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NOTES FOR AN ADDRESS

BY

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TO THE

SPECIAL JOINT COMMITTEE ON

THE CONSTITUTION OF CANADA

OTTAWA,
DECEMBER 5, 1980.

Senator Hays and Mr. Joyal, Honourable Senators and Members of the House, I have with me this morning Louise Simard, Deputy Chief Commissioner of the Saskatchewan Human Rights Commission. Let me begin by thanking you for the invitation to attend before you today. Our purpose is to raise serious questions of institutional competence, with regard to the anti-discrimination provisions of the Proposed Resolution respecting the Constitution of Canada. I propose to begin by talking about the history of anti-discrimination legislation in this country, in order to lay a basis for the argument that Section 15 creates serious difficulties with regard to the interface between the ordinary courts and statutory human rights agencies, such as the one which I have the privilege to head. I will then turn to some examples, from recent experience, such as the Stella Bliss decision of our Supreme Court, as to which you have already heard a good deal, in order to illustrate the problems which we may face, in a heightened form, if the Proposed Resolution leaves Parliament unamended. Finally, I will suggest a form of words which will accommodate the concerns identified by my examples, if incorporated as amendments to the Proposed Resolution.

Although in his speech to the House, on October 6, 1980, the Honourable Jean Chretien, Minister of Justice, gave pride of place in our history to the Province of Saskatchewan, as the first jurisdiction in Canada to enact a Bill of Rights, in 1947, thanks to the leadership of the Honourable T.C. Douglas, the record ought to show that it was Ontario, not Saskatchewan, which first proclaimed anti-discrimination

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laws. In 1944, the Racial Discrimination Act of Ontario was the very first broad legislative statement that racial and religious discrimination were contrary to public policy. May I ask you to please note, at this point, that enforcement of this statute was left to the ordinary courts, on a quasi-criminal prosecution. Three years later, in 1947, Saskatchewan followed Ontario's lead by including in its new Bill of Rights anti-discrimination provisions with regard to race, creed, religion, colour and ethnic origin. Again, adopting the Ontario model, my province left the matter of law enforcement to the courts, on a prosecution.

In 1962, recognizing the futility of the judicial enforcement mechanism, Ontario created a modern human rights enforcement agency, the Ontario Human Rights Commission. It took Saskatchewan not three, but ten years to follow this institutional lead by Ontario. Finally, in 1972, the Saskatchewan Human Rights Commission came into being.

Let me review the anti-discrimination law enforcement record for you. For no less than one quarter of a century, from 1947 until 1972, the anti-discrimination provisions of Saskatchewan's Bill of Rights stood proudly on the statute books. But, there was not one single prosecution under the Bill. You will search the law reports in vain if you set out to find a reported case where a victim of discrimination sought relief in the courts. In just two civil cases, over those twenty-five years, litigants, with a noteworthy lack of success, sought to rely upon the prohibition in the Bill of Rights against discrimination on the ground of religion. (See, Bintner v. Regina Public School Board

(1966) 55 D.L.R. (2d) 637 (Sask. C. of A.); and Regina Midtown Centre Ltd. v. West of England Dress Goods Ltd.(1973) 29 D.L.R. (3d) 619 (Sask. Q.B.)

Perhaps one might conclude, on this footing, that there just wasn't any discrimination based on race or religion, in Saskatchewan, during this period of our history. As a person who has lived in Saskatchewan during all but two of those twenty-five years, I can assure you that such a conclusion runs quite contrary to my own experience. One must, therefore, look elsewhere for an explanation. Professor Walter Tarnopolsky, in his 2nd edition of The Canadian Bill of Rights (Toronto: McClelland and Stewart, 1975) offers this analysis. He suggests that both the Ontario Racial Discrimination Act and the Saskatchewan Bill of Rights, by leaving enforcement of anti-discrimination provisions to the courts placed

> "... the whole emphasis of promoting human rights upon the individual who has suffered most, and who is therefore in the least advantageous position to help himself. It places the administrative machinery of the State at the disposal of the victim of discrimination, but it approaches the whole problem as if it was wholly his problem and his responsibility. The result is that very few complaints were made, and little enforcement was achieved."

Ontario, Saskatchewan, the other provinces and, most recently, the federal government, have all opted for the statutory human rights agency as the preferred law enforcement vehicle for anti-discrimination

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provisions. Let me take a moment or two and describe some of the aspects of a modern human rights agency. The agency has both investigative and educational staff. It may initiate complaints. It has the carriage of complaints, which cannot be settled amicably and which constitute probable cause violations, before independent boards of inquiry. It has the capacity to engage in rule-making, so as to address systemic issues of discrimination on a broad front, rather than chipping away on a case-by-case method of response. My Commission has statutory authority to make regulations, subject to the approval of the Cabinet, defining words in the Human Rights Code, which are not defined in the Code itself. The Canadian Human Rights Commission, to cite another example, has the authority to set down binding interpretive guidelines, as to the meaning of words and phrases in the Canadian Human Rights Act, And these interpretations must be adhered to by adjudicators before whom human rights complaints may come for hearing and determination. In addition, the Saskatchewan Human Rights Commission has the power, after full public hearings, to exempt persons or classes of persons from the provisions of the Code and to approve affirmative action programs designed to accompish the objects cited in Subsection (2) of Section 15 of the Proposed Resolution.

