

THE IRON HAND IN THE VELVET GLOVE:
ADMINISTRATION AND ENFORCEMENT
OF HUMAN RIGHTS LEGISLATION
IN CANADA

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Introduction

In the century since Confederation our human rights and fundamental freedoms, or civil liberties (which is the more traditional Anglo-Canadian synonym), have undergone fundamental transformation in two ways. In the first place, it has come to be recognized in this century that the promotion and protection of several types of civil liberties requires the active intervention of the government in many kinds of private relationships, and not its exclusion from such interference. In the second place, we are finally realizing, and this perhaps only since World War Two, that the rights of man must be extended to every person in our society, regardless of such individual's race, colour, religion, sex, age, ethnic or national origin.

The men in Canada and England who drafted our basic constitutional document—the British North America Act of 1867—did not believe in a Bill of Rights.¹ Moreover, any suggestion that the government had a role in promoting human rights through interference in private relationships would have been inimical to

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¹The attitude in England is probably best exemplified by Dicey who wrote in 1885: "The Habeas Corpus Acts . . . are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty." Introduction to the Study of the Law of the Constitution (10th ed., by Wade, 1961), p. 199. A rather flamboyant example of Canadian sentiment on the subject may be illustrated by the following statement made by Joseph Cauchon, a supporter of Confederation, during the Confederation debates: "I feel myself as free as a bird of the air in the midst of space, under the mighty aegis of the British Empire—a thousand times more free than I should be with the name of citizen in the grasp of the American eagle. (Hear! Hear! Cheers)" Confederation Debates, 3rd Session, 8th Parliament of Canada (Quebec, 1865), p. 573.

their views of civil liberties. If asked what their rights and freedoms were, they would probably have referred to the fundamental freedoms of speech, press, religion, assembly and association, the right to *habeas corpus*, the right to a public trial by an independent and impartial judiciary, and perhaps also to such a freedom as that of contract, and such a right as that of property. All of these rights and freedoms could best be promoted through the absence of governmental interference. The common law was sufficient protection for relationships between man and man, and man and the state. The only body that could take away any right or freedom was Parliament, and since Parliament was subject to periodic elections, the majority could be called upon to protect their own rights and freedoms.

Within the first half century after Confederation the fallacy of relying upon this traditional approach for the promotion and protection of civil liberties was exposed. Since legislative bodies are dependent upon majorities, they could not always be relied upon to protect minorities. Thus, the native Indians and Eskimos were excluded from the franchise until a decade ago, and even today in the Province of Quebec are still excluded from it. As Asiatic immigration commenced, various legislatures not only denied the franchise to these newly arrived peoples, but also restricted their job opportunities, prohibited them from purchasing land in certain areas,² and even made it an offence for white girls to be employed by them.³ Since World War Two, all these legislative schemes, except for the Indian Act,⁴ have been repealed. And even that Act is now under extensive review.

However, the past century has shown very clearly both in the United States and here, that the removal of legislative discrimination is not enough. In a man's life, the exercise of the franchise occurs only periodically, and so its denial is not the source of daily irritation nor is it a deprivation of livelihood. Anyone can live without voting, but it is extremely difficult to live without a job or without decent accommodation. It is denial of equal access to jobs, homes, and public accommodation that most seriously affect

² For a detailed list of these statutes see the submission of the National Japanese-Canadian Citizens' Association to the Special Committee of the Senate on Human Rights and Fundamental Freedoms in: The Senate of Canada—Proceedings of the Special Committee on Human Rights and Fundamental Freedoms (1950), pp. 269-279. Also see such cases as *Union Colliery of British Columbia v. Bryden*, [1899] A.C. 580; *Cunningham v. Tomey Homma*, [1903] A.C. 151.

³ *Quong Wing v. The King* (1914), 49 S.C.R. 440.

⁴ R.S.C., 1952, c. 149, as. am.

a person's dignity, self respect, and ability to provide for himself. This is why in the last two or three decades it has been increasingly recognized on this continent that a "shield" against the government is not sufficient, what is required is a "sword" against private individuals and groups who practice discrimination.⁵

There can be no denying that human rights legislation marks a clear departure from some formerly basic common law rights. If one asserts unlimited freedom of contract, and right to property, then clearly one enjoys the privilege of choosing whom to work with, whom to hire and whom to associate with. As long as one's choice is limited to purely private relationships, the law cannot interfere. However, when a private feeling of prejudice shifts to the realm of discriminatory practices in such public activities as employment, public accommodation, and even rental and sale of real property, then the law has the right to require compliance with certain standards of fair play. In other words, human rights legislation cannot eliminate bigotry and prejudice, but it can put an end to the public manifestation of such feelings which result in discrimination. Opponents of human rights legislation have often argued that the law cannot legislate morality. However, this overlooks the fact that our Criminal Code is based to a large extent upon a commonly accepted moral code. Furthermore, the object of human rights legislation is not to force people to like Negroes or Indians, or Jews, or Catholics, or Scotsmen, or Irishmen: it merely requires that equality of access be assured to all people regardless of their race, colour, religion, sex, ethnic or national origin.

It is proposed in this article to trace briefly the history of human rights legislation in Canada, and then to assess in some detail the administration and enforcement of the most advanced and sophisticated schemes. In Canada these take the form of a Human Rights Code or Act administered by a commission with a full-time staff.

I

Human rights legislation can be traced to pre-confederation times. As early as 1793 the first legislative assembly of the Province of Upper Canada enacted "An Act to Prevent the further introduction of slaves and to limit the term of Enforced Servitude within this Province".⁶ Although this statute affirmed the ownership of slaves then held, it did provide that the children of slaves, upon

⁵ Expressions taken from Bowker, *Anti-Discrimination Legislation*, [1963] *Canadian Bar Papers* 28.

⁶ 1793 S.U.C., c. 8.

reaching the age of twenty-five years, would be set free. In 1833, this legislation was superseded by the Imperial legislation known as the Emancipation Act,⁷ which abolished slavery in all parts of the British Empire.

Modern human rights legislation, however, began over a hundred years later. It involved three major steps. The first was the enactment of prohibitory provisions. In 1944, Ontario enacted the Racial Discrimination Act,⁸ prohibiting publication or displaying of signs, symbols, or other representations expressing racial or religious discrimination. In 1947, the Province of Saskatchewan enacted the Saskatchewan Bill of Rights Act.⁹ Although the Ontario Act was brief and limited to one specific purpose, while the Saskatchewan Act was detailed and covered many prohibited practices, they had this in common, they were both examples of quasi-criminal legislation.

