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Liberty and Equality: A Tale of Two Codes

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The new Ontario *Human Rights Code, 1981* marks a significant change in legislative philosophy; a comparison of the new and old *Codes* reveals several important additions to the authority of the Commission responsible for enforcement of the legislation, and suggests that a decision to eliminate inequality through a program of "affirmative action" is problematic at best. A review of the provisions of the new *Code*, and of the case law under the former *Code* and similar legislation in other jurisdictions, reveals a disturbing tendency to sacrifice freedom to equality in the pursuit of "human rights". A willingness to permit this sacrifice may be a characteristic of liberal democracy, and incident to the secularization of contemporary Canadian society. The author warns that we must reflect carefully on the cost of any effort to legislate against discrimination.

Une comparaison entre le nouveau *Human Rights Code, 1981* de l'Ontario et l'ancien révèle que les pouvoirs de la Commission responsable de son application ont été considérablement élargis. Cette expansion traduit un changement majeur de politique législative et suggère que la décision d'enrayer les injustices par un programme d'action positive s'avère des plus problématiques. Un examen des dispositions du nouveau *Code*, de l'ancienne jurisprudence et d'une législation similaire en vigueur dans d'autres juridictions fait ressortir la tendance déroutante consistant à sacrifier une liberté essentielle au profit d'une égalité toute aussi nécessaire, ceci dans le but toujours ultime de la reconnaissance des droits de l'homme. La volonté de permettre un tel sacrifice pourrait bien être caractéristique d'une democratie libérale et incidente à la sécularisation de la société canadienne. L'auteur nous recommande de réfléchir sérieusement sur le prix de tels efforts législatifs.

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Synopsis

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Introduction

The first consolidated[1] *Human Rights Code* in Canada was proclaimed in force in Ontario on June 15, 1962.[2] In the two decades from 1962 to 1982, the *Code* was amended on seven occasions.[3] These amendments gradually extended the scope of the legislation without altering the underlying legislative philosophy or the basic enforcement model. That model forbade specified discriminatory acts committed on the basis of specified prohibited grounds.[4]

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[1]Consolidating and extending such piecemeal anti-discrimination legislation as: *The Fair Employment Practices Act, 1951*, S.O. 1951, c. 24; *The Fair Accommodation Practices Act, 1954*, S.O. 1954, c. 28; *The Racial Discrimination Act, 1944*, S.O. 1944, c. 51; *The Ontario Anti-Discrimination Commission Act, 1958*, S.O. 1958, c. 70.

[2]*The Ontario Human Rights Code, 1961-62*, S.O. 1961-62, c. 93 [hereinafter the original *Code*], as consolidated by R.S.O. 1970, c. 318 and R.S.O. 1980, c. 340 [hereinafter the former *Code*]. This specific date was chosen because it was the seven-hundred and forty-seventh anniversary of the Magna Carta.

[3]S.O. 1965, c. 85; S.O. 1967, c. 66; S.O. 1968, c. 85; S.O. 1968-69, c. 83; S.O. 1971, c. 50, s. 63; S.O. 1972, c. 119; S.O. 1974, c. 73.

[4]The original legislation prohibited discrimination with respect to accommodation, services and facilities (s. 2), housing (s. 3), employment (s. 4), on the grounds of race, creed, colour, nationality, ancestry or place of origin, and with respect to rates of pay on the grounds of sex (s. 5).

On June 15, 1982, twenty years exactly from the date of proclamation of the original *Code*, a new Ontario *Human Rights Code, 1981*[5] was proclaimed in force. The new *Code* embodies a different legislative philosophy than its predecessor, and this necessitated changes in the substantive and enforcement provisions. The first part of this article considers the nature and significance of the change in legislative philosophy. The second part compares the breadth of coverage under the old and new *Codes* and Part III critically examines several of the more important additions to the new *Code*.

I. Equality: An Elusive Pursuit

Through the two decades from 1962 to 1982, the legislative approach to equality in Ontario was based on a philosophy of gradualism. As new social needs became apparent, and as different minorities began to seek statutory protection through human rights legislation, both the prohibited grounds and the social areas in which discrimination was forbidden were gradually extended.[6]

The new *Code* is, in many respects, a significant departure from past practice.[7] It is a continuation of the gradualist philosophy in that new grounds of discrimination are added to the *Code* and the social areas in which discrimination is prohibited are again extended.[8] But it is a departure from past practice in that the *Code* no longer speaks the language of statutory prohibitions, or "Thou shalt nots". Instead the new statute is phrased throughout in affirmative declarations of rights: specifically, that everyone in Ontario has "a right to equal treatment". The transition is similar to that which occurs between the Old and New Testaments, from a code of negative commandments, difficult to live by but comprehensible, to an all-embracing ethic of equality — on which now hang all the laws and the penalties.

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[5]S.O. 1981, c. 53 [hereinafter the new *Code*].

[6]The first ten years of this evolution are traced in detail in Hunter, *The Development of the Ontario Human Rights Code: A Decade in Retrospect* (1972) 22 U.T.L.J. 237.

[7]The extent of the departure appears to have been better understood by members of the Opposition than by the Minister responsible for the *Code*. Introducing the second reading of Bill 7, the Honourable Robert Elgie, Labour Minister, called it "a landmark in the evolution of human rights reform", Ont. Leg. Assembly Deb. (15 May 1981) 741. By contrast, Opposition critic R.F. Johnston began his speech by proclaiming: "[t]his is not just a revision but a new act", *ibid.*, 746.

[8]The prohibited grounds of discrimination added by the new *Code* are citizenship, family status, handicap, receipt of public assistance and record of offences. Equality in contracts and protection against harassment are new social areas in which discrimination is prohibited.

A review of the Canadian case law on human rights (and it is substantial and growing quickly, with more than 200 board of inquiry and court decisions in Ontario alone) demonstrates that there is neither a universally-accepted notion of equality nor a single approved definition of discrimination.[9] One can identify, however, three approaches to equality which differ not only in definition but in the criteria utilized to judge when equality has been attained. The three approaches may be characterized as: (1) equality of opportunity; (2) equality of treatment; and (3) equality of result.