In short, we have human rights commissions spread across this country, with original jurisdiction to meet the challenges of enforcing anti-discrimination laws, for one simple reason. They are perceived, by all governments, as being equipped to do a better job than the ordinary

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courts. Not only do they have more equipment and flexibility, as a matter of logistics and politics, being in the field on a full-time basis, they can surely be expected to be somewhat more responsive to the needs of those groups who seek shelter under the protective umbrella of human rights legislation.

Be that as it may, let me turn to specific cases, in order to illustrate my point. Section 15 of the Proposed Resolution proscribes discrimination on the ground of sex. An insight into how our Supreme Court might see fit to confine the interpretation of this word, may be found in the unanimous decision handed down by the Court in Stella Bliss v. The Attorney General of Canada (1979) 92 D.L.R. (3d) 417. This decision was signed on October 31, 1978. As you have heard, at some length about the Bliss decision, I will content myself with reminding you that, although the Court readily acknowledged that the Unemployment Insurance Act invidiously discriminated against the plaintiff, on the ground of her status as a pregnant worker, it did not discriminate against her because of her sex.

Exactly one month after the Bliss decision was published, the Saskatchewan Human Rights Commission heard a complaint by Lucille Leier against the CIP Paper Products company. The case involved an allegation that Ms. Leier was discriminated against, by her employer, on the ground of sex, by virtue of being denied disability benefits under a group illness and disability insurance plan written by Metropolitan Life Insurance Company, which specifically excluded coverage in the case of '... pregnancy or resulting childbirth or complications'.

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My colleague Louise Simard and I put our signatures to a decision which cleared the way for an overturning of the Bliss decision, in our province. Allow me to read the last paragraph of our Leier decision.

> " Because of the Bliss judgment, we find ourselves with very little choice. But for this Supreme Court pronouncement, we would have authored an opinion saying that the disability plan in question was in violation of Section 3 of The Fair Employment Practices Act. We would have preferred the unanimous view of the American Federal Circuit Courts of Appeal, as endorsed by the dissenting justices in the American Supreme Court in Gilbert. To establish a dichotomy between 'pregnant women and non-pregnant persons', is surely, to beg the question. As Mr. Justice Stevens said, 'The classification is between persons who face a risk of pregnancy and those who do not.' If this be the proper dichotomy, then the question put to us must be answered in the affirmative. For, to exclude pregnancy-related disabilities from coverage under an employee disability protection plan is, surely, to engage in an act of sex discrimination. This is because men do not face a risk of pregnancy. However, due to Bliss, the only deferential option open to us is to accept the employer's argument. The Ontario government and, more recently, the Congress of the United States, have seen that the question at issue must be answered in the affirmative. Our hope is that the Legislature of the Province of Saskatchewan will demonstrate, before long, that it has similar vision."

As soon as the Leier decision was published, our Commission drafted amending words, with a view to legislatively broadening the definition of sex. I am pleased to report that, within five months, these words

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received support from both sides of the House, in Regina. The Saskatchewan Human Rights Code now explicitly defines six so as to embrace discrimination on the basis of pregnancy or pregnancy-related illness.

I ask you to now imagine how this scene might have played, if the Supreme Court had Section 15 before it, in the Bliss case. There is no reason to conclude that they would have adopted any less strict a definition of sex. But then where would my Commission be, in responding to the challenge of the Leier case? I rather doubt that we would have enjoyed much success in attempting to overthrow a constitutional interpretive decree from the Supreme Court. However, if the Constitution provided an indication to the Court that it should respect the original jurisdiction of statutory human rights agencies to consider anti-discrimination matters there would, at least, be a clear opportunity to present the Court with a complete record and full argument before it took it upon itself to rule on the matter. Allow me to take you into the reasoning of the Bliss decision, for just a moment or two. In a brief judgment, the Supreme Court wrestled with the meaning of the phrase 'equality before the law' in the Canadian Bill of Rights. Five Canadian cases were referred to, and sex is then said not to include pregnancy or pregnancy-related illness. In our decision in Leier we pointed out that no fewer than eighteen United States Federal District Courts and seven Federal Circuit Courts of Appeal had come to the opposite conclusion. We further noted that some seven months before the Supreme Court delivered its judgment in Bliss the House of Representatives published Report No. 95-948 entitled 'Prohibition of Sex Discrimination Based on Pregnancy' and that a bill had, by then, achieved the support of 100 members of the House and some

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30 Senators. This bill made it clear that sex discrimination was to include discrimination on the basis of pregnancy. The bill cleared through Congress well before Bliss was handed down. Yet the Supreme Court apparently knew nothing of this. As a final irony, the very day that Bliss was published, President Carter put his signature to the American bill saying just the opposite. Had the Bliss case, in my hypothetical constitutional scenario, been first considered by a statutory human rights agency, I am confident that the American jurisprudence and legislative history would not have gone unnoticed and perhaps, just perhaps, the Supreme Court might have been saved from error.