The Saskatchewan Bill of Rights, which is still in force, is one of the most extensive statutes on civil liberties. The first few sections deal with the fundamental freedoms of speech, press, assembly, religion, association, commonly known as the political civil liberties. It then proceeds to prohibit discrimination with respect to accommodation, employment, occupation, land transactions, education, businesses and enterprises. It purports to bind the Crown and every servant and agent of the Crown. The enforcement of this legislation is through a penal sanction, that is, the imposition of a fine, or ultimately an injunction proceeding and imprisonment. No provision, however, is made for the administration or enforcement of this Act in a manner other than such as would apply with respect to any other prohibitory statute of the provincial legislature, for instance, the prohibitory provisions in the Liquor Act¹⁰ and the Vehicles Act.¹¹

The Saskatchewan Bill of Rights and the Ontario Racial Discrimination Act, as has been stated earlier, were quasi-criminal statutes in that certain practices were declared illegal and sanctions were set out. The experience in the United States in the twentieth century, and in Canada since World War Two, has been that this form of protection, although better than none, is subject to a number of weaknesses. There is reluctance on the part of the victim of discrimination to initiate the criminal action. There are all the difficulties of proving the offence beyond a reasonable

⁷ 3 and 4 Wm. IV, c. 73.

⁹ Now R.S.S., 1965, c. 378.

¹¹ R.S.S., 1965, c. 377.

⁸ S.O., 1944, c. 51.

¹⁰ R.S.S., 1965, c. 382.

doubt, and it is extremely difficult to prove that a person has not been denied access for some reason other than a discriminatory one.¹² There is reluctance on the part of the judiciary to convict, probably based upon a feeling that a discriminatory act is not really in the nature of a criminal act. Without extensive publicity and promotion, many people are unaware of the fact that human rights legislation exists. Members of minority groups who have known discrimination in the past, tend to be somewhat skeptical as to whether the legislation is anything more than a sop to the conscience of the majority. Finally, the sanction in the form of a fine, does not really help the person discriminated against in obtaining a job or home or service in a restaurant.

To overcome the weakness of quasi-criminal legislation, Fair Accommodation and Fair Employment Practices Acts were enacted. These new types of human rights provisions were copied from a legislative scheme first introduced on this continent in the State of New York in 1945.¹³ The New York legislation was an adaptation of the methods and procedures that had proved effective in labour relations. Fair Employment and Fair Accommodation Practices Acts provide for assessments of complaints, for investigation and conciliation, for the setting-up of commissions or boards of inquiry when conciliation is unsuccessful, and only as a last resort, for prosecution and the application of sanctions. The first Fair Employment Practices Act was passed in Ontario in 1951.¹⁴ Manitoba in 1953,¹⁵ Nova Scotia in 1955,¹⁶ and in 1956 New Brunswick,¹⁷ British Columbia¹⁸ and Saskatchewan,¹⁹ all adopted their own Acts similar in design to that of Ontario. On July 31st, 1964, Quebec became the seventh province to place fair employment legislation on its statute books.²⁰

The first Fair Accommodation Practices Act was passed by the Ontario legislature in 1954.²¹ Other provinces followed Ontario

¹² For example, in *Regina v. Pfennig*, 1963, unreported, a provincial Magistrate in Saskatchewan dismissed a prosecution against an hotel proprietor on the charge that he refused service to an Indian in a beer parlour. He held that the motive was not discrimination. Indians were kept on a separate side of the beverage room, found the Magistrate, in order to prevent disorder on a busy night. Moreover, said the Magistrate, the accused discriminated indirectly through his bartender. Although the Act refers to discrimination directly or indirectly, the information charged the proprietor with the act of discrimination, and this was a fatal defect. (It should be noted that this action was under the Fair Accommodation Practices Act, S.S., 1956, c. 68 and not the Bill of Rights, but the sanction is the same.)

¹³ N.Y. Public Laws of 1945, c. 118, being Executive Law, art. 12, ss 125-136.

¹⁴ S.O., 1951, c. 24.

¹⁵ S.M., 1953 (2nd Sess.), c. 18.

¹⁶ S.N.S., 1955, c. 5.

¹⁷ S.N.B., 1956, c. 9.

¹⁸ S.B.C., 1956, c. 16.

¹⁹ S.S., 1956, c. 69.

²⁰ S.Q., 1964, c. 46.

²¹ S.O., 1954, c. 28.

in passing their own. Saskatchewan passed its Fair Accommodations Practices Act in 1956.²² The prohibitory section of the Saskatchewan Bill of Rights was replaced and expanded to a form similar to that of Ontario. In 1959, New Brunswick²³ and Nova Scotia²⁴ passed their Acts, also similar in form to that of Ontario. A year later Manitoba followed suit.²⁵ Although there is no Fair Accommodation Practices Act in Quebec, a section of the Hotels Act forbids discrimination in hotels, restaurants, and camping grounds.²⁶

In the field of employment another form of discrimination prohibited in a number of provinces is that between men and women in rates of pay. Equal Pay Acts or provisions were passed in eight provinces—British Columbia,²⁷ Alberta,²⁸ Saskatchewan,²⁹ Manitoba,³⁰ Ontario,³¹ New Brunswick,³² Nova Scotia,³³ and Prince Edward Island.³⁴ Although Quebec has no Equal Pay Act, in June, 1964, legislation was enacted to give a “married woman full equal capacity as to her legal rights, subject only to such restrictions as arise from a matrimonial regime”.³⁵ Somewhat similar to equal pay legislation are Age Discrimination Acts which have been enacted by the Province of Ontario³⁶ and British Columbia.³⁷

The Fair Accommodation and Fair Employment Practices Acts marked a considerable advance over the quasi-criminal approach to human rights legislation. In the place of the laying of an information leading to a prosecution, provision is made for the filing of complaints, followed by the administrative proceedings of investigation and conciliation. However, this legislation continues to place the whole emphasis of promoting human rights legislation upon the individual who has suffered the most, and who is often in the least advantageous position to help himself. It does place the administrative machinery of the state at the disposal of the victim of discrimination, but it approaches the whole problem as if it were solely his problem and his responsibility.

²² See *supra*, footnote 19.

²³ S.N.B., 1959, c. 6.

²⁴ S.N.S., 1959, c. 4.

²⁵ S.M., 1960, c. 14.

²⁶ S.Q., 1963, c. 40, s. 8.

²⁷ S.B.C., 1953 (2nd Sess.), c. 6.

²⁸ S.A., 1957, c. 38, s. 41, being an amendment to the Alberta Labour Act, R.S.A., 1955, c. 167.

²⁹ S.S., 1952, c. 104.

³⁰ S.M., 1956, c. 18.

³¹ S.O., 1951, c. 26.

³² S.N.B., 1960-61, c. 7.

³³ S.N.S., 1956, c. 5.

³⁴ S.P.E.I., 1959, c. 11.

³⁵ S.Q., 1964, c. 66, s. 1, re-enacting art. 177 of the Civil Code.

³⁶ S.O., 1966, c. 3.

³⁷ S.B.C., 1964, c. 19, being an amendment to the Fair Employment Practices Act, R.S.B.C., 1960, c. 137.

