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Human Rights in Canadian Society: Mechanisms for Raising the Issues and Providing Redress

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Introduction

To the great body of the people, the whole mass of right is without remedy. Selling justice to the favoured few, denying it to the many, the system gives the rights in outward show; takes them away in effect; gives rights by what it says, takes them away by what it does.¹

Society has changed since Jeremy Bentham made the above observation. However, the problem he identified has not been eliminated. The gap between what governments say about human rights and what they do about violations of human rights is wide.

In spite of occasional verbal protests from other nation states, President Idi Amin continues to murder and torture the people of Uganda. United States' President Carter has made strong statements on the importance of human rights, but has stopped short of imposing economic and political sanctions on offending nations. Canada has ratified the United Nations' Universal Declaration of Human Rights, but it has not drafted legislation to properly implement it. The Canadian Bill of Rights trumpets "equality before the law" but the courts have construed this right narrowly.²

Declarations of right that fail to provide remedies for violations may actually be counter-productive. Too often declarations of rights are regarded as solutions rather than definitions of problems, as conclusions rather than introductions. Attention is diverted from real problems to the declarations themselves.³ The focus must shift from the definition of rights to the provision of real remedies. Actions speak louder than words.

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1. J. Bentham, *The Works of Jeremy Bentham* (New York: Pegasus, 1969) at 148

2. *Lavell v. Attorney General of Canada, Issac et al v. Bedard* (1974), 38 D.L.R. 481 (S.C.C.)

3. Most of the articles on human rights since 1960 deal with the Canadian Bill of Rights rather than the problems which it was meant to remedy.

It is in the context of this need for remedies that this article will examine the existing mechanisms for protecting human rights in Canada. The focus is not upon what an agency claims it will do; but what it actually does. Some mechanisms provide direct redress for violations of rights but others merely raise the issues in a public forum. The latter function does not provide a remedy directly; but the media provides a good example of how raising issues can produce remedies. Raising the issues may also achieve the important goal of preventing future violations. Thus, the effectiveness of each mechanism will be evaluated in relation to two fundamental questions. Does it directly provide a remedy? Does it raise the issues in such a way as to ultimately provide a solution?

I. *Human Rights in a Changing Society*

Rights are never absolute. They are relative to time and place. Thus before examining the mechanisms for protecting human rights, these rights must be set in their proper context. In the closely integrated modern society it makes little sense to divide rights into categories such as civil, political, social or economic. Professor Donald Smiley defined rights in much broader terms as "claims for specific kinds of treatment made by or on behalf of particular individuals or groups."⁴ It is in this sense of "preferred claims" that the expression "rights" is used throughout this article. Thus human rights can be viewed as a three stage process — the defining, ranking and protecting of rights. This process is usually ridden with conflict, for as Professor Smiley pointed out, human rights involve "the clash of human values, the sense of the community about what is acceptable and the broadest judgements of where society is going."⁵

Contemporary Canadian society raises some intriguing and perplexing human rights problems. The increased expectations of an affluent society have given birth to new demands for rights. Advances in technology have made it possible to extend life by artificial means and in the celebrated *In re Quinlan*⁶ case this led to the assertion of a right to die with dignity. In a more bizarre case in

4. D. Smiley, "Courts, Legislatures and the Protection of Human Rights" in Friedland, M.L. (ed.), *Courts and Trials: A Multi-disciplinary Approach* (Toronto: Univ. of Toronto Press, 1975) at 91

5. *Ibid.*, at 101

6. (1975), 44 2 W. 2215 (N.J. Sup. Ct.)

November 1976 Gary Gilmore of Utah demanded the right to die by a firing squad rather than accept life imprisonment. Although these examples are American, the issues are also relevant to Canada.

Equally controversial is the right to life issue. Mrs. Ursula Appolloni, M.P. for South York and founder and leader of the Inter-Parliamentary Committee in Defence of Human Life, has been giving lectures all across Canada asserting the right of a fetus to life. The Gay Alliance has become a vocal lobby in asserting "sexual rights" and seeks the protection of human rights legislation. Children's rights are championed in the movie "Jacob Two Two Meets the Hooded Fang" (developed from Mordecai Richler's book) in which the Children's Liberation Organization fights the oppression of the adult world. Consideration is also being given to the rights of the non-smoker to breathe clean air.

Economic strains and the federal government's *Anti-Inflation Act* have sparked some interesting human rights issues. Organized labour has consistently opposed this program and Joe Morris, leader of the Canadian Labour Congress, demanded that labour be given equal voice with business and government in deciding economic matters. On October 14, 1976 the labour movement staged a day of national protest. Furthermore, workers are beginning to think of jobs, decent wages and government largesse as rights, not privileges. However, the workers' fight for economic rights is by no means won. In July 1977, seven striking workers were shot by private security guards at Robin Hood Multifoods Ltd. in Montreal. The days of labour violence are not dead. Finally, the problems of unemployment have made Canadians less tolerant of immigration by coupling old prejudices with the fear of losing jobs. Many human rights issues will be decided in the context of labour strife.

What is the future of Canadian society? The answer to this question will ultimately determine the type of values which will be protected. Traditionally Canada has been a conservative society showing great deference to authority. Alan Borovoy, Special Counsel to the Canadian Civil Liberties Association, told a group of Dalhousie University law students in Halifax on November 18, 1976 that the balance of power has always favoured the forces of order. As examples he cited the extensive powers of search under the *Narcotics Control Act* and Justice Minister Basford's "Peace and Security" legislation. Historian Kenneth McNaught discovered that the courts in time of crisis reassert the authority of the established

institutions to preserve "order" in society.⁷ An extensive world opinion poll conducted by George Gallup has shown that Canadians are the most contented people in the world.⁸ This smug acceptance of the status quo would suggest that Canadians are unlikely to radically change their values or institutions.

One change that Canada may not be able to avoid is the disintegration of confederation itself. The election of René Levesque and the Parti Québécois in November 1976 makes separatism much more than an academic threat. Furthermore, dissatisfaction in the Maritimes and the West poses a further threat to national unity. Pluralism is being strongly challenged in contemporary Canada. Bilingualism and the 1976 dispute over air traffic control demonstrate the strong English/French rivalry that plagues Canadian society. In spite of the lip service paid to multi-culturalism, Canadian tolerance of other cultures and languages is surprisingly low. Certainly Canada's treatment of its native people illustrates a misunderstanding of different cultural values. Canada's diversity is essential and should be encouraged, but there is serious doubt about Canada's future as a pluralist society.

It is futile to talk about rights in Canada without considering the power structure which both determines and violates those rights. Some writers feel that the essential feature of Canada's power structure is corporatism.

Our political system's organization of power is not merely elitist, but corporatist. Elites interact and attempt to accommodate each other. The various elites often appear to clash, or pretend to clash, but usually maintain a realistic willingness to balance or harmonize their divergent interests and to preserve the interests of the community through collaboration with the state.⁹

In this context, Joe Morris' demand for an equal voice in economic matters is a demand to be recognized as one of the elites in the corporate structure. This view of power is alarming, as the people who set our fundamental values would not be responsible to the populace. The mechanisms of redress discussed in this article would be outside the power structure altogether.

7. K. McNaught, "Political Trials and the Canadian Political Tradition" in Friedland, M. L. (ed.), at 160 *supra*, footnote 4, at 160

8. G. H. Gallup, "What Mankind Thinks About Itself" *Reader's Digest* (October, 1976) at 25-32

9. J. T. McLeod and K. J. Rea, *Business and Government in Canada* (Toronto: Methuen of Canada, 1976) at 339-340

Political Science professor Donald Smiley is unwilling to accept the above view of power in Canada. He feels the most powerful institutions in Canada are the federal and provincial cabinets.¹⁰ The growth of the Welfare State has expanded the role of government at all levels. The great influence of corporate lobbies cannot be denied; but it is accurate to say that the cabinet is at the apex of the power structure and makes the ultimate decisions. As public control over the individual increases, governments must not only abstain from violating individual rights but must also provide positive protection of these rights. Government has become the major focus of concern for human rights.

Our objective must be to bring pressure on governments to mend their ways, because it is governments who are the principle violators of human rights, and governments who have the power to end the violations if they are spurred or shamed into doing it.¹¹

Canada has witnessed a rebirth of participatory democracy in recent years and citizen action groups have mushroomed throughout the country. This allows the dispossessed to challenge the rules of both the governments and the corporate elites. Tenant associations, consumer groups, environmentalists and minority groups actively pressure government and business to follow policies acceptable to the particular group's interest. There will inevitably be conflict between these pressure groups and they will continue to use the tactics of disruption. Alan Borovoy has declared that establishing society's tolerance threshold for disruption will be the dominant civil liberties issue of the next fifty years.¹² When two valid claims for rights conflict it is always difficult to decide which should prevail. Appropriate mechanisms must be developed to balance conflicting claims in a pressure group society.

Contemporary Canada has reached a stage where it must answer some fundamental questions about its future. Not the least of these questions is whether or not Canada should continue as a single nation. Technological advancement and increased mobility have diminished the sense of community in Canadian society. The Church and the family are no longer stable institutions. Industrial

10. D. Smiley, "Rights, Power and Values in Canadian Society" (unpublished article, 1976), at 11

11. N. MacDermot, "The Credibility Gap in Human Rights" (1976), 3 *Dal. L. J.* (No. 1) 262, at 270

12. A. Borovoy, "Civil Liberties in the Imminent Hereafter" (1973), 51 *Can. Bar Rev.* 93, at 106

progress must now be balanced against demands for conservation and a clean environment. Economic controls provide a gentle hint that the days of easy affluence may be nearing an end. These controls also illustrate the increasing government regulation of all aspects of society and the changing relations between the state and the individual. It is timely to evaluate the mechanisms designed to resolve conflicting social rights.

