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The Law and Politics of Human Rights in British Columbia, 1983-1984

BY

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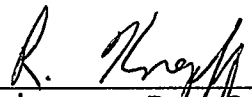
The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "The Law and Politics of Human Rights in British Columbia, 1983-1984", submitted by Thomas Bateman in partial fulfillment of the requirements for the degree of Master of Arts.



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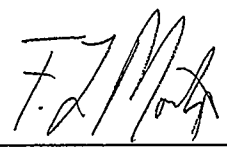

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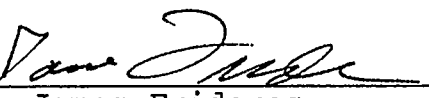

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ABSTRACT

This thesis is an examination of the principles and purposes behind the adoption of a new human rights policy in British Columbia in 1983-1984. Seeking to slow the growth of government and exert greater political control over administrative bodies, the Social Credit government introduced a comprehensive restraint program and to the surprise of many included the repeal of the 1973 Human Rights Code in its agenda. The new Human Rights Act did not contain the open-ended anti-discrimination provisions and liberal complaint initiation sections of its predecessor. Consequently, it was a correction of some of the weaknesses inherent in open-ended provisions in general and the Code's scheme in particular. A more profound significance of the adoption of the new policy is that human rights in B.C. were de-mystified, brought down from the ethereal realm of moral absolutes and abstract ideals to the world of competing values, tradeoffs, and compromises. Whatever its demerits, the Social Credit human rights policy is an attempt to strike a more equitable balance between respect for human rights and the principles of responsible government.

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My parents have always encouraged me in my pursuits, often without quite knowing my objectives. The freedom they gave me is a gift and a blessing. I regret that my father did not live long enough to hear these thanks. My wife, Jill, has been a help and an encouragement in many ways. She has shared my burdens as well as my pleasures. My final strength and source of wisdom is Christ. As the Psalmist wrote, "It is better to trust in the Lord than to put confidence in princes."

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INTRODUCTION

On July 7, 1983, British Columbia's Social Credit Minister of Finance delivered his Budget Address, and on the same day 26 bills were given first reading. Without prior notice to interested groups or indeed to the enforcers of the existing human rights legislation, Bill 27, the new Human Rights Act of British Columbia was introduced.

Bill 27 stood in stark contrast to the existing antidiscrimination legislation, The Human Rights Code of British Columbia, which was passed by David Barrett's NDP government in 1973. The Human Rights Code created a Human Rights Commission charged with extensive promotional and educational authority. Its enforcement scheme was generous, permitting third parties, even the director of enforcement, to initiate complaints, and requiring all complaints to be investigated, regardless of their intrinsic merit. Furthermore, the Code contained an open-ended antidiscrimination provision, the most far-reaching antidiscrimination protection of any Canadian jurisdiction at that time.

Bill 27 sought to narrow or eliminate the progressive provisions of the Code. Under the Bill, the Council of Human Rights, the Commission's counterpart, was assigned

only an enforcement function; it had no promotional or educational mandate. Bill 27 gave the Council authority to dismiss complaints at several stages in the investigation process -- even before investigation was undertaken -- and eliminated the opportunity for the filing of third-party complaints. The Code's open-ended antidiscrimination provision was replaced with a conventional, closed list of prohibited grounds. Bill 27 represented a significant narrowing of the enforcement provisions and reflected a different, more restrained, political attitude toward the protection and advancement of human rights in British Columbia.

Enforcers of the 1973 Human Rights Code of British Columbia(1) at first responded with shock and dismay. This became anger days later when twenty employees in the Human Rights Branch of the Department of Labour were dismissed. Then members of the Human Rights Commission and the Branch's Director were released. Regional offices in some centres were reduced to skeleton staff, others were closed, and personnel in Employment Standards Branch offices were instructed to recieve complaints.(2) The Code temporarily remained in force, but few persons were available to enforce it.

This chain of events produced widespread opposition. Coalitions and ad hoc committes sprang up to protest the

government's actions, some of them assisted by former Commission and Branch personnel. For months the Minister of Labour, the sponsor of Bill 27, was dismissive of this "knee jerk" opposition, emphasizing instead the aims of the new legislation, namely that it would apply only to "truly discriminatory" cases.(3) The opposition was strong enough, however, eventually to force the government to let Bill 27 die on the Order Paper and to negotiate with labour and interest group representatives, organized as the Human Rights Coalition. A new bill, now numbered Bill 11, was debated and passed by the Legislature in the spring of 1984; to the disappointment of the groups and parties opposed to the Social Credit initiative, the new Human Rights Act was not a significant departure from Bill 27.

Although unannounced, the new human rights policy was anticipated by prior policy statements. The Speech from the Throne of June 23, 1983 outlined the Social Credit restraint objectives, which stressed reduction in the size and scope of government in favour of market-driven economic recovery and private initiative. It was portended also by the protracted conflict which for years characterized the relationship between the Social Credit government and the Human Rights Commission. The Commission sought more power and autonomy, while the government was unwilling to relinquish control over the enforcement of the Code's provi-

sions. In short, the tension between the principles of responsible government and the administrative advancement of equality and respect for human rights became embodied in the increasingly acrimonious relations between the government and the Commission.

The Social Credit government observed that this conflict was not wholly reducible to the activism of human rights advocates, though this seemed to play an important role. To a significant extent, the provisions of the Code encouraged this animosity. The educational and promotional mandate of the Commission was vague and indeterminate, allowing it to address itself to a wide range of policy issues, often to the embarrassment of the government. Its complaint initiation provisions allowed staff in the Human Rights Branch to influence the filing of complaints and subordinate them to broader goals such as the development of a human rights jurisprudence. More importantly, the Code's open-ended anti-discrimination provision -- the "reasonable cause" protection -- allowed boards to extend the list of prohibited grounds beyond those anticipated by the Legislature. In effect, boards possessed a legislative, policy-making power, one which allowed them to add group characteristics to the list of prohibited grounds of discrimination independently of substantial political control.

The human rights debate in British Columbia is usually presented as one pitting the friends and enemies of human rights against each other. In fact, as Peter Russell points out, contemporary human rights debates are often best understood not as disputes involving truly fundamental rights, but as disputes about second-order issues on which reasonable people can and do disagree. Debates about rights are often politics by other means. New light can be shed on the British Columbia debate of 1983-1984 by looking at it in this way. When one does so, it then appears as a debate about the proper scope and independence of administrative and quasi-judicial agencies. One is then allowed to situate the debate in the context of the Social Credit government's restraint program, in which issues relating to the operation of administrative agencies played an important role. This sort of analysis reveals the Social Credit government to be not so much the enemy of rights as a friend of responsible government and a foe of uncontrolled bureaucrats and the client groups they cultivate.

Independent agencies can be brought under stricter control in two ways: the agency mandate can be untouched but various accountability and monitoring mechanisms can be put in place to give elected officials more control; or, significant independence can be retained but the agency's mandate itself can be narrowed. The British Columbia

government chose the latter, setting itself in opposition to the long-standing, expansionary evolution of the definition of discrimination. The government restricted both the new Human Rights Council's enforcement scheme and the substantive antidiscrimination protections it is to enforce.

This thesis will proceed in the following manner. Chapter 1 will examine the historical context in which changes to B.C.'s human rights legislation were made, showing how they fit into the Social Credit restraint agenda of 1983-1984. Chapters 2 and 3 will outline the changes in the legislation and assess them in terms of the Social Credit's principles of restraint and accountability. Chapter 2 will deal with enforcement provisions and chapter 3 will examine the substantive protections. Finally, chapter 4 will bring Russell's distinction between primary and secondary rights to bear on the B.C. debate to show that at issue in this debate were not ideological differences alone but different evaluations of the costs associated with alternative ways of protecting human rights.

NOTES

(1) R.S.B.C. (1979) c. 186.

(2) Vancouver Sun, July 19, 1983, p. A15.

(3) The quoted remarks are from an interview in ibid., July 20, 1983, p. A3.

CHAPTER ONE

THE SOCIAL CREDIT RESTRAINT AGENDA

The identification of the political principles and purposes behind the formulation of a new human rights policy is difficult because in this area as much as in any other rhetoric, ideology, and half-truths infuse both debate and analysis. All parties strive to be seen as champions of human rights, and accuse their critics of being against them. The human rights discourse has become one of the sacred cows of contemporary political debate; rights are "powerful moral commodities", indeed the "strongest of all moral claims that all men can assert."(1) Persons of ambition are likely to transport the moral gravity of the human rights discourse to causes, interests, and programs bearing dubious connections to matters of fundamental rights.

It is necessary, then, to go beyond what policy makers and their critics say about human rights to the actual contexts in which such policies are created and debated. Only from the analysis of the events and circumstances surrounding the formulation of human rights policies can the reasons and principles behind them be inferred. This chapter will proceed along this line. Two contexts will be

reviewed: the protracted conflict between the Social Credit government and the Human Rights Commission and other enforcers of the Code; and the restraint policy agenda of the Social Credit government, of which Bill 27, the forerunner of the present Human Rights Act, was a part. The debate of 1983-1984 pitted those favouring the vigourous pursuit of complaints by authorities invested with broad powers operating under open-ended legislation against those emphasizing a narrower definition of offensive discrimination and the principles of political restraint and accountability.

This chapter will show that the two protracted points of conflict between the Human Rights Commission and the government grew in the early 1980s to the point of outright opposition. The Social Credit government responded to this conflict by incorporating a new human rights policy into its 1983 restraint agenda, thereby communicating to the Commission and other human rights advocates that it was embracing a more restrained approach to antidiscrimination policy.

The History of Conflict

Two related issues lay at the root of conflict between the government and the province's human rights enforcers. The first involved differences over enforcement of the Human Rights Code, specifically how vigourously complaints should be pursued. The second concerned the degree of political independence the Commission should possess.

The enforcement issue concerned the government's alleged laxity in the appointment of boards of inquiry for unsettled cases. Under the 1973 Code complaints were investigated and an attempt was made to settle them through conciliation. If complaints could not be settled, they were referred to the Minister of Labour who then determined whether they merited adjudication by a board of inquiry. The Commission claimed that the Minister was not living up to his responsiblities.

The first evidence of conflict between the Commission and the government on this score appeared in 1978 when Commission Chairman Remi De Roo wrote a letter on behalf of the Commission to the Minister of Labour protesting the latter's unwillingness to appoint boards of inquiry. De Roo also issued a public statement encouraging British Columbians to write letters of protest to the Minister on this same issue.(2) It was De Roo's position that almost

no human rights complaint is trivial or vexatious, and therefore that complaints should almost never be dismissed on these grounds. This is true even of complaints alleging discrimination on the basis of possession of a beard. He argued that "the moral issues raised by human rights violations are demeaned if subjected to a strict cost/benefit analysis", as the Minister apparently was doing. Furthermore, and perhaps more importantly, a concerted attack on discrimination requires that "the few acts that result in complaints must serve as a deterrent to the public at large. Such deterrence is effective only if it appears that the Human Rights Code is being enforced vigourously." De Roo suggested in the letter that "too strict a test" for the appointment of boards was being applied by the Minister.(3)

The apparent response of the Minister was to fail to appoint a new Commission after the terms of the existing members expired at the end of January, 1978. Not until the following August was a new Commission appointed, this time consisting of ten members, not the five of previous Commissions.(4)

The Minister's reluctance to appoint boards of inquiry continued. Through the early 1980s the number of formal complaints generally increased but the number of boards appointed did not. In 1979, of 737 complaints

investigated, 32 were referred to boards. By contrast, 828 complaints were handled in 1980, but only three were so referred. In 1981, 881 complaints were investigated and nine boards were appointed. 1,065 complaints were handled in 1982, but only eight were referred to boards of inquiry. The decline in the number of board referrals is not due to an increase in the number of complaints settled: during this period the percentage of cases settled actually decreased.(5)

The government's rationale for this restraint was two-fold. Many complaints were said to be trivial, frivolous, or vexatious, hence demeaning to the human rights process if carried to the point of adjudication. Moreover, the injudicious pursuit of such complaints would clog the settlement process, affecting not only the unworthy complaints but also the legitimate disputes. Both consequences would introduce cynicism and complacency in the community, thereby defeating the purposes of human rights legislation.

How trivial, in fact, were the complaints that provoked the government's criticism? One case involved a complaint by an female member of a public golf course that one of the course's policies discriminated on the basis of sex. Men were given priority on the course on Saturdays and women were given a similar priority on Tuesdays. The

woman complained that this policy discriminated against working women. A board of inquiry was not appointed to hear the complaint, and from the oblique references to the case contained in legislative debates, the reason appears to have been the triviality of the claim.(6) While the policy could be said to have an adverse impact on women, and while the dispute concerned access to a public facility, thereby bringing it under the purview of the Code, golf was obviously not considered as important an activity as employment or the rental or purchase of residential accommodation.(7)

The government did not consistently refuse to appoint boards in all cases it considered trivial, however. Consider the famous "Hunky Bill" case.(8) Bill Konyk is the owner of a chain of restaurants called "Hunky Bill's House of Perogies". The Ukrainian-Canadian Professional and Business Association complained to the director of the Human Rights Branch because of the discriminatory character of the word "Hunky" in signs, advertisements, and other media. The appearances of the word constituted "representations indicating discrimination or an intention to discriminate" against Ukrainians.(9) It was alleged that the word instilled attitudes leading people to discriminate. A board of inquiry was appointed to hear the complaint. It dismissed the allegation, stating that the Code "does not

prohibit the use of words which offend other persons" and which do not involve objective acts of discrimination. In other words, Konyk did not do anything to restrict the access of persons of Ukrainian descent to his restaurants, and so did not offend the Code.(10)

In its reasons the board was perfunctory in its dismissal of the complaint. The weight of press comment on the case was also dismissive of the complaint. The Hunky Bill case was one of the principal bulwarks of the government's claim that the Code permitted the pursuit of trivial complaints. As one government MLA exclaimed:

> If doing away with the Human Rights Commission means that we're not going to have any more "Hunky Bill" stories in British Columbia, then I support that action. If it means that we're not going to have people driving through the interior investigating such trivialities as ads in newspapers asking for a young man to work on weekends to pile wood or a lady required for babysitting services and things of this nature, I support the abolition of that particular commission.(11)

While this suggests that the government was convinced of the triviality of the complaint, the fact is that a board of inquiry was appointed to hear the case. Such appointments were, as mentioned, under the authority of the Minister, who presumably could have refused to appoint a board had he considered the case to be unworthy of

adjudication. While the government claimed that the Hunky Bill case was an example of the director's pursuit of trivial complaints, the Minister appointed a board to hear it. Members of the opposition caught this tension in the government position.(12) The reasons for this contradictory position are hard to determine, but it may be that a board was appointed precisely to publicize the issue of triviality and embarrass the Commission.

