THE DEVELOPMENT OF HUMAN RIGHTS PROTECTION IN BRITISH COLUMBIA

by

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ABSTRACT

In September 1984, the British Columbia Human Rights Act was proclaimed. This statute replaced the Human Rights Code enacted in 1973. As a means to ensure equality of opportunity, the Act was much criticized for its lack of administrative and proscriptive strength. It continued to prohibit discrimination in certain circumstances however its breadth of application and means of enforcement were narrowed considerably from those found in the Code. The Act, which had its origins in the restraint programme introduced in July 1983, was regarded by many as a retreat from what had become the Canadian norm in human rights protection. This thesis will provide an examination of the development of human rights protection in British Columbia and in doing so will demonstrate the manner in which the Act fits the ideological paradigm which dominates in British Columbia.

Many of the explanations of politics in British Columbia focus on our political culture. These studies have shown British Columbia's political culture to be parochial, populist and fragmented along economic, regional and class lines. While not denying the relevance of these findings,

it is thought that in order to understand the types of public policies which emanate from government, one must remain cognizant of the ideological constraints which define the parameters of acceptable government action. This awareness also aids in our understanding of political culture.

This thesis adopts the framework utilized by Ronald Manzer in his book Public Policies and Political Development in Canada. Manzer demonstrates the dialectical nature of Canadian liberalism and asserts that the contemporary crisis in Canadian public policy stems from the dialectic between the values of economic liberalism and those of ethical liberalism. This thesis will demonstrate the equal relevance of this dialectic to understanding the political debate in British Columbia.

Beginning with an explanation of the liberal dialectic and its relevance to the development of human rights protection in Canada, this thesis moves to a detailed examination of human rights policy in British Columbia. Chapter two discusses the demands made on governments in British Columbia for greater human rights protection. Of note is the differing responses to these demands by Social Credit and NDP governments. Chapters three and four provide a closer examination of the types of policies adopted and their implementation. Here, the strategies employed by

these partisan antagonists demonstrates the manifestation of the liberal dialectic in human rights policy.

The conclusion reached by this thesis is that the human rights policy adopted by the Bennett government in 1984 is not inconsistent with the liberal paradigm. The Human Rights Act is indicative of the values of economic liberalism and represents a move away from the moral concerns expressed by ethical liberalism. This thesis demonstrates that despite the intense debate surrounding human rights protection in British Columbia, the policies and strategies advanced have been defined in terms consistent with the ideology of liberalism.

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CHAPTER ONE

INTRODUCTION

On July 7, 1983 British Columbia Finance Minister, Hugh Curtis, presented his government's budget for the fiscal year 1983-1984. Along with his budget he tabled 26 government bills which were to have a profound impact on the political climate of British Columbia. One of these, Bill 27,[1] replaced the Human Rights Code enacted in 1973.[2] It disbanded both the Human Rights Branch and the Human Rights Commission and replaced them with a cabinet appointed Human Rights Council. It retained from the Code, the prohibition of discrimination in employment, accommodation and public facilities because of race, colour, ancestry, place of origin, religion, marital status, sex, political belief, criminal or summary conviction and age (the latter three in respect to employment only) and added to this list physical or mental disability. It prohibited employers from refusing to hire or promote an employee because of the grounds noted above. It did not, however, prohibit employers from requesting such information on employment application forms as had the Human Rights Code. Nor did it prohibit the publication or display of an advertisement which expressed a limitation, specification or preference as to personal and immutable characteristics of a prospective employee.

The Bill made no provision for the hiring of staff to provide investigation, conciliation or administration services. Nor was there any mention of a duty on the Human Rights Council to provide educational services. The Council was given power to dismiss complaints which it considered frivolous, trivial, vexatious or made in bad faith,[3] as well as to hold hearings to determine the settlement of complaints.[4] The Council was not obliged to assume carriage of a complaint as had been the case under the 1973 Code where the Director of the Human Rights Branch stood with the complainant before a Board of Inquiry. Under Bill 27 should a complaint reach the hearing or board of inquiry stage and be found to be justified, the only remedy available was an order to cease the discriminatory conduct and provide the complainant with the opportunity which had been denied.[5]

Bill 27 died on the order paper when the House was prorogued in the fall of 1983 but was resurrected as Bill 11 in the spring, 1984 session. Bill 11 retained the essential elements of Bill 27 with several exceptions. A prohibition on discriminatory employment advertisements was added along with a provision which allowed the Council to "approve any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups."[6] Such affirmative action programs would not be regarded as a contravention of the Act. This clause had also existed under the 1973 Human Rights Code. Bill 11

retained the section found in Bill 27 requiring that the victim of discrimination consent to the filing of a complaint prior to its investigation.[7] However, Bill 11 amended this section to provide for the investigation of complaints even where no intent to discriminate had been demonstrated.[8] The Bill expanded the remedies available to the complainant to include the payment of damages for loss of respect and humiliation up to a maximum of two thousand dollars.[9]

With these changes Bill 11 was enacted as the Human Rights Act in April, 1984 and proclaimed in force in September of that year. The changes brought about by the new Act have the effect of making it more difficult to proceed with a complaint of discrimination. They represent a move away from conciliation and toward a more adversarial procedure. Investigative powers have been curtailed and the discretionary power to dismiss the complaint is increased.

Bill 27, and subsequently, the new Human Rights Act, drew into question the role of governments in protecting the individual from discriminatory conduct and highlighted an essential division in British Columbia's politics. The procedures and substance of the new Act are a marked departure from those which existed under the Human Rights Code and were stridently opposed by both the NDP in the House and the organization of community and labour groups

known as the Solidarity Coalition. The rhetoric employed and the policies advanced by the Social Credit government on the one side and the NDP and Solidarity on the other, represented an antagonism that has been a component of the political debate in British Columbia since the 1950s. This thesis, employing the model of the liberal dialectic utilized by Ronald Manzer in his book Public Policies and Political Development in Canada,[10] will trace the development and administration of human rights legislation in B.C. In the process it will provide greater understanding of the opposing views which give substance to political discourse in B.C.

The precursors to contemporary human rights legislation are the fair practices laws enacted throughout North America during the 1950s and early 1960s. In B.C., Social Credit governments enacted the Equal Pay Act (EPA) in 1953,[11] the Fair Employment Practices Act (FEPA) in 1956,[12] and the Public Accommodation Practices Act (PAPA) in 1961.[13] These acts provided protection from discrimination for individuals in employment situations and in access to public facilities. The EPA provided that women be paid the same wages as men when engaged in the same work with a common employer. The FEPA prohibited discrimination in employment because of race, religion, colour, ancestry, nationality or place of origin. Age, defined as between 45 and 65 years, was added to this list in 1964. The PAPA pertained to

access to public facilities and prohibited discrimination on the same grounds as those found in the FEPA with the exception of age. The PAPA did not apply to either the sale or lease of property or to rental accommodation.

These three statutes provided the basis for the Human Rights Act which was passed in 1969 by the Social Credit government.[14] This Act maintained the proscriptions found in the fair practices legislation and expanded their application to include rental accommodation and the sale or lease of property. It also provided for the establishment of a Human Rights Branch within the Department of Labour and a Human Rights Commission which would adjudicate complaints filed under the Act. This adjudication function had been fulfilled by the Board of Industrial Relations[15] under the EP, FEP and PAP Acts.

During the 1950s and 1960s the CCF-NDP, the Official Opposition in the B.C. legislature, continually pressed the government to extend its protection of human rights. The CCF-NDP proposed amendments to the EPA which would have provided for equal wages for women engaged in work which was "comparatively similar" to work done by men.[16] They advocated that the PAP Act be extended to prohibit discrimination in rental accommodation as well as in the sale or lease of property.[17] A statement introduced to the Legislature by A. Gargrave in 1966, expressed NDP policy:

> The province of British Columbia should enact a British Columbia Bill of Human Rights and establish a Human Rights Commission to guarantee freedom of religion,[18] speech, association and assembly.

In addition, the CCF-NDP proposed measures designed to extend provincial services to the Native Indian community.[19]

Stressing the humanist component to non-Marxist democratic socialism, the NDP placed the protection of human rights within a broader perspective. According to Karen Jackson, the provincial NDP believed "that the guaranteeing and extending of human rights and liberties had political, economic, and civil components" and that the realization of these rights could only result from a "reordering of the economic system so that the pursuing of dignity, security, and equality of man (sic) replaced the unchecked pursuit of private profit."[20] To this end the NDP advocated not only the improvement of statutory protection from discrimination but also the enshrinement of a bill of rights in the Canadian constitution.[21]

The NDP government, elected in 1972, enacted a Human Rights Code in 1973 to replace the Human Rights Act. The Code enhanced the duties of the Human Rights Branch and the Human Rights Commission. The Branch remained a component of the Department of Labour but the Commission became autonomous of the Department. The proscribed grounds of

discrimination found in the 1969 legislation were expanded to include marital status, conviction for a criminal or summary conviction charge and political belief. The Code also contained a feature unique to human rights protection in Canada. It prohibited discrimination without reasonable cause in the provision of public services and facilities, employment opportunities and membership in a trade union or employers association.[22] The enumerated categories of discrimination were not to be considered as reasonable grounds for discrimination. The Code greatly expanded the protected categories of individuals who could not be denied equality of opportunity. Single parents, those convicted of a summary or criminal charge, political activists and others whose personal characteristics had resulted in discriminatory treatment were protected from discrimination. The proscription of discrimination without reasonable cause opened the way for any minority group such as homosexuals or the physically disabled to seek the protection of the Code.

The Human Rights Branch was to be provided with staff whose only responsibility would be to the enforcement of the Code.[23] The independent Human Rights Commission was to act as a point of access to minority groups in order that their concerns be heard and acted upon by an agency of the government. Unsettled complaints were to be adjudicated by an independent Board of Inquiry appointed by the Minister of Labour.[24] Monetary fines in addition to an order to cease

the discriminatory conduct were among the remedies available under the Code.[25]

As noted above, the Code was repealed in 1984 by the Human Rights Act. While it maintained the basic prohibitions against discriminatory conduct, the new Act represented a radical departure from the Code. Both the procedural and substantive protections of the new Act are weaker than those contained in the Human Rights Code. The Act is also significantly different from the type of human rights protection currently available in other Canadian jurisdictions. The Act reduces the public interest component found in the Code and represents a return to an emphasis on individual responsibility in the amelioration of discriminatory conduct. Unlike the Code, the new Act does not provide a means whereby community group interests can voice their concerns. It also limits the type of complaints which are to be covered to those grounds listed in the Act. Under the Act however, protection is extended to individuals who have a physical or mental disability.[26]

In the process of exploring the development of human rights protection this thesis will also provide greater understanding of the nature of political debate in B.C. Much has been written about the uniqueness of B.C. politics, its high degree of polarization and ideological fervour. Explanations have been sought in the geographic,

demographic, religious, cultural and economic cleavages which dominate the economic and political sphere.[27] Edwin Black[28] characterized B.C. political behaviour as the politics of action and resource exploitation "which measures success materially and accepts new men of property rather than traditional elites as the leaders of that society."[29] For Black, B.C. is a modernized frontier heavily dependent on resource extraction which has attracted immigrants who are "parochial" and "money-seeking." The drive for economic development and material wealth produces a political climate in which individual initiative and individual responsibility for one's position in the society are paramount. Despite this rejection of the traditional elites and a reliance on individual initiative, the governments of B.C. have not been anti-interventionist. According to Alan Cairns, prior to World War II,

> ... both the Liberals and Conservatives were basically sympathetic to state aided capitalist expansion, they were also successful in courting the labour vote, and by the late twenties had put B.C. in the vanguard of welfare state development in Canada.[30]

This acceptance of state intervention to ensure economic development continued throughout the post-Coalition governments of W.A.C. Bennett and remained a dominant component of the policies of the W.R. Bennett government. Black views "mega-projects." This connection, according to Black, does not

> permit the provincial cabinet to adopt a laissez-faire attitude toward the economy ... A laissez-faire approach runs contrary to the economic interests of the very anti-Establishment groups from which the government derives both voting and ideological support. Social Credit's rejection of the indefinite promises and panaceas of economic liberalism elicits, instead, a type of state capitalism.[31]

This fact however, has not prevented the Social Credit party from electioneering on a platform of "free-enterprise" and labelling its opponents as "godless socialists."

Mark Sproule-Jones dismisses both the class analyses of Robin et. al. and the notion that B.C. politics is populist in nature.[32] Instead he proposes that the electorate is divided on ideological grounds. On the one side are those attached to the symbols of free enterprise and on the other side are those attached to the symbols of socialism. While it has been argued that class, region, religion, and the pattern of economic development are all facets of both perceptions, this psychological component may provide the best predictor of political behaviour. David Elkins provides a similar measure of ideological commitment; an indicator he terms "individual versus collective responsibility." For Elkins this dichotomy, while appearing superficially similar to "free enterprise versus socialism" is "a fundamentally different orientation" and one which "reflects a profound consensus within the political culture."[33] This consensus on the nature of political

discourse in B.C. is not a dichotomous ideological split but rather is indicative of the dialectical nature of liberalism. The "individual versus collective responsibility" dichotomy identified by Elkins parallels a distinction drawn by Ronald Manzer. Manzer asserts that the Canadian public philosophy is premised upon the ideology of liberalism. However, this liberal ideology is conflictual as it contains a dialectic between the values of economic and ethical liberals. As will be explored in the following, the values of economic liberalism are those of individualism, legalism and accumulation, whereas those of ethical liberalism are the values of collectivism, self-development and human dignity. An examination of the opposing strategies employed in the protection of the individual from discrimination will provide a concrete example of this perceptual and ideological difference which pervades debate over so many policy areas in B.C.

Manzer draws on the work of Samuel H. Beer who defined a public philosophy as "an outlook on public affairs which is accepted ... by a wide coalition and which serves to give definition to problems and direction to government policies dealing with them."[34] Manzer differentiates between political culture and public philosophy thusly:

> As an analytical term public philosophy refers to certain political ideas, beliefs, and values that are also covered by definitions of political culture; but public philosophy focuses

> on orientations both elite and mass, to public problems and government policies and omits reference to such individual psychological orientations as sense of political efficacy, degree of political trust, and level of political interest, which have been central concerns in contemporary studies of political culture.[35]

Manzer's argument that Canada is dominated by a liberal public philosophy results from his analysis of public policy development in Canada. That analysis reveals the dominant influences of British and American liberalism. He also draws on the work of C.B. MacPherson who identifies the dialectical nature of modern liberal theory.[36] MacPherson proposes three distinct stages in the development of liberal thought. First, the seventeenth and eighteenth century theorists from John Locke to Edmund Burke provided a model of liberalism which accepted fully the capitalist mode of production and market relations yet rejected the democratic demands of representative and popularily elected government. Second, the nineteenth century works of Jeremy Bentham and James Mill resulted in the development of "protective democracy" whereby the competitive capitalist economy was maintained and augmented by an extended, although not universal, franchise. The third stage is that represented by John Stuart Mill who "advanced on ideal of developmental liberal democracy that had at its core a moral vision of the human potential for improvement."[37] According to MacPherson, in J.S. Mill's theory of developmental

democracy, "the good society is one which permits and encourages everyone to act as exerter, developer, and enjoyer of the extertion and development, of his or her own capabilities."[38] The optimal means of attaining this good society would be through a democratic political system (i.e., representative and participatory) in conjunction with a capitalist market economy. Inherent in Mill's model of liberal-democracy is the essential contradiction of liberalism. The existence of the capitalist requirements of a class divided society are maintained by minimal government interference in the economy and are protected by rules which enshrine the right of the individual to the unfettered accumulation of private property. In opposition to this is the egalitarian countercurrent for individual self-development. In the words of C.B. MacPherson, "'liberal' can mean the freedom of the stronger to do down the weaker by following market rules; or it can mean the equal effective freedom of all to use and develop their capacities. The latter freedom is inconsistent with the former."[39] This is the essence of the liberal dialectic.

Manzer makes the familiar point that toryism (or Burkean liberalism) and non-Marxist socialism have influenced Canadian liberalism. These two ideological streams are the vehicles for the two components of the liberal dialectic. According to Manzer:

> ... the original Canadian public philosophy was a relatively uncomplicated, highly integrated political doctrine forcefully shaping a simple pioneering society. It has evolved through concentrated critical experiences and prolonged incremental adjustments to become a complex, highly fragmented public philosophy. Now it grapples uneasily and inconsistently with the problems of an advanced industrial society, and it has at its core a fundamental contradiction between economic and ethical liberalism.[40]

The essential difference to be noted between economic and ethical liberalism is the manner in which each regards the nature of the individual and the relationship between the individual and the state. According to Manzer:

> On the one hand, liberalism still shows its original tendency to see people as selfish, calculating, atomistic individuals who are motivated primarily by their material interest. On the other hand, liberalism assumes in principle the worth and dignity of each person and aspires to provide each person's basic needs of welfare, safety, belongingness, respect, and freedom.[41]

The first perspective obliges the state to ensure social order and fair play in the individual pursuit of self-interest. Opportunities for self-development are defined in terms of material enrichment, private initiative and individual responsibility. The market analogy of competing interests producing an equilibrium of common good is an apt description of economic liberalism. The second component to the liberal dialectic stresses the moral concern for individual growth and self development and recognizes the psychological needs of the individual if each

is to develop their capacities and talents to the fullest. From this perspective the obligation of the state extends beyond ensuring that the 'rules of the game' are fair. The state has an obligation to ensure that unfair or unjust differences in opportunities for self-devlopment are minimized.

The development of human rights legislation in British Columbia demonstrates the incorporation in public policy of the conflicting values and strategies of economic and ethical liberalism. The responses of the Social Credit governments between 1953 and 1972 and those of the Bennett government elected in 1983 are illustrative of the doctrine of economic liberalism. The NDP government which served between 1972 and 1975 responded to the need for enhanced protection of human rights in a manner which represents the ethos of ethical liberalism. An examination of the political debate surrounding these three eras of human rights protection as well as the policies implemented to secure human rights in B.C. will demonstrate the constant tension between the two liberal views and their impact on political development in British Columbia.

Prior to embarking on a more detailed discussion of human rights protection in B.C. it is first necessary to place the B.C. experience within the general context of equality rights protection. Liberal democratic states have

adopted two complementary means of securing individual human rights: first, constitutionally entrenched bills of rights which provide protection from unwarranted action by the state against the individual and second, legislation such as human rights codes which proscribe discriminatory conduct in the private sphere.

Walter Tarnopolsky notes the importance of this two-dimensional defense of human rights:

> The absence of discriminatory laws and administrative practices are not in themselves sufficient to ensure that protection and promotion of human rights, because discrimination may be practiced in so many of the daily activities of people. Without legislation forbidding it, the private individual, group, or trade union or corporation, may discriminate in employment, in public service industries, in accommodation, even in the sale of property, on the ground of the applicant's or consumer's race, colour, creed, religion, age or sex. A constitutional safeguard against discriminatory legislation is not enough.[42]

To borrow a metaphor provided by Dean Bowker,[43] human rights legislation provides the sword with which private discriminatory practices can be attacked while constitutional guarantees provide a shield against arbitrary state action.

In Canada, the development of constitutional protections to guarantee the primacy of individual rights

culminated in 1982 with the adoption of the Charter of Rights and Freedoms. Prior to this, Canada had continued the British traditions of parliamentary supremacy and judicial review as the most effective means of ensuring personal liberties. Under this tradition, individual protection from government was guaranteed by an independent judiciary empowered to review legislation and by the conventions of British constitutionalism. The British North America Act proclaimed the constitution of Canada to be "similar in Principle to that of the United Kingdom," a provision that incorporated into Canadian constitutionalism the rights and guarantees set down by the instruments of the British constitution i.e., The Magna Carta, the Bills of Rights, the Act of Settlement, the English common law, and the Habeas Corpus Acts. The effect of this guarantee was to ensure that "the rights of free men ... could not be taken away except by the law of the land as found by the courts, or as passed by a sovereign and popularly elected Parliament."[44] This reliance on parliamentary majorities and an independent judiciary to protect the rights of minorities has not, however, prevented legislative excesses and abuse of the rights of Canadians.

In British Columbia, racist legislation was enacted by a long series of governments. The Provincial Voters Act of 1875[45] disqualified both Chinese and Native Indians from voting. In 1895,[46] Japanese were disqualified and in 1939[47]

Hindus were added to the list of those disenfranchised. Amendments to the act in 1947[48] gave the vote to Chinese and Hindu but removed this right from Doukhobors, Hutterites, and Mennonites unless they had served in the armed forces. The B.C. legislature also attempted to impose a head tax on Chinese immigration but these acts were ruled ultra vires the province by the Judicial Committee of the Privy Council not on the basis of their inherent racism but on the ground that they enfringed on federal powers enumerated in the BNA Act.[49]

The provincial government was also found to be without constitutional jurisdiction in restricting employment and business opportunities to Asiatics. An amendment to the Coal Mines Regulation Act, 1890 stated that:

> No boy under the age of 12 years, and no woman or girl of any age, and no Chinaman shall be employed in or allowed to be, for the purpose of employment in any mine to which the Act applies, below ground.[50]

The provision was found to be ultra vires the province by virtue of section 91(25) of the BNA Act which gave the federal government exclusive jurisdiction over "aliens or naturalized subjects." Racist intent was not a question to be discussed nor answered concerning governmental powers. The case was decided solely on the basis of jurisdictional competence.[51]

This pattern of considering jurisdictional authority rather than the infringement of individual rights in overturning legislation continued well into this century. In 1938, the Supreme Court of Canada overturned an Alberta Act which censored the press[52]. While the majority of the court saw this as an intrusion on federal jurisdiction, three members of the court "put forward for the first time the argument based on the preamble to the BNA Act that 'a Constitution similar to that of the United Kingdom' implies freedom of expression including freedom of the press."[53] Twenty years later, the Supreme Court of Canada found Quebec's 'Padlock Law'[54] to be unconstitutional. Here again three members of the court found that the Act, in addition to impinging on federal powers over criminal law, also found the law to constitute "a restriction of a fundamental political right."[55] These cases illustrate small but significant moves towards the view that the judiciary had an obligation to assert and uphold the democratic principles embodied in the Canadian constitution.

These abortive legislative attempts reveal only part of the failure to defend egalitarian rights implicit in the principles of British constitutionalism and the BNA Act. Thomas Berger in his book, Fragile Freedoms[56], chronicles the injustices done to minority groups in Canada from the denial of the cultural distinctiveness of the Acadians to the on-going battle of Canada's Native Indian peoples. The

most famous example of state sponsored racism were the measures taken between 1940 and 1946 by the federal government with regard to those of Japanese descent. These people, a vast majority of whom were Canadian citizens, were deprived of their livelihood, personal property and civil rights by orders-in-council for no reason other than their race. While the Japanese in B.C. had been subjected to a continuous restriction of their rights prior to the outbreak of World War II, their internment and the subsequent banishment of 3,964 Canadian subjects stands as one of the more odious events in Canadian history.

The enshrinement of the Charter of Rights and Freedoms in the Canadian constitution, is regarded by Berger as providing constitutional protection for Canada's minority groups. Section 15 of the Charter states:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision provides both the symbolic and practical guarantee of the right of the individual to equal protection and application of the law. The open-ended nature of this and other sections of the Charter "appears to be entirely consistent with modern ethical liberalism that gives priority to the general societal requirements for

self-development of each individual."[57] By asserting the primary right of the individual to equal treatment the authority of Parliament is checked. The Charter represents the combination of the idealism of Mill's developmental democracy and the rigor of American liberal constitutionalism.

The Charter pertains only to the actions of governments and does not readily provide a means to challenge private or individual occurrences of discrimination.[58] As a 'shield' it provides protection for the individual from arbitrary state action and functions at a rhetorical level to assert the basic tenets of our democratic system. The 'sword' developed to combat discrimination in the private sphere is anti-discrimination legislation, first in the form of fair practices laws and subsequently human rights codes. These legislative initiatives were developed in response to the failure of the common law to ensure equality in employment situations, the letting of accommodation and the sale of property as well as in the provision of public services and facilities. Examples of this failure are apparent in Canada from the late 1800s to the 1950s when governments began to enact measures aimed at prohibiting racial discrimination.

