Access to Administrative Justice for Community Users: A Litigator's Perspective

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Written for CIAJ's National Roundtable on Administrative Law
June 2021

Introduction

I am a Black, African Canadian, male, with dreadlocks.

I have been a lawyer in private practice in Ontario, appearing in courts and tribunals for 16 years,[1] including extensive practice in administrative and human rights law, as well as civil litigation and criminal law. Much of my practice focuses on social justice with an emphasis on racial justice. A large part of my criminal practice is funded through legal aid, while a lot of my work at the Human Rights Tribunal of Ontario is pro bono, heavily discounted, or structured to provide access to justice for people who have difficulty paying legal fees.

Access to justice is a major aspect of my practice and a large part of why I do what I do. Throughout my career, I have become deeply familiar with the systemic barriers that stand in the way of justice, particularly for Black and racialized people, but also for women, people with disabilities, LGBTQ+ people and members of marginalized groups, particularly those with mental illness and the homeless population. In this paper, I will attempt to set out some important points and major lessons for access to justice that I have gleaned from my practice, including some recent

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[1] My first Tribunal stint was acting as a Refugee Protection Officer in Refugee Determination Hearings at the Immigration and Refugee Board of Canada from 1999 to 2004.

cases that I have worked on and some lessons that emerged specifically out of the COVID-19 pandemic.

This paper has three parts. First, I provide a brief discussion of barriers that many of my clients have faced in accessing administrative justice, with particular reference to some of the cases I have been involved in. Second, I delve into the implications of the COVID-19 pandemic for my clients in relation to access to justice and other systemic justice issues. Third and finally, I ask what can be done and propose a few reforms to improve access to justice in the administrative law process.

1. Barriers to Administrative Justice

As a social justice lawyer, my practice is a constant fight against barriers that stand in the way of access to justice. I use the term "access to justice" in the broad sense of recourse to one's rights, at any step of the legal process and in any area of law. Most obviously, this includes a person's ability to access our system of courts and tribunals with representation from a legal professional in order to have their rights properly heard and adjudicated. But that is not the extent of it. Access to justice includes the ability to access services, whether it be law enforcement, administrative services, jails and other institutions, or private businesses, without danger of harm, discrimination, or other rights violations. It also includes the ability of courts and tribunals to properly understand the reality of the issues they are adjudicating, including racial and other social justice issues, in order to see that these rights are meaningfully protected. All of these are part of the larger picture of access to justice.

I begin my discussion of systemic barriers with some facts about race in the criminal justice system. Racialized people, and in particular Black people, are disproportionately policed,

prosecuted, and subjected to criminogenic consequences when compared to the population as a whole, as the Ontario Human Rights Commission has repeatedly recognized. A 2018 report entitled *A Collective Impact* concluded that "racial profiling is a systemic problem in policing" and found that data indicated a number of racialized over-policing practices as widespread, including unjustified searches, meritless charges, and stopping and/or detaining Black persons without a legal basis.[2] The report further notes that, when it comes to the disproportionate use of force against Black people, "'little [has] changed' since the early 2000s."[3] Similarly, a 2020 report from the OHRC entitled *A Disparate Impact* stated that, between 2016 and 2017, Black people represented 36.7% of cases involving police strikes and 41.1% of cases involving "police grounding/other force," despite representing only 8.8% of Toronto's population.[4]

Another report commissioned by the OHRC and completed in July 2020, entitled *Use of Force by the Toronto Police Service*, found Black people to be 4.4 times more likely to appear in lower-level use-of-force incidents than their presence in the general population would predict.[5] It also found that, between 2016 and 2017, Black people represented 36.7% of cases involving police strikes and 41.1% of cases involving "police grounding/other force," despite representing only 8.8% of Toronto's population.[6] Recent data also shows substantial Black overrepresentation in

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[2] Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (2018), online: <http://www.ohrc.on.ca/sites/default/files/TPS%20Inquiry_Interim%20Report%20EN%20FINAL%20DESIGNED%20for%20remed_3_0.pdf#overlay-context=en/news_centre/ohrc-interim-report-toronto-police-service-inquiry-shows-disturbing-results> ["*Collective Impact*"] at 7, 21-23.

[3] *Ibid* at 19, quoting the report of Dr. Scot Wortley, a criminologist retained by the OHRC.

[4] Ontario Human Rights Commission, *A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (2020), online: <http://www.ohrc.on.ca/sites/default/files/A%20Disparate%20Impact%20Second%20interim%20report%20on%20the%20TPS%20inquiry%20executive%20summary.pdf#overlay-context=en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black> ["*Disparate Impact*"] at 9.

[5] Dr. Scot Wortley, Dr. Ayobami Laniyonu & Erick Laming, *Use of Force by the Toronto Police Service* (2020), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/sites/default/files/Use%20of%20force%20by%20the%20Toronto%20Police%20Service%20Final%20report.pdf> at 112.