In addition to the controversies over the enforcement of the Code, antagonisms were sparked by the Human Rights Commission's efforts to augment its independence from the government. In its various publications and recommendations for legislative change the Commission stressed the need to elevate the enforcement of human rights provisions above the play of partisan forces. Human rights ought to be beyond political manipulation and the appearance of conflict of interest; human rights agencies should therefore be independent of political authority. The Commission proposed in 1981 that authority regarding the disposition of complaints be completely vested in the Commission, combining the educational and promotional functions it already possessed with enforcement functions performed in a separate branch of the Department of Labour. Specifically:

> A single, integrated Human Rights Commission [should] be established with authority

> and responsibility to inquire into and investigate complaints under the Code, and to make reviewable decisions, giving reasons, on their appropriate disposition. These powers would include power to dismiss a complaint if it is unfounded, power to approve a settlement if an appropriate remedy has been made, and power to refer an unsettled complaint to a Board of Inquiry for a public hearing.(13)

Unfounded complaints would be those deemed to be "trivial, frivolous or vexatious". It also proposed that the victim's consent be required for the filing of third-party complaints.(14)

These same recommendations were formally made in 1983, this time accompanied by others of even greater potential reach. It was proposed, for example, that Commissioners be appointed by the Lieutenant Governor upon the unanimous recommendation of a special committee of the Legislative Assembly, thereby eliminating the cabinet from the selection process. The Commission argued that "an open, public appointment of Commissioners will ensure a more representative and credible body."(15) Secondly, the Commission recommended the "removal of [a] newly integrated Human Rights Commission from the Ministry of Labour", so that staff requirements and other resource needs would not require political approval.(16) Finally, it was proposed that the Human Rights Code "supersede other legislation when there is a conflict between the Code and other

legislation."(17) If implemented, these recommendations would have had the effect of significantly distancing the Commission and the Code's enforcement personnel from political authority.

A paradox emerges. The Commission wanted the government to amend the Code to establish the Commission as an independent, quasi-judicial agency whose impartiality and credibility would be beyond suspicion by victims and offenders alike.(18) This recommendation is consistent with the understanding of human rights as claims transcending the vagaries and exigencies of partisan conflict. One would have expected the Commission to have avoided politically controversial statements and activities, to create the impression that it was or was capable of being an impartial, independent body. Yet the opposite was the case. Activities and programs were undertaken which brought the Commission into the thick of political issues, often to the embarrassment of the government. In its formal recommendations, the Commission sought greater independence from government and partisan control; yet its opposition tactics clearly suggested that it was incapable of responsibly handling such authority.

The appearance as well the reality of nonpartisanship must attend the work of an administrative agency, especially one which aspires to quasi-judicial status.(19) If the

agency becomes highly partisan, it undermines the judicial aura to which it aspires. Whether or not the Commission could shed its partisan, opposition role upon the acquisition of quasi-judicial, independent status is an interesting question -- one thinks it would be a difficult task. However the main point is that the appearance of partisanship diminished its credibility in the eyes of the government, particularly one which is suspicious of administrative agencies.

Opposition to the government took several forms. At several points the Commission engaged in a social activism of political commentary and advocacy on behalf of minority groups. One such foray led the Commission to submit a report to the Minister on the socio-economic condition of farmworkers (many of them of East Indian origin) and domestic workers in the province.(20) Commission chairman Charles Paris in a press conference also directly accused the government of failing to do what it could to ameliorate the conditions of these workers, charging that it was practicing a form of unintentional discrimination.(21)

A second example of the Commission's social activism was its creation of an Advisory Committee of Native Indian People in 1982, through which the Commission intended to "establish a close, on-going relationship with Native people in B.C. and to address the specific issues and

concerns of Native people."(22) Worthy of note is the fact that negotiations between the government and Natives over land claims were proceeding at this time. The Commission gave Natives an opportunity to publicize their claims and views.

Related to this social activism was the Commission's cultivation of a pro-human rights constituency, with which it established a relationship of mutual support and cooperation. It provided financial support (through grants) for specific programs and activities and organizational help to groups of highly diverse memberships, while these groups in turn enthusiastically proposed amendments to the Code and called the Commission to a more assertive role in the promotion of human rights.(23)

In 1979, the Commission, in conjunction with the Department of the Secretary of State and the Canadian Council of Christians and Jews, sponsored a conference on human rights and the nature of discrimination. The planners of the conference hoped "to develop a system and a mechanism that will allow for improvement and constant upgrading of programmes and legislation surrounding human rights issues."(24) It was attended by 245 delegates representing over 110 community groups.(25) The conference proceedings contained an appended list of some 175 invited groups, institutions, and departments of government. It

was hoped that the list would "be seen as the beginning of a network which the Human Rights Commission would like to encourage."(26) The network did grow. A "human rights seminar" was held in 1981 to further discuss and formulate recommendations on two topics inadequately dealt with at the 1979 conference: employment and children and youth.(27) Over 100 representatives participated, and again the proceedings and the appended list of concerned groups were intended to serve as a "network tool."

A brief analysis of these meetings illuminates the symbiotic relationship between the Commission and interest groups. Those who attended at the meetings were all invitees of the organizers, permitting a prior selection of representatives and some control over the subjects and tenour of debate. In turn, organizational costs were largely absorbed by the Commission, giving interest groups an inexpensive yet effective and credible arena for the promulgation of their views. Moreover, an opportunity was created to collectivize the human rights voice: disparate groups with fragmented goals could be brought into contact with one another to discover common ground and organize for more effective lobbying.(28)

The Commission's interests were served insofar as the recommendations formulated at these meetings complemented or echoed those of the Commission. Among the more

favourable recommendations were proposals to increase Commission independence, expand the use of the reasonable cause provision, require prospective Commissioners to have had experience in the "positive" promotion of human rights, and even to have representatives of minority groups sit on boards of inquiry.(29) Recommendations such as these can be understood to result both from the Commission's hand in the selection of invitees and from the widely acknowledged perception of the Commission as a prime vehicle for the promotion of human rights issues. The cultivation of a constituency of support external to the government enabled the Commission to bring the element of popular support to bear on its dealings with the government. Infringements on Commission power and autonomy could thus be interpreted as attacks on the goals of the groups with which it was allied.

It must be noted that liaison with interest groups was part of the Commission's legislative mandate. Section 11(4) of the Code described the function of the Commission, inter alia, to develop and conduct programs and activities promoting human rights and fundamental freedoms.(30) The ambiguity of this mandate was, however, interpreted by the Commission is broad and encompassing manner.(31) One Commission member suggested that the Commission "can act on any matter that falls within the general area of human

rights, whether or not it is specifically spelled out in the Act."(32) Secondly, these activities always had the effect of generating more prestige and even moral status for the Commission. According to Anthony Downs, these qualities are important cloaks with which to cover organizational aims such as political power and autonomy.(33) When the Social Credit's restraint program was announced, one of the Commission's first reactions was to organize a public meeting to coordinate opposition to Bill 27, the government's new human rights legislation.(34) So close to community groups had the Commission become that it provided the organizational impetus for the formation of the Human Rights Coalition, a loosely knit protest group presenting a united voice of opposition to the Social Credit restraint program.(35)

This history of conflict has not completely escaped the notice of academics and other observers. A comment by a noted student of Canadian human rights legislation about the behaviour of the Human Rights Commission puts this history into perspective:

> The B.C. Human Rights Commission was one the worst offenders in the pursuit of trivia, in its cavalier disregard for due process, and in their [sic] absolutist view of equality. I can quite understand why the government is now seeking to clip the commission's wings.(36)

In their regard for the primacy of human rights and the need to expand Commission power, Commission members and staff should not be considered atypical of most persons associated with administrative hierarchies. In time such persons "adopt or are perceived to adopt the values, priorities, perspective and preferred solutions with reference to which that hierarchy functions."(37)

Prior to the introduction of the restraint program, the government responded to the Commission's independence strategies in a manner similar to the way in which it responded to pleas for more vigourous enforcement of complaints: through inaction. It ignored the recommendations and public pronouncements. However, an active, considered response can be gleaned from the fact that a new human rights policy was announced in the context of the Social Credit's comprehensive restraint agenda. Human rights legislation could have been exempted from the restraint program. The government would definitely have incurred less vocal opposition if this had been done. Its inclusion in the restraint program suggests that the principles underlying the overall agenda apply to the government's position on human rights. The government's response to the history of conflict with the enforcers and administrators of the Human Rights Code is contained within the ideological foundations of the restraint program.

The B.C. Restraint Program

On July 7, 1983, the British Columbia government announced its "comprehensive restraint-on-government program" through the Budget Address and the introduction of 26 pieces of legislation. The most prominent reason given for the program was that the province's budgetary deficits had to be corrected before the provincial debt grew out of control.

There is certainly merit to this view. The deficit increased due to a drastic shortfall in provincial revenues coupled with unusual stresses on B.C.'s social service network. Like the other western provinces, British Columbia has always been characterized by a great dependence on resource products, especially forest products and nonmetallic minerals.(38) It has therefore also depended on exports for the vitality of its industries. Worldwide recession, increased competition from the developing countries, and depressed lumber markets in the United States combined to reduce export demand for B.C. products. The province was plunged into recession in the 1980s with a severity not experienced by other regions.

The government could respond to decreased revenues either by increasing government transfers to stimulate the economy -- the Keynesian approach to economic recovery --

or by reducing government expenditures to more closely approximate revenues. The latter strategy was chosen. The assumption of public debt for the Keynesian stimulation of the economy was held to be inflationary; as well, it forced the government to compete with productive enterprise for the use of debt capital. As the Finance Minister put it, the government "cannot spend [its] way out of the recession" and consequently "mortgage the future." Such a course would precipitate eventual economic decline and violate the principle of financial accountablility of government.(39)

The government appealed to more than strictly economic claims to defend the restraint program. It was argued that government has grown to a size in excess of what was necessary for the provision of services to British Columbians. Much of the growth of the public bureaucracy and the proliferation of public agencies and commissions was a response more to the availability of public funds during periods of economic prosperity than to authentic needs in the community.(40) Moreover, the weight of regulation and the size of government have effectively distorted and stifled lasting, market-driven economic activity. Unnecessary government activities and agencies would therefore be trimmed or eliminated. The Lieutenant Governor stated this position in the Throne Speech:

> My government has given careful attention to the successive layers of agencies, boards and commissions that have grown up around governments in the last 15 years. Measures will be introduced to streamline the operations of some of these bodies, eliminate those whose functions have become unnecessary in light of market conditions, better define the respective responsibilities of agencies and the courts, and introduce restraint measures where such bodies continue to exist.(41)

Implicit in this is the assumption that there is a dignity as well as an economic value to private productive activity. The Social Credit platform has always affirmed individual responsibility as an attainable ideal; it has also distrusted the ability of governments to provide solutions to economic and social problems. The political expression of this elemental affirmation of the individual is the assertion of classical liberal principles of accountability, both financial (as was already mentioned) and political.

Keenly aware of administrative agencies' potential for autonomous growth and independence, the government reacted with measures to bring agencies within stricter control. Of most notable interest is the government's approach to the so called "open-ended programs", those programs without defined budgetary limits. Among these were the provincial correctional system, the legal aid program, and the criminal injuries compensation program. Their open-endedness

allowed administrators to increase budgets and capture greater authority as a result. The government was convinced that open-ended budgetary allocations led to "automatic" growth of the programs to which they applied.(42) Open-ended programs would have to be capped.

The attack on open-ended programs did not only have an economic motivation. For with budgetary authority comes political power; and the more autonomous the body with budgetary authority, the more politically independent and powerful it may become. The principle of democratic accountability could be brought to bear on the attack on open-ended programs. It is thus true, as some have observed, that "a constant theme in most legislation during the Socred's three terms has been to centralize authority and power in Victoria and in the cabinet."(43) Beyond the economic arguments is the concern about the uncontrolled and, to some extent, unnecessary growth of government and the violation of the democratic principle of accountability of subordinate officers and agencies to elected authority. The attack on open-ended programs is evidence of this.

Some critics have failed to perceive this policy purpose, claiming that restraint only meant cost-cutting and balanced budgetting. On this basis they claim that the introduction of Bill 27 is part of a sinister ideological agenda to crush labour and minorities, that it was included

in the restraint package only to give it a cloak of legitimacy by deflecting public attention way from its contents to larger economic issues. In other words, Bill 27 is an attack on the rights of minorities and workers, which the government attempted to conceal in the guise of values of economic restraint and fiscal accountability.(44)

The Human Rights Code did not empower the Commission to exercise uncontrollable budgetary authority. Nonetheless, it was open-ended in two crucial respects. Firstly, it gave the director of enforcement of the Code power to initiate complaints, even without consent of the victims. The director on his own initiative could seek out discriminatory conduct. This was an important power, particularly in view of prevalent assumptions among human rights advocates about the nature and extent of discrimination in society. As the next chapter will argue, the contemporary view of discrimination is that it pervades society root and branch. It is not enough, given this conception, for an enforcement mechanism to receive, investigate, and settle complaints. Provision must be made for the active pursuit of discrimination where it occurs, regardless of the whims of particular victims. Advocates have gone further by urging that human rights agencies follow coherent complaint initiation and adjudication strategies to expand anti-discrimination protections.

Secondly, the 1973 Code contained a legislative provision enabling enforcers of the Code to pursue this goal. In three areas of private activity -- public accommodation, employment (including public sector employment), and membership in trade and professional associations -- discrimination was prohibited "without reasonable cause". Following this blanket prohibition was a list of categories or classes not constituting reasonable cause; but the list was illustrative, not determinative, of the scope and meaning of the blanket prohibition. As a later chapter will show, this provision gave enforcers of the Code and boards of inquiry considerable discretionary authority, allowing them to give greater effect to the demands of interest groups and the hopes of human rights advocates.

Its open-endedness brought the Code under the critical scrutiny of the creators of the 1983-1984 restraint package. Accountability to government and the implementation of constraints on bureaucratic growth were the policy goals which forced the government to address and respond to the structure of the Code and the enforcement scheme created thereby. The introduction of new human rights legislation in British Columbia during this period was understandable, if not, indeed, foreseeable.

Predictably, human rights advocates argued that the whole administration of human rights in the province was

being "emasculated" in the light of the introduction of Bill 27 in July, 1983; that "the powerless will be without an independent voice"; that the Social Credit's new bill "totally politicizes human rights"; and that it was a "deliberate, philosophical attack on the very concept of human rights legislation."(45)

Actually, only the criticism relating to the politicization of human rights has substantial merit. If politics is understood as the achievement of compromise and settlement among diverse and conflicting interests in society, then the new human rights policy is a more "political" one. For the new policy, as later chapters will show, restores some balance between the interests of private decision-makers and those of minority groups. Furthermore, if by politicization is meant the inclusion of alternative approaches to a problem in party or partisan policy programs, such that debate among parties about means and ends is opened or re-opened, then in B.C. human rights was politicized. And this fact certainly need not be a criticism. It is only a criticism if one was happy when things were kept out of political debate.

In the following two chapters, it will be argued that the Social Credit government substantially achieved its goal of eliminating the open-ended elements from the province's human rights policy.

NOTES

(1) R. Wasserstrom, "Rights, Human Rights, amd Racial Discrimnination" in D. Lyons, ed., Rights (Belmont: Wadsworth, 1979), p. 50. For an account of the development of the human rights discourse in Canada since World war II, see C. Williams, "The Changing Nature of Citizen Rights" in A. Cairns and C. Williams, eds., Constitutionalism, Citizenship and Society in Canada [Toronto: University of Toronto Press, 1985).

(2) Vancouver Sun, January 17, 1978, p. B1.

(3) Remi De Roo to A. Williams, January 12, 1978.

(4) In 1980, the number was reduced to six.