The result is that very few complaints are made and very little enforcement is achieved.³⁸

In 1962, Ontario went further by consolidating the province's human rights legislation into the Ontario Human Rights Code,³⁹ to be administered by the Ontario Human Rights Commission which had been established a year earlier.⁴⁰ In 1963, Nova Scotia in its turn enacted a comprehensive Human Rights Act,⁴¹ but did not provide for a commission until 1967.⁴² Alberta enacted its first human rights legislation in 1966,⁴³ providing for a Commission to administer a comprehensive Human Rights Act. In 1967, New Brunswick adopted its Human Rights Act,⁴⁴ with a Commission to administer it. In 1968 Prince Edward Island became the fifth province to enact a comprehensive Human Rights Code.⁴⁵

There are two important features which advance the effectiveness of Human Rights Codes over such statutes as the Fair Accommodation and Fair Employment Practices Acts. In the first place, the latter are directed towards discrimination in one area, that is, employment or public accommodation. The Human Rights Codes or Acts, on the other hand, prohibit discriminatory practices in a number of fields—employment, public accommodation,

³⁸ The comparison of numbers of complaints dealt with is interesting. A survey of provincial governments undertaken by the author in October, 1968, shows the following: since the inception of the Code in June, 1962, Ontario has had about 6,000 complaints and inquiries, of which about 1,267 came within the terms of the Code. Compare this with those provinces having only Fair Employment and Fair Accommodation Practices Acts: Saskatchewan — about 30 from the enactment of these statutes in 1956 to 1968; Quebec—24 since 1964 when the Act respecting Discrimination in Employment was enacted; Manitoba—2 in 1954, when the Fair Employment Practices Act was passed, and since then, "a very few complaints"; British Columbia—37 under the Equal Pay Act in the period 1954 to 1957, no figures were given for complaints under the Fair Employment and Public Accommodation Practices Acts, except that two complaints under the latter were received in 1967.

Even discounting the greater population of Ontario, the disparity is marked. Could one seriously argue that the above figures show merely that Ontarians are more prejudiced than people in other provinces? This is belied by comparing the New Brunswick statistics on complaints received under the antecedent statutes and under the new Human Rights Act: only about 15 complaints were received under the Fair Employment and Fair Accommodation Practices Acts during the ten year period of their existence as against 52 formal complaints in the one year that the Human Rights Act has been enforced. In Ontario, as compared to the 1,267 formal complaints in the six year period since the enactment of the Human Rights Code, there were only 502 during the previous ten year period when the antecedent legislation was in force.

³⁹ S.O., 1961-62, c. 93.

⁴⁰ S.O., 1960-61, c. 63. The Human Rights Commission replaced the Anti-Discrimination Commission established by S.O., 1958, c. 70.

⁴¹ S.N.S., 1963, c. 5, now R.S.N.S., 1967, c. 130.

⁴² S.N.S., 1967, c. 12.

⁴³ S.A., 1966, c. 39.

⁴⁴ S.N.B., 1967, c. 13.

⁴⁵ S.P.E.I., 1968, c. 24.

housing and dwelling units, advertising, and so on. Second, administration of the Fair Accommodation and Fair Employment Practices Acts is usually entrusted to some officer in the Department of Labour (in Saskatchewan it is the Attorney General), who carries out this task in addition to his main responsibility in other areas in the Department. Except for Alberta, where administration is by a Director, the Human Rights Codes or Acts are administered by part-time Commissions, usually composed of independent persons outside the civil service. In addition, in New Brunswick and Alberta there is a full-time officer and a secretary. In Ontario the Commission has, in its head office and three regional offices, sixteen full-time officers, a part-time librarian and a secretarial staff of nine full-time and three part-time.

The consolidation of human rights legislation into a code to be administratively enforced by an independent commission insures community vindication of the person discriminated against. This is important to the community itself because of the broad educational value of equal treatment. However, it is important to the people who have suffered from discrimination, because without such active community involvement, the mere proclamation of human rights tends to soothe the conscience of the majority, without producing tangible changes. Victims of discrimination are often reluctant to "cause trouble". Sometimes, they lack knowledge of the purpose and scope of human rights legislation. Without encouragement they will not make use of it to help themselves. The objects and purposes of a human rights commission administering a human rights code have been cogently summed up by Dr. Daniel Hill, Director of the Ontario Human Rights Commission:⁴⁶

Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-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 blending of educational and legal techniques in the pursuit of social justice.

To put this more bluntly, human rights legislation is a recognition that it is not only bigots who discriminate, but fine "upright, gentlemanly" members of society as well. It is not so much out of hatred as out of discomfort or inconvenience, or out of the fear of loss of business, that most people discriminate. As far as

⁴⁶ Human Relations, June, 1965, published by the Ontario Human Rights Commission. at p. 4.

possible, these people should be given an opportunity to re-assess their attitudes, and to reform themselves, after being given the opportunity of seeing how much more severe is the injury to the dignity and economic well-being of others, than their own loss of comfort or convenience. However, if persuasion and conciliation fails, then the law must be upheld, and the law requires equality of access and equality of opportunity. This is the "iron hand in the velvet glove".

II

As stated earlier, the Ontario Human Rights Commission is by far the most active in Canada. The Ontario Human Rights Code, as well as the Human Rights Acts of Alberta, New Brunswick, Nova Scotia, and Prince Edward Island, are the most comprehensive legislative schemes in Canada for the promotion of human rights. This assessment of administration and enforcement techniques will, therefore, be confined largely to these examples of human rights legislation in Canada.

The Complaint

All the Human Rights Acts make provision for the initiation of proceedings through a written complaint on a form prescribed by the administering agency, made by the person claiming to be aggrieved.⁴⁷ This is unlike the situation in several states in the United States, where provision is made for a person other than the victim of discrimination to lay a complaint.⁴⁸ Members or officers of the administering agency, or interested private groups may initiate complaints.

There are two main arguments against providing for the laying of complaints by persons other than the victim himself: 1) It is important for the administering agency to have the evidence of the person with first hand knowledge, particularly if the complaint is to reach a hearing stage. 2) Permitting persons other than the victim to lay complaints leads to the institution of "put-up" test cases.

⁴⁷ Ontario Human Rights Code, *supra*, footnote 39 (hereafter, O.H.R. Code), s. 12 (1) and (2); Alberta Human Rights Act, *supra*, footnote 43 (hereafter, Alta H.R. Act), s. 10; New Brunswick Human Rights Act, *supra*, footnote 44 (hereafter, N.B.H.R. Act), s. 11; Nova Scotia Human Rights Act, *supra*, footnote 41 (hereafter, N.S.H.R. Act), s. 11(1); Prince Edward Island Human Rights Code, *supra*, footnote 45 (hereafter, P.E.I.-H.R. Code), s. 10(1).

⁴⁸ See, e.g., Pennsylvania Human Relations Act, P.L. 744 of 1955, as am., s. 9; New York Human Rights Law, art. 15 of Executive Law, as enacted by Laws of 1968, c. 958, s. 297(1). Also see the Uniform Law Commissioners' Model Anti-Discrimination Act, pp. 28-30.

