

**COMMENTS ON THE PROPOSED
MANITOBA CODE OF HUMAN RIGHTS**
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I. Introduction

In May, 1984, the Manitoba Human Rights Commission revealed a "Proposed *Manitoba Code of Human Rights*"¹ which they suggested should replace the current *Human Rights Act*². This proposed *Code* contains many major reforms which I hope will be enacted into law. However, it contains several important proposals with which I respectfully disagree. This commentary³ will deal with four areas which cause particular concern: relationship of the *Code* to other laws; jurisdictional matters, especially the reduced role of the Courts in the scheme of the *Code*; "hate" and related communications; and "harassment".

II. Relationship of the *Code* to other laws

I recognize the need to have some form of "paramountcy" for the *Code* to insure that its purposes are not "accidentally" defeated by operation of technical rules of interpretation. The applicability of such important principles should not depend on whether the *Code* was enacted "before" or "after" another act, or whether such act is "specific" or "general". There is some judicial authority recognizing the superior status of human rights legislation.⁴ An express "paramountcy" provision, however, is advisable to remove all doubt on this important issue.

It may be that certain provisions in the proposed *Code* (s.49,⁵ in combination with s.5;⁶ s.6 subs.(3)⁷ and (4);⁸ and s.7⁹) go beyond mere

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1. hereinafter referred to as "proposed *Code*" or "*Code*".

2. S.M. 1974, c.65 (H175) (hereinafter referred to as "current *Act*" or "*Act*").

3. Limited space available in this issue prevents me from discussing here other important features of the proposed *Code*. For similar reasons, I can only quote the sections that directly pertain to my comments. I regret any unclarity this brevity may cause.

4. See *Insurance Corporation of British Columbia v. Heerspink* (1982), 43 N.R. 168, (S.C.C.) separate concurring opinion of Lamer, J. (concurring in by Estey and McIntyre, J.J.) at pp.178-179; *Newport v. Manitoba*, [1982] 2 W.W.R. 254 (Man. CA); *Craton v. Winnipeg School Division No. 1, et al.*, [1983] 6 WWR87 (Man. CA), leave to appeal to SCC granted (Nov. 24, 1983).

5. Section 49 of the proposed *Code* reads:

Paramountcy of Code

49. (1) Subject to subsection (2), this Code shall be paramount over all other statutes and laws of Manitoba, whether general or specific, and whether enacted before or after the enactment of this Code, and whenever any provision of any other statute or law of Manitoba conflicts with any provision of this Code, this Code shall prevail.

Exception

(2) Subject to subsection (3), the paramount status accorded to this Code by subsection (1) shall not apply to any provision of a statute which that statute declares shall operate notwithstanding this Code.

Duration of Declaration

(3) Every declaration made under the authority of subsection (2) may be repealed at any time, and shall cease to have force and effect upon the elapse of five years from its enactment, but a new declaration of the same force and effect as the original declaration may be enacted at any time.

Amendment

(4) Neither this section nor any provision of it may be repealed or amended, expressly or impliedly, except in the manner and form described in subsection (2), or by a complete repeal of this Code.

6. Section 5 of the proposed *Code* reads:

Right to Equal Treatment

5. Every person has the right to equal treatment in respect of every law, practice, facility, service, activity and undertaking to which this Code applies, without discrimination in any form prohibited by this Part.

7. Section 6(3) of the proposed *Code* reads:

Failure to Make Reasonable Accommodation

(3) It is discrimination to fail to make reasonable accommodation in any law, practice, facility, activity or undertaking to which this Code applies, for the special needs of any individual or group if those special needs are based upon any of the factors listed in subsection (2).

8. Section 6(4) of the proposed *Code* reads:

Unintended Discrimination

(4) Where the effect of a law, practice, facility, activity or undertaking to which this Code applies is to discriminate against any individual, it is discrimination notwithstanding the lack of intention to discriminate on the part of the person or persons responsible for the law, practice, facility, activity or undertaking, provided that such person, or his, her or their servants or agents, are aware, or ought reasonably to be aware, of the discriminatory effect.

9. Section 7 of the proposed *Code* reads:

Discrimination in Laws

7. No statute, regulation, order-in-council, municipal bylaw, or other law within the constitutional authority of the Legislative Assembly shall discriminate against any person or group unless bona fide and reasonable cause exists for the discrimination.

"paramountcy." They seem to elevate this *Code* into an amendment of the Constitution of Manitoba; or at least into a law with "quasi-constitutional" status akin to a *Bill of Rights*. Among the stronger indicia of this purpose are the wording of s. 49(1); the "manner and form" requirements of subsections 49(2), (3) and (4) (compare the *Canadian Charter of Rights and Freedoms*¹⁰ and the *Canadian Bill of Rights*¹¹); and the *test* which s.7 seems to provide by which to measure all other provincial law.¹²

If this is the intention of these provisions, I respectfully suggest that it may well be inappropriate and ought to be reconsidered. If a Provincial Bill of Rights (constitutional or otherwise) is desirable, I suggest that it should include the "fundamental freedoms" and the "legal rights" as well as the "egalitarian rights."¹³ "Constitutionalizing" the latter without the former not only fails to respect the importance of the omitted rights, but it may endanger them. Furthermore, this could be seen as encouraging "over-reaching" by the state for the sake of equality.¹⁴ Additionally, it is questionable whether legislation that imposes duties and liabilities on *private persons* should be elevated into a constitutional or quasi-constitutional status.¹⁵

These provisions, at least as currently worded, create the risk of serious alteration of or interference with the province's entire legal system. The scope of this *Code* is far-reaching indeed. Section 7 seems to be intended as a universal test of Manitoba laws, even beyond the specific provisions found elsewhere in the Code. Furthermore, the term "other law" in s.7 and "other statute or law" in s.49 could well be construed as applying to rules of common law, and even private legislation, as well as public statutes. Not only are "substantive" principles, rules, rights and obligations put at risk of unexpected or undesirable change but the "institutional" and procedural framework are equally vulnerable. As well, liability for violations can be unjustly and unexpectedly expanded; while necessary immunities, privileges or defences can be needlessly destroyed or weakened.

10. Section 33 of the *Charter* reads:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

11. Section 2 of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, reads: "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . ."

12. See Manitoba Law Reform Commission, *Report on the Case for a Provincial Bill of Rights*, Report #25, 1976 for a discussion concerning some of these concepts. Also see W. S. Tarnopolsky, *Discrimination and the Law in Canada* (1982) 476-482; and Ken Norman, "The Charter for the Public Sector and for the Private Sector, Human Rights Codes: A False Dichotomy Leading to the Wrong Result" (1984), 5 C.H.R.R. C/84-5.

13. See for example, Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, cC-12, as amended; *The Saskatchewan Human Rights Code* S.S. 1979, C. S-24.1 as amended. Also see *Alberta Bill of Rights*, R.S.A. 1980, cA-16; and *Individual's Rights Protection Act*, R.S.A. 1980, cI-2.

14. One must not forget the timely warning of Prof. Ian Hunter concerning the arbitrary, authoritarian or even totalitarian consequences that could result from "over-reaching" human rights legislation and its overzealous enforcement. See Ian Hunter, "Liberty and Equality: A Tale of Two Codes" (1983), 29 McGill Law Journal 1.

15. Of course, there is some judicial authority that the *Charter* is directly binding on private persons. See e.g. *R v. Lerke* (1984), 55 AR 216 (Alta. Q.B., Rowbotham J.), which accepts the reasoning of Prof. R. D. Gibson, *The Charter of Rights and the Private Sector* (1982), 12 Man. L. J. 212. However, the view that the *Charter* does not impose duties directly on private individuals also has substantial support. See e.g. *Malaric Hygrade Gold Mines v. R.*, [1984] C.S. 953 (at p.960) and Andrew Petter: *The Charter and Private Action: The Impact of Section 15 on Human Rights Codes*, 5 C.H.R.R. C/84-1.