[6] *Ibid* at 95.

jails. One study found that almost one in 15 young Black men in Ontario experience jail time at some point, compared to approximately one in 70 young white men, and that incarcerated Black people are more likely to live in low-income neighbourhoods.[7]

The systemic barriers that Black and racialized people face in the criminal justice context is obvious from these statistics. Where police services should function to "serve and protect" the people they come into contact with, serving as an initial point of access to justice, too often, police instead present themselves as a threat to the rights and safety of racialized people. In other words, from a customer service perspective, the police do not approach certain communities as enemies or from a battle-hardened posture[8] that escalate rather than deescalate problems. There can be no meaningful access to justice where the justice system itself is discriminatory and dangerous.

These are just the statistics about our criminal justice system. Other data, statistical and anecdotal, indicates similar problems of racial profiling and discrimination across many other sectors. More studies are needed regarding consumer and public service racial profiling, but some do exist. A 2003 inquiry into racial profiling from the OHRC reported complaints of racial profiling across a wide variety of public and private services including law enforcement, schooling, private security, employment, hospitality, the criminal justice system and housing, new policies and an oversight body intended to counteract racial profiling in all these areas.[9] A 2017 collection of essays published by the OHRC entitled *Racial Profiling and Human Rights* examined the

[7] Jim Rankin, "New Data Provides a Rare Glimpse at 'Substantial' Black Overrepresentation in Ontario's Jails" (25 May 2021), online: *Toronto Star* <https://www.thestar.com/news/gta/2021/05/25/new-data-provides-a-rare-glimpse-at-substantial-black-overrepresentation-in-ontarios-jails.html>.
[8] Hands on firearms, firearms drawn or hands on tasers.
[9] Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (2003), online: OHRC <http://www3.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf> at 7, 68-69.

various forms of racial profiling and noted the gradual expansion of the concept to encompass sectors outside of policing.[10]

Several years ago, I became even more personally involved with the law of racial profiling when my first cousin (also a lawyer) Brian Noble and I became the applicants in *Pieters v Peel Law Association*.[11] To make a long story short, we were sitting in the lawyers-only lounge of a courthouse in Brampton, there to attend court on a Youth Criminal Justice Act matter, when an administrative staffer and librarian approached us to ask for identification. We were the only Black men in a room with about twenty people in it, and we were the only ones asked for I.D. It was a clear case of racial profiling and we took the law association to the Human Rights Tribunal of Ontario, where we initially won,[12] then were overturned on judicial review,[13] but ultimately won the day when the initial decision was reinstated by the Court of Appeal.[14]

My case has become an important case for racial discrimination claims at the Human Rights Tribunal, particularly for those alleging racial profiling in the provision of services outside of policing. There have since been many other similar cases, including racial profiling at restaurants[15] and drycleaners,[16] expulsion of a Black child from a daycare program,[17] and disproportionate discipline of two racialized teenagers at a community center.[18]

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[10] Ontario Human Rights Commission, *Racial Profiling and Human Rights* (2017) 14:1 *Canadian Diversity*.
[11] 2013 ONCA 396.
[12] *Pieters v. Peel Law Association*, 2010 HRTO 2411 (Adjudicator Eric Whist). We were each awarded $2,000.00 for general damages.
[13] *Peel Law Association v. Pieters*, 2012 ONSC 1048 (Justices Chapnik, Hockin and Hoy).
[14] *Peel Law Association v. Pieters* 2013 CarswellOnt 7881, 2013 ONCA 396, 228 A.C.W.S. (3d) 204, 116 O.R. (3d) 81, 306 O.A.C. 314, 9 C.C.E.L. (4th) 233, [2013] O.J. No. 2695 (Cronk, Juriansz and Pepall JJ.A.)
[15] *Wickham v. Hong Shing Chinese Restaurant*, 2018 HRTO 500.
[16] *Craigg v. Prosperity Cleaners*, 2020 HRTO 884.
[17] *AA v. P.R.Y.D.E. Learning Centres Inc.*, 2020 HRTO 1020.
[18] *TM v. Bradford West Gwillimbury (Town)*, 2019 HRTO 1500; *CM v. Bradford West Gwillimbury (Town)*, 2019 HRTO 1501.

One recent case I worked on involved a Black couple who alleged that they had been discriminated against by a real estate seller who was keen to sell them a house when she spoke to them over the phone, but allegedly balked when she saw them face to face and realized that they were Black.[19] For that case, we reviewed a large body of research indicating anti-Black racism in the real estate sector, both in the United States and in Canada. A report by an expert, which we tried to have admitted but was ultimately rejected by the Tribunal, indicated that real estate agents and vendors often have a vested interest in discriminating against racialized people because they believe potential buyers are prejudiced and will therefore prefer less diverse neighbourhoods. The same expert had published work examining how Toronto's neighbourhoods had become increasingly polarized by income and race, with Black people disproportionately concentrated in the lower income parts of the City.[20] One possible explanation we were prepared to advance was "red-lining" practices at various levels, including by real estate vendors.