There is certain merit in the first argument, because certainly it would be detrimental to the best operation of human rights legislation if the administration were to proceed merely on rumour or second-hand information. However, certain prohibited activities such as publishing or displaying discriminatory notices, signs, or emblems, can come within the first hand knowledge of commission officers or private groups. It is rather unlikely that a private individual would be moved to institute proceedings under this provision, or provisions which prohibit advertising which discriminates on the ground of age.

Furthermore, the use of public accommodation is basically transitory, that is, a person may be passing through a town, and may order a meal in a restaurant, or try to get a hair cut, or a room in an hotel. If he is denied such access to public accommodation, it is rather unlikely that he will lay a complaint unless he happens to live in the locality and intends to return. Finally, it must not be forgotten that human rights legislation prohibits acts which depend upon the fact of the existence of a certain motive. This is a matter peculiarly within the mind of the respondent. In other words, a proprietor or landlord, or employer, can give many different reasons why he denied a certain person an hotel, an apartment, or a job. The person who has been denied access is faced with an almost impossible task in disproving the reasons given to him. In many cases proof can only be obtained if a person who is not a member of the group discriminated against is willing to testify and can, immediately after the victim's discrimination, obtain access to the same accommodation or employment. Finally, although test cases may involve deception to the extent that the person attempting to obtain the evidence may not want the accommodation or the employment which he asks for, the deception does not diminish the veracity of the fact of discrimination. "The proponents of test cases are not trouble-makers. They are trouble finders."⁴⁹ If the trouble were not there in the form of a discriminatory act, they would not find it.

The Ontario Code and the Alberta Act provide for the making of a complaint on the ground that the complainant has been discriminated against.⁵⁰ Unless these provisions receive very liberal construction they would not seem to permit the laying of a complaint for an alleged act of publishing or displaying a notice, sign,

⁴⁹ Borovoy, *Human Rights and Racial Equality—The Tactics of Combat* (1962), p. 14.

⁵⁰ O.H.R. Code, s. 12(1); Alta H.R. Act, s. 10.

or symbol indicating discrimination, nor would they appear to refer to discriminatory advertising. The link between these acts and the fact of someone suffering discrimination is tenuous indeed. A preferable wording is to be found in The Human Rights Acts of New Brunswick, Nova Scotia, and Prince Edward Island, all of which permit the making of a complaint for "an alleged violation of this Act".⁵¹

In order to provide for the laying of complaints under any provision in the human rights statute, and in order to permit persons other than the ones directly aggrieved to lay complaints, a provision like the following would seem to be more suitable:

Any person may, by himself or through his agent, make a complaint alleging that a violation of this Act has been committed.

None of the Human Rights Acts in Canada places time limits on the laying or processing of complaints.⁵² As far as a time limit on the processing of complaints is concerned, although promptness is important, the volume of complaints received and the personnel available to process them will be the important determinants. However, a time limit should be placed on the laying of complaints. Because of the peculiar nature of human rights legislation, with the primary emphasis on education, and attempts at persuasion and conciliation, the time from the alleged prohibited act to final settlement is long enough anyway. With the possibility of a hearing being necessary, it is important to keep this time lag between the events and the presentation of the evidence of these events as brief as possible. Besides, just as it is important that the victim should receive vindication as soon as possible, so it is important that a respondent not be kept in suspense indefinitely. On the other hand, certain discriminatory acts, such as discriminatory advertising, must be observed over a certain period of time, and so the time limit cannot be too short. As a compromise, a time limit of six months would seem to be appropriate.

Investigation and Conciliation

Following the laying of a formal complaint, the administering agency is charged with investigation and attempted settlement.

⁵¹ N.B.H.R. Act, s. 11. However, s. 12 would seem to be contradictory in that the subsequent investigation is stated to be for a complaint "of any person that he has been discriminated against contrary to this Act"; N.S.H.R. Act, s. 11(1); P.E.I.H.R. Code, s. 10(1).

⁵² A time limit for filing complaints is provided for in some American jurisdictions. See, e.g., Michigan Fair Employment Practices Act, P.L. 251 of 1955, as am., s. 7(b) and (d); New York Human Rights Law, *supra*, footnote 45, s. 297.

None of the statutes make provision for a separation of the function of investigation from that of settlement, probably because of lack of personnel. The equivalent provisions in many jurisdictions in the United States make clear provision for such separation.⁵³ It is most important that the same be provided in the human rights legislation in Canada. This is most important from the point of view of the protection of the civil liberties of the respondent, as well as of the complainant or the victim of discrimination, and also from the point of view of the effectiveness of the Commission's work.

As far as the respondent is concerned, he is entitled to certain protections which have been developed as being necessary in the administration of criminal law. The administration of human rights legislation can be no less concerned with such protection, even though the proceedings are administrative only, rather than criminal.

When a complaint has been filed, it is at this stage no more than an allegation. An investigation is required to see whether the allegation is sustained. No effort should be made at this investigative stage to conciliate or negotiate a settlement, because either of these techniques implies at least partial implication that the alleged prohibited act has been committed. On the other hand, the complainant has a right to know whether his complaint will be dismissed out of hand, or whether the investigator concluded that it was partly sustained, or whether in the investigator's opinion it is wholly sustained.

After ascertaining the facts as far as he is able, the investigating officer should make a determination either that there is probable cause for concluding that the offence occurred, or that the complaint is groundless. Only after a determination of probable cause should attempts be made to conciliate or to negotiate a settlement. Moreover, if at all possible, the negotiating or conciliating should be conducted by someone who did not investigate that particular complaint.

On the other hand, if a determination is made that there is no probable cause, the complainant should be given the opportunity to appeal such determination to the Commission. There should be a limit placed upon the time within which he can appeal.

⁵³ See, e.g., Michigan Fair Employment Practices Act, *ibid.*, s. 7(c); New York Human Rights Law, *ibid.*, s. 297(2), (3a), (4a); Pennsylvania Human Relations Act, *supra*, footnote 48, s. 9.

However, such an appeal is important if we are to balance the interests of the complainant and the respondent.

From the point of view of the effectiveness of the Commission's work, it is important that the functions of investigation and settlement be separated. The process of investigation will almost inevitably arouse a certain amount of hostility on the part of the respondent towards the investigator. It is unlikely that he would be as prepared to discuss possible terms of settlement with an investigator as he might be with someone else, even though that someone else is from the same government agency. Besides, the skills required in order to be a successful investigator are different from those required for effective negotiation. Not many individuals can adequately exercise both skills. Above all, even if these assertions are incorrect, it is unlikely that a respondent would speak as freely, or negotiate as co-operatively, if he knows that the gist of what he says or writes, or even the whole of what he has said or written, would be submitted as evidence at a subsequent Board of Inquiry.