The first instance of a judicial decision involving a private act of racial discrimination was that of Johnson

v. Sparrow et. al.[59] This case, won by the plantiff, Johnson, who had been denied seats in the orchestra section of the Academy of Music in Montreal, however, was not to become the standard followed in subsequent judgements. In 1921, the Quebec Court of Appeal held that while a theatre could not refuse admission to a ticket holder because of their colour, the theatre could restrict which seats certain people occupied.[60] In 1940, again in Quebec, Christie, a black man, was refused service in the tavern of the Montreal Forum and sued for damages because of this refusal.[61] At the Supreme Court of Canada, Mr. Justice Rinfret, in finding against Christie stated:

> Any merchant is free to deal as he chooses with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public good.[62]

This rationale was upheld in British Columbia in the case of Rogers v. Clarence Hotel Co.[63] which involved the refusal of a beer parlour to serve a black man. Although the majority of the B.C. Court of Appeal followed the rationale of Rinfret, J., Justice O'Halloran in the dissenting opinion enunciated the common law tradition overlooked by his peers:

> The respondent is a British subject. All British subjects have the same rights and privileges under the common law - it makes no difference whether

> white or coloured; or of what class, race or religion.[64]

Despite this statement, as Ian Hunter concludes, "it was clear that Canadian courts regarded racial discrimination as neither immoral nor illegal .... The judiciary had not lacked opportunities to advance equality but had preferred to advance commerce; judgements had adumbrated a code of mercantile privilege rather than a code of human rights."[65] The primacy of property rights over the moral imperative of equality had found explicit support in legal interpretation and tacit acceptance in the form of legislature inaction.

The close of the Second World War marked the beginning of present day human right legislation. The Ontario Racial Discrimination Act,[66] enacted in 1944, prohibited the display of signs, symbols or other representations of racial or religious discrimination. This Act was the first statute in Canada to declare racial or religious discrimination to be antithetical to public policy and provided a means for the courts to subordinate the rights of commerce, contract and property to the right of equal treatment. The impetus for this Act can be seen to stem from the demands of a segment of the Jewish community in Ontario for legislative and judicial activism in the protection of minority rights.[67] Canada had not escaped the racist influence of the European fascist movement and throughout the 1930s and the war years there were several

instances of racial violence between Canadian fascists and the Jewish community.[68] In addition, it was not uncommon for Jews to be barred from public beaches and private businesses or subjected to other more subtle forms of discrimination. Demands by groups such as the Jewish Labour Committee (JLC) for protective legislation took on greater urgency as revelations about concentration camp horrors began to penetrate post-war society.

Ontario's Racial Discrimination Act, was a quasi-criminal statute in that certain practices were declared illegal and penal sanctions set down for failure to comply with the Act. As the first statute to state explicitly that discriminatory practices were in contravention of public policy, this legislation was very important. But like the Saskatchewan Bill of Rights passed in 1947 by the CCF government of T.C. Douglas, this legislation suffered several weaknesses. Due to the criminal nature of a prosecution under the Act, many people were reluctant to initiate complaints which would require the standard of proof beyond reasonable doubt. The judiciary was also reluctant to regard an act of discrimination as a criminal offense. Lacking the additional component of a complementary administrative framework to act as liaison between the public, government and the courts, few minorities were made aware of the existence and provisions of this act. Those that were

tended to be "somewhat skeptical as to whether the legislation [was] anything more than a sop to the conscience of the majority."[69] Furthermore, even if a charge was to be laid and a conviction handed down, the imprisonment or fine of an individual did little to aid those discriminated against.

Using as models the various fair employment practices acts passed in the U.S.A. during the Franklin D. Roosevelt administration along with the Fair Employment Practices Act (1945) of New York state,[70] the Ontario based Jewish Labour Committee, a group of young civil rights activists and labour organizers, initiated a programme "to organize a comprehensive approach to social justice through education, legislation, and social action."[71] Herbert A. Sohn has noted in his dissertation, Human Rights Legislation in Ontario: A Study in Social Action, that

> the leaders of Ontario's Jewish community had become sophisticated social activists and uncompromising foes of discrimination. They determined to press for government action against discrimination, and for that struggle they sought and found allies among the leaders of organized labour and in other quarters. In a sense, then, the Jewish community in Ontario became the rallying forces in the struggle for fair practices laws in that province.[72]

In conjunction with the Trades and Labour Congress and the Canadian Congress of Labour, the JLC formed the Labour Committee on Human Rights in 1947. National headquarters were situated in Montreal although the Toronto branch

office, in space donated by the United Steelworkers, was the centre of much of the committee's activities. Branch offices were subsequently established in Winnipeg, Windsor, Halifax and Vancouver, giving a truly national proportion to the drive for legislative action against discrimination.[73]

In British Columbia organized labour was also at the forefront in advocating for anti-discrimination legislation. The B.C. branch of the Trades and Labour Congress and the B.C. Federation of Labour (CCL) organized a committee to further the cause of human rights legislation. The Vancouver Joint Labour Committee to Combat Racial Discrimination (which became the Vancouver Labour Committee for Human Rights following the merger of the two national labour organizations in 1956) was instrumental throughout the 1950s in pressing all levels of government to adopt statements of public policy proscribing discriminatory practices. The Joint Labour Committee and later the Vancouver Labour Committee were successful in getting Vancouver City Council to adopt a by-law which prohibited discrimination on the basis of race, creed, or colour by any business licensed by the City. The proposal was first sent to Council in 1951 but was not passed until April of 1960[74] after several instances of racial discrimination were brought to the attention of Council by the Labour Committee. The committee was also active at the provincial level. Its annual briefs to government included a section dealing with

labour's desire that fair practices legislation be adopted by the provincial legislature.

To overcome the problems inherent in the quasi-criminal statutes such as the Ontario Racial Discrimination Act, fair practices laws were enacted first in Ontario (1951) and then elsewhere. These statutes, generally labelled Fair Employment Practices Acts, Public Accommodation Practices Act and Equal Pay Acts, prohibited discrimination on the grounds of race, religion, colour, nationality, place of origin and ancestry in employment situations and publicly available accommodation. The equal pay acts provided for wage parity between women and men. The acts made provision for the investigation, conciliation and, if necessary, adjudication by an administrative tribunal. However, as W.S. Tarnopolsky states:

> this legislation continued to place the whole emphasis of promoting human rights upon the individual who had suffered the most, and who was therefore in the least advantageous position to help himself. It placed the administrative machinery of the state at the disposal of the victim of discrimination, but it approached the whole problem as if it were solely his problem and his responsibility.[75]

To remedy this problem of individual responsibility in the complaint procedure, provincial, and later the federal, governments enacted comprehensive human rights codes.[76] The codes, first introduced in Ontario in 1962,

maintained the essential proscriptive grounds found in fair practices laws and were designed to attack the problem of discrimination on a broader front. An expanded mandate which included residential accommodation, advertising and media (and, as of late, the concept of equal pay for work of equal value)[77] were combined with a commitment to "the improvement of social systems and public attitudes so as to reduce and eventually eliminate the incidence of discrimination".[78] The new commissions were to have a much more active role in combatting discrimination.

Under the new Codes a separate commission was established to administer them. This active approach ensured community vindication of complaints of discrimination as the commission was made up of representatives of various community interests and not solely of departmental or ministerial staff.[79] Daniel Hill, the first chairman of the Ontario Human Rights Commission describes present day human rights legislation as

> predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion and the presentation of dispassionate socio-scientific materials that are used to challenge popular myths and stereo-types about people .... The skillful blending of educational and legal techniques in the pursuit of social justice.[80]

Human rights legislation then, is concerned not solely with the legal proscription of individual actions but with

people, their attitudes and behaviour. Implicit in all human rights codes is the assumption that a more egalitarian society cannot simply arise from constitutional guarantees.

By 1975 human rights legislation existed in all provincial jurisdictions. The Canadian Human Rights Act was passed in 1977. All of these statutes provided for a human rights agency staffed by professionals. The Acts prohibited discrimination in the provision of services or facilities customarily available to the public, the sale or lease of property or accommodation, and employment opportunities on the grounds of race, colour, nationality, ancestry, place of origin, sex, marital status, political belief and age (generally defined as between 45 and 65 years). In addition, several commissions were provided with the authority to approve or recommend affirmative action or special programmes designed to assist identifiable groups attain access to opportunities previously restricted or denied.

While they differ somewhat in structure and in the scope of prohibited grounds of discrimination, the human rights agencies found in various provinces are essentially similar. The mandate of all agencies is threefold: (a) to provide public education on the causes and effects of discrimination; (b) to receive, investigate and conciliate individual complaints of discrimination and; (c) to

adjudicate unsettled complaints by an administrative tribunal. Prior to 1984, the structure of B.C.'s human rights agency stood apart from those elsewhere in Canada in that these three functions were carried out by different agencies. Under the B.C. Human Rights Code, the Human Rights Commission was to provide educational services, the Human Rights Branch was to investigate and attempt the conciliation of complaints, and ministerially appointed Boards of Inquiry were to perform the adjudicative function. Under the 1984 Human Rights Act, the Human Rights Council is to investigate complaints. It has no express conciliation or educative functions. The Council itself can adjudicate complaints it receives or refer cases to the Minister of Labour who may appoint a Board of Inquiry. In general, complaints not settled by officers of the various provincial commissions are referred to an adjudicative tribunal except in Quebec where such complaints are heard in civil court. Ontario also has a Race Relations Commission within the Human Rights Commission. The appointment of a board of inquiry is at the discretion of the minister responsible except in Ontario and under the federal Act, where this decision is made by the Commission. All jurisdictions set down penalties in the form of monetary fines and/or orders to provide the denied service, accommodation or employment.

Unlike the formalized procedure of the judicial process the remedy for discriminatory conduct provided by

human rights commissions allows claims to be settled quickly and, in most cases, with little or no financial expense to the victim of discrimination.[81] The procedures followed by human rights commissions also allows for greater latitude in the consideration of the facts and circumstances of a complaint as well as in the determination of positive rather than punitive compensatory action. Socio-scientific information can be utilized in conjunction with research aimed at forestalling potentially discriminatory practices. The intent of this type of human rights legislation is not so much punitive as it is to illuminate practices which are contrary to the purpose of the legislation. To this end, the conciliation function is the primary duty of human rights officers. The goal is to force employers, landlords, and the society in general to recognize practices which threaten the dignity and self-esteem of the individual. The board of inquiry stage is a last resort and is to be utilized only when all other attempts at reconciliation have failed. Most crucially, as D.V. Smiley has pointed out, "human rights commissions are able to arrive at and enforce complex solutions to complex human situations."[82]

From this overview of the history of human rights legislation in Canada it is apparent that by the turn of the century the economic liberal position held the greatest currency and was not seriously challenged until the aftermath of the Second World War. According to Manzer:

> The post war policy-making system has been governed by a tenuous conjunction of economic and ethical liberalism. Accumulation and legalism have remained the predominant guides to policy-making, but they have been heavily qualified by the norms of redistribution and regulation while admitting accessibility and tolerance as additional principles of policy development.[83]

This "tenuous conjunction" as it pertains to human rights legislation is apparent in the policies adopted to provide equality of opportunity. As noted above, the first anti-discrimination statutes did not completely embrace the tenets of ethical liberalism. The fair practices laws and, in British Columbia the 1969 Human Rights Act, continued to emphasize the individual's responsibility in seeking redress for discriminatory treatment. The state's role was reactive as it proscribed certain practices but did little to ensure opportunities were made available. Nor did the state assume a role in changing the attitudes and perceptions which gave rise to discriminatory conduct. The development of human rights codes more fully adopted the ethical liberal approach to the protection of equality rights. The mandate of human rights commissions expanded to include not only the settlement of individual complaints but also the advocation of policies and procedures which would enhance tolerance and accessibility. The ethical liberal demand that the 'rules of the game' be applied fairly and that all be afforded the opportunity to participate signalled a far more activist state role in the advancement of equality. The emphasis on

conciliation and positive solutions to situations of inequality marks a significant break with the reactive and non-interventionist role adopted in the 1940s and 1950s.

The conjunction of economic and ethical liberalism which has defined the approach to human rights protection in Canada has become more unstable in the 1980s. Commissions in B.C., Saskatchewan, Manitoba, Quebec and Nova Scotia have all felt the brunt of government "rationalization" of programmes and priorities. Those which have remained unaffected or have seen their mandates enlarged (e.g. the federal and Ontario Commissions) face continued attacks on their authority and legitimacy from the courts and from those who resist commission intrusions on the grounds that individual liberty is being sacrificed to the pursuit of equality of opportunity.[84] The essential dialectic of Canadian politics remains and is perhaps most stridently proclaimed in British Columbia.

The unique nature of B.C. politics has been examined elsewhere and explained in terms of class, regional and economic cleavages.[85] The consensual element of B.C.'s political culture, as identified by Elkins,[86] can be regarded as a consensus around the ideology of liberalism. As indicated earlier, within this ideology is a dialectic: a conflict between values of individualism and those of collectivism. The policies implemented to protect human

rights are illustrative of this conflict. The 1984 Human Rights Act witnessed the final eradication of the ethical liberal ideals embodied in the Human Rights Code (1973) and represented a return to the pre-Code era of human rights protection. The economic liberal tenets of individualism, legalism, and accumulation had re-emerged as the dominant principles aimed at the curtailment of discriminatory practices. The means the government chose to re-assert the principles of economic liberalism were draconian. The policies implemented were not, however, indicative of a novel approach to public policy. They were illustrative of the economic liberal perception of public policy - a perception which is an integral component of B.C.'s public philosophy.

The uniqueness of British Columbia's politics is evident not only in the stridency of partisan debate and the clear division in electoral support but also in the style of its public policy. With regard to human rights protection, other Canadian jurisdictions have accepted as legitimate the role of the state in ameliorating conditions of inequality. This has not however, been the case in British Columbia under Social Credit governments. The history of political development in British Columbia reveals a pronounced division between those who regard the state as a facilitator of equal opportunity and those who view the state's role as solely an adjudicator of unfair practices. The actions

taken by the Social Credit government in 1984 were not simply restraint measures aimed at curbing government expenditures. They were emblematic of an economic liberal definition of the state's role. The acceptance of this desire by a significant portion of the B.C. populace indicates the degree to which the ideals of ethical liberalism had yet to penetrate the province's collective psyche.

The remainder of this thesis will provide a closer examination of the human rights policies developed in British Columbia. This analysis will show the reluctance on the part of Social Credit governments to accept and incorporate ethical liberal ideals into their human rights policies. This reluctance is demonstrated in both the administrations of W.A.C. Bennett and those of W.R. Bennett. The policy adopted by the NDP government in 1973 provides an example of the ethical liberal approach to human rights protection. These two opposing strategies provide a concrete example of the liberal dialectic as it is manifested in public policy. The following chapter details the political demands made on governments for improved human rights protection and will illustrate the substance of the liberal dialectic. Chapter Three will examine the use of the clause found in the Human Rights Code which prohibited discrimination without reasonable cause. This provision can be regarded as signifying the prominent position given the

principle of tolerance in the ethical liberal strategy for protecting human rights. Chapter Four looks at the administration of the various British Columbia statutes implemented to advance equality of opportunity. This analysis will reveal the opposing strategies developed to provide for equality of opportunity in British Columbia: strategies indicative of the alternating strength of economic and ethical liberal values in huam rights policy.

Chapter One Footnotes

[1]British Columbia, Human Rights Act, 1983.

[2]British Columbia, Human Rights Code, S.B.C. 1973, c. 119.

[3]British Columbia, Human Rights Act (Bill 27), 1983, section 10.

[4]British Columbia, Human Rights Act (Bill 27), 1983, section 12.

[5]British Columbia, Human Rights Act (Bill 27), 1983, section 15.

[6]British Columbia, Human Rights Act, S.B.C. 1984, c. 22, section 19(2).

[7]Ibid., s. 11(2).

[8]Ibid., s. 13(2).

[9]Ibid., s. 17(2)(b).

[10]Ronald Manzer, Public Policies and Political Development in Canada (Toronto: University of Toronto Press, 1985).

[11]British Columbia, An Act to ensure Fair Remuneration to Female Employees, S.B.C. 1953 (second session) c. 6.

[12]British Columbia, Fair Employment Practices Act, S.B.C. 1956, c. 16.

[13]British Columbia, An Act Respecting Public Accommodation Practices, S.B.C. 1961, c. 50.

[14]British Columbia, Human Rights Act, S.B.C. 1969, c. 10.

[15]The Board of Industrial Relations was established under the Male Minimum Wage Act.

[16]Bill 47, a private members bill placed before the House in the 1953 spring session by Laura Jamieson contained the provision of "comparatively similar."

[17]CCF-MLA Arthur Turner put forward several private members bills which would have extended protection from discrimination to housing.

[18]NDP Policy Statements Presented to the Legislature by the Provincial Caucus, 1966.

[19]Ibid.

[20]Karen Jackson, Ideology of the NDP in British Columbia (Victoria: B.C. Project, University of Victoria, 1980), p. 10.

[21]See, BC-NDP Constitution, 1971.

[22]See, sections 3, 8, 9 of the Human Rights Code, supra note 2.

[23]B.C., Human Rights Code, section 12(1).

[24]Ibid., section 16.

[25]Ibid., section 17.

[26]B.C., Human Rights Act, 1984, sections 3, 4, 5, 6, 8 and 9.

[27]See, Martin Robin, "British Columbia: The Politics of Class Conflict," in Martin Robin (ed.), Canadian Provincial Politics (Scarborough: Prentice-Hall, 1972), pp. 27-68; J.H. Bradbury, "Class Structures and Class Conflicts in 'Instant' Resource Towns in British Columbia, 1965-1972 in B.C. Studies, No. 37, Spring 1978, pp. 3-18; Mark Sproule-Jones, "Social Credit and the B.C. Electorate," in B.C. Studies, No. 12, Winter 1971-1972; Edwin R. Black, "British Columbia: The Politics of Exploitation" in, Dickson M. Falconer (ed.), British Columbia: Patterns in Economic, Political and Cultural Development (Victoria: Camosun College, 1982), pp. 249-268. The most recent analysis of B.C.'s political culture is, Donald E. Blake, Two Political Worlds (Vancouver: University of British Columbia Press, 1985).

[28]Black, supra note 27.

[29]J.T. Morley, "British Columbia's Political Culture: Healing a Compound Fracture," unpublished paper presented to the B.C. Project Symposium, June, 1983 at the University of British Columbia, p. 25.

[30]Alan Cairns and Daniel Wong, "Socialism, Federalism and the B.C. Party Systems 1933-1983," in Hugh G. Thorburn (ed.), Party Politics in Canada (5th edition) (Scarborough: Prentice-Hall Canada Inc., 1985), p. 286.

[31]Black, p. 259.

[32]Sproule-Jones, supra note 27.

[33]David Elkins, "British Columbia as a State of Mind," in Donald E. Blake, Two Political Worlds, supra note 27, p. 56.

[34]Samuel H. Beer, "In Search of a New Public Philosophy" in Anthony King (ed.), The New American Political System (Washington: American Enterprise Institute for Public Policy Research, 1978), p. 5.

[35]Manzer, p. 192.

[36]C.B. MacPherson, The Life and Times of Liberal Democracy (Oxford: Oxford University Press, 1977).

[37]Manzer, p. 17.

[38]Ibid., p. 48.

[39]Ibid., p. 1.

[40]Manzer, p. 19.

[41]Manzer, p. 190.

[42]W.S. Tarnopolsky, Discrimination and the Law in Canada (Toronto: Richard DeBoo Limited, 1982), p. 25.

[43]W.F. Bowker, "Anti-Discrimination Legislation," Canadian Bar Association Papers, vol. 28, 1963.

[44]W.S. Tarnopolsky, The Canadian Bill of Rights (Toronto: Macmillan Company of Canada Ltd., 1978), p. 30.

[45]S.B.C. 1875, no. 2, section 1.

[46]Provincial Voters Amendment Act, S.B.C. 1895, c. 20, section 2.

[47]Provincial Elections Act, S.B.C. 1939, c. 16, section 5.

[48]Provincial Elections Act Amendment Act, S.B.C. 1947, c. 28, section 14.

[49]The Chinese Tax Act, S.B.C. 1878, c. 35. This act was found to be ultra vires the province on the basis that the purpose of the legislation was an attempt to keep Chinese people from settling in the province. It was therefore regarded as an infringement on the federal powers over trade and commerce and aliens. See, Tai Sing v. Maguire (1878), 1 B.C.R., part 1, p. 101. The Chinese Regulations Act, S.B.C. 1884, c. 4, was also held to be ultra vires the province. See, Regina v. Wing Chong (1885), 1 B.C.R., part II, p. 150.

[50]S.B.C. 1890.

[51]The Judicial Committee of the Privy Council held in the case of Union Colliery Co. of British Columbia v. Bryden (1899), that this provision was ultra vires the province by virtue of section 91(25) of the BNA Act which gave the federal government jurisdiction over "aliens or naturalized subjects."

[52]Reference Re Alberta Statutes [1938] S.C.R., p. 100. See, W.S. Tarnopolsky, The Canadian Bill of Rights, supra note 44, and Peter H. Russell, Leading Constitutional Decisions, Third Edition (Ottawa: Carleton University Press, 1982), pp. 308-317 for a discussion of the Alberta Press Case.

[53]Manzer, p. 152.

[54]R.S.Q. 1941, c. 52. For a discussion of this case see Tarnopolsky, supra note 44, and Russell, supra note 52, pp. 343-353. The Supreme Court of Canada determined that the 'Act Respecting Communistic Propaganda' was ultra vires the province as it impinged on federal powers over criminal law. Only three of the justices, led by Justice Rand, regarded the act as infringing on a fundamental civil liberty.

[55]Manzer, p. 152.

[56]Thomas R. Berger, Fragile Freedoms (Toronto: Clarke, Irwin & Co. Ltd., 1981).

[57]Manzer, p. 156.

[58]See, Dale Gibson, "The Charter of Rights and the Private Sector," Manitoba Law Journal, vol. 12, 1982; John D. Whyte. "The Effect of the Charter of Rights on Non-Criminal Law and Administration," Canadian Human Rights Reporter, vol. 3, 1982; James MacPherson, "The Charter of Rights: Its Impact on Human Rights Commissions," unpublished paper presented to the CASHRA Annual Conference, 1982.

[59]Johnson v. Sparrow et. al. [1899] Q.R.C.S. 104.

[60]Loew's Theatres v. Reynolds (1921), Q.R. 30 B.R. 459.

[61]Christie v. York Corporation [1940] S.C.R. 139.

[62]Ibid., p. 142.

[63]Rogers v. Clarence Hotel Co. [1940] 3 D.L.R. 583.

[64][1946] 2 W.W.R. 545.

[65]Ian A. Hunter, "The Origin, Development and Interpretation of Human Rights Legislation," in R.St.J. MacDonald and John P. Humphrey (eds.), The Practice of Freedom (Toronto: Butterworth and Co., 1979), p. 79.

[66]S.O. 1944, c. 51.

[67]See Yaacov Glickman, "Political Socialization and the Social Protest of Canadian Jewry: Some Historical and Contemporary Perspectives" in Jorgen Dahlie and Tissa Fernando (eds.), Ethnicity, Power and Politics in Canada (Toronto: Methuen, 1981); Alan Borovoy, "Fair Accommodation Practices Act: The Dresden Affair," Faculty of Law Review, University of Toronto, vol. 14, no. 1, 1956; A.A. Borovoy, Human Rights and Racial Equality - The Tactics of Combat (Toronto: Ontario Woodsworth Memorial Foundation, 1964); Herbert A. Sohn, Human Rights Legislation in Ontario: A Study of Social Action, Ph.D. dissertation, University of Toronto, 1975.

[68]L.R. Betcherman, The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties (Toronto: Fitzhenry and Whiteside, 1975).

[69]Tarnopolsky, Discrimination and the Law in Canada, p. 27.

[70]New York Public Laws of 1945, c. 118 added to Article 12 of Executive Law of 1909; now see Article 15 of Executive Law of 1951.

[71]A. Bruner, "The Genesis of Ontario's Human Rights Legislation," University of Toronto Faculty of Law Review, vol. 37, 1979, p. 2.

[72]Herbert A. Sohn, Human Rights Legislation in Ontario: A Study in Social Action, Ph.D. dissertation, University of Toronto, 1975, p. 12.

[73]See, A. Bruner, "The Genesis of Ontario Human Rights Legislation," University of Toronto Faculty of Law Review, vol. 37, 1979.

[74]City of Vancouver, By-Law no. 3846, 1960.

[75]Tarnopolsky, Discrimination and the Law in Canada, p. 29.

[76]Human Rights Codes were enacted in Ontario (1962), Nova Scotia (1963), Alberta (1966), New Brunswick (1967), Prince Edward Island (1968), Newfoundland (1969), British Columbia (1969), Manitoba (1970), Saskatchewan (1979) and Quebec (1975). The Canadian Human Rights Act was passed in 1977. Although Saskatchewan did not have a Code until 1979, it had established a Human Rights Commission in 1972 to administer its various anti-discrimination statutes.

[77]Canadian Human Rights Commission, Annual Report, 1978, p. 1.

[78]See, Canadian Human Rights Act, section 11(1) which states: "It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."

[79]See, W.S. Tarnopolsky, "The Control of Racial Discrimination" in MacDonald and Humphrey, supra note 65, p. 297.

