# HUMAN RIGHTS COMMISSIONS – CHALLENGES AND RESPONSES

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**Maxwell Yalden** a reçu son BA à l'Université de Toronto, et une maîtrise et un doctorat à l'Université du Michigan. Il est entré au ministère des Affaires extérieures en 1956 et a été affecté à Moscou, Genève et Paris, ainsi qu'à divers titres à Ottawa. Il a été nommé sous-secrétaire d'Etat au Département du Secrétaire d'Etat en 1969, et par la suite ministre adjoint des Communications en 1973. En 1977, il est devenu commissaire aux langues officielles pour un mandat de sept ans. En 1984, il a été nommé ambassadeur du Canada en Belgique et au Luxembourg. En 1987, il est devenu commissaire en chef de la Commission canadienne des droits de la personne. En 1996, il a été élu membre du Comité des droit de l'homme des Nations Unies, et réélu en septembre 2000. M. Yalden est Compagnon de l'Ordre du Canada, et Commandeur de l'Ordre de la Pléiade. Il a reçu des doctorats honorifiques de l'Université d'Ottawa et l'Université Carleton.

## ABSTRACT

Two illustrations of challenges dealt with by the Canadian Human Rights Commission during Mr. Yalden's tenure as Chief Commissioner are examined. Discrimination on grounds of sexual orientation is considered. A success for all concerned: the Charter has been interpreted by the courts as including sexual orientation; the Human Rights Act amended to add it as a prohibited type of discrimination; and parliament has adopted the Civil Marriage Act, permitting same-sex marriage. The troubling situation of Canada's aboriginal peoples is reviewed: "at the bottom of every positive scale; at the top of every negative one". The difficulty of devising comprehensive solutions that government will implement is discussed. It is argued that the resolve of both sides to persist is encouraging. The most disturbing current controversy involves the conflict between freedom of expression and hate speech. On June 6th 2012, the House of Commons voted to repeal section 13 of the Canadian Human Rights Act dealing with that issue. And some media sources suggest that commissions should be "shut down" because they have exceeded their mandate. It is argued that the commissions should rally their forces to combat "persistent untruths" about their activities.

## RÉSUMÉ

On examine ici deux illustrations des défis abordés par la Commission canadienne des droits de la personne au cours du mandat de M. Yalden en tant que commissaire en chef. La discrimination fondée sur l'orientation sexuelle est considérée. Un succès pour toutes les parties concernées : la Charte a été interprétée par les tribunaux comme incluant l'orientation sexuelle ; la modification de la Loi sur les droits de la personne l'a ajouté comme type de discrimination prohibée ; et le Parlement a adopté la Loi sur le mariage civil, ce qui permet le mariage homosexuel. La situation préoccupante des peuples autochtones du Canada est passée en revue : « en bas de chaque échelle positive, au sommet de chaque échelle négative ». La difficulté de concevoir des solutions globales que le gouvernement peut mettre en œuvre est discutée. Il est soutenu que la volonté des deux parties de persister est encourageante. La controverse la plus inquiétante actuellement implique le conflit entre la liberté d'expression et le discours haineux. Le 6 juin 2012, la Chambre des communes a voté pour abroger l'article 13 de la LCDP qui traite de cette question. Et certains médias suggèrent que les commissions devraient être « fermées » parce qu'elles ont dépassé leur mandat. On fait valoir que les commissions devraient rallier leurs forces pour lutter contre les contre-vérités « persistantes » sur leurs activités.

I have been asked to speak about "obstacles" that I experienced in my time at the Canadian Human Rights Commission, and on "current controversies".

In my nine years as Chief Commissioner of the Human Rights Commission, I need hardly say that were there many occasions for running into "obstacles". This was especially true, of course, with governments of the day, both Prime Minister Mulroney's and Prime Minister Chrétien's.

Controversy is also the lifeblood of the media, and they were very active players in the human rights game. Probably more so than they are today. However, there is to my mind a major difference between those times and the atmosphere today. In spite of being critical, which is perfectly normal, the media at the time were largely positive in their approach, at least when it came to chivvying the government. And although they had a good go at the commissions when they fumbled the ball, on the whole they were not out to get them, as they not infrequently are today. I will come back to that.

But first, let me return to earlier days. At the federal commission, there are and were hundreds of problems to be dealt with, both in the way of individual complaints and problems of a wider scope that required a broader approach, for example, to matters of systemic discrimination. As a result, and to limit myself to manageable proportions, I want to concentrate briefly on only two illustrations of "obstacles": one where I think I can say our efforts were rewarded with a measure of success; the other an ongoing and particularly stubborn barrier to progress.