A few examples which come readily to mind should illustrate the dangers that giving this *Code* such extreme form of precedence over other laws might entail. Would the *Mental Health Act*¹⁶ and related legislation be imperilled?¹⁷ What about "common law" and equitable rules such as infants' reduced contractual capacity, and the "undue influence" concept as applied to the mentally ill and/or aged?¹⁸ Would these provisions interfere with private legislation setting up religious organizations or schools,¹⁹ or common law or other statutory provisions giving such bodies complete freedom of choice concerning their membership, personnel,²⁰ and policies?²¹

The *Code* would likely be construed to apply to all organs and functions of government.²² The wording of the "enforcement" provisions suggests that *all* such cases would be liable to the "board of adjudication" procedures. The extended "paramountcy" provisions might overrule other statutory, regulatory, institutional and common law remedies, leaving the procedures in this *Code* exclusive and unlimited. This could well mean that the injunctive remedy (provided for in the current Act²³), the declaration (held applicable by judicial decision²⁴) and even the "prerogative remedies" would be ousted in *Code of Human Rights* cases, and all levels of public authority would be amenable to boards of adjudication (and the limited judicial review provided by this *Code*). I suggest that the appropriate forum to test (even in first instance) the validity of legislation, an order-in-council, or the legality of government actions, is a superior court. The wording of s.8 could well include the operation of Courts.²⁵ Certainly courts should be bound by the

16. R.S.M. 1970, c. M110.

17. Note that proposed s. 6(2)(n) prohibits discrimination on basis of "physical or mental disability . . ." (emphasis added).

18. Note that proposed s.6(2)(e) prohibits "age" discrimination.

19. Section 8 of the proposed *Code* reads:

Discrimination in Service, Accommodation, etc.

8. (1) No person shall discriminate, within the meaning of section 6, against any person or group with respect to any service, accommodation, facility, goods, right, licence, or privilege, available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

Matters Included

- (2) For the purpose of subsection (1) the expression "service, accommodation, facility, goods, rights, licence, or privilege, available to the public or to a section of the public" includes, without restricting the generality of that expression, or limiting its application to private undertakings, any benefit provided and any practice, activity or undertaking carried out, by Her Majesty in the right of Manitoba, the Government of Manitoba, any municipal corporation or school district in Manitoba, any board or commission created by or subject in this regard to the laws of Manitoba, any school, university or other educational institution, or by the servants or agents of any of them within the course of employment or the scope of authority.

Exception

- (3) Nothing in subsection (1) prevents the denial or refusal of any service, accommodation, facility, goods, right, licence or privilege to a person who has not attained the age of majority if the denial or refusal is required or authorized by any law or regulation in force in Manitoba.

20. Section 9(1) of the proposed *Code* reads:

Discrimination in Employment

9. (1) Subject to section 11, no person shall discriminate, within the meaning of section 6, against any person or group with respect to any aspect of employment or work, actual or potential, full-time or part-time, permanent, seasonal or casual, paid or unpaid, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or work.

21. Proposed s.8 seems to include purely denominational schools, and could conceivably apply to certain other activities or practices of religious institutions. Subsection 9(1) likely applies to employment related decisions of religious bodies, including qualification for and admission to the clergy.

I suggest that religious organizations (at least when performing a purely religious function) should be *completely* exempted from the *Code*. Granted, boards and courts are likely to show sensitivity to the rights and needs of religious authorities. (See for example, *Caldwell v. Stuart*, [1985] 1 W.W.R. 620 (S.C.C.)). However, religious bodies should not have to establish the "bona fide" or "reasonableness" of, or otherwise justify such decisions to any organ of the state.

22. See s.8, *supra* n. 19.

23. *Supra* n.2, s.34. Note that in the proposed *Code*, s.39 only provides for an "interim" or "temporary" injunction in limited circumstances.

24. *McInyre v. The University of Manitoba et al.*, [1981] 1 W.W.R. 696 (Man. C.A.); *Parkinson v. Health Sciences Centre*, [1982] 2 W.W.R. 102 (Man. C.A.). Note that the Supreme Court of Canada in *Seneca College v. Bhaduria*, [1982] 2 S.C.R. 181 denied a direct action in damages for breach of the (former) *Ontario Human Rights Code*, relying in part on the "comprehensiveness" of that Code. In *Parkinson*, the Court distinguished *Seneca College* both on basis of the nature of a declaration; and its relationship to the *injunction*, which is provided by s.34. The proposed *Code's* replacing the Act's injunction with the limited "temporary" injunction in s.39 could have the effect of abolishing *declaratory* relief in *Code* cases as well.

25. Though perhaps s.96 of the *Constitution Act* of 1867 would prevent its application above the Provincial Court level, and s.91(27) of that Act would prevent its application in criminal cases even in the Provincial Court?

principles in this *Code*. But it seems that the appropriate forum to “try” the alleged impropriety of judicial actions are superior courts (or in some cases bodies such as the Judicial Council), but not a quasi-judicial “administrative tribunal” such as a “Board of Adjudication.”

Some of these problems arise from specific provisions, as well as the general “scheme” of the *Code*. However, absent such extreme “paramountcy” provisions, it might be possible to read the *Code*, as well as other legislation, to retain these other procedures (in addition to, or where appropriate, in lieu of the Boards of Adjudication). However, s.49, as worded, might render such application of the law impossible or doubtful.

Additionally, particular provisions coupled with Sections 7 and 49 may alter the rules of evidence further than intended. For example, would some of the common law and/or statutory rules re “privileged communication” be overridden?²⁶

Furthermore, the wording of some of the particular provisions, coupled with sections 7 and 49, could well unduly create or extend liability for violations, and remove necessary statutory or common law defences, privileges, or immunities. For example, would the wording of s.6(5)²⁷ and s.8(2)²⁸ render officials and employees liable to damages (or even prosecution) in their individual capacities? Would this liability extend to cases where statutory and/or common law provides absolute or qualified legislative, judicial or other “official” immunity or privilege? Would sections 7 and 49 have the effect of overriding of such immunities?

Of course, some protection against unintentional or undesirable alterations of the legal system could be provided by the “unless bona fide and reasonable cause exists” exception in s.7. However, perhaps such a formula is more suited as a test for a particular instance or practice of discrimination than as a test for *laws*. Section 15²⁹ and s.1³⁰ of the *Charter* will require the Courts to develop tests for legislation at any rate. But requiring the Courts to test all legislation according to the *Code* as well could cause needless confusion and uncertainty.

Perhaps consideration should be given to removing or modifying s.7. As well, perhaps s.49 should be amended to provide for some form of

26. Proposed s.31(c) provides that a board “may receive at its public hearing such evidence or other information as it considers relevant and appropriate, whether or not such evidence is given under oath or affirmation, and whether or not it would be admissible in a court of law” (emphasis added). Ordinarily, such a provision would not likely be interpreted as including *privileged* material, absent clear legislative indication that it should. However, s.49 might allow the admission of even privileged material into evidence.
27. Section 6(5) of the proposed *Code* reads:
Indirect and Concerted Discrimination
(5) A person is responsible for discrimination whether the discriminatory act or omission is committed by that person directly or indirectly, alone or with another, in person or by servant or agent acting within the course of employment or the scope of authority.
28. *Supra* n.19.
29. Section 15 of the *Charter* reads:
Equality Rights
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.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national, or ethnic origin, colour, religion, sex, age or mental or physical disability.
30. Section 1 at the *Charter* reads:
Guarantee of Rights and Freedoms
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

“paramountcy” or precedence over ordinary legislation while removing some of the dangers of an extreme application of that concept.³¹ Though I accept the need for some form of “primacy” for the *Code*, I respectfully suggest that this entire area be reviewed in light of the problems discussed.

