Securing Human Rights in Canada

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I. Introduction

By unanimous resolution the United Nations General Assembly in declaring 1968 as International Year for Human Rights asked member states to undertake:

> A review of national legislation against the standards of the *Universal Declaration of Human Rights*... and to consider the enactment of new, or the amending of existing, laws to bring their legislation into conformity with the principles of the *Declaration*.[1]

Rather than attempt to quantify Canadian progress in the protection of human rights, or to measure the particular content of the generalities of the *Universal Declaration,* two related but chimerical exercises, we shall in this paper sketch and comment upon evolving procedural techniques used to secure human rights in Canada. Because only government programs can be systematically established and oriented toward a comprehensive set of social goals, we limit ourselves to a consideration of government strategies. Examples used will hopefully give some idea as well of the substantive range of human rights activities in Canada, and of the degree to which it may or may not measure up to international aspirations.

To an extent, a chronological approach can be used, because Canadian experience has largely mirrored the international process of refinement and sophistication, moving from abstract formulation without predictable legal effect, to more precise delineation and application at the particular level.

A convenient starting point for the survey is World War Two. Depending upon how one chooses to define "human rights" one might, of course, start much earlier with *habeas corpus* and the various common law procedural safeguards, with the evolution of an independent and impartial judiciary, with the rule of law and legislative control of executive power, with the growth of the welfare state or even with the decline of laissez-faire. But many of the Canadian government activities under the *War Measures Act* during

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[1] GA/RES. 2081 (XX) IIB.

World War Two established a low point in official Canadian respect for human rights, which provides some relief for subsequent developments. Despite the excuse of military emergency most Canadians would prefer to forget the suspicion and fear, almost hysteria, which characterized the application of the preventive detention powers awarded to the executive under the *Defence of Canada Regulations*. Censorship of expression and association helped stifle criticism. The indiscriminate and cavalier relocation and deportation of persons of Japanese racial origin, naturalized or not, and the confiscation of their property, will always remain a blot on the record.[2] However, domestic responses to our own wartime conditions, as well, of course, as to the hideous facts of the War itself, helped spark a debate which fed a growing concern for the interests of the individual. This renewed sentiment of liberalism, also reflected in and encouraged by United Nations concern over general respect for individual human beings as a precondition of lasting peace, has carried past the political freedoms and legal rights which were most directly compromised in Canada during wartime, to focus on a considerably enlarged spectrum of "human rights". In Canada the process of securing more meaningful protection of human rights began cautiously after the War but has steadily gained momentum and sophistication.

II. Legislation

In view of the preliminary necessity to articulate goals of the human rights effort, declaration in the form of legislation is one of the first forms of official activity. Also, since particular objectives are frequently formulated in advance of any conception or available resources for a general scheme, authoritative legislative activity often begins in a piecemeal fashion. Thus, in 1944 Ontario passed a *Racial Discrimination Act* which prohibited the publication or display of any sign or notice which expressed racial or religious discrimination.[3] Shortly thereafter the same province prohibited discrimination in collective agreements[4] and in restrictive property covenants.[5] During the 1950's many new pieces of legislation in most Canadian jurisdictions dealt with fair employment practices, fair accommodation practices, and equal pay for equal work done by male and female employees.

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[2] A thoughtful and detailed study of Canadian attitudes to civil liberties during the period 1939-1945 was done by G. Ramsay Cook, *Canadian Liberalism in Wartime* (unpublished M.A. thesis, Queen's University, 1955).

[3] 8 Geo. VI, S.O. 1944, c. 51.

[4] *Labour Relations Act, 1950*, 14 Geo. VI, S.O. 1950, c. 34, s. 34(b).

[5] *Conveyancing and Law of Property Act*, 14 Geo. VI, S.O. 1950, c. 11.

Until the last decade the only departure from this piecemeal approach was an extensive *Bill of Rights* enacted in Saskatchewan in the form of a prohibitory penal statute.[6] During the 1960's a tendency in the other provinces to consolidate anti-discrimination legislation into deceptively broadly titled "Human Rights Codes" has perhaps been the most distinctive aspect of provincial legislative activity in this field.[7] This development may indicate some generalization of concept, but primarily it reflects newly developed techniques of enforcement, to which we shall return. Attempts to improve the legislation in detail have continued, of course, and there is scope for further improvement.[8] The most significant substantive development of the last decade at the provincial level has been a growing concern for the employability of older persons who have not yet attained the normal retirement age.[9]

There persists in Canada some constitutional confusion respecting legislative competence to enact laws dealing with fundamental rights and freedoms. In times of emergency this authority is clearly central. Egalitarian legislation, for such matters as accommodations and most employment, belongs to the provinces. But the position of the basic political freedoms of association, expression and religion is not clear. The courts have clarified that the provinces acting alone possess only very restricted competence to modify the common law; the question is the extent to which the federal parliament acting alone may legislate. Much relevant legislation has been subsumed under the federal criminal law power, but there have been indications that there exists an area of activity which neither federal nor provincial legislation alone may restrict.[10]

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[6] 11 Geo. VI, S.S. 1947, c. 35.

[7] Ontario: *The Ontario Human Rights Code*, 10-11 Eliz. II, S.O. 1961-62, c. 93; Nova Scotia: *The Human Rights Act*, 12 Eliz. II, S.N.S. 1963, c. 5; Alberta: *The Human Rights Act*, 15 Eliz. II, S.A. 1966, c. 39; New Brunswick: *The Human Rights Act*, 16 Eliz. II, S.N.B. 1967, c. 13; Prince Edward Island: *The Human Rights Act*, 17 Eliz. II, S.P.E.I. 1968, c. 24.

[8] Commonly excepted from provincial egalitarian legislation are domestic help, employees of nonprofit organizations, employers employing fewer than a given number of employees, and apartment buildings with fewer than a given number of units.

[9] *E.g.*, *The Age Discrimination Act, 1966*, 15-16 Eliz. II, S.O. 1966, c. 3. The *Act* prohibits an employer or person acting on his behalf from refusing to employ or to continue to employ or to refuse promotion to, a person between the ages of forty and sixty-five years on the ground of age. Trade unions are also bound by the *Act*. A recent amendment prohibits advertising which discriminates on this basis: 17 Eliz. II, S.O. 1968, c. 2.

