PROMOTING AND PROTECTING HUMAN RIGHTS: SNAKES AND LADDERS

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ABSTRACT

In light of current attacks on Canada's human rights institutions, a reflection on a more hopeful time with regard to institutionalizing the promotion of protection of human rights is offered. Professor Norman recalls his work in drafting Saskatchewan's first comprehensive human rights code and in administering the legislation for its first few years. His proposals equipped the Saskatchewan commission with new proactive regulatory agency roles, including exemption power, affirmative action approval and monitoring and rule-making authority; with a robust law enforcement capacity to redress individual acts of discrimination, including a provision enabling the commission to initiate a complaint on its own motion, and with public education and community liaison mandates to promote a culture of human rights in the province. By the end of these initial years, a new government had come to power in Saskatchewan, which marked the beginning of a good deal of backsliding on the systemic discrimination fronts that had been opened-up by the *Code* and the commission.

RÉSUMÉ

À la lumière des attaques en cours sur les institutions canadiennes des droits de la personne, ce texte offre une réflexion sur un temps plus optimiste en ce qui concerne l'institutionnalisation de la promotion de la protection des droits de la personne. Le professeur Norman se souvient de son rôle dans l'élaboration du premier code complet des droits de la personne de la Saskatchewan et dans l'application de la loi durant les premières années. Ses propositions ont équipé la commission de la Saskatchewan avec de nouveaux rôles proactifs d'organismes de réglementation, y compris le pouvoir d'exemption, d'approbation et de suivi de l'action positive et le pouvoir réglementaire, avec une capacité d'application robuste pour réparer les actes individuels de discrimination, y compris une disposition permettant à la Commission de lancer une plainte de sa propre initiative, l'éducation du public et des mandats de liaison communautaire pour promouvoir une culture des droits de la personne dans la province. À la fin de ces premières années, un nouveau gouvernement est arrivé au pouvoir en Saskatchewan, ce qui a marqué le début d'une bonne dose de retour en arrière sur les fronts de discrimination systémique qui avaient été ouverts par le Code et la Commission.

If the platform of the Wildrose Party in Alberta is any measure, there is reason to worry about the state of our human rights institutions. A plank in that platform rests on this assertion, "Over the last 20 years, the Human Rights Commissions in Alberta have probably been the single worst offender of Rights: i.e. freedom of speech; politically correct activists have used them to punish religious and right-wing social commentators." The Wildrose sentence for this 'offender' is, "We'll replace the Human Rights Commission with a new Human Rights Division of the Provincial Court of Alberta, which will adjudicate all human rights complaints." [1]

This regressive signal from Alberta wistfully takes me back some 34 years to a very different time: a time of promise for the promotion and protection of human rights in my neighboring province. In August of 1979, *The Saskatchewan Human Rights Code*[2] came into force. Its ambition was to be comprehensive and transformative in novel ways. In the early summer of 1978, I was appointed "chairman" of the Saskatchewan human rights commission. This position was attractive to me because it seemed to offer a new way forward in terms of promoting and protecting a culture of human rights as envisaged by the *Universal Declaration of Human Rights*[3] *[UDHR]*. A review of a decade's experience on the part of human rights commissions in Ontario and several other provinces left me with no confidence that Saskatchewan should have *that* as its main idea as to what a human rights commission was about. To my eye, marginalization and exclusion of disadvantaged minorities and women was a continuing story left pretty much untouched by their work.

By the early fall of 1978, I announced that I would be proposing several fundamental changes to the structure, function and inquiry procedure of the commission at the next sitting of the Saskatchewan legislature.[4] The proposals would equip the commission with new proactive regulatory agency roles; with a robust law enforcement capacity to redress individual acts of discrimination, including a provision enabling the commission to initiate a complaint on its own motion, and with public education and community liaison mandates to prevent discrimination from occurring. As well, save for Quebec, no other human rights statutes went beyond the field of anti-discrimination law. The proposal envisaged was to incorporate the fundamental freedoms set out in *The Saskatchewan Bill of Rights*[5] in order to make the *Code* comprehensive and thus to justify a proposal that it be given paramountcy over all other legislation.

