THE PROTECTION OF HUMAN RIGHTS IN CANADA (1)

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Introduction

This paper briefly examines the general theory of human rights and gives some historical background for the Canadian experience, examining both specific incidents and the development of human rights mechanisms. The anti-discrimination legislation in force at the federal and provincial levels, as well as in the Yukon and the Northwest Territories, is summarily analyzed. It then moves to a discussion of the international aspects of Canada's human rights policy. The next section enumerates some of the current problems, and the paper concludes with a discussion of the possible constitutional entrenchment of a Bill of Rights.

A. Human Rights Theory in Brief

Modern human rights concepts have evolved over a considerable period of time, and can be traced back to the "natural justice" philosophers of the 18th and 19th centuries. The global political developments of the post-World War II period have in fact produced two opposing views of human rights; essentially there is a dispute as to the relative importance of "group" (or "collective") rights, and "individual" rights. The Communist, social democratic bloc and much of the Third World have argued that the former must take precedence, while the Western, liberal democratic bloc has supported the primacy of the latter. This conflict is exemplified in two main United Nations documents relating to human rights - the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). The

(1) Prepared for the Commonwealth Parliamentary Association.

former refers to rights of the collectivity regarding working conditions, standard of living, education, health care, cultural and social activity, while the second is devoted to individual rights such as freedom of speech, thought, association, and religion, right to a fair trial, nationality, equality before the law, and so on. In Canada a classic conflict between these two approaches can be seen in the Quebec language legislation, which promotes the majority's collective cultural right of language to some extent at the expense of the minority's individual rights.

In the Canadian context, the Western liberal democratic concept of rights has itself been further divided into four categories by Professor (now Chief Justice) Laskin:

> "political liberties - traditionally including freedoms of association, assembly, utterance, press or other communications media, conscience, and religion; economic liberties - the right to own property, and the right not to be deprived thereof without due compensation, freedom of contract, the right to withhold one's labour, etc.; legal liberties - freedom from arbitrary arrest, right to a fair hearing, protection of an independent judiciary, access to counsel, etc.; egalitarian liberties or human rights - right to employment, to accommodation, to education, and so on, without discrimination on the basis of race, colour, sex, creed, or economic circumstances." (1)

There are, of course, numerous other classification systems which attempt to delineate these rights, but all of them generally cover the same area. Human rights officials at the federal and provincial levels now refer to "human rights and fundamental freedoms" when they wish to be all-inclusive in their reference.

A final point should be made regarding the definition of certain human rights terms, namely, "prejudice", "discrimination" and "rights". "Human rights" have been defined by Maurice Cranston as being both universal and inalienable in nature. (2) That is, they are valid for all people at all times, and cannot be "lost". This is in opposition to various privileges or statutorily defined rights of specific individuals or groups (such as, for example, the rights of parents, union members, professional engineers or patients). Whenever an individual or group suffers a violation of their human rights, prejudice and discrimination are generally at the root of the problem. However, despite the fact that the two words are often heard together, or are used interchangeably, they are not the same thing. Prejudice is a mental attitude - a pre-judgement. Stereotypes of various ethnic and religious groups are examples of a prejudicial attitude. All members of a group are classified as the same, and each individual is therefore judged according to which group he belongs. Discrimination, on the other hand, is the application of prejudicial attitudes to actions. Refusing to hire someone, to rent a house to someone or to accept someone for membership in a club, solely because of his or her group affiliations, are discriminatory acts.

While a number of educational and promotional programs can be (and have been) established to combat the prejudiced attitudes which are the root cause of discrimination, it is the role of formal legislation to prohibit any acts of discrimination. Naturally, attitudinal change is more difficult to accomplish. While the effectiveness of legislation can generally be measured in terms of the

(1) Walter Tarnopolsky, The Canadian Bill of Rights, McClelland and Stewart, Toronto, 1975, p. 3.
(2) Maurice Cranston, What Are Human Rights? Bodley Head, London, 1970, p. 11.

> was Immigration Minister, summed up his views in a 1955 speech: 'I don't believe that any immigrant, no matter where he comes from or how good he is, is as good as another Canadian baby, because the immigrant has to learn to be a Canadian and the baby is Canadian to start with.'" (1)

During the Depression the Ku Klux Klan was firmly established in sections of Saskatchewan, Alberta and Ontario. The Regina Riot of 1935 and the Winnipeg General Strike provided many classic examples of violations of civil liberties. Then, during the Second World War, the War Measures Act was used to transport 23,000 Japanese Canadians, (three-quarters of whom had been born in Canada and many of whom had been citizens for several generations), to a number of detention centres across the country. Despite the fact that many suffered considerable financial loss, reparation was minimal and incomplete. Stewart states that "no Japanese Canadian was ever charged, much less tried and convicted." (2) At the same time membership in the Jehovah's Witnesses was declared illegal; twenty-nine members were convicted and sentenced in 1940 to terms averaging one year. More recently in October 1970 the War Measures Act was implemented and a number of civil liberties were suspended. In addition, membership in a political organization, the FLQ, was made retroactively illegal.

Finally, there have been a number of judicial decisions in the area of human rights which demonstrate some of the issues that have arisen and the attitudes taken. In 1953 the case of Saumur v. Québec (1953) 25 CR 299 (in which a Jehovah's Witness challenged a Quebec City bylaw prohibiting public distribution of literature without a permit) left the question of religious freedom undecided, with some judges actually arguing that "both Parliament and the provinces could validly limit freedom of workship providing they did so in the course of legislating on some other subject which lay within their respective powers." (3)

In both the Birks (Birks & Sons Ltd. v. Montreal (1955) SCR 799) and Padlock Law (Switzman v. Elbling & A.G. for Q. (1957) SCR 285) cases the Quebec legislation in question was declared ultra vires on the basis of its infringement of the federal criminal law power, while only three judges referred to the Acts as also constituting a restriction on fundamental freedoms. (These cases involved the anti-Communist, Quebec "Padlock Law" and the Quebec statute authorizing mandatory closing of stores on Roman Catholic holidays). Subsequently the Drybones (R. v. Drybones (1970) SCR 282) case provided the opportunity for the new Bill of Rights to be given preeminence over other legislation, but later cases such as Lavell and Bédard (A.G. of Can. v. Lavell, and Isaac et al v. Bédard (1974) SCR 1349) have demonstrated the tenuous nature of this interpretation and the weakness of the Bill. (In Drybones, the Indian Act was considered to discriminate re: natives and alcohol, whereas in Lavell and Bédard the Indian Act was upheld in its authority to discriminate against native women who marry non-native men).

