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## HUMAN RIGHTS AND THE CITY



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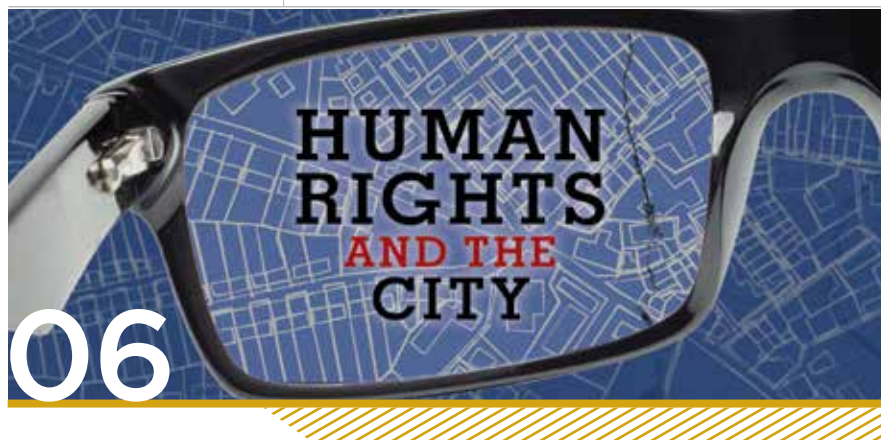
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# Human Rights and the City



**Sandeep Agrawal** PhD, AICP, RPP, MCIP, Guest Editor, *Plan Canada*

**“Human rights are the rights each of us possesses by virtue of being human. Inherent dignity and equal worth of all human beings are the tenets of human rights.”**

**It is my pleasure as a guest editor to introduce this special issue on human rights and the city.** This thematic

issue brings together a Canadian Who's Who of those working in at the intersection of human rights and planning. The contributors come from various disciplinary backgrounds – ranging from sociology and history to law and planning. Their educational backgrounds and the nature of their city-building activities are reflected in their views and opinions about how and where planning policies and practices intersect with human rights. What makes this issue special are the rich contributions made by private and public sector lawyers, academics, and human right activists, as well as by provincial human rights commissions.

Human rights are the rights each of us possesses by virtue of being human. Inherent dignity and equal worth of all human beings are the tenets of human rights. The 1948 Universal Declaration of Human Rights asserts the significance of human rights globally. Constitutional instruments such as Canada's *Charter of Rights and Freedoms* (1981), the American Bill of Rights and the *Civil Rights Act* (1964), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) guarantee the protection of the rights of citizens, while balancing them with governmental powers.

Canada is a signatory to at least eight international human rights treaties, including the International Convention on Economic, Social, and Cultural Rights,

and the Convention on the Prevention and Punishment of the Crime of Genocide. Above all, Canada and its provinces and territories have been pioneers in adopting the most progressive human rights legislation: the *Charter of Rights and Freedoms* goes back almost 35 years, and the Ontario *Human Rights Code* even further back, at 55 years, having been adopted in 1962. Despite such a historically noteworthy legislative environment for human rights in this country, many Canadian scholars and practitioners in planning are still unsure – or worse, unaware – about how these constitutional and quasi-constitutional requirements apply to planning matters at the municipal level. Meanwhile, across the country, we can see a growing trend towards applying human rights code to government actions, which includes challenges to municipal bylaws.

With a view to enabling planners to become sensitive to the significance of human rights in planning, this issue first walks us through the basics of human rights legislation, as encapsulated by the Canadian *Charter of Rights and Freedoms*, and how these apply to planning. It then broadens our knowledge of the current and emerging issues and how they are being dealt with. Examples here include amendments to the Provincial Policy Statement in Ontario, recent landmark rulings in Alberta, BC, and elsewhere, and, of course, the relentless advocacy works of the Alberta and Ontario Human Rights Commissions and the John Humphrey Centre for Peace and Human Rights in Edmonton. ■

# Les droits de la personne et la ville



**Sandeep Agrawal** PhD, AICP, UPC, MICU, rédacteur invité, *Plan Canada*

**C'**est un plaisir pour moi, en tant que rédacteur invité, de présenter ce numéro spécial sur les droits de la personne dans la ville. Ce numéro thématique constitue un « Canadian Who's Who » des personnes qui travaillent à la croisée des droits de la personne et de l'urbanisme. Les auteurs appartiennent à diverses disciplines, de la sociologie à l'histoire, en passant par le droit jusqu'à l'urbanisme. Leurs antécédents académiques et la nature de leurs activités liées à la construction des villes reflètent leurs points de vue et opinions sur la façon dont les politiques et les pratiques de planification convergent vers les droits de la personne. Ce numéro est unique en raison des importantes contributions qu'ont apportées les avocats du secteur privé et du secteur public, les universitaires et les militants des droits de la personne, ainsi que les commissions provinciales des droits de la personne.