For all these reasons, it is most important that the functions of investigation and settlement be conducted by different individuals, if at all possible. Sometimes this is not possible because of lack of personnel, or because the respondent and the place where the pertinent events occurred are too distant from a Human Rights Commission Office. In that situation, if it becomes necessary for the same officer to conduct the investigation and then make an attempt at settlement, at the least such officer should leave the respondent after completing the investigation, assess the evidence, and only after concluding that there is probable cause should he return to attempt settlement.

In any event, evidence of what was said or written in an attempt to negotiate a settlement which was not concluded should never be given at a Board of Inquiry. If the two functions of investigation and settlement are conducted by two separate individuals, only the one conducting the negotiation should be permitted to testify. If the two functions must be performed by one individual, then he must not be permitted to testify with respect to the conciliation and attempted settlement.

One final important aspect of the process of investigation should be discussed in the light of the above recommendation, and that concerns the powers of the investigating officer. None of the human rights Acts in Canada give to the investigating officer the right to inspect pertinent documents or premises. These powers

would seem to be reserved in each case to the boards or commissions conducting the subsequent inquiries at the hearing stage.⁵⁴ This is often too late for effectiveness. In employment cases records may be important. These can be destroyed or altered before the hearing stage. In dwelling accommodation cases it may be important to inspect the premises to see whether they are occupied, if that is the reason given for denial of access, or whether they come within the definition of a dwelling accommodation set out in the Act.

The lack of power to compel discovery of documents may result in unfairness to a respondent as well. If the respondent is an agent for another, it may be important to compel disclosure of the principal. This may not be a problem in the case of a master-servant relationship, but it may be crucial if the relationship between the agent and the principal is more analagous to that of an independent contractor. Thus, where an employment agency refuses to hire or refer an applicant because of the directions it receives from employers, the agency may be extremely reluctant to disclose the identity of the employer for fear of losing business.⁵⁵ And yet, it may not be fair to compel such disclosure at the public hearing stage, because the employer has not been given a prior opportunity to discuss the case with the Commission with a view to settlement.

Without the power in the investigating officer to compel discovery of documents or to inspect premises, not only is there undue delay, not only may the work of the administering agency be thwarted, but the lack of such powers may even be unfair to a respondent or to his undisclosed principal.

In granting this power to investigating officers it is necessary to consider whether it should be provided for automatically or only with approval of another authority. For the protection of res-

⁵⁴In Ontario and New Brunswick the board of inquiry is given the powers of a conciliation board under the respective Labour Relations Acts: O.H.R. Code, s. 13(2); N.B.H.R. Act, s. 13(2). In Alberta and Nova Scotia (where the body is called a commission of inquiry) the board and commission respectively are given the powers of a commission under the respective Public Inquiries Act: Alta H.R. Act, s. 24(1); N.S.H.R. Act, s. 12(5). In Prince Edward Island the inquiry is conducted by the Minister of Labour and Manpower Resources, but nothing is said about his powers in such inquiry. It should be pointed out, however, that the human rights officers in Ontario and Alberta, at least, would have powers of search and inspection under the Department of Labour Act in Ontario, R.S.O., 1960, c. 97, s. 9(3) and the Labour Act of Alberta, R.S.A., 1955, c. 167, s. 5(3).

⁵⁵This would seem to have been the case in an inquiry under the Ontario Age Discrimination Act, *supra*, footnote 36, in the *Complaint of W. Britnell*, unreported, July 1968.

pondents, and for uniform supervision of investigations, it would seem to be preferable for the human rights officer to investigate and inquire without the right to compel discovery or inspection. If the human rights officer does not receive the co-operation of the respondent, he should get the written authority of the administering agency to get access and to compel discovery.

To summarize this discussion regarding the investigation and conciliation stages of a complaint, the following provisions are recommended for adoption in human rights codes:

- (a) After the filing of a complaint a prompt investigation in connexion therewith shall be made by one of the Commission's officers for the purpose of determining whether probable cause exists for believing the allegations made in the complaint. If in the course of the investigation the respondent or anyone on his behalf refuses to permit the investigating officer to inspect pertinent documents or premises, the Commission may give written authorization to such investigating officer to compel discovery of documents or inspection of premises or both.
- (b) If, following the investigation, the determination is made that there is no probable cause, the complainant shall be so informed. He may then, within a period of two weeks, appeal to the Commission for a reconsideration.
- (c) If, following the investigation, the determination is made, either by the investigating officer, or by the Commission upon the appeal of the complainant, that there is probable cause for believing the allegations in the complaint, an immediate attempt shall be made by one of the Commission officers to end the complained of prohibited act by conference, conciliation or persuasion. No disclosure shall be made of what transpired during such attempts at settlement, except the terms of the settlement itself if one is concluded.

The Hearing

The hearing provided for in Canadian human rights codes is conducted by a board of inquiry.⁵⁶ The persistent question—What's in a name?—may be an important one in administrative law. Is it the name of the hearing agency or some other factors which determine its powers and procedures, and whether there is any right of appeal from or review of the findings, report or order made by such an agency?

The hearing agencies are called boards of inquiry or commissions of inquiry, they are given the powers either of a concilia-

⁵⁶ As indicated in footnote 54, *supra*, in Nova Scotia the name used is a Commission of Inquiry, while in Prince Edward Island the inquiry is by the Minister of Labour and Manpower Resources.

tion board under the Labour Relations Act⁵⁷ or a Commission under the Public Inquiries Act,⁵⁸ and they make recommendations upon which a ministerial order may be made.⁵⁹ In all three ways, they have characteristics which would lead to the conclusion that they are investigatory and not adjudicative agencies. From the name, the flexibility of procedure, and from the fact that they make recommendations rather than determinations, the hearing agencies are more in the nature of inquiries than quasi-judicial proceedings. Presumably, then, there are no absolute procedural requirements which must be observed by them. Moreover, there would appear to be no right of judicial review of the findings of these bodies.⁶⁰ Nevertheless, I would suggest that the requirements of natural justice are intended to apply to the procedures of the boards or commissions of inquiry, and that judicial review should be provided for specifically.

(a) *Powers and Procedures*

As far as procedural requirements are concerned, the intention is clear that although the normal evidentiary and procedural rules of a court are not required, there are basic rules of fairness for the protection of the civil liberties of the respondent, known as the rules of natural justice, which must be complied with.

One of the leading English authorities on judicial review of administrative action, Professor S. A. de Smith, suggests that there are only two fundamental rules of natural justice—the right to be heard and the right to be heard by an impartial tribunal.⁶¹ I would expand this to state that what is required is notice to the respondent of the case he has to meet, the right to be represented by counsel who has an opportunity to cross-examine witnesses called by the Commission, the right to call and examine his own witnesses, and the right to arguments at the conclusion of the hearing.