These historical examples should serve to demonstrate that Canada's past performance is less than perfect. Moreover, the popular favourable misconceptions about our past have led to the current sense of complacency. There are still a number of human rights issues which have not been resolved, and which the general populace has been slow to recognize. (A number of these issues are discussed in Section E of this paper).

C. Development of Human Rights Mechanisms

> "Modern day human rights legislation is predicated on

(1) Stewart (1976), p. 48.
(2) Ibid., p. 69.
(3) Peter Russell, Leading Constitutional Decisions, McClelland & Stewart, Toronto, 1973, p. 194.

decline or increase in the number of overt acts of discrimination, this is not always the case. As social consciousness increases, discriminatory acts often become more subtle and difficult to prove. (Recent journalistic revelations about the practices of private employment agencies are an excellent example). (1)

B. Historical Background

There is a general perception by the public in Canada that this country has an excellent record in terms of protection of human rights and fundamental freedoms. Only the U.S. as a rule is considered to have a somewhat similar record, and even there the racial problems involving blacks, Puerto Ricans and Mexican Americans have given Canadians a feeling of superiority. However, while it is true that Canada may have a good record in comparison with many countries, its past is hardly blameless.

Prior to Confederation there were numerous examples of discrimination, often violent, some of the most obvious being the genocide of the Beothuk Indians in Newfoundland, the Orange/Catholic riots in Bytown (1849) and Toronto (1858), the general anti-French, anti-Catholic sentiment, the original acceptance of the practice of slavery, and later the prevailing anti-black sentiment.

> "When the British Parliament abolished slavery in the Empire in 1833, American blacks began to flee into Canada. Although our mythology has us welcoming these dark strangers, it was only a tiny minority of Canadians who were either involved in, or approved of, the Underground Railway. The prevailing sentiment was voiced in the Ontario legislature in 1857, where Colonel J. Prince pronounced the blacks "the greatest curse ever inflicted upon the two magnificent counties that I have the honour to represent." (2)

The immigration policy of the newly formed Confederation was equally discriminatory, favouring British and European stock over "Orientals" and "others". The many thousands of Chinese who came to B.C. in the 1880s were practically slaves, since Chinese companies "sold" them under contract to Canadian railway and mining interests. Their living conditions and treatment in general were appalling. The Federal Electoral Act of 1885 stated "'Person' means a male person, including an Indian, and excluding a person of Mongolian or Chinese race." (3) In 1885 the Royal Commission on Chinese Immigration recommended a $500 poll tax, and by 1923 a stringent Chinese Immigration Act was in place. Other Orientals fared no better, as the Komagata Maru incident demonstrated. (4) As late as 1975, twenty Canadian immigration officers were stationed throughout the U.K., while four officers still handled all Indian applications from their office in New Delhi. Recent attempts to revise immigration policy have produced a tremendous backlash among the Canadian populace in general. Politicians have frequently expressed opinions similar to the following:

> "J.W. Pickersgill, when he

(1) In 1978 journalists in both Montreal and Toronto posed as employers and telephoned various employment agencies to fill fictional positions; all requested the agencies to provide only non-Asian, non-black applicants. Most agencies agreed outright, some pointed out that this was illegal but they probably could arrange it, and only a few refused flatly to go along.

(2) Walter Stewart, But Not in Canada, Macmillan, Toronto, 1976, p. 39.

(3) Ibid.

(4) A Japanese ship chartered by thirty-six Sikhs wishing to immigrate legally to Canada was kept at bay in Vancouver harbour for two months in 1914 while various police forces, immigration officers and Members of Parliament manoeuvred to block their entry and eventually forced them to return to Asia.

> the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of free education, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people ... Human Rights on this continent is a skillful blend of educational and legal techniques in the pursuit of social justice."
> (Dr. Dan Hill, former Chairman and Director of the Ontario Human Rights Commission).

i) History

Despite the fact that diverse and very narrow pieces of human rights legislation did exist in several provinces by the late 1800s, it can justifiably be argued that "It was not until near the end of World War II that modern human rights legislation started to spread." (1) The Racial Discrimination Act introduced in Ontario in 1944, the B.C. Social Assistance Act of 1945 and the Saskatchewan Bill of Rights Act of 1947 were all major accomplishments in this area. However, the Ontario and Saskatchewan Acts were quasi-criminal statutes which declared certain acts illegal and provided for sanctions, such as fines. While they were certainly an improvement, they had a number of failings.

> "Experience soon showed, as it had in the United States, that this form of protection, although better than none, and having a certain usefulness by way of indicating a government's declaration of public policy was subject to a number of weaknesses. There was a reluctance on the part of the victim of discrimination to initiate the criminal action if complaint to the police failed to result in a prosecution. There were all the difficulties of proving the offence beyond a reasonable doubt, and it is extremely difficult to prove that a person has not been denied access for some reason other than a discriminatory one. There was reluctance on the part of the judiciary to convict, probably based upon a feeling that some of the prohibitions impinged upon the traditional freedom of contract, and the right to dispose of one's property as one chose. Without extensive publicity and education, most people were unaware that such legislation existed for their protection. Members of minority groups, who were the victims of discrimination, tended to be somewhat sceptical as to whether the legislation was anything more than a sop to the conscience of the majority. Finally, and this was as important a factor as any, the sanction in the form of a fine did not help the person discriminated against in obtaining a job, a home, or service in a restaurant or hotel or barbershop." (2)

As a result of these weaknesses, most provinces began enacting new types of human rights provisions based on a model introduced in New York State in 1945. Fair Accommodation and Fair Employment Practices Acts were initiated first by

(1) W. Tarnopolsky, "The Control of Racial Discrimination in Canada" in Practice of Freedom (publication pending, Carleton Library Series). This article was presented at the December 1978 Federal-Provincial Conference, "Human Rights in Canada - The Years Ahead".
(2) Ibid., p. 11-12.