(5) British Columbia Human Rights Commission, 1980 Annual Report (Victoria: Queen's Printer, 1980), pp. 21, 23; 1981 Annual Report (Victoria: Queen's Printer, 1981), pp. 17, 23, 24; 1982 Annual Report (Victoria: Queen's Printer, 1982), pp. 23, 24. An anomaly occurs in 1983, in which year 43 of 1,008 complaints were referred to boards of inquiry. 1983 was the year in which new human rights legislation was introduced and the Commission was dismantled. Ministry of Labour, Annual Report, 1983-84 (Victoria: Queen's Printer, 1985), pp. 59, 61.

(6) B.C. Legislative Assembly Debates, April 13, 1984, p. 4408; May 2, 1984, p. 4466. See also Vancouver Sun, February 23, 1983, p. A12.

(7) William Black considers the case far from trivial, but still admits that golf "is hardly a necessity." W.R. Black, "Human Rights in British Columbia: Equality Postponed", Canadian Human Rights Yearbook (1983-84) p. 232.

(8) Ukrainian-Canadian Professional and Business Ass. v. Bill Konyk and Winnipeg Garlic Sausage Co. 3 C.H.R.R. (1982) p. D/1158. An appeal to the B.C. Supreme Court failed; see 4 C.H.R.R. (1983) p. D/1653.

(9) 3 C.H.R.R. (1982) p. D/1158.

(10) The board stated paranthetically that "people should learn to laugh at themselves and take themselves less seriously. Perhaps that way, there would be less discrimination." Ibid., p. D/1161. Much was made in the press of the fact that Konyk is himself Ukrainian and found nothing offensive about the term. See Vancouver Sun, October 29, 1982, p. A7.

(11) B.C. Legislative Assembly Debates, August 18, 1983, p. 918; also, p. 911.

(12) Ibid., September 2, 1983, p. 1755; September 27, 1983, p. 1987.

(13) Human Rights Commission of British Columbia, Recommended Changes to the Human Rights Code of British Columbia (Victoria: Queen's Printer, 1981) p. 22.

(14) Ibid.

(15) Human Rights Commission of British Columbia, How To Make It Work (Victoria: Queen's Printer, 1983).

(16) Ibid., pp. 34-35.

(17) Ibid., p. 36. A primacy clause would merely codify a finding by boards of inquiry and the Supreme Court of Canada that, in the absence of statutory language to the contrary and constitutional provisions notwithstanding, human rights legislation is to be considered fundamental law, more important than all other laws. See, e.g., Heerspink v. Insurance Corporation of B.C. 3 C.H.R.R. (1982) p. D/1166.

(18) So concerned were Commission staff about independence of the agency from the government that efforts were made to keep the Human Rights Commission newsletter free from a hint of government sponsorship. "It is...vitally important that the Newsletter remain the Commission's and that it not be seen to be a government publication." Memo, N. Linquist, Research Officer, to C. Paris, Chairman, June 12, 1982.

(19) F.F. Slatter, Parliament and Administrative Agencies (Ottawa: Law Reform Commission of Canada, 1982) pp. 18-19.

(20) Human Rights Commission of British Columbia, What This Country Did To Us It Did To Itself (Victoria: Queen's Printer, 1983).

(21) Vancouver Sun February 17, 1983, p. A3.

(22) Human Rights Commission of British Columbia, 1982 Annual Report p. 6.

(23) "While the Commission aids community groups by approving grants, the groups are also helping to carry out work related to the aims of the Commission." 1982 Annual Report, p. 4.

(24) Human Rights Commission of British Columbia, Proceedings of the Conference on Human Rights for British Columbians (1979) p. 1.

(25) British Columbia Human Rights Commission, Newsletter 2 (February, 1980) p. 1.

(26) Ibid., p. 63. 250 representatives of various bodies attended the conference. Human Rights Commission of British Columbia, 1979 Annual Report (Victoria: Queen's Printer, 1980) p. 4.

(27) See Human rights Commission of British Columbia, Proceedings of Human Rights Seminar on Employment and Children and Youth (1981)

(28) The Human Rights Commission intended the conferences to serve this end. Human Rights for British Columbians, p. 1.

(29) See ibid., pp. 55-58.

(30) A promotional mandate such as this is inconsistent with the exercise of quasi-judicial powers. Among its recommendations is no acknowledgement that these functions would have to be dropped if it was given a quasi-judicial role.

(31) Early in the life of the Code, the Commission understood these terms of reference to include "all issues" pertaining to the promotion of human rights. The fungibility of "human rights" gave the Commission a

jurisdictional carte blanche; the terms of reference provided no limitation on the areas of its concern. See Human Rights Commission of British Columbia, 1975 Annual Report, pp. 1-2.

(32) Minutes, meeting of the B.C. Human Rights Commission, February 14, 1974, p. 2.

(33) A. Downs, Inside Bureaucracy (Boston: Little, Brown & Co., 1967), pp. 237-250.

(34) Vancouver Sun July 13, 1983, p. A13.

(35) Confidential interview with former staff member, B.C. Human Rights Commission, April 13, 1987.

(36) Ian A. Hunter, quoted during a Canadian Bar Association annual meeting. See Vancouver Sun August 30, 1983, p. A11.

(37) L. Vandervort, Political Control of Administrative Agencies, (Ottawa: Law Reform Commission of Canada, 1979) p. 20. This view is by no means limited to occupants of one point on the ideological continuum. See Downs, chapters 18 and 19; M. and R. Friedman, Free to Choose (New York: Avon, 1979) chapter 7; J. K. Galbraith, The New Industrial State (Boston: Houghton Mifflin, 1967; reprint ed. Scarborough: Mentor, 1979) chapter 13.

(38) M. Jenkin, The Challenge of Diversity (Ottawa: Science Council of Canada, 1983) Pts. I and II.

(39) B.C. Legislative Assembly Debates, July 7, 1983, p. 161.

(40) Ibid., pp. 160, 163-164.

(41) Ibid., June 23, 1983, p. 4.

(42) Ibid., July 7, 1983, p. 164.

(43) M. Budgen, "Slashing Billy", Quest 13:8 (December, 1983) p. 37. Also see W. Magnusson et al, eds., The New Reality (Vancouver: New Star Books, 1984) Pt. II.

(44) See, e.g., M. Rankin, "Human Rights Under Restraint", in Magnusson et al, eds., p. 177; also W.R. Black, "Equality Postponed", pp. 219-233.

(45) Vancouver Sun July 11, 1983, p. A12. These statements were made by William Black, former Commissioner and contributor to the drafting of the Code, and Charles Paris, then Chairman of the Commission.

CHAPTER TWO

DISCRIMINATION, ACCOUNTABILITY AND THE ADMINISTRATION OF THE HUMAN RIGHTS CODE

It was argued in the last chapter that the inclusion of human rights policy in the Social Credit's restraint program was motivated by the lack of political control and accountability evident in the administration of human rights in B.C.. The Code's two-fold open-endedness brought it under the critical eye of the government. This chapter will attempt to evaluate the government's efforts: Was a significant measure of political accountability introduced into the administration of human rights legislation? Did the Social Credit government close the first kind of open-endedness which characterized the Code?

At first glance, the answer is not what one might expect. Far from reflecting an undivided determination to implement the principle of political accountability, the Act continues to give considerable discretion to unelected authorities, and in some respects it even increases this discretion. On the other hand, the Act rests on a considerably narrower conception of discrimination than the 1973 Code. As the last chapter noted, anti-discrimination laws can be thought to embody more than attempts to resolve

disputes between individuals. They can also serve the broader goal of substantive group equality. The Act steers away from the latter. Instead of employing more effective modes of political accountability for an agency with a broad mandate, the government chose to restrict the mandate.

The Human Rights Act and Political Accountability

The 1973 Human Rights Code was the most far-reaching anti-discrimination legislation of its time, incorporating wide discretionary authority into the functions of the Commission. As the last chapter made clear, the Commission interpreted its already broad mandate in as broad a manner as possible, bringing the human rights perspective to bear on "all issues" concerning them -- i.e., all issues. It was able, under the Code's terms of reference, to create a symbiotic relationship with community groups interested in expanding the Code's protections and having the Commission's powers augmented. It also advocated greater independence from the government so that it could more vigourously and impartially promote human rights. The history of conflict between the Commission and the government suggests, however, that the Commission took on an opposition role vis-a-vis the government, discrediting its

own independence proposals and violating the principle of political accountability.

Despite the existence of liberal complaint initiation and investigation provisions, unsettled complaints were referred to the Minister who decided whether or not to appoint boards of inquiry. This appointment power is, at least in principle, an important device for the assertion of political control. Certainly the Commission and some interest groups thought it was effective; otherwise they would not have lobbied so aggressively for its elimination.

The board appointment power was crucial particularly in light of the importance the Code's drafters attached to every complaint received by the director. The Code stipulated that regardless of the source or the legitimacy of the complaint, "the director shall at once inquire into, investigate and endeavour to effect a settlement of the alleged discrimination or contravention" (section 15(1)). The absence of criteria for the dismissal of illegitimate complaints indicates that all complaints were to be pursued, and that if they were not settled it would ultimately fall to the Minister to decide which cases did not merit adjudication. According to Section 16(1), regardless of the recommendations of the director contained in the report, it fell to the Minister to dismiss the complaint or appoint a board. This framework enhanced the

perception that the enforcers of the Code were always on the side of victims of discrimination and the Minister, when he failed to appoint a board in a given case, was the enemy. The incentives prompting the Minister to accede to the director's advice in regard to complaints were appreciable.(1)

Ironically, the government responded to the problem of political accountability by creating in the new legislation an alternative to the board of inquiry that does not require Ministerial appointment. The Human Rights Act provides, according to section 14(1)(d), that the Human Rights Council can "designate one member...to receive, as specified by him, written or oral submissions from the complainant and the person alleged to have contravened this Act...." The member chairing the hearing is given the powers of a board of inquiry.(2)

In effect, the council is given authority to appoint its own board of inquiry. Reference to the Minister is the prerogative, not a requirement, of the council. It can make a report to the Minister regarding an unsettled complaint (as was required under the Code) at its discretion. The hearing alternative, it should be noted, has thus far been the only procedure followed.(3) Since taking jurisdiction in September, 1984, the council has referred 52 of 221 substantiated backlog complaints to hearings. Of

157 new complaints between this time and March 31, 1985, four were referred to hearings. No complaints have been referred by the Minister to boards of inquiry.(4)

For what reasons could the government have designed an adjudication procedure seemingly so inconsistent with its policy goal of accountability? This question is all the more important since it is conceivable that the hearing procedure creates problems of bias and partiality. The same member who participates in the complaint investigation process may be designated to chair the hearing. In MacBain v. Canadian Human Rights Commission and Potapczyk,(5) the Federal Court of Appeal struck down provisions of the Canadian Human Rights Act allowing the Commission both to investigate a complaint and to appoint the tribunal, arguing that they infringe the right to a fair hearing protected by the Bill of Rights.(6) In the past, provisions of the Saskatchewan Human Rights Act permitting the Commission both to investigate and to adjudicate complaints have been roundly criticized.(7) On the other hand, such bias could be avoided by ensuring that investigating members will not be appointed to chair hearings. This is in fact what is being done in B.C..(8)

There is a sense in which the hearing procedure secures a measure of impartiality rather than threatens it. Some human rights complaints are brought against the

government as employer, thereby creating potential conflict of interest situations for the Minister. Could he fairly and impartially consider the merits of a board appointment when a board decision may conceivably flout his government's policy interests?(9) The hearing procedure allows the council to relieve the Minister of the duty to make such difficult decisions if in its estimation the Minister would be in a conflict of interest.

The inconsistency of the hearing procedure with the government's policy goals nonetheless persists. One possible reason for the introduction of this procedure is that the government partially conceded some of its opponents' demands. Notable in this regard is the fact that the Council-appointed hearing, absent in Bill 27, was included in Bill 11, after human rights advocates were given an opportunity formally to respond to the government's initiative.(10) The Human Rights Commission, with the support of a plethora of groups, recommended in 1981 and 1983 that the appointment of boards be removed from Ministerial control. As well, the hearing procedure accords with one stated concern of the government, namely that the complaint resolution process should be quick and efficient.(11)

If political accountability is to be understood as Ministerial control over the functioning of the human rights complaint process, then the government's concern

about making the Human Rights Council accountable is less than undivided. But this is not the only way in which the government may exercise control over an administrative agency. It may also limit or narrow the policy mandate or terms of reference of that agency, so that there is less to be accountable for. The rest of this chapter discusses the nature and significance of the narrowing of the Council's enforcement mandate against the background of the legislative history of expanding mandates in the sphere of enforcement. The next chapter will examine the narrowing of the new legislation's substantive provisions.

Restraint and the Reversal of Legislative Evolution

In restricting the mandate of the new Council, the government was placing itself in opposition to a long-standing evolution of human rights legislation, in which commission mandates have been progressively expanded. Commentators have frequently traced the development of human rights legislation in Canada, noting the ways in which subsequent laws improve upon the putative inadequacies of their predecessors. This development has not escaped the notice of human rights advocates who regard failures to improve existing statutes as irresponsible and the return to former enforcement modes as anathema. The development of human

rights legislation has been characterized not only by the increase in the number and types of human characteristics protected, but also by more complex, aggressive enforcement schemes. Both of these elements reflect a broader, more pervasive conception of offensive discrimination to which legislation should apply.

Walter Tarnopolsky, in a number of publications, analyzes the development of Canadian anti-discrimination protections within an evolutionary framework.(12) Prior to World War II, governments began to remove overtly discriminatory legislative provisions from statutes, a necessary but inadequate step in light of the prevalence of discrimination between persons in their private relations. Legislation was later passed -- for instance, Ontario's Racial Discrimination Act and the Saskatchewan Bill of Rights Act -- to prohibit discriminatory conduct in various private activities. This legislation in effect set up a quasi-criminal offence of discrimination, requiring victims to initiate a court action and prove the discrimination beyond a reasonable doubt. Essentially, the bulk of responsibility for pursuing the complaint lay with the victim; the enforcement body, the court, reacted to his initiative.

In the 1950s the structure of the administrative agency was employed to enforce anti-discrimination provisions. Complaints were investigated and assessed and

boards of inquiry appointed if conciliation was not possible. Staff were employed for this purpose. The administrative structure better facilitated the settlement of complaints than quasi-criminal legislation, but it was still inadequate. According to Tarnopolsky:

> ...this legislation continued to place the whole emphasis of promoting human rights upon the individual who had suffered most, and who was therefore in the least advantageous position to help himself. It placed the machinery of the state at the disposal of the victim of discrimination, but it approached the whole problem as if it were solely his problem and his responsibility. The result was that very few complaints were made, and very little enforcement was achieved.(13)

Two changes were made in the 1960s and 1970s to address these weaknesses. First, anti-discrimination acts were consolidated under codes, to be aggressively administered by commissions with professional staff. Second, these commissions were given broad educational mandates to promote human rights and change the attitudes that lead to discrimination. Consolidation of anti-discrimination provisions is a reflection of the fact that discrimination is an overall problem unconfined to one or two areas of private activity. It is a social problem,

one on which the community's censure must be brought to bear:

> The consolidation of human rights legislation into a Code to be enforced administratively by Commissions ensures community vindication of the person discriminated against. This is justified as being important to the community itself because of the broad educational value of equal treatment, as it is to the victim of discrimination. Without active community involvement, the person who suffers from discrimination may lack knowledge of the purpose and scope of human rights legislation, or may fear that the costs of vindication would be too high in terms of money or embarrassment.(14)

The development of human rights legislation has paralleled a transformation in the conception of discrimination. Discrimination formerly was conceived primarily to include racial bigotry and prejudice. Early anti-discrimination legislation sought to proscribe offensive conduct stemming from such prejudices. A wider public goal was served by such provisions; after all, liberal democracies can flourish only in the absence of violent conflict among their members. However, in the main the public significance of discriminatory conduct was contained in the conduct itself; no positive policy goal beyond those associated with the proscription of bigotted treatment inconsistent with the principles of liberal democracy was

served by the prohibition of such cases. Single occurrences of discrimination were the targets of the law.