[10] *Re Alberta Legislation*, [1938] S.C.R. 100; *Switzman* v. *Elbling*, [1957] S.C.R. 285 (per Abbott, J.).

In 1960 the Parliament of Canada enacted the *Canadian Bill of Rights*.[11] While subject to repeal as a simple federal statute, and despite its many deficiencies as an operative legal tool, the *Bill of Rights* possesses educative value in its support for fundamental political freedoms and specific civil or legal rights.

Currently, the focus of much human rights attention in Canada relates to a proposal by the federal government that a *Bill of Rights* be entrenched in the constitutive law of the federation.[12] The theory of entrenchment is that by removing from both the federal and provincial spheres respectively any legislative competence to modify the entrenched rights, the courts will become entitled to hold legislation from either sphere unconstitutional if in "pith and substance" the enactment restricts anyone's exercise of an entrenched right.

Proponents of entrenchment argue that if indeed entrenchment only confirms to the courts power they already possess in fact, such a solemn statement of basic policies will encourage courts to articulate value judgments which too often remain unstated.

The entrenched rights will provide a new focus for debate, and the substantive content of the rights will gain practical and real meaning for the man in the street. This view implies a curious conflict with the simultaneously held faith in the values and tendencies of judges. If our courts were undesirably conservative in their use of common law principles to protect important human rights, and if they refused the opportunities and political encouragement of the 1960 *Canadian Bill of Rights*, why should they react differently toward entrenched rights?

Opponents of entrenchment argue that the generalities in which fundamental human rights must necessarily be expressed, together with the fact that none of the "rights" is an absolute but rather is subject to a variety of qualifications, leave too broad an authority to the personal value preferences of persons who are not politically responsible. Even assuming that the principle of *stare decisis* will be relaxed, an undesirable court decision concerning an entrenched right could only be legislatively changed by the inflexible technique of constitutional amendment.

It is impossible to predict the effects of entrenchment apart from any political gain that might result. Legal effects might be

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[11] 8-9 Eliz. II, S.C. 1960, vol. 1, c. 44.

[12] This proposal has become identified with Prime Minister Trudeau's government by reason of positions taken in *A Canadian Charter of Human Rights* (Ottawa, 1968), and more recently in the federal government's proposals for constitutional reform: *The Constitution and the People of Canada* (Ottawa, 1969).

extensive or they might be virtually non-existent. This uncertainty is due to the interpretative dexterity of the courts and to the flexibility permitted to them by the generalities of fundamental law. It is trite that abstract formulations cannot be mechanically applied to resolve particular conflicts. Rather, the statutory skeleton must be fleshed out by other values, preferences and rules. Reliance upon the good sense and creativity of the judiciary is, however, both ancient and essential. The specific meaning of any statement of rights for a particular employment situation, housing dispute or trial in magistrates court, must necessarily be highly dependent upon the dispositions of the particular judge. American experience, for example, makes this crystal clear.

Accordingly, it is possible to overemphasize the legal significance of entrenchment. The nature of argument and evidence before the courts may change substantially but it need not. Any entrenchment of basic rights will be so abstract in nature that courts will not be forced to react in any particular way. The opponents of entrenchment, on the other hand, seem to ignore the necessary flexibility the courts enjoy in applying the generalities of the existing distribution of powers in the *British North America Act*. Despite traditional theory concerning the character and social role of our judiciary, there are many ways in which values are brought to bear upon the classification of laws for constitutional purposes. If political condemnation of any constitutional rule is widespread, constitutional amendment would not be difficult.

Two things are reasonably clear. First, to the extent the federal government may seek changes respecting police interrogation, the right to counsel, self-incrimination, bail, illegally obtained evidence or other aspects of criminal procedure, it need not wait upon the courts for reform. Second, the issue of entrenchment requires the consent of the provinces and in the lengthy process of constitutional bargaining which is just beginning, it will not be settled in either principle or detail apart from other issues such as the amending formula, the constitution of the Supreme Court, or the distribution of powers itself.

A different brand of federal legislative activity seems to be gaining in popularity. Distinct from armchair legislation of general orientation there is increasing resort to detailed empirical investigation into the factual setting of and requirements for specific human right problems, with a view to corrective legislation to equalize real opportunity. Current examples include the royal commissions on bilingualism and biculturalism and on the status of women, as well as the efforts to develop a new Indian policy and the hearings on

housing. In all cases the human rights goals are predetermined at a fairly abstract level, the grass roots factual inquiry being directed toward the problems and techniques of effective implementation. A more modest exercise along similar lines culminated in the *Report of the Special Committee on Hate Propaganda,* which recommended new criminal legislation to prohibit communication advocating genocide or group defamation, or incitement to hatred along racial lines.[13]

III. Conflict Resolution

Legislative declaration has only very limited value in the absence of effective techniques of implementation. Forms of implementation include education, assistance programs, and meaningful application of the principles in the process of resolving conflicts between individuals or between individuals and government. In the area of conflict resolution Canadian practices and emphasis within the last two decades have moved toward more flexibility, localization, and specialized machinery.

(a) *Judicial*

Historically, of course, the main agency for implementation has been the regular courts. Even in the absence of specific statute the judiciary at no time seemed obviously frustrated by a lack of guiding common law principle if the particular judge perceived a situation offensive to his scale of values. Several major Supreme Court of Canada decisions in the 1950's discussed problems of basic democratic values and to an extent defined a charter of political freedoms for Canadians.[14] In a notable case in 1945, the Ontario High Court held invalid a covenant restricting the sale of land along racial lines, on the ground that the covenant contravened public policy.[15] As evidence of public policy the court cited the *United Nations Charter,* the *Atlantic Charter,* anti-discrimination legislation in Canada, and speeches of political leaders in allied countries.

Judicial use of Canadian human rights legislation has been conservative and unresponsive. The few prosecutions under provincial anti-discrimination legislation have not created interesting jurisprudence. Despite many arguments and opportunities to apply the *Canadian Bill of Rights* to specific problems arising under federal legislation, and despite an interpretative instruction in the

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[13] (Ottawa, 1966).

[14] *E.g., Saumur* v. *City of Quebec,* [1953] 2 S.C.R. 299; *Chaput* v. *Romain,* [1955] S.C.R. 834; *Switzman* v. *Elbling, supra,* n. 10; *Roncarelli* v. *Duplessis,* [1959] S.C.R. 121.

