

Thirty-five Years and Looking Forward

A Discussion Paper and Survey on New Directions in Human Rights for New Brunswick

New Brunswick Human Rights Commission

October 9, 2002

Strategic Planning and Public Consultation

In 2002, the New Brunswick Human Rights Commission is celebrating its 35th anniversary. Much has changed since the Commission's creation in 1967, and the Commission has adjusted its programs and priorities to address this continually evolving human rights landscape. It is now time to review our priorities and programs again.

In the weeks and months ahead, the New Brunswick Human Rights Commission will be developing and perfecting our strategic plan for 2003-2008.

The heart of our efforts will be to follow up on many of the 152 recommendations of the *Towards a World Family* report. However, we will also take stock and determine in more practical terms how the Human Rights Commission's present efforts are meeting public expectations and whether we are achieving the intended results.

The Commission's strategic plan will address:

- 1) the case for legislative change,
- 2) issues pertaining to institutional governance,
- 3) the promotion of community relations and
- 4) the development of a management plan.

In order to guide our reflection in these areas, the Commission is inviting public debate and feedback on the issues set out in this paper and in particular on the four key areas just mentioned. The questionnaire that is appended to this discussion paper is intended for the general public, the practising bar, academics, the NGO community and everyone who has accessed the Commission's services or been a party to a human rights complaint. Some of the questions are future-oriented and relate to the recommended reforms, while other questions are retrospective and ask for feedback on the quality of services received. Responses to the questionnaire should be sent by **December 2, 2002**.

The History of Human Rights

From the beginnings of history, men and women have sought human rights. For instance, the *Code of Hammurabi*, often referred to as humanity's first charter of rights, was enacted about seventeen centuries before the birth of Christ. While at times draconian, the first known legal code sought to protect the weak from the strong.

By the twentieth century, the struggle for human rights was becoming more intense, with the idea of individual human rights gaining ever-wider attention and entering into international law. In the nineteenth century, individual human rights were still subordinate to the concept of national sovereignty. However, after World War I, international organizations such as the League of Nations and the International Court of The Hague were established to provide a forum where accusations of human rights violations could be debated. At an early stage of these developments, Canada became an active member of international attempts to secure individual, national and economic human rights.

Sadly, none of this was enough to prevent the rise of fascism and Nazism and the outbreak of World War II. As a result, by 1948, large parts of the world lay in ruins. Indeed, it was the response of an aroused world public opinion to the unprecedented human rights violations—including mass murder, torture and slave labour—that occurred immediately before and during the Second World War that ultimately resulted in the adoption of the *Universal Declaration of Human Rights*.

Even before the end of the war, the Allies had adopted as their rallying cry freedom from want, freedom from fear, freedom of speech and freedom of conscience. Men and women who had fought and lived through this conflagration came out with the conviction that the horrors of the Holocaust must never be repeated. For this reason, the Charter of the United Nations adopted at the Peace conference of San Francisco in 1945 was founded upon the principle of equality of all human beings in rights and dignity without discrimination as to race, sex, language or religion.

John Humphrey, a native of Hampton, New Brunswick, was the main author of the text that would eventually be adopted by the UN General Assembly as a common standard of achievement for all peoples and all nations, the *Universal Declaration of Human Rights*. It would take many years of effort by him and others at the UN and in its member states to transform this *Declaration* into treaty law. The *International Bill of Rights* consists of the *Universal Declaration* and two principal treaties, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. The covenants were adopted and proposed for ratification in December 1966 and came into force ten years later.

Many other international instruments have since supplemented the *International Bill of Rights* in the areas of discrimination against women, children's rights, race discrimination and elimination of torture, to mention a few. Canada was an early proponent of the development and ratification of such instruments. In recent years, it subscribed to regional systems like the *Charter of the Organisation of American States* and was a leading advocate for the establishment of the World Criminal Court. All these instruments create obligations for Canadian governments at the federal, provincial and local levels.

Human Rights in New Brunswick

The Province of New Brunswick enacted the *Fair Employment Practices Act* in 1956, the *Fair Accommodation Practices Act* in 1959, and the *Female Employees Fair Remuneration Act* in 1961. However, the spirit of these *Acts* emphasized law enforcement, rather than education. Since little effort was made to change public attitudes, the public remained virtually unaware that such protection even existed. As a result, few complaints were actually filed.

During the 1960's, the Government of New Brunswick proved itself capable of engineering substantial social change. The Program of Equal Opportunity transformed the Province through a radical reform of local administration and improved access to

public education and health services. The government's cornerstone legislative enactments for this program were the *Human Rights Code* and the *Official Languages Act*.

Since its inception in 1967, the New Brunswick Human Rights Commission has evolved into an organization with a staff complement of 12 distributed in four offices around the province. During the 1970's and early 80's, the scope of the *Human Rights Code* was expanded as new areas of discrimination were addressed: sex (1971), marital status and age (1973), physical disability (1976), mental disability (1985) and sexual harassment (1987).