While our minds are occupied with thoughts of sex, let me turn to another example. As I have earlier indicated, statutory human rights agencies have a much broader array of response mechanisms than do ordinary courts. Such agencies are not, as are courts, left with the hard choice of either striking something down or approving it as lawful, with no possible middle ground. Section 15 of the Proposed Resolution proscribes discrimination on the ground of sex. Where does this form of words leave a judge who is invited by a litigant to liberate all public wash rooms and changing rooms at public swimming pools and other recreational facilities? I wonder --- and I ask you to wonder with me. What might a judge do with a suit seeking the absolute removal of all sex bars with regard to custodial personnel in penal institutions? Well, I leave you to speculate. For better or worse, the judge's response will likely be an all or nothing at all decision. Such is not the case under existing human rights legislation.

Last winter the Saskatchewan Human Rights Commission conducted

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hearings with regard to certain exemptions sought by the Corrections Branch. At the time of the hearing there was not one single female custodial officer employed in Saskatchewan's male correctional facilities. Facing the Code's prohibition against sex discrimination in employment, the Correctional Division sought an exemption. After a full hearing, my Commission granted a partial exemption. We said this:

> " The first question to be determined is whether some sort of sex bar is warranted as a reasonable occupational qualification, on the ground of public decency. The Commission is of one mind in answering this question in the affirmative, so long as the matter of tight security is at stake. Where the compelling interest of this degree of security dictates surveillance or searching of the person, at any given moment, at the option of custodial workers, conventional standards of public decency in this Province, at this point in time, clearly require that custodial staff [in 'secure' areas] be of the same sex as the inmate population."

So far as I can tell, this exemption order met with general approval, from all concerned. It opened-up close to half of the compliment of custodial positions to competition without regard to the sex of the applicant. That is surely a dramatic step forward for women, which, in time, may well lead to further steps in our jails. And, such a step was accomplished without shocking people's sensitivities with regard to personal privacy or public decency.

With no hint in the Proposed Resolution that our courts should be respectful of, if not deferential to, the decision-making processes

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of human rights commissions and boards of inquiry under human rights legislation, I ask you to consider just where Section 15 may leave our Commission's Correctional Division Exemption Order of February 27, 1980.

Due to the time allotted to me this morning, I will not burden you with further examples. But, that is not to say that I do not have them at hand. If, during the question period, you would like to ask me about them, I would be pleased to refer to examples touching the prohibitions in Section 15, with regard to both religion and age.

In summation, I invite you to consider certain procedural amendments which will accommodate the concerns to which I have addressed my opening remarks this morning. I propose amendments to Section 25, rather than to Section 15, as I am not seeking substantive changes. The Proposed Resolution has already adopted this course by choosing to put Section 15 'on ice' for three years, pursuant to Section 29(2), while everyone runs around trying to figure out what to do about it. Would you consider amending Section 25 to read:

> "25(1) *Subject to subsection (2),* any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.
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> (2) *No law or practice shall be construed as inconsistent with section 15 unless any other remedy available and provided for by law has been sought.*"

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There is one other amendment to which I would like to specifically lend my support. Section 47 of The Saskatchewan Human Rights Code gives my Commission authority to approve and monitor affirmative action programs designed to ameliorate conditions of employment, education or accommodation for disadvantaged groups, protected by the Code. Subsection (2) of Section 15, as presently worded, literally gives carte blanche to any effort at affirmative action, however half-baked or egregious. As the United States Supreme Court made clear in its decision last year in Brian Weber v. United Steelworkers & Kaiser Aluminum & The United States 99 S. Ct. 2721 (1979) voluntary affirmative action programs are only acceptable if they do not unnecessarily trammel the interests of white male employees. Under Section 47 of The Saskatchewan Human Rights Code, it is our Commission's responsibility to give due weight to this vital moral consideration in our deliberations leading to approval or variation of affirmative action programs. Section 15(2) ought to take cognisance of such a statutory responsibility, but ought not to go further, in the name of human rights for all. Thus, I endorse the following language, presented to you by my Federal opposite number Gordon Fairweather, on November 14, 1980.

> " *(2) This section does not preclude any legislative distinction which is justifiably related to some bona fide amelioration of the condition of certain specified classes of persons."*

Let me conclude these remarks with the language which I set down in my telegram to you Senator Hays and Mr. Joyal, of November 12. I said that Section 15 gives rise to both theoretical and practical

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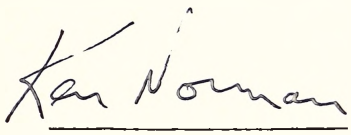
concerns. Accordingly, I requested that you afford me an opportunity to detail for this committee the potential friction points between judicial interpretation of Section 15, as it is now worded, and the orderly administration of human rights legislation, across the face of this country of ours, by statutory agencies, such as the one which I chair. You have now given me this opportunity and I am grateful. Mr. Chairmen, Louise and I now stand ready to answer any questions which this committee may now choose to put to us.



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Saskatchewan Human Rights Commission.