Equality of opportunity occurs when individuals who wish to compete are given the same opportunity to do so. This was the primary emphasis of Ontario's human rights legislation from 1962 to 1982. These *Codes* defined as illegal any reliance on factors which were considered prejudicial to a determination of one individual's ability compared to another's. The original prohibited grounds of discrimination (except for "creed") were factors over which the individual had no control. It was considered unfair, therefore, to place an individual at a competitive disadvantage because of some innate factor, such as race, colour or sex. So long as individuals are given the same opportunity to compete for society's scarce resources and benefits (jobs, housing, *etc.*) without discrimination because of prejudice-based exclusion, then this view of equality is satisfied. In this model, the role of the State is roughly that of a race starter who lines everyone up at the gate and makes sure that no one jumps the gun.

A second view, based on equality of treatment, starts from a recognition that there is little point in worrying about a fair start if some runners are lame or some lanes are strewn with shards of glass. Instead, it is argued, the State must superintend not only opportunity but *treatment*, extending its reach and monitoring equality not just at the opportunity-selection stage but in the daily life of its citizens as well. In the employment context, for example, equal opportunity requires that all applicants receive fair and unbiased consideration in hiring; equal treatment would require that all employees enjoy equal terms, conditions and benefits, including such intangible benefits as a congenial working atmosphere.[10] This would appear to be the animating philosophy of the new *Code*, which speaks throughout of a right to "equal treatment".

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[9]The search for a comprehensive definition of discrimination is discussed in Hunter, *Human Rights Legislation in Canada: Its Origin, Development and Interpretation* (1977) 15 U.W.O.L. Rev. 21, 30-4. See also Keene, *Toward a Definition of Discrimination — Exemptions Under the New Ontario Human Rights Code* (1982) 3 Advocates' Q. 265.

[10]For example, one where racially derogatory language is not used. *Cf. Simms* v. *Ford Motor Co. of Canada*, Report of a Board of Inquiry under *The Ontario Human Rights Code* (4 June 1970).

The third view, which looks to equality of result, starts from the proposition that all talk of equality is humbug if, in the end, nothing changes. To continue the analogy, it is who gets the medals, not the race itself, that matters. If, at the end of the day, those who are disadvantaged by race, colour or sex compete no more successfully after human rights legislation than they did before, then of what use is it? Those who espouse this view of equality, commonly identified with such words as "quotas", "affirmative action" and "reverse discrimination", judge the success of a human rights initiative by what it actually achieves. If empirical analysis shows no change in the distribution of jobs or income or any of the other perquisites of power and influence in society, then human rights legislation has achieved nothing. The new *Code* at least tacitly accepts this view of equality in section 13, which allows suspension of the "right to equal treatment" if the purpose to be served is "to relieve hardship or economic disadvantage".[11]

The spread of the idea that an appropriate response to inequality is not to prohibit but to encourage the drawing of distinctions based upon one's race, colour or sex, has been rapid. Decisions which were once required to be colour-blind may now, by "affirmative action", be required to prefer one applicant to another because of that applicant's race, colour, or sex. The alchemy which transmutes an illegal act of bigotry into a socially-encouraged exercise in affirmative action is simply the decision of an omniscient commission that such discrimination is "designed to relieve hardship". The hardship to the passed-over candidate apparently does not count. Thus, within the same *Code*, equality is defined in mutually contradictory terms. One wonders whether, as the clamour for equality has grown more intense, the underlying concept has not become so highly qualified as to be unrecognizable.

The continuing pursuit of equality exacts a price in human liberty. Of course, in one sense, all legislation diminishes liberty by regulating hitherto unregulated behaviour. But human rights legislation makes a direct incursion into human liberty. It does so, first, because the scope of the legislation has been steadily expanded. Freedom to contract with whom one chooses, freedom to dispose of property, freedom of choice over one's tenants and employees — all such decisions have been subordinated to an over-arching public policy of equality.

In their infancy, human rights commissions proclaimed it their goal to work themselves out of business by the elimination of discrimination. In fact, if one measured their success by the reduction of discrimination in the areas with which they were originally created to deal (essentially, racial

[11]New *Code*, s. 13(1).

discrimination in housing and employment), they have been quite successful. But far from withering away, the growth of human rights commissions, like the growth of other bureaucracies, has been exponential and inexorable. 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 year the Commission's Annual Report 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 case load, 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.[12] To date, the Ontario legislature has been willing to accept the Commission's recommendations (with the single exception of adding sexual orientation as a prohibited ground of discrimination).[13]

Second, the conflict between liberty and equality is exacerbated by the transition in language in the *Code*, from relatively precise statutory prohibitions to sweeping declarations of a generalized "right to equal treatment". No lawyer should need reminding of the danger to liberty inherent in vague, over-reaching legislation which compensates for a lack of clarity by conferring the maximum discretion on the enforcement agency, in this case an appointed commission. Even a decade ago, when the statutory language was more precise and the commission's discretion more limited, this danger was sufficient to prompt one judge to refer to the enforcement scheme of the original *Code* as "a legislative bear-trap from which no subject can escape, a charge which cannot be defended, and a fine which cannot be escaped".[14]

Third, an examination of recent case law reveals increasing conflict between fundamental liberties (identified as such in section 2 of the *Charter*

[12]The most egregious example of this was the creation by the Ontario Commission, without legislative authorization or approval, of a Code Review Committee (entirely comprised of Commissioners) "to address the urgent needs of the changing human rights situation in Ontario". See Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (1977) 5. This Committee held hearings throughout the province and then published a report containing over one hundred recommendations, almost all of which were designed to extend the Commission's own jurisdiction and influence and most of which are reflected in the new *Code. Ibid.*, 92-109.

[13]Recommended in *Life Together, ibid.*, 81-2.

[14]Stewart J. in *R.* v. *Tarnopolsky, Ex parte Bell* [1969] 2 O.R. 709, 713, (1969) 6 D.L.R. (3d) 576 (H.C.).

of Rights and Freedoms)[15] and the attainment of equality. Before two human rights Boards of Inquiry, individuals were put to the expense and inconvenience of defending themselves for the offence of writing letters which are published or otherwise displayed to the public.[16] What does freedom of expression mean where the right to hold and to voice critical opinions is subject to review by a board of inquiry?