Ontario in 1951 and 1954, and other provinces followed suit over the next fifteen years. These Acts "provided for assessments of complaints, for investigation and conciliation, for the setting up of commissions or boards of inquiry where conciliation provided unsuccessful and, only as a last resort, prosecution and the application of sanctions." (1) Then in 1962 Ontario consolidated all human rights legislation into the Ontario Human Rights Code, which was to be administered by the Human Rights Commission created a year earlier. By 1975 all provinces had established human rights commissions, and in 1977 a federal one was created by the Canadian Human Rights Act. Following is a list of existing legislation:

Acts

FEDERAL:

Canadian Human Rights Act S.C. 1976-77, c. 33.

ALBERTA:

The Individual's Rights Protection Act, S.A. 1972, c. 2; as amended 1973, c. 61.

BRITISH COLUMBIA:

Human Rights Code of British Columbia, S.B.C., 1973, c. 119; as amended 1974, c. 87 and c. 114.

MANITOBA:

The Human Rights Act, C.C.S.M., c. H-175, enacted by S.M. 1974, c. 65; as amended 1975, c. 42; 1976, c. 48; 1977, c. 46; 1978, c. 43.

Employment Standards Act, R.S.M. 1970, c. E-110; as amended 1975, c. 42; 1976, c. 48.

NEW BRUNSWICK:

Human Rights Code, R.S.N.B. 1973, c. H-11; as amended 1974, c. 20 (Supp); 1976, c. 31.

NEWFOUNDLAND:

The Newfoundland Human Rights Code, R.S.N. 1970, c. 262; as amended 1973, Act. No. 34 and 1974, Act.

NOVA SOCITA:

Human Rights Act, S.N.S. 1969, c. 11; as amended 1970, c. 85; 1971, c. 69; 1972, c. 65; 1974, c. 46; 1977, c. 18 and c. 58.

Labour Standards Code, S.N.S. 1972, c. 10; as amended 1974, c. 29.

ONTARIO:

The Ontario Human Rights Code, R.S.O. 1970, c. 318; as amended 1971, c. 50, s. 63; 1972, c. 119; and 1974, c. 73.

The Employment Standards Act, 1974, S.O. 1974, c. 112.

PRINCE EDWARD ISLAND:

Human Rights Act, S.P.E.I. 1975, c. 72; as amended 1977, c. 39.

QUEBEC:

Charter of Human Rights and Freedoms, S.Q. 1975, c. 6; as amended 1976, c. 5; 1977, c. 6; 1978, Bill 9.

SASKATCHEWAN:

The Saskatchewan Human Rights Commission Act, S.S. 1972, c. 108; as amended 1973, c. 94; 1976-77, c. 81, s. 6.

The Fair Employment Practices Act, R.S.S. 1965, c. 293; as amended 1972, c. 43.

The Fair Accommodation Practices Act, R.S.S. 1965, c. 379; as amended, S.S. 1972, c. 42.

(1) Ibid.

The Saskatchewan Bill of Rights Act, R.S.S. 1965, c. 378, as amended, S.S. 1970, c. 56; 1972, c. 104; 1974-75, c. 44.

The Labour Standards Act, S.S. 1969, c. 24; as amended 1971, c. 19; 1971, c. 4; 1972, c. 59; 1973, c. 51, 1973-74, c. 53, 1974-75, c. 22, repealed by 1976-77, c. 36 Labour Standards Act (1977).

NORTHWEST TERRITORIES:

Fair Practices Ordinance, O.N.W.T. 1966, c. 5; as amended 1974, c. 4.

YUKON TERRITORY:

Fair Practices Ordinance, R.O.Y.T. 1971, c. F-2; as amended 1974, c. 7.

Labour Standards Ordinance R.O.Y.T. 1971, c. L-1; as amended 1973, c. 13; and 1974, c. 9.

ii) Analysis of Legislation

I.A. Hunter described the evolution of Canadian human rights legislation in the following terms:

> "Canadian human rights legislation began in 1793 by freeing children of slaves; it evolved through stages of proscribing racist signs, requiring fair employment and accommodation practices, until today it comprises an inclusive code of social conduct. Both the activities to which the legislation applies and the prohibited grounds of discrimination have been steadily enlarged. Freedom of contract with whom one chooses, freedom to dispose of one's property, freedom to discriminate in the choice of one's tenants or employees, have all been subordinated to a public policy which declares the primacy of human dignity." (1)

Human rights legislation, or more accurately anti-discrimination legislation, has been enacted at the federal and provincial levels, and in both the Yukon and Northwest Territories. Both the prohibited grounds of discrimination and the enforcement procedures contained in this legislation are similar in all jurisdictions. The anti-discrimination legislation sets out a number of prohibited discriminatory practices based upon which an individual who feels he has been aggrieved may make a complaint to the Human Rights Commission, or other appropriate body, which will then use a variety of mechanisms from conciliation through adjudication and, finally, penal sanctions and injunctive relief to resolve the dispute. The primary goal of such legislation, and of the extra-legal programs in education and information undertaken by the various commissions, is to conciliate differences between individual, and between individuals and institutions, and to attempt to bring them to a realization of their common humanity. Basically, the legislation and the commissions are involved in a difficult task of attitudinal change.

The publication or display of discriminatory signs, symbols or other representations is prohibited in all jurisdictions in Canada. The prohibited grounds are race, religion, national or ethnic origin, sex, or colour. Age is a prohibited ground of discrimination in Alberta, British Columbia, Manitoba, New Brunswick, and in the federal legislation. The federal legislation includes pardoned conviction. The British Columbia, Prince Edward Island, and Quebec legislation includes political convictions as a prohibited ground of discrimination. Manitoba and New Brunswick include physical handicap or disability within their legislation. The Quebec legislation includes any type of handicap or disability. All jurisdictions except

(1) I.A. Hunter, "Human Rights Legislation in Canada: Its Origin, Development and Interpretation", University of Western Ontario Law Review, Vol. 15, 1976, pp. 21-58, at p. 57.

Alberta and Saskatchewan include marital, civil or family status among their prohibited grounds of discrimination. Manitoba legislation includes source of income. The Quebec legislation includes language, social condition, and sexual orientation as prohibited grounds of discrimination.