⁵⁷ N.B.H.R. Act, s. 13(2) refers to the Labour Relations Act, R.S.N.B., 1952, c. 124; O.H.R. Code, s. 13(2) refers to s. 28 of the Labour Relations Act, R.S.O., 1960, c. 202.

⁵⁸ Alta H.R. Act, s. 24(1) refers to the Public Inquiries Act, R.S.A., 1955, c. 258, as am. S.A., 1960, c. 80; N.S.H.R. Act, s. 12(5) refers to the Public Inquiries Act, R.S.N.S., 1967, c. 250.

⁵⁹ Alta H.R. Act, s. 16(2); N.S.H.R. Act, s. 14(2); O.H.R. Code, s. 13(6). In New Brunswick power is given both to the Minister and presumably to the Commission to issue orders—N.B.H.R. Act, ss 13(6) and 14(1)(c). In Prince Edward Island the Minister "shall direct the course that ought to be taken with respect to the complaint", and may also "issue whatever order he considers necessary to carry out the course of action into effect". P.E.I.H.R. Code, s. 12(1) and (2).

⁶⁰ *Lafleur v. Guay*, [1965] S.C.R. 12; *St. John v. Fraser*, [1935] S.C.R. 441.

⁶¹ *Judicial Review of Administrative Action* (2nd ed., 1968), p. 135.

All of these rights are provided for by the human rights codes which require that notice be given to the respondent,⁶² and that the parties be given full opportunity to present evidence and to make submissions.⁶³ These protections, as well as others such as the holding of public hearings, and the appointment of independent hearing officers, which have been provided in the past under the Ontario Human Rights Code, can be recommended as being required in the future. In fact, as far as the hearing is concerned, the only major recommendation that should be made is the one mentioned earlier with respect to evidence regarding the conciliation and settlement phase of the Commission's administration. It is most important that statements made or written during that stage be privileged.

One further comment should be made, and that is with respect to the power of the board of inquiry in compelling witnesses to attend, to give evidence, and to produce documents. At the moment there is some doubt as to the powers of boards to enforce attendance, or the production of documents in their own right. Can they cite for contempt? The power to cite for contempt is a drastic one involving confinement and thus deprivation of liberty of movement. The recommendations of the Ontario Royal Commission Inquiry into Civil Rights⁶⁴ should be adopted to provide that the board may summon witnesses to attend and produce documents, but that the power to cite for contempt be retained by the Supreme Court to be granted on application by the Board or the Commission.

(b) *Appeal and Review*

Of perhaps greater importance is whether there is presently a right of appeal or review, and if not, whether there should be one. There is no appeal from a finding of an administrative tribunal unless it is specifically provided for,⁶⁵ and only the Alberta Human Rights Act does so provide.⁶⁶ It is rather unusual today to find legislation providing for the right of review. If anything, many

⁶² Alta. H.R. Act, s. 12(2); N.B.H.R. Act, s. 13(1); O.H.R. Code, s. 13(1). Neither the Nova Scotia nor the Prince Edward Island Acts make specific provision for notice to be given.

⁶³ Alta. H.R. Act, s. 14; N.B.H.R. Code, s. 13(3); N.S.H.R. Act, s. 13(1); O.H.R. Code, s. 13(3), P.E.I.H.R. Code, s. 12(1).

⁶⁴ Report Number One, Vol. 1 (1968), ch. 32.

⁶⁵ *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824.

⁶⁶ Section 17 provides for an appeal to the district court within a time limit of thirty days. The district court is empowered to hear the appeal *de novo* and may confirm, reverse or vary the findings and recommendations of the board of inquiry.

statutes attempt through privative or finality clauses to withdraw such right. In either case, that is, where the statute is silent with respect to review, or where a privative or finality clause is included, the possibility of review depends upon the type of function that the agency is said to perform. This in turn may be determined, to some extent, by the powers of the agency, or by the procedure it is required to follow in carrying out its functions.

Do the boards or commissions of inquiry exercise a judicial or quasi-judicial function so as to be subject to review by way of *certiorari* and prohibition? When an administrative agency merely hears and reports to another that makes the decision then it is not, presumably, exercising a judicial or quasi-judicial function.⁶⁷ Since the boards of inquiry report and merely recommend a course of action to human rights commissions or directly to the Minister, and since only the Minister in each case determines the course of subsequent action then, presumably, the boards of inquiry would not usually be considered judicial or quasi-judicial, and so not subject to judicial review. However, on the other hand, the boards of inquiry are specifically required to give the parties "full opportunity to present evidence and to make submissions".⁶⁸

To remove any doubt, a right of review of the determinations of boards of inquiry should be provided for. There are a number of arguments in favour of this. In the first place, the words of Mr. Justice Schroeder of the Ontario Court of Appeal in *Re Ontario Crime Commission, Ex parte Feeley and McDermott*⁶⁹ apply with emphasis to proceedings under human rights legislation. The persons affected, "have come under the full glare of publicity", and it is only fair and just that they be afforded all protection consistent with the administration of the legislation. Secondly, where the statute itself provides for the giving of notice and a full opportunity to be heard, there is need to ensure that this is preserved. Finally, since human rights legislation is a part of the whole field of civil liberties, it is important that other aspects of civil liberties be observed while furthering the purposes of human rights. Any man, regardless of his ability, training, and fair-mindedness, can overstep the bounds of his jurisdiction or overlook, ignore, or forget about the procedural requirements of natural justice. The more informal atmosphere of an administrative tribunal can sometimes lend itself to this. The role of judicial review is to keep the tribunal within its jurisdiction observing the rules of natural justice.

⁶⁷ See the cases under footnote 60, *supra*.

⁶⁸ See footnote 63, *supra*.

⁶⁹ [1962] O.R. 872, at p. 896.

It is not the role of the reviewing tribunal to substitute its own judgment for that of the hearing officer or officers by way of an appeal.

There has been criticism of judicial review of administrative action as it has sometimes been practised.⁷⁰ Administrative tribunals are composed of individuals with some or considerable expertise in the subject matter within their jurisdiction. At times the review of a board composed of several experts has been conducted by a single judge having no specialized knowledge of the subject matter of the legislation, and sometimes even a hostility to its objectives. At times, under the guise of determining jurisdictional questions, the reviewing court has actually substituted its own opinion for that of the tribunal on a matter strictly within the tribunal's jurisdiction. Often the very intricate requirements of the various types of review have resulted in delays and added costs to all concerned.

Two of the reforms suggested by the Ontario Royal Commission Inquiry into Civil Rights, if instituted, should remove many of the criticisms of judicial review as it is now practised. One of these is that a standard form of review be used to replace all types now current.⁷¹ The other is that all applications for review be heard by a new Appellate Division of the High Court.⁷² When these reforms are instituted there should be no hesitation to provide a right of review of boards of inquiry under human rights legislation in Canada.

Enforcement

Enforcement of human rights legislation in Canada is provided for through a penal provision for non-compliance with a ministerial order made pursuant to an inquiry, as well as for the act of discrimination itself.⁷³ It will be argued that these forms of enforcement should be changed.