II. *Mechanisms for Giving Effect to Human Rights*

When the average Canadian is denied what he/she considers to be a basic right, he/she is probably unaware of the avenues of redress available. This is indicative of Canadians' general ignorance of their legal rights. It may also suggest that real remedies are not available. The following consideration of the established mechanisms of redress will test the validity of the latter assumption.

A. *Judicial Mechanisms*

Canadian courts play a much more limited role in protecting human rights than do their American counterparts. This is not so much an admission of weakness as a statement of policy. Parliament has always been considered the champion of liberty in Canada and judicial review of its actions have been narrowly limited. It is argued that the adversary system with its restrictive evidence rules is not the proper forum for deciding issues of broad social policy. For the courts to become active in upholding human rights would "politicize" the judiciary and this has been traditionally considered undesirable.

Some people (particularly lawyers) advocate a more activist judiciary. In 1960 Prime Minister John G. Diefenbaker succeeded in getting a Bill of Rights through the Parliament, but it was passed as a regular statute and not an entrenched bill. The 1960's marked the high point of direct political involvement by the American Supreme Court in the promoting of desegregation, busing and civil rights. In 1970 a bold step was taken toward policy-making in *The Queen v. Drybones*¹³, indicating that Canada might be following the American model. The appointment of Bora Laskin as Chief Justice of the Supreme Court of Canada offered further encouragement for those who desired judicial activism. However, a restrictive

13. [1970] S.C.R. 282 (S.C.C.)

interpretation of the Bill of Rights in the *Attorney General of Canada v. Lavell*¹⁴ indicated a retreat to the traditional deference to the will of Parliament.

Examining the American experience with an entrenched Bill of Rights, Professor Schmeiser concluded that social change was actually hindered by the influence of a conservative judiciary.¹⁵ The protection of a powerful bill of rights may be more illusory than real. In Canada the crucial decisions on language rights, conscription, police powers and other civil rights issues have been made in the elected legislatures and not the courts. Elected legislatures have a wider scope of action, control their own agenda, are open to public scrutiny and are not hampered by the rules of evidence. This was essentially the view expressed by the McRuer Commission.¹⁶ However, even good laws must be interpreted. Litigation as a means of protecting human rights should not be ignored.

1. *Government Violations of Rights*

The courts do have some control over the elected legislatures by the process of judicial review. It is the courts which interpret the laws and they can thus influence how they are applied. Often statutes will make provisions for judicial review. It is the duty of the courts to see that the many administrative agencies of government operate under the rules of procedural justice and within their statutory limits. Finally, it is the Supreme Court of Canada which must ultimately rule on the constitutionality of legislation.

The *British North America Act*, unlike the American Constitution, does not contain a bill of rights. There are some guarantees of language rights, denominational schools and democratic government in the Canadian Constitution; but these have sometimes proven embarrassing. The rights granted to denominational school boards under section 93 of the *British North America Act* have allowed Newfoundland school boards to insert a morals clause in its teaching contracts empowering the board to dismiss teachers for what the board considers immoral behavior.¹⁷ It is ironic that

14. *Supra*, footnote 2.

15. D. A. Schmeiser, "The Case Against Entrenchment of the Canadian Bill of Rights" (1973), 1 *Dal. L.J.* 15

16. The Report of the Ontario Royal Commission of Inquiry into Civil Rights (1969), Report No. 2, Vol. 4, at 1592-1593

17. "Teachers Fight 'Morals Clause' in Newfoundland Pacts" *The Globe and Mail* (October 30, 1976), 17

constitutional guarantees should be used to violate fundamental rights. The current movement to repatriate the constitution should also consider the injustices of outdated provisions.

The problems involved in a constitutional challenge are well illustrated in the recent Nova Scotia case in which newspaper editor Gerard McNeil challenged the validity of the censorship board.¹⁸ Although the court reached a decision in McNeil's favour, it was based upon the technical division of constitutional powers and not the principles or merits of his argument. The court never dealt with the broader issue of whether any government had the right to censor what the public consumes. After three years of court battles the case was finally decided in January 1978 on appeal in the Supreme Court of Canada. The court ruled against McNeil. McNeil is faced with huge legal expenses and a defeated cause within a divided Supreme Court.

One of the first problems encountered by a citizen hoping to vindicate his/her rights in the courts is the issue of standing. Until recently only those who were exceptionally prejudiced by the application of a law had standing to challenge a law in the courts.¹⁹ In the *McNeil* case discussed above, it was stated that the granting of standing was at the discretion of the court.²⁰ As a prerequisite to standing, a request that the Attorney General act on behalf of the citizen has normally been required. However, in the case of *Carota v. Donald Jamieson and Marcel Lessard*²¹ standing was granted even though there was no request that the Attorney General act and no consequent refusal. Mr. Justice Collier suggested that the Attorney General acting on behalf of the citizens is not a realistic option in Canada's federal structure.

Mr. Carota's case has interesting implications for citizen access to the courts. Although now a resident of Prince Edward Island, Mario Carota was born in the United States and this may explain his desire to seek redress in the courts rather than the political arena. Mr. Carota is a farmer of modest means with an adopted family of nineteen children. He is arguing his case without a lawyer. He is

18. *McNeil v. The Queen* (Unreported decision of N.S.S.C. App. Div., February 2, 1976)

19. *Smith v. Attorney General of Ontario*, [1924] 3 D.L.R. 189 (S.C.C.)

20. *McNeil v. Nova Scotia Board of Censors et al* (1974), 46 D.L.R. (3d) 295 (N.S.S.C. App. Div.). Later approved in the S.C.C. (unreported decision of May 20, 1975).

21. Unreported decision of May 18, 1976 (F.C.C.)

also making a movie of his struggle against the Department of Regional Economic Expansion. His basic claim is that the government has mismanaged funds and particularly, has failed to allow citizen participation as required by section 25(2) of the *Government Organization Act*.²²

This type of complaint is usually handled *via* the political process and one of the arguments offered in the *Carota* Federal Court case was that the court offered no remedy. A wider view of standing is desirable, but the high cost of litigation would continue to put the courts beyond the reach of the average person. There should be cheaper and more accessible avenues of redress.

The most obvious forms of government authority are laws and regulations. However, not all government power is exercised by elected representatives. A bureaucracy of government departments, boards and tribunals exercise great authority. The *Anti-Inflation Act* has spawned a board with the power to control both wages and prices. These agencies are limited by their statutory terms of reference; but the controls over the agencies are often minimal. The Nova Scotia Amusements and Regulations Board at issue in the *McNeil*²³ case is an excellent example of an appointed board with extensive discretionary power.

The courts too have been quite inadequate in preventing administrative agencies from violating basic rights or providing a remedy once a violation has occurred. Generally, it is only if an agency acts in a judicial or quasi-judicial capacity, that it must follow the procedural rules of "natural justice." Essentially, these rules of "natural justice" only guarantee: prior notice to the parties concerned; an opportunity for a fair hearing; and an unbiased decision.

Even when these rules are applied the effect of a procedural injustice is unclear. The rules of "natural justice" may have little effect unless there is a substantial injustice. In *Glynn v. Keele University*²⁴ a student appeared naked on campus and shocked the staff. A disgruntled Chancellor bypassed the discipline committee and had the student fined and expelled. The court upheld the Chancellor's ruling. It was held that the substantive case against the student was so strong that a breach of "natural justice" should have no effect.

22. S.C. 1969, c. 28

23. *Supra*, footnote 20.

24. [1971] 1 W.L.R. 487 (C.A.)

Generally, the effect of a violation of procedural justice is the issuing of a *certiorari* order to quash the original ruling. In appropriate cases a declaration or injunction may be granted to prevent future violations. However, there can be no "right" to a prerogative order or declaration as these remedies are at the discretion of the court. Professor Donald Clark argued that the grounds for refusing a discretionary remedy should be specifically stated in an exhaustive list.²⁵ At present the protections of "natural justice" are small. "While natural justice casts a lengthening shadow, the shade serves only to conceal the decline in its substance."²⁶

There is a clear need for better protections against administrative abuse of power. The only question is what direction reform should take. France has the *Conseil d'Etat*, a separate court, to handle problems of administrative law. It offers a wide range of remedies and has a broad jurisdiction that allows consideration of incompetence, delay and substantive policy. Because they specialize in administrative law, the judges of the *Conseil d'Etat* can develop needed expertise. The French system was considered by the McRuer Commission but was rejected in favour of cleaning up the existing system.²⁷

Opponents of an administrative court fear that it would lead to constitutional problems and might be inclined to favour the government. Some of these problems can be overcome by adopting the New Zealand compromise of setting up an administrative division of the Supreme Court. This has proven to be a fast and efficient system²⁸ and should be adopted in Canada on at least a trial basis. It is time to face the need for change and Professor Mitchell of the University of Edinburgh stated the situation well.

A new jurisdiction is required in order to free the law from the shackles on thought which are part of the heritage of the past: to free lawyers from thinking in narrow terms about administrative law, and even within those narrow terms of being captivated by the past splendor of the prerogative orders.²⁹

25. D. H. Clark, "Natural Justice: Substance and Shadow" (1975), *Public Law* 27, at 62

26. *Ibid.*, at 63

27. *Supra*, footnote 17, at 1462-1468

28. Sir R. Wild, "The Administrative Division of the Supreme Court of New Zealand" (1972), 22 *U. Toronto L.J.* 258

29. J. B. D. Mitchell, "Administrative Law and Parliament Control" (1967), 38 *Political Quarterly* 360, at 367

The continuing growth of government power necessitates new mechanisms to control the abuse of that power.

2. *Private Violations of Rights*

Courts are designed to settle disputes between private individuals or groups, but often violations of human rights do not produce a legal wrong. To overcome this problem the government has created agencies like the Human Rights Commission to supplement the protection of the courts. However, even when the courts do offer remedies they are often not accessible to the poor and dispossessed who need protection.