In terms of "structure", I aimed first to elevate the purposes of the *Code* above the current understanding of a human rights commission being just about protecting individuals from discrimination at the hands of misguided others to the level of the grand purposes of the *UDHR*. Therefore I proposed that the *Code* set out, in the body of its text, an "objects" clause mirroring the *UDHR*'s vision of a world where the inherent dignity and the equal inalienable rights of all members of the human family would be recognized. This was novel. The Ontario *Code* had made such linkage in its preamble. However, preambles just weren't given the same weight as statutory text:

> *The preamble is not [...] of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts.*[6]

No doubt for this reason, preambles were "rarely used these days".[7]

In the hope that this "objects clause" [8] would illuminate the dignitary underpinnings of the *Code* and provide interpretive guidance to its text, I proposed language expanding on the "notice, sign, symbol" prohibition against hate propaganda in *The Saskatchewan Bill of Rights*.[9] The new provision extended to any "representation [...] which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person [...] or group" protected by the *Code*. By using the word "dignity", this clause linked with the "inherent dignity" language of the objects clause.[10] No human rights code had reached this far[11] to fashion a shield against attacks from free speech absolutists. I was influenced by the *Cohen Report, The Special Committee on Hate Propaganda in Canada*, 1966, which lead to the 1970 hate crime provision of the *Criminal Code*[12]. The first sentence of the *Cohen Report* stated, "This Report is a study in the power of words to maim, and what it is that a civilized society can do about it." [13] It seemed to me that the transformative capacity of a human rights code had a better chance of moving towards a civil society based on respect for the inherent dignity of marginalized minorities than did the *Criminal Code*, with its narrow language requiring proof beyond a reasonable doubt of intent willfully to promote hatred against an identifiable group. Recently, Jeremy Waldron has argued that the best justification for a law curbing hateful speech *is* to stand it on the firm ground of human dignity. Waldron argues that it is vital to the democratic project that "reputational assurance" thereby be promised to vulnerable minorities.[14]

In the same vein, I meant to break new ground by proposals to equip the commission with administrative/regulatory agency capacity to move forward in building a culture of human rights by overcoming systemic barriers to the full participation of marginalized groups in society. This proactive role for the commission included a "rule-making" function to set standards for overcoming systemic

barriers as well as an approval and monitoring function to ensure that change actually took place. In support of this transformative vision, I proposed that the *Code* be elevated to a quasi-constitutional level, as paramount legislation in the hands of the commission. This was accomplished by s. 44 of the *Code*:

> *Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.*[15]

Related to the first exception set out in this clause was a power given to the commission, in section 48, either on the application of a person or class of persons or on its own motion to grant, to review and revoke an exemption from "any or all of the provisions of this Act." Vesting authority in the commission, in this way, seemed to me to signal that the commission could temporize in a progressive way, in circumstances where the institution involved might be granted a temporary exemption on the ground that it was taking steps to overcome systemic barriers; to bring itself into compliance with the values of the *Code*. As it turned out, shortly after the *Code* was proclaimed the following August, the commission engaged in just such an exemption exercise with regard to facilitating a staged removal of barriers to the employment of female correctional officers in provincial jails.[16]

With regard to "function", there were two areas, in addition to this exemption power, where I thought the commission needed to be mandated to enable it to go beyond being responsive to investigate individual complaints of discrimination. Barriers denying access to protected groups needed to be brought down. And, if fostering a human rights culture was the objective, then the classroom was an obvious site of activity for the commission. As to barriers, the two urgent fields of interest, for me, were the underrepresentation of disadvantaged groups both in the workforce and in educational institutions *and* the physical barriers found everywhere in the built environment barring access for people with disabilities. To me, neither of these vast systemic challenges seemed likely to be transformable by means of a case-by-case litigation process.