[15] *Re Drummond Wren,* [1945] O.R. 778, 4 D.L.R. 674.

Bill of Rights that every law of Canada shall, in the absence of specific provision to the contrary, be construed and applied so as not to abrogate or infringe any of the rights or freedoms declared in the *Act*, the courts have emasculated the *Act* and rendered it virtually meaningless.[16] A case is currently before the Supreme Court of Canada which may alter past tendencies. A charge of intoxication laid under the *Indian Act* was dismissed on the ground that section 94 of the *Indian Act* is discriminatory and therefore inoperative by virtue of the *Bill of Rights*.[17] The Crown is appealing.

(b) *Non-Judicial*

Legislative provisions respecting egalitarian, economic, linguistic and legal rights can usually be more specific and detailed than those guaranteeing political freedoms. In these areas of greater specificity, specialized commissions can play a very practical role supplementing judicial protection of human rights. The authority of the courts is a desirable backstop for the enforcement effort, but its use is attended with some formality, delay and expense, elements which prevent effective enforcement in certain types of cases.

In 1958 Ontario established an Anti-Discrimination Commission to publicize egalitarian legislation.[18] In 1962 this agency was replaced by the Ontario Human Rights Commission,[19] a body with full-time specialized staff charged with administrative and supervisory functions as well as that of public education. Since the Ontario experiment has enjoyed a significant measure of success and has been partially emulated in Nova Scotia, New Brunswick and Alberta, it merits some examination.

The purely educative efforts of the Ontario Human Rights Commission comprise a very important aspect of its work, but more interesting is the Commission's role in the process of conflict resolution. Persons who feel they are victimized by practices contrary to the *Ontario Human Rights Code* or the *Age Discrimination Act* may submit a formal complaint, written and signed, to the Commission. A Commission investigator from the nearest regional office then interviews the complainant. If a contravention of the legislation seems to have occurred, the Commission officer seeks by personal contact to arrange a conciliated settlement between the parties. The methodology of conciliation is very flexible. Accusations

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[16] See Tarnopolsky, *The Canadian Bill of Rights*, (Toronto, 1966). See *Whitfield* v. *Canadian Marconi Co.*, (1967), 68 D.L.R. (2d) 251, 766.

[17] *R.* v. *Drybones*, (1967), 64 D.L.R. (2d) 260 (N.W.T. Court of Appeal).

[18] *The Anti-Discrimination Commission Act*, 6-7 Eliz. II, S.O. 1958, c. 70.

[19] *Supra*, n. 7.

are avoided if possible, in order to prevent any hardening of positions which would frustrate the process. Usually the settlement sought is an offer of employment or accommodation as the case may be, and assurance that the provisions of the *Code* are being and will be honoured. The Commission claims extensive success for its conciliation efforts. From time to time, however, conciliation fails, in which event the Commission may recommend that the Minister appoint an independent person, usually a judge or legal scholar, to sit as a Board of Inquiry. Increased danger of publicity has often inspired settlement in the forty or so instances, out of about two thousand formal cases, that over the course of six years have gone as far as a Board of Inquiry. The function of the Board is to determine whether a probable breach of the legislation has occurred, and to this end the Board has power to summon witnesses and take evidence. The Board may recommend to the Commission that the complaint not be pursued further, or it may recommend to the Minister of Labour that he issue an order or that a prosecution be brought. The sanction provided for successful prosecution is a fine.

The obvious value of the Commission lies in its informality, its flexibility, its speed, and in its demonstrated ability to secure meaningful relief in many cases which have come to its attention. It supplies the knowledge, financial resources and much of the initiative, the lack of which would otherwise usually prevent or inhibit a disadvantaged person from seeking redress. The Commission's ability to function depends upon reasonably precise legislation, a diminished role for subjective value judgment, and widespread public support for the norms embodied in the legislation.

Human Rights Commissions in Canada have healthy, flexible and experimental attitudes toward their procedures, and amendments are effected as shortcomings become apparent. Professor Tarnopolsky has ventured several valuable suggestions for improvement in Ontario, concerning the laying of complaints, procedural safeguards in the processing of complaints, increased authority for investigators, judicial review of Inquiry findings, the whole subject of ministerial orders, and the realignment of penal sanctions both for the discriminatory act and for interference with investigation.[20] Another question which has been raised asks whether the *Human Rights Code* does not impose a conflict of objectives upon the Commission, by inducing it to seek simultaneously publicity on the one hand, and on the other hand the confidentiality from which conciliated

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

settlements spring.[21] Effective relief for a complainant may preclude publicity.

Policy respecting prosecutions also presents problems. The Commission appears to have a bias against prosecution in the regular courts, and as a result we are possibly deprived of a very valuable type of publicity. On the other hand, prosecution may not be thought appropriate for the polite unthinking bigot, or it may frustrate the immediate interests of the complainant.

Another potential problem concerns the appointment of boards of inquiry. Only nominally does the Minister of Labour select, and pay, the chairman. In practice the selection is made by the Commission, a situation which presents at least the possibility of compromised independence or impartiality.

Apart from the possibility of prosecution, section 13(6) of the *Ontario Human Rights Code* permits the Minister, acting upon the recommendations of the Commission, to issue "whatever order he deems necessary" to carry into effect the recommendations of a board of inquiry. This power includes the right to withhold or deny licences. Such an order is final. In the case of successful prosecution, the Minister may apply for a permanent injunction.

Similar flexible supplements to formal court action, as grievance procedures for individuals, have developed in the area of administrative action. As government extends its functions there is an increasing risk that civil, or "legal", rights will be compromised. Here again several Canadian jurisdictions have recognized that common law procedures are too cumbersome for the majority of cases and have adopted a compatible civilian institution, the ombudsman. The function of the ombudsman varies in detail according to the statute constituting his office, but in essence it is to hear and investigate individual complaints on an informal basis, and to negotiate settlements.