The Alberta legislation allows a sign to express a bona fide qualification for employment even if it is discriminatory. Both the Manitoba and the Alberta legislation do not include as prohibited signs that identify facilities generally used by one sex. The New Brunswick Human Rights Commission is empowered to allow exceptions based on bona fide qualifications pertaining to sex or marital status.

Discrimination in the areas of public accommodations, services, and other facilities is prohibited in all jurisdictions. The grounds upon which such discrimination is prohibited in all jurisdictions are race, religion, colour, sex, and national, ethnic or place of origin. Age is a prohibited ground in the federal legislation, Manitoba, and New Brunswick (19 and over). Marital or civil status is a prohibited ground of discrimination in the federal legislation, Manitoba, New Brunswick, Newfoundland, Ontario, Prince Edward Island, Quebec, the Northwest Territories, and the Yukon. Pardoned conviction is a prohibited ground of discrimination in the federal legislation. Physical or mental handicap is a prohibited ground of discrimination in Newfoundland, and Quebec. In Quebec, social condition and sexual orientation are additional grounds of prohibited discrimination.

In British Columbia, Manitoba, and Ontario, the anti-discrimination legislation allows exceptions to the prohibition of the provision of public accommodations, services, or other facilities on the discriminatory grounds of sex where public decency is at issue. In addition, British Columbia allows an exception to the prohibited ground of sex where it is necessary to determine insurance benefits or premiums. Where accommodations, services or facilities are usually used by one sex, Yukon legislation allows such discrimination.

Prohibitions against discrimination in employment practices have been enacted in all jurisdictions. Prohibited practices include such matters as the terms and conditions of employment, promotions, and transfers. The prohibited grounds of discrimination are race, religion, national or ethnic origin, colour, and sex. Age is a prohibited ground of discrimination in federal legislation, Alberta (45 to 65), British Columbia (45 to 65), Manitoba, New Brunswick (19 and over), Newfoundland (19 to 65), Nova Scotia (40 to 65), Ontario (40 to 65), and Prince Edward Island (18 to 65). The federal legislation prohibits discrimination based on a pardoned conviction. Marital status is a prohibited ground of discrimination in the federal legislation, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Northwest Territories and the Yukon. In Quebec, social condition is a prohibited ground of discrimination. Physical disability or handicap is a prohibited ground of discrimination in the federal legislation, Manitoba, New Brunswick, Nova Scotia, and discrimination on the basis of any kind of handicap is prohibited in Quebec and Prince Edward Island. Political belief is a prohibited ground of discrimination in British Columbia, Manitoba, Newfoundland, Prince Edward Island, and Quebec. The Quebec legislation prohibits discrimination on the grounds of sexual orientation, language and social condition.

Much of the legislation allows exceptions to the prohibited discriminatory practices where there is a bona fide qualification for employment. In addition, some of the legislation permits an exception where, in cases of age, sex or marital status, they are considered, by

the Human Rights Commission, to be bona fide in the operation of an insurance, retirement, or seniority plan. The Prince Edward Island and Quebec laws allow exceptions from complaints of discrimination for charitable, philanthropic, political, religious, or educational institutions operated on a non-profit ba is, and for institutions which are devoted exclusively to the well-being of a particular ethnic group.

Legislation in Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, and Quebec forbids any employment agency to discriminate against any person seeking employment. The Prince Edward Island legislation forbids employment agencies from accepting discriminatory inquiries from any employer or prospective employee. All of the anti-discrimination legislation prohibits the use or circulation of application forms or the publication of advertisements or the making of any inquiries concerning employment which directly or indirectly expresses preferences on grounds on which discrimination is prohibited. In particular, the Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia, Saskatchewan, and Northwest Territories legislation have a specific provision against requiring any applicant to furnish information concerning matters which are prohibited discriminatory practices. The prohibition of discriminatory practices in matters related to employment, on the grounds outlined above, apply to trade unions, employee associations, and professional, business, and trade associations. All jurisdictions have provisions in their anti-discrimination legislation requiring equal pay for equal work without discrimination on the grounds of sex.

All Canadian jurisdictions have enacted provisions prohibiting discriminatory practices in the area of property rental and occupancy. The federal legislation covers both commercial premises and residential accommodation. The Yukon provisions cover self-contained residences which are located in apartment buildings with more than six dwelling units. The Northwest Territories legislation covers self-contained apartment dwelling units without any limitation on the size. Legislation in Alberta, Newfoundland and Nova Scotia cover occupancy in either commercial or self-contained dwelling units. The prohibition in the Quebec legislation is general in that it prohibits discrimination in any juridical act thus including occupancy or lease agreements. The occupancy provisions of the anti-discrimination legislation in the other jurisdictions cover all types of dwelling units. Prohibited grounds of discrimination are the same as those which were listed above in reference to employment practices.

The Manitoba legislation provides an exception where the occupancy of any housing units is restricted to one sex only and it also provides a preference for elderly persons. Ontario and the Yukon have a similar exception to that allowed in Manitoba. Where the New Brunswick Human Rights Commission determines that sex or marital status is a bona fide qualification for occupancy, it can authorize an exception to its governing statute. In Nova Scotia, an exception to any prohibited ground of discrimination may be allowed where the dwelling unit is a single, non-advertised, non-listed room in a dwelling, the rest of which is occupied by the landlord and the landlord's family. The prohibition in the Quebec legislation does not apply where the lessor or his family resides in the dwelling and leases only one room which is not advertised by public notice.

In all jurisdictions, except the Northwest Territories and the Yukon, the anti-discrimination legislation applies to the Crown. In Manitoba, Nova Scotia, New Brunswick, Ontario, British Columbia and the Northwest Territories, the Human Rights Commission may approve special programs which are designed to promote the welfare of specified, underprivi-

leged, minority groups. In each of these jurisdictions, these special programs, also known as affirmative action programs, may be initiated in either the public or the private sector, and must be approved by the Human Rights Commission in order to be exempted from the prohibited discriminatory practices covered by the anti-discrimination legislation. There is a similar provision in the federal anti-discrimination legislation allowing for application to the Human Rights Commission for the approval of affirmative action programs.