The advent of legal aid has improved the position of the poor. Legal aid began as a voluntary plan in the 1950's and by 1966 Ontario had passed a *Legal Aid Act*. Soon the system was adopted by the other provinces and it arrived in Nova Scotia by 1972. Although these programs are financed by the government, they are usually controlled by the provincial bar societies. In 1977 control over Nova Scotia Legal Aid was given to a newly established commission. In Ontario a person in a stipulated income category can acquire a legal aid certificate and choose any lawyer that he wishes. Nova Scotia offers a neighbourhood store front office and provides a limited choice of legal aid lawyers.

The poor normally regard the law as an enemy which takes things away; so it is not enough to simply make the machinery available to them.³⁰ There is a real need to educate the poor about their rights and how they can assert them. The main problem with legal aid is that many people fall outside its limited coverage. In spite of the public expense, judicare should be considered as a possible solution to the high cost of litigation.

One of the most exciting legal developments in recent years is the increased use of class actions. These actions are frequently used in the United States and were prominent in the Nader consumer movement. The rules governing class actions in Canada are strict. Quebec allows none at all. In the other provinces the members of a class must be shown to have the same interest and the courts have used this restriction extensively. However, Phil Edmunston and the Automobile Protection Association recently launched a class action on behalf of rusty Ford owners that clearly produced results. To avoid an adverse decision and bad publicity Ford Motor Company

30. J. D. Honsberger, "The Ontario Legal Aid Plan" (1969), 15 *McGill L.J.* 436

agreed to compensate the owners of rusty Fords and to meet with the Federal Minister of Corporate and Consumer Affairs to establish acceptable standards of rust control. The Federal government enhanced the appeal of class actions in the spring of 1977 by passing a bill loosening the requirements for initiating such actions. This is a positive aspect of the existing system that should be expanded.

Another little used device that could improve the accessibility of the courts is the brief *amicus curiae*. This device, which literally means "friend of the court," was originally used to provide expert advice to the court. It allows a third party to promote a viewpoint in a dispute between two other parties. The brief *amicus* is extensively used in the United States by Civil Liberties Unions and other interest groups as a device for lobbying the courts.

The utility of the *amicus* brief is well illustrated in the important case, *University of California v. Bakke*³¹ which is presently on appeal to the United States Supreme Court. Dozens of agencies including the Natural Association for the Advancement of Coloured People (N.A.A.C.P.), have submitted briefs on the constitutional validity of a quota system to promote minority attendance at medical school. Although the brief *amicus* has been rarely used in Canada, there are some precedents for its use. In *Re Drummond Wren*³² the Canadian Jewish Congress made an oral representation attacking restrictive land covenants against Jews. More recently in a Newfoundland obscenity case the counsel for *Playboy* magazine was allowed to intervene and present a statement.³³

Many factors have been suggested to explain the neglect of the brief *amicus curiae* in Canada. Lawyers are generally unaware of the device and do not like the idea of judicial lobbying. The use of Attorneys General as intervenants on behalf of the citizen is considered a substitute for the brief *amicus*, but the *McNeil* and *Carota* cases discussed earlier demonstrate the fallacy of this argument. After considering these factors, Alan Levy concluded that courts do engage in policy making and the brief *amicus curiae* would be a valuable aid in this process.³⁴

Canadian special interest groups could also represent the interests of those who cannot afford legal action by seeking declaratory

31. (1976), 132 Cal. Rptr. 680 (Cal. Sup. Ct.)

32. [1945] 4 D.L.R. 674 (Ont. C.A.)

33. *R. v. ex rel. Rose v. Marshall* (1962), 48 M.P.R. 64 (Nfld. Co. Ct.)

34. A. D. Levy, "The Amicus Curiae" (1971), 5 *Law Soc. of Upp. Can. Gazette* 110, at 132

judgements and presenting briefs in reference cases. Since the early 1960's the N.A.A.C.P. Legal Defence Fund has extended the protection of the equal rights clause (the Fourteenth Amendment to the American Constitution) to blacks who could not afford the costs of litigation. Organizations have now been established to assume responsibility for litigation on behalf of Mexican Americans, Native Americans, Puerto Ricans and women as well as prisoners and drug addicts.³⁵ In West Germany the courts themselves can initiate a human rights action. It is important to establish means of giving redress to those who cannot afford litigation.

Delay is another serious problem in the courts, since the wheels of justice grind slowly. A remedy that takes several years to acquire may be no remedy at all. Small claims courts provide a partial solution to this problem and have been adopted in many provinces. Small claims can be argued in an informal setting without the aid of a lawyer and this helps circumvent the problem of cost as well as delay.

There are many problems with the judicial mechanisms of redress. There are also foundations upon which to build a better structure. However, the law must escape the illusion that declarations of rights *per se* solve problems. The real test of a right is the kind of remedy provided upon violation.

B. Government Agencies

Although governments often violate human rights they are also one of the major protectors. The complexity of society has made it impossible for elected representatives to adequately represent the interests of all constituents.

This does not diminish the importance of letters to elected representatives as a means of raising human rights issues. In response to a letter, the Member of Parliament from Central Nova, Elmer MacKay, indicated that Members of Parliament must often act as ombudsmen as well as representatives. However, Mr. MacKay also suggested that ultimately it was the Cabinet that had the muscle to change citizens' rights for better or for worse.³⁶ By passing laws to protect human rights and setting up agencies to administer these laws, the government has become an important source of remedies.

35. R. B. McKay, *Nine For Equality Under Law; Civil Rights Litigation* (New York, Ford Foundation Report Series, 1977)

36. Letter from Elmer MacKay, November 10, 1976

1. *Human Rights Commissions*

As early as 1793 Upper Canada passed a statute placing limits on the importation of slaves. The first serious legislative attack on discrimination still came only in the 1940's. Ontario lead the way with the *Racial Discrimination Act* in 1944. In 1947 Saskatchewan passed a provincial Bill of Rights which is the only document of its kind in Canada. Other provinces followed suit and soon each province had a series of quasi-criminal statutes dealing with discrimination, fair employment, equal pay and fair accommodation. By 1962 Ontario had consolidated its patchwork of statutes into a comprehensive Human Rights Code and set up a full time commission to administer the code. This was a significant departure from the traditional common law and statutory protections of human rights.

The commission would actively intervene to promote human rights even to the extent of limiting property and contract rights. Commissions spread to five provinces by 1968 and today exist in all provinces. In July 1977 the Canadian Human Rights Bill (C-25) passed both houses of Parliament and became law. Section 21 of the bill establishes a human rights commission to operate on a federal level. Mr. Michael Pitfield, Clerk of the Privy Council and Secretary of the Cabinet, indicated that this was an important piece of legislation, revealing increased government concern for human rights.³⁷

These commissions, are normally established as a separate government department under the direction of the Minister in charge of the *Human Rights Act*. The director of the Commission, who provides the effective leadership, is considered a deputy minister. However, an appointed body of human rights commissioners also has the power to make recommendations to the minister and these are usually accepted.³⁸ The machinery of the Commission is set in motion when an individual files a complaint with it. Thus, the government often has less direct control over the Commission than would appear from the wording of the statute.

Canadian human rights legislation has emphasized conciliation and settlement in place of penalizing discriminators. The goal is to

37. Letter from Michael Pitfield, December 1, 1976

38. This information is based upon conversations with Mr. Duncan McNab, Education Officer of the Nova Scotia Human Rights Commission and may not be directly applicable to other provinces.

slowly change attitudes by education and negotiation. Most commissions feel harsh penalties and public exposure should only be used as a last resort.³⁹ Retribution is clearly not the aim of settlements; since retribution normally requires giving the job or accommodation denied, posting a human rights scroll, sending a letter of apology and paying out of pocket expenses. Although statistics published by the commissions themselves claim high rates of success, this does not mean complainants have received adequate redress. Some critics claim that human rights commissions are simply window-dressing to appease the majority conscience.

In order to be effective, human rights legislation must have wide public support. This places a heavy burden on human rights commissions to educate the public about the evils of prejudice. Although efforts are being made, funding does not allow the kind of program that would change public attitudes significantly. Governments know that building highways wins more votes than supporting human rights and they spend money accordingly. An informal poll of 100 high school students revealed that only 13 students had heard of the Human Rights Commission and most of them did not know its proper title or address.⁴⁰

The major criticism of human rights commissions is that they do not have enough power. Section 3 of the *Canadian Human Rights Act* prohibits discrimination on the following grounds: race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted, physical handicap and matters related to employment. This is considerably broader than most of its provincial counterparts but the words are likely to be interpreted in a narrow fashion.

Sex has been defined narrowly and homosexuals have normally been denied protection. The Ontario Human Rights Commission has defined sex in terms of gender and not sexual preference.⁴¹ When the Saskatchewan Human Rights Commission did accept a complaint from a university lecturer who was dismissed because of his homosexuality, the university obtained an order from the court

39. *Gordon v. Papadopolous*, Report of Ontario Board of Inquiry, May 31, 1968; was a case in which Dean R. St. John MacDonald did advise a prosecution but such actions are rare.

40. Informal poll of grade eleven students of Prince Andrew High School, Dartmouth, Nova Scotia, in September 1976

41. *Damien v. Ontario Human Rights Commission et al*; application for judicial review filed December 8, 1975

preventing an inquiry.⁴² A Nova Scotia Board of Inquiry held that a university may not discriminate on a basis of citizenship in selecting its basketball team.⁴³ This decision was reversed by the Nova Scotia Supreme Court which held that a team was not a service or facility within the meaning of the Human Rights Act. Stating grounds of discrimination and enforcing them are two different matters.