III. Jurisdictional matters

I respectfully suggest that the Courts ought to be given a greater role in the scheme of the *Code*.³² Access to the Queen’s Bench under the current *Act* (and in light of judicial decisions) is inadequate.³³ The reduced access to the Courts which the *Code* seems to provide may well be dangerous.

There are circumstances where a person ought to be able to go directly to the Court of Queen’s Bench to seek any remedy³⁴ for a violation of the *Code*. Such circumstances³⁵ could include:

- (a) where the facts could give rise to other causes of action independent of the *Code* as well as *Code* violations (for example, common law “wrongful dismissal” actions, excess or abuse of jurisdiction by a statutory body, action under another statute);³⁶
- (b) where the government or a public statutory body is involved, or a remedy sought would include or resemble remedies traditionally sought from a superior court (for example, declaratory or injunctive relief, prerogative remedies);
- (c) where constitutional issues may also be involved.

Similarly, there may be cases where the Commission should be empowered to go directly to Court (to seek *all* judicial remedies) rather than having to request the appointment of the Board of Adjudication. Additionally, s.23³⁷ ought to give a complainant whose complaint is dismissed by the Commission the option of direct Court action in like cases.

31. Perhaps in lieu of the proposed s.49, wording along these lines could be considered:
 49 (1) Subject to subsection (2), this Code shall be paramount over all other statutes and laws of Manitoba, whether general or specific, and whether enacted before or after the enactment of this Code;
 (2) When any provision of any other statute or law of Manitoba conflicts with any provision of this Code, this Code shall prevail unless a contrary intention appears expressly or by necessary implication.
 Note that s.46(2) of *Human Rights Code*, Stats. Ont. 1981, c.53 provides:
 Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act.
 Subsection 46(3) continues: “(3) Subsection (2) does not apply to an Act or regulation heretofore enacted or made until two years after this Act comes into force.”
 A formula based on the Ontario provisions could have several advantages over proposed s.49. Though it would ensure the Code’s primacy as to *substantive rights and obligations*, it would likely not seriously alter the “institutional” and “procedural” aspects of the law which I referred to. Furthermore, its two-years delay would reduce the risk of inadvertently repealing a necessary legal provision.

32. However, I suggest that serious consideration be given to removing (or at least limiting) the *prosecution* made available by proposed s.38.

33. Quære whether giving such wide ranging power to a provincially appointed board of adjudication is consistent with s.96 of the *Constitution Act*, 1867. (Though the Saskatchewan Court of Appeal *upheld* the “board of inquiry” system provided by the *Saskatchewan Code of Human Rights* (*supra* n.13) in *Scowby v. Chairman of Board of Inquiries*, [1983] 4 W.W.R. 97, leave to appeal that decision to the Supreme Court of Canada has been granted (Supreme Ct. of Can. (1983) Bulletin of Proceedings, p. 629, June 20, 1983). Any s.96 problems inherent in the current *Act* could be increased by the expanded scope of the proposed *Code*, and the limited judicial review which it would provide. (Note that proposed s.37 provides a Queen’s Bench Judge “replacement” jurisdiction should the board of adjudication system be held unconstitutional.) I must emphasize, however, that I do *not* base my suggestions for greater Court involvement primarily on s.96 issues.

34. Including damages where appropriate.
 See *Seneca College v. Bhaduria*, *supra* n.24 and *Tenning v. Government of Manitoba*, 25 Man R (2d) 179 (Man. C.A., 1983) which held that a direct “civil action” in damages for violation of human rights legislation is not available.

35. In such cases, it may be appropriate to require that notice be given to the Commission and that it be allowed to intervene on *Code* or constitutional issues.

36. This could prevent the need for multiple proceedings.

37. Proposed s.23 gives a complainant the right to request appointment of a Board of Adjudication where the Commission dismisses his complaint and in related circumstances.

The Commission should also be empowered to seek a declaratory judgment, independently and irrespective of the existence of a complaint or alleged violation. There may be provincial or subordinate legislation or regulations that conflict with *Code*, or are unconstitutional as violating the *Canadian Charter of Rights and Freedoms* or other provisions in the *Constitution Acts*.³⁸ Similarly, federal legislation purporting to allow or require actions contravening the *Code* may exist and might well be unconstitutional as *ultra vires* the federal Parliament, conflicting with the *Charter*, or "inoperative" in light of *Canadian Bill of Rights*. There may be circumstances where it would be more fair and expedient to have such issues determined in a declaratory action, rather than await a complaint and require a respondent who did not know what law to follow to defend his actions on the basis of conflicting legislation.

I respectfully suggest that limiting judicial review of a board of adjudication's decision in the manner provided by proposed sections 35 and 36 is inappropriate,³⁹ and that an appeal to the Court "on questions of law or fact or both" as provided by sections 30 and 31 of the current *Act*⁴⁰ be retained. Even the review of law in proposed s.36(1)(b) may prove inadequate, if it is given an unduly "narrow" interpretation.⁴¹

As well, an appeal or review is needed on questions of fact (or "mixed fact and law"). It seems that some of the most important questions in human rights adjudications are questions of fact. "Reasonableness" or "reasonable cause" are considered questions of fact⁴² (or "mixed fact and law").⁴³ Not only are there important complicated factual questions in a particular case which could be largely determinative, but the case could have profound impact beyond its effect on the parties. Strictly speaking, a factual finding of "reasonableness" or "bona fides" concerning an exception or occupational requirement would probably not operate as *res judicata* beyond the parties to the case. However, such findings (especially after a thoroughly litigated case) could often serve as norms (or at least guidelines) in similar situations, and perhaps affect major practices in industry, public facilities or society generally. Furthermore, they can have a substantial "educational" or "value promoting" impact.

38. Proposed s.44 imposes a duty on the Commission to "maintain a continuing scrutiny" of Manitoba legislation from this perspective.

39. Sections 35, 36 of the proposed *Code* read:

Finality of Adjudication

35. Subject to Section 36, every decision of a board of adjudication is final and binding on the parties to the adjudication.

Limited Judicial Review

36. (1) Decisions and orders of a board of adjudication may be reviewed by the Court of Queen's Bench, and set aside or varied where appropriate, if and only if the decision was:

- (a) in excess of jurisdiction;
- (b) an error of law on the face of the record; or
- (c) in breach of fundamental principles of justice.

40. *Supra* n.2. Subsection 30(1) of the current *Act* reads: "Any party to a hearing before a board of adjudication may appeal from a decision or order of the board, within 30 days from the making of the decision or order, to the Court of Queen's Bench."

Section 31 of the current *Act* reads:

Powers of court.

31. An appeal under section 30 may be made on questions of law or fact, or both, and the court after hearing the appeal may,

- (a) affirm or reverse the decision or order of the board of adjudication; or
- (b) direct the board to make any other decision or order that the board is authorized to make under the *Act*; or
- (c) substitute its decision or order for that of the board".

See *Ostborne v. Inco Limited*, Man. C.A., unreported, Dec. 11, 1984. Matas J.A. discusses the nature of this appeal (at pp. 12-14).

41. See R.Reid, H. David, *Administrative Law and Practice* (2d ed. 1978) 387-399.

42. *Insurance Corporation of B.C. v. Heerspink*, *supra* n.4, Ritchie J. at 175.

43. *Gay Alliance Towards Equality v. Vancouver Sun*, (1979), 27 N.R. 117 at 132 (S.C.C.) (*per* Laskin, C.J.C., dissenting).