Discrimination has recently been construed to constitute much more than manifestations of bigotry and is now seen to be far more pervasive than previously; the elimination of overtly racist legislative provisions, for example, ignores social structures embodying inequalities in private relations and group distributions. Hence, as the former Chairman of the Ontario Human Commission states, discrimination is "inherent in the institutions of our society and cannot be reduced to a series of single occurrences."(15) And former British Columbia Chairman Remi De Roo, in the aforementioned 1978 letter to the Minister of Labour, claimed that only a "small fraction of discriminatory acts are brought to the attention of the Human Rights Branch". Every act that does reach the Commission acquires a high public significance, representing a systemic evil, not just a private dispute.

Discrimination, in other words, is considered one of the barriers to the attainment of an egalitarian society, a society in which equality of opportunity and equality of result are synonymous. J.M. Vickers claims that although "perfect or complete equality of condition is not a realistic goal of either law or politics", nonetheless "we can learn much about the social processes of groups

striving for more equality, and of established groups grappling with that striving, by examining ideas which hold perfect equality as a supreme goal."(16) It is not the absence of discrimination in the old sense of the term but equality in its various forms which stands as the goal of anti-discrimination legislation. This can be the only explanation for human rights advocates' support for affirmative action or "constructive discrimination" in favour of minorities.(17) Discrimination is offensive not merely because it is the product of bigotry, but because it evidences and reinforces inequalities, stunting progress toward an egalitarian society.

On the basis of this broader egalitarianism anti-discrimination legislation is now criticized by some for its focus on individual disputes rather than systemic inequalities among groups. The notion that the wider goals of equality and minority representation can be achieved by addressing individual occurrences of discrimination is viewed increasingly with frustration and impatience because it has not led to the flowering of an egalitarian society.(18)

One of the implications of the view that discrimination is imbedded in the very fabric of society is that all the differentiating decisions made in daily life have a discriminatory taint. Public bodies created for the pur-

pose of countering discrimination must reach into the "very fabric" of society and transform it. Private relations must be monitored and corrected. Agencies must have affirmative, aggressive mandates to transform private relations to accord with the public goal of equality. In this process private relations become public, because they are being brought to the service of public goals.(19)

Legislative developments and the evolution of the conception of discrimination have not proceeded in mutual isolation. Each has dialectically influenced the course of the other. Perceptions of the extent of discrimination cause human rights agencies to lobby for more enforcement power. This power is used to search out more discrimination, which in turn forces agencies to appeal for more resources. The elimination of discrimination in practice means the discovery of more discrimination. Hunter has this to say about the Ontario Commission:

> The Ontario Commission began in 1962 with a full-time staff of one (Dr. Daniel G. Hill) and a part-time secretary; twenty years later the Ontario Commission has a full-time complement of 101. Despite such bureaucratic growth, each of the Commission's Annual Reports bemoans an increasing case load which, it is said, precludes an all-out effort to eradicate discrimination. Yet whenever there is a levelling-off or slight decline in caseload, the Commission is quick to seek legislative amendments stretching the concept of equality still further and

> recommending new forms of discrimination to be prohibited and new social areas for the law to reach into.(20)

On the basis of this developmental view of the legislative history of anti-discrimination protections, critics of Bill 11 described it as a "regressive", "retrograde" change in human rights protections. The "logical evolutionary step" would have been to pick and choose among other jurisdictions' legislation and implement their most progressive substantive and enforcement provisions. Although Bill 11 "might have been fine in 1935, 1940 or 1945, that is inappropriate for today."(21) Black claims that the Act is "a return to an earlier and less effective model of human rights legislation."(22)

It is "less effective" assuming the most "advanced" definition of discrimination. Under a more restrained conception of offensive discrimination, this criticism cannot so easily be made. Such a restrained conception is evident in the enforcement provisions of the new Act.

The 1973 Code contained a primary or initial emphasis on the conciliation of disputes. But in the case of unsettled complaints, the dispute was transformed into a publicly relevant example, used for the development and refinement of a growing human rights jurisprudence and the deterrence of would-be offenders. The Code attributed an

overriding public significance to discriminatory conduct, as if the fact of discrimination was more important than the individual parties to the dispute.

No clearer evidence of this exists than the third party complaint provision, whereby anybody, including the director of the Human Rights Branch and the Commission itself, could, with or without the consent of the victim, file a formal complaint of discrimination.(23) This provision existed to overcome the barriers created by an embarrassed or frightened complainant who would feel jeopardized if he initiated a complaint -- this despite the fact that the Code created an offence for reprisals against complainants. In any case, the third-party complaint provision signifies that the importance of an act of discrimination transcends the complainant's own estimation of the costs of complaining. As Commission chairman De Roo argued in his 1978 letter to the Minister of Labour, acts of discrimination brought to the attention of the Branch are only a "small fraction" of the total and must serve as deterrents to others. A victim's queasiness should not stand in the way of this wider public goal.

Deterrence is not the only goal of the adjudication process. Particular cases were also used in the refinement, development, and expansion of legal concepts or doctrines utilized by human rights advocates. Furthermore,

the Code explicitly provided for appeals to higher courts from board decisions on questions of fact, not simply those of law (jurisdiction) which is usually the case for the decisions made by administrative agencies.(24) There was ample opportunity, then, for the clarification of abstract principles, for the "[advancement] of the state of the law".(25)

It must also be noted that the director was permitted under the terms of the Code to make representations at board of inquiry hearings. This power was used to give voice to the "public interest" in disputes. More specifically, it was used to ensure that protections won in previous decisions would not be eroded in cases at hand.(26) Clearly human rights disputes were held to have a relevance far beyond the interests of the parties to a dispute.

By contrast, the 1984 Human Rights Act permits the filing of third-party complaints only with permission of the person allegedly discriminated against. Complaints must therefore be deemed by the complainant to be worth pursuing; other goals such as the deterrent effect of a finding of discrimination or the advancement "of the state of the law" are secondary to this fact.(27)

The Act does not provide for appeals of either board or hearing decisions. When combined with the absence of an

educational and promotional mandate, the finality of adjudicators' decisions somewhat reduces both the public status of the Human Rights Council and the impact of its work on the private relations of British Columbians.

In contrast to the Human Rights Commission, the Human Rights Council is primarily an adjudicative, dispute-resolving agency. It is significant that the Council is given no promotional or educational mandate. Its informational activities are limited to describing to groups and businesses the contents of the Act and the attendant responsibilities of employers, landlords, and providers of public services. To date, the Council has not strayed from this narrow, informational function.

Indeed, the Council's adjudicative role to some extent prevents it from acquiring a promotional function. For example, in 1984 the Council was asked to send a representative to a national conference on human rights, attended by groups from across the country. No representative was sent. Council Chairman James Edgett explained later that it was inappropriate for an impartial, quasi-judicial body to be represented at a function at which participants are invited to attack and criticize empowering legislation. The Council, he stressed, is not an educative body.(28)

Parenthetically, it should be mentioned that the attribution of an adjudicative role to the Council has the

consequence of preventing or impeding the Council from acquiring a promotional, expansionistic function. For only at the expense of credibility and the appearance of impartiality could the Council take on a Commission-like advocacy role while selecting its own members to adjudicate hearings. In addition to the absence of a legislative mandate, then, another incentive exists to keep the Council within the bounds set by the government. One can only speculate, but it does appear that this arrangement is the product of astute legislative draftsmanship.

It was mentioned above that the provisions of the Code permitted enforcers to refine legal concepts at issue in particular disputes, and that the new Act excluded this feature. The wider significance of this change is that human rights enforcers are no longer permitted to formulate litigation strategies and influence the development of a human rights jurisprudence. Hence, the Act removed the potential for human rights enforcers to exercise a policy-making power through the exploitation of judicial creativity. The next section will examine this important change.

Litigation Strategies and Human Rights Jurisprudence

The human rights movement is concerned not only with the eradication of discrimination but also with the attainment of the related goal of equality of condition. Because minorities by definition cannot rely on majority support for their interests, their attention has been turned from representative political institutions to the courts, where debates are conducted on the basis of principle, without final regard to numerical power. Eberts claims:

> Achieving results in litigation does not depend on having a consensus of public opinion in favour of the argument put forward. Judges do not ask, at least not explicitly, how many of their constituents favour this approach. One person or group, even with limited popular support, can prevail in a court with the "right" argument.(29)

The most profound influence of minority groups has occurred in the area of constitutional law through the systematic exploitation of equality guarantees. Minority groups have developed "litigation strategies" to select and sponsor those cases which most unambiguously embody the interests of the sponsor and which will most likely be decided in favour of its goals. Probably the most successful litigation strategy was employed by the National

Association for the Advancement of Colored People (NAACP), an American group founded to shatter the barriers to Negro legal, institutional, and cultural advancement.(30) The formulation of its litigation strategy was predicated on the assumption that the law was malleable, subject to the forces of judicial creativity, and that the direction of the creativity was determined by the nature of the case brought before the courts. Over a period of five decades, the seemingly unshakeable constitutional doctrine of "separate but equal" as applied to segregated public facilities was, largely through the litigation strategy of the NAACP, transformed into the finding that "separate" could never be "equal". Fundamental change was effected with the systematic use of litigation.

The entrenchment of the Canadian Charter of Rights and Freedoms has encouraged groups in this country to employ similar strategies. Significantly, the Canadian Advisory on the Status of Women regards the NAACP's Legal Defence and Education Fund as "a model for all other civil rights organizations."(31) Groups in Canada regard the law more as a tool for the attainment of their goals than as statement of policy.(32) Judges are invited, if not compelled, in the course of their decisions to make policy choices, their conclusions in large part determined by the skillful presentation of issues and precedents by

litigants' sponsors.

Litigation strategies can similarly be applied to the adjudication of disputes under human rights legislation. This is especially true of those jurisdictions permitting the filing of third-party complaints. It is acknowledged, for instance, that the third party complaint mechanism "is a good way for a concerned organization to shoulder, for its members, some of the work of bringing a complaint."(33) Litigation strategies are doubly useful when employed to exploit open-ended anti-discrimination provisions, such as the 1973 Code's "resonable cause" standard.(34) Thus minority groups had the opportunity under the Code to actualize their goals.

But the third-party complaint provision allowed not only representatives of private groups but also Commission members and the director of the Human Rights Branch to file complaints. The Code's enforcers themselves could be the veritable sponsors of minority group interests. Human rights advocates such as William Black have proposed such a sponsorship:

> If a human rights agency relies entirely on private complaints, its priorities are, in effect, set by those who choose to file complaints. The groups that are most seriously disadvantaged are less likely than others to file complaints due to suspicion about government agencies, lack of education and other barriers. Thus, there can

> be a misallocation of resources unless the agency itself actively seeks to identify areas of inequality and to initiate complaints where appropriate.(35)

Minority groups have urged the Commission to develop litigation strategies on their behalf. Such was the case particularly when judicial decisions narrowly interpreted anti-discrimination protections. This happened in the famous GATE case, which addressed the question of whether the reasonable cause provision of the Code included homosexuals' rights to freedom from discrimination on the basis of sexual orientation. The board of inquiry decided that it did; but when the Supreme Court of Canada considered the appeal of this case, it preserved the newspaper's right to refuse publication of the group's advertisement on freedom-of-the-press grounds. In other words, the majority did not address the big issue of the status of sexual orientation relative to the Code, but avoided the question by elevating the newspaper's right of freedom of the press.(36)

Gay rights proponents made the following recommendation at the Conference on Human Rights for British Columbians, co-sponsored by the Commission: that the Commission "go forward and continue to prosecute cases under the 'reasonable cause' language of the Code because

the Supreme Court of Canada's language (in the G.A.T.E. case) is so narrow that it is limited to newspapers."(37) In other words, the freedom-of-the-press restriction would not apply to other areas where discrimination on the basis of sexual orientation might take place, e.g., employment. Groups urged the enforcers of the Code to engage in policy-making activity by selectively developing the jurisprudence of reasonable cause according to standards of necessity and merit ostensibly insulated from the wider political community.

Black has stated that the third-party complaint provision was not used by the Code's enforcers often or aggressively enough. The potential policy-making power inherent in the reasonable cause and complaint provisions, however, cannot be understated. Persons close to the Code's enforcement acknowledge that the Code permitted groups to mount systematic attempts to create a jurisprudence favourable to their interests.(38) The government's elimination of these provisions in 1984 constituted an appreciable curtailment of the mandate and policy importance of the Human Rights Council, consistent with the Social Credit's goals of administrative accountability and restraint. While it may be true that direct Ministerial control over the appointment of tribunals was dropped as an accountabililty device, the government's goals were sub-

stantially achieved via the narrowing of the policy mandate of the Council.

Conclusion

This chapter has shown that, as part of its attack on open-ended programs and the "unnecessary" growth of administrative agencies, the government curtailed Commission policy-making power and the potential for enforcers to develop litigation strategies. Yet this was done circuitously. Direct lines of political control were relaxed, but the end was substantially achieved through the narrowing of the focus of the Council. The Act reflects a greater concern for the resolution of individual disputes than it does for the attainment of group equality.

The focus on individual disputes is to the procedural scheme of the Act what the use of a conventional, exhaustive list of prohibited grounds is to its substantive protections. The substantive provisions of the Code, especially the open-ended reasonable cause provision, reflected a broad definition of offensive discrimination; indeed, they encouraged boards and other enforcers to adopt such a conception. It is to the reasonable cause provision that the next chapter turns.

Notes

(1) It is true that the Commission recommended that it be given power to dismiss complaints on certain specified grounds, as the last chapter indicated. But this recommendation was not isolated; it was accompanied by others advocating greater Commission autonomy. The Commission would not have advocated a complaint dismissal power without advocating autonomy in other areas.

(2) See sections 14(1)(d)(ii) and 14(2).

(3) Confidential interview with staff member, B.C. Council of Human Rights, April 13, 1987.

(4) B.C. Council of Human Rights, 1984-1985 Annual Report, (Victoria: Queen's Printer, 1986), p. 3.

(5) 6 C.H.R.R. (1985) p. D/3064.

(6) See also Black, "Equality Postponed", pp. 228-229.

(7) See I.A. Hunter, "The Origin, Development and Interpretation of Human Rights Legislation", in R. St. J. Macdonald and J. Humphrey, eds., The Practice of Freedom (Toronto: Butterworths, 1979) p. 94.