Often the protections offered by human rights codes are inadequate. When a human right conflicts with a traditional property right, the bias of the courts is clear. In *Bell v. MacKay*⁴⁴ an apartment was not considered a "self-contained dwelling unit" within the meaning of the Ontario Human Rights Act because the landlord and tenant shared a common entrance. The farce of this decision was well expressed by Ian Hunter.

The result is that the Code protects people against discrimination in large apartment complexes where little discrimination occurs, and where high rents disqualify most minority group members; it fails to protect the urban black man or northern Indian from discrimination in the places to which economic necessity compels him to seek abode.⁴⁵

To the credit of Ontario it dropped the phrase "self-contained dwelling unit" from its Code but it is still used in other jurisdictions; namely, Nova Scotia, Prince Edward Island, Yukon and the Northwest Territories. Human rights legislation has not been applied to private clubs and the *Ontario Loyal Order of the Moose* is free to restrict its membership to white Caucasians who have not intermarried. The law is slow to invade traditional rights to discriminate.

Narrow interpretations are not always imposed by the courts. Commissions also employ such constrictions, as was demonstrated in the recent Nova Scotia case of *Ryan v. Town of North Sydney*.⁴⁶ When Roberta Ryan applied for a job on the police force, the Police Chief rejected her because he did not think she could work a night shift. By the time the case reached the public hearing stage, the

42. *Wilson v. University of Saskatchewan*, Sask. Q. B. (unreported decision of January 26, 1976)

43. *Beattie et al v. Canadian Inter-Collegiate Athletic Association Acadia University et al*, Report of a Nova Scotia Board of Inquiry, November 7, 1975; reversed in unreported decision of N.S.S.C., February 5, 1976

44. [1968] 2 O.R. 709; [1970] 11 D.L.R. (3d) 658; [1971] 18 D.L.R. (3d) 1 (S.C.C.)

45. J. A. Hunter, "The Development of the Ontario Human Rights Code: A Decade in Retrospect" (1972), 22 *U. Toronto L.J.* 237 at 256

46. Unreported Nova Scotia Board of Inquiry Report, 1975

excuse for not hiring Ms. Ryan was that she failed to meet objective height and weight requirements. The Nova Scotia Human Rights Commission concluded that there was insufficient evidence of discrimination and dismissed the case. If Ms. Ryan lived in the United States she could still take her case to the courts, but this may not be so in Nova Scotia. A civil action for breach of statutory duty may not apply when special remedies are provided in the statute itself. Elizabeth Lennon considers this approach indicative of a general paternalistic attitude that the commission knows what is best for you.⁴⁷ The major defence to sex discrimination is *bona fide* job qualifications and this exception has been perpetuated in section 14 of the *Canadian Human Rights Act*. It seems difficult to deny that height and weight restrictions in effect are discriminatory and not neutral.

Prosecutions under human rights acts are rare and most provinces require the permission of the minister who may refuse to prosecute for political reasons. In many provinces the report of a Board of Inquiry can be ignored and the minister may refuse to take any action. The large discretion granted to the minister places a political limit on the actions of most commissions. At its worst a commission could be used for channeling a dispute away from the public eye.

Human rights commissions are also criticized for abusing the powers that they have. In the celebrated case of *Bell v. MacKay*⁴⁸ the court concluded that an Ontario Human Rights Commission clearly denied the defendant his right to a fair hearing and newspapers trumpeted the irony of a human rights commission violating basic rights. Furthermore, some commissions exceed their jurisdiction by conducting as many as 30-40% of their investigations outside the terms of their statute.⁴⁹ In Saskatchewan the Human Rights Commission is given an unfettered discretion to take any action deemed necessary and such power is easily abused.

Ian Hunter also suggested that stupid applications of human rights legislation destroy its credibility.⁵⁰ He cited as an example of this point *Borho v. Atco Lumber Co.*⁵¹ in which an employer was held

47. E. Lennon, "Sex Discrimination in Employment: The Nova Scotia Human Rights Act" (1976), 3 *Dal. L.J.* 593, at 628-9

48. *Supra*, footnote 44

49. Conversations with Nova Scotia Human Rights Officer Jim Hughes, October 6, 1976

50. I. Hunter, "Human Rights Legislation in Canada: Its Origin, Development and Interpretation" (unpublished article, 1976) at 25-26

51. Report of a British Columbia Board of Inquiry, April 30, 1976

liable for sex discrimination because he failed to specifically state that the job required the ability to operate a fork-lift. The fact that the application for the job included a trial operation of a fork-lift was considered irrelevant.

Many improvements are needed to put real teeth into human rights legislation. The range of coverage needs to be expanded and the *Canadian Human Rights Act* has taken one step in this direction. Human rights commissions should keep a higher profile if they really hope to change public attitudes. This requires financial commitment on the part of government. Affirmative action programs should be used much more extensively in a manner similar to the American experience. These programs should not be voluntary and haphazard; but should offer real incentives for businesses and communities to uphold human rights. Fines should be raised to the point that discrimination becomes unprofitable.

Compensation to victims of discrimination has been generally small and damage awards vary from commission to commission. In Nova Scotia and other provinces monetary compensation is not considered a major goal of human rights legislation.⁵² A more generous position was taken in an Ontario case which resulted in the first award of special damages. *Gabiddon v. Golas* stated:

Surely this head of damage is as valid and integral an ingredient of discriminatory injury as injury to feelings in libel, slander, malicious prosecution and assault actions. In these latter actions, compensation is permitted to remedy the harm inflicted upon a man's reputation and dignity. Hurt to similar feelings should be the subject of compensation under the Human Rights Code.⁵³

However, only \$100.00 in damages was awarded and this is typical of such awards to date. The *Canadian Human Rights Act* takes an important step forward in section 41, dealing with compensation. A Human Rights Tribunal is permitted to order such compensation as it deems appropriate. Provision is also made for special damages to cover hurt feelings and loss of respect, to a maximum of \$5,000. This approach to compensation should be used as a model for provincial commissions.

Many valid complaints never get to human rights commissions. The possibility of a class action for human rights has recently been explored by the Nova Scotia Human Rights Commission. Residents of Preston, a rural black community, brought a complaint against

52. *Pate v. Wonnacott*, Report of a Nova Scotia Board of Inquiry, 1970

53. *Gabiddon v. Golas*, Report of Ontario Board of Inquiry, July 9, 1973, at 28

the Halifax County School Board alleging racial discrimination in the provision of educational facilities.⁵⁴ However, the dispute was settled before it reached a Board of Inquiry. Thus there was no ruling on the validity of class actions.

Governments need to take a more affirmative approach. Walter Tarnopolsky suggested that Canada should follow the American model of active government enforcement.⁵⁵ Every contract with the government should require as a condition that there be no violation of the *Human Rights Act*. Employers who contract with the government should be required to review their job qualifications and provide on-the-job training to the disadvantaged. Licences to public places should be revocable on the basis of human rights violations. Governments must provide proof that they are willing to uphold human rights even when they restrict traditional legal rights or are politically unpopular.

2. Law Reform Commissions

Law reform commissions have recently become a part of the political landscape. In the late 1960's and early 1970's these commissions were created by statutes in all ten Canadian provinces and at the federal level. How laws are made is vital to human rights. Law reform has a two-fold impact on human rights — remedial and investigatory. By scrutinizing existing laws, commissions can eliminate anachronisms and discriminatory provisions left over from a previous era. Law reform commissions have also made valuable investigations of human rights topics. The Canadian Law Reform Commission has produced provocative reports on criminal law, immigration and obscenity. In both Ontario and Quebec, studies of privacy have been conducted. British Columbia has made a full scale study of civil rights. In its fifth annual report to Parliament on December 15, 1976, the Canadian Law Reform Commission proposed an extensive study of the changing legal definitions of life and death. Law reform commissions certainly have raised issues of human rights.

Former Federal Finance Minister, John Turner, is optimistic about the role of law reform commissions.

54. See *Newsletter*, Nova Scotia Human Rights Commission, 4th Quarter 1975, at 2-3

55. W. S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 *Can. Bar. Rev.* 565

. . . the process of law reform goes to the core of defining the kind of society we will have as a Canadian people and the kinds of rights we will enjoy as individuals.⁵⁶

Director of Research for the British Columbia Law Reform Commission, K. B. Farquhar, feels Mr. Turner's approach to law reform is an attempt to play philosopher king and will likely result in recommendations that gather dust in a legislative library.⁵⁷ Charles Reich is even more pessimistic about real change for he feels politicians have too much vested interest in the legal order to allow more than tinkering.⁵⁸ The problems of defining the proper limits of law reform are further complicated by rapid changes in Canadian society. Justice E. Patrick Hart, former Chairman of the Law Reform Commission of Canada, stated that our laws are designed to fit a dying social order.⁵⁹ Law should no longer impose a majority value system on Canadians; but should allow multiple value systems to co-exist and develop. This approach may be essential to preserve confederation.

How a law reform commission sees its function is crucial to the kind of work that it does. Brian Grossman took the view that there are essentially three models of law reform in Canada.⁶⁰ The first is the Royal Commission model of using commissions as a device for diffusing hot political issues. The second is the lawyer's law model which tinkers with matters of technical law and avoids contentious policy decisions. The third is the fundamental change model which attempts to remedy basic injustices in the legal system. Some of the weaknesses of these mechanisms will be examined by comparing law reform in Nova Scotia, Manitoba and at the federal level.