In *Gay Alliance Toward Equality* v. *The Vancouver Sun* the British Columbia Human Rights Commission claimed authority (upheld by the British Columbia Supreme Court but denied by majorities in the Court of Appeal and in the Supreme Court of Canada)[17] to override a decision of a daily newspaper as to the content of its classified advertising. The effect of such arrogation of authority by a human rights commission on freedom of the press is clear. The same Commission, incidentally, recently sought to prevent a company from carrying on business under the trade name "Hunky Bill's", apparently on the ground that this corporate name might be offensive to Ukrainian-Canadians, although the company president, William Konyk, was himself a Ukrainian-Canadian.[18] In support of its allegation of racism, the Commission called as an expert witness a professor of English who admitted a desire to ban "on the basis that they showed certain classes of people in an unfavourable light, Shakespeare, Johnson, Boswell, Tobias Smollet and John Milton".[19] There would be little room for English literature, still less for freedom of speech and press, in the Utopias envisioned by such human rights zealots as these. Small wonder, then, that the Board of Inquiry speculated whether or not human rights commissions "are aware of the Orwellian implications of the world they seem to advocate?"[20]

The starkest example of the conflict between human rights and fundamental liberties occurred in 1979 when a Canadian Human Rights Tribunal concluded that the expressed opinions of John Ross Taylor were

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[15]Part I of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [hereinafter the *Charter*]. These "fundamental freedoms" as set out in s. 2 are: "(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."

[16]*Levesque* v. *The Daily Gleaner*, Report of a Board of Inquiry under the New Brunswick *Human Rights Act* (10 September 1974); and *McKinlay* v. *Cranfield* (1980) 1 C.H.R.R. D/246 (Sask. Board of Inquiry).

[17]*Gay Alliance Toward Equality* v. *The Vancouver Sun*, Report of a Board of Inquiry under the *Human Rights Code of British Columbia* (1975), *aff'd* [1976] W.W.D. 160 (B.C.S.C.), *rev'd* (1977) 77 D.L.R. (3d) 487, [1977] 5 W.W.R. 198 (B.C.C.A.), *aff'd* [1979] 2 S.C.R. 435, (1979) 97 D.L.R. (3d) 577. It remains to be seen whether or not a board of inquiry could reach such a decision in the face of section 2(b) of the *Charter* (reproduced *supra*, note 15).

[18]*Ukranian Canadian Professional and Business Association of Vancouver* v. *Konyk* (1982) 3 C.H.R.R. D/1157 (B.C. Board of Inquiry).

[19]*Ibid.*, D/1160.

[20]*Ibid.*

contrary to the letter and spirit of the *Canadian Human Rights Act* and Mr Taylor was ordered to cease recording and communicating his opinions by telephone.[21] Mr Taylor, who was 69 years old, refused to alter either his opinions or his practices. He was then convicted of contempt of court and served one year in jail, thereby becoming Canada's first prisoner of conscience to be jailed for daring to contradict the orthodoxy of human rights.[22] It should be (but is not) superfluous to point out to human rights commissions that one may defend John Ross Taylor's right to free speech without endorsing his views.[23]

In considering the cost in liberty which human rights legislation exacts, it is worth noting a small but significant change in the "Preamble" to the new *Code.* From 1962 to 1982, the "Preamble" stated that "it is public policy in Ontario that every person *is free* and equal in dignity and rights" (emphasis added). The new *Code* drops any reference to "free": "AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination". Whether deliberate, or a draughtsman's inadvertence, this excision of the word "free" is increasingly symbolic of the direction of legislated egalitarianism.[24]

De Tocqueville's analysis of the tension between liberty and equality, and his prediction that the extension of universal suffrage mass democracy inevitably meant that society would increasingly prefer equality to liberty, have proven to be accurate. He might well have been writing of the province of Ontario, *circa* 1982 when, a century and a half ago, he wrote these words:

> Democratic nations are at all times fond of equality, but there are certain epochs at which the passion they entertain for it swells to the height of fury. This occurs at the moment when the old system, long menaced, completes its own destruction .... At such times men pounce upon equality as their booty and they cling to it as to some precious treasure which they fear to lose. The passion for equality penetrates on every side into men's hearts, expands there, and fills them entirely. Tell them not that by this blind surrender of themselves to an exclusive passion they risk their dearest interests: they are deaf. Show

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[21] *Canadian Human Rights Commission* v. *Taylor*, Report of a Tribunal under the *Canadian Human Rights Act* (20 July 1979).

[22] *Canadian Human Rights Commission* v. *Taylor* (1980) 1 C.H.R.R. D/47 (F.C.T.D.).

[23] When, in 1976, I ventured some mild criticism in a Law Review article of what I conceived to be abuses of authority by Human Rights Commissions, I was reprimanded as a "traitor" and "fascist" by a former chairperson of the Saskatchewan Human Rights Commission.

[24] The speech of the Honourable Robert Elgie, Labour Minister, might imply that the excision was deliberate: "Today I want to review briefly the key provisions of this bill. It seems appropriate to begin by drawing attention to the preamble, which confirms the universality of human rights and enunciates our commitment to revise and extend human rights in Ontario to reflect an evolving sense of equity and social justice." Ont. Leg. Assembly Deb. (15 May 1981) 742.

> them not freedom escaping from their grasp, whilst they are looking another way: they are blind — or rather, they can discern but one sole object to be desired in the universe.[25]

II. The Ontario *Human Rights Code, 1981*

Part I, sections 1 to 8, and section 12 of the new *Code* identify eight social areas in which discrimination is prohibited on fourteen specified grounds.[26] Each of the first eight sections follows the same general format, proclaiming "a right to equal treatment" without discrimination "because of" the specified grounds. I shall first compare the breadth of coverage under the old and new *Codes*, and then examine several important additions.

A. Announced Intention to Discriminate (Section 12)

Section 1 of the former *Code* prohibited publication or display of "any notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate . . . for any purpose because of" a prohibited ground of discrimination. Subsection (2) then stated that this was "deemed" not to interfere with free expression of opinion on any subject.[27] The former section, of dubious constitutional validity and derived from the *Racial Discrimination Act, 1944*,[28] has now been replaced by a no less dubious section:

> S. 12(1): A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.
>
> (2) Subsection (1) shall not interfere with freedom of expression of opinion.