During this same period, there were substantial developments at the federal level. By the mid 1970's, it was increasingly apparent that judicial interpretation had watered down the *Canadian Bill of Rights* to such an extent that commentators doubted that it would ever live up to its promise. Furthermore, the failure of federal-provincial negotiations on the Victoria Charter had halted federal-provincial negotiations toward a revised constitutional document with human rights guarantees. Meanwhile, the provinces had for the most part adopted non-discrimination legislation. However, the federal government had not. All of this changed with the adoption of the *Canadian Human Rights Act* in 1977, one year after the coming into force of the international covenants of the International *Bill of Rights*. The Canadian Human Rights Commission established by the new law has proven to be a powerful ally to provincial Commissions in the promotion and protection of human rights across Canada.

Human Rights Reform

In 1989, Charles Ferris was appointed to review human rights in New Brunswick and make recommendations for reform. The *Towards a World Family* report written by Mr. Ferris remains to this day the starting point for any discussion of human rights reform in the province. The 270 page long (plus appendices) report lists 152 recommendations for human rights reform in New Brunswick.

The New Brunswick Human Rights Commission believes that much of the analysis needed in matters of human rights reform in New Brunswick and in Canada has been done, and the foundation for renewal has been laid. The Government's principled commitment to linguistic equality, as demonstrated by the adoption and recent proclamation of the new *Official Languages Act*, has further strengthened this foundation. Human rights reform is thus timely, practical, and necessary.

The Human Rights Commission believes that the present time is opportune for revising the *Human Rights Code*. In our estimation, it is time for a major revision to the *Code* and it is only by undertaking a thorough reform that the government can demonstrate a robust and renewed commitment to human rights and equal opportunity.

Reforms to Date

Some important recommendations from the 1989 study have been implemented. These include recommendations:

- to add sexual orientation as a ground of discrimination (1992);
- to allow the Commission, through its own counsel, to present the complaint before a Board of Inquiry (1996);
- to allow the Labour and Employment Board to sit as a Human Rights Board of Inquiry (1996); and,
- for the Human Rights Commission to publish its own annual report, separate from the Department of Labour's annual report (1990).

New Grounds of Discrimination

Most of the recommendations from the 1989 study, although well received publicly, still await legislative enactment.

In the Commission's view, any substantive reform of human rights law in the Province should be based upon the adoption of best practices from other jurisdictions and should keep pace with the thrust of reform elsewhere. Other jurisdictions have more explicit equality protections than does New Brunswick. For example, they usually list the following grounds of discrimination that are not included in the *Human Rights Code* of New Brunswick:

- social condition;
- political belief;
- language;
- family status (having children, for example);
- citizenship; and,
- pardoned criminal offense (having received a pardon for a criminal conviction).

Social condition refers to a person's social and economic background. The inclusion of this ground is aimed at preventing discrimination against the poor. New Brunswick is the only jurisdiction in Canada without some form of protection against discrimination based on poverty.

The Canadian Association of Statutory Human Rights Agencies, which represents human rights commissions across Canada, has been forcefully advocating for the adoption of social condition as a prohibited ground in every jurisdiction in Canada since May 2000. The recent report on reform of the *Canadian Human Rights Act* chaired by former Supreme Court of Canada judge Gérard La Forest also recommended adoption of social condition as a prohibited ground under that law.

As one of the first Canadian provinces to adopt a *Human Rights Code*, and as a province that has in the past shown significant leadership in human rights matters, it is important to address this and other gaps in the *Code* in a timely fashion.

Institutional Reform

Beyond the issues of substantive reform of the law, there are also a number of reforms that are needed in terms of process, that is, how the Human Rights Commission and the Government as a whole implement human rights guarantees in New Brunswick. Here again, the recommendations from Chapters 3 and 5 of *Towards a World Family* are particularly helpful. For the most part, they await implementation.

The key recommendations of the Ferris report are aimed at making human rights protection not merely the function and role of an enlarged and more autonomous government agency, but rather the responsibility of the Government as a whole, with an increased role for Cabinet and the Legislature in particular. For instance, the Ferris report recommends that:

- a Standing Committee on Human Rights be established in the Legislative Assembly, and that the Human Rights Commission report directly to the Legislature through this committee;
- a Cabinet committee, comprised of Cabinet members responsible for reporting obligations under international human rights treaties, be established to coordinate responses to UN agencies and to coordinate, with the advice of the Human Rights Commission, the promotion of human rights in the province;
- the Chair and Vice-Chair of the Commission be appointed by the Lieutenant-Governor in Council, on the legislative motion of the Premier and the Leader of the Official Opposition;
- the Chair and Commission members only be removable on address of the Legislative Assembly, and their appointments be for fixed terms, staggered to allow for a gradual rotation in composition, with the possibility of only a single reappointment; and,
- the Commission be given corporate status and be self-administering with respect to staffing, budget and contractual functions.