(8) Confidential interview with former staff member, B.C. Human Rights Commission. Thus the B.C. Civil Liberties Association is incorrect in suggesting that "the same agency will sometimes be both the investigator and the judge of a case." Bill 11 Summary Fact Sheet (1984) p. 2. Not the "agency" but a member designate hears the complaint.

(9) The Human Rights Commission in its 1983 recommendations for appointment autonomy made precisely this argument. How To Make It Work, pp. 31-36.

(10) Bill 27 was allowed to die on the Order Paper after first reading. A "human rights advisory panel", composed of representatives of major groups and coalitions, was appointed in the fall of 1983 to make recommendations on the drafting of a new Act. There is evidence that the specific recommendations of the panel were not considered -- three days intervened between the submission of the report and the introduc-

tion of Bill 11 -- but the government can reasonably be expected to have realized that the board appointment power favours the views of human rights advocates. see Black, "Equality Postponed", p. 234n53.

(11) "Speed", said the Minister of Labour, "will be one of the key features of the administration of our new act." B.C. Legislative Assembly Debates, April 12, 1984, pp. 4373-4374.

(12) W.S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada", 46 Canadian Bar Review (1968) pp. 565-590; "Human Rights", in D.J. Bellamy et al, eds., The Provincial Political Systems: comparative essays (Toronto: Methuen, 1976) pp. 269-279; Discrimination and the Law (Toronto: Richard De Boo, 1982) chapter 2; "Equality and Discrimination", in R.S. Abella and M.C. Rothman eds., Justice Beyond Orwell (Montreal: Les Editions Yvon Blais Inc., 1985).

(13) Discrimination and the Law, pp. 29-30. It is significant that the effectiveness of a particular scheme is measured by the number of complaints it facilitates.

(14) Ibid., p. 31. "Human rights commissions are really in the business of changing and influencing public attitudes." Daniel Hill, "Equality and Minorities", in Abella and Rothman, eds., p. 287.

(15) Hill, "Equality and Minorities", p. 287.

(16) J.M. Vickers, "Major Equality Issues of the Eighties" Canadian Human Rights Yearbook (1983-1984) p. 48.

(17) See I.A. Hunter, "Liberty and Equality: Tale of Two Codes" 29 McGill Law Journal (1983) pp. 3-9.

(18) See, e.g., W.R. Black, Employment Equality: A Systemic Approach (Ottawa: Human Rights Research and Education Centre, 1985).

(19) The literature on regulations and the regulatory state now understands the "private" citizen to be a regulator, that is, an implementor of public policy goals. Everything is public, since even those policy decisions not to alter "private" behaviour are made with a policy purpose in mind. See R.A. MacDonald, "Under-

standing Regulation by Regulations", in I. Bernier and A. Lajoie, eds., Regulations, Crown Corporations and Administrative Tribunals (Toronto: University of Toronto Press, 1985) pp. 81-154, esp. p. 104.

(20) Hunter, "Liberty and Equality", p. 6.

(21) B.C. Legislative Assembly Debates May 3, 1984, p. 4495; also April 12, 1984, p. 4388, and May 4, 1984, pp. 4534, 4543.

(22) Black, "Equality Postponed", p. 221.

(23) B.C. was the only province in which the director had no discretion not to investigate complaints when they were filed without consent of the victim. Tarnopolsky, Discrimination and the Law, p. 440.

(24) Since 1981, the right of appeal on a question of fact from a board decision extended only to the B.C. Supreme Court. Appeals could be made from this court only with leave of the higher court. Formerly, appeals as of right extended also to the B.C. Court of Appeal.

(25) R.I. Heenan, "Administrative Tribunals: Is Justice Done?" in Abella and Rothman, eds.. The author makes the important argument that in advancing the state of the law administrative bodies forsake one the primary benefits an administrative framework possesses over a judicial framework, namely expedition. Several B.C. human rights disputes were resolved after as many as three or four years of appeals.

(26) Confidential interview with former staff member, B.C. Human Rights Commission, April 15, 1987.

(27) Significantly, Bill 27 did not provide for third party complaints at all. The Act does represent a concession to opponents but nonetheless preserves the limitations of Bill 27's complaint scheme.

(28) Vancouver Sun September 25, 1984, p. A12. This issue arose soon after the Council took jurisdiction. Its perceptions about its limited mandate may have changed since then.

(29) M. Eberts, "The Use of Litigation Under the Canadian Charter of Rights and Freedoms as a Strategy for Achieving Change" in N. Nevitte and A. Kornberg, eds., Minorities and the Canadian State (Oakville: Mosaic Press, 1985) p. 62.

(30) For a thorough history of the NAACP and a detailed analysis of the litigation strategies it employed, see R. Kluger, Simple Justice (New York: Alfred A. Knopf, 1976).

(31) Canadian Advisory Council on the Status of Women, Women and Legal Action (Ottawa, 1984) p. 117.

(32) Ibid., p. 5.

(33) Ibid., p. 33.

(34) The open-endedness of section 15 of the Charter is one of the primary reasons for excitement in the human rights community about the potential of the Charter as a vehicle of social transformation.

(35) Black, "Equality Postponed", p. 226. Emphasis added.

(36) Gay Alliance Towards Equality v. Vancouver Sun (B.C. Human Rights Board of Inquiry) February 24, 1975. Note that B.C. board decisions rendered prior to 1980, the year of the creation of the Canadian Human Rights Reporter, are unreported in all but a collection of such decisions from all Canadian jurisdictions produced by the Human Rights Research and Education Centre at the University of Ottawa. Hereafter, unreported B.C. decisions will be denoted (B.C.H.R.B.I.).

(37) See Human Rights for British Columbians, p. 30.

(38) Confidential interview with former staff member, B.C. Human Rights Commission.

CHAPTER THREE

THE REASONABLE CAUSE PROVISION

Introduction

An analysis of the Code's enforcement mechanisms and the relationships of authority and accountability they created is only half the story. Equally important are the substantive bases on which enforcment is grounded, the actual anti-discrimination provisions to which the Code's enforcers sought adherence. This chapter seeks to examine critically the central feature of the Code, the reasonable cause standard, what one of its defenders called the "guts" of the legislation. From this examination something of the Social Credit human rights policy can be understood; for while the reasonable cause provision was the centrepiece of the Code, it is noticeably absent in the 1984 Human Rights Act.

The reasons for the elimination of this provision, one can well imagine, are politically sensitive for a government which, like all others, wants to be known for its respect for human rights. Thus there are precious few statements by members of the government revealing the reasons for "gutting" B.C.'s human rights legislation. Some guidance is given, however, and it is possible to make

some intelligent extrapolations from available evidence.

One of the primary reasons given for the exclusion of the reasonable cause standard was that it lacked specificity; no one could definitely say what was and was not discriminatory conduct. This transferred discretionary authority to boards of inquiry, who had to impose a meaning on the provision which was not immediately evident from the wording of the legislation. Without this guidance, boards were tempted to follow various courses of construction, of differing degrees of intrusiveness; and employers and other respondents had little idea of how the Code was to be applied to their disputes. Additionally, the interpretation of the provision intruded upon decision-making processes, primarily those in the employment sphere. These intrusions were not sympathetically received by a government whose chief policy principle was the restraint of government interference in the private sector. In all, the reasonable cause standard was a more potent and volatile instrument than it would first appear. It is hardly surprising that a restraint-oriented government chose to adopt a more conventional form of anti-discrimination protection.

The Reasonable Cause Provision

When the B.C. Human Rights Code was enacted in 1973, the NDP government derided the former Human Rights Act(1) not only for the weakness of its enforcement power but for the narrow scope of its substantive provisions. The Minister of Labour claimed that under "the old legislation and through experience we found that not every type of discrimination was recognized...,"(2) implying that the new Human Rights Code would address this flaw.

Yet the prohibition of "every type of discrimination" is a high expectation. Human conduct is inherently discriminatory, and no previous piece of legislation had attempted to prohibit "every type of discrimination." Rather, a specified number of grounds of discrimination were proscribed and this list was periodically expanded through legislative amendment. The amendments were the products either of successful lobbying on the part of groups interested in protection or of the initiatives of sympathetic governments.

While not denying the merits of the determinaton of legislative mandates by representative, democratic bodies, human rights advocates see the legislative process as a less-than-perfect arena for the expansion of

anti-discrimination legislation, viewing it as cumbersome and distracting. Black argues:

> ...though new grounds have been added over the years to conform to changing public expectations, the legislation has often been criticized as outmoded before it has been proclaimed. Theoretically, the legislation could be amended frequently to meet these criticisms, but that solution has obvious disadvantages including the fact that other legislative priorities may cause considerable delay.(3)

In other words, legislators may not agree that frequent amendment is a high priority, deserving immediate attention. They may count other issues more important, therefore denying expectant groups anti-discriminaton protection.

As an open-ended anti-discrimination provision, the reasonable cause formulation avoids this problem by transferring de facto legislative power from legislative to judicial and quasi-judicial bodies. The novel provision was used in three sections of the Code, covering access to public facilities, employment, and membership in unions, occupational, and business associations. Of these, section 8, the employment provision, was considered to be the most important substantive section. It reads in part:

> 8. (1) Every person has the right of equality of opportunity based on bona fide

> qualifications in respect of his occupation or employment...; and, without limiting the generality of the foregoing,
>
> (a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and
>
> (b) no employment agency shall refuse to refer him for employment,
>
> unless reasonable cause exists for the refusal or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (a) the race, religion, colour, age, marital status, ancestry, place of origin or political belief of any person or class of persons shall not constitute reasonable cause;
>
> (b) a provision respecting Canadian citizenship in an Act constitutes reasonable cause;
>
> (c) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency;
>
> ...

Section 8 was the most heavily litigated part of the Code. And its interpretation generated substantial controversy among boards of inquiry. Much of this controversy focused on the proper meaning of the open-ended dimension of the reasonable cause formulation.

The Meaning of Reasonable Cause

The phrase "reasonable cause" was the child of William Black, a University of British Columbia law professor and contributor to the drafting and development of the Code. For a term he was a member of the Human Rights Commission. While the concept of reasonable cause is unique in B.C., he wrote in 1981, "it is not without precedent. At common law, innkeepers and common carriers are prohibited from denying their accommodation or services without reasonable cause, and it appears that a similar obligation once extended to other businesses as well."(4) In second reading debate on the Code, the Minister of Labour stated that the provision was merely a "common law test", a principle whose meaning and breadth would grow with increasing application to unique circumstances.(5)

Unquestionably the reasonable cause provision was intended to expand human rights protections beyond those provided by conventional, exhaustive lists of prohibited grounds. As the NDP Minister of Labour put it, "previously discrimination was prohibited on the basis of race, religion, sex, colour, nationality, ancestry or place of origin or age if over 45 years. But now far wider protection is given...."(6) So the Code was intended to be open-ended, but what was the nature of this open-endedness? Boards of

inquiry did not answer this question consistently over the life of the Code. One interpretation of the provision ties it to the list of prohibited grounds deemed not to constitute reasonable cause for discriminatory conduct. In this view, listed grounds are examples of the kinds of grounds of discrimination prohibited by the reasonable cause provision. The blanket prohibition extends beyond the listed grounds, but the grounds as yet unidentified must be substantially similar to those that are listed.

Most if not all listed grounds have a stigmatic character. That is, persons of a certain race, colour, religion, or sex are denigrated or hated because of their possession of one or more of these characteristics. Furthermore, listed grounds, with certain notable exceptions, are very poor indicators of what a person is really like or predictors of how he will behave in certain situations. Nothing is gained, in other words, by referring to these factors in making decisions about individuals. Under this first interpretation of "reasonable cause", unlisted grounds must share these characteristics.

Reasonable cause in this understanding is novel in the sense that it permits boards to engage in the quasi-legislative activity of adding new prohibited grounds of discrimination, but it is conventional in the sense that

its approach to discrimination is the familiar prohibition of grounds of discrimination deemed to be generally irrelevant to decision-making in the areas covered by the Code.

One member of the government, in second reading debate on the Code, seemed to take this grounds-oriented approach to reasonable cause. She noted that many groups sought explicit protection by the Code, among them groups seeking protection against discrimination on the basis of sexual orientation. Not all groups were explicitly identified, she conceded, but that is not cause for despair. "Although the requests of these members were not spelled out in the Act, by including the statement, 'unless reasonable cause exists', we have in fact given them the protection they were asking for."(7)

The second sense in which the reasonable cause provision can be understood to be open-ended is based more closely on the meaning of the word "reasonable". In regard to an allegation of discriminatory conduct, for instance, the first, or group-oriented, approach to reasonable cause asks the question: Does the conduct involve discrimination on the basis of the kind of prohibited ground covered by the Code, be it explicitly listed or implied by the open-ended wording? The second, or reasonableness, interpretation asks: Was the conduct reasonable or fair to the individual?(8) In other words, this approach is not

limited in its invalidation of unlisted grounds of discrimination to those which are like listed grounds in the respects noted above. No matter how benign may be the general attitude toward persons possessing a certain group characteristic, the characteristic may still be subject to broad scrutiny.

One way, then, to distinguish one interpretation from the other is to examine the reference to listed grounds of discrimination in each. Another way is to probe the meaning of "individual treatment" or "individual assessment" under each approach. Individual treatment is the goal of all human rights legislation, including the B.C. Code. It refers essentially to discrimination-free treatment of persons in relationships of employment, tenancy, accommodation, and so on. Persons ought to be treated on the basis of their individual merits rather than the group characteristics they happen to possess. As one board of inquiry stated: "...the evil at which the Code is aimed is making decisions about individuals based on classes or categories rather than upon individual treatment. Individuals should be evaluated on individual merit and not by category unless the category is related functionally to the evaluation."(9)

For the conventional, group-oriented approach to reasonable cause, individual treatment requires that individu-

als be considered without reference to prohibited group characteristics, listed or unlisted, contained in the Code. However, since not all categorizations are challengeable under this approach, it is possible for the requirements of individual treatment to be satisfied even when the decision leading to the human rights dispute is found to be unfair or unreasonable.

A more stringent view is implied by the reasonableness interpretation. This approach looks to the prospective dimension of decision-making and sets a high standard of predictive accuracy for employers who try to estimate the future behaviour of applicants. Almost all decisions regarding employment are prospective: decisions are predicated on the necessity of predicting how applicants would behave if accepted for the job. Because the future is unknowable with certainty, it can only be guessed or predicted. Some guidance for prediction is given by the fact that group characteristics correlate with varying degrees of accuracy with behaviour, allowing employers some hope of accurate prediction.

It is in the interest of employers to use the best, most accurate predictors of behaviour. Otherwise, efficiency and productivity is lost. But even the best predictive group characteristic is not perfect. Thus a tall and heavy applicant may be too weak to work in a

lumber mill, and a short and light person may be strong enough. If a height/weight standard was used in the application process, the weak applicant would be hired and the strong applicant rejected. Statistical prediction using group characteristics has this basic limitation.