Clearly, this section is anticipatory in effect: it makes it an offence (ultimately punishable by the criminal sanction)[29] to announce an intention not to practice "equal treatment", even though that intention never issues forth into conduct. Although a refined sense of ethics or morality might condemn intention standing alone, the law has always required an overt

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[25]A. de Tocqueville, *Democracy in America* (London: The Colonial Press, Reeve trans., 1900) vol. 2, 102.

[26]The social areas are: enjoyment of goods, services and facilities (s. 1); occupancy of accommodation (ss 2, 6(1)); contracts (s. 3); employment (ss 4, 6(2)); membership in trade unions, and trade or occupational associations (s. 5); sexual harassment (s. 6) and reprisals (s. 7); and announced intention (s. 12). The prohibited grounds are: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status, record of offences, the receipt of public assistance and handicap.

[27]Former *Code*, s. 1.

[28]S.O. 1944, c. 51, s. 1.

[29]New *Code*, s. 43.

act. Indeed, the requirement that intention manifests itself in criminal behaviour is one point of distinction between the rule of law and totalitarian legal systems.[30] Section 12(1), apparently, tends to eliminate the distinction, and assigns liability on the basis of a declared intention alone. By so doing, it lends credence to those critics who consider that human rights commissions have become the "thought police" of contemporary society.[31]

It is difficult to interpret section 12(2). If it means that the prohibitions in section 12(1) do not interfere with freedom of expression, it is patently false. Self-evidently, they do. The landlord who communicates the opinion that tenants in receipt of public assistance are less financially reliable than employed tenants now risks offending section 12(1), even though he has denied accommodation to no one. The landlord's freedom of expression has been diminished. Alternatively, if section 12(2) is interpreted to mean that section 12(1) shall be "deemed" not to interfere with freedom of expression, then the legislature has once again "deemed" an artificial interpretation to cloak a disturbing reality and the purported legislative change (*i.e.* dropping the "deeming" provision in the old *Code*) was a sham.

To read section 12 is to be reminded of George Orwell's explanation for obscurity: "The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words . . . like a cuttlefish squirting out ink."[32]

Whichever approach to interpreting section 12(2) is correct, its presence draws attention to the dubious constitutional validity of the whole section. If section 12(1) does not interfere with freedom of expression it is difficult to discern much effective scope for its application; if it does interfere with freedom of expression, it is *ultra vires*. There is considerable pre-*Charter* authority to establish that provincial legislation cannot derogate from, or diminish, freedom of expression.[33] The *Charter*, which is expressly applicable to provincial legislation,[34] has now put the matter beyond dispute.

Section 12 is novel, dangerous and of dubious constitutional validity.

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[30]Alexander Solzhenitsyn discussed this distinction in his incisive Harvard Commencement address, reprinted as *A World Split Apart* (1978) 12 L. Soc. Gazette 223.

[31]B. Amiel, *Confessions* (1980).

[32]G. Orwell, "Politics and the English Language" in *Collected Essays, Journalism and Letters* (New York: Harcourt, Brace and World, 1968) vol. 4, 127, 137.

[33]See, *e.g.*, *Reference Re Alberta Statutes* [1938] S.C.R. 100, [1938] 2 D.L.R. 81, *aff'd* [1939] A.C. 117, [1938] 4 D.L.R. 433 (J.C.P.C.); *Switzman* v. *Elbling and A.G. Quebec* [1957] S.C.R. 285, (1957) 7 D.L.R. (2d) 337; and *Saumur* v. *The City of Quebec* [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.

[34]*Charter*, s. 32(1)(b).

B. Accommodation

Section 2 of the former *Code* prohibited any discriminatory denial of accommodation "available in any place to which the public is customarily admitted". The only exception was the barring of one sex upon the ground of "public decency".[35]

Section 3 of the former *Code* prohibited discrimination in "housing accommodation" but made an exception for unisex accommodation.[36] Housing accommodation was defined as "any place of dwelling except a place of dwelling being part of a building in which the owner or his family reside and the occupant or occupants of the place of dwelling are required to share a bathroom or kitchen facility with the owner or his family".[37]

Section 2 of the new *Code* proclaims a right to equal treatment in the occupancy of "accommodation". Section 2(2) proclaims a right to "freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building" because of any proscribed ground of discrimination. Section 6(1) provides that every occupant of accommodation has a right to freedom from harassment "because of sex" by the landlord, his agent, or by an occupant of the same building.

The exemption in respect of accommodation where the occupant is required to share a bathroom or kitchen facility with the owner or his family is preserved,[38] as is the unisex accommodation exception.[39] The new *Code* additionally exempts discrimination because of marital status in owner-occupied residential accommodation in buildings of less than four units,[40] and discrimination because of family status in multi-unit buildings served by a common entrance.[41] The new harassment provisions will be considered separately.

C. Services and Facilities

The former *Code* lumped together "accommodation, services and facilities" and prohibited discrimination in respect of each "in any place to which the public is customarily admitted".

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[35]Former *Code*, s. 2(2).
[36]Former *Code*, s. 3(2).
[37]Former *Code*, s. 26(f).
[38]New *Code*, s. 20(1).
[39]New *Code*, s. 20(2).
[40]New *Code*, s. 20(3).
[41]New *Code*, s. 20(4).

Section 1 of the new *Code* proclaims a right to equal treatment with respect to "services, goods, and facilities". Gone is the qualifying requirement that these be available in a place to which the public is customarily admitted. In place of that limiting clause there is a bewildering array of qualifications, exemptions and provisos: some general (*e.g.*, the definitions of the proscribed grounds of discrimination and the definition in s. 9(c) of "equal"), and others rather more specific (senior citizen preferences (s. 14)); citizenship preferences (s. 15); provision of services and facilities by special interest organizations (s. 17); athletic activities (s. 19(2)); and recreational clubs (s. 19(3)).

Whatever merits might be urged for the proclamatory style of the new *Code*, intelligibility and simplicity of interpretation are not among them. The prior sections were concise and relatively straightforward.[42] The new section, by simply proclaiming a right to "equal treatment", requires extensive general and specific qualification.