**My first illustration** is the matter of discrimination on grounds of what we have come to call "sexual orientation".

It is interesting to note, to begin with, that sexual orientation was not even included in the Canadian Human Rights Act when it was first adopted. Homosexual acts had been decriminalized in 1969, but it was clear some eight years later, as my predecessor, Gordon Fairweather, put it, that MPs "did not have the stomach" to accept an amendment to the Human Rights Bill, then before the House, that would have added "sexual orientation" to the types of discrimination to be prohibited by law. The excuse given at the time was that they did not wish to add a contentious matter of that sort "in order not to imperil the swift and unanimous passage of the Bill".

In the end, it was to take some twenty years before the Chrétien government finally worked up the courage to take the fateful step of amending the Human Rights Act. In the meantime, there was much activity in the courts, and pressure from our commission to get on with the job. As I put it in testimony to a Senate committee, "the Canadian Human Rights Commission has been arguing in favour of the inclusion of sexual orientation in the Canadian Human Rights Act for some time […] The issue for us is not a matter of lifestyle; it is a matter of fairness. Ensuring that all Canadians enjoy the same rights and benefits regardless of their race, religion, sex, age […] and sexual orientation is what equality rights are all about, no more and no less."

In the event, the government finally moved in 1996 to amend the Human Rights Act to include sexual orientation. And in 2005, it introduced the Civil Marriage Act, whose purpose was to provide that "marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others", instead of the traditional reading, "of a man and a woman to the exclusion of all others".

Nevertheless, there was still considerable opposition in Parliament. Thus, pressure built up for the then newly elected Conservative government to reopen the same-sex marriage debate in the House of Commons, a commitment first stated in the party's electoral platform. In the event, the motion to re-open was brought forward at the end of 2006 and defeated in the House on 7 December by a vote of 175 to 123.

And so it was, with those few words, 'the lawful union of two persons,' what one observer has called "a social revolution" came to pass. The Charter had been interpreted by the courts as including sexual orientation; it had been incorporated in the Human Rights Act as a prohibited type of discrimination; and Parliament had passed legislation permitting marriage between two individuals of the same sex. And all this had come about exceptionally quickly, when one thinks of the usual time frame for significant social change.

**My second illustration** is a much less rewarding one: the situation of our aboriginal peoples, which I described as "without a doubt Canada's most shameful human-rights-discrimination problem". And one that goes a long way back in Canada's history. In a Royal Proclamation in the mid 18th century, for example, King George III noted, "the great Frauds and Abuses [that] have been committed […] […] to the great Dissatisfaction of the […] Indians". Such has been the unhappy, centuries-long story of our relationship with the aboriginal peoples, combined with conditions of life in which many of them live that are a distressing stain on Canada's human rights record.

In my time at the Canadian Human Rights Commission, this was the issue that we took up most vigorously, indeed passionately. As we persistently argued, they represented the major human rights failure in this country. Not that we were without fault in other areas, but their plight was of a different order of magnitude. At the bottom of every positive scale, at the top of every negative one, living, many of them, in appalling circumstances, plagued with depressing records of incarceration, gas sniffing, family violence, and suicide, to cite only a few of many troubling examples.

The expansion of the white population in the nineteenth century was the excuse for a mixture of unalloyed land grabs, discriminatory practices, and misplaced Christian charity. Thus, on the one hand, the gradual confinement of native people to "reserves", a few hundred, often uneconomic enclaves carved out of all those vast lands not occupied by agreement with aboriginal leadership; and on the other, attempts to "civilize" them through residential school programs and other wrongheaded paternalistic enterprises. And all of this was topped off in the latter part of the century by the Indian Act – an extreme example of colonial legislation if there ever was one.

If this is a not unreasonable sketch of the problem, what is more difficult to discern is some notion of the solution. Even in a country like this one, where at last our political leaders seem to have awakened to its magnitude and seriousness, and where, I believe, there is a genuine desire to do something about it, the way out is not evident.

Thus far, all manner of stratagems have been tried to come to grips with the problem. Throwing money at it is clearly not the answer; if it were, we would be home free. Nor, it appears, are traditional Canadian approaches to human rights problems. Compared with this one, other rights issues are relatively simple, both the principles involved and practical questions of implementation.

Probably the main consideration for getting started, or restarted, is to accept that complicated global solutions are not likely to fit the bill. The report of the Royal Commission on Aboriginal Peoples, for example, contains no less than 440 recommendations covering 115 pages of text, on everything from fundamental constitutional change to administrative details. In the circumstances, it is not surprising that, whatever the proposals' substantive merits, no government was or is likely in the future to pick up the challenge of actually implementing all or even most of them.