Who composes the commission? This often sets the tone of things to come. *An Act to Provide for a Law Reform Advisory Commission*⁶¹ restricts membership on the Nova Scotia commission to members of the bar. In practice it has been composed of three

56. J. N. Turner, "Law for the Seventies: A Manifesto for Law Reform" (1971), 17 *McGill L.J.* 1 at 2

57. K.B. Farquhar, "The Law Reform Commission of British Columbia — A Perspective" (1976), 3 *Dal.L.J.* 275 at 284

58. C. A. Reich, *The Greening of America* (New York: Bantam Books, 1971) at 330

59. E. P. Hart, "The Limitations of Legislative Reform," Address to the Manitoba Law School Foundation, Winnipeg, November 6, 1973

60. B. Grossman, "Law Reform a Saskatchewan Viewpoint" (1975), 2 *Dal.L.J.* 455

61. R.S.N.S. 1967, c. 14, s. 2(3)

judges, five practicing lawyers and one law professor. No such restrictions are imposed by *The Law Reform Commission Act*⁶² of Manitoba and anyone that the government appoints can serve upon the commission. At present there are four lawyers and three laymen on the Manitoba commission and they have co-operated quite effectively. Under the *Law Reform Commission Act*⁶³ Canada permits two of its six members to be outside of the legal profession. However, to date the commission has been composed entirely of lawyers. The Manitoba experience indicates that the mix of professional and lay views about the law is an asset that should be extended to other commissions. Lawyers are often too close to the law to appreciate the need for significant change.

What are the goals of the commission? The goals determine the real scope of law reform. It should be noted that law reform commissions can only report and recommend action to governments which can ultimately make changes. In Nova Scotia reports may only be instigated with the consent of the Attorney General and investigations may be limited to statute law.⁶⁴ Manitoba's commissioners have much broader powers and can initiate their own investigations and receive suggestions from anyone.⁶⁵ They are also free to co-operate with other commissions and delegate their research functions to subordinate bodies.⁶⁶ Canada's powers under the *Law Reform Commission Act* are about the same as Manitoba's.

What has the commission done? It is the actions and not the words of a commission that ultimately determine its value. The Nova Scotia Law Reform Advisory Commission has concerned itself largely with technical lawyer's law such as mechanics liens, personal property security and reciprocal enforcement of judgments. Furthermore, there has been very little effect as the suggested changes have not been implemented. Manitoba has undertaken a broad range of topics such as the age of majority, privacy and a Bill of Rights. Because of a good working rapport with the government the commission has succeeded in having 50% of its reports implemented.⁶⁷ The Federal Law Reform Commission

62. S.M. 1970, c. 95, s. 3(1)

63. S.C. 1970, c. 23 (1st Supp.), s. 4(3)

64. *Supra*, footnote 61, s. 4

65. *Supra*, footnote 62, s. 5

66. *Supra*, footnote 62, s. 6(1) (c) and s. 6(4)

67. P. Thomas, "The Manitoba Law Reform Commission: A Critical Evaluation" (1975), 2 *Dal.L.J.* 417

has produced a wide range of reports that recommend some very significant changes in the law. How many of these changes will be implemented remains to be seen. However, the Federal Commission has kept a high public profile and served a valuable educational function. Although the response was poor, it did conduct public hearings and has made excellent use of the media. Moreover, the readable paperback reports of the Commission have been widely distributed. The Federal Commission's public relations program should be emulated by provincial commissions.

It is difficult to balance the need to recommend serious change and the need to have recommendations implemented by a conservative legislature. The Ontario Law Reform Commission has achieved considerable success by moving slowly from technical law to more basic change. Manitoba acquired the confidence of the legislators in a different way. Whatever the method, a good working rapport with government is essential. There is a vital need for more public input. The commissions could make much more effective use of community and university resources. Much time and money could be saved by an exchange of information among provincial commissions which is rarely done at present. Experience suggests that a small commission with a permanent staff and a long term of office is the most effective unit.

Law reform commissions are plagued by vested interests. Most law reform commissions are closely tied to the Attorney General's department and are unlikely to seriously upset the political balance. When Bill C-69 recently attempted to set up a bankruptcy regime that would shift the focus of protection from the creditor to the debtor, it was defeated by the vested banking interests. The proposed evidence code of the Federal Law Reform Commission is staunchly opposed by Bar Societies who have a vested interest in maintaining the present system. Acceptance of superficial reforms may simply banish problems from public consciousness.

3. *Ombudsmen*

Ombudsmen would probably object to being included in a list of 'government' agencies, for their roles as administrative watchdogs demand that they be largely outside the government. Nonetheless, they are government appointed and the office of ombudsman was created by a legislative enactment. The powers of an ombudsman vary considerably from province to province. However, his function

is always an advisory one. All provinces seem to have one thing in common — a low public awareness of the office of ombudsman.

Ombudsman is a Swedish word for "commission man". The term is now commonly used in several languages, including English. Sweden in 1809 was the first country to appoint an official charged with upholding the rights of the citizen against the government. By 1960 New Zealand adopted a Parliamentary Commissioner, and thus became the first commonwealth country to appoint an agency with the function of checking the power of government. Alberta was the first Canadian province to appoint an ombudsman in 1967. The only Canadian provinces that do not now have such an office are Prince Edward Island and British Columbia. British Columbia does plan to appoint an ombudsman in the near future. Although the federal government has no official ombudsman, it does have two 'near' ombudspersons — Max Yalden and Inger Hansen. Mr. Yalden is in charge of the *Official Languages Act*⁶⁸ and Ms. Hansen handles complaints about Canada's penitentiaries.

The rapid growth of administrative agencies has also multiplied the number of citizen complaints against the government. Given their modest budgets and small staffs, ombudsmen have been kept busy in simply reacting to these complaints. There is great disparity in the financial support given to the different provincial institutions. Nova Scotia has a very modest budget and total staff of five; while Ontario allots 2.3 million dollars and has a staff of one hundred.⁶⁹

The jurisdiction of the ombudsman is narrowly defined by both the government that appoints him/her and the courts. In a recent Nova Scotia decision the ombudsman, Dr. Harry D. Smith, was told that his jurisdiction was restricted to provincial government agencies that administer law.⁷⁰ Although the Sydney Steel Corporation was a crown corporation set up under a provincial statute, it was held that the corporation did not administer law in the sense of carrying out a public function. Furthermore, federal statutes are entirely outside the jurisdiction of provincial ombudsmen who have no federal counterpart.

Much of the ombudsman's power is discretionary. His role is

68. R.S.C. 1970, c. 0-2

69. J. Beaufoy, "Look Up in the Headlines: It's a Bird. It's a Plane. No, It's Ombudsman" *MacLean's* (October 18, 1976) at 72

70. Unreported decision of the N.S.S.C. App. Div., November 4, 1976, per MacKeigan C.J.

contingent upon his political environment and personality. From the beginning Nova Scotia has taken a restricted view of the ombudsman's role. He can only investigate complaints related to laws with no statutory provisions for appeal or judicial review.⁷¹ Dr. Harry Smith, a former professor at the Nova Scotia Teachers' College, was made aware of his political limits very soon after he took office. A sign worker, Arnold MacLeod, lost his job with the Department of Highways as a result of a cartoon he published ridiculing the state of road signs. Dr. Smith's attempts to intervene on behalf of the worker were frustrated by the Liberal government. It so happened that Mr. MacLeod was a prominent Progressive Conservative in a county where political patronage was an accepted institution. When Dr. Smith receives complaints with political overtones, he now refers complainants to their elected representatives.⁷²

Celebrated criminal lawyer, Arthur Maloney, takes a very different view of his role as Ontario's ombudsman. He is not reluctant to challenge the government which appointed him. In December 1975 Mr. Maloney investigated a land purchase in North Pickering and found what he considered to be 44 valid complaints against the Ontario government. When his report was rejected, Maloney refused to withdraw and ultimately worked out a compromise. Mr. Maloney operates a high profile office and uses publicity effectively. He realizes that the media is the strongest weapon at the disposal of the ombudsman.

At the federal level Max Yalden occupies the controversial post of Commissioner of Official Languages. He is, in effect, a language ombudsman who has been appointed by Parliament for a seven year term. Mr. Yalden is charged with the duty of investigating complaints arising from the *Official Languages Act* and recommends improvements to the federal government *via* independent reports. In addition, he offers a Special Studies Service for federal agencies aimed at preventing violations of language rights. Although the *Official Languages Act* only ensures official status to English and French, it does contain a clause that prevents the Act from being used to violate third language rights.

The office of Correctional Investigator was created in June 1973 to serve as ombudsman to the inmates of 52 federal correctional

71. An Act to Establish the Office of Ombudsman, S.N.S. 1970-71, c. 3, s. 11 (2) (a)

72. T. McBride, "The Nova Scotia Ombudsman" (1975), 2 *Dal. L.J.* 182

institutions. This step was taken cautiously by an order-in-council rather than special legislation, so the office can be cancelled at any time by the whim of government. Ms. Inger Hansen, a former British Columbia lawyer, has held the difficult position of prison ombudsman for the last four years. As a consequence of thousands of requests for help, Ms. Hansen has conducted six major investigations of prison problems. Ms. Hansen has personally visited all the federal penitentiaries and keeps her staff of seven active. Although some inmates feel a correctional investigator is merely window dressing, others appreciate having their own personal ombudsman.

There need to be several changes in the position of ombudsmen if they are to provide effective redress to citizens' grievances. The first priority should be the appointment of a federal ombudsman to deal with the many problems that fall outside the provincial jurisdiction. In its 1969 report the McRuer Commission suggested that there might be value in appointing a number of ombudsmen to deal with problems arising from local government.⁷³ This is worthy of consideration. In any case, government must provide proper support staff to the existing ombudsmen and expand their meagre budgets. It is important that they be given broad investigatory powers and made genuinely independent of political influence.

A citizen often becomes lost in the bureaucratic jungle of red tape. Keith Spicer former Commissioner of Official Languages, produced a pamphlet called "The Jungle Book of Official Languages"⁷⁴ which explains in cartoons and simple language how to file a complaint when language rights have been violated. Similar booklets should be distributed by provincial ombudsmen. In Tanzania the agency designed to check abuse of administrative power pursues a very active educational role. The Permanent Commission of Inquiry has made safari tours throughout the country and addressed over 64,000 people.⁷⁵ Canada could profit from emulating this model.