It must be remembered that questions of "unreasonableness" or related matters, though they largely rely on technical evidence and conflicting testimony, are often value judgments. This is especially the case in "human rights" matters. Such "value judgments" ought not be definitively settled at a single hearing.

There are some circumstances where a final factual determination by a board of adjudication would be especially dangerous. For example, s. 15, concerning "hate" -related communication, refers to "unreasonable risk" of hatred or violence and "unreasonable affront to human dignity" and measures these by a "reasonable person" test.⁴⁴ Although the "reasonable person" test is supposedly an "objective" test, in reality many "reasonable" people differ quite profoundly on a given question. Experienced and dedicated human rights experts will disagree on whether a given communication is "intolerable" or is within the accepted range of "robust, albeit extreme" criticism. And their views may well differ from the views of the "average" citizen (which are likely to be diverse). As well, many adjudicators, though knowledgeable and concerned with all aspects of "human rights" and "civil liberties," might have an overriding concern with the "egalitarian rights." The right to have their judgment on the "reasonableness" of a communication reviewed from a more "balanced" perspective could be especially important.

It is to be noted that s.15(3) provides "truth" as a defence to "unreasonable affront to dignity." Leaving this factual issue⁴⁵ for final determination by a board of adjudication is dangerous on "two fronts." From a "free expression" and defence perspective, it unduly limits the opportunity to justify oneself, and could increase any "chilling" effect. From an offended group's perspective, it could leave them effectively "stuck" with a finding that a particular "slur" is true. This in itself could be a great setback in their struggle for equality.

However, I do not rest my opposition to the narrowness of the s.36 review primarily on s.15. Even if s.15 were to be removed, I suggest that a full appeal on the facts as well as law is necessary.

I realize there is a tendency to seek to limit judicial review from highly technical or specialized "administrative tribunals", in part, at least, in deference to the technical qualifications of tribunal members. However, although "human rights" could be deemed a specialized field of law where a group of expert adjudicators are of tremendous service, it certainly cannot be deemed a "narrow" field. The legal and factual issues involved, though difficult and important, are probably not any more "technical" than many issues in other types of cases involving expert witnesses in specialized fields. The superior courts have developed an ability to master such cases. Indeed, human rights legislation (especially the expanded scope of this *Code*) involves a major part of our entire legal system, and the "fundamental" nature of this legislation militates against restricting the role of the superior courts.

44. Section 15 itself poses serious freedom of expression problems, which are discussed *infra* n. 50.

45. It is questionable whether the "truth" or "falsity" of most communication of this kind are amenable to a judicial or quasi-judicial determination in any event.

If there is a fear that Courts are too “conservative” for a major role in human rights litigation, I suggest that this is *not* a valid reason for limiting judicial review of or appeal from board of adjudication decisions. We trust our courts not only with our most important legal problems in most other fields, but with the proclamation of the *Charter of Rights and Freedoms*, they are also given substantially increased powers in “civil liberties” and “human rights” matters. Perhaps dealing with *Charter* issues will broaden the “perspective” of judges which could be helpful in *Human Rights Code* decisions (and vice versa) if indeed their perspective is as narrow as some commentators feel. I must note, however, that I am not convinced that the allegations of undue “conservatism” levelled at Canadian courts have been borne out by their decisions under various human rights legislation or the *Charter*. Though some decisions have disturbed many members of the “human rights community”, others have been quite well received. On the whole, it might be fairer to say that our courts generally maintain a reasonable, balanced approach.

If courts can be criticized as unduly “conservative” in these matters, can the argument not be made that boards of adjudication would be unduly “activist” in these areas? Undoubtedly they have, and will likely continue to be, composed of people of the highest qualifications and integrity. Though these boards would be impartial between the parties, the danger that ideological bias towards “egalitarian” values or “social reform” might exist in certain adjudicators could be just as great as the danger that ideological bias towards more “traditional” values might exist in certain judges. Perhaps full appeal to the courts will allow such “ideological biases” to be balanced out. Indeed the attempt to promote the “egalitarian” rights and values promoted in the *Code* can produce a certain amount of overzealousness which could imperil other rights and values which exist in our legal and social systems. Perhaps the great experience of the Courts concerning these other vital rights and values could reduce this peril, and lead to more balanced and equitable results.

One must not forget the certain amount of “deference” appellate courts sometimes show to findings of fact, and the “restraint” courts sometimes show in reviewing findings or policy of “specialized” administrative tribunals. Perhaps these factors might temper any tendency towards undue “conservatism” that may exist in judges in human rights matters. The courts’ respect for board of adjudication decisions would likely be enhanced by the well reasoned decisions we have every reason to expect to be written by the adjudicators.

I respectfully suggest that “judicial review” not be limited as proposed in s.36, but that the appeal provided for in the current *Act* be retained.⁴⁶

Perhaps this *Code* ought to provide for cases where there is an overlap between Human Rights issues and other matters (for example collective

46. The need to reduce expense and delay is often cited as a reason for limiting judicial review. Perhaps in relatively minor or uncomplicated cases where the Court of Queen's Bench *upholds* the board's decision, further appeal to the Court of Appeal (at least on questions of fact) should be impossible without leave. In especially important or difficult cases, it might be advisable to provide an appeal from the board's decision *directly* to the Court of Appeal. However, the right to at least one appeal on all the issues should not be abolished.

agreement, individual contract, common law, other statute). Possibly there should be provisions by which all such issues are tried in one hearing before a single forum (subject, of course, to full appeal), rather than a multiplicity of proceedings. All possible uncertainty over whether collective agreement arbitration⁴⁷ or proceedings under another statute⁴⁸ would render the complaint *res judicata*, thus depriving the Commission or board of adjudication of jurisdiction ought to be eliminated. It ought to be clear to all concerned what procedure is necessary in the event of overlap so as to preclude the danger of the person being deprived of a remedy for choosing the wrong forum.

IV. "Hate" and related communications

Though I have dealt with the general topic at length in an earlier article,⁴⁹ further discussion of the issue is needed to respond to the proposed section 15.⁵⁰

Although the proposed new wording may seem to expand the scope of the proscription in some respects, it actually also reflects a concern with free expression protection, in that the new terminology is probably intended to narrow the type of material brought within its provisions. The existing legislation⁵¹ (and decisions concerning related provisions in other jurisdic-

47. See *Manitoba Food and Commercial Workers Ltd. v. Canada Safeway Ltd.*, (1983), 4 C.H.R.R. D/1495 at D/1496-D/1497 (Man. Board of Adjudication, Chairperson F.M. Steel). Note that the above decision was reversed on other grounds in *Canada Safeway Ltd. v. Manitoba Food and Commercial Worker's Union*, (1984), 5 C.H.R.R. D/2133 (Q.B.); aff'd (sub nom. *Canada Safeway Limited v. Steel*) 29 Man. R. (2d) 154 (C.A.) application for leave to appeal dismissed (S.C.C., Feb. 11, 1985); (Bulletin of Proceedings, Feb. 15, 1985 at 163).

48. See *Re Bouten*, (1982), 37A.R. 323 (Alta. Q.B.).

49. Edward H. Lipssett, "Freedom of Expression and Human Rights Legislation: A Critical Analysis of s.2 of *The Manitoba Human Rights Act*" (1983), 12 Man. L.J. 285.

50. Section 15 of the proposed Code reads:

Offensive Signs and Statements Prohibited

15. (1) No person shall publish, display, transmit, broadcast, or otherwise communicate, or cause or abet the publication, display, transmission, broadcast, or communication, of any notice, sign, symbol, statement, application form, or other representation, which:

- (a) discriminates, advocates discrimination, or indicates intention to discriminate, against any person or group contrary to this Code;
- (b) creates an unreasonable risk that a person or group will be exposed to violence or hatred on the basis of any factor listed in section 6(2); or
- (c) constitutes an unreasonable affront to the human dignity of any person or group on the basis of any factor listed in section 6(2).