[80]Daniel G. Hill, "Merchants of Hate," Human Relations, June 1965, published by the Ontario Human Rights Commission, p. 4. This quote is taken from Tarnopolsky, Discrimination and the Law in Canada, p. 32.

[81]This is not the case in B.C. under the 1984 Human Rights Act. The Council has however arranged with the Legal Aid Society for complainants to be considered eligible for legal aid.

[82]D.V. Smiley, The Canadian Charter of Rights and Freedoms, 1981 (Toronto: Ontario Economic Council, 1981), p. 21.

[83]Manzer, p. 189.

[84]See, Ian A. Hunter, "Liberty and Equality: A Tale of Two Codes," McGill Law Journal, vol. 29, no. 1, 1983 and Hunter, "When Human Rights Become Wrongs," University of Western Ontario Law Review, vol. 23, no. 2, 1985. In the latter article Hunter claims that: "Liberty may not be capable of being legislated, but equality is. Human rights acts legislate a conception of equity which is a vague, arbitrary levelling toward a common denominator of mediocrity and increasingly destructive of fundamental freedoms.", p. 197.

[85]Supra, note 27.

[86]Supra, note 33.

CHAPTER TWO

STATUTORY HUMAN RIGHTS PROTECTION IN BRITISH COLUMBIA

The development of statutory protection of human rights, as indicated above, had its beginnings in the years following World War II. According to Ronald Manzer, the policy responses to the public problem of discrimination during this time were characteristically liberal.

> In the 1950s legal guarantees of fair employment and accommodation practices began to reverse what had previously been at best laissez-faire and at worst sometimes very restrictive public policies on egalitarian rights. During the 1960s and 1970s more comprehensive codes of individual rights were based on the liberal principles of individualism, tolerance, and equality of opportunity.[1]

As noted in Chapter One, Manzer draws the distinction between the economic liberal view of human rights which stresses political and legal rights and the ethical liberal stance which emphasize individual needs for self-respect and self-development.

The policies implemented to advance egalitarian rights are illustrative of the tension between economic and ethical liberalism. The strategies favoured by adherents to the economic liberal perspective provided an adjudicative mechanism to rectify individual complaints of

discrimination. The state was not to take an active role in eradicating the causes of discrimination nor was the state an advocate for the victim of unfair conduct. The individual was to bear the responsibility for obtaining relief from prejudicial actions. The ethical liberal strategy retains the case-by-case method of redressing discriminatory conduct. However, the state not only provides a mechanism for adjudicating complaints, it also takes an active role in supporting the victim. Human rights codes, as examples of the ethical liberal strategy, provide for a human rights commission representative of the community it serves. Human rights commissions are mandated not merely to rectify individual acts of discrimination but also to educate the public about human rights issues. The purpose is to dispel the myths and stereotypes which give rise to unequal treatment. The essential tension between these two strategies revolves around the level of state intervention to achieve the goal of equality of opportunity.

This chapter will explore the policies developed in B.C. to curb private acts of discrimination. By focussing on the political debate both in the Legislature and in the community in general, we will see how conflict between the demands of economic and ethical liberalism have shaped the debate and the development of human rights legislation. The fair practices laws and the Human Rights Act passed by the W.A.C. Bennett government provided a partial recognition of

the ethical liberal principles of individualism, tolerance and equality of opportunity. However, these Acts did not fully embrace the tenets of ethical liberalism. They remained an expression of economic liberalism, providing legal safeguards but no activist role for the state in eliminating discriminatory conduct. The Human Rights Code, enacted in 1973 by the NDP government, is indicative of legislation which more thoroughly embraces the ethical liberal solution to discrimination. Later, the Social Credit government, under the leadership of W.R. Bennett returned to the values of economic liberalism as reflected in the 1984 Human Rights Act. This statute denies the proactive element which differentiates human rights legislation from fair practices laws. The 1984 Act places greater responsibility on the individual for the amelioration of discriminatory conduct. While it provides a statement of public policy which acknowledges the need for equality of opportunity, the Act places the responsibility for pursuing a complaint with the victim of discrimination. The 1984 Act effectively "privatizes" the protection of human rights in B.C. and restricts the government's role to the adjudication of complaints. The economic liberal principles of legalism and minimal government intrusion into the marketplace replaced the ethical liberal demands for tolerance and accessibility.

Thus we see oscillation back and forth between the economic and ethical liberal approach to human rights protection. In order to explore these shifts more fully, this chapter will chronicle the demands made upon governments to provide protection from discrimination. The demands, made by organized labour and community groups, can be seen as an expression of the ethical liberal strategy in protecting individual rights. The response of first, the W.A.C. Bennett government and latterly those of the W.R. Bennett regimes was illustrative of a reluctance to incorporate these demands in their policies. The NDP government more fully incorporated the demands made and provided an investigative, educative and sanctioning structure which addressed the concerns of minority groups. The policies developed by Social Credit and the NDP and the response to these policies by the B.C. electorate are indicative of the opposing liberal paradigms.

Initially the governments of W.A.C. Bennett responded to the demand for anti-discrimination legislation in an incremental fashion. The fair practices laws and the 1969 Human Rights Act provided statutory proscriptions but failed to incorporate them into a comprehensive program which would remedy both the causes and effects of discriminatory treatment. Most importantly, these early attempts to halt discriminatory practices neglected to include a proactive component aimed at increasing public

awareness of the plight of minority groups. The Human Rights Act (1969) was a tentative step toward providing the type of comprehensive protection necessary yet it continued the neglect of the educational and administrative components which had resulted in FEPA, PAPA and the EPA being largely unsuccessful.

The Human Rights Code introduced in 1973 represented a major shift towards the more comprehensive approach of the ethical liberal perspective. It included a strong administrative and enforcement component and emphasized educational and research programmes designed to increase awareness of the problems faced by minority groups. The Code contained a unique provision prohibiting discrimination without reasonable cause through which many of the non-traditional grounds of discrimination could be considered (e.g. mental or physical disability, sexual harassment, sexual orientation). The importance of the reasonable cause provision will be more fully examined in the following chapter. Its use and its elimination from the 1984 Human Rights Act is illustrative of the conflicting liberal views on human rights protection.

The 1973 Act provided for a Human Rights Branch staffed by people with expertise in dealing with human rights problems. Conciliation rather than confrontation became the focus of the complaint settlement process. Those

complaints which could not be settled through conciliation were adjudicated by a Board of Inquiry appointed by the Minister of Labour from a panel of knowledgeable persons (the Minister could also dismiss complaints considered to be without merit and the panel of experts from which the boards were formed was not utilized after the Social Credit assumed power in 1975). The Commission, independent of the Branch and ministry and appointed by the government, conducted research and review of the Code and was not hesitant to recommend changes to the legislation. The Code was not without its faults nor were its supporters hesitant to acknowledge this, however its breadth of application (through the reasonable cause clause), its division of functions between the Branch and Commission, and its public interest component (the Branch assumed carriage of the complainant's case) combined to make the Code an effective instrument in the denial of discriminatory practices in B.C. The administrative apparatus developed under the Code was also unique to the Canadian experience in protecting human rights. Chapter four of this thesis will examine in detail the different structures utilized by Social Credit and NDP governments and will highlight the liberal dialectic in the administration of human rights policy in B.C.

The most recent legislative development resulted in the near complete re-structuring of the Code. No longer is there an agency to carry out research and education; no

longer are complaints of discrimination other than those based on the enumerated grounds to be considered; no longer is the enforcement agency staffed by professional human rights officers; no longer is there a representation of the public interest in the complaint procedure and, finally, no longer does conciliation play a central role in the settlement of complaints. The Social Credit government under Premier Bennett has retreated from the notion of collective responsibility in attacking discrimination. Those who suffer the consequences of discrimination are on their own to seek a remedy before a board of inquiry. At a time when other provincial governments (notably Ontario) and the federal government are moving to strengthen the protection of minority groups through legislative review, B.C. has retreated from this goal.

The three eras of human rights protection briefly outlined above demonstrate the shift in emphasis from the economic liberal perspective to the ethical liberal perspective and back. However, public policy is not developed in isolation from social demands. The following examination of the forces which pushed governments to develop human rights policies will illustrate the conflict between the demands of community groups and the response of government. It will show that the NDP responded to the concerns expressed in a manner emblematic of the ethical liberal approach to human rights protection. Social Credit

governments, both prior to, and following the NDP interim, chose to ignore the demands of the communities served by the Human Rights Branch and Commission and responded with legal proscriptions which addressed neither the causes nor consequences of discrimination.

The first of the fair practices laws to be implemented in British Columbia was the Equal Pay Act (EPA). Bill 20, "An Act to ensure Fair Remuneration to Female Employees" was introduced to the legislature in September 1953. Similar legislation introduced in the previous session of the Legislature by the CCF had failed to receive the support of the then, minority Social Credit government. Bill 20 provided that:

> 3(1) No employer and no person acting on his behalf shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee employed by him for the same work done in the same establishment.
>
> (2) A difference in the rate of pay between a female and a male employee based on any factor other than sex shall not constitute a failure to comply with this section.

This statute charged the Board of Industrial Relations with the enforcement of the Act and the conciliation of complaints received. It also provided that the Minister of Labour upon receipt of the recommendations of the Director of the Act "may issue whatever order the Minister deems necessary to carry the recommendations of the

Board into effect, and the order shall be final and shall be complied with in accordance with its terms."

Two provisions of the EPA were opposed by the opposition in the House as well as various groups in the community. Laura Jamieson speaking for the Vancouver Council of Women, noted that the stipulation of "same work" as men, rather than that of work "comparable with" men rendered the act to be of little consequence. It allowed even the most unimaginative of employers to escape the Act simply by slightly altering the duties or classification of female employees.[2] Further, the breadth of ministerial discretion in acting upon the recommendations of the Director gave a political component to the Act and left reason to think that the system would be open to potential abuse.

The opposition members in the House (both Liberals and CCF), attacked these facets of the Act, claiming it to be of little value and lacking appropriate sanctions. The government regarded these charges as 'unacceptable' and inconsistent with the intent of the Act.[3] Clearly the government had no desire to dictate to businesses the worth of their female employees. Nor was the government concerned with punishing employers who disregarded the Act. The government, true to the dictates of economic liberalism, refused to go further than to proscribe discrimination in

the payment of wages. The monitoring and enforcement of the law was left to women themselves. Given the procedural and substantive problems mentioned above as well as the general lack of popular support for working women in society at that time, some of the impetus for the enactment of this statute probably stemmed from the desire to honour the memory of Tilly Rolston who had died suddenly in the fall of that year. Rolston, who had been Minister of Education in the W.A.C. Bennett cabinet, was said to have wanted the passage of an act to recognize the equal worth of working women.[4]

Labour department officials were dubious as to the effectiveness of the EPA. The Vancouver Sun, quoting unnamed department officials two days prior to the proclamation of the act, stated that,

> Labour officials say there is 'not too much' protection in the act for women who complain. They [department officials] can protect identity up to a point but if the issue turns into a dispute a woman worker might find herself revealed to the boss and perhaps fired, unless there is a strong union in the plant.

Even this reservation was not as strong as might have been warranted. As late as the mid-1970's several collective agreements retained discriminatory wage differentials between men and women engaged in the same work in the same establishment.[6]

The second of the fair practices laws to be enacted in B.C. was the Fair Employment Practices Act. Introduced to the House in February 1956, the Act prohibited discrimination because of race, religion, colour, nationality, ancestry, or place of origin in the offer of employment or continued employment of any person. It also prohibited discrimination on these grounds in trade union membership. Section 5 of the Act provided that:

> 5. No person shall use or circulate any form of application for employment, or publish any advertisement in connection with employment or prospective employment, or make any written or oral inquiry in connection with employment which expresses either directly or indirectly any limitation, specification, or preference as to the race, religion, colour, nationality, ancestry, or place of origin of any person, unless the limitation, specification, or preference is based upon a bona fide occupational qualification.

Complaints filed under the Act were to be investigated by the Director of the Act. The Director had however, the discretion to refuse a complaint. Unsettled complaints were referred to the Board of Industrial Relations (BIR) again at the discretion of the Director. Orders of the BIR were to be enforced by the Minister of Labour and could include a fine not exceeding one hundred dollars. The Minister also retained the option of not implementing the orders recommended by the Director and BIR.

The Act passed the House with one dissenting vote. George Gregory, MLA (Liberal) for Victoria claimed the Act to be "ridiculous" as it would "prohibit a railway company from hiring a negro porter."[7] Gregory thought it best "to leave [the prohibiting of discrimination] to the good sense and judgement of the people rather than try to legislate them into the kingdom of heaven."[8] Support for the concerns raised by Gregory are found in an editorial published by the Victoria Daily Colonist. The newspaper considered the FEP Act as

> possibly injudicious ... in view of persistent efforts of Communist elements to play up and exaggerate the question of discrimination on this continent .... If there are any lingering vestiges of discrimination they are fast disappearing and will vanish in the progress of human development. What this bill seeks to accomplish can be done far better by education and example than by legal processes and punishments.[9]

The racist and 'red baiting' sentiments aside, the opinion voiced by Gregory and the Daily Colonist are indicative, as was the Act, of the economic liberal perspective. Government regulation was regarded as an interference with the rights of individuals in private conduct. Their response was that 'morality cannot be legislated' however, fair practices laws were not designed to change attitudes but only to alter behaviour. Equality had not gained ascendency over individual liberty but the demand for

equality of opportunity qualified the liberty of individuals.

The FEP Act was supported by organized labour and community groups such as the Vancouver Civic Unity Association. However, both groups stressed that the Act did not do enough to ameliorate discriminatory practices. The Act did not provide for the Director or the BIR to educate employers about the Act or to encourage compliance with the Act. Their role, was to be reactive. Only once a complaint had been made did the government assume responsibility and there was no mechanism established to monitor the extent to which employers followed the law.

The extent to which employers voluntarily complied with the Act is demonstrated by the results of a survey conducted by the B.C. Federation of Labour in 1957. The results of this survey showed than 75% of all job application forms were discriminatory under the provisions of the FEP Act. Armed with this evidence, the human rights committee of the BCFL requested and received a meeting with Attorney-General Robert Bonner, Labour Minister Lyle Wicks, and Education Minister Leslie Peterson. In addition to presenting a recommendation tabled at the BCFL Convention calling for a government initiated education programme to enhance employers awareness of the Act, the committee also proposed that the FEP Act be amended so as to allow for

third party intervention in the laying of complaints under the Act. The goal was to free the victim from sole responsibility in the pressing of a complaint under the Act.

The response to the proposals presented to the government by the BCFL was not as receptive as the BCFL might have hoped. Education Minister Peterson responded that while the brief was competent and self-explanatory the government "could not agree with all the proposals." Attorney-General Bonner was even more emphatic in his refusal to accept the concerns as expressed by the BCFL. In commenting on the survey conducted by the BCFL, Bonner stated that it

> is one thing to say the questions are unfair. It is another thing to say that they are used for purposes of discrimination. That's a matter for argument ... I think it is proper to assume the employers are following the law."[10]

Bonner's refusal to see that employment application forms that demanded information irrelevant to the performance of the job (i.e., nationality, country of origin, religion, etc.) represented a denial of equality of opportunity is illustrative of the legalistic and reactive approach favoured by the Social Credit government. Discrimination was proclaimed as being contrary to government policy yet the government accepted only minimal responsibility for its eradication.

In 1961 the Public Accommodation Practices Act was enacted, making B.C. the sixth province to proscribe discrimination because of race, colour, nationality, etc., in the provision of facilities and services "to which the public is customarily admitted." Unfortunately this clause greatly weakened the statute's force as it did not prohibit discrimination in the rental and sale of housing and property. The PAP Act also carried over the procedural problems which had plagued the FEP and the EP Acts. As was the case with the previous fair practices statutes, the PAP Act was to be administered by a Director designated by the Minister of Labour. Unsettled complaints were to be adjudicated by the BIR. Again the government had ignored the requests of community groups and failed to provide a mechanism which would promote the rights of minorities to equal treatment.

The years 1962-65 witnessed continued demands for the extension of the coverage afforded by the PAP Act.[11] In its submission to Cabinet in 1963, the Human Rights Committee of the BCFL chastised the government for its failure to ensure fairness and equality in the provision of rental accommodation. Citing examples of the failure of the PAP Act such as a "white students only" rental accommodation notice posted at a UBC bus stop, the Committee reiterated its demand that B.C. follow other Canadian jurisdictions in extending the protection of PAPA to multi-dwelling units.

The growing public awareness of apartheid in South Africa, coupled with the activities of the civil rights movement in the U.S. placed human rights concerns in a continental and global perspective. Support for the NAACP prompted the BCFL to step-up its expressions of concern and action in aid of the ethnic minorities of B.C. Of particular concern were the Native Indians living in Vancouver (most prominently in the lower East End) as well as the continuing problems experienced by the Doukhobour community in the Kootenays. The ethical liberal concerns for self-development and the recognition of the need for dignity and self-respect as a prerequisite for individual development had gained wide acceptance and a moral urgency that could not be easily ignored. The Social Credit government however, continued to reject statutory regulations as a means to address the inequalities brought to its attention.

As the 1960s drew to a close it became increasingly apparent that the concern for the equality of all British Columbians was one which transcended partisan divisions and was no longer simply an employment related issue. Municipal leaders, labour groups, community and ethnic organizations, newspaper editorialists and provincial politicians were all coming to support further legislative action to prohibit discriminatory practices. In acknowledging the United Nations commemoration of 1968 as the year for human rights, the Social Credit government took its first tentative steps

toward providing a comprehensive statement of the status of human rights protection in B.C. In a November 1968 address to the B.C. Commission for the International Year for Human Rights, Labour Minister Leslie Peterson conceded that the existing legislation was in need of improvement. He stated that forthcoming legislation would broaden the scope of anti-discrimination protection.[12]

Peterson's remarks can be seen to stem, at least in part, from the publication of the report of the B.C. Human Rights Commission, a private group which represented 29 community, professional, ethnic, religious and women's organizations. It was co-chaired by E. Ostapchuk of the Vancouver Civic Unity Association and J. Katz, a professor of education at U.B.C. The goals of the commission were to study the feasibility of:

(a) the establishment of a provincial ombudsoffice
(b) the establishment of labour courts
(c) the introduction of free legal aid
(d) programmes to aid employment opportunities for women in the professions
(e) amendments to the Childrens Act
(f) implementing programmes to publicize the fair practices laws
(g) the enactment of a Provincial Bill of Rights
(h) the development of enhanced educational services and employment opportunities for Native Indians
(i) the development of an improved social sciences curriculum to be used in schools
(j) the establishment of teacher training programmes to improve their awareness of minority group issues and problems.

The primary goal of the commission was the establishment of a provincial human rights act to be administered by a permanent human rights commission.[13]

The committee's 1968 report, based on a year long study, was presented to the Social Credit cabinet in the fall of 1968. The conclusion reached by the commission was that

> many people in the province are being denied their rights in education, in housing, in employment, in health and welfare, and in legal aid and, in consequence, are not able to live their lives in dignity as human beings.[14]

The recommendations of the report covered all aspects of social welfare from the expressed concern for the plight of Native Indians, single parents, and women to adjustments in the taxation structure and the provision of services to the disabled. The report also echoed the long standing demand of organized labour that fair practices legislation be extended to all groups in the community and the provisions of such legislation be strengthened and widely publicized. Most importantly, the report recommended that a human rights statute be enacted.

The Throne speech opening the Legislature in 1969 fulfilled Peterson's promise. The Government announced it would enact B.C.'s first Human Rights Act during the forthcoming session. On February 27, 1969, Leslie Peterson

put before the House an "Act for the Promotion and Protection of the Fundamental Rights of the People of British Columbia." Despite its grandiose title, this Act was to receive much criticism in the ensuing months for its lack of protection and administrative force. Heralded as a 'charter for women' by the Vancouver Sun, the proposed Human Rights Act was defended by Peterson as being the most comprehensive legislation of its type in Canada. It must, however, be regarded as only marginally more effective than the legislative enactments which proceeded it. To a considerable extent the Act was merely a consolidation of the already existing fair practices legislation.

The NDP regarded the proposed Human Rights Act as both weak and incomplete. During debate in the Legislature it proposed an amendment to the Bill which would have given the Human Rights Commission the powers of an Ombudsoffice independent of the government. This was defeated by the Social Credit government on the grounds that the establishment of an independent full-time commission would be a drain on the public purse.[15]

Attempts by NDP-MLA Alex MacDonald to strengthen the provisions relating to sexual discrimination also met with defeat. The concept of women as equal in all aspects with men had apparently not yet been accepted by government members. Nor had the popular press been converted. In its

editorial comment on MacDonald's accusations that physical appearance rather than merit remained the principle characteristic upon which women seeking employment were judged, The Province stated, "If Mr. MacDonald is serious (which we doubt) he would carry his campaign against discrimination to its logical conclusion: matrimony. Here, surely, is the most important career of all for a woman - the most vital and, hopefully, long lasting."[16]

Opposition to the Act was also heard from the B.C. Federation of Labour. A long time advocate for improved human rights protection, the BCFL chastised the government for its failure to provide a full-time commission and the intended use of Industrial Relations Officers (IROs) and the BIR. According the Ray Haynes, Secretary of the BCFL, "[t]o make human rights legislation meaningful, provision for proper investigation and handling of complaints is essential. It is clear that this legislation is not a human rights bill and is only designed to catch votes rather than protect the human rights of the citizens of the province."[17] The Vancouver District Labour Council was critical of the fact that the Act applied to neither agricultural nor domestic workers. Their exclusion, the Council claimed, denied these groups the citizenship rights accorded others. As well, a vast majority of workers employed in these two areas are members of ethnic minorities.[18]

Joining the NDP and the BCFL in criticizing the Act was the B.C. Civil Liberties Association (BCCLA) which decried the lack of protection for the traditional liberties of freedom of speech, of the press, of conscience, of religion and of association. (A Bill of Rights of the sort advocated by the BCCLA had been enacted provincially only in Saskatchewan although the Quebec Charte des droits et libertes de la personne (1975) contained protection of these rights.) Mr. D. Robertson of the BCCLA also opposed the use of the BIR, stating that this "part-time body already has much to do and is not particularly qualified to deal with matters unrelated to employment."[19] The B.C. Human Rights Council, which emerged from the B.C. Commission for the International Year for Human Rights, also responded critically to the Act. Its head, Dr. Joseph Katz, berated the government for not providing a legislative framework capable of addressing the real problems faced by individuals in acquiring accommodation and employment. Noting that the Act provided no more than a 'slap on the wrist' for those found in contravention of the Act, Dr. Katz called for greater penalties to be applied to those who discriminate.[20]

Despite these protestations B.C.'s first Human Rights Act was passed in April of 1969. It was an attempt to enact in law a comprehensive statement of the status and recognition of human rights in B.C. But to many it represented little improvement over the anti-discrimination

legislation which preceded it and from which it heavily borrowed. It simply consolidated the earlier statutes, incorporating their weaknesses as well as strengths. The Act continued the government's neglect of its educational and administrative responsibility of ensuring social justice for the citizenry of B.C. As a measure of the Social Credit government's commitment to the ideals expressed in the Universal Declaration of Human Rights, it was decidedly lacking. The Act marginally improved the protection of women from discrimination by adding sex to the list of proscribed grounds of discrimination. However, the partisan nature of the Human Rights Commission, the lack of staff to be provided the Human Rights Branch and the elimination of monetary sanctions, rendered the Act ineffective and largely unenforceable. It was indicative of the Social Credit government's pre-eminent concern for the rights of business over the rights of individuals to an egalitarian environment. It had failed to incorporate the ethical liberal strategies in the protection of human right.

It should be noted that 1969 was an election year and, as Ray Haynes had predicted, the introduction of the Human Rights Act was used by the Social Credit government and candidates in an attempt to convince detractors and supporters alike that it was indeed acting to prevent the occurrence of discrimination. For example, advertisements taken out by the Social Credit government during the

campaign depicted Labour Minister "Les" Peterson sitting at the phone awaiting complaints of discriminatory practices. These drew the wrath of campaigning NDP candidates. Dr. Ray Parkinson, the candidate in Vancouver-Burrard, described the protection afforded by the Human Rights Act as a "paper tiger" and little more than "socred window dressing." Thomas Berger, the newly elected leader of the NDP, argued that although the Act was satisfactory as far as it went, it remained an anti-discrimination code which neither protected nor asserted the rights of the individual. Berger's concern was for the development of safeguards designed to curb government actions against the individuals. Legislation and constitutional mechanisms such as freedom of information acts, ombudsman statutes and an entrenched bill of rights were among the policies advocated by the NDP. While a valid and consequential concern (particularly amidst lawyer dominated groups such as the BCCLA and the Liberal Party) these strategies represented a failure to see beyond the realm of litigation and the pronouncement of guarantees to the root cause of discrimination. As several legal scholars have noted, the abuse of an individual's civil liberties by governments are comparatively few and subject to relatively formalized procedures when contrasted with "an employer's power to dismiss; a landlord's power to exclude the needy, or an entrepreneur's refusal to provide a service."[21] What was yet to be recognized was that without the ability to enjoy the necessities of adequate shelter and equitable

employment opportunities, the exercise of the traditional liberties associated with liberal democracy remains impossible.