(a) *The Order*

In Ontario and New Brunswick the board of inquiry submits its report and recommendations to the Commission which then

⁷⁰ See, e.g., Carter, *The Apparent Virility of Privative Clauses*, [1967] Centennial Edition U.B.C.L. Rev. 219; Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar Rev. 986; Millward, *Judicial Review of Administrative Authorities in Canada* (1961), 39 Can. Bar Rev. 351.

⁷¹ McRuer Commission Report, *op. cit.*, footnote 64, ch. 22.

⁷² *Op. cit.*, *ibid.*, chs 22 and 44.

⁷³ Only the Ontario and New Brunswick statutes state this explicitly: O.H.R. Code, s. 14; N.B.H.R. Act, s. 16. The same effect is achieved by the

recommends to the Minister what course of action should follow.⁷⁴ The Human Rights Acts of Alberta, Nova Scotia, and Prince Edward Island do not provide for prior submission to a Commission.⁷⁵ In all provinces the Minister may make whatever order he deems necessary to carry the recommendations of the board into effect.⁷⁶ Thus, in essence, the recommendations of the board are subject to a form of review at one or two different stages. This is desirable as a protection both for the complainant and for the respondent. However, no provision is made for either the complainant or the respondent to make representations. Although such may occur in practice, this does not really amount to an appeal or review since both sides are not heard. If that is so, it is just as well that the findings of the board be treated as orders, subject to judicial review. They could be enforced by filing with the superior court of the province, whereupon they would have the same force and effect as if they were orders of the superior court.

What is being suggested here is that provision be made for filing the recommendations of the board with the Supreme Court, and that thereupon these be enforceable as an order of the Supreme Court. The board would still send its findings to the Commission in those provinces where this is now being done. This would enable the Commission to have one last informal meeting with the complainant and the respondent to see whether a settlement can be reached for voluntary compliance with the board's recommendations. If not, enforcement would be achieved, not through a ministerial order, but through enforcement by court order.

It should not be forgotten, however, that most complaints are settled by voluntary agreements without a board of inquiry being called, and thus without the issuance of any order.⁷⁷ If these agree-

other three Human Rights Acts through separate enactments which require compliance with the ministerial order, and then provide that non-compliance with any provision in the Act is an offence: Alta H.R. Act, ss 16 and 18(1); N.S.H.R. Act, s. 14(3) and 15; P.E.I.H.R. Code, s. 12(3) and 14.

⁷⁴ O.H.R. Code, s. 13(3) and (6); N.B.H.R. Act, s. 13(3) and (6).

⁷⁵ Alta H.R. Act, ss 15 and 16 provide for the report to be submitted to the Administrator who, *semble*, passes it on to the Minister without comment or recommendations of his own. Under the N.S.H.R. Act the recommendation is made directly to the Minister: s. 13. In Prince Edward Island the Minister conducts the inquiry himself: P.E.I.H.R. Code, s. 12(1).

⁷⁶ Alta H.R. Act, s. 16(2); N.S.H.R. Act, s. 14(2); O.H.R. Code, s. 13(6); P.E.I.H.R. Code, s. 12(2). In New Brunswick the authority to issue orders to effectuate the recommendations of the board of inquiry are given both to the Minister and to the Commission: ss 13(6) and 14(1)(c).

⁷⁷ In Ontario, for example, there have been only about 30 complaints which reached the board of inquiry stage as against over 1,200 complaints which were settled through negotiation.

ments are not to be used for the subversion of the object of human rights legislation it is important that they be enforceable as stringently as orders pursuant to determinations by boards of inquiry. In any case, whether a complaint is terminated by a settlement or an order, certain forms of redress for the victim will be outlined. In addition, certain modes of compliance in order to show good faith are usually required of the respondent. Therefore, subsequent supervision and compliance investigation must be specifically required.

(b) *Penal Provisions*

Earlier in this article,⁷⁸ a number of arguments were presented in favour of replacing the penal approach to enforcement of human rights by the current method of combining education with enforcement by a Commission through investigation, conciliation, and settlement, and ultimately through the administrative agency known as the board of inquiry.⁷⁹ To these arguments I would add others.

If there is a possibility of prosecution for the act of discrimination, the whole of the antecedent procedures must be tested, to some extent at least, by the usual procedures in the administration of criminal law. The powers of investigation, questioning, requiring the discovery of documents, and so on, must be subject to the most stringent protections for the citizen. Furthermore, there is no doubt that under its present powers under the Labour Relations Act⁸⁰ or the Public Inquiries Act,⁸¹ as the case may be, the board of inquiry can make a determination on the basis of the preponderance of evidence. However, since the act of discrimination may also be the subject of a prosecution, some questions are inevitably raised by members of the legal profession as to whether the determination should be made unless the complaint is proved beyond a reasonable doubt. Then, too, since proof of discrimination involves proving a motive which is rather easy to disprove, it is difficult to prove the act of discrimination beyond a reasonable doubt. It is not so difficult to prove it by a preponderance of evidence. The result may be that the board of inquiry will find that the act of discrimination was committed, and a criminal court, not satisfied beyond a reasonable doubt, may acquit. If this were to happen, great discredit may result to the administration of

⁷⁸ *Supra*.

⁷⁹ For a full discussion of these see Eberlee and Hill, *The Ontario Human Rights Code* (1964), 15 U. of T.L.J. 448, at p. 449 *et seq.*

⁸⁰ See *supra*, footnote 57.

⁸¹ See *supra*, footnote 58.

human rights provisions. Finally, the primary object of human rights legislation is to obtain compliance through an agreed settlement. This requires negotiation and conciliation. This process is foreign to criminal law. When the act of discrimination is made a crime, the whole process of negotiation, conciliation, and settlement could be likened to compounding a criminal offence.

For all these reasons it is recommended that there be no penal provision for the act of discrimination itself. The preferable form of enforcement has been outlined in the previous section. However, a penal provision is required for a different purpose, and that is to prohibit interference with or obstruction of the administration and enforcement of human rights legislation.

Interference or attempted interference with, or the obstruction of the administration and due enforcement of human rights legislation can result from undue pressure on any one of: the complainant, a prospective employee, an employee, a witness, officers or members of a Commission, or the board of inquiry. Interference or obstruction may also arise from destruction of or tampering with documents.

A person who feels he has been discriminated against may be afraid to make a complaint. If there is genuine fear by such a person that he will suffer upon the making of a complaint—whether this suffering will be at the initiative of the prospective respondent, or some other employer, or a trade union, or an employment agency—legislative measures must be adopted to give such prospective complainant protection. Even if his fears are unjustified, or if the fear is merely of the opprobrium of others, or if this person is a timid soul, legislative support can be important.