Short of a cooperative federal-provincial human rights agency, the federal distribution of powers prevents our having one supervisor responsible for safeguarding the whole spectrum of human rights. But the principle of specialist supervisors is gaining acceptance domestically as well as internationally as a useful technique. The most recent Canadian example is the proposal by the federal government to establish an office of Commissioner of Official Languages

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[21] This point is elaborated by H.W. Arthurs in his report as Chairman of a Board of Inquiry into a complaint by Reust against I.B.E.W. Local 120, Nicholls and Turner (April, 1968).

for Canada.[22] Like an ombudsman, the proposed Commissioner will have authority to initiate investigations in the execution of his function, which will be to ensure recognition of the equal status of the French and English languages in the administration of the affairs and institutions of the Government of Canada. He will be able to summon witnesses, administer oaths and receive evidence. As with the ombudsman, the remedial procedures at his command will be report, recommendation and publicity.

Like the United Nations High Commissioner for Refugees and the proposal for a United Nations High Commissioner of Human Rights, these various types of full-time professional watchdogs have great flexibility and can act with efficiency. An important public judgment they represent is that the expense of certain types of enforcement procedures for human rights should be borne by the public as a whole rather than by the particular victim.

IV. Education and Publicity

Nourishment of a broadly based public opinion favouring meaningful human rights is the most difficult and long-term technique of protection and the one with the fewest tangible results. At the same time it is the most important task of all and brings the most permanent and far-reaching improvements. Apart from the obvious hope that the entire psychological atmosphere respecting minorities will be maintained in a healthy state and that actual legal violations will thereby decline in number, the concrete advantages of strong liberal views held throughout the community are two. First, general public respect for human rights is essential for successful mediative and conciliatory efforts of settlement. Second, it gives us valuable confidence in the strength and stability of our society, and in the good judgment and perspective of our citizenry. That we may lack this strength and judgment in Canada was indicated by the *Defence of Canada Regulations* in World War II, certain government activities thereunder, and more recently by the *Report on Hate Propaganda.*

Members of the Canadian public are increasingly reached by a wide variety of educative efforts. These range from conferences and publicity concerning the *Universal Declaration of Human Rights,* held every year since 1948 and including a concentrated effort in 1968, to declaratory statutes such as the *Canadian Bill of Rights,* and to a rapidly growing study of and literature on human rights. Incidental benefits also derive from news media transmission of

[22] Bill C-120 (Official Languages) 1968, clauses 19-34.

current events with its increasing human rights content. Dramatic civil rights events in the United States are frequently geared to the mass media. Attention of people around the world is thus focussed particularly upon egalitarian and economic rights. Canada has perhaps gained most from this by virtue of her close media ties with the United States. The mass media also respond well to other spiralling facets of the growing activity and interest over the whole spectrum of human rights.

The most systematic Canadian publicity effort is that of the Ontario Human Rights Commission. The Commission, with its predecessor, has for ten years represented a commitment by the Government of Ontario to publicize its fair practices laws and thereby to further the cause of human rights. Included in the regular circulation of its journal and newsletter service are ethnic and other social organizations as well as over 150,000 individuals. A wide variety of informational pamphlets are also distributed. Commission staff members engage in various forms of public relations work, and the cases before the Commission receive encouraging coverage in the newspapers. Direct approaches are made to employment agencies, newspapers, key industries and associations of real estate agents. Minority groups and "ghettos" are likewise sought out for special educational programs.

There is an observable correlation between the Commission's educational activities and the number of complaints received.[23] Over the first four years of its operation the case load of the Commission increased almost thirty-fold, while the education and publicity budget increased four to five times.

In 1968 the Commission sponsored a research project to examine all social studies textbooks used in provincial schools for attitudes to minority groups and implications for discrimination generally.

V. Economic Rights

It is axiomatic that the formal enumeration of particular rights is but one facet of an effective human rights program and may be a meaningless exercise in the absence of a material base permitting their enjoyment. The rhetoric of human rights has a hollow ring for the immigrant or displaced worker in a Toronto slum, the family scratching out a precarious existence from a small farm,

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[23] Speech by the Commission Director, Dr. Daniel G. Hill, "Protecting Human Rights in Ontario", November 27, 1967. See also the paper prepared by Dr. Hill for the National Conference on Human Rights, December, 1968: "The Role of a Human Rights Commission: The Ontario Experience".

or the Indian on the reservation. Such individuals are in a real sense the victims of what has been called the "accidental century".[24] They are just as effectively denied freedoms as if someone openly refused them in a discriminatory fashion. Since the focus of human rights efforts is the freedom and dignity of the individual human being, the means of denial are incidental. General realization of this mutual interdependence between the traditional rights and physical and mental well-being has resulted in this century in a considerable broadening of the scope of "human rights" activity. For the same reason, once the enjoyment of an economic or social right becomes a precondition for the enjoyment of a legal or political right, it becomes artificial to pursue any conceptual distinction between them. The converse is likewise true. What meaning have rights to life, health or education, in the absence of guaranteed access to legal services, health services, proper nourishment and guaranteed access to educational facilities?

Economic disparity is not a new phenomenon, but its relevance to any meaningful program of human rights has recently been brought sharply into focus in the United States and Canada.[25] The Marxist view has unfailingly dismissed Western developments as either a fraud or, at best, an irrelevance, for their attempts to implement traditional human rights goals without embarking on the essential first step of guaranteeing basic economic rights.[26] Closer to home, Michael Harrington dispelled much of our complacency when he wrote of "The Other America" — a segment of society whose economic deprivation excludes them from full enjoyment of many of the democratic values.[27] That the problem of poverty has a Canadian dimension was graphically illustrated in 1968 by the Fifth Annual Review of the Economic Council of Canada.

In the United States, the call by black militants for black control of the economic infrastructure of the ghetto as an essential first step toward a goal of human dignity recently received the imprimatur of Mr. Nixon, who espoused an enigmatic concept of "black capitalism" during his campaign for the Presidency. During the 1968 Canadian federal election Mr. Stanfield advocated the establishment of a guaranteed minimum income, a proposal now echoed quite widely

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[24] Harrington, *The Accidental Century*, (1965).

[25] See Harrington, *The Other America*, (1962), and the *Fifth Annual Review of the Economic Council of Canada*, (1968), Chapter 6.

[26] See, for example, *The Socialist Concept of Human Rights*, Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences, (Budapest, 1966).

[27] *Supra*, n. 25.

in Canada.[28] Such diverse spokesmen may disagree about the strategies to be pursued but they give added emphasis to the realization that the economic advancement of disadvantaged groups is an essential step in the implementation of human rights.