While claiming success for pressuring government to finally enact an expanded human rights act, the BCFL was dismayed by the narrowness of the Act and the lack of independence afforded the Human Rights Branch and Commission. In December 1969 the BCFL submitted a brief to an advisory council established by the newly elected Social Credit government to receive public comment on the Human Rights Act. The BCFL reiterated the complaints of others that the use of the BIR and IROs fell far short of what was necessary to secure proper enforcement of the Act. Citing the Ontario example, the BCFL noted that the use of overworked and inexperienced IROs undermined the notion of the Act as being truly a human rights act. It remained, thought the BCFL, simply an anti-discrimination act which focused primarily on employment related issues and was a reactive rather than a proactive statute. In addition the BCFL said, the complete lack of minority group representation on the Human Rights Commission provided grounds for fears of paternalism and illustrated a lack of understanding of the needs of minorities in B.C. As well as these more general criticisms, the Federation also brought to the attention of this council the concern that employment agencies were only too willing to cater to the requests of

employers who would hire only whites or younger women. The failure of the Act to incorporate third party intervention in the bringing forward of complaints was also of concern to the BCFL as this practice served to perpetuate the problem of forcing the victim of discrimination to bear sole responsibility in pursuing a claim of discrimination. To re-emphasize the point made above, it is often those least able to defend themselves against the capriciousness of landlords and employers who are in greatest need of relief. It is this situation which the Act failed to address.

The BCFL and other community groups continued to berate government for its reluctance to take measures designed to provide a greater measure of social justice in B.C. throughout the early 1970s. However, this period witnessed what was to be a boon for the human rights movement. The Royal Commission on the Status of Women established by the federal government served to highlight the problems women faced in seeking equitable employment opportunities as well as the general status of women within Canadian society. In response to increased demands that the women's voice be heard, the BCFL formed a Special Committee on Women's Rights which was to concern itself with the role of women in the trade union movement. Mandated to "study ways and means of making the practice of equal pay for equal work a reality,"[22] this committee acted in conjunction with other women's groups to press for the realization of female

equality in the workplace. It called for the revision of statutes which limited the opportunities open to women as well as for the establishment of an Employment Act which would grant adequate and available daycare and equal wages. This committee can be regarded as indicative of a substantive shift in the focus of the human rights lobby. Groups such as the Status of Women Action Group (SWAG) and the Voice of Women (VOW) were particularly active in pressuring governments and politicians to recognize and act upon the concerns and demands of women.

In December, 1971 the Victoria Voice of Women presented a brief to Labour Minister Chabot outlining its concerns and giving examples of specific instances of employment related discrimination within the public service. Citing extensively from the Status of Women Report as well as from statistics gathered by the Vancouver Board of Trade, this report severely condemned the Social Credit administration and the labour minister. His statement earlier in the year that the "Status of Women Report was written for the rest of Canada. It does not apply to B.C."[23] seemed to women's groups to illustrate the government's intransigence on the issue of equal rights for women. In response to the charges put forward by VOW, Chabot maintained that pay differentials in the civil service reflected a high turnover of women in the service and the fact that women were most prominent in clerical

positions. The Minister refused to recognize that these two circumstances could be seen as the product of the very problems which existing legislation and political motivation were unable to rectify; i.e., discriminatory job classification and the correlation between workforce turnover and the non-existence of advancement opportunities and remuneration commensurate with the level of skill.

From its first statutory protection of equality rights through to the passage of the Human Rights Act, the Social Credit government responded in a manner illustrative of the tenets or economic liberalism in the protection of equality rights. It forbade discriminatory treatment by legal sanction yet it did not act to ensure that equal treatment became a reality. It failed to establish a mechanism which could address the concerns of women and ethnic minorities in a meaningful way. It functioned on the assumption that employers and landlords would obey the law and that an unregulated market would provide the best means to ensure equality of opportunity. Social Credit governments refused to acknowledge the widespread concerns of the people of B.C. that without an active involvement by the state in the private practices of individuals, equality and a measure of social justice were unattainable. For the governments of W.A.C. Bennett the need for equal opportunity in the accumulation of private capital transcended the

ethical demands of respect for individual dignity and equality.

With the election of the NDP in August, 1972 the protection of human rights in B.C. entered a new and more dynamic stage. The provision of a bill of rights to encompass human rights protection had remained a cornerstone of social democratic thought in B.C. and a recurring plank in the NDP-CCF electoral platform. While not specifically mentioned by campaigning NDP'ers in 1972, supporters of a strengthened Human Rights Act were confident that the election of the NDP would have the desired effect. Throughout the fall and early winter of 1972 the new government received much public input into the setting of its legislature agenda. The BCCLA presented Attorney-General Alex MacDonald with a series of briefs detailing the concerns of the organization. The BCCLA proposed among other initiatives that the government move quickly to implement a comprehensive human rights act to demonstrate its commitment to the protection of civil liberties and human rights. In its brief to the Attorney-General, the BCCLA sought guarantees of fundamental human rights to the fullest extent permissible within provincial jurisdiction. That is, it wanted legislation which would affect not only the private sector but also bind the Crown. They sought legislation which would permit citizens to sue the Crown and make illegal discrimination based on political

belief as well as discrimination based on sex, marital status or criminal conviction in the sale or rental of housing. These, in addition to the already-existing proscriptions found in the Human Rights Act, would provide for the protection of the rights of the individual from both governments and other persons.

As the NDP government passed its first anniversary in power it had yet to enact new human rights legislation. A workshop sponsored by the BCCLA and attended by 14 organizations held on September 29, 1973 resulted in 14 recommendations being passed to the government regarding its proposed changes to the Human Rights Act. In addition to calling for the general strengthening of the legislation and the appointment of a provincial ombudsman, resolutions were passed at this conference requesting a higher priority to be placed on the protection of human rights in B.C. Specifically the workshop called for: increased staffing of the branch; minority group representation on the commission; the development of human rights programmes in the schools and increased funding to publicize the activity of the branch/commission as well as the nature of the problem minority group members face. An amended Human Rights Act should prohibit the denial of "services, access to public facilities, housing or employment except on reasonable grounds." To be considered as unreasonable grounds would be sex, sexual orientation, domestic arrangement, marital

status, political beliefs. former criminal conviction, lifestyle, language, source of income, physical handicap, position, existing treatment for mental or emotional disturbances and age.

In addition to calling for the expansion of the grounds of discrimination, this conference argued for the application of the Act to domestic servants, the prohibition of discrimination in commercial rooming houses, and for a clause that would put the Act in a paramount position to other provincial legislation. Other resolutions, such as one which would provide for the involvement of third parties in the complaint procedure, were also adopted. If implemented, these resolutions would have provided B.C. with the most comprehensive human rights legislation in Canada.

The Human Rights Code of B.C. Act (Bill 100) was introduced to the House by Labour Minister Bill King on October 31, 1973. It incorporated many of the recommendations just noted. From the standpoint of the scope of protection provided, the penalties available, and its administrative structure, the Code was a considerable improvement over the previous Human Rights Act. The Code expanded the prohibition of discrimination to include the grounds of marital status, conviction for a criminal or summary conviction charge, and political belief. These grounds were in addition to those found in the old Human

Rights Act. Most significantly, discrimination without reasonable cause was prohibited in sections 3, 8 and 9, namely those dealing with public facilities, employment, and membership in a trade union or employers association. The enumerated grounds of discrimination found in the Code were not to be regarded as a reasonable ground for discrimination. This clause made the Code open-ended in that it provided a means by which complaints of discrimination on grounds other than those specified in the Code could be considered. Penalties for those found to have contravened the Code were increased substantially. The fair practices laws had provided for a fine of one hundred dollars. There was no fine found in the Human Rights Act. The new Code, on the other hand, provided for fines not exceeding five thousand dollars.

The Code maintained the division between the Human Rights Branch and Human Rights Commission as found in the Act. However, the responsibilities of these two agencies were redefined. The Branch continued to be responsible for the investigation and conciliation of complaints and was to be provided with the necessary staff for this purpose. The Commission assumed responsibility for public education on human rights issues, research, and review of the Code. The Commission was appointed from the community by the Lieutenant-Governor in Council and was autonomous of the Department of Labour. Unsettled complaints were to be

referred to the Minister of Labour by the Director of the Branch. The Minister was given the authority to dismiss the complaint or pass it on to a Board of Inquiry which would hear the complaint and determine the appropriate remedy.

It is clear then that the Code adopted a strategy that illustrates a shift towards the ethical liberal approach to human rights protection. The independent and representative role played by the Commission provided a means by which minority group concerns could be addressed and the causes of discrimination challenged. The reasonable cause clause provided a public policy statement making tolerance for all minority groups as the essential goal of the state. A fully staffed and activist Human Rights Branch ensured rigorous enforcement of the law. A failure to comply with the Code would result in substantial and consequential penalties. The Code elevated to a prepotent purpose of human rights policy the tenets of ethical liberalism. The enhancement of individual development, and a recognition of the inherent dignity of the individual were the values embodied in the Code. The enforcement of the Code and the active involvement of the Branch and Commission in attacking unfair practices was to provide justice not only for individual complainants but also a degree of social justice which would improve the status of all British Columbians.

Legislative debate on the Code was largely concerned with the technicalities of its administration. As the Bill progressed through the House opposition members urged the government to add clarity to the "without reasonable cause" provision. And applying a critical theme that was raised in attacks on much of the NDP's legislation, the opposition expressed concern with the degree of discretion given the Minister in the appointment of boards of inquiry. An amendment proposed by Garde Gardom would have removed the discretionary element to the Code and required the Minister to appoint a board of inquiry on the recommendation of the Director of the Human Rights Branch. Although the Code provided only that the Director report unsettled cases to the Minister and not that she recommend a course of action, King stated that he would heed the recommendations of the Director. Opposition members also raised the concern that the Branch/Commission were not completely independent of the government and urged that these agencies report directly to the Legislature rather than through the Minister of Labour. King responded to this concern by stating that

> ... it would be an unusual departure from precedent to have a situation where an agency of the Crown ... would have no direct voice answerable for its interests in the Legislature. I think that could create some real problems, if no department or no Minister were answerable for the whole function of the human rights commission and the director and the various panels that will be set up ... I think that the fact that it is certainly more independent, and certainly more divorced from the

> Department of Labour than was the case heretofore is an indication that we want this agency to function ..[24] free from any political interference.

However, because the Code did not provide for safeguards from political interference the system remained open to abuse.

The response to the Code from community groups and organized labour was generally favourable. The BCCLA expressed concern for the lack of independence afforded the Branch and Commission. It was also dismayed that the Code did not include protection for the traditional political and legal rights generally included in bills of rights. In a brief presented to Attorney-General Alex MacDonald in 1972, the BCCLA had urged that an ombudsoffice be established and that citizens be given the right to sue the Crown. Neither of these concerns were addressed by the Code. It must be noted of course that they are also somewhat outside the jurisdiction of human rights codes as they have developed in Canada.

Women's groups were also supportive of the Code for its inclusion of marital status as a proscribed ground of discrimination and for the inclusion of sex as a prohibited ground in all sections of the Code. They were concerned, however, that the Code had not fully embraced the

recommendations of the Status of Women Report. This report recommended that

> federal, provincial and territorial Human Rights Commissions be set up that would (a) be directly responsible to Parliament, provincial legislatures or territorial councils, (b) have the power to investigate the administration of human rights legislation as well as the power to enforce the law by laying charges and prosecuting offenders, (c) include within the organization for a period of 7 to 10 years a division dealing specifically with the protection of women's rights, and (d) suggest changes in human rights legislation and promote widespread respect for human rights.[25]

The structure of the Code addressed three of the five points made in this recommendation. The Code did not provide for a fully independent commission nor for the implementation of a women's rights division. However, several government departments including Labour, Provincial Secretary and Education did initiate women's programmes and a review of their policies and practices regarding women.

One other group was not completely satisfied with the Human Rights Code. The Gay Alliance Toward Equality had met with the Minister of Labour both prior to the passage of the Code and subsequently seeking specific protection for homosexuals and lesbians from discrimination. The response of the Minister was that the reasonable cause provision protected this minority group, an opinion also supported by Rosemary Brown in the Legislature. As will be seen in the

following chapter, the issue of gay rights was to be among the first to be addressed by the Human Rights Branch.

On November 7, 1973 the Human Rights Code was passed by the Legislature and received Royal Assent. It was not proclaimed however, until October, 1974 although two sections which provided for the establishment of the Human Rights Commission and the hiring of staff by the Human Rights Branch were proclaimed earlier. Despite this delay, the Human Rights Branch, headed by Kathleen Ruff, wasted little time in ensuring the old Act was enforced and employers made aware of the aggressive stance the Branch was to assume in protecting the equality rights of British Columbians. Ruff regarded her role not merely as an administrator of individual complaints - a process she regarded as ineffective and "shameful" - but as an advocate for social change. According to Ruff, legislation itself is

> worthless unless there is an energetic, aggressive approach taken, because you're trying to change the status quo. You're trying to ensure that those who are at the bottom of the totem pole are going to have a better opportunity, a better chance. And that doesn't happen easily .... Because you're going against all the ingrained structures, the normal expectations, of the individuals themselves, and the system. You've got to be ready to fight it out. Otherwise ... its a farce.[26]

It was this attitude in conjunction with a stronger Human Rights Code which differentiates the protection of human

rights between 1973 and 1983 from what had occurred previously and subsequently.

The NDP government was defeated in a general election held in 1975 December. Social Credit governments up to 1983 did not alter the Code itself. But they did, in several instances, show a reluctance to support the effective administration of the Code. Allan Williams was the first Social Credit Labour Minister to have responsibility for the Human Rights Code. It had been the practice of Bill King to delegate the selection of board of inquiry members.[27] A panel of persons willing to sit as board members had been established and one or more of these individuals would act as a board of inquiry. This system provided a degree of impartiality in the appointment of boards of inquiry. Williams chose not to utilize it. The BCCLA and the NDP brought to the attention of the government what appeared to be political interference in the complaint settlement process. The Minister was, however, firm in his commitment to continue this practice.[28] The Minister's refusal to remove himself from what was a quasi-judicial procedure coupled with the apparent delays in the appointment of boards of inquiry was also opposed by the Advisory Council on the Status of Women. According to Joan Wallace,

> The evidence seems to be mounting that the new Social Credit government has no more intention of enforcing human rights

> legislation than the previous Socred government whose 'window dressing' Human Rights Act of 1969[29] was completely unenforceable.

It was only after extensive pressure by groups such as the BCCLA, Status of Women, and the NDP that boards were appointed by the Minister. Wallace places some of the blame for this situation on the NDP who she describes as "naive, but well meaning"[30] in the structure developed under the Human Rights Code which did not provide a mechanism to limit ministerial interference in the complaint procedure.

Delays in the calling of boards of inquiry continued throughout the tenure of Allan Williams as Minister of Labour. In June 1978 the BCFL had requested and not received a meeting with the Labour Minister. The BCFL was concerned that no boards of inquiry had been appointed since the previous August. It was also concerned that there existed no Human Rights Commission. The term of the first Commission, appointed by the NDP, had expired in December, 1977 and a new Commission had yet to be appointed. James Matkin, then Deputy Minister of Labour, dismissed this concern as being of little consequence as the Commission had no role in the administration of the Code. Matkin saw the delay in the appointment of the Commission as simply a matter of not being able to find the right people.[31] When asked in the legislature about this delay, Williams' response was, "so what?" This illustrates a failure to

understand the dual role of human rights agencies. It reflects the view that as long as the law was being properly administered human rights were being protected. This perception is one which has a focus only the prohibitive aspects of the Code and not its proactive role in elimination of circumstances which give rise to discriminatory conduct. This view was also held by the Social Credit governments of W.A.C. Bennett. A ten member Commission was finally appointed in August, 1978.

The general election held in May 1979 returned the Social Credit party to government. Kathleen Ruff, who had been Director of the Human Rights Branch since 1973, resigned from this position in August of that year. Her replacement was Nola Landucci who had previously worked for the Canadian Human Rights Commission. Landucci remained as Director of the Human Rights Branch until July, 1981 when she was fired by Jack Heinrich who had become the Minister of Labour following the 1979 election. The dismissal of Landucci stems from her outspoken criticisms of the Minister and the lack of access and support she was receiving from her superiors.[32] Delays in the appointment of boards of inquiry, allegations of political interference, and conflicts between the government appointed Human Rights Commission and the Branch were among the problems Landucci experienced.

The Human Rights Commission appointed in 1978 ended its term in August, 1981. Margaret Strongitharm, head of this Commission, sent a letter to Heinrich expressing her displeasure with the governments human rights policy. She saw no clear direction from government regarding human rights and complained of the lack of government criteria in the appointment of commissioners. In order that the Commission be effective, it was Strongitharm's opinion that the Commission be given greater powers under the Code and be made independent of the government.[33] In the fall of 1981 a new five member Human Rights Commission was appointed. It was headed by Dr. Charles Paris and existed until July, 1983 when Bill 27 was introduced.

The difficulties faced by both the Human Rights Branch and Commission following the election of the Social Credit government in 1975 are indicative of a gradual decline in government support for human rights protection. The lack of willingness by successive labour ministers to expedite the settlement of complaints and heed the concerns raised by the Human Rights Commission and community groups, is illustrative of the economic liberal approach to human rights protection. As was pointed out by Kathleen Ruff, the case-by-case method of ameliorating discriminatory conduct does not address those societal conditions which give rise to discriminatory conduct. According to Ronald Manzer this,

> liberal tendency to see the problem of discrimination in terms of conflicts between identifiable individuals avoids the issue of the social-group context of their conflict and its crucial implication that any permanent resolution of individual discrimination requires a transformation of the social-group environment within which prejudice is learned.[34]

Both economic and ethical liberals favour this individual approach to human rights protection. However, they differ in the strategies used and resources expended to address the public problem of discrimination. The economic liberal strategy is one which prohibits unfair treatment through legal sanction. It does not, as does the ethical liberal strategy, encompass programmes which would address the circumstances which give rise to discrimination. The practices and policies of the Social Credit government prior to 1983 illustrate a gradual movement away from the ethical liberal strategy embodied in the Code. In 1983 the government moved to eliminate the last vestiges of the ethical liberal strategy.

Bill 27, introduced to the provincial legislature on July 7, 1983, was the initial attempt by the newly elected Social Credit government to re-assert the economic liberal ideals of individualism, legalism and the primacy of the right to property. The Bill resulted in the immediate dismissal of 20 employees of the Human Rights Branch and the members of the Human Rights Commission. Hanne Jensen, the

Director of the Branch, was fired on July 15 for refusing to completely dismantle the Branch.

In place of the Human Rights Branch and Human Rights Commission, Bill 27 was to establish a Human Rights Council to be composed of no more than five persons appointed by the Lieutenant-Governor-in-Council to serve during pleasure. The powers of the Council differed significantly from those previously held by the Branch and Commission. The Council was to receive and investigate complaints and either prior to investigation or subsequently it could dismiss complaints it considered "trivial, frivolous, vexatious or made in bad faith." The Council could recommend a settlement of the complaint and if this recommendation was not accepted, report to the Minister. The Minister could either dismiss the complaint or call for a board of inquiry to settle the matter. Finally, the Council could hold a hearing on its own to determine the settlement of the complaint. There existed no avenue of appeal if the complaint was dismissed at any point and only a limited appeal process from a hearing or board of inquiry. The Council had no mandate to hire staff or to conduct educational programmes designed to promote and uphold the principles of the Act.

From a substantive point, the Bill made several major changes to the types of conduct to be prohibited as well as to the breadth of the Act. Perhaps the most

innovative element of the Code was the reasonable cause provision contained in sections 3, 8, and 9. This provision was struck from Bill 27. In place of the reasonable cause clause, Bill 27 added mental and physical disability to the list of proscribed grounds of discrimination. The Bill continued to prohibit discrimination because of race, colour, ancestry, place of origin, religion, marital status, and sex. However, Bill 27 no longer prohibited discriminatory advertisements for employment or the use of employment application forms requesting information on an individual's ethnicity, religion, age, etc.

A significant omission from the Bill was a provision found in section 9(1) of the Code. This clause provided that:

> ... no trade union, employers' association or occupational association shall, without reasonable cause in respect to the qualifications of that person,
>
> (b) negotiate, on behalf of that person, an agreement that would discriminate against him contrary to this Act.

While organized labour has long been at the forefront of the drive for extended human rights protection and is thought an unlikely transgressor of the more traditional non-discriminatory rights, trade unions have less than enthusiastically embraced the provision of affirmative action programmes that would circumvent the seniority provisions of collective agreements. The increasing public

prominence of those with physical and mental disabilities (as well as their increased political presence as witnessed by the 1982 constitutional talks) and their desire to enter the mainstream of economic, political and social life may well present problems to labour and management with which they are ill-equipped to deal. Increasingly, judicial and quasi-judicial agencies will be called upon to secure the right of such individuals to full enjoyment of employment opportunities and access to public facilities. The failure of the Act to compel compliance with the Act in the collective bargaining process has the effect of reducing the potency of the demands made by both women and the disabled. Without the explicit support of labour and management groups the rectification of past discriminatory practices, the assurance of equal opportunity, and a full attack on the problems presented by systemic or constructive discriminatory practices, does not command the high profile needed.

According to Murray Rankin, Bill 27 "became a focal point for the Solidarity Coalition in its campaign against the Social Credit legislative package."[35] Women's groups, ethnic organizations, and groups representing the disabled rallied to form an integral component of the Solidarity movement. Renate Shearer, who had been on the Human Rights Commission dismissed by Bill 27, became co-chair of the Solidarity Coalition. Condemnation of Bill 27 was heard

from outside the province as well. Federal Secretary of State for Multiculturalism, Serge Joyal, the Canadian Association of Statutory Human Rights Agencies, and Gordon Fairweather, head of the Canadian Human Rights Commission, all urged the Social Credit government to reconsider its proposed human rights legislation. According to Charles Paris, the former chairman of the B.C. Human Rights Commission, Bill 27 was not a restraint measure but "a deliberate, philosophical attack on the very concept of human rights legislation."[36]

The actions of the Solidarity Coalition and the parliamentary tactics employed by the NDP delayed the consideration of Bill 27 by the Legislature. The public crisis faced by the government during the summer and early autumn of 1983 ended in November with the agreement known as the "Kelowna Accord." Forged by Jack Munro, head of the IWA, and Premier Bennett, this agreement provided in part, that Bill 27 be allowed to die on the order paper and an advisory committee be formed to recommend changes to the existing Human Rights Code. The committee was struck in February 1984 and was composed of 5 persons: James Edgett, a former ADM in the Ministry of Labour and also a member of the Human Rights Commission between 1969 and 1973; Barry Sullivan a former Crown Counsel; Jane Evans, Vice-President of the National Action Committee, Status of Women; Eric Powell, a community worker involved with native issues; and

Lynn Smith, a Vancouver lawyer and law professor at the University of British Columbia. The committee met, received input from various community groups and presented its recommendations to Labour Minister McClelland on April 5, 1984. Bill 11, which replaced Bill 27, received first reading in the House on April 10 only five days after the advisory committee had reported and this with a weekend intervening. This short period of time for which the Minister and his staff had to review the recommendations, suggests that "most, if not all, of the decisions about the bill were made before the advisory committee reported."[37]

Bill 11 was an improvement on Bill 27 but only marginally. Whereas Bill 27 had not included a monetary penalty to be assessed against those found to have contravened the Act, Bill 11 provided for a penalty of not more than two thousand dollars. The bill added a section prohibiting discriminatory employment advertisements but did not prohibit the use of discriminatory employment application forms. To address concerns raised by several groups including the B.C. Branch of the Canadian Bar Association, regarding unintentional discrimination, Bill 11 was amended to state that:

> 13. (2) The Council shall not decline to proceed with an investigation by reason only that there was no intent by the person against whom the complaint was made to contravene this Act.

It was unclear however, if this power to investigate also implied a prohibition against unintentional discrimination.

This chapter has provided a description of the demands made on governments in British Columbia to provide protection from discriminatory treatment. The responses of the Social Credit governments of W.A.C. Bennett were indicative of the economic liberal strategy. The state was not to take an active role in ameliorating the causes and consequences of discrimination. Its role was reactive. It provided a mechanism for the adjudication of complaints but did not actively intervene in private business practices to ensure compliance with the law. Nor did the government adopt policies directed at the enhancement of tolerance. The advancement of minority group concerns was relegated to extra-governmental groups. Continued demands from organized labour, civil liberties groups, and women's organizations failed to move the government toward the ethical liberal perspective on human rights protection.