From the beginning, the Ontario legislature has distinguished between inherently "public" and inherently "private" activities. While wishing to forbid discrimination in virtually all areas of public commercial activity, the legislature chose not to forbid discrimination in more private and personal relations. To a minor extent, this distinction has been preserved (*e.g.*, the choice of a medical attendant employed to nurse an ailing family member, s. 23(c)). But the new *Code* recasts the boundary by narrowing, indeed nearly eliminating, the enclave of purely private activities. First the new *Code* practically eliminates the public/private distinction in its substantive declarations of equality; then it must re-impose some basic distinctions through a crazy quilt of exemption provisions.

A simpler, neater approach would have been to insert the word "public" before "services, goods and facilities" in section 1. The process of interpretation would then have determined when services, goods or facilities are sufficiently "public" to warrant application of the *Code*. Had the legislature wished to give further guidance, it could have done so by Regulations; alternatively, the Commission could issue interpretation bulletins or advisory opinions on what were to be regarded as "public" services, goods or facilities. Instead, the draughtsman has transformed what was a concise, understandable section in the former *Code* into an awkward and ultimately uncertain "right to equal treatment" in the new *Code*.

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[42]Although not entirely free from ambiguity: *cf. Re Cummings and Ontario Minor Hockey Association* (1978) 21 O.R. (2d) 389, (1978) 90 D.L.R. (3d) 568 (Div. Ct.), *aff'd* (1979) 26 O.R. (2d) 7, (1979) 104 D.L.R. (3d) 434 (C.A.); and *Re Ontario Rural Softball Association and Bannerman* (1978) 21 O.R. (2d) 395, (1978) 90 D.L.R. (3d) 574 (Div. Ct.), *aff'd* (1979) 26 O.R. (2d) 134, (1979) 102 D.L.R. (3d) 303 (C.A.).

D. Employment

The former *Code* contained a lengthy and complex section dealing with all employment discrimination.[43] Section 4(1) of the new *Code* consolidates these detailed provisions into a general declaration of a right to "equal treatment with respect to employment". However, the cosmetic simplicity is once again misleading, for general (s. 9(c)) and specific (ss 13, 14, 15, 23, and 24) limitations and exemptions follow.

The former *Code* exempted discrimination because of age, sex or marital status whenever any of those grounds was "a *bona fide* occupational qualification and requirement for the position or employment".[44] The new *Code* adds "record of offences" to this catalogue (which is not a particularly significant addition given the limited definition of "record of offences")[45] and adds in section 23 the qualifier "reasonable" to "*bona fide*".

Jurisprudence under the former *Code* revealed a conflict as to the degree of subjectivity involved in proving "a *bona fide* occupational qualification" exemption. A 1976 Board of Inquiry gave that term an essentially subjective definition. However, another Board of Inquiry, on virtually identical facts and in the same year, required proof of scientific evidence which would support an objective conclusion.[46] The Supreme Court of Canada has now resolved the conflict by interpreting "*bona fide* occupational qualification" as requiring *both* an honest, subjective belief in the requirement and also

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[43]Former *Code*, s. 4(a)-(g).

[44]Former *Code*, s. 4(6).

[45]The new *Code*, s. 9(h) states:

> "Record of Offences" means a conviction for,
>
> (i) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
>
> (ii) an offence in respect of any provincial enactment . . . .

[46]In *Cosgrove* v. *North Bay*, Report of a Board of Inquiry under *The Ontario Human Rights Code* (21 May 1976), the Board held that mandatory retirement of firefighters at age sixty was a *bona fide* occupational qualification because it was "enacted or imposed honestly or with sincere intentions" and was "supported in fact and reason 'based on the practical reality of work-a-day world and of life.'" The decision was upheld on appeal: *Re Ontario Human Rights Commission and City of North Bay* (1977) 17 O.R. (2d) 712, (1977) 81 D.L.R. (3d) 273 (Div. Ct.); leave to appeal refused (1977) 92 D.L.R. (3d) 544 (C.A.). But in *Hadley* v. *Mississauga*, Report of a Board of Inquiry under *The Ontario Human Rights Code* (21 May 1976), the Board rejected mandatory retirement of firefighters at age sixty as a *bona fide* occupational requirement:

> A claim for differentiation should not be permitted on the basis of an employer's assumption that every employee over a certain age becomes physically or mentally unable to perform the duties of the job. Each case should be determined on an individual case by case analysis, not on the basis of any general or class concept.

proof of objective reasonableness.[47] Presumably section 23(b) of the new *Code* does no more than incorporate this requirement of objective reasonableness into the statutory exemption.

For many years, board of inquiry decisions have held that the onus of proving an exemption is on the respondent. This view was unanimously upheld by the Supreme Court of Canada.[48] It is a difficult onus to discharge. Not only must the employer prove his *bona fides* in a subjective sense, but he must also satisfy a board of inquiry that the discrimination is objectively reasonable. The Supreme Court of Canada declined to say precisely what this meant; however, McIntyre J. did say that "it would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work place, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported."[49] But if a single individual of the excluded age, sex, or marital status is demonstrably capable of performing the job, can the discrimination then be said to be objectively reasonable? And if it cannot, then employers must abandon all general rules and policies of exclusion (such as mandatory retirement below age 65 for physically demanding jobs) or risk violation of the new *Code.*

III. Significant Additions

The new *Code* doubled the number of statutory sections (from 26 to 50) and more than doubled the sheer statutory verbiage of prior legislation. There are many minor changes, both substantive and procedural. This part examines four of the more important additions to the *Code.*

A. Contracts

Section 3 declares: "Every person having legal capacity has a right to contract on equal terms without discrimination" because of the prohibited grounds. While this section has no precedent in prior legislation, it may only have codified the common law principle that renders contracts void

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[47] *Ontario Human Rights Commission* v. *Etobicoke* [1982] 1 S.C.R. 202, (1982) 132 D.L.R. (3d) 14 [hereinafter cited to S.C.R.].

[48] *Ibid.*, 208, *per* McIntyre J.:

> Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification *by the employer.* The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities. [Emphasis added.]

[49] *Ibid.*, 212.

if the terms of the contract are contrary to public policy.[50] An exemption is included for insurance and life annuity contracts, other than with an employer, in which reasonable and *bona fide* distinctions based on age, sex, marital or family status, or handicap, are drawn.[51]

Section 3 contains no limitation on the kind of contract to which the declared right applies. Nor would there appear to be any basis for implying any limitation on the scope of this new section; therefore, all forms of business and consumer contracts are covered.

