanding of privacy are individual dignity and autonomy.⁴⁴

The right to privacy is referred to in a number of international human rights instruments. Both the *UDHR* and the *ICCPR* contain similar provisions protecting against arbitrary interference with one's "privacy, family, home or correspondence" and against "attacks upon honour and reputation."⁴⁵ There is also a provision in the *Convention on the Rights of the Child* granting similar rights to children.⁴⁶

There is no specific provision in the *Charter* guaranteeing an explicit "right to privacy". However, the SCC has interpreted the *Charter* to include privacy protections. With respect to section 8 of the *Charter*, the SCC has interpreted the right to be free from unreasonable search and seizure in a broad fashion "to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments."⁴⁷ Further, the SCC has noted that privacy is "grounded in man's physical and moral autonomy" and is "essential for the well-being of the individual."⁴⁸

³⁴ *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, 4 April 1997, E.T.S. No. 164 (entered into force 1 December 1999).

³⁵ Council of Europe, *Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (DIR/JUR (97) 1) (Strasbourg: Directorate of Legal Affairs, January 1997) at para. 9.

³⁶ *Ibid.* at para 22.

³⁷ *Supra* note 35 at Article 15.

³⁸ *Ibid.* at Article 17.

³⁹ *Ibid.* at Article 21.

⁴⁰ *Supra* note 28 at 33.

⁴¹ [1999] 1 S.C.R. 497.

⁴² *Ibid.* at para 53.

⁴³ S.D. Warren & L.D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. Rev. 193 at 193.

⁴⁴ See *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 at para. 19; *R. v. Mills*, [1999] 3 S.C.R. 668. See also: M. Marshall & B. von Tigerstrom, "Health Information" in J. Downie, T. Caulfield & C. Flood (eds.), *Canadian Health Law and Policy* (2nd Ed.) (Markham: Butterworths, 2002); P.S. Florencio & E.D. Ramanathan, "Secret Code: The Need for Enhanced Privacy Protections in the United States and Canada to Prevent Employment Discrimination Based on Genetic and Health Information" (2001) 39 Osgoode Hall L.J. 77.

⁴⁵ *UDHR*, *supra* note 23 Article 12; *ICCPR*, *supra* note 24 at Article 17.

⁴⁶ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990) at Article 16.

⁴⁷ *R. v. Dyment*, [1988] 2 S.C.R. 417 at 426.

⁴⁸ *Ibid.* at 427-438.

With respect to section 7 of the *Charter* (right to life, liberty and security of the person), the SCC has found that it includes a residual right to privacy. Although, the Court has not made a precise determination as to whether the right to privacy emanates from the liberty component or the security of the person component of section 7. In some cases, the Court has relied on the liberty interest to protect an individual's right to privacy, whereas in others, the Court has relied on the security of the person component.⁴⁹ Further, the SCC has not clearly determined the interaction of the privacy interests under sections 7 and 8.⁵⁰

The SCC has discussed three different categories of claims to privacy: (1) territorial or property privacy, such as the right to privacy in one's home; (2) personal privacy, such as the right to be free from bodily intrusions; and (3) informational privacy, which includes the right to control personal information about oneself.⁵¹

Other sources of privacy protections include the federal *Privacy Act*,⁵² which governs the collection, use and disclosure of personal information by federal institutions, the *Personal Information Protection and Electronic Documents Act*,⁵³ which governs the collection, use and disclosure of personal information by federal public bodies, and by private sector bodies in the course of a commercial activity. In addition, there is provincial legislation respecting privacy,⁵⁴ which governs information held by provincial public bodies.

Liberty and Security of the Person

Although they are distinct rights, the right to liberty and the right to security of the person are often found together in a single provision. For example, the right to liberty and the right to security of the person are found together in article 3 of the *UDHR* and article 9 of the *ICCPR*.

Section 7 of the *Charter* guarantees "the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with fundamental justice."

The liberty interest in section 7 contains two separate aspects. First, the right to liberty protects an individual's physical liberty. Individuals have a right to be free of physical restraint, such as imprisonment or extradition.⁵⁵ To constitute a deprivation of liberty, the physical restraint need not be severe.⁵⁶ Second, the liberty interest in section 7 provides a protected sphere in which individuals may make fundamental personal decisions, without state interference, that go to the essence of enjoying individual dignity.⁵⁷ However, not all personal decisions will be protected. The SCC has stated that the personal autonomy that stems from the liberty aspect of section 7 is not "synonymous with unconstrained freedom."⁵⁸

The right to security of the person contained in section 7 of the *Charter* has been broadly interpreted. It includes the right to physical integrity, i.e., to control one's bodily integrity. The right will be engaged where state action interferes with the personal autonomy of an individual.⁵⁹ Security of the person has both a physical and psychological aspect, such that an individual's security of the person will be engaged where state action imposes physical punishment and/or causes severe psychological harm.⁶⁰ Not all state-imposed psychological harm will constitute a breach of one's security of the person.