So, I drew from the work of K.C. Davis[17] who had argued that rule-making by administrative agencies "was one of the greatest inventions of modern government."[18]

> *Affected parties who know facts that the agency may not know or who have ideas or understanding that the agency may not share have opportunity by quick and easy means to transmit the facts, ideas, or understanding to the agency at the crucial time when the agency's positions are still fluid. The procedure is both democratic and efficient.*[19]

Ralph Nader's Center for Study of Responsive Law had recently published a manual for citizen access to such processes.[20] This book discusses a number of U.S. federal agencies and the opportunities their mandates afforded to concerned citizens to make their voices heard with regard to regulatory policy development.[21] Thus, on democratic grounds, I thought it quite appropriate, albeit "unCanadian", for a human rights commission to be proactive in policy develpment in this very public "rule-making" way.

Section 47 of the proposed legislation gave the commission authority to "approve or order any program to be undertaken by any person if the program is designed to prevent disadvantages [...] that are suffered by" disadvantaged groups protected by the *Code*. The commission was to have the power to "make inquiries concerning the program, vary the program, impose conditions on the program or withdraw approval of the program". Finally, as an incentive for employers and educational institutions to come forward with such "affirmative action" programs, section 47 ended with "Nothing done in accordance with a program approved pursuant to this section is a violation of the provisions of this Act."[22] To my eye, section 47's reference to the commission's authority envisaged for the commission an open and democratic "rule-making" responsibility for the working out of regulations governing affirmative action to be submitted to the Cabinet for adoption and proclamation.[23]

Concerning physical barriers in the built environment faced by people with disabilities, no specific legislative proposal was made. Rather, I drew from K.C. Davis' assertion that "power to make rules always accompanies discretionary power and need not be separately conferred."[24] Should the legislature accept the recommendation to add "handicap" to the list of protected grounds in the *Code*, then the commission would be free to launch a public consultation process with a view to framing accessibility standards for the built environment. In the short run, the hope was to persuade municipalities to amend their building codes and street-scaping practices so as to make the built environment accessible to people with mobility limitations. In the long run, the objective was to persuade the Blakeney government to bring forward a new uniform accessibility standard statute.[25]

On the educational front, the commission was mandated by the proposed *Code* to "develop and conduct educational programs designed to eliminate discriminatory practices related to" protected disadvantaged groups.[26] With this in hand, the commission proposed that a budget be developed to enable a Director of Education to move forward not only on the sort of materials published by other commissions in Canada but also to work with the Ministry of Education on curriculum reform to bring human rights education into the classroom.[27] In an interview with a reporter from the *Star-Phoenix* I stated that I will recommend that the commission be given "a broader mandate so it can get involved in public education in the area of human rights." If young people in the classroom for example, could be taught to understand tolerance and the dignity of the individual, we would have the battle won.[28]

With regard to the formal inquiry procedure, in order to promote expedition, expertise and independence, I proposed that an end be put to the commission's dual role as both the investigator and the adjudicator of complaints; that adjudication of complaints be done by a member of an appointed panel of inquirers—a tribunal system. Though the Ministry was open to the creation of an adjudication process at arm's length from the commission, by letter of December 19, 1978, the crown solicitor in charge of the file on the human rights commission's legislative change project advised that this proposal had been rejected in favour of *ad hoc* appointments of a single inquirer by the Attorney General on application to him from the commission[29].

Come the proclamation of the *Code* and its regulations in August, I sought to make the most of the unanimous support given to it by the assembly.

> ***New human rights code now law*** *– Norman was instrumental in designing the new code and feels it is an accomplishment that it gained unanimous approval of both parties in the legislature this spring [...] In fact, the cabinet accepted his proposals in full, except for one section which dealt with anti-discrimination protection for homosexuals [...]*[30]

November of 1981 saw the intense first ministers' negotiations around the proposed language of the *Constitution* and *Charter*. At a certain point Premier Blakeney made some positive comments about the Saskatchewan *Code*'s affirmative action provisions and how they would fit with the *Charter*. I commented in the press:

> *[...] the commission is pleased by Premier Allan Blakeney's support for affirmative action programs in Saskatchewan. The recent public debate over removing the override clause from [...] the constitutional proposal has brought the Premier's commitment to affirmative action out very strongly.*[31]