The right to social security and entitlement to "the economic, social and cultural rights indispensable for [the individual's dignity] and the free development of his personality", as well as the right to an adequate standard of living were included in the 1948 *Universal Declaration.*[29] However, the traditional western approach to human rights implementation has been to relegate economic, social and cultural rights to a secondary role. The reluctance of many states to undertake formal obligations in the economic field was an early stumbling block to the protracted task of translating the aspirations of the *Declaration* into the limited reality of an international convention. The compromise result teok the form of two separate instruments: the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights.*[30]

Tarnopolsky has noted that the development of human rights in Canada, as in the other major common law systems, has historically been primarily concerned with the need to protect the individual from arbitrary interference by government.[31] The problem posed was that of two unequal parties — the individual and the state — with the recognized need for and implicit adequacy of the rule of law, exercised through a sovereign Parliament and independent judiciary, to guarantee the individual certain fundamental freedoms and rights. Traditionally these have included freedom of expression, association, religion, the right to a fair and public trial, freedom of contract and freedom to hold and dispose of property. The technological revolution of the past hundred years has, however, transformed our society. It has led to the creation and development of resources which have given new meanings to traditional legal concepts. Freedom of contract, for example, has long been modified in situations involving a socially unacceptable imbalance of power. Freedom of expression has taken on a new dimension in the age of television and mass communications, and freedom of association

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[28] See, for example, *A Statement by the Canadian Welfare Council: Social Policies for Canada,* Part I, (Ottawa, January 1969).

[29] The *Universal Declaration of Human Rights,* 1948, Articles 22 and 25.

[30] Both were adopted and opened for signature, ratification and accession by General Assembly resolution on December 16, 1966. (1966), U.N. Doc. A/6316, pp. 49 and 52.

[31] *Supra,* n. 20.

now has to be seen in the context of the sophisticated machinery which regulates many aspects of business and labour relations.

In obvious ways the technological revolution has made it possible for many more people to exercise certain rights effectively. Increased educational facilities have led to greater awareness of the individual's rights, and a sophisticated communications system has resulted in closer scrutiny of certain arbitrary abuses of power. However, the dramatic developments of the past century have created their own problems.[32]

Enormous increase in our gross national product has led to a quickly rising standard of living from a national point of view. But these advances have benefited some segments of the population more than others. There remain literally millions of Canadians who are economically deprived [33] — people who have been untouched or swept aside by the onrush of our technology. At the same time, one effect of these changes has been to create new expectations and to lead to a growing awareness that it is anomalous to talk of an effective program of human rights while so many people live in conditions which effectively deny them access to such rights and which in themselves constitute a negation of any goal of human dignity. Concomitant with this has been the increasing realization that the traditional and almost exclusive common law emphasis on legal rights is no longer adequate. In order to meet the special problems of our age government can no longer be viewed solely as an antagonist; rather, its positive and beneficial capacities must be exploited. Pierre Trudeau gave succinct expression to this problem in 1961:

> Within such a legal framework, western man reached standards of living undreamed of four centuries previously. But in the process, he had set up institutions wherein the principle of maximum self-assertion by all was eventually to lead to maximum insecurity for many. Economic Darwinism produced a great increment in the wants and needs of industrial man, but not always the means to fulfill them adequately. More and more people began to realize that the concept of civil rights availed them little against such realities as economic exploitation or massive unemployment.[34]

Periodic attempts have been made to mitigate the more extreme social inequalities, but recent evidence suggests there remain severe

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[32] See the Montreal Statement of the Assembly for Human Rights, (March, 1968), Section IX.

[33] The Economic Council pointed out that 4.2 million Canadians live below "low-income" levels. The vast majority of these exist in a condition of poverty, with all its implications: *Fifth Annual Review of the Economic Council of Canada*, (1968), p. 109.

[34] *Economic Rights*, (1961-62), 8 McGill L.J. 121, at p. 121.

economic disparities between different groups and regions within Canada, particularly when measured in terms of income distribution.[35]

The positive role of government as an agency for channelling resources to implement human rights goals is manifested in a number of areas. Notable in this regard are the variety of federal and provincial welfare schemes. These plans vary in nature but are generally aimed at providing a measure of financial security for the individual. Some are universal in that they involve the payment of allowances regardless of actual need. Examples here are family, youth and old age allowances. Other plans fall within the rubric of social insurance, whereby benefits accrue in proportion to contributions made by the individual. Where contributions are tied to earnings, the more highly paid will usually receive higher benefits. The person who has no job and is therefore unable to pay into the various social insurance funds does not benefit from such schemes. He is more likely to be dependent upon the third type of program — social assistance — under which payments are made upon proof of actual need on the part of the individual.[36]

Government has also moved in other areas. The framework has been laid to supplement existing hospital insurance plans with a comprehensive medicare program, to be operated by the provinces with fifty per cent of the cost being met by the federal government.[37] Ontario has recently established a promising legal aid plan funded by the province.[38] Much will depend on the manner in which this plan is administered, but it does have the potential to provide access to adequate legal assistance and counselling for many of those who have hitherto been precluded by their financial circumstances from the benefits of such service.

We have, therefore, gone part of the way towards removing some of the more intolerable inequities, but we have done this on an *ad hoc* basis, often without any clearly articulated goals. There remain certain basic issues to be faced. In spite of the various programs aimed at economic and social betterment, one in five Canadians still lives in poverty [39] and is denied full participation in our society.

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[35] *Fifth Annual Review of the Economic Council of Canada*, (1968), especially at p. 106 *et seq.*

[36] For a general review of the various types of social insurance and welfare programs, see the Statement by the Canadian Welfare Council, *supra*, n. 28.

[37] *Medical Care Act*, 14-15-16 Eliz. II, S.C. 1966-67, c. 64. The success of this Plan will depend on federal-provincial cooperation, which is by no means assured.

[38] *The Legal Aid Act, 1966*, 14-15 Eliz. II, S.O. 1966, c. 80.

[39] Such was the conclusion arrived at by the Economic Council, following their discussion of the problem of definition: see *Fifth Annual Review, supra*, n. 35, pp. 103-110.