4. *Royal Commissions and Commissions of Inquiry*

Traditionally, commissions have been a significant part of the Canadian political process. These commissions often explore issues

73. *Supra*, footnote 16, at p. 1405

74. A government pamphlet that may be obtained by writing, Commissioner of Official Languages, Ottawa, Ontario

75. P. Oluyede, "Redress of Grievances in Tanzania" (1975), *Public Law* 8

of human rights. For example the Hall Commission on Health Services still influences the provision of health services in Canada. More recently, the Royal Commission on Bilingualism and Biculturalism, the Le Dain Commission on the Non Medical Use of Drugs and the Royal Commission on the Status of Women have molded social attitudes and governmental policy on important issues. On the provincial level, the Hall-Dennis Commission, appointed by the government of Ontario and the Parent Commission appointed by the government of Quebec, have both had a great impact on education in Canada. The McRuer Commission on civil rights in Ontario has made some valuable recommendations.

Both royal commissions and commissions of inquiry are created by an order-in-council pursuant to the *Inquiries Act*.⁷⁶ Thus, they are creatures of the Cabinet. These commissions are usually established to investigate political conduct or recommend legislative policy. Dean Gerald E. LeDain felt that a commission was not just an extension of Parliament, but was a form of social influence based upon public decision-making.⁷⁷ He felt that a commission should be accountable to the public. The role of a commission of inquiry, as Dean Le Dain saw it, is to inform the public, clarify the issues and promote understanding. He did not consider the implementation of a commission's recommendations as being vital to its success.

Wide public discussion too often costs, in my view, more than it is worth. It encourages a government, any kind of government, to substitute talk for action.⁷⁸

Professor John Willis' cynicism about the value of commissions of inquiry is widely shared in contemporary Canada. On November 22, 1976, the Auditor General J. J. Macdonnell criticized the financial management of the federal government in his annual report to Parliament. He also recommended the appointment of a comptroller-general. Minutes after Mr. Macdonnell made his report, a \$1,000 per day royal commission headed by bank president Allen Lambert, was announced. It was clear that the government response was carefully orchestrated by the treasury board and other bureaucrats who hoped to diffuse a hot issue.⁷⁹ It is

76. R.S.C. 1971, c. I-13

77. G. E. LeDain, "The Role of the Public Inquiry in our Constitutional System" in Ziegel, J.S. (ed.), *Law and Social Change supra*, footnote 78

78. J. Willis "Comment" in Ziegel, J.S. (ed.), *Law and Social Change* (Agincourt: The Carswell Company Ltd., 1973) at 99

79. "Civil Servants Campaign Against Macdonnell Charges" *Halifax Mail-Star* (November 24, 1976) 2

this kind of political maneuver that has destroyed the credibility of commissions.

The approach taken by Mr. Justice Tom Berger assured that the recommendations that emerged from the MacKenzie Valley Pipeline Inquiry, appointed in March 1974, would not collect dust. He took a dynamic high profile approach which may breathe fresh air into a dying commission process. Mr. Berger travelled to every major northern settlement along the MacKenzie River, to schools and homes, in order to hear the opinions of the native peoples. He has amassed volumes of evidence — both expert and lay — by conducting a wide-ranging inquiry into the impact that a pipeline would have on the environment and people of the north. Mr. Berger held hearings in southern cities as well and gave all concerned a fair and informal hearing. The result was a compelling and readable report which became a non-fiction best seller.

The extensive use of the media by the Berger Commission made it impossible for the government to ignore his report. The use of the media was a deliberate tactic.

We have sought to make this an Inquiry without walls. We have sought to use technology to make this Inquiry truly public, to extend the walls of the hearing room to encompass the entire valley. We have sought to bring the Inquiry to the people.⁸⁰

Some commentators have dubbed the experience a four and one half million dollar exercise in participatory democracy. The rejection of the MacKenzie Valley pipeline route by the National Energy Board in July 1977, is strong evidence of the Berger Commission's impact.

If the Berger Commission is indicative of a new high profile approach to commissions, then commissions may become valuable devices for raising problems of human rights. If not, then they may serve to avoid rather than promote remedial action. The Berger Commission has been valuable in making Canadians aware of the rights of native people. Mr. Justice Berger expresses the educational value of the Commission's experience eloquently.

Maybe we have begun to realize we have something to learn from those who have gone north from southern Canada to make the north their home. And maybe it is time the metropolis listened to the voices on the frontier, time the metropolis realized it has something to learn from Old Crow and Hay River. Because what

80. T. R. Berger, "The MacKenzie Valley Pipeline Inquiry" (1976), 83 *Queen's Quarterly* (No. 1) 1 at 9

happens in the north will be of great importance to the future of our country. It will tell us what kind of people we are.⁸¹

The Lysk Commission Report casts doubt on the long range effect of Justice Berger's work. Chaired by the Dean of the University of British Columbia Law School, the Lysk Commission recommended the Alcan route through the Yukon and a moratorium of only two years to settle native land claims. In early August 1977, shortly after Mr. Lysk reported, Parliament held a hasty two day debate on the pipeline and the Cabinet put its stamp of approval on the Yukon recommendations. Dean Lysk's inquiry lasted for less than three months. This is strong evidence of American pressure for a speedy decision. The natives of the Yukon may be the victims of a political compromise that will avoid the politically hot MacKenzie line but still satisfy the urgent American thirst for oil. If Tom Berger represented the commission system at its best, Dean Lysk was the victim of it, at its worst.

5. *Government Department*

Surprisingly, the bureaucracy can sometimes be a protector of human rights. The Departments of Justice at both the federal and the provincial level and the Department of Indian Affairs and Northern Development are distinct examples of agencies that must concern themselves with human rights. At the provincial level the Department of Social Services must constantly balance the power of the state against the rights of the individual in dealing with matters like adoption, wardships and the dispensing of welfare.

Government agencies have been far more receptive to economic rights than the courts. Charles Reich has argued that government largesse should be regarded as a property right rather than a charity and thus enjoy the legal protections attached to property.⁸² Professor Innis Christie has suggested that classifying government largesse as property would have little significance in Canada since the Constitution does not attach the protections of "due process" to expropriation.⁸³ Many people do regard government largesse as a right rather than a charity.

Social assistance programmes often exact a high price in traditional civil liberties. Based upon a survey of 1,000 welfare

81. *Ibid.*, at 12

82. C. A. Reich, "The New Property" (1964), 73 *Yale L.J.* 733

83. I. Christie, "The Nature of the Lawyer's Role in the Administrative Process" (1971), *Special Lectures* (L.S.U.C., Toronto) 1 at 27

recipients across Canada, the Canadian Civil Liberties Education Trust presents an alarming picture in its book, *Welfare Practices and Civil Liberties — a Canadian Survey*.⁸⁴ This book documents state encroachments upon the privacy and freedom of choice for the poor. It also reveals a callous disregard for procedural justice in administering social assistance.

In the interests of safeguarding public funds, the state is intruding on some of the most intimate situations in our society. In some cases, it is pressuring unwed mothers to name and sue their lovers. In some cases, it is forcing deserted wives to bear witness against their husbands. In its general insistence that only husbands can qualify, the state is effectively determining the sexual roles in many families.⁸⁵

Such actions cannot be justified. It has been suggested that Canada should adopt a Japanese device, whereby each government department is scrutinized by a civil liberties commissioner trained to protect citizens' rights.⁸⁶ This localized ombudsman would provide a check upon the abuse of bureaucratic power. There is certainly a need for a more rational and coordinated welfare system with less overlap between provincial and federal jurisdictions. The problem was well expressed by a tenant:

I go to see the Health and Welfare guy because every basement in our neighbourhood has rats, and when I finally get to see him he just says, 'Rats are provincial.'⁸⁷

Government departments should make their services more accessible to the public. More emphasis on educational programmes and more imaginative use of the media are needed. Finally there ought to be a more active involvement of the citizens themselves and particularly the poor. On this point Canada could learn a lesson from the American Office of Economic Opportunity.

6. *In House Procedures*

Within the legislative structure there are also mechanisms for remedying violations of human rights. Elected members themselves

84. A. Borovoy, (ed.) *Welfare Practices and Civil Liberties — A Canadian Survey* (Toronto: Canadian Civil Liberties Education Trust, 1975)

85. *Ibid.*, at 107

86. J. Hucker and B. C. MacDonald, "Securing Human Rights in Canada" (1969), 15 *McGill L.J.* 220, at 239

87. R. Cooper, "The Media As A Law Reform Device" Address to the Canadian Bar Association, Quebec City, Quebec, August 25, 1975, at 4

continue to play an important role. Member of Parliament from Central Nova, Elmer MacKay, has demonstrated the continued value of the question period in his celebrated probing of the Skyshops Affair. Of course, more instrumental in Mr. MacKay's success was the use of the media which is another device at the disposal of an elected representative.

Elmer MacKay made another important inroad. He suggested that the Senate could be effective as an educational institution because many of its committees have excellent reputations.⁸⁸ There is some doubt that the type of person likely to be appointed to the Senate appreciates the real problems of human rights; but the suggestion does have some merit. Finally, the cabinets have the ultimate power to remedy injustices by proposing new laws. Cabinets were instrumental in establishing new mechanisms of redress such as Residential Tenancies Boards and Planning Appeal Boards.