Definitions

(2) For the purposes of this section:

- (a) "unreasonable risk" means a risk that a reasonable person, taking account of both the likelihood of occurrence and the probable severity of consequence, would not inflict on another person in the circumstances; and
- (b) "unreasonable affront" means an affront that a reasonable person would regard as intolerable in the circumstances.

Truth a Defence

(3) It is a defence to a complaint or prosecution for contravention of subsection 1(c) that the meaning conveyed by the notice, sign, symbol, statement, application form, or other representation, is true, but the onus of proving the truth lies on the respondent or accused.

51. Section 2 of the current Act reads:

Discrimination prohibited in notices, signs, etc.

2 (1) No person shall
 (a) publish, display, transmit or broadcast, or cause to be published, displayed, transmitted or broadcast; or
 (b) permit to be published, displayed, broadcast or transmitted to the public, on lands or premises, in a newspaper, through television or radio or telephone, or by means of any other medium which he owns or controls;
 any notice, sign symbol, emblem or other representation

(c) indicating discrimination or intention to discriminate against a person; or
 (d) exposing or tending to expose a person to hatred;

because of the race, nationality, religion, colour, sex, marital status, physical or mental handicap, age, source of income, family status, ethnic or national origin of that person.

Am. S.M. 1976, c. 48, s. 2; Am. S.M. 1977, c. 46, s. 2; S.M. 1982, c. 23, s. 5.

Exception as to matters of opinion.

2 (2) Nothing in subsection (1) shall be deemed to interfere with the free expression of opinion upon any subject.

Exception.

2 (3) Subsection (1) does not apply to the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one sex.

S.M. 1974, c. 65, s. 2; Am. S.M. 1976, c. 48, s.2; Am. S.M. 1977, c. 46, s. 2; S.M. 1982, c. 23, s. 5.

tions) seems capable of creating a wide-ranging and "overbroad" censorial instrument. The proposed wording seems intended to make it clear that the most dangerous or repulsive type of materials can and will be proscribed, but that anything short of that will be outside of its reach. Yet even the proposed new wording still poses substantial danger to freedom of expression, both from the intended banning of the "targetted" material and the remaining uncertainty over how wide the ban would extend. I will elaborate in more detail below.

Aside from the actual wording of s.15 itself, three important provisions elsewhere in the proposed *Code* make this section far more dangerous than the existing *Act*. Section 38(1)(e), the "prosecution" section of the proposed *Code* provides for imprisonment as well as a \$2,000 fine for an individual. Imprisonment is a particularly unjust and inappropriate sanction for expressive matters, and could well exacerbate any "chilling effect" that such proscription could have on *any* expression relating to such issues. I suggest that if s.15 (and/or s.38) be retained, the "prosecution" option (especially the possibility of imprisonment) *not* be retained for s.15 violations. Indeed, it could be argued that if a proscription such as s.15 or anything similar on expression is needed, the *only* sanction that ought to be available in such cases should be declaratory and injunctive, or a cease and desist order. Though even an injunction or "cease and desist" order is censorship, at least the absence of imprisonment, fine or damages could reduce the "chilling effect".

Furthermore, as I elaborated earlier, the reduced judicial review provided for in s.36 is especially inappropriate for s.15; and if s.15 is kept and the "board of adjudication" system is to apply to it, an appeal to the Courts on all issues, including fact, must be provided for.

Another increased source of danger from such provision is that it refers to all factors referred to in the proposed s.6(2);⁵² and the factors here are substantially expanded over the current *Act*. (Would s.15 ban a particularly vicious tirade against a political party or movement; a "fire and brimstone" sermon a clergyman may deliver concerning the Biblical condemnation of homosexual activity; or a harsh reference to convicts released on mandatory supervision or parole?)⁵³

52. Section 6(2) of the Proposed *Code* reads:

Examples

- (2) Discrimination includes, without restricting the generality of subsection (1), differential treatment based on any of the following factors:
- (a) ancestry, including colour and alleged race;
 - (b) nationality or national origin;
 - (c) ethnic or linguistic background or origin;
 - (d) religion or creed, or religious belief, religious association or religious activity;
 - (e) age;
 - (f) gender or sex;
 - (g) pregnancy or related circumstances;
 - (h) sexual orientation or sexual preference;
 - (i) marital or family status;
 - (j) social status;
 - (k) source of income;
 - (l) criminal record or criminal charges;
 - (m) political belief, political association or political activity;
 - (n) physical or mental disability, or related circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

53. Perhaps if such a proscription on communication is necessary, it should not cover *all* prohibited grounds of discrimination but only those analogous to the "identifiable groups" within the meaning of the *Criminal Code* "hate propaganda" provisions. Sub-section 281.1(4) of the *Criminal Code* includes "... colour, race, religion or ethnic origin."

Though perhaps a clarification⁵⁴ rather than expansion was intended, the addition of the terms "otherwise communicate" and "statement" to s.15(1) could considerably expand the range of circumstances included, and might even increase uncertainty. Does "otherwise communicate" include oral statements (other than those broadcast) etc.? Does it include private conversation? Note that even s.281.2(2) of the *Criminal Code* expressly excludes "private conversation". Though it was probably intended that the definitions provided would prevent inappropriate application of this section, one need not be gifted with an unusually creative imagination or burdened with a particularly paranoid outlook to see the potential for abuse in such wide wording.

Removing the expression "permit to be published . . ." and replacing it with "abet" is definitely an improvement. It certainly reduces the risk to innocent owners and reduces the incentive for "censorial" activities by such persons.^{54a} "Abet" seems to be a reasonably clearly defined legal concept. However, even this word could leave some needless uncertainty or cause difficulties. Perhaps reference to the person who actually "publishes . . ." or "causes" such publication . . . is adequate?

Paragraph 15(1)(a) is a substantial improvement over the wording of s.2(1)(c) of the current *Act*. It seems intended to limit the wide meaning that decisions⁵⁵ from other provinces have given the concept "indicating discrimination", and to make it clear that it only refers to communications that are part of, facilitate, or advocate unlawful *actions* otherwise proscribed by the *Code*. However, I respectfully suggest that some further amendments even here are needed to reduce possible overbreadth or uncertainty.

I suggest that it might be better to ban "intentional incitement" of discrimination rather than mere "advocacy"; or at least to define "advocate" within the limits adopted by the United States Supreme Court. *Brandenburg v. Ohio*⁵⁶ held that only "advocacy of the use of force or law violation . . . directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" (emphasis added) can constitutionally be proscribed.

I further suggest that the words "contrary to the *Code*" be replaced by "contrary to sections 8,⁵⁷ 9,⁵⁸ 10,⁵⁹ 12,⁶⁰ or 13⁶¹ of this *Code*" to ensure that it cannot be applied to inciting, advocating or discussing laws or government policy that may violate some of the more far-reaching provisions of the *Code*.⁶² Even with these limitations, it must be clear a prohibition against

54. For example, does "any notice, sign, symbol, emblem or other representation" include newspaper articles or editorials? Although *Linklater v. The Winnipeg Sun*, (1984), 5 C.H.R.R. D/2098 (Man. Board of Adjudication, Chairperson J.M. Chapman) decided in the affirmative, the opposite conclusion was reached by Morse J. in *Warren v. Chapman*, (1984), 5 C.H.R.R. D/2226 (Q.B.); aff'd. Man. C.A., February 18, 1985, unreported.