The reasonableness interpretation uses an extreme test of individual treatment. Every imperfect predictive group characteristic is unreasonable and invalid whenever it is applied to the individual exceptions to the rule -- which invariably arise. Dale Gibson clarifies the underlying premise of this approach. Discrimination is abhorrent, he writes, "...whether the stereotype is statistically false or accurate. The unfairness is obvious in the case of inaccurate generalizations....But even stereotypes based on statistically valid generalizations...may be fallacious when applied to any member of the groups identified....Statistically sound stereotypes are the more dangerous ones in fact, because they are more likely to be given wide credence, and to be acted upon when decisions are being made."(10)

In contrast to the group-oriented approach, individual treatment under the reasonableness approach can never be achieved when an unfair decision is made. The former approach concentrates primarily on grounds which traditionally have inspired hatred and bigotry, and which have poor

correlations with employment-related bevaviour; the latter goes beyond these to employment qualifications of even high predictive accuracy. The decision itself must be fair or reasonable. It is not enough for the policy or rule leading to the discrimination to be fair or reasonable in general.

Some speakers in the 1973 debates did not regard the reasonable cause provision as the least bit ambiguous. But its meaning for them was not reducible to the grounds-oriented approach; it was construed to go farther and impose an affirmative duty on employers, persons providing accommodation and services, and business and employment organizations to act fairly in dealings with individuals. Significantly, it was the Minister of Labour who made this argument. He said:

> The criteria [sic] on which discrimination is judged now is the concept of reasonable cause. In other words, the only reason by which a landlord, who advertises public space, could deny access would be an obligation on his part to provide reasonable cause for restricting its access to any member of the public whatsoever.(11)

Hardly a better statement of the reasonableness interpretation exists than this.

Boards applying the reasonableness interpretation have

regarded conduct which involved prediction on the basis of statistical categories simply as unreasonable or unfair. However, such decisions can always be reformulated in terms of the group-oriented approach, such that unfair conduct is actually discrimination on the basis of an offensive ground.

A hypothetical example would be helpful. The decision that a person's employment was terminated after a probation period of one week -- during which time the complainant did not master the skills of the job -- could be held by a board of inquiry to constitute a termination without reasonable cause, contrary to section 8. The time allotted for learning the skills of the job in question was too brief and unfair to persons whose facility with machinery and production routines is not exceptional, though not inordinately poor. The contravention could be reformulated to constitute discrimination against all persons who need a longer period of time to learn the skills of the job in question. The group characteristic here is 'slowness of learning' or 'slowness of starting'; the discrimination occurs when all people who are slow learners or starters are subjected to strict probationary periods at their places of employment and dismissed accordingly.

The inclusion of a group characteristic in a list of prohibited grounds depends on the relative infrequency with

which the group characteristic is a relevant and reasonable qualification. It is senseless to add a group characteristic to the list of prohibited grounds if there exists an overwhelming, or at least substantial, number of reasonable exceptions to the general prohibition. If such was the case with the category of 'slow starters', it would not be included in the list of prohibited grounds and would not be reached by human rights legislation. However, the reasonableness approach avoids these limitations. For it reaches those circumstances, few though they may be, in which the slow starters are unfairly discriminated against. Thus, the reasonableness interpretation covers all the circumstances reached by the group-oriented approach as well as those cases in which discrimination occurs on the basis of a group characteristic which is irrelevant in that instance alone or in any number of others.

The foregoing abstract discussion is not idle academic speculation, but a distillation of the two main branches of the jurisprudence of reasonable cause. Analytically, the differences between them may not be fundamental, but in practice they are significant. Thus it is of some importance to determine which branch boards followed. Actually, they followed both branches, first the reasonableness approach and later the more traditional interpretation.

The Two-Pronged Reasonable Cause Jurisprudence

The first case to be considered involved several employees who worked in a nursing home before the takeover of the facility by the provincial government.(12) The complainants were dismissed prior to the takeover -- an administrative step in the completion of the takeover -- and were told to re-apply for their positions to the personnel officer of the new facility. They did so and their applications were given full consideration. The personnel officer had had the opportunity to become acquainted with and observe the performance of staff of the nursing home prior to the takeover. She was not pleased with the condition of the nursing home, and since the facility was to be upgraded to an extended care facility, she wanted to upgrade its condition and the quality of its staff. One area which was particularly displeasing to the administrator was the kitchen, in which Mrs. Lopetrone worked. On the basis of her observations of Mrs. Lopetrone and an assessment of the condition of the kitchen and the nature of the menu, the administrator rejected Lopetrone's application for employment in the new facility.

The board of inquiry stated that the administrator did not consider all the evidence available adequately to assess Lopetrone's competence. Nor did she appreciate the

mitigating circumstances of the complainant's performance, notably that she had insufficient help, poor equipment to work with, and no control over the menu and portions served to residents. The administrator held her responsible for the menu and servings, and also blamed her for the poor maintenance of the kitchen. It was concluded that the administrator "...reacted unfairly. She asked for no explanation from Mrs. Lopetrone. Indeed, she made no further enquiries of any kind beyond her inspection of the kitchen."(13) If she had "looked into the matter further", she would have understood that Lopetrone "did well under the circumstances." The Society was held to have discriminated without reasonable cause.

In its decision the board made no reference to discrimination on the basis of one or more group characteristics. Indeed, allegations of discrimination on the basis of race and place of origin were dismissed. Reasonable cause was conceived to be a standard of conduct independent of the prohibition of discrimination on the basis of group characteristics. This standard reached beyond specific, offensive and irrelevant decision-making criteria to the nature of the decision-making process and the fairness of the ultimate decision. The personnel administrator inadequately assessed Lopetrone's competence, and thus failed to fulfill her duty of fair, objective, and individual assess-

ment.

Most of the furor over the interpretation of the reasonable cause provision was created by the Lopetrone case. Equally significant, however, for an understanding of the policy implications of the reasonableness interpretation is another case decided a few months after Lopetrone. In Wilson v. Vancouver Vocational Institute(14) the complainant claimed that she was discriminated against on the bases of sex and age, and without reasonable cause. She was enrolled in a graphic arts program requiring both theoretical aptitude and practical skills in the operation of machinery. Her instructors dismissed her from the program after four months had passed. Several reasons were offered, but they are all reducible to the contention that she performed very poorly on the machines, possessing little practical ability.(15)

A majority of the three person board found that a contravention of the Code had occurred: Wilson had been terminated without reasonable cause. The chairman argued:

> It is my opinion that the Respondent has contravened Section 3(1) of the Human Rights Code. In view of the short time that elapsed from the complainant's enrollment and her termination, I do not feel she was given an adequate opportunity to become proficient in the use of the machinery. Further, no extra time was extended to her to complete assignments or use the machinery and no special effort was made by the

> instructors to teach her the practical work even though they saw she was having some difficulty with parts of the course. The reasons advanced by the Respondent for termination of the complainant do not, in my opinion, amount to reasonable cause....(16)

Accordingly, the board ordered that the Institute "provide to the complainant eighteen three-hour lessons on the press of her choice by an instructor satisfactory to her", as well as instruction in the use of cameras under the same terms.

As in Lopetrone, the board here divorced the reasonable cause provision from the prohibited grounds, interpreting reasonable cause to impose a standard of fairness on all decision-making. In the name of individual treatment the board searched for a way to have Wilson's instructors know her individual abilities, regardless of the fact that Wilson could not pick up the skills as quickly as the other students in the class. Her individual needs had to be met. Fair treatment in this case really meant that Wilson be kept on until she learned the practical skills.

The departure from this reasonableness approach began with the dissenting member's opinion in Wilson. Granting that Wilson was given insufficient opportunity to master the use of the machinery, and that no "special effort" was

made to develop her competence, the dissenting member argued that the truth of these claims does not amount to an absence of reasonable cause for termination. The Code only reaches conduct which distinguishes one person from others of similar abilities when the distinguishing conduct is predicated upon "irrational or unwarranted prejudices or biases stemming from some characteristics of the person treated differently such as race, sex, age, etc.." He continued:

> The scheme of the [Code] incorporating, as it does, the concept of "reasonable cause" does not, in my view, extend the operation of the statute to the point that all citizens are obliged to act with perfect fairness in every aspect of their conduct. So long as an individual assessment is made unaffected by motivations arising out of such characteristics as race, sex, age, etc., it is my view that such an assessment, whether or not a Board of Inquiry would agree that it was the correct assessment, is not subject to review....

If Lopetrone links the Code to a "standard of absolute fairness", he wrote, then "the decision is incorrect in law."

This dissent by no means exhausts the criticism of the jurisprudence represented by the Lopetrone/Wilson cases. Several boards thereafter made particular efforts to discount the authority and correctness of these decisions.

The first was the board in Jefferson v. Baldwin and B.C. Ferries, which considered an allegation of discrimination on the basis of physical disability, an unlisted ground. At the outset the board established the meaning of the law to be applied to the facts. It understood the Legislature to have used the reasonable cause provision to permit boards to "decide" which unlisted grounds of discrimination fall under the general prohibition. It noted that the board in Lopetrone approached the meaning of the provision "from a different perspective. Rather than listing protected and unprotected categories, that board focused on the decision-making of the respondents and concluded that in the case of two of the three applicants, the respondent's decision-making was unreasonable."(17) It continued:

> This board prefers to approach the question of reasonable cause from a different direction. We view the Human Rights Code more as a discrimination statute than as a statute designed to upgrade the reasoning processes of prospective employers. While we do not wish to be taken as approving the employment practices described in the Lopetrone decision, we are not convinced that the statute is aimed at curing the problems therein described.(18)

Reasonable cause, then, is to be understood to require boards to concentrate on the "categorization process" and

"identify" prohibited but unspecified grounds. Such an identification, however, does not proceed by reference to "any single standard" which differentiates the prohibited from permitted grounds of discrimination. There is "no better approach than to examine the categories which have attracted the concern of our community historically and currently", a process which involves the analysis of other jurisdictions' lists of prohibited grounds and hearing the testimony of experts with knowledge of the problems of particular groups.(19)

Even more directly in opposition to the Lopetrone decision was that in Bremer v. Bd. of School Trustees Sooke.(20) Bremer was a school teacher in search of a position with the Sooke board. Her husband had been dismissed from his position as Commissioner of Education for B.C. by the Premier, an issue which created considerable public controversy. Bremer was not offered the position. She argued before the board that she was discriminated against without reasonable cause contrary to section 8, claiming that the refusal to hire was based on the fact that she shared her surname with her unpopular husband. Before the board was the question of whether one's name was a prohibited consideration under the terms of the Code.

In the course of determining that one's name could be

construed to be a prohibited ground, the board followed Jefferson in adopting the group-oriented approach to reasonable cause. Citing a line of decisions in which boards found discrimination to have occurred on the basis of unlisted grounds,(21) the board concluded that the provision was intended by the Legislature to protect classes of persons from "prejudicial conduct relating to the differentiating group characteristic which distinguishes the class or category from others in society."(22) But the "list of prohibited considerations is never closed."(23) Indeed, the "strength of the reasonable cause standard is the flexibility it provides the entire statute."(24)

Despite its flexibility, limitations on the scope of the provision must be respected. Repeating the point made in Jefferson, the board here stated that the provision does not impose a standard of absolute fairness; nor does it seek to promote "an abstract, perfect form of equality." Judging from the example given to illustrate its meaning, the board must have meant equality of opportunity. For it claimed that a qualified job candidate who fails in an employment competition because his interviewer had a headache and was bothered by the candidate's loud voice would not have recourse in a human rights proceeding. Though the treatment was unfair, the candidate was accorded individual treatment; no discrimination on the basis of a prohibited

ground took place. "The Code does not prohibit mistaken judgement where individual assessments are made; the Code only makes such individual assessments mandatory."(25) In the case at hand, the applicant was refused employment because of the method by which she was recommended for the position and because of her particularly strong, outspoken personality. "A consideration of either of these factors," the board stated, is not remotely akin to a consideration of any of the factors enumerated in ss. 2 of s. 8."(26)

Other boards affirmed this interpretation. If the reasonableness approach was consistently followed, the board in Holloway warned, the Code would encroach upon the jurisdiction of labour relations boards.(27) The chairman in Lopetrone, Mohan Jawl, in a later decision reversed his earlier view of reasonable cause, stating that though the complainant in the immediate case was treated unfairly, "the Code does not entitle us to intervene in every instance where someone is treated unfairly."(28) The grounds-oriented view of reasonable cause became the authoritative view from about 1978 onward, buttressed in 1979 by the Supreme Court of Canada's consideration of an appeal of a B.C. human rights complaint.(29) Many other decisions follow the grounds-oriented approach.(30)

It is worthwhile to reflect on the importance of the stunted growth of the reasonableness jurisprudence. Why

did this approach appear early in the life of the Code rather than later? Are the particular intellectual and political sensibilities of members of early boards of inquiry to blame? This is not clear, since, as was just mentioned, one chairman completely changed his mind about the meaning of reasonable cause after reading decisions rendered subsequent to Lopetrone.

On the other hand, the reasonableness approach seemed to die with the defeat of the NDP government in 1976. Perhaps the members of boards of inquiry appointed by the Social Credit Minister of Labour conservatively construed any ambiguity in the legislation, consistent with the tenour of the new government. It is possible, as some boards stated, that there arose doubt that the implications of the reasonableness approach could have been intended by the Legislature. Faced with the prospect of venturing into uncharted waters, boards retreated to the familiar group-oriented approach.

Some observers argue that "the clear and unambiguous language of the Human Rights Code" points to the reasonableness interpretation, while "the probable intent of the Legislature" suggests the group-oriented approach.(31) Yet, others have pointed to the provision's "vague and ambiguous quality", making it difficult for boards to develop a consistent interpretive approach.(32) It is even

argued that "the test applied by a Board of Inquiry to a particular set of facts may be made wider or narrower depending upon the desired result...," a criticism which suggests that the reasonable cause standard was almost meaningless.(33) Because of this ambiguity the standard has been labelled "dangerously open-ended", "unquestionably the most sweeping prohibition of discrimination of any provincial legislation in Canada."(34) Despite this ambiguity, however, early boards adopted the reasonableness interpretation because it was an obvious extension of the logic of individual treatment and was not clearly precluded by the wording of the provision itself.

The Social Credit Response

The reasonable cause provision is notably absent in the 1984 Human Rights Act. The Social Credit government reverted to the conventional, comprehensive list of prohibited grounds. The list itself contains more grounds than those enumerated in the Code, but the additional protections are merely codifications of grounds determined by boards of inquiry to fall under the general reasonable cause protection of the Code. As well, they bring British Columbia into line with most other jurisdictions' legislation in Canada. Beneath this thin veil of human rights

activism was an attempt to limit the number of prohibited grounds and reduce the latitude of boards of inquiry expansively to interpret anti-discrimination protections. There are three inter-related reasons for the elimination of the reasonable cause provision: it was unfair to respondents; it was vague and unclear; and it permitted boards to render decisions which potentially had the effect of transforming decision-making processes. A detailed examination of this latter reason will be reserved for the last section of this chapter.