⁴⁹ See *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 487, where L'Heureux-Dubé J. concluded that the right to privacy was a significant aspect of the right to liberty in a free and democratic society; *R. v. Beare*, [1988] 2 S.C.R. 387 at 412, where LaForest J., writing for the Court, suggested that s. 7 included a right to privacy; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, where the Court discussed the relationship between s. 7 and privacy and where Wilson J. stated that the liberty component of s. 7 included a right to make fundamental private decisions; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, where the Court held that the security of the person component of s. 7 protected the privacy of individuals with respect to decisions that affected their body.

⁵⁰ See *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] S.C.J. No. 61; *Ruby v. Canada (Attorney General)*, [2002] S.C.J. No. 73.

⁵¹ *Ibid.* at 429-430.

⁵² R.S.C. (1985) c. P-21.

⁵³ S.C. 2000, c. 5.

⁵⁴ *Supra* note 53.

⁵⁵ *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

⁵⁶ Compelling an individual to give oral testimony or fingerprints has been found to be deprivations of liberty. See *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425; *R. v. Beare*, *supra* note 49.

⁵⁷ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

⁵⁸ *Ibid.* at para. 54.

⁵⁹ *Rodriguez*, *supra* note 49.

⁶⁰ *Blencoe*, *ibid.*; *G.(J.)*, *supra* note 11; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519.

Rather, the harm must have a serious and profound effect on the individual's psychological integrity: it must be greater than ordinary stress or anxiety⁶¹ but does not have to rise to the level of psychiatric illness.

The analysis under section 7 occurs in two stages. The courts would first determine whether a *Charter* right has been engaged by government action and then determine whether the deprivation was in accordance with the principles of fundamental justice. The courts must find that the government action deprived an individual of one or more of the interests in section 7, i.e., life, liberty or security of the person. Second, the courts would identify the relevant principle of fundamental justice in the circumstances of the case and would then determine whether the deprivation of the right was in accordance with the principles of fundamental justice.

The principles of fundamental justice are found in the basic tenets of the legal system, including, the common law, the rights set out in sections 8-14 of the *Charter* and international norms. There are both substantive and procedural principles of fundamental justice. They are legal principles that are in the domain of the judiciary and not the domain of public policy. There must be significant societal consensus that the principle is fundamental to the way in which the legal system ought fairly to operate and the principle must be able to be identified with sufficient precision to make it a standard against which a deprivation can be measured.

If the government deprivation is found to be in accordance with the principles of fundamental justice, then no *Charter* violation would have been made out. If, on the other hand, the deprivation is found not to have been in accordance with the principles of fundamental justice, then a *Charter* violation would have occurred. The courts might require the Crown to justify the violation under section 1 of the *Charter* as a reasonable limit in a free and democratic society. The onus is on the complainant during the first two stages of inquiry and on the Crown during the third stage, i.e., government justification under section 1.

Equality

The concept of equality is difficult to define in exact terms. A determination of whether there is a violation of the right to equality necessitates comparisons between individuals or groups. Defining the correct comparator group has been the subject of significant debate particularly concerning the appropriate comparisons and about what constitutes equal treatment.⁶²

Equality guarantees appear in several international human rights instruments. Both the *UDHR*⁶³ and the *ICCPR*⁶⁴ contain equality provisions. In addition, international human rights instruments exist that specifically address discrimination against woman⁶⁵ and discrimination on the basis of race.⁶⁶

The equality guarantee in section 15(1) of the *Charter* states that every individual has the right to equal benefit of the law without discrimination on the basis of enumerated or analogous grounds. Equality guarantees are also set out in the *Canadian Human Rights Act* and provincial human rights instruments, which typically relate more specifically to discrimination in the context of employment, accommodation or services.

The approach to be taken respecting discrimination claims under the *Charter* was set out by the SCC in *Law v. Canada (Minister of Employment and Immigration)*.⁶⁷ The claimant must prove: that the law imposes differential treatment between the claimant and others, in purpose or effect, on the basis of a personal characteristic; that the differential treatment is based on an enumerated or analogous ground; and that the treatment constitutes discrimination in a substantive sense, having the effect of treating the claimant as less worthy of concern, respect and consideration in a manner that offends human dignity.

⁶¹ *G.(J.)*, *supra* note 11.

⁶² R.J. Sharpe, K.E. Swinton & K. Roach, *The Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law Inc., 2002) at 245.

⁶³ *UDHR*, *supra* note 23 at Articles 2, 7.

⁶⁴ *ICCPR*, *supra* note 24 at Articles 2, 26.

⁶⁵ *International Convention on the Elimination of All Forms of Discrimination Against Woman*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

⁶⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195 (entered into force 4 January 1969).

⁶⁷ [1999] 1 S.C.R. 497 at para. 39.

1.6 Conclusion

The foregoing discussion briefly outlined the major human rights instruments and concepts that will be considered throughout this paper in order to provide a general understanding of the current human rights framework. Each of the following chapters will examine this framework in greater detail as it relates to specific aspects of biotechnology. Each chapter will identify relevant human rights issues and address those areas where the current human rights framework does not adequately address the human rights issues raised by biotechnology.