54a. See *Lipsett*, *supra* n.49, at 328-329.

55. *Singer v. Iwasyk*, Sask. Human Rights Commission, unreported, Nov. 5, 1976. See *supra* n.49, at 286-287 for a summary. See also, *Rasheed v. Bramhill*, (1980), 2 C.H.R.R. D/249 (Nova Scotia Board of Inquiry, Chairperson W.H. Charles).

56. (1969), 89 S. Ct. 1827 at p.1829.

57. *Supra*, n.19.

58. *Supra*, n.20.

59. Proposed s.10 concerns "discrimination in contracts".

60. Proposed s.12 concerns "discrimination in the rental of premises".

61. Proposed s.13 concerns "discrimination in the purchase of real property".

62. See for example, proposed s.5, *supra* n.6, and proposed s.7, *supra* n.9.

advocacy, or even "incitement", must only apply to inciting direct unlawful action by private bodies, and not advocating that the government or a public body adopt a policy or practise which might violate the *Code*.

I respectfully suggest that the proposed s.15(1)(a) (with the suggested amendments) is as far as this section should go; and that the remaining provisions, even though probably an improvement over the wording of s.2 of the current *Act* still unduly imperil freedom of expression.

Paragraph 15(1)(b), in conjunction with s.15(2)(a), seem designed to reduce the wide censorial range inherent in the current wording of s.2, and some of the uncertainty inherent in such terminology; but also designed to make it clear that the "hard core hate materials" can and will be banned. Indeed the terminology brings to mind material that (if any literature could legitimately be banned on the basis of its ideas) would certainly be in that category; and suggests purposes that undoubtedly would justify censorship of ideas if any purposes could justify such censorship. However, I suggest that some of the targeted materials, dangerous as they may be, and some of the purposes, laudable as they are, do not justify this extreme measure. Additionally, the problems of "overbreadth", "uncertainty" and "chilling effect" remain with the new terminology, though possibly to a reduced extent.

I suggest that hatred *per se* is not a sufficient risk to warrant banning material. As Mr. David Matas⁶³ rightly points out, hatred is a "passion" rather than an "opinion." But I respectfully suggest it is not a proper function of a "free and democratic" state to attempt to control its citizens' "passions," emotions or attitudes any more than it ought to attempt to control their ideas. It is still a form of "mind" control. Coercion should be reserved for harmful *action*. Furthermore, although "hate" is an emotion, it is particular ideas or beliefs (erroneous and dangerous though they are) that often lead to hate and it is these ideas that such laws seek to suppress.

Had the proposed s.15(1)(b) used the expression "violence *and* hatred" or "*hatred likely to lead to imminent violence*," it would have been substantially closer to reflecting a legitimate purpose for proscribing expression and encompassing only material appropriate for such ban. Even such wording, however, would not be without its problems.

One must consider the various risks that the drafters of this proposed section may have had in mind. The risk of poisoning the political and ideological thoughts of the voters causing them to elect a government that would violate human rights or persecute minorities, frightful as it is, is not the kind of risk for which censorship is an appropriate weapon. The essence of democracy is that the voters be free to evaluate and choose from the ideas and candidates seeking acceptance. That they may err, even tragically, is one of the risks inherent in the system.

Furthermore, it is not at all certain that banning extremist materials (even of a virulent and racist nature) will reduce the risk of electing a racist

63. David Matas, Chairman, League for Human Rights — Mid-West Region, *Brief Submitted to the Manitoba Human Rights Commission*, January 1983. This brief makes an eloquent argument for the retention and strengthening of a ban on "hate" material in *The Human Rights Act*.

or extremist government. It may, in fact, *increase* the risk. "Extremist" hatemongers, such as the Ku Klux Klan and the Nazis and their messages are often recognizable for what they are. Proscribing such materials could have the effect of leading people of such persuasion into "disguising" their messages, aims and identities so as to circumvent such legislation. In so doing, they may be able to deceive more people than if they openly "marched under their repulsive banners" and unequivocally articulated their dangerous views. (And of course, a law that is so broad that it would reach such "disguised" material could multiply the damage to free expression to a clearly intolerable level.)

If immediate violent conduct is the risk sought to be avoided, that is another matter. Many proponents of stronger "anti-hate" laws claim that racist and anti-Semitic materials "incite genocide". Materials that literally fit this description perhaps could be dealt with under s.281.1(1) of the *Criminal Code*.⁶⁴ Statements "inciting hatred" which are "communicated in any public place" and are "likely to lead to a breach of the peace" can be brought within s.281.2(1) of the *Criminal Code*.⁶⁵

There may be other circumstances, where spoken or written "hate" material falling short of s.281.1(1) or s.281.2(1) of the *Criminal Code* pose such a peril of immediate violence that banning them may be legitimate. Most such cases would probably involve "emergency" type circumstances, or the manner or tone of communication rather than the substance or ideas. Perhaps these are the types of circumstances that should be dealt with by s.281.2(2)⁶⁶ of the *Criminal Code*, rather than the wide-ranging concept of "promoting hatred" as such. Or perhaps the Canadian *Human Rights Act*, s.13⁶⁷ could be expanded to include such cases. Perhaps amendment to proposed s.15 of the *Manitoba Code of Human Rights* could be drafted to deal with such problems, although the constitutional problem of trenching on federal "criminal law" power has to be considered.⁶⁸

If something akin to proposed s.15(1)(b) is deemed necessary, I suggest that the proposed wording be replaced with (something like):

64. Subsection 281.1(1) of the *Criminal Code* reads "Everyone who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years".

65. Subsection 281.2(1) of the *Criminal Code* reads:

Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of (a) an indictable offence and is liable to imprisonment for two years; or (b) an offence punishable on summary conviction.

66. Subsection 281.2(2) of the *Criminal Code* reads:

Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for two years; or (b) an offence punishable on summary conviction.

See *R. v. Keegstra* (1984), 5 C.R.D. 525, 100-04 (Alta. Q.B.) where Mr. Justice Quigley upheld s.281-2(2) of the *Criminal Code* against a *Charter* "freedom of expression" challenge.

67. Subsection 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 reads:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Note that s.41(2)(a) and s.42(1) provide that the only sanction that a Tribunal can order against a violator of this section is a cessation order (or an order to take preventative measures against repetition). Failure to obey such order is punishable as contempt by the Federal Court of Canada.

In *Canadian Human Rights Commission v. John Ross Taylor and the Western Guard Party*, (F.C.T.D., Jerome A.C.J., unreported, Dec. 20, 1984), s.13(1) was upheld as a "reasonable limit" on free expression. See also, *John Ross Taylor and the Western Guard Party v. Canada*, 5 C.H.R.R. D/2097 (Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, April 6, 1983); and *Canadian Human Rights Commission et al. v. John Ross Taylor et al.* (C.H.R. Act Tribunal, unreported July 20, 1979) summarized in *Lipsett*, *supra* n.49 at 313-319.

68. See Tritschler C.J.Q.B. remarks concerning s.19 of the *Defamation Act*, R.S.M. 1970, C. D20, in *Courchene v. Marlborough Hotel Co.* (1971), 20 D.L.R. (3d) 109 at 115 (Man. Q.B.); aff'd on other grounds (1972), 22 D.L.R. (3d) 157 (Man. C.A.).

"is intended or calculated to cause hatred against a person or group on the basis of any factors listed in s.6(2) and

"(i) such hatred is highly likely to put such person or group in serious peril of imminent violence and

(ii) the circumstances of such publication, displaying . . . is highly likely to cause the hatred and peril referred to in (i) and

(iii) such circumstances are known to the publisher or displayer . . . and

(iv) such circumstances do not involve bona fide educational, religious, historical, cultural, journalistic or similar activities or bona fide discussion concerning any issue."