The Supreme Court in the 1979 Gay Alliance case noted that the meaning of reasonable cause is determined "on the particular facts and circumstances of each case."(35) In other words, boards do not issue decrees or pronouncements on the nature of the provision; they wait for a dispute to come before them and interpret the provision in the light of its facts. For an open-ended anti-discrimination provision, even if the grounds-oriented approach is taken, this creates a difficulty. Respondents may not know that the group characteristic to which they have always had reference in their decision-making is going to be interpreted by the board to fall under the reasonable cause prohibition. For example, height and weight standards were widely used to determine the ability of applicants to do jobs in lumber mills. Not until a short and light woman complained and a

board decide in her favour did the respondent learn that height and weight qualifications were covered by the reasonable cause provision.(36) Boards and academics alike have acknowledged that the reasonable cause provision led to ex post facto determinations of guilt when unlisted grounds were added to the list of prohibited grounds. In Jefferson, the board conceded that "we have identified a protected category which might not have been recognized by persons such as [the respondent] prior to our decision...." However, the board was merely following the course "created by the Legislature which necessarily requires that rules be made on a case by case basis."(37)

It is important to note that proponents of the reasonable cause standard can avoid the above criticism only by stressing the reasonableness interpretation of reasonable cause. For the affirmative duty of reasonable care -- reasonable qualifications, probation periods, etc. -- then applies prospectively to everyone. For reasons already mentioned and to be further discussed below, however, this defence has not been made.

The Minister of Labour confidently asserted that "one of the problems has been that people didn't understand what was discrimination in this province. There were no clear guidelines, no clear routes to follow; that's one of the reasons it took so long for the resolution of disputes in

British Columbia."(38) He emphasized, however, not so much the unfairness of retrospective identification of prohibited grounds as the educational limitations thereof. As was mentioned in the last chapter, human rights legislation has been increasingly structured with educational or promotional purposes in mind. Education, though, occurs in more than one way: the wording of the legislation itself is educational, its substantive provisions instructive in what is and what is not acceptable discrimination. As legislation becomes more vague and indeterminate, this function is less effectively served.

The preceding implies that the Code's anti-discrimination provisions were simply vague. "I think we need to be very specific, clear and simple," the Minister argued, "so that the public doesn't misunderstand what we're doing and people who are asked to adjudicate know exactly where they're supposed to go."(39) One suspects that he was referring to more than the indeterminate set of unlisted grounds; if the directional manner of speech is significant, he was referring to confusion among early boards as to the proper interpretation of the provision.

This assertion was not made unequivocally. An opposition tactic in the debates was to get the government to explain the exclusion of specific groups from the ambit of

the new Act. The political attraction of the Code was that one could claim that any group was potentially protected from discrimination. Naturally, some political embarrassment is involved in admitting that some groups are left out. The Minister avoided these admissions, arguing instead that some groups, such as single parents who are welfare recipients seeking tenancy, could seek protection under the prohibition of discrimination on the basis of sex.(40) Thus he rejected proposed opposition amendments which would ostensibly add more group characteristics to the list of prohibited grounds.

An opposition member was quick to catch a contradiction in the Minister's position. On the one hand, he rejected the reasonable cause formula because it was not specific enough, yet on the other, he rejected calls for the inclusion of more (and more specific) grounds, claiming that grounds already listed could be construed broadly or generally enough to cover these additional grounds.

To avoid greater embarrassment, the government had to fall into this rhetorical contradiction. Otherwise, its criticisms of the Code's vagueness would force it to admit that unlisted groups were being excluded from anti-discrimination protection, a politically unpalatable alternative.

The correction of the Code's vagueness is surely

consistent with one of the principles underlying the restraint agenda, namely the introduction of greater political accountability into the work of government agencies. So is the limitation of the number and types of grounds prohibited by the new Act. The principles of a liberal democratic order require human rights legislation with strong prohibitions of discrimination on the basis of stigmatic and related characteristics over which the individual has no control. But is the use of such characteristics as personal appearance, height and weight, or slow learning capability similarly repugnant to liberal democratic principles? The Social Credit government drew a distinction between these types of group characteristics, permitting competition to determine what group characteristics are relevant in decision-making processes. Its criticism of the Code was that it allowed a second tier of decision-making to pervade the areas of employment, accommodation and membership in employment-related associations, transforming decision-making processes and creating extra costs.

Reasonable Cause and the Transformation of Decision-Making

Confusion about the meaning of reasonable cause was not the only issue of concern to the Social Credit government.

Evidence indicates that the provision's impact on employment-related decision-making was also a worry, particularly insofar as costs were implied. Is there any substance to the claim that reasonable cause transformed, or at least had the potential to transform, decision-making? Two characteristics of the provision -- its open-endedness and its focus on objective evidence for the proof of reasonable conduct -- suggest that this is so. The relationship between these two characteristics and decision-making will be explored in this final section.

The Erosion of Prospective Decision-Making

In the previous discussion of prospective decision-making it was observed that knowledge about the future behaviour of individuals can at best be probabilistic. To this can be added the observation that the more specific the knowledge sought, the more difficult and costly it will be to obtain.

Predictive capability can be increased with the use of more than one statistical category, as well as with the use of categories that are highly correlated with the behaviour sought. However, as Thomas Sowell has insistently claimed, knowledge is almost never obtained without costs. The cost of a decision varies directly with the quality of the knowledge employed. This is because decision-making

"through any kind of process involves costs created by the decision-making process itself, quite aside from the costs created by the particular decision reached."(41) Frequently, the cost of a decision-making process outweighs the benefits of employing that process to generate the best possible decision.(42)

Sometimes, employers avoid the limitations of prospective decision-making by structuring decision-making processes with a retrospective element. Retrospective decision-making allows decisions to be made about the future (an allocation of benefits, promotions, etc.) based on the evaluation of past performance in the same or a related activity. Probation periods, where a worker's progress over a period of time at a job determines his future in that position, are an example. This process can be costly due to investments of time and training, and so is usually combined with prospective processes which weed out unlikely candidates for positions.

Retrospective decision-making is an attempt to go beyond the limitations of prediction on the basis of statistical categories to the evaluation based on individual treatment. Individual treatment is possible in retrospective decision-making because time is afforded evaluators to understand the individual as more than a concatenation of group characteristics. Time is afforded

for the determination of the question: Does this particular individual have the ability to do the job? Such determinations cannot be exhaustive, since individuals are highly complex and arguably can be fully known only after a lifetime of 'getting to know'. Businesses cannot afford a lifelong probation period. A duration of this length is senseless in any event because there would not be a future of employment to determine. Thus, even retrospective decisions of this nature are in varying degrees prospective. In all but the most extreme cases, individual treatment remains an ideal, capable of being more or less approximated, but never perfectly achieved.(43)

In the hope of attaining the ideal of individual treatment, human rights advocates have sought anti-discrimination protections which attack the prospective dimension of decision-making. This has occured with differing degrees of boldness. The more restrained approach has been to require the use only of classifications which bear a clear functional relationship to the employment in question and to invalidate all others. This involves the finer sorting of categories, the movement from the use of proxy indicators to more precise and relevant variables. The board in Kroff stated: "Our society now believes that individuals should be evaluated on individual merit and not on the category into which they fall, unless

the category is related functionally to the evaluation."(44) This restrained concern with relevance can be identified with the group-oriented approach to reasonable cause. The expansion of lists of prohibited grounds of discrimination in Canadian jurisdictions' legislation reflects this approach, as does the increase in the number of unlisted grounds under the reasonable cause provision in B.C..

Conservative though this concern with relevance may be, it must be noted that "relevance" is often difficult to determine, and boards are likely to have a more high-minded, even imperious understanding of how decisions ought to be made. Boards, after all, have neither the time nor the inclination to work out all the costs involved in creating a decision-making process which employs only "functional" categories; they do not have the knowledge to determine what is functional in any event because that is not their business.(45) Attitudes like these need not be the products of institutional arrogance or ideological animus; however, ignorance of the intricacies of other people's business does not often inspire respect.

Occasionally, human rights enforcers were frank about the effects of their decisions. The board in Kroff wrote that the Human Rights Code required "a higher and more expensive standard of conduct."(46) Others were less

candid. In the Foster case, the board stated that it should not "easily second guess hiring practices of honest men with long experience in the industry." Hiring "is not an exact science" and a judicial body "should not put the hiring practices of an employer under a microscope with a view to detecting minor irregularities."(47) This comment was made after the board concluded that the respondent company had an "eclectic hiring process" and used "meaningless, or near-meaningless factors" in its hiring decisions. After assessing the nature of the work and conducting an on-site inspection, the board concluded that instead of selecting persons on the basis of strength, the company should have selected on the basis of flexibility and stamina. If it had done so, the complainant, a short and light but otherwise capable woman, would have been given the job. Despite its unwillingness to second-guess hiring practices, the board felt no reluctance to engage in a form of management consultation in relation to which Foster's specific complaint seemed a secondary or incidental consideration.

In addition to the invalidation of grounds used for prospective decision-making in B.C., boards were occasionally tempted to invalidate prospective decision-making more directly and radically by ordering respondents to introduce retrospective elements into their decision-making. No

better example exists than the aforementioned Wilson case, in which the instructors of the Vancouver Vocational Institute were criticized for not allowing Wilson "an adequate opportunity to become proficient in the use of the machinery" used in the program. Accordingly, Wilson was to be given extra instruction ouside of class time. After four months of instruction and observation, the instructors predicted that she would not improve in the practical work. The board thought that this was not a long enough time, that her particular abilities were not yet known; that, expressed in terms of the group-oriented approach, she was discriminated against on the basis of 'slow starting'.

For reasons which were not presented in the decision, the board settled on eighteen three-hour lessons on each of two machines to resolve the dispute. Perhaps it was thought that this was sufficient to compensate for Wilson's slow starting. Perhaps an order to allow Wilson to repeat the whole course seemed to the board to be impractical, too costly to the Institute. But the time period seems arbitrary. The board tacitly understood Wilson to fall into the category of slow starters whose disadvantage could be remedied by a set amount of extra instruction. If she failed to understand the machinery at the end of the extra instruction, her enrollment would be terminated. But could this not simply mean that she was a slower starter than the

board had thought, and that she needed more time, say twice as much or three times as much? At the extreme, any determinate period of time used for the purpose of predicting future ability is a form of discrimination on the basis of a group characteristic, hence unfair.

Theoretically, Wilson should have been taken on and given instruction until she learned the skills of graphic arts. Her position in the course, and presumably in employment afterward, would be contingent upon her own willingness to keep trying. But the logic of individual treatment extends even farther than this. Why should only those applicants with previous experience be chosen for a position on the graphic arts course? If more people apply than can be chosen, why should early applicants be chosen before late applicants? Is this not discrimination against 'slow applicants', against those who deliberate before acting in favour of the rash actors?

The reasons why boards have not played out the logic of individual treatment are ultimately practical ones, borne of the imagined costs and social disruptions attending the transformation of decision-making. This analysis of individual treatment makes clear that cost-oriented considerations influence all decisions, even those made by human rights enforcers who are not responsible for implementing the decisions they make, nor for

assuming their costs. The threshold of tolerance of costs in the name of individual treatment is higher for them precisely because they are more insulated than other decision-makers from the complex array of costs circumscribing every decision.

Individual treatment is the bulwark of a discrimination-free world. Contemporary egalitarianism is promoted and furthered with reference to this standard of conduct. As is true of other ideals, however, the actualization of individual treatment and through it an egalitarian world is constrained by the conditions of scarcity and costly knowledge that define daily life.

Objective Cause for Discrimination

Early human rights provisions sought to prohibit particularly malicious forms of discrimination, and in such cases evil intent was fairly easy to prove. Bigotry was not as socially offensive as it is today and so was easy to detect. Two developments distinguish contemporary protections from early legislation. First, nonstigmatic grounds such as age, marital status, and sexual preference have increasingly been prohibited. Their addition to the list of prohibited grounds has not been easy and obvious; it is an issue on which reasonable people have differed. The existence of such principles as "bona fide occupational

qualification" and "reasonable accommodation" are evidence that for these newer grounds prohibition is a complex issue. Second, the existence of objective evidence has increasingly been used to identify discriminatory conduct. This has been done, in large part, to counter the alleged sophistication with which discriminators hide their evil intent. Anybody can say that he did not intend to discriminate, it is argued. The mind of the discriminator has become less important, less determinative of the case.

The relationship between subjective and objective determinants of behaviour was clarified in the early 1980s. The Supreme Court of Canada in Ontario Human Rights Commission v. Borough of Etobicoke(48) gave meaning to these two components:

> To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such a limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.(49)

In B.C. the reasonable cause provision was given a similar meaning. Again, the Supreme Court of Canada in its consideration of the GATE case interpreted the provision primarily to constitute an "objective test" of conduct, though it also insisted that a classification must be used in good faith.(50) In short, good faith is a necessary but not sufficient condition for justifying a classification. Furthermore, "good faith" is not a defence against the claim that classification is "objectively" unnecessary and unreasonable. This primacy of "good faith" over "objectivity" has been difficult to maintain in practice, however. Knowledge is not a free good and the onus of establishing the objective bona fides of a classification is placed on the employer, who is acutely sensitive to costs. Recognizing this, boards have exercised restraint by occasionally falling back on "honest belief" or "good faith" as a defence against objective error and irrelevance.

To illustrate, consider three cases under the B.C. legislation turning on the question whether employment rules that exclude those with mental or physical handicaps can be justified as bona fide occupational qualifications. In the first of these cases, the official position is applied and "honest belief" is rejected as a defence. The following two cases show the practical limits of this approach, and thus the necessity of falling back upon a

defence of honest belief.

In the first case, Jorgenson v. B.C. Ice Storage,(51) a female worker was denied work in a more physically demanding class of work because of certain disabilities her employer thought she possessed. She taped her wrists regularly and on a few occasions complained of back pain. The employer attributed her apparent ill-health to the work she was doing and on this basis refused her request for more arduous work. It was later determined at the board hearing that the back pain was due to an implanted intra-uterine device, that wrist taping was commonly done for protection and added strength, and was practiced even by some male employees. The employer did not offer arguments substantiating honest belief, so the board made no such finding. It continued:

> ...even if the Employer held an honest belief...such honest belief would not constitute reasonable cause if the alleged facts upon which such honest belief were based did not, in fact, exist, or were not as the Employer believed.(52)

The absence of authentication of the employer's perception of a disability was determinative of the case. Resort should have been had to medical examination and evidence.

The next two cases show the limits of this approach. In Andruchiw v. Corp. of District of Burnaby(53) the

complainant applied to the Corporation for a position as fireman and, having passed the initial screening, was required to undergo a medical examination, including back X-rays. The X-rays revealed an interarticularis defect (separation of vertabrae) on one side of the L-2 vertabrae. The effect of this defect on Andruchiw's performance as a fireman was the central issue. The Corporation's doctor referred to a 1964 medical report on the risks of injury for different types of work and used its evaluation of back defects to recommend that Andruchiw not be hired. As was discovered at the board hearings, however, the report was "outdated and of questionable value" in light of more recent medical evidence.(54) Studies after 1964 suggest that this back defect in such a location in the spine would not adversely affect a fireman's ability or safety requirements. Andruchiw was subjected to a false standard. Whatever the 1964 report said, the truth was that Andruchiw's back defect should not have been used to deny him employment.

This case paralleled Jorgenson in all respects except that recourse was to medical evidence was undertaken, the credibility thereof notwithstanding. Is this difference so significant as to warrant a different decision? The board in Andruchiw thought so. The 1964 report was obsolete, but "the Corporation did not have the benefit of that perspec-

tive." The Corporation is "obliged to maintain high selection standards, including high medical standards." But, since "the Complainant's back was both revealed and determined through medical opinion to be potentially troublesome", reasonable cause existed for the refusal to employ.