C. *The Media*

We must use the media to aggressively inform people of their rights. It is interesting to note how little people know of law or of government and how little they trust law and government. But not only does the low income viewer watch more television than others do; he trusts television. Television is overwhelmingly the most preferred and most believed medium among the poor.⁸⁹

In the above quotation C.B.C. Ombudsman Robert Cooper has described the power of the media as a device for raising and resolving issues of human rights. With government expansion, a highly complex legal structure and bureaucracy has arisen to confound and intimidate the average citizen. Violations of basic rights are not perceived as a grievance, but an accepted way of life.⁹⁰ The predominant response of the citizen to the abuse of government power is a feeling of frustration and powerlessness. The media proposes a change to this syndrome. It creates an illusion of intimacy. Robert Cooper is seen in people's living rooms every Sunday night fighting for the rights of the underdog. It is only natural that the citizen should turn to Cooper for a remedy.

Not only does the media have a captive audience, but it also gets response. Probably the best example of this is the C.B.C. program "Ombudsman," which began in 1974. Although it has a staff of

88. *Supra*, footnote 36

89. *Supra*, footnote 87, at 8

90. *Supra*, footnote 87, at 2

only 25 to 30, investigators process 5,000 complaints per year.⁹¹ About 50% of these complaints are settled. Many of those that cannot be effectively handled are referred to the appropriate provincial agency. Robert Cooper sees his role as remedial, not just one of attention-getting. The result is often the opening of the doors of bureaucracy.

The educational function of "Ombudsman" is vital. People are woefully ignorant of their legal and democratic rights and methods of enforcing them. Both governments and lawyers can be blamed for this. Governments do not provide free access to information and fail to publicize mechanisms of redress available to the citizen. Lawyers only provide the information at prices many people cannot afford. The departmental ministers who appear on "Ombudsman" are often educated by it as well. Due to their position in the bureaucracy they are neither convinced of the existence of injustices nor sympathetic towards them. The media fills the communication gap between the people and those in positions of power.

In recent years there has been an increase in the number of programs designed to develop public consciousness. Television and radio offer programs which consistently deal with controversial issues of public concern. The most popular radio programs are the hot line shows through which listeners can air their grievances. The hosts of such programs often use the threat of public exposure to produce remedies. On the average, 5,000 Canadians per week also complain through letters to the editors of newspapers.⁹²

On the other hand, in a classic conflict of rights, the media often asserts freedom of the press to the detriment of individual privacy. The investigative reporter often justifies questionable tactics by invoking the public's right to know. In a more subtle manner, the content of the media (or absence of it) can deny rights to minorities. This problem has been considered more extensively in the United States where the Ford Foundation and others have funded programs designed to sensitize the media to minority interests.⁹³ Since most of Canada's electronic culture is imported from the United States, this country has benefited as well. Canadian media is still open to

91. Letter from Barbara A. Betcherman, Director of Research, C.B.C. Ombudsman, November 12, 1976

92. *Supra*, footnote 87, at 3

93. The Ford Foundation has funded projects in educational and community television to more accurately represent minorities. G. Astor, *Minorities and the Media* (New York: Ford Foundation Report Series, 1974)

criticism on the basis of the biases and quality of its content. Recently the Canadian Broadcasting Corporation created a controversy by refusing to air ads for the Gay Alliance for Equality. The C.B.C. is also subject to the built-in biases of a Crown Corporation.

Pressure groups and minorities have recognized the value of the media as a tool for change. In 1967 a young Indian leader, Nelson Small Leggs, committed suicide on his Ontario reserve. Before putting a bullet in his chest, Nelson wrote a letter to be released to the press. The letter explained that he took his life to dramatize the desperation of the Indian cause. He was buried in full Indian costume and the press gave the funeral nationwide coverage. The Indian movement had an instant martyr. Few cases are this dramatic. Nonetheless, the value of using the media is clear. Robert Cooper is enthusiastic and optimistic about the role of the media:

. . . it can gain access to the highest link of decision making and thus pierce the government veils that isolate and insulate the government from the aggrieved; it can attempt to redress wrongs - not only in terms of the aggrieved individual, but in terms of the common weal - the public interest, and ultimately, therefore, it can hope to reform the law - if not the bureaucracy - in the service of the people.⁹⁴

D. *Special Interest Groups*

Lobbying has long been part of the political process, so special interest groups are not new. Certain groups have become so well organized that they have become institutionalized lobbies; business, labour and agriculture provide examples. These groups have considerable influence in determining policies and making laws. Many new groups have arisen expressing diverse interests. Supporters of unpopular causes have also recognized the value of a pressure group. Gay alliances have become much more vocal in recent years and pro-abortion groups openly state their views.

Citizen action groups have become active in the 1970's. Ratepayers, home owners, environmentalists and wood lot owners are all making their voices heard. When the Ontario government announced plans to build an airport in Pickering, it was opposed by an influential and angry association of local residents. In 1976 the residents of Bedford, Nova Scotia, prevented the provincial government from proceeding with its plans for a sanitary land fill in

94. *Supra*, footnote 87, at 10

that area. The Bedford residents fought their battle in the courts all the way to the Supreme Court of Canada. This article merely hints at the variety of groups active in shaping public policy.

1. Consumer Groups

Consumerism blossomed more slowly in Canada than it did in the United States. However, by the 1970's the strategies of consumer advocate Ralph Nader were being copied north of the American border. The best example is the class action of rusty Ford owners discussed earlier in this article. Phil Edmunston of the Automobile Protection Association worked for Ralph Nader and is now using Nader's tactics in Canada.

Traditionally, consumer complaints were handled by Better Business Bureaus and these community agencies are still kept busy. In the 1960's self-regulation by the business community was supplemented by government departments at both the provincial and federal levels. Consumers still felt that there was room for improvement. The Consumer Association of Canada (C.A.C.) was established. The C.A.C. is one of the few lobbies in Ottawa to counter the influence of big business. It also educates consumers. Last year the federal government contributed \$400,000 to the C.A.C. providing a good example of the merger of public and private spheres. Local consumer groups have also sprung up all across Canada. The C.B.C. television program "Market Place" is another healthy sign that consumers' rights will not be ignored.

2. Canadian Civil Liberties Association

The Canadian Civil Liberties Association (C.C.L.A.) is a national organization with seven affiliated chapters and a cross country membership of more than 3,000 individuals. There are also fifty associated groups representing several thousand more people. Membership is composed of people from all walks of life: including professionals, writers, housewives, trade unionists, minority groups and executives. The C.C.L.A. investigates complaints about violations of civil liberties and publishes books and pamphlets to educate people about their rights. In 1965 the Canadian Civil Liberties Education Trust was created as a sister organization. Its purpose was to promote public education and conduct research into civil liberties problems in Canada. Many important studies have been produced.

Sometimes the C.C.L.A. will appear in a court action and it frequently submits briefs to government. The C.C.L.A. has generally limited its activities to traditional political and civil rights. A consideration of economic and social rights would increase the effectiveness of the association. The benefits of the C.C.L.A. would also be extended to a broader range of people.

From 1971-1973 the C.C.L.A. conducted a successful program of citizen advocacy. With the approval of the Toronto Social Services Department, desks were set up in local welfare offices to advise and assist welfare recipients. Although lawyers and law students were occasionally involved in the program, most of the citizen advocates were lay members of the Metro Toronto C.C.L.A.. These advocates were instructed by a law professor and carried out a variety of functions. In all, 613 cases were handled and the results were very favourable.⁹⁵ Citizen advocacy services have also been set up by legal aid clinics, social workers and welfare recipients organizations. Such services should be provided on a permanent basis.

3. Minority Group Associations

Minorities have often found that government agencies set up to protect them do not understand their needs. The Department of Indian Affairs and Northern Development provides a disturbing example. Rather than improve the quality of the reserves, government agents have attempted to integrate the Indian into white society. In a 1956 "relocation," Manitoba Chipewyans were plucked from their wilderness home and taken to jobs in Churchill. The government built them new homes on the outskirts of the city with the ominous name of Camp 10. Unable to adapt to white civilization, the Chipewyans began to return to the wilderness in 1973. By 1976 they had carved a new community out of the woods at Tadoule Lake and are still in the process of building houses. Apparently no one had taken the time to ask the Indians what they wanted.

Many provinces now have Unions of Indians who actively promote the interests of their people. These agencies have been the initiators of land claims and reservation improvement programs. In the Maritimes a more informal network of MicMac Friendship Centres has emerged in the last few years. These federally funded

95. *Supra*, footnote 84, at 101

centres are designed to provide Indians with information as well as a drop-in centre.

Blacks have also formed associations to protect their interests. The federally funded Nova Scotia Black United Front has been actively involved in providing jobs, houses and educational opportunities to black Nova Scotians since 1969. On a national level, the National Black Coalition of Canada (N.B.C.C.) is an umbrella group representing many black organizations in the country.

Traditionally minority groups have had little influence in shaping government policy. However, the Berger Commission offers some hope that governments are at last willing to listen to the claims of Canadian minorities.

4. *Professional Associations*

In spite of their financial resources and educated membership, professional associations have not been active in the promotion of human rights. Bar societies rarely use their respect and power to lobby for better laws. There are exceptions, such as the supervision of provincial legal aid programs and participation in law reform commissions. However, the Bar exhibited a more typical reaction, in its cautious and conservative response to the changes proposed by the Canada Law Reform Commission. When vested interests and social justice clash, it is the former that usually prevail.

Addressing the Canadian Bar Society, Robert Cooper suggested that citizens should be able to get legal "checkups" for a nominal fee.⁹⁶ Alberta, British Columbia, Manitoba, Ontario and Quebec do offer a bar referral service whereby a person can get a half hour of advice for a low fee. However, these programs are poorly advertized and seldom used. The other five provinces offer no such service at all. Although bar societies have helped organize legal aid programs, they have been reluctant to contribute financial support.