Les droits de la personne sont les droits dont nous jouissons tous du fait même de notre humanité commune. Ils sont fondés sur le principe de valeur et de dignité égales de tous les êtres humains. La Déclaration universelle des droits de l'homme de 1948 invoque l'importance des droits de la personne dans le monde. Les actes constitutifs tels que la *Charte canadienne des droits et libertés* (1981), la Déclaration des droits et la *Civil Right Act* (É.-U., 1964) et la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (1950) visent



**Les droits de la personne sont les droits dont nous jouissons tous du fait même de notre humanité commune. Ils sont fondés sur le principe de valeur et de dignité égales de tous les êtres humains. »**

à garantir la protection des droits des citoyens, tout en les harmonisant aux pouvoirs gouvernementaux.

Le Canada est signataire d'au moins huit traités internationaux sur les droits de la personne, notamment, le Pacte international relatif aux droits économiques, sociaux et culturels et la Convention pour la prévention et la répression du crime de génocide. Mais avant tout, le Canada, ses provinces et ses territoires ont été les premiers à adopter la législation sur les droits de la personne la plus progressiste : la *Charte des droits et libertés*, qui remonte à près de 35 ans, et le *Code des droits de la personne de l'Ontario*, dont l'origine remonte encore plus loin, à 55 ans, puisqu'elle été adoptée en 1962. Malgré un environnement législatif remarquable sur le plan historique en ce qui a trait aux droits de la personne dans ce pays, de nombreux spécialistes et praticiens canadiens en urbanisme demeurent encore incertains, ou pire, inconscients, de la façon dont ces exigences constitutionnelles et quasi constitutionnelles s'appliquent aux questions d'urbanisme au niveau

municipal. Entre-temps, partout au pays, nous constatons une tendance croissante qui est celle d'appliquer le code des droits de la personne aux actions gouvernementales, ce qui comprend les défis liés aux règlements municipaux.

Pour permettre aux urbanistes de se sensibiliser à l'importance des droits de la personne en ce qui a trait à l'urbanisme, ce numéro traite tout d'abord des principes fondamentaux de la législation sur les droits de la personne, comme l'indique la *Charte canadienne des droits et libertés*, et de la façon dont ils s'appliquent à l'urbanisme. Cela nous permet d'élargir nos connaissances à l'égard des enjeux actuels et émergents et sur la façon d'y remédier. Vous trouverez des exemples de modifications visant la Déclaration de principes provinciale en Ontario, de récentes décisions historiques en Alberta, en Colombie-Britannique et ailleurs et, bien entendu, les activités de plaidoyer incessantes des Commissions des droits de la personne de l'Alberta et de l'Ontario et du John Humphrey Centre for Peace and Human Rights d'Edmonton. ■

# Human rights 101

## for planners

### Summary

With the growing number of human rights challenges in planning matters, understanding of human rights among planners is becoming imperative. This article explains the basics of human rights and related legislation, as well as a few new and emerging human rights issues in planning. Based on the case law and existing jurisprudence, it also provides some possible solutions to guard against future challenges.

### Résumé

En raison du nombre croissant de défis en matière de droits de la personne dans le domaine de l'urbanisme, la compréhension de tels droits devient essentielle pour les urbanistes. Cet article explique les principes fondamentaux des droits de la personne et de la législation qui en découle, de même que certains enjeux émergents concernant les droits de la personne dans le domaine de l'urbanisme. Sur la base du droit jurisprudentiel et de la jurisprudence existante, cet article propose également des solutions possibles qui permettront de mieux affronter les défis de demain.