The NDP government enacted the B.C. Human Rights Code in 1973. This statute more fully incorporated the ethical liberal values of tolerance and accessibility. It also addressed many of the concerns raised by groups active in advancing the cause of equality. The Code provided for a strengthened enforcement agency and a semi-independent Human Rights Commission. The Code also expanded the proscription of

discrimination to include many groups not covered by the previous Act. The proscription of discrimination "without reasonable cause" will be examined in detail in the following chapter. The administrative structure provided by the Code will be discussed in Chapter Four. From this analysis the ethical liberal approach to human rights protection will be demonstrated.

The most recent development in B.C.'s human rights protection provides an example of the return to the economic liberal model. The Human Rights Act (1984) recognizes the liberal belief in equality of opportunity, however, the protection it provides is significantly reduced from that of the Code. The Act provides only for the adjudication of individual complaints of discrimination. It does not address the concerns raised about the effectiveness of the Code. It also eliminates community based representation in, and input to, the protection and advancement of equality rights. The Act signifies the re-emergence of the ethos of economic liberalism. This ideology has been a consistent component to Social Credit policy since 1952. It is also a dominant component to the political culture of British Columbia.

Chapter Two Footnotes

[1]Ronald Manzer, Public Policies and Political Development in Canada (Toronto: University of Toronto Press, 1985), p. 183.

[2]Vancouver Sun, October 6, 1953. "Council Seeks Changes in Bill for Equal Pay."

[3]Vancouver Sun, October 15, 1953. "Women 'Let Down' by Act, House Told."

[4]Labour Minister Lyle Wicks, speaking at a convention of the B.C. Trade Union Congress said that Rolston was the driving force behind the EPA. See, Vancouver Sun, October 14, 1953. "Tilly's Last Act to Help B.C. Women."

[5]Vancouver Sun, December 30, 1953. "Equal Pay Only if Women 'Beef'."

[6]See, Susan Jorgenson v. B.C. Ice and Cold Storage Ltd. B.C. Human Rights Board of Inquiry Decision, 1981. Also, the first action taken by Kathleen Ruff following her appointment as Director of the Human Rights Branch was to reach an agreement between the Department of Health, and provincial hospital boards which ended discriminatory wage agreements. This case was the first class action taken under human rights legislation in Canada. It also remedied a problem which the Social Credit government had refused to address. In 1970, the Human Rights Commission had ordered Vancouver General Hospital to rectify wage disparities between its male and female staff. Then Health Minister, Ralph Loffmark had warned that wage parity would come only at a cost to patient care as Hospital Insurance Service would not provide the monies to make up the wage differential. A second complaint made to the Human Rights Branch was subsequently dismissed. In a letter Loffmark sent to Labour Minister Leslie Peterson and Premier Bennett he stated that:

> The hospital should instead be encouraged to correct any discrimination by revising its classification and re-assigning duties. The hospital must have time to work out arrangements to assign the transportation of patients exclusively to female employees with some other job title. It would be fatal if a settlement along the lines implied by the Department of Labour is made or

an order issued under the Human Rights Act.

Mr. Loffmark further advised Labour Minister Peterson, of his concerns and one wonders if the second complaint brought forward by employees at VGH was dismissed due to the concerns raised by Loffmark. The agreement reached by Ruff affected 9,000 female workers at a cost to the government of 5 million dollars.

[7]Victoria Daily Colonist, February 29, 1956.

[8]Vancouver Sun, March 1, 1956, "Employment Racial Bill Unnecessary."

[9]Victoria Daily Colonist, March 1, 1956.

[10]Victoria Daily Colonist, September 23, 1958.

[11]Submission by the Human Rights Committee of the B.C. Federation of Labour to the Provincial Cabinet, UBC, Special Collections.

[12]"Human Rights and the Law," an address by L.R. Peterson to the B.C. Commission for the International Year for Human Rights, November 22-23, 1968.

[13]Report of the B.C. Commission for the International Year for Human Rights.

[14]Vancouver Sun, December 10, 1968.

[15]See, Vancouver Sun, March 26, 1969. "Industrial Relations Board Eyed as Human Rights Body." An amendment to the Act proposed by the NDP which would have added political belief to the proscribed grounds of discrimination was defeated by the government.

[16]The Province, March 25, 1969. "Veils for female job-seekers.

[17]The Province, April 10, 1969. "Human Rights Act full of holes-federation."

[18]Vancouver Sun, April 2, 1969. "Labour Official Raps Human Rights Bill."

[19]Vancouver Sun, April 29, 1969. "B.C. Rights Act has Loopholes."

[20]Vancouver Sun, October 26, 1970. "B.C. Human Rights may be overhauled."

[21]R.A. MacDonald, "Postscript and Prelude - The Jurisprudence of the Charter: Eight Theses," Supreme Court Law Review, vol. 4, 1982, p. 346.

[22]Report of Proceeding, Annual Convention of the B.C. Federation of Labour.

[23]From a brief presented to the Provincial Cabinet by the Voice of Women, December 1971.

[24]B.C. Hansard, 1973, p. 1268.

[25]Report of the Royal Commission on the Status of Women. Recommendation no. 16.

[26]The Province, March 7, 1974. "A Ruff year for human rights."

[27]Bill King had appointed Joe Wood as chairman of the panel from which Board of Inquiry members were selected. In practice, King left the selection of board members to Wood. The minister simply asked that a board be appointed. He was not directly involved in the selection process.

[28]In April 1976, the BCCLA had sought to meet with Williams to convey their concerns over the administration of the Code. The delays in the appointment of boards of inquiry were regarded as being politically motivated. See, Vancouver Sun, April 29, 1976 ("Government accused of bowing to pressure") The Minister responded to NDP questions in the House that he was not about to delegate authority which belonged to him under the Code. The prominent case at that time was a complaint made against the B.C. College of Physicians and Surgeons by the Human Rights Commission. See, Decision of the B.C. Human Rights Board of Inquiry, 1976.

[29]Vancouver Sun, August 3, 1976. "The human rights impasse."

[30]Ibid.

[31]See, interview with Jim Matkin conducted by J.T. Morley. B.C. Project files.

[32]Administrative changes which removed the Director of the Branch from direct access to the Deputy Minister of Labour and the refusal of Hienrich to allow Landucci to see the Civil Rights Protection Act (CRPA) before it was placed before the House are two examples of the lower priority given human rights protection by the Social Credit government. The CRPA effectively undermined section 2 of the Code protecting freedom of speech. The Act was directed

at the emergence of the Klu Klux Klan in the lower mainland. A report commissioned by the government to recommend what action should be taken suggested amending the Code. See, The McAlpine Report.

[33]See, Vancouver Sun, November 23, 1981. "Socreds 'have no clear policy on human rights'."

[34]Manzer, p. 174.

[35]Murray Rankin, "Human Rights Under Restraint," in Warren Magnusson, et. al. (eds.), The New Reality (Vancouver: New Star Books, 1984), p. 167.

[36]See, Vancouver Sun, July 11, 1983. "Socred moves scares rights groups." Charles Paris quoted in the article.

[37]William Black, "Human Rights in British Columbia: Equality Postponed" in William Pentney and Daniel Proulx (eds.), The Canadian Human Rights Yearbook, 1984-85 (Toronto: Carswell Co. Ltd., 1985), p. 221.

CHAPTER THREE

THE PROHIBITION OF DISCRIMINATION "WITHOUT REASONABLE CAUSE"

The purpose of human rights legislation is the satisfaction of human needs. The preamble to the Ontario Human Rights Code states in part that:

> ... it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well being of the community and the Province;[1]

The need for feelings of self-worth, dignity, equality and the development of a community based upon tolerance and equal participation are the human needs recognized by human rights legislation. The expression of these individual needs as "political goods" provides a means whereby these needs can be satisfied. Fraternity is a political good which guides public policies that have as their purpose the assurance

> that diversity of groups is accepted, that tolerance prevails, and that primary relationships involving family, friends, neighbourhoods, churches and workplaces are protected and developed.[2]

Equality as a political good finds expression in public policies which ensure that persons are not denied political,

social or economic benefits because of their personal status or beliefs. These two ideas are 'good'

> because they represent conditions known to be agreeable, beneficial, commendable, right, or proper for the satisfaction of basic needs. They are 'political' because they can only be realized through public collective action, and consequently they provide justification for compulsory collectivization.[3]

Differences arise over the level of diversity to be tolerated and over which characteristics are relevant in determining equal treatment. However, the satisfaction of human needs, expressed as the political goods of fraternity and equality, remains the guiding purpose to human rights policy.

This chapter will provide an analysis of the proscriptive elements to B.C.'s human rights legislation. From the first fair practices law enacted in the 1950s through to the 1969 Human Rights Act, those characteristics which were to be regarded as irrelevant to obtaining of employment or accommodation were specifically defined in the legislation. The narrow, proscriptive view of economic liberalism was embodied by these acts. The Human Rights Code provided an open-ended, catch-all prohibition of discrimination. In sections 3, 8, and 9 of the Code, discrimination was prohibited unless reasonable cause was demonstrated. The enumerated grounds found in the Code could not be considered reasonable in any circumstance. The

effect of this clause was to open the Code to all minority groups. The advancement of tolerance, as a central purpose to ethical liberal policies, was recognized by the Code. The 1984 Human Rights Act eliminated the reasonable cause provision and is illustrative of a return to the strategies and protections of the pre-Code era.

In B.C., the Fair Employment Practices Act (FEP), the Public Accommodation Practices Act (PAP) and the Equal Pay Act (EP) were the initial statutory measures which recognized the needs of individuals for a fraternal and egalitarian environment. The PAP Act and FEP Act prohibited discrimination because of race, colour, religion, nationality, ancestry or place of origin in the provision of services, facilities and accommodation "customarily available to the public" as well as in employment opportunities. The EP Act prohibited employers from discriminating in the wages or salaries paid female and male employees engaged in the same work.

The B.C. Human Rights Act, 1969 was a consolidation of these fair practices laws and continued the prohibitions against discrimination found in those statutes. The Human Rights Act also expanded upon several of the provisions found in these fair practices laws. The Act added sex to the existing list of proscribed grounds of discrimination in employment and expanded the equal pay provisions to

encompass "the same work or substantially the same work done in the same establishment."[4] The protection from sexual discrimination was qualified however, by the clause,

> discrimination because of sex, where based on a bona fide occupational qualification, does not constitute a failure to comply with this section."[5]

A proscription against sexual discrimination was also added to section six of the Act which prohibited discrimination by trade unions. The Human Rights Act expanded on the provisions found in the Public Accommodation Practices Act so as to prohibit discrimination because of race, religion, colour, nationality, ancestry, or place of origin in the rental or sale of any "commercial unit or self-contained dwelling unit that is represented as being available for occupancy ..."[6] The PAP Act pertained only to accommodation "customarily available to the public," i.e., motels and hotels.

The repeal of the Human Rights Act and the introduction of the Human Rights Code in 1973 brought about a further expansion of grounds of discrimination to be regarded as antithetical to public policy in British Columbia. The Code maintained the discriminatory grounds of race, religion, ancestry, place of origin, found in the Act and continued to deny such discrimination in the provision of public services and facilities, employment situations, trade union membership, the display of discriminatory

notices, signs or symbols, and in the sale or rental of commercial or residential accommodation. In the provision of services or facilities "customarily available to the public," the Code added a proscription against sexual discrimination

> unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance.[7]

Section 4 of the Code prohibited discrimination in the purchase of commercial or residential accommodation as had the Act on the grounds of race, colour, religion, ancestry or place of origin but the Code expanded this list to include sex and marital status. This provision was also to encompass the sale of land. Sex and marital status were also added to the list of grounds of discrimination found in the Act in the rental or lease of tenancy premises. This section did not apply to accommodation which required the sharing of bathroom, sleeping or kitchen facilities.

Wage parity between females and males was defined under the Code to include those employment situations in which the work performed was "similar or substantially similar."[8] As noted, the Human Rights Act had provided for equal wages only if the work done was the "same work or substantially the same work." The Code expanded the grounds of discrimination in employment application forms and advertisements for employment to include sex, marital status

and political belief in addition to the proscriptions found in the Act (race, religion, colour, ancestry, place of origin and age). The Code prohibited any employer from discriminating the offer of employment, continued employment or promotion or advancement of an employee because of race, religion, colour, age (45-65 years), marital status, ancestry, place of origin, political belief, sex, or a conviction for a criminal or summary conviction charge. The proscription against sexual discrimination in employment was qualified by the maintenance of public decency and the prohibition regarding criminal or summary conviction was qualified by:

> unless the charge relates to the occupation or employment, or to the intended occupation, employment, advancement or promotion of a person.[9]

The ban on discrimination because of age was not to prohibit

> the operation of any term of a bona fide retirement, superannuation or pension plan, or the terms or conditions of a bona fide group or employee insurance plan, or of a bona fide scheme based on seniority.[10]

With these qualifications, the Code also prohibited discrimination on the above grounds in the prospective or continued membership in a trade union or employers association. Membership in this latter group had not been covered by the Human Rights Act. This section of the Code also prohibited the negotiation of a collective agreement which contained provisions contrary to the Human Rights Code.

The Code however, went further than simply expanding the list of proscribed grounds of discrimination. Included in sections 3, 8, and 9 of the Code was the provision that no person shall discriminate against a person or class of persons "unless reasonable cause exists" for the denial, refusal or discrimination. In the provision of services and facilities available to the public, (section 3 of the Code) a person's race, religion, colour, ancestry or place of origin would not constitute reasonable cause. Sex, except for the maintenance of public decency, would also not constitute reasonable cause for discrimination. Section 8 of the Code stated that:

> 8. (1) Every person has the right of equality of opportunity based on bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement or promotion; and, without limiting the generality of the foregoing,
>
> (a) no employer shall refuse to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and
>
> (b) no employment agency shall refuse to refer him to employment, unless reasonable cause exists for the refusal or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (a) the race, religion, colour, age, marital status, ancestry, place of origin or political belief of any person or class of persons shall not constitute reasonable cause;
>
> (b) a provision respecting

> Canadian citizenship in an Act constitutes reasonable cause;
> (c) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency;
> (d) a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless the charge relates to the occupation or employment, or to the intended occupation, employment, advancement or promotion of a person.
>
> (3) Nothing in this section relating to age prohibits the operation of any term of a bona fide retirement, superannuation or pension plan, or the terms or conditions of a bona fide group or employee insurance plan, or of a bona fide scheme based on seniority.[11]

Section 9 maintained the same proscription as section 8 and applied to membership in a trade union or employers' association with the exception of section 8(2) (b) regarding Canadian citizenship. The reasonable cause provision was also incorporated into section 2 of the Code regarding discriminatory publications although it is not specifically mentioned. This section stated that:

> 2. (1) No person shall publish or display before the public, or cause to be published or displayed before the public, a notice sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against a person or class of persons in any manner prohibited by this Act.
>
> (2) Notwithstanding subsection (1), a person may, by speech or in writing, freely express his opinion on a subject.[12]

By expanding this section to proscribe discrimination "in any manner prohibited by this Act," the concept of reasonable cause was thereby incorporated. In addition, it was the opinion of NDP Labour Minister, Bill King, that the common law approach to statutory interpretation would extend the application of the reasonable cause clause to all sections of the Code.[13]

By utilizing the reasonable cause provision, the Code was no longer definitive in its proscription of discrimination. It forbade discrimination unless reasonable cause existed for the discrimination and it defined those attributes which could not be considered as reasonable in any circumstance. The open-ended nature of the reasonable cause clause allowed for the administrators of the Code to consider complaints of discrimination on grounds other than those enumerated. The concept of tolerance was to be given precedence over the strict legal proscriptions found in the previous and subsequent statutes. According to Ronald Manzer:

> Individual needs for acceptance, respect, and creativity require the achievement of a society that is flexible in its application of rules and standards, unwilling to make narrow-minded judgements about non-conformist behaviour, and consistently disapproving of unequal treatment of any of its members. Public policies that are guided by the principle of tolerance seek this ideal society by attempting to eliminate or, more realistically, to reduce public and

> private actions that are perceived to discriminate unfairly against members of minority groups.[14]

Unlike the Human Rights Act (1969) which at best upheld this principle of tolerance toward racial and religious minorities, the Code, through the use of reasonable cause, provided access for any minority group member to seek redress for discriminatory conduct. The Code proclaimed as public policy not only the narrow provisions of the Act but expanded the prohibited grounds of discrimination to state that any unreasonable distinction in the provision of services and facilities available to the public, housing, and employment opportunities was an abrogation of the rights of the individual to the fullest development of their potential. The Human Rights Code broadened the concept of tolerance as a propotent public purpose to include not only those characteristics mentioned in the Code but also any other group characteristic which could be regarded as an unreasonable basis for differential treatment. With the enactment of the new Human Rights Act in 1984, the statutory protection from discrimination was narrowed by the exclusion of the reasonable cause provision.

The concept of reasonable cause stems from the English common law regarding the obligation of an innkeeper "to supply a traveller with food and lodging, which he cannot refuse without reasonable excuse."[15] B.C. and

Manitoba are the only two Canadian jurisdictions to incorporate this concept into human rights legislation. Manitoba follows the common law in restricting the provision to public services, facilities, accommodations and commercial or residential tenancy.[16] In a draft of the human rights code submitted to the Minister of Labour by Professor Bill Black the reasonable cause provision was used only in section 3 which applied to public services, facilities and accommodation.

This draft code differed from the final Code in one other aspect: it provided specific protection for homosexuals. Prior to the introduction of the Human Rights Code and subsequent to its passage, members of the Gay Alliance Toward Equality (GATE) had urged Labour Minister Bill King to include sexual orientation in the list of prohibited grounds of discrimination. Following a meeting with King in August 1973, Maurice Flood, spokesperson for GATE, stated that the refusal of the Minister to include protection for homosexuals and the arguments he put forward were "infused with social prejudice."[17] A protest outside the Legislature on November 8, 1973 by GATE regarding the exclusion of protection for homosexuals resulted in Labour Minister King stating that sexual orientation would be protected under the reasonable cause provision.[18]

A test of the ministers belief in the use of "without reasonable cause" to prevent discrimination against homosexuals was among the first cases to be heard by a Board of Inquiry. In 1975, the Gay Alliance Toward Equality attempted to have an ad placed in the classified section of the Vancouver Sun. The ad read:

> Subs to Gay Tide, gay lib paper $1.00
> for 6 issues, 2146 Yew St., Vancouver.

This ad was rejected by the Vancouver Sun as being "not acceptable for publication." Maurice Flood of the Gay Alliance subsequently complained to the Human Rights Branch of a denial of a 'service customarily available to the public' without reasonable cause. Section 3 of the code provides that:

> 3(1) No person shall
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public; or
> (b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public unless reasonable cause exists for the denial of discrimination.
>
> (2) For the purposes of subsection (1),
> (a) the race, religion, colour, ancestry or place of origin of a person or class of persons shall not constitute reasonable cause, and
> (b) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency

> or to the determination of premiums or benefits under contracts of insurance.[19]

The board in its decisions stated that the list of proscribed grounds found in the section was not exhaustive or exclusive and that the listed grounds appeared

> in a context which is clearly designed to be illustrative and not determinative of the broad scope of the prohibition with which they are preceded.[20]

As such, the board held that homosexuality was a protected category under the reasonable cause test.

Having decided it could hear this case, the board posed two questions which were to be answered by it:

(a) is classified advertising a service or facility customarily available to the public and,

(b) did the Vancouver Sun have reasonable cause for the denial of service.

The Vancouver Sun argued that its decision was a reasonable one on three grounds. First, that homosexuality is offensive to public decency and the ad would offend some of its subscribers. Second, that the Code of Advertising Standards, to which the Sun subscribed, prohibited the display of an ad which is vulgar, suggestive or offensive to public decency and that the ad submitted by GATE contravened this standard. Third, that the newspaper had a duty to protect the morals of the community it served.

The board rejected the defense of reasonableness offered by the Sun. Arguing against the Sun's view that it had a duty to protect public decency and morality, it stated that "(t)he notion that the content of a newspaper whether it be advertising or editorial be governed by the standard is ludicrous."[21] Rather, the board found that

> the real reason behind the policy was not a concern for any standard of public decency, but was in fact, a personal bias against homosexuals and homosexuality on the part of the various individuals within the management of the appellant newspaper.[22]

Dr. D.E. Smith in her dissent on the reasons for finding the Vancouver Sun in contravention of the Code, but not in the decision itself, notes that testimony given by the advertising manager of the Sun (Mr. Toogood) placed the objection to the ad in a somewhat different context. The ad, according to Toogood, was directed to homosexuals and the magazine asserts the rights of homosexuals. It is this which the Sun found offensive to public decency and not any particular bias on the part of employees of the Sun. However, as Smith notes, the issue was

> quite simply that the respondent's interpretation of standards of public decency implied that they should not publish the GATE advertisement, that the decision resulted in a contravention of the Human Rights Code. Since their interpretation is in principle and in practice contradictory to the principles of the Human Rights Code, it cannot, ... provide reasonable grounds for contravention of the code.[23]

At issue for Smith is not the imputed motives of the respondents but simply their actions and the reasonableness of those actions.

The Sun appealed this decision of the board to the B.C. Supreme Court where Mr. Justice MacDonald held that the decision of the board was one based on fact and thereby outside the competency of the court to overturn. The avenues of appeal from a board of inquiry decision were set out in section 18 of the Code:

> 18. An appeal lies from a decision of a board of inquiry to the Supreme Court on any
>
> (a) point or question of law or jurisdiction; or
>
> (b) finding of fact necessary to establish its jurisdiction that is manifestly incorrect, and the rules under the Offence Act governing appeals by way of states case to that court apply to appeals under this section, and a reference to the word "Justice" shall be deemed to be a reference to the board of inquiry.[24]

The argument put forward by the Sun was that the board had erred in finding that it had denied a service to a group without reasonable cause. MacDonald, J. held that the appeal of the Sun was such that it necessitated an interpretation of fact which the court lacked the authority to do given section 18 of the Code.[25]

The newspaper appealed this decision to the B.C. Court of Appeal where Justice Robertson, with Branca, J.A. concurring, allowed the appeal. Robertson, J.A. in commenting on the actions of the board suggested that

> what the board has done is to add (by some quasi-legislative process which is not a function of the board) homosexuality to the attributes of persons which are specifically protected in varying circumstances from discrimination by (various provisions in the code) that is to say ... sex ...[26]

Branca, J.A., also in the majority decision, noted that a bias against homosexuals if honestly held, provided reasonable cause under section 3 of the code, unless there was bad faith. Mr. Justice Seaton dissented from the majority opinion on the same grounds cited by MacDonald, J. of the Supreme Court.

This reversal of the board's decision led to an appeal by the Human Rights Commission to the Supreme Court of Canada. Initially the Minister of Labour, Allan Williams, did not support the Commission in its desire to appeal this case. The Minister had no stated objections to the appeal per se. He refused, however, to provide financial support for the appeal. The Commission sought out and found legal counsel willing to handle the case and waive payment. Faced with the prospect of having its legislation defended by the Commission and not itself, the government recanted and provided the necessary funds for the appeal.

At the Supreme Court of Canada, the court decided in a six to three decision that the Sun had not violated the Human Rights Code. However, it did so without the majority of the court addressing the issue of reasonable cause.