B. Harassment

Section 4(2) of the new *Code* declares that it is a right of all employees to be free from harassment on any prohibited ground of discrimination by an employer, his agent, or other employees. While this section has no legislative predecessor, there did exist a sparse jurisprudence[52] which held that racially derogatory conduct (slurs, insults, epithets, *etc.*) directed at an employee who was a member of a visible minority group with the knowledge and/or acquiescence (even *passive* acquiescence) of the employer, was a violation of the old *Code*. The reasoning was that such conduct created a hostile or threatening work environment which amounted to a discriminatory "term or condition of employment" for the employee affected.

Where a board of inquiry makes a finding of harassment, either in employment or accommodation, and finds that a party had the means to prevent that harassment from occurring, together with actual or constructive ("ought to have known") knowledge, the board shall remain seized of the matter and may, upon proof of a repetition of the conduct, order that party to take any steps reasonably available to prevent a further occurrence.[53] Not only is this extraordinary authority of a board not subject to the discretionary six month limitation period imposed on filing of complaints,[54] it appears to be subject to no limitation period, statutory or common law. Theoretically, a board of inquiry in such a case is never *functus officio*; although the respondent has been duly convicted and "sentenced", although he has made reparations for his violation, he must forever live

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[50]The "Preamble" of the new *Code* declares that non-discrimination is "public policy in Ontario". Therefore, even in the absence of s. 3, it may be that courts would have declined to enforce discriminatory contracts. *Cf. Re Drummond Wren* [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.); *Re Noble and Wolf* [1948] O.R. 579, [1948] 4 D.L.R. 123 (H.C.), *aff'd* [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.), *rev'd* [1951] S.C.R. 64, [1951] 1 D.L.R. 321.

[51]New *Code*, s. 21.

[52]See *Simms* v. *Ford Motor Co. of Canada, supra*, note 10; and *Dhillon* v. *F.W. Woolworth Co.* (1982) 3 C.H.R.R. D/743 (Ont. Board of Inquiry).

[53]New *Code*, s. 40(4).

[54]New *Code*, s. 33(1)(d).

with the prospect that the original tribunal which tried and found him guilty will be "reconvened" and additional "sanctions or steps" (the actual language of the statute) meted out. It will be interesting to hear the arguments proffered by the Ontario Human Rights Commission to defend this extraordinary section if and when it is challenged as a violation of the *Charter*, specifically of section 11(d) which guarantees the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" and (h) guaranteeing the right, if found guilty of an offence, "not to be tried or punished for it again".

Prior to the enactment of the new *Code* several board of inquiry decisions had concluded that sexual harassment in employment was prohibited conduct as a species of sex discrimination.[55] It is submitted that this rationalization was illogical; if sexual harassment was presently covered, why then was it necessary to have sexual harassment added to the new *Code*? Such an interpretation also flew in the face of the legislative intent; when "sex" was added as a prohibited ground to the *Code* in 1972,[56] it is clear that the intended meaning was "gender", not sexual practice or harassment. Indeed, there is not a single mention in the legislative record at that time of the problem of sexual harassment. Moreover, this interpretation led to the anomalous result that an employer who harassed an employee of the opposite sex contravened the *Code*, while a bisexual employer, who indiscriminately harassed both male and female employees, did not.

However illogical the root of title, the Ontario legislature has unequivocally prohibited sexual harassment in the new *Code*. Sections 6(1) and (2) deal expressly with harassment in accommodation and employment. Subsection (3) casts the net wider:

> Every person has a right to be free from,
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
> (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

The phrase "a person in a position to confer, grant or deny a benefit or advancement" clearly extends well beyond landlords and employers.

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[55]See, *e.g.*, *Bell* v. *Ladas* (1980) 1 C.H.R.R. D/155 (Ont. Board of Inquiry); *Mitchell* v. *Travell Inn (Sudbury) Ltd.* (1981) 2 C.H.R.R. D/590 (Ont. Board of Inquiry); *Coutroubis* v. *Sklavos Printing* (1981) 2 C.H.R.R. D/457 (Ont. Board of Inquiry); *Cox* v. *Jagbritte Inc.* (1981) 3 C.H.R.R. D/609 (Ont. Board of Inquiry); *Torres* v. *Royalty Kitchenware Ltd.* (1982) 3 C.H.R.R. D/858 (Ont. Board of Inquiry); and *McPherson* v. *"Mary's Donuts"* (1982) 3 C.H.R.R. D/961 (Ont. Board of Inquiry).

[56]*The Ontario Human Rights Code Amendment Act, 1972*, S.O. 1972, c. 119.

Teachers, doctors, social workers, indeed virtually any person in a position of privilege or authority, is a potential respondent in a sexual harassment complaint.

In the very first Canadian sexual harassment case, the Board of Inquiry defined the conduct prohibited as running the "gamut from overt gender-based activity such as coerced intercourse to unsolicited physical contact to persistent propositions, to more subtle conduct such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment".[57] The new *Code* defines "harassment" even more broadly: "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".[58] The guidelines on harassment recently issued by the Canadian Human Rights Commission suggest that the tribunals responsible for enforcing these new sections will interpret their mandate in an unlimited way. These guidelines are so frightening in what they reveal about the mindset of their draughtsmen that I forego critical comment and merely reproduce them:

> Harassment may be related to any of the discriminatory grounds contained in the Canadian Human Rights Act. Such behaviour may be verbal, physical, deliberate, unsolicited or unwelcome; it may be one incident or a series of incidents. While the following is not an exhaustive list, harassment may include:
> -verbal abuse or threats;
> -unwelcome remarks, jokes, innuendos or taunting about a person's body, attire, age, marital status, ethnic or national origin, religion, etc;
> -displaying of pornographic, racist, or other offensive or derogatory pictures;
> -practical jokes which cause awkwardness or embarassment;
> -unwelcome invitations or requests, whether indirect or explicit, or intimidation;
> -leering or other gestures;
> -condescension or paternalism which undermine self-respect;
> -unnecessary physical contact such as touching, patting, pinching, punching;
> -physical assault . . . .[59]

The threat implicit in any such legislative scheme is so obvious that it is unnecessary to attempt to follow these "guidelines" with a discourse on the danger of legislating in the always tempestuous and complex relations between the sexes or to sound again an alarm about overreaching legislation.