There is also an unfortunate correlation between poverty and other disadvantages. The poor are less likely to receive adequate education and to acquire the developing skills that our society demands. They are also more prone to physical and mental illness. As a result of these factors they are in turn the least employable and the least likely to achieve financial security without assistance. It is a vicious and inhuman circle, with poverty both the cause and the effect. As an adjunct to this material deprivation there often exists a malaise, which is a less apparent but perhaps more insidious threat to human dignity — the *culture* of poverty.[40] In the words of the Economic Council:

> Much more serious and more widespread is the kind of low-income situation that carries with it a sense of entrapment and hopelessness. Even the best statistics can only hint at this. They cannot capture the sour atmosphere of poor health and bad housing — the accumulated defeat, alienation and despair which often so tragically are inherited by the next and succeeding generations.[41]

There is a further aspect to the problem. We have spoken of poverty as denying certain groups their basic rights in society. It becomes pertinent at this point to ask, which groups? In the United States, negroes and certain other minorities constitute a significantly larger proportion of the economically disadvantaged than they do of the population as a whole. With respect to Canada the Economic Council, in presenting a breakdown of low income families, exposed both regional and racial disparities. There is a higher incidence of poverty in the Atlantic Provinces than elsewhere. Similarly, the statistics of health, life expectancy, infant mortality, education and employment are particularly ugly for our Indians, Eskimos and Metis. For example, in 1965 almost 80 percent of Indian families subsisted on annual incomes of less than $3,000., more than 50 percent on less than $2,000., and over a quarter on less than $1,000. The average life expectancy of an Indian woman in Canada is 25 years and among Eskimos the infant mortality rate is more than one in four — ten times higher than the rate for the population as a whole.[42] The special problems of the Indian and the Eskimo are compounded by differences of culture and tradition, but these groups, together with others such as many rural communities and unskilled urban workers living in areas of industrial stagnation, suffer primarily

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[40] Harrington, *The Other America*, (1962).

[41] *Supra*, n. 35, at p. 105.

[42] *Ibid.*, at pp. 121-124. For comment upon the *Economic Council Report* in general and the statistics in particular, see the general debate on the problems of and policies for Canada's Indian population, in *House of Common Debates*, March 6, 1969, pp. 6283-6332 (28th Parliament, First Session).

because they are an irrelevance to our post-industrial society. The technological revolution has provided no place for them. What then must we do?

First, it may be taken that when western societies speak of "equality of opportunity" what we really mean is the guarantee of certain types of opportunity, or, at times, the removal of certain obstructions to an individual's pursuit of his interests. This is the case whether one looks at education (for example, student loan plans), social security, health or the right to work. "Economic rights" at their base pose political and cultural questions, and in western society the tendency is not to seek an economic levelling as a matter of principle, but rather to raise the bottom to certain functionally defined standards.

"Economic rights" go both to principle and to the detailed implementation of programs in income protection, public housing, health care and legal aid. These varieties of social security are, of course, extensively inter-related. The basic questions raised by economic rights have profound implications. Formulating answers is made more difficult because all relevant costs or benefits are neither obvious nor quantitative, but the complexities of the problems involved must not preclude the effort. A fundamental issue concerns the potentially undesirable effects of social security upon the attitudes of people. How does it affect their self-reliance? How does it affect the concern they manifest for each other on a private basis? Are there optimum levels for various programs? Are some types of programs better than others? A more obvious practical difficulty with economic rights concerns the immense cost of ideal programs. The details of income redistribution are politically sensitive and socially important. Where wealth comes from, and the criteria by which it is taken, are as critical on both the individual and regional levels as where it goes and the criteria by which it is dispensed.

The 1960 *Canadian Bill of Rights* constituted a formal restatement of the traditional fundamental rights and freedoms, with some reference to criminal procedure. Its principles were formulated at a generally high level of abstraction and it made no reference to economic rights. The recent debate in Canada over the need to entrench in our constitution a new *Charter of Human Rights* has raised anew the issue of economic rights. In the government proposals published in 1968, some mention is made of economic rights. However, Justice Minister Trudeau considerably modified his radical call to action of a few years before:

> The guarantee of such economic rights is desirable and should be an ultimate objective for Canada. There are, however, good reasons for putting aside this issue at this stage and proceeding with the protection of political, legal,

> egalitarian and linguistic rights. It might take considerable time to reach agreement on the rights to be guaranteed and on the feasibility of implementation.[43]

Economic rights, then, are not to be included in the proposed *Charter*. We may aspire to a goal of guaranteed economic rights as enumerated in the *International Covenant,* but are not yet ready or able to meet the political challenge involved in giving substance to such matters as the right to work,[44] adequate food, clothing and housing,[45] and the highest attainable standard of physical and mental health.[46]

The political decisions implicit in any attempt to give meaning and effect to such terms as the "right to work" or "an adequate standard of living" in a particular social context would necessarily be far-reaching. The implementation of an effective right to work, for example, would involve an immense reallocation of resources and may already be an obsolete goal as automation and other advances greatly reduce the number of workers required for the production of goods or services. Furthermore, the human automatism required for the performance of many current work functions is a significant factor in the emerging problems of meaninglessness or "existential nausea" that increasingly face the individual.

While there remains a real need for material assistance in many areas, the Economic Council has indicated that merely to increase welfare payments is no answer for the deeper problems of those groups who remain mired in the chronic poverty cycle, and has pointed to the need to involve the poor themselves in the development of programs designed to help them.[47] The experience of other countries, particularly the work of the Office of Economic Opportunity in the United States, with its emphasis on self-help programs, can be of particular relevance here.

There is some distance to which we can proceed even within the existing degree of government involvement. First, we can formulate goals of a comprehensive social security program. This will necessitate consideration of the challenges of poverty, urbanization, technological change and retraining, and the desirability of

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[43] *A Canadian Charter of Human Rights,* (Ottawa, 1968), p. 27.

[44] *International Covenant on Economic, Social and Cultural Rights,* Article 6. One of the quandaries is posed by the conflicting goals of a low level of unemployment and reasonable price stability. For an attempt to resolve this impasse see the federal government white paper, *Policies For Price Stability,* (Ottawa, 1968).

[45] *Covenant, ibid.,* Article 11.

[46] *Ibid.,* Article 12.