The majority decision delivered by Mr. Justice Martland with Ritchie, Spence, Pigeon, Beetz and Pratte J.J. concurring, was concerned in the main with the issue of freedom of the press. Mr. Justice Martland first dealt with the question of whether provincial legislation could interfere with the right of a free press and relied on the minority decision in the Alberta Press Case which asserted that such interference may be unconstitutional. Martland, J. then went on to determine that the classified sections of a newspaper were not an "accommodation, service or facility ... customarily available to the public" and therefore outside the jurisdiction of the Human Rights Code. This opinion, in conjunction with the published policy of the newspaper to 'revise, edit, classify or reject' any advertisement, led the justice to hold that the Sun had not contravened the Human Rights Code in refusing to publish the GATE advertisement.[27]

The dissenting members of the court were the only ones to address the issue of reasonable cause. Chief Justice Laskin, with Estey, J. concurring, viewed the initial appeal by the Sun as procedurally unsound and agreed

with Mr. Justice Seaton of the B.C. Court of Appeal that the determination of the board of inquiry was one based on fact or at best, mixed fact and law and therefore outside the avenues of appeal provided for in the Human Rights Code. Laskin, C.J.C., regarded the decision of the B.C. Court of Appeal as one which substituted a notion of reasonable cause that was at odds with the determination of the board and that this was a role the courts could not assume. The Chief Justice did not deal with the issue of freedom of the press which had concerned Martland, J. He argued that a discussion of the constitutionality of the Code was precluded by lack of proper notice by the Attorney's-General of B.C. and Canada. Laskin, C.J.C. dismissed the argument put forward by the Sun that its actions were reasonable as it had refused the ad on the basis of its content and not on the personal characteristics of the person seeking to place the ad. According to Laskin, C.J.C., this argument was a "desperate one" and one which sought "to circumvent the question of reasonable cause."[28]

Mr. Justice Dickson, in a separate dissenting opinion, noted that a distinction existed between the editorial content of a newspaper and its commercial advertising. The need for a free and unhampered press is a component of a democratic system and demands judicial protection. However, it was the opinion of Dickson, J. that

> once services of facilities are provided to the public through the classified advertising section of the newspaper, the public interest demands that another goal be given priority - that of ensuring the non-discriminatory treatment of all sectors of society in the provision of a commercial service or facility 'customarily available to the public'."[29]

Mr. Justice Dickson also noted that the editorial department of the Sun had not refused to publish material concerning homosexuality and it was only the advertising department that concerned itself with this subject. Lastly, Dickson, J. took issue with the Sun's published statement reserving the right to refuse any advertisement. According to Dickson, J.:

> [no] newspaper, or any other institution or business providing a service to the public can insulate itself from human rights legislation by relying upon "honest" bias, or upon a statement of policy which reserves to the proprietor the right to decide whom he shall serve.[30]

Despite the lack of judicial clarity in the application of the "without reasonable cause" clause and the protection it afforded homosexuals, the Human Rights Branch continued to accept complaints of discrimination because of sexual orientation. The GATE case was, however, the only complaint on this ground to reach a board of inquiry. It is of some note that subsequent to the Supreme Court of Canada decision the Sun reversed its policy concerning homosexuality and published ads similar to that desired by

the Gay Alliance Toward Equality, without suffering any adverse consequences.

Professor Black in a 1981 article outlining the B.C. experience with the reasonable cause provision cites several advantages to this approach in the enforcement of human rights legislation. The most obvious advantage is that

> the formulation avoids the use of a closed list of prohibited grounds of discrimination, thus providing the flexibility needed to expand protection as new grounds of discrimination emerge and come to be considered unacceptable.[31]

This additional flexibility negates the necessity of statutory amendment, a procedure that is often slow to react to developing social issues. The provision of the reasonable cause clause also allowed for the B.C. Code to be regarded as fulfilling B.C.'s obligation to abide by Article 26 of the International Covenant on Civil and Political Rights. The Covenant provides in part that:

> the law shall prohibit <u>any discrimination</u> and guarantee to all persons equal and <u>effective protection against discrimination on any ground</u> such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status.

As several of the prohibited grounds mentioned are not included in any human rights legislation in Canada, the reasonable cause provision can be regarded as encompassing them despite their apparent inappropriateness to the

Canadian social setting. This approach also satisfies the demands of Article 7 of the International Covenant on Economic, Social and Cultural Rights as regards discriminatory pay differentials.[32]

A third advantage to this approach is that it provides for the consideration of new grounds of discrimination in light of facts derived from actual cases. By allowing for a determination of reasonableness, requirements which in the abstract may appear as legitimate, may not stand up to scrutiny given the test of actual experience. It could allow the "ecological fallacy" of assigning group characteristics to individuals within that group to be tested as to its reasonableness. In essence the test of merit replaces the arbitrary assignment of group characteristics to an individual.

A fourth advantage to the reasonable cause approach is that it allows for the consideration of grounds of discrimination that may be invidious in some circumstances yet justifiable in others. While the enumerated grounds of discrimination found in the Code are to be regarded as "inherently suspect" and never a reasonable basis for discrimination, other less suspect grounds such as physical disability are to be considered discriminatory only within the context of specific circumstances. The refusal to employ someone because of their physical inability to

perform the job is not in itself discriminatory. However, the refusal to hire the disabled in positions in which the disability is irrelevant to the performance of the job is clearly an instance where reasonable cause would need to be demonstrated. As such, the

> 'reasonable cause' formulation allows human rights agencies to deal with such problems in a manner that is fair to both the complainant and respondent by allowing justifiable requirements, while forbidding those practices that cannot be justified.[33]

Human rights tribunals are quasi-judicial bodies whose conduct mirrors our adversarial judicial process. As such, it is neither unusual nor infrequent for cases brought before boards of inquiry to be argued not on substantive issues but rather on legal technicalities. The reasonable cause test provides increased latitude for the tribunals to consider the substantive issue before them rather than merely determining the extent to which the technicalities of the law have been adhered to.

The decisions of boards of inquiry have provided greater clarity and substance to the concept of reasonable cause. According to the decision reached in Bremner v. Sooke School Board, the reasonable cause provision was

> intended to protect classes or categories of persons and individual members of such classes or categories from prejudicial conduct related to the differentiating group characteristic ...[34]

Those characteristics which received recognition and protection under the reasonable cause clause of the Code include physical-disability,[35] personal appearance and/or lifestyle different than the societal norm,[36] pregnancy,[37] citizenship,[38] sexual orientation,[39] and language.[40] Throughout much of the existence of the Code, sexual harassment was considered under the reasonable cause provision although in some years a complaint of sexual harassment was considered under the rubric of sex discrimination. Under the 1984 Act, sexual harassment cases have been heard as sex discrimination.[41]

In addition to expanding the grounds of discrimination, the reasonable cause provision provided a means by which systemic or unintentional discrimination could be addressed. Unintentional discrimination occurs when qualifications, requirements or procedures are used which, while appearing neutral or unbiased on the surface, have the effect of restricting equal opportunity to certain groups. For example, a B.C. board of inquiry found in the case of Grafe v. Sechelt Building Supplies[42] that the imposition of height and weight requirements for prospective employees had the effect of discriminating against women. In the case of Dhaliwal v. B.C. Timber,[43] a board of inquiry determined that an unreasonable language requirement had the effect of discriminating against persons because of place or origin. There existed no demonstrated prior intent on the

part of either employer to deny employment to women or recent immigrants. However, the use of standards such as those mentioned had the effect of denying equal opportunity to these groups. In both cases the requirements were deemed unreasonable and, thereby, in contravention of the Human Rights Code. The reasonable cause clause allowed for the consideration of discriminatory effect in the absence of legislative direction regarding the issue of intent.

The use of the reasonable cause provision throughout the life of the Human Rights Code supports Professor Black's contention that the flexibility of its application allowed for the consideration of complaints of discrimination on grounds other than those specifically mentioned in the Code. Between 1974 and 1983 approximately 24% of the complaints handled by the Human Rights Branch concerned discrimination "without reasonable cause." However, the use of reasonable cause has not been without its detractors. According to Professor I.A. Hunter:

> The effect of this dangerously open-ended section is to make the Human Rights Commission (sic), rather than the employer or even the statute, the arbiter of what qualities may reasonably be sought in the hiring process. Any employment decision made in good faith by any employer may subsequently be held to have been without reasonable cause .... Not by an independent court of law, but by a governmental commission ... or by an appointed tribunal of inquiry. Not only does this section exemplify the paternalism that increasingly animates much contemporary human

> rights legislation, it also betrays a disturbing insensitivity to the particular rights of an employer, and to the generalized right of a free citizenry against arbitrary ex post facto law-making by unelected public authorities.[44]

Professor Hunter regards present day human rights legislation as subordinating the

> freedom to contract with whom one chooses [and the] freedom of choice over one's tenants and employees ... to an over-arching public policy of equality.[45]

Legislation such as the B.C. and Ontario Human Rights Codes, according to Hunter, compensate "for a lack of clarity by conferring the maximum discretion on the enforcement agency,"[46] an action which he regards as a threat to individual liberty.

This concern for the use of the without reasonable cause provision to extend the Code to circumstances not specifically mentioned in the Code is echoed elsewhere. Nola Landucci, Director of the B.C. Human Rights Branch from 1979 to 1981, also regarded the lack of clarity in the reasonable cause clause as troublesome. In an address to the Vancouver Board of Trade, Landucci stated that,

> the group characteristics that you can't use against an individual ... have to be clearly stated and must be recognized as reflective of our community standards ....[47]

Her assessment of the inclusion of reasonable cause was that it was "a great system for a lottery, but ... a rather

counter productive way to gain ... respect for and cooperation with standards of justice ...."[48] Landucci felt that the legislature should lay down specific guidelines that would be readily and clearly understood rather than leave to the discretion of even a benevolent civil servant the assertation of what conduct was reasonable and what was not.

A third disadvantage with the reasonable cause provision is identified by David Vickers. Professor Black has noted that the "without reasonable cause" provision in the Code allowed for the examination of complaints of discrimination although there existed no intent to discriminate. Vickers argues that the use of the concept of reasonable cause blurs the issue of intent. By substituting a consideration of reasonableness for an examination of the discriminatory effect of a particular action, the focus of the complaint shifts from the complainant to the respondent, who then has the opportunity to demonstrate the reasonableness of his or her actions. For Vickers,

> such a result defeats the purpose of the legislation. The consequences of what was considered to be a reasonable practice ... was nonetheless discriminatory.[49]

By focussing on the motivation for the discrimination and the reasonableness of the action, the effect of that action on the victim is made a secondary consideration - if it is considered at all. As an instrument to remedy the enduring

systemic inequities in British Columbia, the concept of reasonable cause was only of partial benefit. It allowed for complaints of discrimination to be heard on grounds other than those enumerated in the Code and allowed for the examination of practices not intentionally discriminatory. However, it also allowed systemic inequities to be assessed not for their discriminatory effect but as to their reasonableness. While the reasonable cause clause was not intended to be used to counter systemic discrimination it had, perhaps inadvertently, been employed by employers and business people to delay or avoid the administrative, judicial and legislative consideration of such discrimination.

The Human Rights Act, 1984, precludes consideration of discriminatory effect by deleting the reasonable cause provision, and re-asserting intent as a relevant element in discrimination. Section 13(2) of the Act provides that:

> (2) The Council shall not decline to proceed with an investigation by reason only that there was no intent by the person against whom the complaint was made to contravene this Act.[50]

This provision appears to say that intent need not be demonstrated. It is not, however, a recognition of the importance of overcoming the systemic barriers of equality. According to Professor Black, "the 1973 Code did too little in dealing with ... 'systemic' discrimination, and the new Act seems to exacerbate the problem."[51] Ontario, having

recognized the inability of its human rights legislation to combat systemic discrimination, amended its Human Rights Code in 1981 to provide that:

> A right of a person ... is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, ...[52]

This provision provides protection from discrimination regardless of the motivation of the discriminator and is a means by which the subtle, yet invidious, sources of inequality can be countered. In revising its statutory protection of human rights, the Social Credit government chose not to pursue this course but instead left open a means by which employers could circumvent the sanctions of the Act. In 1985, a hearing by the B.C. Human Rights Council held that a personnel policy which awarded managers more points for hiring men than for hiring women was a reasonable one and one which did not discriminate untowardly against women.[53]

The rationale presented by Labour Minister McClelland for the exclusion of the reasonable cause clause was that the new Act provided greater certainty and clarity as to what was to be considered unacceptable discrimination in British Columbia. According to McClelland:

> By making the prohibited grounds of discrimination more specific, the act will strengthen available protection. There will be no doubt what is unacceptable conduct in the community or workplace.[54]

However, by excluding the "without reasonable cause" clause, uncertainty is also increased. It is now unclear whether discrimination because of pregnancy or sexual harassment will be considered as sexual discrimination. It is clear however that discrimination because of the language one speaks, age (other than between 45 and 65 years) and sexual orientation are not covered by the act. The certainty given to the protection of the physically and mentally disabled is also suspect. Lacking a clear statement regarding the intent to discriminate, it is unclear whether compulsory aptitude tests would violate the Act even if such tests were irrelevant to the actual requirements of the job. Similarly, it is unclear whether a public or private employer could be required to make his workplace or business accessible to the physically disabled. According to Professor Black, the

> net effect of the changes is to eliminate protection for certain groups and to reduce the effectiveness of the protection given the groups that are specifically named.[55]

During debate in the House on Bill 11, the NDP raised the issue of the exclusion of the "without reasonable cause" provision. One group of particular concern for the

NDP were homosexuals. The government's specific exclusion of this group was defended by John Parks, MLA for Maillardville-Coquitlam. Parks, in response to a question posed by Rosemary Brown (MLA for Burnaby-Edmonds), stated that:

> I am unable to stand up and acknowledge ... that I am in favour of perversion, deviant behaviour or what my family considers behaviour apart from my norm. I am not able to condone the behaviour of homosexuality. I don't think it does any good for our society ...[56]

The lack of statutory protection for homosexuals may well conflict with the Canadian Charter of Rights and Freedoms. The federal government, in reviewing federal laws which may conflict with the protection afforded by section 15 of the Charter, stated that:

> ... the Government is committed to the principle that all Canadians have an equal opportunity to participate as fully as they can in our society; no one should be denied opportunities for reasons that are arbitrary or irrelevant ... The Government believes that one's sexual orientation is irrelevant to whether one can perform a job or use a service or facility. The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees in section 15 of the Charter.[57]

The issue for the federal government is not one of condoning individual behaviour but one of providing equality of opportunity in an open and tolerant society. The federal government report recommended that the Canadian Human Rights

Act be amended to provide protection for homosexuals and to provide such protection without the necessity of judicial order. The government of B.C. refused to acknowledge the principles of equality and tolerance in reference to homosexuality and has left to the courts the determination of the equality rights of a significant minority group.

Labour Minister McClelland was of the opinion that the decisions of boards of inquiry which aided in the determination of reasonable cause would provide guidelines for the decisions of the Human Rights Council or boards of inquiry appointed under the Act. According to McClelland:

> ... the matters of sexual harassment, pregnancy and others are all dealt with as human rights activities, and it has been found across Canada that they are discrimination on the basis of the various codes of the country, including ours.[58]

It was, then, the opinion of the Minister that despite the lack of specific mention or an open-ended proscription such as "without reasonable cause," grounds of discrimination defined by the reasonable cause provision would continue to be incorporated in the Act. If clarity and specificity were the reasons for the exclusion of "without reasonable cause," the Minister's comments seem to be at odds with this objective. Nor have these two grounds of discrimination received consistent enforcement. Discrimination because of pregnancy has not always been found to be sexual discrimination nor has sexual harassment always been viewed

as a form of discrimination.[59] In order to remedy this situation other jurisdictions such as Alberta have amended their human rights code to include pregnancy as a prohibited ground of discrimination.[60] The Ontario Human Rights Code explicitly prohibits sexual harassment.[61]

While the "without reasonable cause" clause was excluded from the 1984 Act as a ground for a complaint of discrimination, the concept of reasonableness remained in the Act as a defense for alleged discriminatory conduct. Section 8 of the Act provides that:

> 8. (1) No person or anyone acting on his behalf shall
> (a) refuse to employ or refuse to continue to employ a person, or
> (b) discriminate against a person with respect to employment or any term or condition of employment,
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, physical or mental disability, sex or age of that person or because of his conviction for a criminal or summary conviction charge that is unrelated to the employment or to the intended employment of that person.
> (2) No employment agency shall refuse to refer a person for employment for any reason mentioned in subsection (1).
> (3) Subsection (1) does not apply
> (a) as it relates to age to any bona fide scheme based on seniority, or
> (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of any bona fide retirement,

> superannuation or pension plan or to a bona fide group or employee insurance plan.
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.[62]

According to Professor Black this section seriously weakens the protection it is designed to provide. It does so by setting forth "a new defense providing that there is not a violation if a distinction is based on a 'bona fide occupational requirement.' Taken together with the elimination of the reasonable cause provisions, the effect is that a distinction is no longer prohibited because it is unreasonable, but reasonableness continues to provide a defense even for an exclusion based on an enumerated ground of discrimination."[63] Whereas under the Code 'reasonableness' was a means by which both complainant and the respondent could argue the merits of their position, under the Act this defense is available only to the respondent.

Human rights legislation furthers the liberal belief in tolerance for diversity and equality of opportunity as a means to ensure individual self-respect and dignity. It does so by prohibiting discrimination because of personal or group characteristics deemed to be irrelevant to the provision of equal treatment in employment, accommodation, and access to public services and facilities. Policy-makers

will however, differ vigorously among themselves about which characteristics ought not to be considered as a basis for unequal treatment. The Human Rights Code embraced the concept of prohibiting discrimination without reasonable cause as a means to provide protection to any minority group or individual who felt they had been unfairly treated. As such the Code can be seen as an expression of the pre-eminent position of tolerance as the purpose of public policy designed to prohibit discrimination; a purpose that is an integral component of the ethos of ethical liberalism. The 1984 Human Rights Act eliminates the reasonable cause clause, thereby restricting the prohibition of discrimination and the encouragement of tolerance to specific groups. The Act, while not a complete repudiation of the liberal precepts of tolerance and equality of opportunity, narrows the application of these concepts. The Act does not provide a means whereby systemic inequalities can be addressed and seriously weakens the protection provided to women against sexual harassment or discrimination because of pregnancy. The Act denies protection to homosexuals and is vague as to the level of protection the mentally and physically disabled can expect. The Act is more closely representative of economic liberal beliefs in offering concise legal remedies to specific complaints and non-interference by the state in private business decisions and practices. Inherent in the Act is a

recognition of the primacy of the rights of property over the right to equality.

Chapter Three Footnotes

[1]S.O., 1981, c. 53, Preamble.

[2]Ronald Manzer, Public Policies and Political Development in Canada (Toronto: University of Toronto Press, 1985), p. 6.

[3]Ibid., p. 6.

[4]S.B.C., 1969, c. 10 s. 4.

[5]S.B.C., 1969, c. 19 s. 5.

[6]S.B.C., 1969, c. 10 s. 9.

[7]R.S.B.C., 1979, c. 186 s. 3.

[8]R.S.B.C., 1979, c. 186 s. 6.

[9]R.S.B.C., 1979, c. 186 s. 8.

[10]R.S.B.C., 1979, c. 186 s. 8.

[11]R.S.B.C., 1979, c. 186 s. 8.

[12]R.S.B.C., 1979, c. 186 s. 2.

[13]In response to questions by Liberal MLA David Anderson, King stated:

> If the specific section does not outline the particular ground upon which the person claims discrimination, then they still have the option of appealing to the board, or to the director, on the basis of discrimination which violates the common law as contained in the Act here .... What I have said is that the common law proposition of reasonable cause has been established in this Act.

See, B.C. Hansard, November 6, 1973, p. 1355.

[14]Manzer, p. 163.

[15]See, R. v. Higgins [1947] 2 All E.R. 620. and Henry L. Molot, "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation," The Canadian Bar Review, vol. XLVI, 1968, pp. 612-642.

[16]See, Manitoba Human Rights Code, S.M. 1970, c. 104, sections 3, 4.

[17]Kings response to GATE was that he thought homosexuals would be protected by the reasonable cause provision. He did not want the specific inclusion of sexual orientation in the Code because he did not wish to give it legal recognition. It was perhaps more likely that King desired to avoid the political repercussions of advocating the rights of homosexuals. See, Daily Colonist, August 30, 1973, p. 45.

[18]Daily Colonist, August 30, 1973, p. 45.

[19]R.S.B.C. 1979, c. 186 s. 3.

[20]Gay Alliance Toward Equality v. Vancouver Sun, 1975, B.C. Board of Inquiry Decision, unreported.

[21]Ibid.

[22]Ibid.

[23]Dr. D.E. Smith, "A dissent from the Judgement of the Board of Inquiry" in the matter of the Gay Alliance Toward Equality v. the Vancouver Sun., 1975, unreported.

[24]R.S.B.C. 1979, c. 186 s. 18.

[25]Vancouver Sun v. Gay Alliance Toward Equality (B.C.S.C.), [1976] W.W.D. 160.

[26]Re: Vancouver Sun and Gay Alliance Toward Equality (1977), 77 D.L.R. (3d) 487.

[27][1979] 2 S.C.R. 435. 97 D.L.R. (3d) 577.

[28]Ibid., p. 447.

[29]See, Jeff Richstone and J. Stuart Russell, "Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada" in McGill Law Journal, vol. 27, 1981, p. 100.

[30]Supra, note 27, p. 473.

[31]Bill Black, "'Reasonable Cause; in Human Rights Legislation," Labour Research Bulletin, British Columbia Ministry of Labour, February, 1981, p. 14.

[32]See, International Convenant on Civil and Political Rights, Article 26. Emphasis added. Also see, International Covenant on Economic, Social and Cultural Rights, Article 7 which states in part:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men ....

Both these Articles are open-ended and prohibit any and all discrimination.

[33]Black, p. 14.

[34]Bremner v. Sooke School Board, B.C. Board of Inquiry Decision, June, 1977, p. 6.

[35]Jefferson v. B.C. Ferry Corp., et. al., B.C. Board of Inquiry Decision, September, 1976, unreported.

[36]Oram et. al. v. Pho, B.C. Board of Inquiry Decision, 1975, unreported.

[37]H.W. v. Riviera Reservations of Canada Ltd., B.C. Board of Inquiry Decision, July, 1976, unreported.

[38]The Human Rights Commission of British Columbia v. B.C. College of Physicians and Surgeons, B.C. Board of Inquiry Decision, May, 1976, unreported.

[39]Gay Alliance Toward Equality v. Vancouver Sun, B.C. Board of Inquiry Decision, 1975, unreported.

[40]Dhaliwhal v. B.C. Timber Ltd., B.C. Board of Inquiry Decision, 1983. Canadian Human Rights Reporter, vol. 4, p. D/520.

[41]See, A. Fields v. Willie's Rendezvous Restaurant, Canadian Human Rights Reporter, vol. 6, 1985, p. D/2550. An appeal of this Council decision to the B.C. Supreme Court resulted in a re-hearing of the case. The court ruled that the Council had violated principles of natural justice in its original decision. The new hearing resulted in the complaint being substantiated. See, Canadian Human Rights Reporter, vol. 6, 1985, p. D/3074.

[42]Grafe v. Sechelt Buildling Supplies, B.C. Board of Inquiry Decision, May 1979, unreported.

[43]Supra, note. 40.

[44]Ian A. Hunter, "The Origin, Development and Interpretation of Human Rights Legislation" in R. St. J. MacDonald and J.P. Humphrey (eds.), The Practice of Freedom (Toronto: Butterworth and Co. Ltd., 1979), p. 82.

[45]Ian A. Hunter, "Liberty and Equality: A Tale of Two Codes," McGill Law Journal, vol. 29, no. 1, 1983, p. 5. See also I.A. Hunter, "When Human Rights Become Wrongs," University of Western Ontario Law Review, vol. 23, no. 2, 1985, pp. 197-204.

[46]Hunter, "Equality and Liberty: A Tale of Two Codes," p. 6.

[47]Nola Landucci, "What's Wrong With Human Rights in British Columbia," An Address to the Vancouver Board of Trade, March 16, 1981, unpublished, p. 5.

[48]Ibid., p. 12.

[49]David Vickers, "Values Legislation - Who Sets the Policy," Human Rights in B.C. (Vancouver: Continuing Legal Education Society, 1985), p. 4.2.08.

[50]S.B.C. 1984, c. 22 s. 13.

[51]W.W. Black, "Human Rights in British Columbia: Equality Postponed," in William Pentney and Daniel Proulx (eds.), The Canadian Human Rights Yearbook, 1984-85 (Toronto: Carswell Co. Ltd., 1985), p. 225.

[52]S.O. 1981, c. 53 s. 10.

[53]Linda J. Pollitt v. Mappins Inc., B.C. Human Rights Council Decision, Canadian Human Rights Reporter, D/2780.

[54]B.C. Hansard, April 12, 1984, p. 4373.

[55]William Black and Lynn Smith, "Notes on B.C.'s Bill 27 (Human Rights Act)," Canadian Human Rights Reporter, vol. 4, July, 1983, p. c/83-11.

[56]B.C. Hansard, May 4, 1984, p. 4562.

[57]Toward Equality: A Response to the Report of the Parliamentary Committee on Equality Rights (Ottawa, Department of Justice, 1986), p. 13.

[58]B.C. Hansard, April 12, 1984, p. 4373.

[59]Regarding pregnancy see, Re Attorney-General of Canada and Bliss (1977), 77 D.L.R. (3d) 609. Also, M.E. Gold, "Equality Before the Law in Canada," Osgoode Hall Law Journal, vol. 18, 1980. The court ruled in Bliss that discrimination on the basis of pregnancy was not discrimination because of sex. Conflicting judgements have been reached regarding sexual harassment. See, Tellier-Cohen v. Treasury Board (1982), Canadian Human Rights Reporter, p. D/1169, and Breton c. Societe Candienne des Metaux Reynolds Ltee (1981), Canadian Human Rights Reporter, p. D/532.