C. Constructive Discrimination

The issue of "intent to discriminate" has been a vexed question in the interpretation of human rights legislation. It most often arises when an employer invokes an ostensibly neutral requirement which can be shown

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[57]*Bell* v. *Ladas, supra,* note 53, D/156.

[58]New *Code,* s. 9(f).

[59]Canadian Human Rights Commission, *Harrassment Policy,* 1 February 1983.

to have a disproportionate impact on a group of persons protected by the *Code.*

Human rights legislation has always proscribed discriminatory acts occurring "because of" a prohibited ground of discrimination. Early boards of inquiry tended to the view that proof of an intention to discriminate was required. In one early Ontario case the Board stated that "one of the most difficult facts to determine are motives. And yet discrimination, whether it be with respect to employment or accommodation, cannot be ascertained from the mere act of denial. There must also be the fact of intention or motive."[60]

Later boards of inquiry began to examine only discriminatory results; such decisions hold that a respondent's motivation or intention is irrelevant, except possibly in mitigation of penalty.[61]

The issue was first considered judicially in an Alberta equal pay case in which McDonald J. of the Alberta Supreme Court stated that it was "the discriminatory result which is prohibited and not a discriminatory intent".[62] However, the matter was most recently and exhaustively canvassed by both the Divisional Court and the Ontario Court of Appeal in *O'Malley* v. *Simpsons-Sears Ltd.*,[63] a case which arose when a Seventh Day Adventist refused to work on Saturdays (considered the Sabbath by that sect). The Board of Inquiry held that an intention to discriminate was not essential to a finding of discrimination; rather, a discriminatory result was sufficient.[64] The majority of the Divisional Court disagreed and drew from the phraseology of the statute (prohibiting discrimination "because of" specific grounds) the conclusion that "an intention to discriminate on a prohibited ground is essential to a contravention" of the *Code.*[65] This decision was unanimously upheld by the Ontario Court of Appeal.[66] Although the Court of Appeal

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[60]*Britnell* v. *Brent Personnel Placement Services*, Report of a Board of Inquiry under *The Age Discrimination Act* of Ontario (June 1968) 3-4.

[61]See, *e.g.*, *Hayes* v. *Central Hydraulic Manufacturing Co.*, Report of a Board of Inquiry under the Alberta *Individual's Rights Protection Act* (9 January 1973); *B.C. Human Rights Commission and the College of Physicians and Surgeons*, Report of a Board of Inquiry under the *Human Rights Code of British Columbia* (7 May 1976); and *Jones* v. *Huber*, Report of a Board of Inquiry under the *Ontario Human Rights Code* (1976).

[62]*Re A.-G. Alberta and Gares* (1976) 67 D.L.R. (3d) 635, 695 (Alta. S.C., T.D.).

[63]*O'Malley* v. *Simpsons-Sears Ltd.* (1981) 2 C.H.R.R. D/267 (Ont. Board of Inquiry), *aff'd* (1982) 36 O.R. (2d) 59, (1982) 133 D.L.R. (3d) 611 (Div. Ct.) [hereinafter cited to O.R.], *aff'd* (1982) 38 O.R. (2d) 423, (1982) 138 D.L.R. (3d) 133 (C.A.).

[64]*Ibid.* (Ont. Board of Inquiry).

[65]*Ibid.* (Div. Ct.) 66, *per* Southey J. (Gray J. concurring).

[66]*Ibid.* (C.A.).

decision is presently under appeal to the Supreme Court of Canada,[67] the question would appear to be moot in the face of section 10 of the new *Code*:

> A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
> (a) the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances; or
> (b) it is declared in this Act that to discriminate beeause of such ground is not an infringement of a right.

This section clearly proscribes a discriminatory result, unless the requirement, qualification or consideration which brings about that discriminatory result can be proved to be "a reasonable and *bona fide* one in the circumstances".

Not only is the onus of proof on the respondent,[68] but it is an exceedingly difficult onus to discharge. The respondent would have to prove, on a balance of probabilities, that the requirement, qualification or consideration in question was (a) in good faith, and (b) objectively essential to the effective operation of his business.[69]

D. Handicap

The most significant, and potentially most litigious, additional ground on which discrimination is now prohibited is "handicap". The statutory definition is breathtakingly comprehensive:

> "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,
> (ii) a condition of mental retardation or impairment,
> (iii) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, or

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[67]Leave to appeal was granted 1 November 1982: *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd.* (1982) 45 N.R. 270 (S.C.C.). At the time of writing the appeal has not yet been heard.

[68]Once the Commission makes out a *prima facie* case, the respondent who seeks to rely on a statutory exception bears the onus of proof. See *Ontario Human Rights Commission* v. *Etobicoke, supra,* note 47, 208.

[69]*Ibid.* See also *Steel* v. *Union of Post Office Workers* [1978] 2 All E.R. 504, 510 (Employment App. Trib.).

(iv) a mental disorder.[70]

It is difficult to imagine any handicap — physical or mental, past or present, real or perceived — which will fall outside this definition. Obesity, for example, is considered by the Ontario Commission to be an "infirmity ... caused by ... illness" and therefore covered. The Prince Edward Island Human Rights Commission has interpreted alcoholism as a handicap, thereby forbidding employers from refusing to hire or from discharging an alcoholic. This interpretation has been supported by the Ontario Human Rights Commission.[71] Drug dependence, according to an official of the Canadian Human Rights Commission, is a "handicap" qualifying an addict for protection against discrimination.[72] Given the breadth of the statutory definition, coupled with the innate tendency of Commissions to adopt the most expansive interpretation, it seems safe to predict that the addition of handicap ushers in a new era of State intrusion in the name of human rights.

Where denial of equality is due only to lack of physical access, there is no violation of the *Code*.[73] Nevertheless, the Commission is empowered to receive and to attempt settlement of such complaints,[74] and boards of inquiry are empowered to make access and amenities orders, consequent upon a finding of discrimination, "unless the cost occasioned thereby would cause undue hardship".[75] What costs would convince a board of inquiry of "undue hardship" remains to be seen.

Most complaints based on handicap will come in the area of employment.[76] The new *Code* now requires employers to treat handicapped and non-handicapped job applicants and employees equally. Section 16(1)(b) provides that a handicapped person's equality rights are not infringed where

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[70]New *Code*, s. 9(b).