The Indian Act has been singled out as well on many occasions (not least by the Canadian Human Rights Commission) as an outmoded approach to relations with Canada's Aboriginal communities that should be substantially altered or simply done away with. For the foreseeable future, this is probably beyond the capacities (or at least the priorities) of government. In the circumstances, where rights are concerned, following the Charter and the Canadian Human Rights Act, as the courts and commission have been doing, is doubtless the best course of action, with governments and Aboriginal representatives onside so far as possible, both with respect to the principles and the actions necessary to implement changes as they become more practicable.

And there is after all a gleam of light in the resolve by both sides not to abandon the field, and to continue to look for realistic solutions, however distant they may seem. I am sure that human rights commissions will continue to play their part in removing the "obstacles" that this may entail.

## CURRENT CONTROVERSIES

Probably the most troubling matter that embroils human rights commissions at the present time is the conflict between freedom of speech and hate propaganda, which has spread to wholesale denunciations of all manner of alleged sins committed by the commissions.

A recent article in the Calgary Herald (March 17) carries the media's warlike stance to unbelievable lengths:

> *"It is difficult to imagine a greater public policy fiasco and a state branch in greater disrepute than human rights commissions. Human rights are essential, but their enforcement by commissions has an appalling record of violating religious liberty, censoring the press and abusing fundamental legal rights of Canadians [...] these afflictions alone should be enough to shut human rights commissions down [...]"*

These words, embellished with all sorts of largely inaccurate observations about commissions' procedural methods and their "often frivolous and sometimes nefarious accusations", amount to the most outlandish set of allegations about human rights commissions that I have seen in all the years I have been in the business.

Why should this be so? Put in simple terms, the furore has been generated because the "frivolous" complaints in question appeared to be directed against the media themselves.

As a result, some have argued that section 13 of the Human Rights Act, the clause relating to hate speech, should be repealed. Indeed, a Bill (C 304) with that effect has been introduced in the House of Commons, and, I believe, is now in Committee.[1]

And yet, it is worth noting that section 13 is not a new prohibition. It has been included in the act since its inception more than thirty years ago. The fact is that a more recent amendment designed "for greater certainty" explicitly to include the Internet has exacerbated the whole issue to an extent that was never anticipated.

It should be underlined that only a very small percentage of complaints addressed to the federal commission (some 2 per cent in the period 2001–8) involve section 13; and that an even smaller number are sent to a

human rights tribunal and judged to have been in violation of that section (roughly .04 per cent). And finally, of the few cases sent by the commission to the tribunal, almost all have involved "extreme and hateful" expression, rather than harmless jabs, as one might conclude from some media reporting on the matter.

Also to be noted for the record is the wrangling over complaints launched by Muslim law students over an allegedly anti-Muslim article published in Maclean's magazine and on their website that managed to trap Canadian human rights agencies in the crossfire. The Canadian and Ontario commissions and the B.C. tribunal were all seized of the issue. However, what is important to emphasize, and has been little reported, is that the federal commission and the B.C. tribunal dismissed the complaint, and the Ontario commission said it could not deal with it for want of jurisdiction.

For my own part, I believe that, while we all uphold the right of free speech as important in a democratic society, particularly in the Internet era, most of us also believe that "hate speech" can have serious consequences and cannot be exempt from any limitations whatever, simply because it has been carried in the mass media. After all, just how far is speech as such removed from inciting people to take action against vulnerable groups? I cannot believe that throwing aside the worldwide condemnation of that kind of conduct – in the Universal Declaration of Human Rights, the U.N. covenants, and even our own Charter of Rights and Supreme Court decisions based on it – would be acceptable.

On the other hand, it strikes me that the slightest disparaging remark about, say, an ethnic or racial minority or even a so-called joke in bad taste is in a different category. It may be just that, in bad taste, but is probably not inadmissible in an open society or in violation of human rights legislation.

At the same time, those who are involved in the human rights business should recognize that the problem has become a much broader one. Some representatives of the media seem, as I have already suggested, determined to "get" the commissions, and in order to do so, spread the false belief that they are not performing the role they were given by parliament and provincial legislatures. To a degree, they are getting their message across.

And what should be done about it? Whether it is too late to do anything about Bill C 304 is not for me to say. However, at the very least, the commissions should fight back. They should insist on having "equal time" and they should use their access to legislatures and the media to press their views whenever the occasion presents itself. Individually and collectively, they simply should not allow persistent untruths about human rights commissions and human rights law in Canada to pass unchallenged.

## NOTES

[1] On June 6, 2012 the House of Commons voted to repeal section 13.