So, the way ahead looked like clear sailing to me. Premier Blakeney had come to be persuaded that affirmative action *was* a good Saskatchewan idea. And, that his cabinet had not taken the step of approving the affirmative action regulations "made" by the commission in April, 1980[32], didn't seem to be any kind of problem as the commission was carrying on regardless; fettering its statutory discretion by these standards to no one's apparent dismay. In a speech at *A Practitioners' Workshop on Affirmative Action*, in Toronto, on April 15, 1983[33], I noted, "At least in the Province of Saskatchewan, there is no longer any doubt about the definition of what amounts to an acceptable affirmative action plan. It must entail: (1) a systematic analysis of an employer's current workforce, (2) A comparison of the make-up of that workforce with that of the larger surrounding community; (3) establishment of management policies which will move in the direction of overcoming those imbalances which have been identified, with a certain time frame; (4) a monitoring system in order that the goals not slip out of sight and the timetables not be ignored.[34] This amounted to my "swan song" given what the Devine Government had in mind for my tenure as chief commissioner.[35]

To come full circle, the Wildrose Party's current proposal to scrap human rights institutions in Alberta is in the same vein as recent developments in Saskatchewan, which have seen the human rights tribunal abolished and commission staff cut in half leaving it with no credible law enforcement capacity.[36]

NOTES

[1] The Wildrose web site, "Justice, policing and human rights", http://www.wildrose.ca/policy/justice-policing-human-rights/. Last visited on April 14, 2012.

[2] R.S.S. [1978] c. S-24.1.

[3] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[4] http://sain.scaa.sk.ca/collections/index.php/ken-norman-fonds;rad, Archives, University of Saskatchewan, Ken Norman's fonds, Retrieval NºMG 79, [Box 7], *The Leader Post*, Regina, September 13, 1978.

[5] S.S. 1947, c.35.

[6] *A.G. v. Prince Ernest Augustus of Hanover* [1957] A.C. 436, per Lord Normand at 467; discussed in E.A. Driedger, *The Construction of Statutes* [Toronto: Butterworths, 1974] at 120 and Sir Rupert Cross, *Statutory Interpretation* [London: Butterworths, 1974] at 109.

[7] *Ibid*, Driedger at 120.

[8] Supra, *SHRC*, note 2, s. 3, The objects of this Act are: (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

[9] *Ibid*, s. 14.

[10] *Ibid*.

[11] Tarnopolsky, *Discrimination and the Law in Canada*, Canada [Toronto: Richard De Boo Limited, 1982] at 330, refers to this language as being "the most extensive."

[12] http://www.chrc-ccdp.ca/publications/srp_2009_rsp/page3-eng.aspx. Last visited on April 14, 2012.

[13] *The Report of the Special Committee on Hate Propaganda* [Ottawa: The Queen's Printer, 1966] at 1.

[14] Jeremy Waldron, "Dignity and Defamation: The Visibility of Hate", [2010], 123 Harvard Law Review 1597.

[15] Supra, *SHRC*, note 2, A year after the *Code*'s proclamation, Howard McConnell wrote that "It is patent that considerable publicity would attend the infrequent employment of such a *non obstante* clause, and that for political and other reasons it would not be invoked by the Legislature without the most anxious forethought and canvassing of alternatives." W.H. McConnell, *Prairie Justice* [Toronto: The Carswell Co. Ltd., 1980] at 243. This notwithstanding clause preceded the *Charter's* like clause by three years.

[16] *Archives*, supra, note 4, [Box 14], *Annual Report of The Saskatchewan Human Rights Commission*, filed on March 14, 1983, at 15.

[17] K.C. Davis, *Administrative Law Text* [St. Paul: West Publishing Co., 1972].

[18] *Ibid*: 142.

[19] *Ibid*.

[20] *Working on the System* [New York: Basic Books, Inc,. 1974].

[21] *Ibid*, at 67 and following.

[22] This language was largely drawn from s. 19 of the *Nova Scotia Human Rights Act*. 1969 and s. 13 of the *New Brunswick Human Rights Code*, 1971 with one significant difference. Both of the maritime provisions had vested the commissions with power to approve programs "to promote the welfare of any class of individuals" whereas the Saskatchewan power was more clearly directed to overcoming systemic barriers to disadvantaged groups protected by the *Code*. The language used to achieve this was drawn from s. 15 of the *Canadian Human Rights* Act, 1977. Though, there is no approval and monitoring role given by s. 15 to the new Canadian Human Rights Commission. Ontario had amended its code in 1972, by s. 6 (a), to give the commission power to approve employment programs for the benefit of disadvantaged groups protected by the code. Manitoba had done something similar in s. 9, in 1974.