Dalhousie Law School in Nova Scotia was one of the pioneers in establishing a clinical law program in 1970.⁹⁷ The dual purposes of the program were to provide legal education and deliver services to needy clients. In addition to representing clients the clinic has produced pamphlets and organized conferences for the layman. Funding for the clinic has come largely from the federal

96. *Supra*, footnote 87, at 8-9

97. H. Savage, "The Dalhousie Legal Aid Service" (1975), 2 *Dal. L.J.* 505

government. The Nova Scotia Barristers' Society has resisted taking over this function. Effective clinical law programs are now operated in several Canadian law schools. As the experience with law clinics has shown, professional educators and lawyers can combine to promote the public interest.

One of the major injustices of a pressure group society is that many interests are not represented. The American legal profession made more efforts than its Canadian counterpart to remedy this injustice. American lawyers have been active for many years in the practice of poverty and civil rights law; but such specialized law firms have not spread to Canada. More recently a broader concept of the public interest law firm has arisen in the United States to represent new constituents. The purpose of such firms was well stated by Edward Levi, President of the University of Chicago.

A central assumption of our democratic society is that the general interest of the common good will emerge out of the conflict of special interests. The public interest law firm seeks to improve this process.⁹⁸

Although firms have long been willing to take on *pro bono publico* cases, this often produced a conflict of interests. In the 1970's this problem was circumvented by the development of independent public interest law firms.

The American Bar Association has actively supported public interest lawyering, but much of the interest law firms' financial support has come from the Ford Foundation. Public interest represents a variety of constituents: minorities, consumers, environmentalists, tenants, women and many others. In addition to litigation, public interest law firms have conducted valuable research. They also cooperate with private groups and government agencies to improve access to information. A public interest law firm was instrumental in gaining the unusual ruling that television stations that promote big cars and high horsepower ratings must also broadcast information about the adverse effect of automobiles on the environment.⁹⁹

Funding is the major problem facing the experiment in public interest law. The government has been reluctant to take over from the foundations. There is no doubt that funding would be a major problem in Canada too. However, the venture is worth undertaking.

98. *The Public Interest Law Firm: New Voices for New Constituencies* (New York, Ford Foundation Report Series, 1973) at 8

99. *Friends of the Earth v. F.C.C.* (1971), 449 F. 2d. 1164 (D.C. Cir.)

5. *Foundations and Research Agencies*

In Canada, the private sector has not been active in the promotion of human rights. This is partly explained by the fact that Canada does not have large foundations equivalent to the Ford Foundation, the Rockefeller Foundation or the Rand Corporation. However, this is not the total answer. The private sector should be more generous in its support of the public interest. Furthermore, the government should set up agencies to compensate for private inaction. The National Research Council and the Canada Council have donated more funds to research in the sciences than the humanities. In 1968 the Canada Council on Human Rights was set up but its budget is quite limited. Consequently, its effect as an educational body has been minimal.

6. *The Church*

An often neglected mechanism for handling human rights complaints is the Church. In *Re Drummond Wren*¹⁰⁰ the Canadian Jewish Congress actively intervened to protect human rights. However, the involvement of churches in human rights issues is usually less direct. The World Council of Churches has kept international attention focused on the repression of human rights and the practices of torture followed in many countries.¹⁰¹ When a consortium of Canadian banks approved loans to Chile in December 1976, it was condemned by the Canadian Taskforce on the Churches and Corporate Responsibility. Church representatives questioned the morality of the banks' participation in the loan to Chile where torture is openly practiced. During the deliberations of the Berger Commission church groups frequently presented briefs calling for a just settlement of Indian land claims.

Eleven churches under the direction of the Church Council of Justice and Corrections have undertaken the ambitious program of humanizing Canada's prison system.¹⁰² "Alternatives" is a three

100. *Supra*, footnote 32

101. The same function has been performed by the United Nations and other international agencies such as the International Labour Organization and Amnesty International. Although not specifically dealt with in this article, international mechanisms for dealing with human rights are also important to the future of human rights in Canada.

102. The churches involved are: Anglican Church of Canada, Baptist Federation of Canada, Canadian Catholic Conference, Greek Orthodox Diocese, Lutheran Council, Mennonite Church, Religious Society of Friends, Salvation Army and United Church of Canada.

year project directed by Rev. David McCord, who is a former prison chaplain. Rev. McCord hopes to popularize the theme that it is the community as a whole that is responsible for the treatment of prisoners and not just the government or the courts. He also hopes to explode some of the myths about prison rehabilitation.

One of the most active churches has been the United Church of Canada which has established a special Department of Church in Society. This department has raised issues of human rights in a wide variety of areas. In a series of pamphlets it has examined the problems of native land claims in the MacKenzie Valley. In its publications, the Church addresses recurring problems of both national and international concern, such as land use and development.¹⁰³ Topics have also included inflation, capital punishment and abortion, to name only a few. In addition to raising issues, the department also seeks remedies for injustice. *Project North*, which was active in the Berger Inquiry, is a United Church task force.

There is little doubt that the Church has done valuable work. It still has considerable influence as a political lobby. The fact that the Church is so often ignored by commentators on human rights suggests that its agencies are not well publicized. A higher profile approach would extend its impact.

E. *Civil Disobedience*

As for adopting the ways which the state has provided for remedying the evil, I know no such ways. They take too much time and a man's life will be gone.

Henry David Thoreau

Thoreau's alternative was civil disobedience to laws which were out of harmony with the higher moral laws of mankind. Civil disobedience became a major tactic for social change in America's turbulent civil rights and anti-war struggles of the 1960's. Martin Luther King realized that some injustices were so pressing that they required immediate attention not possible within the existing legal structure. Father Robert Drinnan of Boston College Law School suggests that some legal injustices may be so great as to invoke a duty to disobey.¹⁰⁴

103. *Land Use*, Issue 13, Dept. of Church in Society (Toronto May, 1976); and *Land for the Future*, Issue 12, Dept. of Church in Society (Toronto April, 1976)

104. R. Drinnan, "Lawyers and Nonviolent Demonstrations" (1964), *The Catholic Worker* 1, at 7

Henry Morgentaler's challenge to the abortion laws provides a current Canadian example of civil disobedience. After seven years of court battles and legal costs near \$200,000 Dr. Morgentaler appears to have succeeded in challenging what he considers to be an unjust abortion law. Quebec Justice Minister, Marc-Andre Bedard, on December 11, 1976 ordered a halt to any further prosecutions against admitted abortionist, Dr. Henry Morgentaler. Mr. Bedard said that the abortion law in its present form was unworkable and he called on Parliament to modify the Criminal Code. Prior to Mr. Bedard's order, Dr. Morgentaler had been acquitted by three separate juries, but convicted by a Quebec Court of Appeal and incarcerated. It has been a long and costly challenge and the result is still not clear.

It is difficult to define a higher moral law. Alan Schwartz asserts that social morality can be defined and cites the Nuremburg trials and the Declaration of Human Rights as two examples of such definition.¹⁰⁵ It provides a safety valve for the political structure and fills gaps in the established system of redress.

In July, 1977 workers in Cape Breton turned to civil disobedience as the only way to get attention from the federal government. The Cape Breton Committee of Concern for the Unemployed mobilized its supporters and occupied the Post Office and Unemployment Insurance Offices in Sydney. Not only did the workers attract nationwide coverage but they also prompted a meeting with Privy Council President, Allan McEachen on August 12, 1977. Similar committees of concern have sprung up in other parts of Canada.

Civil disobedience is a legitimate mechanism for raising human rights issues, but it should only be used as a last resort. Dr. Morgentaler has certainly dramatized the rights of women but redress is slow and uncertain. Surely such actions indicate a weakness in the conventional avenues of change and the need for civil disobedience should be minimal in a truly democratic structure.

Conclusion

It is a critical time for human rights in Canada and there is some doubt that the established mechanisms of redress can meet the challenge. There must be more evaluation of how well the existing

105. A. M. Schwartz, "Civil Disobedience" (1970), 16 *McGill L.J.* 542, at 548-9

mechanisms are working. There is a need to experiment with new devices. Yet reform should also involve an innovative use of existing mechanisms. It is time to take stock of the whole system of protection which has tended to develop in a patchwork fashion. The greatest single problem is a lack of co-ordination. There is a desperate need for a master plan to untangle the maze of mechanisms that currently exist.

Government agencies will continue to be the major source of remedies in contemporary Canada. The other mechanisms of redress must adjust to this reality. Governments should recognize the need to localize the process and provide remedies at the level where the violations occur. Experiments such as public interest lawyering should be funded by the government as part of its commitment to human rights. The courts, the media and special interest groups should spur the government to action and prevent it from abusing its powers. Moreover, they must also expand their own mechanisms of redress.

People are generally unaware of their rights and how to assert them. This is partly explained by the tendency of writers to deal with human rights in academic terms. More writing should be done from the point of view of the man in the street who experiences daily violations of his rights. Because of the complicated array of mechanisms facing the citizen, there should be one clearing house available to all. Perhaps the ombudsman could perform the important function of explaining the options that exist. A more imaginative use of the media by all agencies concerned with human rights would help inform the citizen of his rights and how to exercise them. Without proper information remedies will not be used.

Human rights have not been a priority item in Canadian society. The deportation of the Japanese in the 1940's and the disgraceful treatment of our native Indian population are blotches on the pages of our history. Language which has often been the focus of French-English rivalry in Canada is once again at the heart of the separation debate. Economic pressures place further stress on the limits of Canadian tolerance and the militance of the unemployed is the sign of things to come. Challenging times lie ahead.

The willingness and ability of Canadians to respect the rights of their fellow citizens - both French and English-will determine whether there will continue to be a Canadian nation. An adequate mechanism for the protection of human rights is one step in the right

direction. However, in the final analysis there are two critical factors: a true desire by Canadians to protect basic rights even at the expense of traditional concepts of order, and Governmental action to implement the human rights to which they so often give lip service.

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