It must be emphasized that the danger must indeed be high and the feared violence imminent. The possibility that such material might ultimately lead an isolated deranged individual to commit an act of violence, or that it could create a "social atmosphere conducive to violence" are insufficient grounds. Indeed, banning material for the latter two reasons may "backfire." If there is a risk of a dangerous person receiving such communications and committing a violent act as a result, the risk could be substantially multiplied by prosecuting the communicator. Holding a high profile trial⁶⁹ could bring the offending statements to the attention of millions by the press, radio and T.V., and the emotion and controversy surrounding such trial could well trigger such irrational action where the original communication would not have. Similarly, the public "atmosphere" could well be poisoned more by the trial than the original communication. Not only would the expanded "forum" necessarily given to the defendant or respondent enable the material to reach millions who otherwise would not have heard of it, but many persons susceptible to being influenced by such material would see the prosecution as corroboration rather than negation of such theories (irrespective of the trial's outcome). Furthermore, the proceedings might make a "martyr" of the defendant, and even create resentment against the "victim" group.

By proposing s.15(1)(c) (in conjunction with s.15(2)(b)), the Commission did not invent an additional head of censorship. The words "indicating discrimination" in s.2(1)(c) of the current *Act* might be wide enough to encompass the concept of "affront to dignity".⁷⁰ While intending to clarify the matter, it seems that the Commission also wished to limit the scope of this concept to the most serious cases.⁷¹

69. At the time this is being written, one Ernst Zundel is on trial before a judge and jury in Toronto, Ontario on charges of violating s.177 of the *Criminal Code* which reads:

Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

He is accused of publishing articles alleging "that the Holocaust was greatly inflated" and "that there is an international conspiracy of Zionists, bankers, secret societies and Communists." *The Globe and Mail*, January 11, 1985.

Similarly, James Keegstra, a former Alberta high school teacher, faces trial under s.281.2(2) of the *Criminal Code* for allegedly teaching similar matters to his students. He failed in his constitutional challenge to that provision. See *supra* n.66.

(Note: On February 28, 1985, subsequent to the submission of this article, the jury convicted Zundel on the count concerning the "Holocaust denial" pamphlet, but acquitted him on the count concerning the "conspiracy" pamphlet.)

70. See *supra* n.55. In *Singer v. Iwasyk and Rasheed v. Bramhill* the "affront to dignity", as well the perpetuation of negative stereotypes and danger to equal opportunity were factors leading to a decision that the impugned materials "indicated discrimination." I argued, *supra* n.49, that such "censorial" provisions was not the appropriate way to deal with these problems.

71. See Manitoba Human Rights Commission, *Proposed Manitoba Code of Human Rights Summary*, 6 C.H.R.R. c/85-1 at c/85-4.5.

Nevertheless, I respectfully suggest that this provision be deleted from the *Code*.⁷² Of all "interests" advanced in favour of restriction of expression, protection from insult *per se* may be the least "compelling"; and the vital goal of promoting genuine respect for the "dignity" of persons and groups may be the least amenable to a coercive solution.⁷³

Furthermore, neither the new terminology chosen (nor indeed any formula where such a proscription is involved) seem able to remove the "overbreadth" and uncertainty inherent in this concept.

Though an "objective" test ("the reasonable person") is sought, this goal may well be impossible to reach in a matter such as this. Here is a matter especially prone to influence by the unique value judgments, style, or temperament of the adjudicator in question. By what criteria would a "reasonable person" decide if something is "intolerable" in the circumstances? What factors would influence the adjudicator's decision: the extent to which he places empathy with a group before fear of legal overreaching; the extent to which he prefers "proper" style before "vigorous" debate and discussion; his sense of humour or lack thereof? Or should a "community standard" be developed? This may well be unsatisfactory for two completely opposite reasons. On the one hand, free expression should protect those with attitudes or styles widely divergent from the "mainstream"; on the other hand, "minority rights" may not be adequately protected by "community standards" (especially if a majority or high proportion of the community have antipathy towards the group in question). Or would the result turn in part on what side could get the testimony of the most persuasive social scientists (or other experts)?

There may be *rare* cases where "affront to human dignity" *could* (in combination with other factors) be a legitimate basis for proscription. For example, communication in conjunction with a public facility or employment (see proposed s.15(1)(a)) or "harassment" (see proposed s.16) perhaps could legitimately take account of such factors (in extreme cases). Where the communication is independent of such other activities, factors might include the extreme pervasiveness and intrusiveness of the material (for example, a sign of that nature "larger than life" that any one in the city could not help but see; or "electronic" or "technological communication"; or where elements of intimidation or invasion of privacy are involved.) However, if these are factors to be considered, the legislation should be specific and narrow enough to indicate exactly the areas aimed at. Perhaps such problems are best dealt with by other areas of the law?

I suggest that the defence provided in s.15(3) of truth (which a respondent must prove) is inadequate. Perhaps this should be available for s.15(1)(b) as well. In either case, standing alone it is an inadequate defence. Not only

72. See *McKinlay v. Cranfield and Dial Agencies* (1980), 1 C.H.R.R. D/249 (Saskatchewan, Board of Inquiry, B.P. Halstead, Chairman) and *Saskatchewan Human Rights Commission v. The Engineering Students' Society* (1984), 5 C.H.R.R. D/2074 (Saskatchewan, Board of Inquiry) dealing with complaints of "affront of dignity" under the expanded wording of s.14 of *The Saskatchewan Human Rights Code*, *supra* n.13. The latter decision has been appealed to the Sask. Q.B. challenging the constitutionality of s.14 and the decision is pending.

73. See Mr. Owen-Flood's interesting discussion on this and related matters in *The Ukrainian Canadian Professional and Business Association of Vancouver v. Konyk and Winnipeg Garlic Sausage Co.* (1982), 3 C.H.R.R. D/1157 (British Columbia, Board of Inquiry, D.O. Owen-Flood, Chairman); *aff'd* (1983), 4 C.H.R.R. D/1653 (B.C.S.C.).

may it put an impossible burden on a respondent, but it fails to account for honest belief and bona fide discussion. Indeed, it could be argued that if any "hate" material were to be banned on a "group defamation" basis, free expression would require a test analagous to the "actual malice" test the American courts⁷⁴ have developed for defamation of public figures, that is, proven knowledge or recklessness concerning falsehood. However, such test may render such laws almost unworkable, again leading to the conclusion that a ban on such materials may be a "no win situation". Another factor that must be remembered is that the "truth" or "falsity" of much of the material in question might prove incapable of determination in a judicial or quasi-judicial proceeding.

In some cases, the "truth" of the statement could be irrelevant to the evil, which would result from the "time, place, manner", method or tone of the communication. If such provisions are needed at all, a general defence of "bona fide discussion" would perhaps be more suitable (with the relevant onus remaining on the prosecution or complainant, and not shifted to accused).

Though the wording of current s.2(2) defence of "free expression of opinion upon any subject" may not have been adequate,^{74a} its removal (without replacing it with an adequate formula) could well be more dangerous.

I respectfully suggest that the argument⁷⁵ that the proclamation of the *Charter* rendered this statutory defence (and the *Criminal Code* defences of "religious argument" and "reasonable belief")⁷⁶ unnecessary are erroneous. Perhaps the courts will read these defences into the legislation in order to avoid unconstitutionality.⁷⁷ However, the *Charter* was not intended to relieve the legislatures of their duty to legislate clearly. Courts, as is often stated, are not "legislative draftsmen" and constitutional standards ought not to be seen as an invitation to legislators to draft wide, unlimited statutes in the hope that courts will "read them down." Furthermore, several years may elapse before a definitive ruling on such provisions comes from the Supreme Court of Canada. In the interim, the absence of such defences can leave enforcement agencies without adequate guidance, and can exacerbate any "chilling effects" such legislation may have on members of the public.