[71]Jill Armstrong, the manager of program review for the Ontario Human Rights Commission, has stated, "we've had limited experience in the area of human rights for the handicapped, but we'd certainly accept a case involving alcoholism, if one came up". See Kay, *New slant in human rights: protection for alcoholics* (1983) 56 Canadian Business 123 (May).

[72]Linda Poirier, the acting director of research policy for the Canadian Human Rights Commission, defines "disablement" so as to include "dependence on alcohol or a drug". Her comments provide another chilling example of how little an employer's former freedom to hire counts in the balance against a newly discovered human right: "Poirier feels that viewing alcoholism as a type of physical disability will help to demystify the condition for employers. 'I hope that they'll begin to see it as a disability over which one has little control, rather than a sinful, willful act. And this will improve the lot of alcoholics in general', she says." *Ibid.*

[73]New *Code*, s. 16(1)(a).

[74]New *Code*, s. 16(2).

[75]New *Code*, s. 40(2).

[76]In the first five months of the new *Code* (to November, 1982), the Commission received fifty-nine complaints on the grounds of handicap: two thirds related to employment. See Justason, *Unit for the Handicapped* in Ontario Human Rights Commission (1983) 4 Affirmation 2 (March).

that person is "incapable of performing or fulfilling the essential duties or requirements . . . because of handicap". What constitutes "essential duties or requirements" and who decides, the employer or the Commission?

The new *Code* provides no definition of "essential duties" but the Commission already has:

> 'Essential' means 'necessary and indispensable' and is determined through an examination of the job in the context of the entire company structure and function. Essential duties are usually defined as being 70-80 *per cent* of the job content. In handling complaints, the officers must determine what adaptations can be made to the job, to the workplace and to such terms and conditions of employment as hours of work and length of training, that will enable the handicapped person to work effectively.[77]

As this quotation makes clear, it is the Commission and its investigators, not the employer, who will decide whether a handicapped applicant could perform the essential job duties. The only review of that determination would be by a board of inquiry or court. Employers might draw slight comfort from the fact that what sparse litigation has occurred in this area suggests that courts are more sympathetic to the employer's plight than either the commissions or boards of inquiry.[78]

To deal with the anticipated increase in human rights complaints based on handicap, the Ontario Commission has created a special division (Unit for the Handicapped). According to a recent Commission publication, the Unit seems poised to encourage complaints actively:

> The more widely known the commission's legislation becomes throughout the province, the greater the number of people there will be to test its applicability in seeking protection against discrimination. The Unit for the Handicapped, with the co-operation of all citizens of Ontario, hopes to contribute to the increase in equal opportunity wherever it applies for the benefit of everyone.[79]

Conclusion

The Ontario *Human Rights Code, 1981* is more than just a revised and extended *Code.* It is a statute different in kind from its predecessors. It is declaratory in form, comprehensive in scope, and, I venture to assert, totalitarian in its implications.[80] It signifies a legislative preference for equality over liberty, as the *Code* intrudes further into hitherto unregulated human

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[77]*Ibid.*

[78]See, *e.g.*, *Huck* v. *Canadian Odeon Theatres Ltd.* (1981) 2 C.H.R.R. D/521 (Sask. Board of Inquiry), *rev'd* [1982] 5 W.W.R. 420 (Sask. Q.B.); and *Peters* v. *University Hospital* (1981) 2 C.H.R.R. D/358 (Sask. Board of Inquiry), *rev'd* (1981) 127 D.L.R. (3d) 302, (1981) 2 C.H.R.R. D/524 (Sask. Q.B.).

[79]*Unit for the Handicapped, supra,* note 76.

[80]"Totalitarian" — "Characteristic of a dictatorial one-party state that regulates every realm of life." *Collins Dictionary of the English Language* (1979).

activity. New social areas are added and discrimination is prohibited on new grounds. Social interaction between the sexes, dressed in the pejorative label "harassment" (and interpreted so as to include practical jokes, condescension and leering), is made subject to governmental regulation. Unconscious (or constructive) discrimination is forbidden. Boards of inquiry are given expanded, indeed virtually unlimited, powers. Fines under the *Code* are quintupled for corporations; for individuals the maximum fine is increased from $1,000 to $25,000.[81]

The bureaucracy charged with achieving this utopian vision of equality is the Ontario Human Rights Commission. Its statutory powers are increased. Its discretion is enormously broadened. Its staff and budgets multiply inexorably. What minimal check formerly existed on its authority (*viz.* the requirement of Ministerial consent to the appointment of a board of inquiry)[82] is abolished.[83]

Why has this happened? Why do legislators willingly invest human rights commissions with statutory powers they would entrust to no other government agency? Why is no check put on the exercise of discretion by a human rights commission? And why do these commissions enjoy a virtual exemption from public scrutiny and criticism?

Part of the answer, as de Tocqueville foresaw, lies in the democratic impulse to level all vestiges of rank and privilege; he wrote:

> [D]emocratic communities have a natural taste for freedom: left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible: they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery.[84]

The rest of the answer, I venture to suggest, lies in the essentially theological nature of human rights legislation. To a secular society the quest for equality fulfills the same yearning as, in centuries past, did once the quest for God. The religious vision of heaven, a land beyond time and mortality and very far off, has been replaced by a utopian vision of an egalitarian society, to be attained through Charters of Rights, Human Rights Codes, and affirmative action. To criticize human rights legislation and its

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[81]Compare former *Code*, s. 21 and new *Code*, s. 43(1).

[82]Section 17(1) of the former *Code* provided that, following a recommendation from the Commission that a board of inquiry be appointed, "the Minister *may, in his discretion,* appoint a board of inquiry" (emphasis added).

[83]Section 37(1) of the new *Code* provides that "[w]here the Commission requests the Minister to appoint a board of inquiry, the Minister *shall* appoint" a board of inquiry (emphasis added).

[84]*Supra*, note 25, 102-3.

premises is regarded as antediluvian, if not blasphemous.[85] Because such statutes come clothed in the mantle of "human rights", with much reassuring talk of brotherhood and compassion, we are disinclined to reflect on the cost in human freedom which our relentless pursuit of equality exacts.

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[85] *Cf.* note 23.