The key factor seems to be the effort made by the Corporation to seek out objective evidence for its decisions, not the actual substance of the evidence. Is this not a re-introduction of the notion of honest belief, this time as a recognition of the limitations on the acquisition and use of knowledge in decision-making? Certainly the board cannot claim to be consistent with Jorgenson in stressing the importance of objective evidence. In the face of all the implications of requiring employers actively to seek the best and latest medical evidence, the board exonerated the Corporation on the basis of its effort to get a medical opinion. Insofar as such an effort can be analytically distinguished from the actual nature of the evidence collected, this decision can be understood to re-establish honest belief -- the mind and will of the respondent -- as the primary test of discriminatory conduct.

The board's lack of consistency on the issue of objective evidence did not go unnoticed. In a minority

opinion in Cook v. Noble et al(55) a dissenting board member, in discussing the place of medical opinions in the weighing of objective evidence, had the following to say:

> Reliance on a medical opinion may or may not provide an employer with reasonable cause, depending on all the circumstances. The question in the end is whether assessment of an applicant was based on his abilities as an individual rather than upon his sharing a particular characteristic with other persons where there are common preconceptions about that characteristic. In my view, such preconceptions may arise in a number of ways (including, possibly, in medical literature) and may operate on the thinking of a professional medical person as much as on anyone else. As may be seen, I do not agree with the Board in the Andruchiw case if what the Board is saying is that reliance on a medical opinion is enough to establish reasonable cause in every case.(56)

If heeded, this minority opinion (obiter dicta at that) would have momentous implications for the transformation of decision-making processes, and would lead to inestimable costs. It must be emphasized that it contains a more consistent understanding of individual treatment than that contained in Andruchiw. The fact that honest belief was re-introduced as a defence in the very case in which the implications of the requirements of objective evidence came dramatically to the fore is highly important. Requirements for the demonstration of objective cause for

discrimination in the end are constrained by the costs of imposing such requirements. The board in Andruchiw realized this.

Conclusion

Needless to say, the elimination of the reasonable cause provision does not do away with the costs associated with the implementation of conventional human rights provisions. Clearly the Social Credit government is willing to impose some costs on decision-makers for the sake of equality of opportunity, an essential element in a liberal democratic order. However, the argument has been made that, among competitive firms in a market environment, employers have an interest in hiring on the basis of relevant factors, whatever they may be, rather than characteristics of no functional importance such as race or other prohibited grounds.(57) According to this position, a flourishing, unhindered market system is the best human rights policy. Employers simply cannot afford to cut themselves off from competent persons wherever they may be found. The market performs the same function as human rights legislation, but without the distortions created by decisions and jurisprudence reflecting an ignorance of and insensitivity toward decision-making.

Whatever the merits of this argument, the Social Credit government did not completely implement it, despite the fact that Michael Walker of the Fraser Institute, the leading Canadian think-tank promoting the benevolence of the market, briefed members of the cabinet in 1983, prior to the introduction of the restraint program.(58) That the government replaced the Code with the Human Rights Act suggests that its quarrel was not with human rights legislation per se but with the Code in particular. As far as the Code's substantive provisions are concerned, poor draftsmanship appears to be its principal objection. The reasonable cause provision was ambiguous, giving little direction to its interpreters and even less to the decision-makers to whom the legislation applied. Its open-endedness gave boards wide discretionary authority, what in fact were de facto legislative powers. Under boards' stewardship, the Code was in effect out of the government's control. It could do little short of repealing the Code to counter the consequences the reasonable cause provision created for decision-making in employment and access to public accommodation in B.C.. While enumerated lists of prohibited grounds are somewhat vague and indeterminate, the reasonable cause protection was perilously vague, making eventual legislative correction understandable if not foreseeable.

NOTES

(1) S.B.C. c.10 (1969)

(2) B.C. Legislative Assembly Debate November 5, 1973, p. 1256.

(3) W.R. Black, "Paper on 'Reasonable Cause'" (unpublished, January, 1981) p. 2.

(4) Black, "'Reasonable Cause'", p. 5; also "Equality Postponed", p. 232.

(5) B.C. Legislative Assembly Debates, November 6, 1973, p. 1353.

(6) Ibid., November 5, 1973, p.1256.

(7) Ibid., p. 1260.

(8) Boards of inquiry employing the reasonableness interpretation have without exception found reasonable treatment and fair treatment to be synonymous.

(9) Jefferson v. Baldwin and B.C. Ferries (B.C.H.R.B.I.) September 29, 1976, p. 15. See also H.W. v. Kroff and Riviera Reservations (B.C.H.R.B.I.) July 22, 1976, pp. 6-7; Gibbs & Surrey Teachers' Ass. v. Bd. of School Trustees Surrey (B.C.H.R.B.I.) July 11, 1977, p. 13; and Holloway v. Clair MacDonald et al 4 C.H.R.R. (1983) p. D/1454.

(10) D. Gibson, "Stereotypes, Statistics and Slippery Slopes", in Nevitte and Kornberg, eds., p. 126.

(11) Ibid., p. 1256.

(12) Lopetrone et al v. Harrisons and Juan de Fuca Hospital Society (B.C.H.R.B.I.) March 31, 1976.

(13) Ibid., p. 6.

(14) (B.C.H.R.B.I.) June 4, 1976.

(15) It was also mentioned that she disrupted other students' progress, either by dangerous use of the

machinery or by inconsiderate, distracting behaviour in class.

(16) Ibid., p. 4. According to the board, Wilson was also the victim of age discrimination. "Where there is a denial of [public accommodation] and the reasons advanced are unsubstantiated, an inference may be drawn when the elements of age and sex are present, that discrimination has occurred." Ibid.

(17) Jefferson, p. 4.

(18) Ibid., p. 5.

(19) Ibid., pp. 6-7. The determination of community concern cannot be made by reference purely to the facts of the case at hand. For the board here added physical disability to the list of prohibited grounds even though the complainant himself was found not to have been unreasonably discriminated against. The board also claimed that prohibited grounds are those with a stigmatic character, i.e. those which cannot be changed at the will of their possessors. This limitation was repudiated by subsequent decisions.

(20) (B.C.H.R.B.I.) June 10, 1977.

(21) GATE v. Vancouver Sun (B.C.H.R.B.I.) February 25, 1975; Oram and McLaren v. Pho (B.C.H.R.B.I.) June 8, 1975; the Kroff decision; B.C. Human Rights Commission v. B.C. College of Physicians and Surgeons (B.C.H.R.B.I.) May 27, 1976; and the Jefferson decision.

(22) Bremer, p. 6.

(23) Ibid., p. 7.

(24) Ibid., p. 8.

(25) Ibid., p. 11.

(26) Ibid., p. 44. Emphasis added.

(27) Holloway v. Clair MacDonald et al 4 C.H.R.R. (1983) p. D/1454.

(28) Warren v. Becket, Nadon, and Creditel of Cda. (B.C.H.R.B.I.) September 1, 1976, per Jawl, pp.

9-10. Boards, he wrote, must look for "discriminatory factors" in order to find a violation.

(29) GATE v. Vancouver Sun 4 W.W.R. [1979] p. 118 (S.C.C. 1979).

(30) See W.R. Black, "The Human Rights Code of British Columbia" 36 Advocate (1978) pp. 203-209 for a review of the cases up to 1978. Black's unpublished essay, "Paper on 'Reasonable Cause'", cites those decided by the early 1980s.

(31) S.C. Coval and J.C. Smith, "Compensation for Discrimination" 16 U.B.C. Law Review (1982) p. 91. Given the above noted confusion among legislators regarding the meaning of reasonable cause, this is a presumptuous assessment.

(32) J.H. Simpson, "Law, Politics & Human Rights: A Critical Analysis of Bill 27" unpublished (1983) p. 5.

(33) Ibid., p. 10.

(34) Hunter, "Human Rights Legislation", pp. 81-82.

(35) GATE (S.C.C. 1979) p. 139. See also R.A. Goreham, "Comment", 59 Canadian Bar Review (1981) pp. 165-179 for a trenchant defence of this interpretation.

(36) Foster v. B.C. Forest Products (B.C.H.R.B.I.) April 17, 1979.

(37) Jefferson, p. 7. See also Hunter, "Human Rights Legislation", pp. 81-82, and Simpson, pp. 11-12 for mention of this problem.

(38) B.C. Legislative Assembly Debates, May 4, 1984, p. 4545.

(39) Ibid., p. 4536.

(40) Ibid., pp. 4536-4539.

(41) T. Sowell, Knowledge and Decisions (New York: Basic Books, Inc., 1980) p. 42.

(42) Ibid., pp. 85-86.

(43) This analysis borrows generously from that of Thomas

Flanagan, "On Treating People as Individuals" (unpublished, 1984).

(44) Kroff, p. 7. See also Vitcoe v. Dominion Life Insurance Co. 5 C.H.R.R. (1984) p. D/2049 for an affirmation of the use of statistical categories that are functionally related to an assessment applicants' risks as potential policyholders. The respondent's statistical evidence was not "impressionistic" but rather "relevant and applicable medical evidence and statistical data...."

(45) T. Flanagan, "Insurance, Human Rights, and Equality Rights: When is Discrimination Reasonable?" Canadian Journal of Political Science 18:4 (December, 1985) pp. 715-737.

(46) Kroff, p. 8.

(47) Foster, p. 25.

(48) 3 C.H.R.R. (1982) p. D/781-785.

(49) Ibid., p. D/783.

(50) GATE (S.C.C. 1979) p. 139.

(51) 2 C.H.R.R. (1981) p. D/289.

(52) Ibid., p. D/293.

(53) 3 C.H.R.R. (1982) p. D/663.

(54) Ibid., p. D/666.

(55) 4 C.H.R.R. (1983) p. D/1510.

(56) Ibid., pp. D/1519-1520.

(57) W.E. Block and M.A. Walker, eds., Discrimination, Affirmative Action and Equal Opportunity (Vancouver: Fraser Institute, 1982). "Any well-run organization must be concerned with recruiting and selecting people with the ability or potential to do the required job well." J. Gandz and J.C. Rush, "Human Rights and the Right Way to Hire" Business Quarterly 48:1 (Spring, 1983) p. 70.

(58) See "Introduction" in Magnusson, et al, eds., p. 11.

CHAPTER FOUR

CONCLUSION: POLITICS AND HUMAN RIGHTS

Peter Russell has introduced some clarity into the human rights debate by insisting that a distinction be made between general respect for and support of rights and freedoms and the selection of particular means of protecting them. Too often advocates identify support for rights with support for a particular enforcement mode. Unfortunately this identification misses one of the central questions about the protection of rights: "what limits it is reasonable to attach to them and how decisions about these limits should be made."(1) Part and parcel of this is the fact that rights are not things possessed entirely or not at all. It is not a zero-sum game. More or less of them are enjoyed, depending on a range of considerations including the manner of decision-making about rights.

The distinction between assent to rights in principle and support for decision-making regarding the enforcement of rights implies another distinction, namely the difference between the "core values or ideals of all contemporary liberal democracies" and secondary rights or "operative rules of law" affecting or stemming from these core values. In other words, the distinction is between rights in the

abstract and the rights created by legislative fiat. Advocates frequently ignore this distinction, "reifying" rights and falling into the above mentioned zero-sum fallacy.(2) In so doing they forget that rights are invariably in conflict. An inordinate enjoyment of one right is bought at the expense of the enjoyment of another, usually others' enjoyment of it.

The task of striking an acceptable balance among rights is not easy. For example, Mill's argument that individual freedom is to be limited by the harm the exercise of that freedom inflicts on others is attractively simple and indisputable in principle among liberals. But what is harm? Is it merely physical harm, or does it include emotional and psychological harm produced by threats of physical harm, hatred, bigotry, or lack of brotherly acceptance and toleration? The definition of harm brings the principle down from the ethereal heights to the concrete world of policy choices, to the world of secondary rights. Here sincerely held disagreements among liberals arise. Different people take account of costs and consequences differently, and it is difficult to prefer one account over another. Thus the realm of secondary rights is also the realm of debate and compromise.

Russell's comments were made in reference to the entrenchment of the Canadian Charter of Rights, particular-

ly to the manner in which the courts' decision-making processes will influence the nature of reasonable limits to be attached to the entrenched rights. But his reasoning can profitably be applied to human rights legislation and the way the general principle of equality of opportunity is given or should be given concrete expression. Some think the concept means the absence of explicit policies of exclusion on the basis of grounds such as race or religion. From this perspective, substantive group equality is not a policy concern. It may or may not attend a policy of equal treatment regardless of race or religion. Others think the concept requires that protected groups must be substantively equal or made to be equal before equality of opportunity regardless of race or religion can have concrete expression.

The range of policy choices under the principle of equal opportunity is extensive and highly controversial. Inevitably they are objects of political debate. Naturally, different parties will have different policies and will act on them if given the chance. The Social Credit government had the chance, and indeed was spurred to action by the activism of the Human Rights Commission, so to act and did. Considerations of continuity and predictability are important: decisions in the private sector, for instance, are made in the context of time-frames extending

beyond terms of office of the provincial government. However, it is up to the government of the day whether these benefits outweigh those associated with changes in policy.

Aside from the expansionism and activism of the Commission, the government was concerned about the enforcement of the Code's provisions, which in its view facilitated the undesirable growth of autonomy and jurisdiction of the Commission. It was also concerned about the key substantive provision of the Code, the reasonable cause protection, which, in retrospect, seemed to be poorly drafted and which reached too far into the decision-making processes of employers in British Columbia. In short, the Code violated the policy goals of political accountability and government restraint characterizing the Social Credit government of the 1980s.

Opponents of the government's actions with regard to human rights do not not value these principles as highly, focusing instead on the need for aggressive, unhindered enforcement of anti-discrimination provisions.(3) In this view, state-sponsored enforcement of the high standard of reason or relevance is superior to the operation of the market and initiatives of private individuals, corporations or associations.(4) This thesis has shown why the new Social Credit human rights policy merits the respect if not

the support of its opponents. This policy cannot simply be dismissed as redneck, reactionary, or right-wing. Human rights is very much a political issue, subject to the same constraints of cost as are other issues. This realization can correct the conventional wisdom that human rights are properly "above" politics and critical debate. Students of human rights should be suspicious of attempts to elevate human rights above the political, for such an attempt may merely be an effort to put a particular policy beyond the reach of its critics.

NOTES

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(1) P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms", 61 Canadian Bar Review (1983) p. 43.

(2) Ibid.

(3) Advocates of strong, independent human rights commissions find no conflict between this goal and the rule of law. They argue that the rule of law means that no one is above the law, including the government; therefore, that the government itself must be subject to the impartial enforcement of anti-discrimination legislation. The possibility that the rule of law also requires responsible government -- the performance of public functions by those who are responsible to the governed for their actions -- is not even entertained. Consider the comments by Ken Norman, in 1982 the Chief Commissioner of the Saskatchewan Human Rights Commission and President of the Canadian Association of Statutory Human Rights Agencies, who, in addition to making the above argument, had this to say: "...commissions are not just law enforcement and educational agencies.With varying degrees of regulatory authority we are actually law makers and we should not be shy about recognizing this reality." K. Norman, "Independence for Human Rights Commissions: An Idea Whose Time Has Come" 3 C.H.R.R. (1982) p. C/82-3.

(4) K. Ruff, "Reinforcing the Standard of Merit", in Vancouver Sun November 16, 1977, p. A4.

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