The procedures set up for the implementation and enforcement of the human rights legislation in all jurisdictions is virtually identical. In all cases, the Acts operate through a complaint process. In Alberta, Nova Scotia, Ontario, Manitoba, and the federal legislation, the Human Rights Commission may undertake an investigation on its own initiative without waiting for a complaint from a citizen who feels he has been aggrieved.

Once a complaint has been made, it must be investigated by the Human Rights Commission. The initial informal investigation into a complaint is done by an officer of the Human Rights Commission who is generally instructed and trained to attempt to effect a settlement between the complainant and the alleged discriminator at this early stage of the proceedings. Generally, the investigation officer is either an employee of a government department or the Commission. If this informal attempt at conciliation fails, a more formal inquiry including a hearing by a board, tribunal, or commission could then be held. The finding by this body and its order, once it has adjudicated on the relevant issues, is binding and enforceable in the courts through either injunctive or penal relief if there is not compliance.

Some of the orders which a commission, board or tribunal can make are described by I.A. Hunter in the following words:

> "Board orders commonly include such requirements as: (a) a letter of assurance against further discrimination to be sent to the Commission and often to the complainant; (b) the posting of human rights cards in the respondent's rental premises or place of employment; and (c) notification to the Commission of future rental vacancies or positions of employment for a specified period. Of course if the apartment or job sought is still available (an infre quent occurrence given the lapse of time between filing of complaint and inquiry) the board could order that it be offered to the complainant, but usually the complainant has found alternative accommodation or employment. In any event, Canadian boards have recognized the injustice of ordering a respondent to give the complainant the denied apartment or job if it is presently occupied by an innocent third party.
>
> Many boards of inquiry have awarded financial compensation to the complainant. This may take two forms: an order of compensation, analogous to special damages, for out-of-pocket expenses incurred as a direct result of the discriminatory act; and, more recently, financial compensation, analogous to general damages, to alleviate the humiliation and indignity of the discriminatory act." (1)

Needless to say, the full procedure provided for in the anti-discrimination legislation of all jurisdictions is rarely resorted to. Many cases of alleged discrimination are either found to be without foundation or are concil-

(1) I.A. Hunter (1976), "Human Rights Legislation in Canada", pp. 55-56.

iated at an early stage of the procedure. It is only in very rare cases that it is necessary to set up a human rights tribunal whose findings are binding. It is even rarer for the Human Rights Commission to have to resort to the common law courts to seek either injunctive or penal relief.

D. International Aspects

In addition to establishing internal mechanisms for the protection of human rights, Canada has accepted a number of international standards internally by ratifying conventions, and has also played a role in the development of international protection mechanisms primarily as a member state of the United Nations. For example, the Convention on the Prevention and Punishment of the Crime of Genocide was ratified by Canada in 1952, the Convention on the Political Rights of Women in 1957, and the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights in 1976. Both federal and provincial governments have been involved in special programs such as the 25th anniversary of the Universal Declaration of Human Rights (1973), the Decade to Combat Racism and Racial Discrimination (1968-78), and International Women's Year (1975). In 1975, Canada was one of the prime movers in ensuring that strong human rights provisions were inserted in the Helsinki accords.

In the past Canada has been recognized for its participation in international human rights issues through Professor John Humphrey, who served with Eleanor Roosevelt on the U.N. Human Rights Commission responsible for the Universal Declaration of Human Rights in 1948 and later became Director of the Human Rights Division, and Lester Pearson, who received a Nobel Peace Prize in 1956. Since 1977 Canada has again had a representative serving with the U.N. Human Rights Commission (this is an elected position, and is currently filled by Dr. Walter Tarnopolsky, professor at law at Osgoode Hall and noted human rights expert).

Outside the U.N. Canada has further enunciated its human rights concepts by means of foreign policy decisions. Addressing the Conference on International Human Rights in 1978, the Secretary of State for External Affairs stated:

> "Canada has moral and legal obligations to be involved in the promotion of human rights both at home and abroad. Canadians are demonstrating growing interest in perfecting the protections for human rights at home. They are also increasingly making known their hope that the Canadian government will observe a morality which reflects Canadian standards in its dealings with other governments." (1)

Some examples of this policy include the proscription of arms sales to Portugal during the 60's because of Portuguese colonial policies, the condemnation of apartheid and the institution of visa requirements for South Africans, and the acceptance of numerous Ugandan, Vietnamese, South American and other political refugees. More recently Canada has taken a strong stance on the issue of decolonization, particularly in Africa, and is a member of the "Group of Five" which presented a proposal for solution of the Namibian situation to the Security Council in April 1978.

A statement by the representative to the General Assembly, M. Pierre Charpentier, summarizes the Canadian position in general:

> We continue to support negotiated settlements where they are possible. Our approval of the report of the Special Committee entails the appro-

(1) Hon. Donald Jamieson, Address to Conference on International Human Rights, Ottawa, Canada, 26 October 1978.

> val of the great majority of recommendations but not each and every one. We consider that each foreign economic investment in non-self-governing territories must be judged on its own merits and that some, particularly in the smaller territories, are often desirable. We fully endorse the Security Council resolution 418 which institutes a mandatory arms embargo against South Africa and which requires that states refrain from any co-operation with South Africa towards the development of nuclear weapons; however, we do not consider that normal political and economic relations with South Africa constitute collaboration. We believe that international organizations must operate within their specified mandate. We fully support, however, the approach to this item embodied in the consensus adopted at this session on the question of Guam, namely that the maintenance of military bases in any non-self-governing territories should not inhibit the right of the people of that territory to self-determination." (1)

However, the paradox between Canada's formal government policy and private economic commitments has occasioned much discussion within Canada and abroad. A special Canadian Dimension (2) issue of December 1977 on Africa devoted an entire article to this problem. The author points out that in no case has the government prevented private economic involvement, and that at most it is officially critical of investment in the "illegal" regimes of Namibia and Rhodesia (Zimbabwe) while saying almost nothing concerning the "legitimate" concerns in South Africa. On the other hand, Canada actually did enact as laws certain provisions of the U.N. sanctions on Rhodesia and withdrew trade commissions from South Africa, whereas no such action has been taken in the case of Namibia. In 1970 the World Council of Churches reported that a total of $210 million was raised by a consortium of the largest banks in America, Canada and the U.K. in direct support of South Africa. Three Canadian banks subsequently contributed a direct loan to the South African Central Bank in 1972 (Bank of Commerce $3 million, Toronto Dominion $3 million and Bank of Montreal $2 million). At a shareholders' meeting in 1976 the Chairman of the Royal Bank of Canada formally rejected the suggestion of an embargo on loans to South Africa and was supported by his colleagues. It would therefore appear that there is a conflict between the official position and the economic reality but the government has so far taken the position that there is no need for intervention as the governmental and private sectors must be considered separate spheres of activity.