The person who is threatened or coerced may not be a complainant, but may be a witness or a potential witness. He may be instructed or ordered not to reveal himself as a person with knowledge of the pertinent facts, or he may be instructed or ordered to perjure himself or at least “edit” his testimony. It may even be that there has been no threat at all, but the potential witness may know what has happened to others who have testified, or may even think he knows. Again, whether the fear is justified or not, there is need for a legislative provision to render protection, or at least to induce co-operation by providing the confidence that comes with legislative protection.

The interference or obstruction may be directed against an officer of the Commission, a member of the Commission, or the board of inquiry. In its most raw form, the interference may be a

physical one directed against the investigating Human Rights Officer or at the conciliator. It may be that there would be reluctance on the part of the Human Rights Officer to lay a charge of assault and battery or to bring a civil action. Nevertheless, protection may prove necessary. At any level, attempts may be made to apply political pressure. Although such attempts would certainly be resisted, it would save a lot of time and embarrassment to the one refusing, rejecting, or resisting, if there were a provision making it a prohibited act to interfere or attempt to interfere with, or obstruct, the administration and due enforcement of the human rights statute.

With respect to destruction and alteration of pertinent documents, it must be remembered that quite often important evidence in employment cases depends upon documents which are in the control of the respondents or those acting on their behalf. It is very easy to alter job orders. If Human Rights Officers are limited to the right to order discovery, or the right to *subpeona* documents, it is necessary to rely upon documents being unaltered. Making such destruction or falsification a prohibited act would discourage law-abiding citizens from doing so.

It would be possible to set out separate provisions for each type of interference or obstruction mentioned above. However, there is a sufficient inter-relationship and identity between them to draft one general, all-inclusive provision. The following would be recommended for adoption:

Any person, employer, employment agency, or trade union, who or which shall wilfully resist, prevent, impede or interfere with the Commission or its members or officers in the performance of their duties under this Act, or shall, directly, or indirectly, retaliate or discriminate against any person because he has filed a complaint, testified or assisted in any proceeding under this Act, is guilty of an offence and on summary conviction is liable. . . .⁸²

If the penal provision is adopted either as a separate section or in conjunction with the prohibition of interference with complainants or witnesses, it must be clear that the usual negotiation, defence, and review proceedings are excluded from such provision. If there is any doubt about this it would be important to include the following proviso:

The process of argument, discussion, negotiation at the conciliation stage, and the normal process of participating at a hearing, or subse-

⁸² For somewhat similar, although less extensive, provisions see P.E.I.-H.R. Code, s. 9; N.Y. Human Rights Law, *supra*, footnote 48, s. 299; Pennsylvania Human Relations Act, *supra*, footnote 48, s. 11.

quently in proceeding for review, shall not be deemed to be such wilful conduct.

New Methods to Promote Human Rights

Comprehensive human rights codes such as those discussed in this article are relatively new in Canada, except for Ontario. In view of this, except for Ontario, the emphasis must be still on publicity of the existence of the legislation, and on education, rather than on vigorous enforcement. However, if after an interim period the transition to enforcement is not achieved, the various human rights statutes will constitute a sham. The enforcement techniques discussed here will have to be applied if the human rights statutes are not to deteriorate to pious but ineffectual declarations. This is particularly important because immigration from non-European countries is increasing. In addition, new techniques will have to be devised in view of the intractability of the problem of Indian poverty and the continuing lack of equality of opportunity faced by the Indian population.

(a) Contract Compliance

Contract compliance is a procedure which has not yet been tried in Canada, but which is increasingly being instituted by the federal authorities in the United States, and by some state commissions like the Michigan Civil Rights Commission. By section 4 of the Michigan Fair Employment Practices Act,⁸³ every contract with public authorities must include a provision requiring the contractor and his subcontractors not to discriminate contrary to the provisions of the human rights legislation. The Contract Compliance Division of the United States federal government in enforcing similar requirements, has a time limit within which to review those who tender bids on government contracts. The Contract Compliance Division could recommend that the contract not be granted to a bidder who is not in compliance. Both the Michigan and federal Contract Compliance Divisions investigate to see that those who have already been granted government contracts comply with the human rights provisions in force in the respective jurisdictions.

Contract compliance provisions can be one of the most effective methods of overcoming systems or patterns of discrimination that often do not lend themselves to an enforcement which relies upon individual complaints. Furthermore, these procedures are

⁸³ *Supra*, footnote 52.

educational in that they bring the human rights legislation to the attention of people who might otherwise ignore it. They enable Human Rights Commissions to work with an employer before any tension arises because of an incident which leads to a complaint. In Canada, such provisions covering contracts with public authorities would give added effect to the assertions in the preambles to most human rights statutes that promotion of human rights is public policy in the province. There will be skepticism as to the sincerity of these declarations if public bodies contract with individuals who, or corporations which, are not required to comply specifically with human rights provisions.

(b) *Display of Human Rights Codes by All Places of Public Accommodation*

The issue of a license is deemed to be the granting of a privilege. Therefore, provincial or municipal authorities which issue licenses for the operation of businesses require compliance with certain criteria deemed necessary for the protection of the public. If the enforcement of human rights statutes is public policy in the province, there is no reason why places of public accommodation should not be required to post human rights codes prominently. The present practice has been to require this as a condition in the terms of settlement of a complaint. This is at best a "hit or miss" technique. The posting of human rights codes in premises offering service to the public would be an effective means of widespread publicity.

(c) *Valid Employment Criteria*

Two assumptions underlie the present philosophy of human rights legislation: 1. Employment qualifications are based upon *bona fide* criteria; 2. Members of minority groups who suffer discrimination are prepared to meet such qualifications. Both assumptions are often not true. Many employers use sets of standards and other employment criteria which have no valid relation to job requirements. Often these innocently or deliberately serve to disqualify members of minority groups. Moreover, many members of minority groups lack the training necessary to compete on equal terms for jobs or promotional opportunities.⁸⁴

⁸⁴ Report of the Governor's Committee to Review Laws and Procedures in the Area of Human Rights, New York, N.Y., March 27th, 1968, pp. 19-21. The Committee was appointed on August 10th, 1967 for the purpose of re-examining "the laws, the administrative machinery and the procedures built to the specifications of yesterday's problems . . . in the light of today's need".

Employers who contract with public agencies should be required to co-operate with the Human Rights Commission to review job requirements and even to provide on-the-job training. Other employers should be encouraged to do the same. This approach is particularly important in areas such as those in North-western Ontario and Halifax where there are large enough concentrations of disadvantaged minority groups like Indians or Negroes to make such a programme practical.

Conclusion

Human rights legislation was long overdue in the Western world, and is a recognition for the first time of the sameness of all men, of the fact that there can be no real dignity of any man unless society dedicates itself to ensuring the dignity of all men. Any man who is unmoved by the suffering and oppression of another is to that extent less a being of feeling and compassion, and thus less a man himself. In today's "global village", more than ever before, the question—Who is my neighbour?—cannot be answered with qualifications of race, colour, or creed.