I am not suggesting that there can be no ban on any form of "hate" or related materials. Some of the possible legitimate areas of control were

74. The leading cases are *The New York Times Co. v. Sullivan* (1964), 84 S. Ct. 710 and *Garrison v. State of Louisiana* (1964), 85 S. Ct. 209.

74a. See Lipsett, *supra* n.49 at 334-336.

75. See Matas, *supra* n.63.

76. Subsection 281.2(3) of the *Criminal Code* reads:

No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

77. On the other hand, if they decide such defences are necessary to avoid unconstitutionality, they may well strike down the entire provision. In *Director of Investigation v. Southam Inc.*, [1984] 6 W.R.R. 577 at 597, the Supreme Court stated:

While the courts are guardians of the Constitution and the individual's rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. (emphasis added)

referred to earlier. Other areas worth serious study (although some may be more appropriate for federal than provincial legislation) could include abuses of "electronic" and "technological" communication, especially when they are used in conjunction with expertise in psychology and mass communication and are designed to reduce the individual's ability to critically analyze material, or to create mass hysteria or genuinely "manipulate" members of the public.⁷⁸ Other areas could include "hate" messages involving forgery and deliberate fraud, intimidation, or "specialized" situations, for example, misconduct by teachers⁷⁹ or other professionals in the course of their duties. However, I respectfully submit that a general proscription of "hate messages" *per se*, whether by s.2 of the current *Act*, proposed s.15, or s.281.2(2) of the *Criminal Code* are not only inconsistent with freedom of expression, but may well be counterproductive to the goals they seek to accomplish.⁸⁰

V. Harassment

I do not quarrel with the proposition that in certain circumstances, "harassment" should be prohibited by the *Code*. Indeed, many cases hold that "harassment" of the type referred to in proposed s.16 comes within existing provisions, in that it can amount to a "term or condition of employment."⁸¹ Though expressly including and defining that concept in the *Code* may be a good idea, there are some aspects of proposed s.16⁸² that perhaps ought to be reconsidered.

Section 16(1) could be quite far reaching. It could be read as including the conduct of, and imposing liability directly on not only employers and managers, but fellow employees or tenants, or even casual users of a public facility directed against fellow users. Is this what was intended? In some cases, this may be too far reaching.

Of even greater concern is the imposition of liability for "permitting" such practice. Often employers should be liable for the actions of their employees or officers acting within the course of employment. In extreme cases, it may be appropriate to impose a duty to control one's employees and liability for failure to control their harassing actions, even where such

78. See *Lipsett, supra* n.49 at 332, n.182, and authorities cited therein.

79. See *Keegstra v. Board of Education of Lacombe No. 14* (1983), 25 Alta. L.R. (2d) 370 (Bd. of Reference, McFadyen, J.), which upheld the dismissal of Keegstra, *supra* n.69 on ordinary educational grounds, without referring to the Criminal Code provisions.

80. Recent publications taking a point of view completely or partially opposite to mine on the "hate" issue include: Patrick D. Lawlor, Q.C. *Group Defamation: Submissions to the Attorney General of Ontario* (1984); Canadian Bar Association Special Committee on Racial and Religious Hatred — "Hatred and the Law", July, 1984. "Equality Now — Report of the Special Committee on Visible Minorities in Canadian Society", March, 1984. Heather Sinclair. "Hate Propaganda Laws — Will They Survive the Charter of Rights?" (1982), 3 C.H.R.R. C/82-13.

81. See for example, *Olarte et al. v. DeFillippis and Commodore Business Machines Ltd.* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. of Inq., Peter A. Cumming); appeal dismissed *Olarte et al. v. Commodore Business Machines Ltd. et al.* (1984), 6 O.A.C. 176 (Ont. Div. Ct.). See also, *Re Brennan* (Fed. C.A., unreported, Feb. 18, 1985).

82. Section 16 of the proposed *Code* reads:

Harassment Prohibited

16. (1) No person shall, in the course of any practice, activity or undertaking to which this Code applies, harass any individual or group on the basis of any factor listed in section 6(2), or permit such harassment by others in any such practice, activity or undertaking for which that person is responsible.

Harassment Defined

- (2) For the purposes of this section, "harassment" means:
- a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome;
 - a sexual solicitation or advance made to an individual by a person in a position to confer or deny any benefit to that individual, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 - any reprisal or threat of reprisal against an individual for rejecting any sexual solicitation or advance.

harassment could not be ordinarily considered "within the course of employment or the scope of authority". However, the wording of s.16(1) seems to go beyond this, and impose liability for failure to control actions of tenants, patrons, students, other users, or even those casually present on the person's premises. This seems to go beyond the liability the common law imposes in tort for actions of third parties not under one's control, and even to negate statutory immunities, such as s.66 of the *University of Manitoba Act*,⁸³ protecting the University from liability for actions of students "while not under the direction of the University . . ."⁸⁴ This extension of liability seems unfair and dangerous. Not only can it place an unfair burden on such authorities to "police" their premises for such conduct, but it might even place an authority in the dilemma of facing liability at the hands of an alleged "harasser" for wrongful eviction or expulsion, or liability under this *Code* for "permitting" such conduct. This could lead to unfair treatment against tenants or patrons by managers on the basis of complaints which may or may not be valid, which "management" does not have the ability to judge. Furthermore, it could motivate authorities to act with undue vigour in the exercise of their regulatory and disciplinary jurisdiction. I therefore respectfully suggest that the word "permit" be removed from proposed s.16(1).

The wording of s.16(2)(a), though possibly having certain advantages, leaves some cause for concern. Reference to "a course" reduces the risk of liability for an isolated incident or comment, and "known or ought reasonably to be known to be unwelcome" may reduce the risk of liability for purely subjective offence taken at relatively "innocent" conduct.

However, there are still some problems with this wording (and even with this concept). How serious does the conduct have to be before it can come within the scope of this proscription? Perhaps some conduct that can fit this description, though undesirable, is of too trivial a nature to merit legal intervention.⁸⁵ Reference to "comment" in the *Code* or in cases referring to existing legislation also poses a problem.⁸⁶ Though a deliberate, concerted course of verbal abuse with the purpose of making it unbearable for members of a protected group would properly be within this ban, there may be circumstances coming within this wording that should be beyond the scope of the law, or even protected by free expression.⁸⁷ If particular employees have developed a certain speech pattern which involves the use of particular epithets, but they are not used with malice or directed against a particular person, should a fellow employee by making it known that it is "unwelcome" have the right to "censor" such words? If in the course of legitimate conversation or discussion, opinions unfavorable to a particular group are stated, surely members of this group ought not be able to "veto" the discussion.

83. C.C.S.M., cU60.

84. This immunity would likely yield to the Code in light of proposed s.49.

85. For what might be considered a "borderline" case see *Potapczyk v. MacBain* (1984), 5 C.H.R.R. D/2285 (*Canadian Human Rights Act Tribunal*).

86. See Lipsett, *supra* n.49, at 289, n.16.

87. The need to avoid "inhibiting free speech" was recognized by Mr. O.B. Shime, Q.C., whose decision was the first in Canada to hold "sexual harassment" to be a prohibited form of discrimination, *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 at D/156 (Ont. Bd. of Inq.).

Although it is hoped that the Commission, boards and courts⁸⁸ will exercise caution in applying this concept, consideration should be given to whether proposed s.16(2)(a) should be removed, or at least amended to provide safeguards to prevent or reduce the risks referred to.

88. Here is another area where failure to provide an appeal on the facts could be particularly unfair.