### Canadian legislative context

According to the United Nations, human rights are the rights one has by virtue of being human – they represent the dignity of all human beings and are equal, inalienable, and universal. In Canada, they are entrenched in the constitution through the *Canadian Charter of Rights and Freedoms*. The *Charter* sets out the rights and freedoms of people *only* in relation to government activities, which distinguishes it from human rights legislation – which addresses both private and public acts. Specifically, Section 15 of the *Charter* guarantees equality before the law and the right to equal protection and benefit of the law without discrimination based on race, disability, and analogous grounds. Laws (including municipal government bylaws) that are inconsistent with the *Charter* may be declared invalid and may lead to the payment of damages or other remedies. Constitutional guarantees are not, however, absolute. *Charter* section 1 places “reasonable limits [on rights] prescribed by law as can be demonstrably justified in a free and democratic society.”

Because the *Charter* does not apply to non-government activities, interactions *between individuals and organizations* (such as employers or landlords) are governed instead by human rights legislation. Provincial and territorial human rights agencies deal with matters such as equal treatment without discrimination based on race, religion, age, or sexual orientation according to the particulars of their human rights code. A salient fact here is that the rights and freedoms in the *Charter* are not always included in other human rights laws; thus, when certain rights are violated the

remedies may not be the same. However, human rights legislation and the *Charter* may overlap when an act of government occurs in an employment context or when services, facilities, or accommodation are provided.

### Planning and human rights legislation

Canada currently has little jurisprudence on constitutional rights and how they apply to municipal planning and property rights. However, significant court cases addressing rights and land use regulation have occurred, leading to some notable outcomes:

- Drummond Wren 1945 case – a Supreme Court decision voiding a restrictive covenant against selling land to a Jewish person.
- Noble and Wolf v. Alley, 1951 – a Supreme Court decision striking down the covenant restricting the sale of land to a person of colour.
- Bell v. Queen, 1979 – a Supreme Court case distinguishing between the restrictions on the use versus the users of land. This case has been cited in many subsequent cases,<sup>1</sup> although they do not take such a strong position in the recent decisions.
- A Supreme Court decision<sup>2</sup> allowing a place of worship in a commercial zone. Several other cases<sup>3</sup> have dealt with human rights-related issues in a municipal context, but are too narrow or specific to point to general principles or strategies.

Many municipalities, irrespective of size or urban or rural status, face serious human rights challenges. Toronto, Sarnia, Kitchener, Hamilton, and Smith Falls, for example, have all been challenged based on the definition of group homes and associated





separation distances.<sup>4</sup> Calgary's bylaw that banned any type of livestock farming within the city limits led to a human rights challenge<sup>5</sup> in the Provincial court, which upheld the bylaw. In the Ontario Township of Tiny<sup>6</sup> the issue concerned the reference to "family" in seasonal dwellings, but the zoning restriction was upheld. On the other hand, Delta, BC had a bylaw that allowed secondary suites only when occupied by family members – this was quashed by the Supreme Court of BC.<sup>7</sup> Similarly, the human rights tribunal found Kelowna, BC's mayor guilty of violating the BC human rights code when he refused to proclaim gay pride week in the city.<sup>8</sup>

While many municipalities have responded to these issues with relevant changes, in several other jurisdictions they remain very much alive. For instance, Calgary, Edmonton, and Red Deer, have seen issues of locating group homes and supportive housing.<sup>9</sup> In Edmonton, this author<sup>10</sup> has argued against the pause on funding for supportive and affordable housing<sup>11</sup> in certain inner city neighbourhoods and as a violation of human rights issue. Red Deer is struggling over whether to allow a special form of group home in a residential area for people who have very severe mental health problems, so much so that the residents of the facility need to be physically restrained for their

own safety and that the facility needs to be fitted with bullet-proof windows. The City of Outremont recently placed a ban on the construction of a new synagogue for the ultra-orthodox Jewish community. Ironically, this is the same religious community that won the court challenge<sup>12</sup> in 2001 against Outremont, which had banned them from erecting eruv during sabbath.

### Emerging human rights and zoning issues

Several human rights and zoning issues are emerging as new concerns, which I outline below.

#### Safe injection sites

In 2011, the Federal Minister of Health refused to exempt a supervised injection site and its clients from drug possession laws. This was challenged under *Charter* Section 7 – with the allegation that this position violated the life, liberty, and security rights of both health care workers and their clients. The Supreme Court<sup>13</sup> found the benefits to the health of the drug addicts far outweighed any detriment to the community or to society generally, and therefore ordered the exemption. Municipal authorities must now heed this decision when dealing with land use decisions related to safe injection sites.