In terms of economic, cultural and social rights, Canada's international role has been primarily one of providing aid. Professor Humphrey has stated that:

> "One of the chief claims of the Universal Declaration of Human Rights to a place in history is its recognition of the fact that all human beings, are entitled to enjoy not only the traditional civil and political rights but, also are entitled to enjoy the economic, social the economic, social and cultural rights without which, for most people, the traditional rights have little meaning." (3)

(1) Explanational Vote on Resolution (AC 4/323/1-35, L-36 and L-37) by M. Pierre
(2) "Canada and Southern Africa", Canadian Dimension, Vol. 12, No. 1, December 1977.
(3) J.P. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century", The Present State of International Law, Kluwer, The Netherlands, 1974, p. 75-105.

Dr. Noel Kinsella, Chairman of the New Brunswick Human Rights Commission, has further pointed out that:

> "By the time the International Covenant on Economic, Social and Cultural Rights appeared in 1966, the list of these rights was longer and much more comprehensive than that proclaimed by the Declaration. This is an important development. It may be attributed, in part, to the increased size of the United Nations and to the fact that the leaders of many newly independent nations regard economic development and the attainment of a higher standard of living as most important priorities.
>
> To accept the notion of economic, social and cultural rights, however, is one thing, but to give them effect, whether domestically or internationally, is quite another matter.
>
> First of all we must under stand that unlike the civil and political rights which are self-executory, these new rights are what some call, programmatic. That is, in order for these rights to have any tangible content the community, the domestic and international community, must develop and implement programmes which will make possible the economic climate for full employment, social security, health, etc. For some states in the world today there is a perception that the civil rights are a luxury which cannot be afforded until a certain economic development has been achieved. (1)

Canadian aid in 1978, primarily through the Canadian International Development Agency (CIDA) was $1.2 billion. This amounted to 0.45% of the GNP, falling short of the U.N. goal of 0.7% to which Canada has committed itself. At present this aid is frequently "tied" to purchase of Canadian goods. Besides, a plan implemented in the U.S. by President Carter to withhold or tie aid for countries accused of human rights violations has met with little response in Canada, despite private members' bills presented by Andrew Brewin (NDP) (Bill C-272, Foreign Aid and Human Rights Act, first reading 30 October 1978) and David MacDonald (PC) (Bill C-330, Foreign Aid Prohibition Act, first reading 30 October 1978).

E. Current Problems

At present there are a number of human rights issues in Canada which are cause for concern at both federal and provincial levels. The blatant and sometimes official discrimination described in the historical section has for the most part faded from memory, but there are exceptions. There is also a higher incidence of subtle intentional discrimination than most Canadians would care to admit, as well as discrimination that is committeed unitentionally through a lack of understanding or consciousness.

In recent years the remaining examples of blatant discrimination have tended to centre around Canada's immigrant population. It goes without saying that most Canadians condemn these acts of violence vigorously. Nevertheless, this problem has reached the critical stage in areas such as Toronto, Montreal and Vancouver, where the influx of new Canadians has been greatest. Violent incidents involving East Indians, Pakistanis and blacks from the Caribbean occur with discouraging frequency. Unfortunately, the current economic climate has done little

(1) N. Kinsella, "Human Rights: A Brief Global Review". Address to Conference on "Human Rights in Canada - The Years Ahead", Ottawa, 1978, p. 6.

to deter this trend, despite publications by the Department of Manpower and Immigration which make use of statistics to disprove a number of work-related myths about immigration. In addition to isolated incidents of violence, it has been reported that a well-organized hate propaganda organization continues to operate in southern Ontario by means of taped telephone messages. The federal Human Rights Commission has recently established a special committee to investigate this particular manifestation of overt discrimination. The other major area of overt racial discrimination involves native people. Publications such as the popular one originating from the difficulties in Kenora in 1975 (a pamphlet by a white housewife, entitled Bended Elbow) reflect the deeply ingrained biases which exist against natives in our society.

Examples of overt discrimination can also be found directed at various other categories of Canadians. A recent book entitled Bilingual Today, French Tomorrow has enjoyed huge sales. The police chief of a small Ontario town recently defended the refusal of a restaurant owner to admit epileptics or blind persons with guide dogs. Both American and Canadian sociologists have uncovered a surprisingly high incidence of work-related sexual harassment among working women, as well as the battered wife syndrome. Gay rights groups carrying out lawful demonstrations are frequently the victims of violent assaults by onlookers.

Federal immigration policy itself is also subject to criticism as reflecting a racial bias, despite the stated intent to select individuals on a point merit basis, because the actual effet is to significantly limit the influx of Third World immigrants. However, in comparative perspective one could argue that the policies of other major receiving countries, such as Australia, the U.S. and Great Britain, are significantly more stringent. In fact, the Canadian system was used as a model by Australia when it announced its intention to introduce a new and less biased Immigration Act early in 1979.

Overt discrimination can generally be dealt with under existing human rights legislation in terms of punitive action. However, this does not eliminate the prejudicial attitudes which are the root cause. Moreover, a certain number of categories of offences are not covered under current legislation. For example, the present situation concerning the prohibited grounds for discrimination has been outlined above, but a current problem in both federal and provincial jurisdictions is the extension of these grounds. Much has been written, both in Canada and abroad, about the merits of including "physical handicap", "sexual preference", "marital status", "political opinion" and "age" as additional grounds. As indicated earlier, some of these are already included in some provincial legialation, but none have been included in the federal act (with the exception of physical handicap, which is only applied with regard to employment).