The thrust of all these reforms is to place human rights matters at the heart of Government activity and to give the Commission increased autonomy and profile within the structure of Government (See recommendations 3.5 to 3.14 of *Towards a World Family* at www.gnb.ca/hrc-cdp/e/ferris2e.html)

Current members of the Commission are convinced that the Commission's staff needs to be increased, in particular to allow for an improved communications and public education function and for an improved policy development function. The Commission should have staffing authority, and the responsibilities of the Executive Director should be set out by statute (See recommendations 3.22 to 3.27).

Other recommendations from Chapter 5 of the 1989 Report address means of making the Commission's compliance process more expedient and effective. They include recommendations to:

- grant authority to the Commission to initiate complaints on its own motion;
- grant broader investigative powers without prior authorization from a judge;
- require pre-hearing settlement conferences before a Board of Inquiry;
- authorize publication of complaint settlements negotiated by the Commission;
- establish a specialized panel of jurists to sit as human rights adjudicators;
- allow complainants to apply for a Court Order forcing a Board of Inquiry referral;
- establish a Human Rights Board of Inquiry procedural rule book; and,
- enact more liberal appeal provisions from Board of Inquiry decisions.

International Human Rights Obligations

As its title suggests, a central theme of the *Towards a World Family* report is to more closely align New Brunswick's human rights protections with the obligations imposed upon the Province by virtue of Canada's ratification of international human rights instruments. The New Brunswick Human Rights Commission endorses the view, accepted by all Canadian human rights commissions, that equality law in Canada must increas-

ingly be interpreted and applied in the context not only of the *Charter* but also of the international instruments to which Canada is signatory.

For example, one cannot meaningfully interpret an obligation upon the State to treat indigent citizens fairly, without discrimination on the basis of their age or social condition, without reference to the rights under Article 11 of the *International Covenant on Economic, Social and Cultural Rights*. This provision of the *Covenant* guarantees the rights "...to an adequate standard of living for [one]self and [one's] family, including adequate food, clothing and housing..."

Similarly, the right to equal access to public education without discrimination on the basis of physical or mental disability should not be debated without reference to the broader context of the right to education enshrined in Article 26 of the *Universal Declaration of Human Rights* and in Article 13 of the *International Covenant on Economic, Social and Cultural Rights*.

Canadian commissions have recently resolved to plead international law whenever applicable in the Board of Inquiry proceedings to which they are party. The Supreme Court of Canada has recently invited barristers to do the same when human rights issues are raised before the highest court. Nonetheless, most lawyers are ill-equipped and poorly trained to carry out this task. A more forceful and direct way of demonstrating our commitment to universal human rights values is the path taken by Quebec over a quarter century ago when it adopted the Quebec *Charter of Human Rights and Freedoms*. It is this legislative framework that the Ferris Report recommended as a model in 1989 and in our view it remains a pre-eminent human rights instrument in Canada.

A New Brunswick Charter of Rights

The Commission invites public debate on whether the *Human Rights Code* of New Brunswick should be replaced by a Charter containing guarantees of fundamental freedoms similar to those that are included in the human rights laws of Quebec, Sas-

katchewan and Yukon. If so, which fundamental human rights should a New Brunswick Charter protect?

The *Towards a World Family* report recommended adoption of a broad-based Charter, similar to Quebec's, modelled on international human rights instruments. (For the full text of the Quebec *Charter*, see: http://www.cdpedj.qc.ca/htmen/htm/4_4.htm)

The charter proposed by the Ferris report would include fundamental freedoms, democratic rights and legal rights similar to those already enshrined in the *Canadian Charter of Rights and Freedoms*, but would in addition embrace economic, social and cultural rights, revised and enlarged anti-discrimination provisions and, possibly, new guarantees in areas such as environmental rights and Aboriginal self-government rights.

In today's context, it would be appropriate to ask also whether the interests of New Brunswick citizens with respect to religious and cultural minorities, privacy and the role of the family are sufficiently protected in Canada's foundational law. Should a New Brunswick Charter include provisions modelled on Articles 17 (privacy), 23 (family) or 27 (ethnic, religious or linguistic minorities) of the *International Covenant on Civil and Political Rights*? (See www.unhchr.ch/html/menu3/b/a_ccpr.htm)

It is our contention that in replacing the *Human Rights Code* by a broad-based Charter of Rights, New Brunswick would be providing leadership in human rights. This would support harmonization of human rights instruments in Canada, as recommended by the United Nations Human Rights Committee. New Brunswick could again provide leadership in bringing the Canadian polity one step closer to the ideals embraced by the international community over the last half century. As we did so, it would be wise to keep an eye on the future, being cognizant of the new frontiers in Canadian equality and human rights law, such as privacy and the misuse of genetic information.