[60]See, Bill 33, Individual's Rights Protection Amendment Act, 1985. Provided protection for pregnant women in employment situations. See, R.S.A. 1980, c. 1-2, as amended.

[61]S.O. 1981, c. 53 s. 6.

[62]S.B.C. 1984, c. 22 s. 8.

[63]Black, "Human Rights in British Columbia: Equality Postponed," Supra, note 51, p. 224.

CHAPTER FOUR

THE BRITISH COLUMBIA HUMAN RIGHTS COMMISSION

On July 7, 1983, the Honourable Hugh Curtis, Minister of Finance for British Columbia, presented the government's budget for the 1983-84 fiscal year. One brief section of his speech dealt with what was in store for the province's human rights agencies:

> Years of government expansion have led to a proliferation of committees, boards, commissions and other agencies in government. In many instances this has resulted in excessive use and employment of highly paid professional staff to support the regulatory process. As an example, savings are to be realized by initiatives affecting the Employment Standards Board ... the human rights branch and the Human Rights Commission in the Ministry of Labour.[1]

While this brief mention of the Human Rights Branch and Commission belies the harshness of Bill 27, the Human Rights Act subsequently introduced by Labour Minister McClelland, it does identify two central components of the government's restraint programme. First, the government wanted to 'de-regulate' the economy and second, it was resolved to reduce the dependence on professionals in the design and implementation of public policy. Both these objectives are indicative of the ethos of economic liberalism which posits that the state should perform a minimal role in the

marketplace and holds that individuals and not a professional public bureaucracy should have responsibility for rectifying market inequities.

The following will provide a description and analysis of the administrative structures developed in British Columbia to provide human rights protection. The strategy of economic liberalism will be apparent in the discussion of those statutory initiatives taken during the 1950s and 1960s. The reliance on legal proscriptions, individual responsibility, and a neglect of the state's role in ameliorating discriminatory practices, as components of the economic liberal perspective, are readily seen in the fair practices laws and the 1969 Human Rights Act. Those statutes prohibited discriminatory conduct but failed to provide for competent administrative agencies which could effectively work towards the goal of equality of opportunity. The Human Rights Code, enacted in 1973, remedies many of the problems of the previous Act and provides an example of the ethical liberal strategy in protecting human rights. The Code provided for a semi-independent Human Rights Commission which fulfilled the ethical liberal demand for greater accessibility to the legislature and the regulatory process. The complete re-structuring of human rights protection in 1984 with the passage of the Human Rights Act completed the circular development of equality in British Columbia. The

not assume carriage of the complaint, as had the Branch. It was up to the victim of discrimination to pursue the complaint. The public interest component in the settlement of the complaint was thus reduced. In addition, the Council, unlike the Human Rights Commission, was not provided with a mandate to conduct educational programmes or other policies designed to advance the principles of the Act. Nor was it given the powers needed to ameliorate conditions which give rise to discriminatory conduct. It was mandated to simply receive, investigate, and adjudicate complaints.

Discrimination, as viewed by the Social Credit government, was merely an individual conflict which could be remedied without the active involvement of the state. In its view the state had a minimal role in the amelioration of conditions and attitudes which produce inequality. The ethical liberal ideals and strategies, embodied in the Human Rights Code, of a professional, independent and accessible agency mandated to strive toward the creation of a tolerant and egalitarian society were greatly reduced by the new Human Rights Act. To a large extent it privatized the protection of human rights. It removed the notion of collective responsibility for the eradication of discrimination. The liberal dialectic which characterizes political debate in this province can be readily seen in the strategies employed to protect human rights.

As already indicated in Chapter One, the statutory protection of human rights in Canada was first recognized by the Ontario Racial Discrimination Act[3] (1944) and the 1947 Saskatchewan Bill of Rights.[4] These statutes were augmented by fair practices laws in the 1950s which in turn led to the development of federal and provincial human rights codes in the following two decades. According to Ronald Manzer, this movement from relatively narrow and specific proscriptive legislation to the use of comprehensive codes of conduct was indicative of the "greater weight given in Canadian policy-making to ethical liberal ideals."[5] The strategies employed to protect human rights in Canada can be regarded as stretching along a continuum. The first acts adopted were quasi-criminal statutes which prohibited particular discriminatory activities. These were enforced through the judicial system. The later adoption of fair practices acts represented a recognition of the public interest component to the protection of egalitarian human rights. These were administered and enforced through a governmental ministry or department. However, both these strategies reflected the economic liberal ethos in that they merely provided an apparatus whereby those who felt they had been treated unfairly could seek redress. The next stage of development brought human rights codes which prohibited discrimination but also provided for an independent agency which would strive for the elimination of circumstances which gave rise to discriminatory conduct as well as providing sanctions

against those who continued to deny equal treatment. Implicit in human rights codes was the ethical liberal concept of tolerance as the pre-eminent purpose of the legislation. The enhancement of tolerance through education and community involvement in the process of protecting human rights in conjunction with the threat of sanctions marks human rights codes as substantially different from their predecessors.

The first anti-discrimination statutes developed in Ontario and Saskatchewan were quasi-criminal in nature and placed the responsibility for alleviating discriminatory conduct with the individual who had been discriminated against. The only avenue open to the victim of discrimination was to file a complaint and have the courts determine the appropriate remedy. This reliance on the courts and the judiciary was fraught with difficulties. There was a reluctance on the part of the victim of discrimination to initiate criminal action and a corresponding reluctance by the judiciary to regard discriminatory conduct as a criminal act. As well, it was difficult to prove beyond reasonable doubt that the service or accommodation was denied because of prejudice and not for other reasons. Even if it was proven, the imposition of a fine against the individual who had discriminated did little to aid the victim.

elimination of the Human Rights Commission and, thereby, of institutionalized community access to, and participation in, the protection of human rights, announced the re-emergence of the tenets of economic liberalism as the principal guide to B.C.'s human rights policy.

The economic liberals' theme of individual responsibility is of particular relevance to the revision of British Columbia's human rights legislation. The Throne speech delivered by Lieutenant-Governor Robert G. Rogers in February 1984, made clear the Social Credit government's desire to restrict collective action in the amelioration of discrimination:

> British Columbia is entering a new era in human rights, where a greater emphasis will be placed on individual responsibility for eliminating discrimination.[2]

As outlined earlier, to accomplish this goal the Bennett Government introduced legislation which repealed the NDP's Human Rights Code. The Code had provided for a Human Rights Branch within the Ministry of Labour as well as for an autonomous Human Rights Commission. Bill 11, which was proclaimed as the new B.C. Human Rights Act in September 1984, eliminated both these agencies and substituted a cabinet appointed Human Rights Council. The Council was to continue to receive and investigate complaints of discrimination as had the Human Rights Branch. But should a complaint proceed to a board of inquiry, the Council would

To overcome problems like these, Ontario and then all other Canadian jurisdictions implemented fair practices laws modelled on similar legislation developed in the State of New York (1945). In British Columbia the Equal Pay Act (1954), the Fair Employment Practices Act (1956), and the Public Accommodation Practices Act (1961) prohibited discrimination in the wages paid women, along with discrimination in employment and public accommodation because of race, religion, colour, ancestry, place of origin, or nationality. The advantage these statutes provided was that an agency of government was charged with the investigation, conciliation and settlement of complaints. The acceptance of a public interest component to discrimination relieved the victim of complete responsibility in seeking redress.

In British Columbia the administration of the fair practices laws was provided by the Secretary of the Board of Industrial Relations who was empowered to receive and investigate complaints and attempt conciliation. If no agreement could be reached the complaint could be referred to the Board of Industrial Relations which would determine what action should be taken. Enforcement of the order of the board was at the discretion of the Minister of Labour and in addition to any other action could include a fine not exceeding one hundred dollars. During the existence of these Acts 37 complaints were received under the Equal Pay

Act with 27 of these received in 1954, the first year the act was in force. The PAP Act was used only 3 times between 1961 and 1969 and the FEP Act was utilized at least 52 times. Seventeen of the complaints under FEP were made in 1957, the first full year the Act was in force.[6] It is also of note that the Annual Report for the Department of Labour in 1958 appears to recognize the inability of legislative proscriptions to rectify discriminatory treatment. The report states that the "nature of the legislation is such that persuasion and education are more desirable than compulsion."[7] However, the legislation provided no means other than the ability of the investigative officer to accomplish these goals. This statement may also be seen as an admission by the Department that it was futile to try to use the Act to ameliorate conditions giving rise to discriminatory conduct.

The structure provided by fair practices laws was an improvement on the previous statutes. Yet they continued to place the burden of responsibility for protecting human rights or the victim of discrimination. Only once a complaint had been made did the state take an active role. The fair practices legislation provided for sanctions against those who had unjustly discriminated. But very little was done to educate employers and landlords of their responsibility to act in a non-discriminatory manner.

Fair practices legislation reflected the economic liberal belief that government should not interfere in the activities of private individuals except to lend some support to individuals who have been treated unfairly by others. Fair play and an equal opportunity to compete for societal benefits, whether political, social, or economic, was all that the individual could or should expect from a government attuned to the ethos of economic liberalism.

The Ontario Human Rights Code of 1962 marked the first attempt to consolidate fair practices laws into a code of human rights. This Act provided for an appointed Human Rights Commission to administer the Code and for the appointment of quasi-judicial tribunals to adjudicate unsettled complaints. Most importantly, under section 9, the Code required the commission:

> (a) to forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin;
>
> (b) to promote an understanding of, acceptance of and compliance with this Act,
>
> (c) to develop and conduct educational programs designed to eliminate discriminatory practices related to race, creed, colour, nationality, ancestry, or place of origin.[8]

The commission was made up of individuals selected from the community. Commission members were not public servants in the strict sense. The Commission was independent of

government although it reported to the Labour Minister for the province and it was the Minister who appointed human rights tribunals.

According to W.S. Tarnopolsky, there were two reasons for utilizing the model provided by human rights codes instead of handing to a line agency the additional responsibility for human rights protection. First, this new structure "insures community vindication of the person discriminated against," a development that is "important to the community itself because of the broad educational value of equal treatment." Second, the use of an independent commission is important to the victim of discrimination because "without such active community involvement, the mere proclamation of human rights tends to soothe the conscience of the majority without producing tangible changes."[9] By establishing a separate agency whose sole responsibility was the elimination of discriminatory treatment, a broader attack on the conditions which give rise to unequal treatment could be mounted. In addition, the community at large would be involved in both the settlement of complaints and in the development of programmes designed to eliminate intolerance.

In 1969 British Columbia became the seventh province to enact a consolidated human rights act.[10] Labour Minister Leslie Peterson had announced his plans to introduce a Human

Rights act in a November 1968 address to the B.C. Commission for the International Year for Human Rights. Peterson stated that he thought it desirable to consolidate the fair practices laws into a single human rights act. However he stopped short of advocating the model adopted in Ontario and elsewhere. Peterson described the purpose of human rights legislation as the creation of "a climate of understanding, cooperation and respect through which all people can feel equal thereby enabling them to make a rich and full contribution to the development of their own individuality and the economy of the Province."[11] However, despite his concern for individual development and the creation of a climate in which individual dignity and self-respect would flourish, Peterson was unconvinced of the need for an independent agency which would strive to overcome the conditions underlying discriminatory treatment. He maintained that legal compulsion and "conciliation with the least harm being done to all concerned"[12] provided the best means to dissuade individuals from discriminatory conduct. The Minister continued to defend the economic liberal position that unequal treatment was a private and individual matter and that the state should only seek to arbitrate the dispute and not to rectify its causes or consequences.

On December 10, 1968, International Human Rights Day, Peterson announced that the guarantee of free choice in employment and accommodation for all British Columbians was

a necessary step toward the recognition of the rights and obligations as set down in the Universal Declaration of Human Rights. The Throne Speech to open the Legislature in the spring of 1969 committed the Social Credit government to enacting a human rights statute. In February, Peterson placed before the House an "Act for the Promotion and Protection of the Fundamental Rights of the People of British Columbia." This Act, was defended by Peterson as being the most comprehensive legislation of its type in Canada. In truth however, it was little more than a consolidation of the existing fair practices laws.

The Human Rights Act called for the development of a Human Rights Branch headed by a Director, who would be an employee of the Department of Labour. Complaints made under the Act were to be investigated by the Director or an officer appointed by the Director. The Director was given the discretionary power to refuse to investigate a complaint. The Director was instructed by section 18 of the Act to:

> 18. (a) promote the principle that every person is free and equal in dignity and rights without regard to race, religion, sex, colour, nationality, ancestry, or place of origin;
>
> (b) promote an understanding of, acceptance of, and compliance with this Act,
>
> (c) develop and conduct educational programmes designed to eliminate discriminatory practices relating to

> race, religion, sex, colour, nationality, ancestry, or place of origin and
>
> (d) make a report to the minister for the year ended on the previous thirty-first day of December, which shall be included in the annual report of the Department of Labour, outlining activities under this Act during the year.

With the exception of subsection 18(d) these provisions are a near replica of those contained in the 1962 Ontario legislation. The major difference was that in Ontario these duties were assigned to a commission which was to be representative of the community, while in B.C. they were assigned to a civil servant.

During the period this legislation was in effect the primary role of the Director was the investigation of complaints. However, John Sherlock, the first Director of the Human Rights Branch, did succeed in speaking to employers, the media, and community groups about the Act.[13] The recognition of the importance of education as a complementary tactic in eliminating discrimination is indicative of a shift toward the ethical liberal strategy for ensuring equality. However, the lack of community representation and the use of Industrial Relations Officers unskilled in human rights issues to conciliate complaints indicates that the shift was a limited and tentative acceptance of the ethical liberal position.

Complementing this departmental agency was the Human Rights Commission whose task was the adjudication of unsettled complaints referred to it at the discretion of the Director of the Human Rights Branch. The Act provided only that a Human Rights Commission may be established. In fact, the one that was established existed in name only as those who made up the Commission were the same individuals who comprised the Board of Industrial Relations (BIR) and the Labour Relations Board. Those who made up the Human Rights Commission included the Deputy Minister of Labour, both the Assistant Deputy Ministers and five members. These included J.R. Edgett who was appointed chairman of the Human Rights Council in 1984 and E. Ostapchuk who was the Executive Director of the Vancouver Civic Unity Association and Vice-Chairman of the B.C. Commission for the International Year for Human Rights. All members of the Commission were appointed by the Lieutenant-Governor in Council and their remuneration was set by the Lieutenant-Governor in Council.

The Commission members retained the powers of a commissioner under the Public Inquiries Act and the ability to determine its own procedures. Its sole function was to adjudicate complaints referred to it by the Director. It was empowered to dismiss complaints which it regarded as without merit. Where the commission determined that the complaint was substantiated by the evidence presented, it could "make an order directing the person to cease the

contravention." The Commission could also, at its discretion, order the person to rectify the contravention or order "that an employer employ or re-employ a person and pay the person the sum equal to wages lost by reason of the contravention."[14] Any order made by the Commission was not appealable except under the limited provisions of the Public Inquiries Act,[15] and if the Commission filed a copy of its order with the Supreme Court of B.C., the order became enforceable as an order or judgement of that court. The Commission could not, as was the case in Ontario and other provinces, order a person found to have contravened the Act to pay damages to the victim for loss of respect or the humiliation incurred because of the discrimination. The Act also eliminated the monetary sanction found in the fair practices laws.

The 1969 Human Rights Act provided a recognition of the advocacy role to be taken by the state in reducing discriminatory conduct. However, it is apparent from the activities of the Human Rights Branch between 1969 and 1972 that little was done in this regard. The activities undertaken by the Director of the Branch to promote the principles of the Act consisted mainly of meeting with various community groups and the distributing of pamphlets to employers and landlords. The lack of success in this approach was recognized by the Director in his 1971 annual report. In it, he endorsed the view of E.M. Pollock,

General Counsel for the Ontario Human Rights Commission, that

> ... the human rights officer must be an educator, in the sense that even if no culpability can be assigned in the particular case, as the field representative ... he must ensure that in all possible situations the philosophy of human rights and the essential dignity of man as publicized in the general community. In this respect it is my firm conviction that a Human Rights Officer by direct and personal contact can do far more to further these principles than any number of inanimate press releases, advertisements, or other publications, no matter how slick or well designed.[16]

However, the branch had no full-time human rights officers and was required to call on the services of Industrial Relations Officers unskilled in human rights issues.

In an interview with the Vancouver Sun upon his retirement as Director of the Human Rights Branch, Sherlock stated that he would like to see the jurisdiction of the Act expanded to include the public sector as well as cases involving alleged sexual discrimination other than in employment. He also recommended that the Commission be empowered to levy monetary fines rather than simply orders of re-instatement and re-embursement for lost wages.[17] The ex-director's concerns indicate that he regarded the Act as ineffective in both its punitive and proactive components. If his view were shared by his political superiors then it would seem that the Social Credit government between 1969

and 1972 had recognized that legal compulsion was an incomplete approach to eliminating discriminatory treatment. Whether or not this was the case, it failed to provide the means by which the complementary component of public participation and enhanced awareness could be attained. The Act incorporated some of the rhetoric of the ethical liberal, but it ignored the functional necessities required to implement the ethical liberal strategy for protecting human rights.

The election of the NDP in August 1972 and the enactment of the B.C. Human Rights Code in 1973, brought to fruition the principles and strategies of ethical liberalism in the protection of human rights. While the NDP did not make improved human rights protection a specific plank in its election platform, it was longstanding party policy to provide improved protection for individual rights. As well, equality has always held a pre-eminent position in socialist thought; a position that advocates not merely equality of opportunity but equality of result or condition.

The first initiative taken by the NDP government to improve B.C.'s human rights legislation was the appointment of a new Director of the Human Rights Branch. Following the retirement of Sherlock in March, 1973, Kathleen Ruff was appointed. Before taking the job Ruff had distinguished herself as an active advocate for women's rights and human

rights in general. She was to head B.C.'s human rights agency until 1979.

In an interview published in the Daily Colonist, Ruff stated that she did not view her role as that of an impartial arbitrator. It was clear that she saw herself as an advocate of the rights of those who had been denied equality of opportunity. According to Ruff:

> To achieve the objectives of the Human Rights Act, I am willing to do all I possibly can up to and beyond the letter of the law. I think it is not sufficient simply to investigate signed complaints of acts of discrimination. In my view, it is necessary to take the initiative, to encourage affirmative programs, to question practices and attitudes that impede equality of opportunity, to develop close relationships with minority groups in order to better serve their needs, to actively promote compliance with the principles of the Human Rights Act. My role is not to be objective but to be a catalyst - an advocate for minority groups who do not enjoy equal rights in society. My job is not to be objective but to be committed to the people I serve.[18]

Clearly, as a public servant, Ruff saw her main responsibility as being to the people of B.C. rather than to elected representatives or superiors in the bureaucracy.

As the NDP government passed its first anniversary in power it had yet to enact new human rights legislation. A September 1973 workshop sponsored by the BCCLA and attended by 15 organizations resulted in 14 recommendations

concerning the governments proposed changes to the Human Rights Act. In addition to calling for the general strengthening of the legislation and the appointment of a provincial ombudsman, resolutions were passed at this conference requesting a higher priority to be placed on the protection of human rights in B.C. In addition, resolutions called for: increased staffing of the branch; minority group representation on the commission; the development of human rights programmes in the schools and increased funding to publicize the activity of the branch/commission as well as the nature of the problem minority group members face.

In February of 1973, Labour Minister King had instructed the three member commission charged with developing a new provincial labour code to incorporate the development of a human rights code into their study. This commission, made up of Noel Hall, James Matkin and D.E. McTaggart appeared, however, to have had little input into the bill presented the Legislature in November of that year. In conjunction with Professor William Black of the UBC Law School, Matkin assigned a UBC class the task of drafting a human rights code. The draft presented to the Minister was largely a result of this process[19] and the code greatly resembled the proposals made.

Bill 100, the B.C. Human Rights Code was introduced in November 1973. It represented a marked departure from

the previous Human Rights Act. The Code substantially altered not only the proscriptive aspects of the previous Human Rights Act but also the administrative structure. The Code continued the use of the Human Rights Branch as an agency of the Department of Labour. In addition it provided for a Human Rights Commission independent of the Department. Complaints which could not be settled by the Human Rights Branch were to be referred to a board of inquiry at the discretion of the Minister of Labour.

The Director of the Human Rights Branch was to act as Chief Executive Officer for the Human Rights Commission as well as to receive and investigate complaints made under the Code. The Director was obligated to investigate all complaints and had the authority to initiate an investigation on her own without the receipt of a formal complaint. The Director or an officer appointed by her, had the obligation to attempt to settle the complaints through conciliation. If no settlement could be reached, the Director was to report the complaint to the Minister of Labour. Upon receipt of such a report, the Minister could appoint a board of inquiry to determine the outcome of the complaint. Should the Minister determine the complaint to be without merit he could dismiss it.

The Human Rights Commission was independent from the Ministry of Labour although, as Chief Executive Officer of

the Commission, the Director acted as liaison between the Ministry and the Commission. The Commission was made up of individuals appointed by the Lieutenant-Governor in Council to hold office for an unspecified period. One member was appointed chairman of the Commission. The members were paid as determined by the Lieutenant-Governor in Council. The functions of the Commission as provided by section 11(4) of the Code were to:

> (4) (a) promote the principles of this Act;
>
> (b) promote an understanding of any complaints with this Act
>
> (c) develop and conduct educational programs designed to eliminate discriminatory practices; and
>
> (d) encourage and coordinate programs and activities promoting human rights and fundamental freedoms.

The Commission was further empowered to "approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals."[20] It could also approve settlements reached between parties regarding discriminatory conduct when this agreement was reached prior to the hearing of a board of inquiry.

As noted in Chapter Two, the NDP while in opposition was critical of the 1969 Human Rights Act. One concern raised by the NDP was that the Human Rights Branch and Commission were not independent of the government. However,

once in power the NDP maintained the branch model rather than moving toward a more independent status for this agency. It must be stressed, however, that the Human Rights Commission appointed under the Code represented a greater degree of independence than had the previous Commission. There are several explanations offered for the retention of the branch model. Labour Minister King voiced the concern that an independent commission with full investigative and adjudicative powers would violate the conventions of responsible government. A regulatory agency without a direct line of accountability to the legislature was viewed as incompatible with these conventions. A second rationale for maintaining the branch model is that King, and the government in general, placed a high priority on human rights. The previous Human Rights Act had proved ineffective in dealing with many human rights problems and the NDP government desired a 'hands on' approach to rectifying inequality. It therefore desired a means by which it could direct the Human Rights Branch. A third view reflects on the approach taken by the NDP to the use of administrative agencies in general. Paul Tennant has noted that despite the increased use of various non-line administrative agencies by the NDP, many of these agencies remained under the control of the cabinet. This allowed for the control over the appointment of personnel and an implicit control over the activities of the agency. It also reflected a populist element to B.C.'s political culture:

the distrust of a professional and independent public service.

The first Commission appointed by Labour Minister King was, as were subsequent Commissions, a part-time agency. Bishop Remi deRoo was appointed chairman, along with members William Black, Rose Charlie, Gene Errington and Larry Ryan. Unlike the Commission established under the previous Human Rights Act, this Commission represented a cross section of community activists and was made up of people with an in-depth knowledge of human rights legislation. This Commission served until 1978 when a new twelve member commission headed by Margaret Strongitharm was appointed. Membership on the Commission was reduced to six in 1980 and responsibility for the Commissions personnel and budget were assumed by the Director of the Human Rights Branch. In 1981, Charles Paris was appointed chairman of the Commission and Renate Shearer, Bijou Kartha, and Gloria George were appointed to the Commission. This Commission was dismissed by the government in July 1983 with the introduction of the Human Rights Act (Bill 27).

The activities of the Commission between 1973 and 1983 can be seen as indicative of the ethical liberal approach to the protection of human rights in British Columbia. In attempting to promote the principle of tolerance and the equal rights of all British Columbians, the

Commission developed formal and informal links with various community and business organizations. It assisted in the development of equal employment opportunity programmes to be implemented by the Public Service Commission, the Vancouver Resource Board and the City of Vancouver. The Commission aided in the development of materials to be used by the RCMP and B.C. Police College to assist law enforcement agencies in dealing with human rights issues. It sponsored seminars, workshops and public meetings in order to involve community groups in the process of protecting individual rights as well as a means by which the problem faced by minority groups could be brought to the attention of the Commission and thereby the government. The Commission produced a newsletter, pamphlets and other materials and two studies on the portrayal of minority groups in the media and school textbooks. The Commission also acted to aid those who felt they had been treated unfairly either by assisting in the filing of a complaint, presenting evidence before a board of inquiry or, if the complaint was outside the jurisdiction of the Human Rights Code, assist the individual in dealing with the appropriate government agency.