#### Methadone clinics

In many municipalities across Canada, the location of these clinics is a persistent issue. One approach, reflected in the Ontario Human Right Commission strategy, involves including addictions within the framework of mental health disabilities and viewing methadone clinics as "medical offices." On this basis, it strongly advised several Ontario municipalities not to discriminate against such people by using any restrictive zoning regulations for the methadone clinics.

#### Marijuana grow-ops

Since 2015, the *Federal Marijuana for Medical Purposes Regulations* (MMPR) has required that medical marijuana be grown at licenced commercial facilities, a sharp departure from previous regulations. Users used to grow their own plants or get them from a third party who grew them for up to three prescription-holders. Today, Health Canada (HC) requires applicants to meet existing municipal regulations pertaining to medical marijuana facilities. But if no such regulations exist, HC can still approve a facility without prior site approval from municipalities. Future marijuana grow operations could be seriously affected by either the absence of land use regulation, or too rigid municipal

restrictions – currently the case in many Ontario municipalities – which could lead to human rights challenges.

A recent noteworthy development is a 2016 federal court decision<sup>14</sup> that declared the MMPP infringes on *Charter* rights, and, thus, that Canadians with prior authorization to use medical marijuana could continue to grow it at home. This court decision could complicate municipal land use regulations, since medical marijuana can be grown commercially or at home.

### Supportive and affordable housing

Restrictive provisions in municipal bylaws affect where supportive and affordable housing may be located, and who can live there. In many large and small municipalities, the most contentious issue concerns the placement of co-owned housing, communal dwellings for seniors, rooming and lodging houses, transitional housing, and secondary suites. Some other examples are:

- **Ontario:** Concerns exist about the 'licensing' of rental housing (especially in Toronto) and various limits on other types of housing.
- **Alberta:** In Calgary, issues of direct control are an area of interest: the city council is responsible for directly approving the zoning of emergency shelters, rather than the usual process of approvals through a development officer. This practice adds costs and barriers to services intended to shelter *Charter*-

protected groups. Further, Calgary and other large municipalities still restrict the location of supportive housing or prohibit affordable housing, including secondary suites in certain parts of the city.

- **BC:** A Superior Court decision<sup>15</sup> addressed the idea of public space in a city. Who does this space 'belong' to, and who gets to use it? The conclusion, based on *Charter* Section 7, is that the homeless have a constitutionally protected liberty right to sleep overnight in parks under temporarily erected overhead shelters, if a municipality has insufficient accessible shelter space for them.
- **Ontario Human Rights Commission:** This body has alerted Oshawa, Barrie, Mississauga, and other cities about potentially discriminatory practices impeding access to affordable housing in their municipalities.

### Municipal properties and freedom of expression

Community standards bylaws in Alberta municipalities – which attempt to regulate individuals' behaviour and activities in public space as well as issues related to maintenance of private properties – have a long and contentious history. They can regulate noise, graffiti, panhandling, littering, and loitering; they also place limits on public assembly. Critics argue that sections of the bylaws, such as those that put limits on peaceful assembly, go

against the *Charter*, which allows "freedom of peaceful assembly" as a fundamental freedom assured to Canadians.


*Charter* Sections 1 and 15 have often been used in case law regarding human rights. When complainants ask for relief from a bylaw under Section 15, municipalities could use Section 1 to show the bylaw serves the public interest and safety, and hence a reasonable limit on rights and freedoms is justifiable. Increasingly, allegations of violations pertaining to complainants' fundamental freedoms are based on Section 2 (right to religion and peaceful assembly) or Section 7 (right to life, liberty, and security). When human rights legislation is the basis of a court challenge, most complaints address discrimination regarding goods, services, accommodation, or facilities.