[47] *Supra,* n. 35, at p. 132.

family cohesion. It is a necessary blueprint for future development. Second, we can rationalize existing welfare programs, to prevent both undesirable gaps and unnecessary overlap. Recent studies by the Canadian Welfare Council and by the Willard Task Force have focussed attention on the need for adjustments of both principle and detail. The national need for inter-jurisdictional cooperation or centralized direction is clear, as is the need for efficient administration in terms of both timeliness and dollar cost. Third, there is a need for institutional facilities for review and appeal throughout the social security system. A specialized ombudsman would probably provide the decentralization, informality and flexibility required. Indeed, much of the process of welfare administration, particularly at the local level, should be subjected to scrutiny. Screening processes, initiatives to assist persons entitled, the attitudes of administrators, and the use of welfare as a lever to promote certain values, are among the important issues on the front lines of welfare administration.

VI. General Assessment

Concern for human rights and the taking of effective measures to provide access for all members of society to the rights now enjoyed only by some is a primary function of government. This function involves guarantee to the individual human being of a certain quality of life and opportunity, guarantee of certain equalities and minima in the treatment of one individual by another, and a defined standard of treatment of the individual by government authority.

Post-World War Two activity in Canada across most of the spectrum of human rights has reflected a liberalism renewed by the events of the war and by a sharper international focus on human rights as a precondition of lasting peace. There is, not surprisingly, a parallel between evolving types of techniques utilized at the international [48] and national levels. A protracted period of definition and declaration at both levels has created the basis and demand for adequate implementation and legally enforceable standards. Consequent efforts to refine techniques put the definitional efforts, and the *bona fides*, to the test. The process is difficult and subjective, partly for the reason that statements of human rights and freedoms cannot be absolutes.

This paper has surveyed the Canadian process of refinement of legislative activity and enforcement process. The regular courts, not

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[48] Carey, *Procedures For International Protection of Human Rights*, (1967), 53 Iowa L.R. 291.

limited to statutory guarantees of human rights and therefore capable of a uniquely creative role, remain an essential part of the total enforcement effort. However, they have been supplemented by a variety of more flexible agencies of conflict resolution, the expense of which is borne by the public at large rather than by the individual complainant. These permanent agencies, from commissions to single persons, are constituted by specialized and particular statutes and their functions are limited to the provisions of the relevant statuto. They have not been found possible or desirable for the broad areas of political freedoms or economic rights, but for the purposes for which they have been constituted they have served to decentralize and accelerate the enforcement effort. The localization and relative informality which characterizes these developments can only contribute to meaningful observance of human rights.

Evaluation of the total Canadian human rights effort, or suggestion of other avenues or techniques which might be attempted, requires some articulation of the goals adopted by our society.

The search for Canadian goals must, for two reasons, go beyond the international declarations and covenants. First, in the search for unanimity or wide acceptance much of the specificity is compromised out of international declarations, leaving them so vague and ambiguous that almost any substantive content may be given to them. Concrete meaning in terms of the real effect upon the life of a human being can only be particularized at the national level. The second reason is that whether for constitutional or other reasons, Canada has not become bound by the most significant of the human rights covenants.

The process of defining and elaborating goals is, of course, a continuous one, as is that of evaluating existing procedures and techniques against those goals. The most recent attemps to articulate Canadian goals, even at a fairly high level of abstraction, are the federal government positions taken in *A Canadian Charter of Human Rights* and in *The Constitution and the People of Canada.*[49] The most notable feature is the continued unwillingness to include economic rights as an immediate goal of the Canadian government effort.

Turning first to legislative prescriptions, there has been little evidence of any systematic review at either the federal or provincial levels, as was called for by the General Assembly resolution [50] and

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[49] *Supra,* n. 12.
[50] *Supra.* n. 1.

by the Jamaica Seminar in 1967,[51] to evaluate the extent to which our legislation measures up to the spirit and requirements of the *Universal Declaration*. Given Canadian resources and fortuitous benefits from our position, it is easy to be smug about the progressive quality of our legislation with respect to everything from immigration policy to anti-discrimination efforts. Without denying possible political relevance in national comparisons,[52] however, the relevant standard of achievement should be that of maximum fidelity to the principles of the *Universal Declaration* commensurate with national resources.

Another suggestion of the Jamaica Seminar which should be taken up in Canada is peacetime re-evaluation of the *War Measures Act*.[53]

As for the effectiveness of the legislation and of the enforcement procedures, empirical studies are the only way in which we can discover the extent to which liberal official postures are more than political exercises. Considerable research is, of course, being carried out, particularly at the provincial levels. But still we do not know, for example, the real effects of conciliation efforts by provincial human rights commissions. Do negotiated settlements really work, and if so how well and for how long? Are there continuing checks on offenders? If the main lasting value of commission work derives from publicity, do current techniques constitute the best use of our resources? Should there be greater emphasis on prosecutions? Does human rights information reach the substantial pockets of poverty? If not, how do we reach these people? If so, how far do these people use the existing procedures?

In the never-ending search for new strategies by which to advance the cause of human rights, certain presumptions would seem to apply. First, the fundamental importance of the subject dictates that we be prepared to consider genuinely and to try anything that might work, and that few restrictions be placed on method.[54] Second,

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[51] *Report of the U.N. Seminar on the Effective Realization of Civil and Political Rights at the National Level*, Jamaica, April 25 — May 8, 1967 (Doc. ST/TAO/HR/29), p. 58. Canada did not participate in the *Seminar on the Realization of Economic and Social Rights Contained in the Universal Declaration of Human Rights*, held in Poland in August, 1967 (U.N. Doc. ST/TAO/HR/31).

[52] Cohen, *Human Rights: Programme or Catchall? A Canadian Rationale*, (1968), 46 Can. Bar Rev. 554.

[53] *Supra*, n. 51, at p. 60. An abortive effort to review the *War Measures Act* by a Select Committee of the House of Commons occurred in 1961. The problem was revived for discussion by the *Charter* proposal, *supra*, n. 43, at p. 30.

[54] For example, one restriction might be the use of subliminal advertising or chemical conditioning of the mind as a method of promoting widespread

that with respect to the realization of goals and the allocation of resources for that purpose, localization of effort and direct contact with the man in the street should be favoured. The impetus needed to achieve this contact must come initially from government rather than from the individual. A third presumption which might well be adopted is that the physical and mental health, education, attitudes and opportunity of children be recognized as the highest priority for long term advancement of human rights.

More specifically, what techniques might be considered?