[23] By the end of my time as chief commissioner, the SHRC's *Annual Report, 1983*, reflected how important the work of the commission had become in transforming the hiring practices of major employers in Saskatchewan. *Archives*, supra, note 4 [Box 14] *Annual Report of the Saskatchewan Human Rights Commission*, filed on March 14, 1983. In this Report to the new Devine Government's Attorney General, Gary Lane, the commission explains, at p. 13, that seven affirmative action programs were granted full or provisional approval by the commission in the preceding year "[…] pursuant to the proposed regulations of April 9, 1980, which the commission incorporated by reference into each of its published decisions." The approved programs were (1) Potash Corporation of Saskatchewan, (2) Saskatchewan Housing Corporation, (3) The Co-operators, (4) Pre-Employment Trades Exploration for Women, Prince Albert Natonum Community College, (5) Saskoil Affirmative Action Program, (6) Key Lake Mining Corporation, Construction Phase, (7) Sask Tel Affirmative Action Program.

[24] K.C.Davis, supra note 17 at 143.

[25] This was accomplished by *Bill 33, The Uniform Building and Accessibility Standards Act*, First Reading on March 19, 1982. *Archives*, supra note 4, [Box 7] *Star-Phoenix*, March 20, 1982. However, the newly elected Devine Government had no interest in taking this any further. *Archives*, supra, note 4, [Box 14], *Annual Report of The Saskatchewan Human Rights Commission*, filed on March 14, 1983.

[26] *SHRC*, supra, note 2, s. 25 (c).

[27] McConnell, *Prairie Justice, 1980*, supra, note 14, at 246, "Since the publication of the reports, *Sex Bias in Primary Readers* and *Prejudice in Social Studies Textbooks*, [the commission] has brought to the attention of educators the danger of propagating in textbooks negative images of women and members of visible minority groups. Such images could, it was contended, foster prejudicial attitudes about vulnerable social groups on grounds of race, colour or sex. Valuable discussions were also held with teachers on how to deal with prejudice and stereotypes in material currently in general use in schools."

[28] *Archives*, supra, note 4, [Box 7], *Star-Phoenix*, December 15, 1978.

[29] *Archives*, supra, note 4, [Box 14].

[30] *Archives*, supra, note 4, [Box 7], *Star-Phoenix*, August 8, 1979. For the record, the recommendation that I had pressed in a meeting with the Attorney General on February 1, 1979, [Box 7] Letter from Ken Norman to Roy Romanow of February 5, 1979 – to leave room for analogous grounds – also bit the dust.

[31] *Ibid*, [Box 7] *Weyburn Review Weekly*, December 9, 1981.

[32] *Archives*, supra, note 4, [Box 16] File entitled "Affirmative Action Regulations", Letter Ken Norman to Roy Romanow, April 9, 1980.

[33] *Ibid*, [Box 7] Notes for an address by Ken Norman, Chief Commissioner, Saskatchewan Human Rights Commission, Friday, April 15, 1983 – on commission stationery. Ontario Institute for Studies in Education, "The Future for Affirmative Action Practitioners".

[34] *Ibid.*

[35] The next notable event, spelling the end of my time with the commission and the beginning of a good deal of backsliding on the systemic discrimination fronts that we had opened up, was a courteous letter to me from new Attorney General Lane thanking me for my services during my tenure as chief commissioner, commending me for my dedication to human rights and wishing me well in the future. *Archives*, supra, note 4. [Box 7] Letter, Gary Lane to Ken Norman, October 19, 1983.

[36] http://www.leaderpost.com/life/wrong+moves+Sask+human+rights/6507191/story.html http://www.thestarphoenix.com/news/Obligation+defend+human+rights+applies+Canadians/6514111/story.html Last viewed April 25, 2012.