Several *Charter* challenges have also taken up concerns about the use of public space by politically or religiously oriented signage or behaviour. For example:

- **Calgary:** An Alberta Provincial Court decision<sup>16</sup> upheld the City's bylaw, by which a street preacher was charged with causing extreme noise and trespassing on the City's Stampede parade. It was arguably the most highly visible challenge brought to a city bylaw, based on *Charter* Section 2(b), with an allegation that the *Charter* rights of freedom to religion and freedom of expression were infringed upon. The decision stated that such limitation is reasonable and demonstrably justified in a free and democratic society.
- **Edmonton:** An Alberta Queen's Bench 2016<sup>17</sup> decision to remove an advertisement from the American Freedom Defence Initiative, a sign that made explicit references to the honour killings of Muslim girls. Under *Charter* Section 1, the courts concluded that the City's policy imposed a reasonable limit that is justified in a free and democratic society.
- **Grande Prairie:** An Alberta Queen's Bench decision supported the City's refusal to advertise a pro-life advertisement on the city buses.<sup>18</sup>

### Concluding remarks

The reality is that municipal planning professionals, even after decades, still tend to overlook these constitutional and quasi-constitutional requirements. However, in developing new bylaws or amending an



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**“Planners have an obligation to understand their provincial human rights legislation, the *Charter*, and how these two legislations apply to their planning practice, just as they consider other adverse impacts or externalities, like traffic, parking, sunlight, and shadow.”**

existing one, no group should experience adverse and discriminatory impacts. Planners have an obligation to understand their provincial human rights legislation, the *Charter*, and how these two legislations apply to their planning practice, just as they consider other adverse impacts or externalities, like traffic, parking, sunlight, and shadow. This understanding of human rights issues is as important as knowing the provincial planning legislation and municipal statutory plans and bylaws.

To determine whether a bylaw is compatible with human rights legislation, it can be subjected to three tests:<sup>19</sup>

1. Is the purpose of the bylaw rationally connected to the function being performed?
2. Is the bylaw adopted in an honest and good faith belief that it is necessary to achieve that purpose?
3. Is the bylaw reasonably necessary to the accomplishment of the stated purpose?

In summary, planners should take all steps possible to promote municipal services and facilities that are inclusive for all groups, and make accommodations as much as possible, especially, for those who are protected under the provincial Human Rights legislation or the *Charter*.

**Sandeep Agrawal** is a Professor and Inaugural Director of the Urban and Regional Planning Program at the University of Alberta. He has been a champion of human rights and multiculturalism in planning education, policies, and practice.

<sup>1</sup> Smith et al. v. Township of Tiny, 1980.

<sup>2</sup> *Congrégation des témoins de Jéhovah de St-Jérôme- Lafontaine v. Lafontaine [Village]*, 2004.

<sup>3</sup> Examples are Smith et al. v. Township of Tiny, Milton (Town) v. Smith, Alcoholism

Foundation of Manitoba v. Winnipeg (City), Haydon Youth Services v. Keaney (Town), Kitchener Official Plan Amendment (No. 58), Advocacy Centre for Tenants Ontario v. Kitchener (City) and Toronto (City) Zoning Bylaw No. 138-2003.

<sup>4</sup> The author's report to the City of Toronto was instrumental in getting recognition of the group inhabiting the group home and separation distances between them removed from the bylaw. It also helped in introducing human rights in Ontario's Public Policy Statement.

<sup>5</sup> *Calgary (City) v. Hughes* 2012.

<sup>6</sup> *Smith et al. v. Township of Tiny* [1980].

<sup>7</sup> See *Tenants' Rights Action Coalition v. Corp. of Delta*, 1997.

<sup>8</sup> *Okanagan Rainbow Coalition v. Kelowna (City)*, 2000.

<sup>9</sup> Supportive housing is a combination of housing and social services meant for those who may have health issues including addiction or alcoholism, mental health, HIV/AIDS, or diverse disabilities.

<sup>10</sup> Author made a deputation to the Edmonton City Council on April 12th 2016.

<sup>11</sup> Although housing in itself is not included as a human right, it has a place within the human rights discussion especially given that it often applies to groups who are protected under the *Charter* or human rights legislation and have trouble accessing affordable and safe housing.

<sup>12</sup> *Rosenberg v. Outremont (City)*, 2001.

<sup>13</sup> *Canada (Attorney General) v. PHS Community Services Society*, [2011].

<sup>14</sup> *Allard v. Canada* [2016].

<sup>15</sup> *Abbotsford (City) v. Shantz* [2015].

<sup>16</sup> *R. v. Pawlowski* [2014].

<sup>17</sup> *American Freedom Defence Initiative v. Edmonton (City)* 2016.

<sup>18</sup> *Canadian Centre for Bio-Ethics v. the City of Grande Prairie* 2016.

<sup>19</sup> Further details, see author's report to the City of Toronto. ■



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