With respect to legislative programs, it has been suggested elsewhere that permanent bodies be established to advise governments on the constant adaptation of their laws to standards of human rights developed by the United Nations.[55]

In the area of enforcement, including conflict resolution, would there by any advantage in emulating domestically the example set by the Council of Europe or the Inter-American Commission on Human Rights, in establishing a Human Rights Court? Would the more specialized French example of the Conseil d'Etat be useful in Canada?[56] Short of a new court, is there any advantage in a federal counterpart to the provincial human rights commissions? Would a single federal-provincial cooperative agency be better still?[57]

In the matter of sanctions, flexibility demands a wide range of selection and the opportunity for imagination. Here Canada rates well. Although the *Canadian Bill of Rights* follows the example of landmark English and American human rights legislation by omitting to provide any special sanction for breach, the courts possess inherent jurisdiction to fashion appropriate remedies. Insofar as penal

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education in and support for human rights principles. These techniques are usually regarded with horror because they by-pass the rational faculties of man and in a sense thereby deny his humanity. Nevertheless, it is surprising that several people think this little different in principle from mass advertising and oppose the technique not on the basis of principle, but rather on the control risks of limiting its use to "desirable" purposes.

[55] Montreal Statement of the Assembly for Human Rights, (March, 1968), *Proposal for Action ‡ 11.*

[56] Such a court for provincial purposes has been recommended by McWhinney, *A New Base for Civil Liberties*, (1965), 8 Can. Bar J. 28, at pp. 33-34.

[57] Japan has a very active system of numerous localized Civil Liberties Commissioners organized under the Civil Liberties Bureau of Ministry of Justice. The work of these commissioners involves areas which in Canada would cut across the distribution of federal and provincial powers. See Horiuchi, "The Civil Liberties Bureau of the Ministry of Justice and the System of Civil Liberties Commissioners", in *Effective Realization of Civil and Political Rights at the Naticnal Level — Selected Studies*, pp. 51-92 (United Nations, 1968: Doc. ST/TAO/HR/33).

sanctions are concerned, it might be argued that the modest fines permitted under provincial human rights legislation do not adequately represent the social significance of the substantive content. Other suggestions include increased scope for private civil actions, and use of government purchasing power in the awarding of contracts.[58]

Publicity and education is recognized as the key to advancing general respect for human rights. It is difficult to evaluate the extent of performance in Canada of obligations commonly specified in international human rights documents, to publicize the goals and provisions of the document. The matter is of such fundamental significance, however, that it should be systematized so far as possible. One way of encouraging this is to establish an identifiable government agency with separate budget and with the sole and exclusive responsibility to reach the public in the most effective possible ways. Techniques might include everything from public relations assistance to imaginative use of television.[59]

In this age of rising and spreading expectations it is increasingly important that initiatives be taken by government to satisfy legitimate demands of particular groups. At best, unfulfilled or frustrated expectations create despair and bitterness; at worst they can be explosive and destructive of society.[60] With respect to the most obvious and serious Canadian problem, namely the plight of her aboriginal peoples, recent initiatives taken by both the federal and Saskatchewan governments at high levels, and by other governments at lower but no less effective levels, are to be welcomed.

A special plea should be made to reinforce the Canadian post-War trend toward localization of effort. This is where effective action occurs and much more can be done in this direction. It is not accidental that locally based action in many practical forms is the dominant theme of the *Economic Opportunity Act* in the United States.[61] Recent provincial efforts of research on a regional basis into specific minority problems, with a view to specialized programs,

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[58] With respect to the latter, see Tarnopolsky, *supra*, n. 20, at pp. 588-589. Some attempts are already made by government to influence contractors: see the statement by Minister without Portfolio, The Honourable Mr. Andras, in *House of Commons Debates*, November 14, 1968, p. 2777 (28th Parliament, First Session).

[59] Tarnopolsky has suggested that prominent posting of human rights codes be made a condition for the grant of a business licence. See *supra*, n. 20, at p. 589.

[60] *E.g., Report of the National Advisory Commission on Civil Disorders (Kerner Commission)*, Chapter 4, (Washington, 1968); *Report of the Special Committee on Hate Propaganda, supra*, n. 13.

[61] (1964), 78 Stat. 508.

can be intensified.[62] Perhaps most important of all, protection of human rights cannot be hived off from other social problems into a separate compartment. For example, human rights agencies at the city or municipal level should maintain constant liaison and consultation with local authorities responsible for such matters as police administration and training, education, employment, welfare and housing. In several American cities this has proven one of the most practical and effective structures for the realization of the relevant human rights.

This paper has gone only to government responses to the need for meaningful recognition of human rights in Canada. We have sought to assess neither the total human rights effort of Canadian governments nor the total range of efforts within Canada. The former would require examination of such aspects of Canadian external policy as support for international human rights exercises and aid to developing countries. The latter would require examination of a wide variety of unofficial strategies and groups, from extensive work by labour, church, social welfare or educational organizations,[63] to civil liberties unions, to civil disobedience, to violence, and perhaps even to President DeGaulle's efforts at humanitarian intervention to protect French Canadians. Many of these essentially private activities can be effective and, where initiated by responsible groups, often are carried out in healthy and efficient liaison with government agencies. To an extent, however, their very existence reflects failures or gaps in official government policy.

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[62] The Government of Nova Scotia has set an encouraging example: MacKay, *Equality of Opportunity: Recent Developments in the Field of Human Rights in Nova Scotia*, (1967), 17 U. of T.L.J. 176, at pp. 183-86. The Ontario Human Rights Commission also initiates research of this type.

[63] A new national organization of potential significance, the Canadian Council for Human Rights, was established by the National Conference on Human Rights held in Ottawa in December, 1968. The circumstances in which the Council was created were less than satisfying. The Executive Committee of the Canadian Commission, International Year for Human Rights, had long been charged with considering means by which a permanent body might be established. Far from this matter being the primary concern of the Conference, in the dying and rushed minutes of the three-day meeting the Committee distributed a simple proposal designating itself as a Provisional Executive "to establish a constitution... and programme of action" for the new Council. An unhealthy degree of resentment, suspicion and disagreement among certain elements of the "rank and file" unfortunately did not have an opportunity to be aired. It is at least not obvious that the membership of the Executive Committee, selected by criteria required for its organizational work, comprises an ideal Provisional Executive for the Council. Another Conference is envisaged for 1969, however, and it is to be hoped that an effective agency will emerge with unremitting and broadly based public support. Human rights is one area where we cannot afford an "establishment".