In addition there appears to be a need for an affirmative action policy of some type to combat the underlying prejudicial attitudes. This is true not only for the problems of immigrants and natives, but also for other disadvantaged groups such as women, the handicapped and the aged. At present a number of very different policy approaches exist (as outlined below) in countries such as the U.S., Britain and Sweden, and some effort has been made by the federal government to evaluate these different methods. Some programs have been established in Canada, particularly in the federal civil service, but little real progress appears to have been made. Advisory councils for women and the handicapped have constantly bemoaned their impotence, and Public Service Commission statistics indicate that many disadvantaged groups are actually losing ground.

The basic options for affirmative action policy can be summarized as follows:

(a) Voluntary compliance with suggested guidelines.
(b) Informal quotas.
(c) A formal quota system.

Each of these can apply:

(a) Within the public sector.
(b) Within the public sector and any private companies which have government contracts (this is called "contract compliance").
(c) Within the public and private sectors in toto.

Naturally any number of permutations and combinations are possible; some countries have used different approaches for different subjects, (e.g., in the U.K., informal quotas for women, but formal quotas and contract compliance for the disabled), while other countries have preferred to adopt one policy format for all subject areas.

Using "physical handicap" as an example, a variety of these policy options can be found internationally. West Germany, Britain, the Netherlands, and Japan have formal quota systems. Sweden has a voluntary compliance system augmented by compulsory "adjustment groups" for employers of more than 50 persons. All of these involve both the public and private sectors. The U.S., on the other hand, has an informal quota system (which intentionally avoids the word quota and is referred to as an "affirmative action system") that involves the federal government and private companies through contract compliance. All of these countries also have a number of supportive programs; Britain and West Germany have Disabled Registers and Resettlement Officers, Sweden has a complex tax break system and special equipment assistance programs; and the U.S. has a President's Committee on Employment of the Handicapped, which has initiated several programs in conjunction with the AFL-CIO. In addition a number of private institutions such as universities have initiated their own versions of quota systems.

A major problem with the concept of affirmative action in North America is the tendency of the average citizen to equate it unequivocally with a quota system. The word "quota" appears to have an extremely negative sociological connotation for much of the populace in general. As the European examples have demonstrated, however, the formal quota is not essential to a definition of affirmative action. On the other hand, experience has tended to indicate that those countries with the most successful programs have in fact employed a type of quota system.

The American federal system has demonstrated one method of overcoming this problem, essentially by semantics. The universities have provided other solutions - "setting aside" by percentages or flat rate numbers, or the opening up of additional positions for special students in the professional faculties. Here again there have been examples of successful (Harvard) and unsuccessful (University of California) methods. Both the Bakke and DeFunis cases have demonstrated the dangers of "reverse discrimination" charges and a general backlash effect. In both cases, the plaintiff was refused entry to a professional college while less qualified minority or disadvantaged students were admitted. In short, there is a fine line between the "acceptable" and "unacceptable" means of implementing such programs.

In Canada, as in the U.S., the political fact of federalism has also hindered human rights progress. At present there is a definite need to coordinate the various federal programs for the different categories of disadvantaged, and to achieve an overall policy approach. Moreover, there is a pressing financial problem for those voluntary groups engaged in the educational and promotional aspects of human rights in order to alter attitudes. In difficult financial periods such as the present these types of voluntary groups are often the first to be affected by government cutbacks, and federal government programs

of this nature also appear to have encountered restraints. Given Canada's recent additional international commitments vis-à-vis the U.N. Conventions, this is yet another problem which remains to be resolved.

F. Entrenchment

For many years, a vigorous controversy has raged around the question of the entrenchment of a Bill of Rights. Most proposals of this sort have dealt largely with the rights included in the present Bill of Rights - those of a legal and political nature. Several propositions have dealt with so-called "egalitarian rights" or anti-discriminatory legislative measures.

First of all, what is meant by entrenchment? It is a means by which legislation is enacted so that it cannot be amended or repealed by the ordinary legislative procedure. Entrenchment of legislation can be into a constitution whereby its alteration would be subject to the established constitutional amendment procedure. It can also be effected by a provision in the enacting legislation for its repeal or amendment in accordance with a specified procedure - e.g. subject to approval by a referendum or a special legislative majority such as two-thirds or three-quarters of the Members of the legislature present and voting. (1)

There are strong arguments both in favour of and against the entrenchment of human rights either in the Constitution or by a special legislative provision. Those who are in favour of entrenchment affirm that it is necessary to have such a protection to ensure that rights and freedoms are not subject to the political whim of the day. They see the possible danger of particular attitudes becoming over-whelmingly popular, although in direct contradiction with the basic values of Canadian society, and thus leading to the sweeping away of many acquired and legislated rights without reflection on the longer term implications of such an action. Those who oppose the entrenchment of human rights affirm that it will lead to the replacement of parliamentary sovereignty by judicial sovereignty - all legislative action would, consequently, be subjected to the entrenched portions of the Constitution dealing with human rights. The opponents of entrenchment argue that the final decision on policy would be made by unrepresentative members of the judiciary rather than by elected members of the legislative branch. They also say that entrenchment is not possible in a parliamentary system since it is in direct contradiction with the principle of legislative sovereignty. (2) The proponents of constitutional entrenchment respond to this argument by saying that the doctrine of parliamentary sovereignty does not apply to Canada since the framework of government is based in part upon a written constitution and legal custom provides for judicial review of any conflicts of jurisdiction between the federal and provincial levels of government. (3)

Despite this controversy, several proposals have been made in the last decade for the entrenchment of egalitarian rights or anti-discriminatory legislation in the Canadian Constitution. In 1968, the federal government, as part of the constitutional review process of 1968-71, proposed that a number of prohibited criteria of discrimination be included in a Canadian Bill of Rights which would subsequently be entrenched in the Constitution. It was submitted that discrimination based on race, national origin, colour, religion, ethnic origin, or sex should be prohibited in the areas of employment, admission to professions, education, the use of public accommodations, facilities and services, contract-

(1) Walter Tarnopolsky, The Canadian Bill of Rights, 2nd Revised Edition, McLelland and Stewart Limited, Toronto, 1975, c. 3.
(2) Douglas A. Schmeiser, "The Case Against Entrenchment of a Canadian Bill of Rights", Dalhousie Law Journal, Vol. 1, 1973-74, pp. 15-50.
(3) Tarnopolsky (1975), The Canadian Bill of Rights, at pp. 110-112.

ing with public agencies, or in the acquisition of property and interests in property. (1) No constitutional amendment formula was proposed by the federal government.