The first Commission conducted its work without its own staff, a situation which left the Commission frustrated at its inability to respond to community needs.[21] This changed in 1978 when the Strongitharm Commission was appointed. The Commission hired a secretary, a Director of

Education and Public Relations, and a research officer. This twelve member Commission also instigated a committee system, namely, Education, Current Issues and Special Projects, Legislative Review, and Administration. These were in existence for only two years as their function was returned to the Commission as a whole following the 1980 reorganization.

The 1980 restructuring merged the staff of the Commission with that of the Human Rights Branch and placed the responsibility for the budget of the Commission with the Director of the Branch. The size of the Commission was also reduced by half. This move to centralize the administration of the Commission followed the re-election of Social Credit in 1979 and the appointment of Nola Landucci as Director of the Human Rights Branch. Rather than an independent, albeit cabinet appointed, Commission free to pursue its mandate, it was subsumed under the auspices of the agency whose primary purpose was the investigation of individual complaints of discrimination. This shift in the status of the Commission was made in order to "increase the impact of human rights programs in British Columbia."[22]

However, the change can also be regarded as a substantive shift in the manner in which the government viewed the protection of human rights. By placing the Commission under the control of the Branch, the human rights

agenda was set by those who complained of discrimination. As Bill Black has pointed out, this has the effect of reducing the protection available to those in the greatest need of it. This is because those who face the most serious denials of equal treatment "are less likely than others to file complaints due to suspicion about government agencies, lack of education and other barriers. Thus there can be a misallocation of resources unless the agency itself seeks to identify areas of inequality ..."[23] This change in administrative structure also reflects the economic liberal view that the role of the state be remedial and not preventive.

Throughout its existence, the Commission took an active role in recommending amendments to the legislation. In 1981[24] and again in 1983[25], the Commission presented to the government recommendations for changes to the Human Rights Code. The recommendations called for broadening the application of the Code as well as altering its administrative structure. These suggestions were arrived at following an extensive review of the Code and the advice of various community, minority, labour and civil rights groups. In 1981, the Commission recommended that:

> 30. A single, integrated Human Rights Commission be established with authority and responsibility to inquire into and investigate complaints under the Code, and to make reviewable decisions, giving reasons, on their appropriate

> disposition. These powers would include power to dismiss a complaint if it is unfounded, power to approve a settlement if an appropriate remedy has been made, and power to refer an unsettled complaint to a Board of Inquiry for a public hearing.

The Commission further recommended that:

> 31. The Human Rights Commission be given power to dismiss complaints that are found to be "trivial, frivolous or vexatious," and power to require consent of the victim to investigate a third-party complaint.[26]

Both of these recommendations are reiterated in the 1983 report submitted to the Social Credit government.

These recommendations would have brought the B.C. Human Rights agency in line with other such agencies in Canada, most notably the Ontario and the federal Human Rights Commissions. Their effect would have been to make the Human Rights Commission independent of the Minister of Labour. It would have been put in a position to control its case load and the settlement of complaints. Under the Code, the Director of the Human Rights Branch had to investigate all complaints regardless of their merit and only the Minister could refer complaints to a tribunal for adjudication. These recommendations, taken in conjunction with the Commission's endorsement of the position adopted by

the Canadian Association of Statutory Human Rights Agencies (CASHRA), would have given the Commission status similar to that of an Ombudsoffice. The resolution adopted by CASHRA, at its 1982 annual meeting stated:

> BE IT RESOLVED that the Canadian Association of Statutory Human Rights Agencies calls upon the Parliament of Canada and the Legislative Assemblies of Provinces to insure the independence of statutory human rights agencies by:
> 1) Separating such agencies from departments of government;
> 2) Appointing commissioners for fixed terms, of not less than three years, during good behaviour, subject to removal only by Parliament or the Legislature;
> 3) Reporting to Parliament and Legislatures through their respective Speakers rather than through a Minister of the government.

These recommendations are consistent with the ethical liberal position of equality of opportunity. By removing the protection of human rights from the control of government, the Commission, as an agency of the parliament, would be made not only representative of the community but also accountable to the community through the elected members of the parliament. A Commission independent of the government, secure in the tenure of its members, and more fully integrated into the constituency it served, would provide for the most effective means of protecting human rights. This ethical liberal strategy places the protection of human rights beyond the direct reach of governments. The Commission would be able to set its own agenda free of government control. Human rights policy would not be simply

government policy but rather a reflection of the needs and values of the whole community.

It is somewhat ironic that the structure and function of the agency provided for by the 1984 Human Rights Act partially incorporated the recommendations made by the previous Human Rights Commission. The new Act eliminated the dual structure of a Human Rights Branch and a Human Rights Commission found in the 1973 Code and established a single Human Rights Council. The Council assumed the responsibilities of the Human Rights Branch but not those of the Commission. The Council consists "of not more than 5 members appointed by the Lieutenant-Governor in Council to hold office during pleasure."[27] One member is to be designated chairman. The Council is not a component of the Ministry of Labour, however, it is housed within the offices of the Ministry and the Minister acts as fiscal agent for the Council. The Council is to receive and investigate complaints, however, it has the discretion to dismiss a complaint prior to investigation, if, in the opinion of the Council the complaint:

> (a) is not within the jurisdiction of the council,
> (b) could be more appropriately dealt with under another Act,
> (c) is trivial, frivolous, vexatious or made in bad faith, or
> (d) is based on facts that occurred more than six months before the complaint ...[28]

A decision by the Council not to investigate a complaint cannot be appealed.

Once a complaint has been accepted and investigated, the council shall,

> (a) order the proceedings be discontinued
> (b) recommend a settlement of the complaint and, where the recommendation is not accepted by the complaint or the person alleged to have contravened this Act, submit a report to the minister,
> (c) submit a report to the minister, or
> (d) designate one member of the council to receive, as specified by him, written or oral submissions from the complaint and the person alleged to have contravened this Act, ...[29]

Should the Council decide to refer the complaint to the Minister, the Minister is to either dismiss the complaint or refer the complaint to a one member board of inquiry appointed by the Minister. Where a complaint is heard by the Council and considered justified by the Council, the Council may order the person who violated the Act to,

> (i) make available to the person discriminated against the right, opportunity or privilege ...
> (ii) compensate the person discriminated against for all, or a part ... of any wages or salary lost, or expenses incurred by the contravention,
>
> and, in addition to or instead of any other order ... may order the person who contravened this Act to pay to the person discriminated against an amount exceeding $2,000.[30]

To an extent these functions are similar to those recommended by the Human Rights Commission in 1983. However, as indicated below, the Act severely hampers the effectiveness and credibility of the council in performing these duties.

The Act makes no reference to the hiring of staff to assist the Council in the investigation of complaints. It has had to rely on IRO's for this function as had been the case under the 1969 Human Rights Act. The Council acts as an impartial arbitrator under the Act. It does not assume the role of advocate for the complainant as had been the case under the Human Rights Code. The Council has no obligation to attempt to settle a complaint. There is no mention of its role as conciliator which had been a component of both the 1969 Act and the 1973 Code. The aspect most damaging to the effectiveness of the Council is its lack of credibility. It is regarded as an arm of the government and under the control of the cabinet and not an agency representative of and responsive to the needs of the community. The Act represents a retreat from the goals and strategies of ethical liberalism in the provision of equality of opportunity. It embraces, as did the 1969 Human Rights Act, the narrow, proscriptive elements illustrative of economic liberalism.

Most importantly, from the perspective adopted here, the Council does not have a mandate to conduct educational programmes or other measures designed to advance the principle that human dignity, self-respect and self-development are possible only with equal treatment. It does not provide for community representation in the process. Nor does it provide a means by which community concerns and problems can be addressed. The Act establishes a mechanism that is suited only for the redress of individual complaints and denies the concept of collective responsibility for the causes and consequences of discriminatory treatment. It embodies a concept of equality of opportunity that does not extend beyond legal proscription as a means to remedy unfair treatment. The individual, as was the case under the fair practices laws of the 1950s, must bear the greatest responsibility in ameliorating discrimination.

The restructuring of British Columbia's human rights agency was, according to Labour Minister McClelland, the result of a year long study of the Human Rights Branch. The conclusion McClelland reached from this study was that

> the system was not working, that justice wasn't being served, that justice delayed was justice denied, and that a totally new system was necessary in order that we could move in a very meaningful way towards the day when we wouldn't have to worry about discrimination in this province.[31]

According to McClelland, the government had become "trapped by the belief that there [was] a bureaucratic solution to the problem of preserving basic human rights."[32] It was the concern of the Minister that the procedure under the Code led to extensive delays in the settlement of complaints and that much time and resources were wasted on trivial and frivolous complaints.

As had been noted above, as early as 1981 the Human Rights Commission had expressed concerns similar to those of the Minister and recommended that the Code be amended to deal with these problems. However, the recommendations of the Commission and those adopted by the Government represented opposing conceptions of the problems and their roots. In the Commission's view the source of these problems lay with the Code itself and not with the agency charged with its administration. The Director of the Human Rights Branch was compelled to investigate all complaints and refer unsettled complaints to the Minister of Labour. In practice, complaints were priorized when received by the Branch but this did not allow the Branch to escape dealing with even the most minor and trivial of complaints. As it was the responsibility of the Minister to appoint boards of inquiry, unsettled complaints had to await a ministerial decision which, in the case of politically sensitive areas, also led to delays in the settlement of the complaint. The Code also provided for an appeal of board of inquiry

decisions to the courts which, of course, had their own appeal procedures. Complaints cited by government members as having taken three to six years to settle were those which had been appealed to the courts and the Human Rights Branch had no control over the judicial agenda.

To remedy these problems, the Human Rights Commission simply recommended that the Branch or a new agency be given the authority to dismiss complaints which were trivial or frivolous. A unified Human Rights Commission, independent of government, would have the authority to dismiss unsettled complaints or refer them to a tribunal which would be independent of the government. At all stages of the process the decisions of the Commission would be open to review.

The 1984 Human Rights Act does not implement these recommendations. The Human Rights Council serves at pleasure and is not therefore independent of the government. The Council can dismiss complaints which it considers "trivial, frivolous, vexatious or made in bad faith," but it can do so without conducting an investigation and its decision is not reviewable. The Council can appoint one of its members to adjudicate an unsettled complaint. There is, however, no clear separation between this function and its investigative role.

The problem with this structure is that it harms the integrity of the Council. According to William Black, the wide discretionary powers given the Council must be balanced by a perception of independence and impartiality. "It is important that the power [to dismiss trivial complaints] be administered by a body that is perceived as fair and impartial ... there is concern that the council does not have the independence necessary to support that perception ..."[33] These features of the legislation would suggest that while the government desired an effective and efficient human rights agency it also wanted control over the types of cases heard and the kind of decisions rendered. If the sole concern of the government was to provide for an efficient and effective human rights agency it must be questioned why the new Act abolished the Human Rights Commission. The Commission had no role in the complaint procedure and acted only as a means whereby the principles of the Code could be advanced and the concerns of the community be passed on to government. As a means of improving the administration of human rights protection in B.C. the new Act creates as many new problems as it solves.

Other reasons presented for the dramatic restructuring of B.C.'s human rights agency also fail to justify fully the government's actions. Bill 27 was introduced as part of the 'restraint package' introduced in July 1983 and thereby could be seen as part of the government's desire to curb

expenditures. However, as Black has pointed out, "the entire human rights budget is a minuscule fraction of the total provincial budget (fifteen thousandths of one per cent), and even a total elimination of the human rights budget ... would have no noticeable effect on the government's monetary position."[34] Figures taken from the Estimates and Public Accounts for the Ministry of Labour also demonstrate that since 1984 no significant savings have been incurred under the new structure.

Another possible explanation is that the government simply over-reacted to two well publicized complaints and received inappropriate and ill-informed advice on how to improve the administration of the Human Rights Branch. This explanation may hold for the introduction of Bill 27 however it fails to explain the government's persistence in introducing Bill 11. Following the introduction to Bill 27, the government received advice from various community groups, the Provincial Council of the B.C. Branch of the Canadian Bar Association, and from a special advisory committee it set up to accommodate the concerns being voiced. Bill 11, introduced following the report of the advisory committee, was very similar to Bill 27. It seems that the government chose to ignore the advice of this committee. Bill 27 might be explained away as an overly hasty and ill-conceived response to technical problems. But, Bill 11, adopted after nearly 4 months of further deliberation, leaves no doubt

that the government had thoroughly thought through its intentions.

The explanations presented above are concerned with the manner in which human rights legislation is administered and enforced and are based upon technical procedural considerations and not on political motivation. It has also been suggested by Black that there was a "conscious decision that a low priority should be assigned to human rights based either on some perceived political advantage or because of a philosophical belief that the right of business to be free from government regulation outweighs the interests served by strong human rights legislation."[35] Following the election of the Social Credit government in May 1983, the caucus met at the Okanagan Lake Resort to prepare for the forthcoming session of the Legislature. Those who met with the caucus included Michael Walker, an economist with the Fraser Institute, a Vancouver based 'think tank'. One of the publications of this group is a book entitled Discrimination, Affirmative Action and Equal Opportunity[36] in which the authors attack the use of human rights legislation as a means of remedying inequality. In general, the Institute adheres to laissez-faire liberal capitalist tenets which posit that the unfettered marketplace is the best means of achieving the efficient and effective allocation of social, economic, and political resources. The similarities between the stance of the Fraser Institute

and the actions of the Social Credit government have a firm base in the ethos of economic liberalism.

The 1984 Human Rights Act is indicative of the economic liberal approach to the protection of human rights. It provides for an administrative agency to arbitrate individual complaints of discrimination. That agency's perspective is to be entirely reactive. The Council has no statutory authority to hire staff and must rely on other Ministry of Labour staff to investigate complaints. It cannot initiate complaints on its own. Nor can it align itself with the victim of discrimination before a hearing or board of inquiry: there is a reduced public interest component to the complaint procedure. The important functions performed by the previous Human Rights Commission are absent from the mandate of the Council. There is neither a cross-section of community representation on the Council nor a mechanism whereby community concerns can be heard. The Council is not compelled by the statute to conduct educational programmes aimed at increasing public awareness of human rights problems or at making businesses more sensitive to the needs of minority groups. The economic liberal position that the state intervene only to arbitrate individual complaints has triumphed over the ethical liberal belief in community participation, education as a means to enhance tolerance, and remedial public policies as a means to ensure equality of opportunity.

The administrative structures developed in British Columbia to protect and enhance the individual right to equality of opportunity are illustrative of the alternating dominance of economic and ethical liberalism. The tenets of the economic liberal ethos guided the policies developed by the governments of W.A.C. Bennett. First the fair practices laws and later the Human Rights Act (1969) prohibited discrimination. However, these statutes did not provide a mechanism whereby the causes and consequences of discrimination could be addressed. True to the economic liberal perspective, the Social Credit government enacted laws to proclaim that the market should treat all fairly but it refused to provide an agency with the authority to monitor business practices. The Acts also failed to provide a significant penalty for those who ignored these proscriptions. Most importantly, the Acts lay the responsibility for rectifying discriminatory conduct with the victim of the discrimination. The state intervened only to the extent that certain practices were declared contrary to public policy and not to prevent their reoccurrence.

The Human Rights Code solved many of the problems inherent in the previous legislation. Incorporating the ethical liberal beliefs of participation and accessibility, the Code provided for community involvement in the protection of human rights. It combined legal proscription with an administrative structure capable of addressing both

the causes and results of unequal treatment. The Human Rights Commission was to be representative of minority groups and a means by which their concerns could be passed on to government. The Commission provided a means by which emerging issues could be addressed as well as providing support for victims of discrimination. The activities of both the Branch and the Commission were proactive and educative. The underlying desire was to advance the cause of those who had been historically denied equality of opportunity and to challenge the beliefs and practices which produced inequality.

The latest development in B.C.'s protection of human rights returns to the era which preceded the Code. The Human Rights Act (1984) eliminated the ethical liberal principles found in the Code. Again the individual who has suffered from discrimination must bear the brunt of responsibility in seeking redress. No longer would minority groups have a readily accessible avenue to the policy-makers and enforcers of the Act. The Act re-asserts the rights of property over the egalitarian rights of the individual. It is indicative of the economic liberal perspective which denies an activist role for the state in the amelioration of unfair and inequitable conduct.

Chapter Four Footnotes

[1]British Columbia, Ministry of Finance, Budget Speech, July 7, 1983.

[2]Speech from the Throne, opening the Provincial Legislature, February, 1984.

[3]S.O. 1944, c. 51.

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

[5]Ronald Manzer, Public Policies and Political Development in Canada (Toronto: University of Toronto Press, 1985), p. 173.

[6]Annual Reports for 1967 and 1968 do not give the specific number of complaints but state: "numerous complaints in connection with employment inquiries were settled through correspondence and consultation." See, B.C. Department of Labour, Annual Report, 1968.

[7]Ibid.

[8]S.O. 1962, c. 93.

[9]W.S. Tarnopolsky, "The Iron Hand in the Velvet Glove," Canadian Bar Review, vol. 46, p. 572.

[10]The six provinces which preceded British Columbia were Ontario, 1962; Nova Scotia, 1963; Alberta, 1966; New Brunswick, 1967; Prince Edward Island, 1968; and Newfoundland, 1969.

[11]L. Peterson, "Human Rights and the Law," an address to the B.C. Commission for the International Year for Human Rights, November 1968, p. 27.

[12]Ibid., p. 30.

[13]See, the report of the Director in Department of Labour Annual Reports, 1969-1972.

[14]Section 14 of the Human Rights Act, 1969.

[15]The avenues for appeal were limited to those of the principles of natural justice ie., a fair and impartial hearing, and questions of jurisdiction.

[16]Annual Report of the Human Rights Branch contained in the Annual Report of the Department of Labour, 1971.

[17]Vancouver Sun, March 12, 1973. "Men get no equal-pay protection."

[18]Victoria Daily Colonist, August 18, 1973. "'Up to and Beyond Letter of the Law'."

[19]Interview with Bill Black, April 1986.

[20]Section 11(5) of the Human Rights Code.

[21]See, Annual Reports of the B.C. Human Rights Commission, 1975-1978.

[22]Annual Report of the B.C. Human Rights Branch, 1980, p. 6.

[23]W.W. Black, "Human Rights in British Columbia: Equality Postponed" in William Pentney and Daniel Proulx (eds.) Canadian Human Rights Yearbook, 1984-85 (Toronto: Carswell Co. Ltd., 1985), p. 226.

[24]See, Recommendations for Changes to the Human Rights Code of British Columbia, Human Rights Commission of British Columbia, June 1981.

[25]See, "What This Country Did To Us, It Did To Itself," a report to the B.C. Human Rights Commission on farmworkers and domestic workers; "I'm Okay; We're Not So Sure About You," a second report concerning the extension of the Human Rights Code; and, "How To Make It Work," the third report of this series which was concerned with strengthening the statutory protection of human rights in B.C.

[26]See, Recommendations for Changes, supra note 26.

[27]Human Rights Act (1984), section 19.

[28]Human Rights Act (1984), section 13.

[29]Ibid., section 14.

[30]Ibid., section 17(2)(b).

[31]Hansard, August 11, 1983, p. 769.

[32]Hansard, April 12, 1984, p. 4373.

[33]Black, p. 231.

[34]Ibid., p. 231.

[35] *Ibid.*, p. 234.

[36] W. Block and M. Walker (eds.), *Discrimination, Affirmative Action and Equal Opportunity* (Vancouver: Fraser Institute, 1981).

CHAPTER FIVE

CONCLUSION

This thesis, in providing an examination of the development of human rights protection in British Columbia, has also sought to expand our understanding of politics in this province. Through an analysis of human rights policy, and the strategies embodied in those policies, the conflictual or divisive nature of B.C.'s political culture is apparent. The policies implemented by Social Credit and NDP governments are illustrative of the dialectical nature of modern liberal theory. Governments in B.C. have, since 1953, enacted legislation to prohibit discriminatory conduct. They have done so however, in dissimilar ways.

The Social Credit governments of W.A.C. Bennett enacted laws which forbade discrimination in employment and accommodation. They did not however, take an active role in the amelioration of conditions and practices which gave rise to unfair treatment. From the perspective of Social Credit, the role of the state was reactive and non-interventionist. Its function was to provide for the administration of justice, not the creation of a just society. This perspective, grounded in the ethos of economic liberalism, is readily apparent in the administrative structures and

proscriptions found in the fair practices laws of the 1950s and the 1969 Human Rights Act.

The ethical liberal approach to human rights policy was demonstrated by the NDP government. The Human Rights Code incorporated the principles of tolerance and accessibility as the main purpose of human rights legislation. An expansive proscription of discrimination in the form of the reasonable cause clause coupled with an activist and representative administrative structure, signalled the emergence of the ethical liberal strategy in the protection of human rights.

Social Credit governments between 1975 and 1983 did not change the Code. However, it is apparent from the actions taken by successive labour ministers that human rights protection was no longer a priority of government. In 1983 this process was made complete. The new Human Rights Act represents a return to the pre-Code era. The ethical liberal principles embodied in the Code were subsumed by the economic liberal tenets of non-interventionism, individualism and legalism. The Social Credit government of Bill Bennett had acted to re-assert the rights of property over the right to equality. Human rights protection in British Columbia had come full circle.

The policies adopted by the Bennett government in 1983 have been linked to the ideology of the 'new right.' Milton Friedman, the economic guru of this ideology, placed Bennett in the same league as Margaret Thatcher and Ronald Reagan.[1] Opponents to Bennett have also made this connection.[2] However, as Donald Blake has pointed out,

> Social Credit and the NDP have carved out sharply contrasting positions regarding the appropriate role for government in economic development, regulation of business and labour, and the degree of state responsibility for the well-being of individuals unable to provide adequately for themselves and their families. These differences were dramatically illustrated during the 1983 election campaign and its aftermath, but they have been present, more or less, since Social Credit and the CCF acquired their stranglehold on the provincial party system in the 1950s.[3]

The contrasting and conflicting positions are illustrated by this study of B.C.'s human rights legislation. The actions taken in 1983 were not an aberration. They were the re-emergence of the principle ideological rift which characterizes B.C. politics.

The point must be made that liberalism has been, and continues to be, the ideological guide to human rights protection in British Columbia. Indeed, as Manzer has shown, it is the dominant ideological framework in Canada. As demonstrated in this thesis, the governments of British Columbia have responded to demands for increased equality in ways reflective of the liberal paradigm. The dialectical

nature of this paradigm produces antagonistic, although not incompatible policy responses. The primary role of B.C.'s human rights agencies from the 1950s to the 1980s has been the settlement of individual complaints of discrimination. This process has not however, reduced the level of inequality. The procedures and programmes adopted can be seen as indicative of the economic and ethical liberal perspectives but they are both overwhelmingly liberal in their ideological base. By providing a means by which equality of opportunity and fair play are maintained, human rights legislation has aided individuals in achieving a degree of justice. However, human rights codes have been unable to provide for the equitable distribution of economic, social, and political benefits. Women, the disabled, visible minorities, and Native peoples continue to disproportionately represent those at the lower end of the socio-economic ladder. This is not to condemn human rights legislation as useless. It is only to recognize that the case-by-case method of handling inequality has not produced a greater degree of social justice. Liberalism, even from the ethical perspective, has demonstrated a halting ability to rectify social and economic inequality.

To overcome this shortcoming, present day human rights activists and theorists are calling for a greater emphasis on group rights - a strategy which collides with the pre-eminent liberal concern for the individual.

Concomitant with this emphasis on group rights and the social context which engenders inequality, is an advocation of equality of result. However, whereas the liberal paradigm readily accepts the demand for fair play, it resists the notion of providing all with a fair share of societal benefits. As Manzer has pointed out,

> liberals give their allegiance to equality of opportunity, which implies the possibility of failure ... economic and ethical liberals will differ vigorously among themselves about how generous public programs to remedy inequalities really should be, but they are agreed on the liberal idea of human rights as equality of opportunity, not equality of conditions, results, or outcomes in life.[4]

The challenge for those who desire greater equality is to recognize the limitations to liberal thinking on human rights and to seriously re-assess the structural and institutionalized constraints which impede the attainment of this goal.

Chapter Five Footnotes

[1]Milton Friedman, The Tyranny of the Status Quo (San Diego: Harcourt Brace Javanovich, 1983).

[2]Philip Resnick, "The Ideology of Neo-Conservatism" in Warren Magnusson, et. al., The New Reality (Vancouver: New Star Books, 1984), pp. 131-143.

[3]Donald Blake, Two Political Worlds (Vancouver: University of British Columbia Press, 1985), p. 170.

[4]Ronald Manzer, Public Policies and Political Development in Canada (Toronto: University of Toronto Press, 1985), p. 175.

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