Conclusion

In the main, the recommendations on procedural reforms to the *Human Rights Code* in the *Towards a World Family* report are a textbook application of recommended best practices in the conduct of proceedings before administrative tribunals in Canada. They are modelled on the provisions of other human rights commissions and administrative tribunals in Canada at the time. Other new practices may have emerged, but it is a testimony to the foresight and thoroughness of the Ferris report that these recommendations remain as timely and cogent today as they were 13 years ago. Regardless of the direction that human rights reform may take on a substantive basis, the Ferris report recommendations with respect to procedural reform of the *Human Rights Code* generally are non-controversial and would be welcome by legal practitioners, Commission staff, and all parties, past and future, to proceedings under the *Code*.

With respect to the recommendations on substantive reforms to the *Code*, the Human Rights Commission considers that these reforms are not about creating bold new rights for the disenfranchised, nor about urgently addressing massive human rights abuses. Fortunately, as New Brunswickers, we live in a society where for the most part we can take many fundamental rights for granted and live our lives peacefully and productively thanks to the constitutional fabric we have in place. The reforms do concern themselves with taking rights seriously and with honestly meeting our obligations under international human rights law. They are meant to ensure that our foundational law adequately addresses the values we cherish most.

Survey

As part of our 2003-2008 strategic planning process, the New Brunswick Human Rights Commission invites you to complete the questionnaire below and return your responses to us **by December 2, 2002**. We also invite you to distribute the form to other individuals whose input you believe would be beneficial.

Additional information about the *Human Rights Code* and the Commission, may be found at www.gnb.ca/hrc-cdp. This website includes the full text of the current *Human Rights Code*, the Commission's annual report, as well as the Executive Summary and Recommendations of the *Towards a World Family* report. Printed copies of the Ferris report and our annual report are available from the Human Rights Commission.

Completed questionnaires or comments in any other form can be returned to the Commission to the address provided below or by e-mail to hrc.cdp@gnb.ca. Commission members are also available to discuss and accept your feedback.

New Brunswick Human Rights Commission
Human Rights Survey
751 Brunswick Street
P.O. Box 6000
Fredericton, New Brunswick
E3B 5H1
Telephone: (506) 453-2301
Fax: (506) 453-2653

Thank you for your contribution to this planning process.

Questionnaire

1. Quebec's *Charter* is the only human rights instrument in Canada that expressly prohibits discrimination on the basis of language. All international human rights instruments do so. Our Commission takes jurisdiction in language-based complaints as a

form of ancestry-based discrimination. Should a New Brunswick charter specifically include language as a prohibited ground of discrimination? Why?

2. New Brunswick is the only jurisdiction in Canada where the *Human Rights Code* does not prohibit some form of discrimination against the poor. Other human rights laws prohibit discrimination on the basis of social condition (i.e. a person's social and economic background), source of income, or receipt of social assistance. How should New Brunswick's *Code* deal with this type of discrimination? Why?
3. Other grounds of discrimination prohibited by human rights laws elsewhere in Canada, but not under ours, include pardoned criminal record (having received an official pardon for a criminal conviction), political belief, citizenship, and family status (e.g. having children). Which of these, if any, should be prohibited grounds in New Brunswick law? Why?
4. The New Brunswick *Human Rights Code* only deals with non-discrimination law, while human rights laws in Saskatchewan and Yukon also guarantee basic fundamental freedoms. Quebec's *Charter* is the most comprehensive; it guarantees many rights that have since been included in the *Canadian Charter of Rights and Freedoms*, as well as several economic, social and cultural rights that are not guaranteed by any other human rights law in Canada. Should our *Human Rights Code* be replaced by a more comprehensive charter? Why?
5. Human rights complaints in all jurisdictions can involve lengthy proceedings, both prior to and after referral to a Board of Inquiry. What has been your experience with the Commission's complaint process? Have the interventions been timely and efficient? Why?
6. Given the rapid evolution of human rights law, employers, service providers, legal practitioners and the public are challenged to keep pace with changing legal obliga-

tions. How could the Human Rights Commission improve its performance in the area of human rights education? Why?

7. How accessible and informative have you found the Commission's current educational activities and services? Why?
8. How could reforms best ensure the Commission's autonomy and independence? Should the Commission report to a Minister or should it report directly to the Legislature? Why?
9. What importance do you place on human rights considerations in your workplace? Has the Commission assisted in raising the profile of human rights matters in your work or in the services you provide? What perception do you have with respect to the profile of the Commission and of the importance of human rights in New Brunswick? Why?
10. What other comments do you have with respect to the Commission's strategic direction or priorities in the years ahead? Why?