At the second meeting of the Constitutional Conference held in Ottawa on February 10-12, 1969, the federal government put forward the following slightly revised variation of its earlier position. It was proposed that an entrenched Charter of Human Rights should provide that every individual in Canada should not be discriminated against because of his race, colour, national or ethnic origin, religion, or sex in employment or in membership in any professional, trade or other occupational association, in owning, renting, holding, or otherwise possessing property, or in obtaining public accommodations, facilities and services. (2) The recommendation of entrenchment was not accompanied by a constitutional amendment formula.

Although the Victoria Constitutional Conference held in June of 1971 considered the whole range of human rights and freedoms, the resultant Canadian Constitutional Charter, which included political and language rights, and did provide for a constitutional amending procedure, did not deal either with egalitarian rights or anti-discriminatory legislation or their entrenchment.

The Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada recommended in 1972 that a Bill of Rights should be entrenched in the Constitution. The Committee recommended that the Bill of Rights should state that no person shall receive unequal treatment by reason of sex, race, colour, ethnic origin, or religion, and that it should have a clause which would prescribe the right of the individual to equal treatment under the law. The Committee furthermore recommended that these same prohibited grounds of discrimination should apply to employment, membership in a professional, trade or other occupational association, the obtaining of public accommodations and services, and the owning, renting or holding of property. It was also suggested by the Committee that it would be necessary for both the federal and provincial legislatures to enact legislation at their respective levels to implement the general provisions entrenched in the Bill of Rights. Entrenchment was to be protected by subjecting the Bill of Rights to the constitutional amending formula. The Committee recommended that the constitutional amending formula, when applied to any changes in the Bill of Rights, should require the agreement of the federal Parliament and a majority of the provincial legislatures, including those of every province which at any time has contained 25 per cent of the population of Canada, at least two Atlantic provinces, and at least two Western provinces which would have a combined population of at least fifty per cent of all the Western provinces. (3)

Neither the 1978 Constitutional Amendment Bill nor the Report of the 1978 Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada dealt with egalitarian rights or anti-discriminatory legislation, although they did discuss legal and political rights, as well as the entrenchment of human rights and freedoms.

The Canadian Bar Association Committee on the Constitution recommended that a Bill of Rights be entrenched in the Canadian Constitution once there has been agreement between federal and provincial levels of government as to its extent, and the method of entrenchment and amend-

(1) Government of Canada, A Canadian Charter of Human Rights, Information Canada, Ottawa, 1968, pp. 24-26.
(2) Government of Canada, The Constitution and the People of Canada, Information Canada, Ottawa, 1969, pp. 18-22 and p. 54.
(3) Canada, Final Report of the Special Joint Committee of the Senate and the House of 's Commons on the Constitution of Canada, Queen Printer, Ottawa, 1972, pp. 9-11 and 18-22.

ment to which it would be subject. The Committee suggested that it would not be desirable to have egalitarian rights spelled out at length in a constitutional document but that it would be preferable that there be a clause providing for equality before the law which would thus deal with unjustified discrimination based on sex, race, national or ethnic origin, colour, or religion. The entrenchment of this clause and any other rights agreed to by the various levels of government would be protected by the constitutional amendment process recommended by the Canadian Bar Association. The Committee recommended that since both the federal and provincial legislatures would have to enact legislation to entrench the Bill of Rights, it would be necessary to involve both levels in its amendment. The agreement of Parliament and a majority of the provincial legislatures including all provinces that at any time have had or may in the future have 25 per cent of the populaion of Canada, at least two of the Atlantic provinces, and at least two of the western provinces (including at least one of the two most populous provinces) would be required. (1)

Without being specific, the Pépin-Robarts Task Force on Canadian Unity recommended that those egalitarian rights upon which both the federal and provincial governments can agree should be entrenched in the Constitution. These entrenched egalitarian rights would be protected by the constitutional amendment formula. The Task Force recommended that the amendment procedure should be started by a bill initiated either in the House of Commons or in the Council of the Federation and passed by a majority of the House of Commons and a majority of votes in the Council. Once this has occurred, the ratification of the proposed amendment of the entrenched egalitarian rights would be by a Canada-wide referendum requiring approval by a majority of electors voting in each of four regions (the Atlantic provinces, the province of Quebec, the province of Ontario, and the Western provinces and Territories). (2)

The discussion of the entrenchment of egalitarian rights and anti-discrimination legislation has thus far been largely academic. Although there have been several serious proposals in this area, they have not met with any success because the eleven governments involved in the constitutional amendment process have been unable to agree either on the extent of such rights or on the acceptability of and necessity for entrenchment. Underlying all this, of course, is the failure to agree to a constitutional amending formula upon which entrenchment would be based. Like many other aspects of constitutional change in Canada, this area of discussion is fraught with complex entanglements and will not be satisfactorily resolved with ease or, indeed, in the near future.

Conclusion

In this paper, we have examined the historical development and legislative enactment of egalitarian rights and anti-discriminatory mechanisms. Historically, the Canadian public, legislators and courts have not always dealt with individuals and groups who are different from the bulk of the population in the most enlightened, even-handed way. Unjustified and often irrational discrimination is an aspect of Canadian history and experience that should not be denied or under-estimated.

Since the end of the Second World War, there has been a widespread legislative response to unjustified discrimination in Canada. All jurisdictions have Human Rights Commissions, or their equivalents, which enfore anti-discriminatory legislation, and engage in educational programs which are aimed at effecting attitudinal change. Although discrimination would now appear to be less pervasive in Canada than it has been historically, there continue to be instances where it is shown to still exist in concrete form.

(1) Canadian Bar Association, Towards a New Canada: Report of the Committee on the Constitution, Canadian Bar Foundation, Ottawa, 1978, pp. 19-20 and 143-149.
(2) Government of Canada, A Future Together: Report of the Task Force on Canadian Unity, Minister of Supply and Services Canada, Ottawa, 1979, pp. 102-104 and 108-109.