Another recent case I worked on was called *Black et al. v City of Toronto*,[21] in which my co-counsel and I sought an injunction to stop the City of Toronto from evicting people experiencing homelessness from City parks during the COVID-19 pandemic. The core of our claim was that the City's policy of clearing out the parks, often with force and violence, put our homeless clients in danger, particularly in the absence of housing alternatives available other than unsafe congregate living situations rife with COVID-19.[22] Part of that case was about discrimination on various grounds including race and disability, because racialized and LGBTQ+

[19] *Walkes v. Reid's Heritage Homes*, 2021 HRTO 251 ["*Walkes*"].
[20] J. David Hulchanski et al., "The Three Cities Within Toronto: Income Polarization Among Toronto's Neighbourhoods, 1970-2005" (2010), online: Cities Centre, University of Toronto <http://www.urbancentre.utoronto.ca/pdfs/curp/tnrn/Three-Cities-Within-Toronto-2010-Final.pdf>. See also Sandro Contenta, "Toronto is Segregated by Race and Income. And the Numbers Are Ugly" (1 October, 2018), online: *Toronto Star* <https://www.thestar.com/news/gta/2018/09/30/toronto-is-segregated-by-race-and-income-and-the-numbers-are-ugly.html>.
[21] 2020 ONSC 6398 ["*Black*"].
[22] *Ibid* at paras. 2-5.

people are disproportionately represented among those experiencing homelessness.[23] The way we saw it, this was just one more example of the indifference of the powerful to the wellbeing of the stigmatized and marginalized, whether because of race or some other kind of "otherness."

The basic fact that I mean to illustrate with these statistics and examples, and one of the fundamental realities underlying my practice, is that racism are other kinds of discrimination are real in Canada, and that they manifest themselves wherever people with power exercise wide discretion without sufficient accountability. This is the background reality that we need to recognize if we are going to have a conversation about racial discrimination and access to justice, or about the processes by which we aim to make rights meaningful in the face of prejudice and systemic disadvantage. Every time racial bias and discrimination rears its head, it puts more and more distance between the person and the right, thereby inhibiting access to justice, whether in a courtroom, an encampment site, a daycare centre, or a courthouse lounge.

2. The Impact of COVID-19

The COVID-19 pandemic has impacted every aspect of life and law around the world, and my practice is no exception. Remote work, Zoom court appearances, meetings and hearings, constantly changing pandemic regulations, the anxiety of contact tracing and needing to get tested – all of these have become ordinary parts of life in the last 15 months. The theme that I want to focus on for this paper, though, is the tendency for the COVID-19 pandemic and associated regulations to exacerbate pre-existing injustices and inequalities, disproportionately affecting those who were already stigmatized, marginalized, or disadvantaged in one way or another.

[23] *Ibid* at paras. 60, 66.

Nowhere is it clearer how COVID-19 exacerbates pre-existing disadvantages than in the prison system. One of my clients has been in Toronto South Detention Centre (TSDC) for most of the COVID-19 pandemic. That institution has been consistently plagued by outbreaks, beginning with multiple cases in March 2020.[24] In December, 2020, it was reported that the COVID-19 cases at TSDC had doubled in a single week[25] and, more recently, in March 2021, site-wide testing found 70 cases of coronavirus in staff and inmates, 36 of which were variants of concern.[26] These outbreaks are, of course, horrible for those who contract the disease, but also have a huge impact on those who do not, causing enhanced lockdowns that make life behind bars even more grim than it already is. As I have mentioned above, Black and racialized people are vastly overrepresented in the imprisoned population, meaning that the issue of pandemic conditions in detention centres are, by definition, a racial justice issue.

The encampment case, *Black et al. v City of Toronto*, is another case in point. That application specifically addressed the City's actions, and failures to act, in the context of the pandemic, but the underlying reality was that of a homelessness and housing crisis that preceded the virus by several decades. Beginning in Mach 2020, COVID-19 merely exacerbated this pre-existing emergency, sending many to take refuge and seek community in Toronto's parks. Several of the applicants in *Black* lost work or precarious housing due to COVID-19 and found themselves suddenly thrust into homelessness.[27] As I have mentioned, most of these individuals had

[24] Shanifa Nasser, "Inmate with COVID-19 Admitted to Toronto South Jail After Testing Positive" (25 March, 2020), online: *CBC* <https://www.cbc.ca/news/canada/toronto/covid19-inmate-ontario-jail-1.5510308>.
[25] Brian Aguilar, "COVID-19 Cases at Toronto South Detention Centre Doubled in a Week" (18 December 2020), online: *CTV News* <https://toronto.ctvnews.ca/covid-19-cases-at-toronto-south-detention-centre-doubled-in-a-week-1.5237767>.
[26] Gabby Rodrigues, "70 COVID-19 Cases Reported at Toronto South Jail Outbreak, 36 Variants of Concern" (17 March, 2012), online: *Global News* <https://globalnews.ca/news/7701537/toronto-south-detention-jail-etobicoke-covid19/>.
[27] *Black*, *supra* note 18 at paras. 11, 13.

disabilities, were racialized and/or were members of the LGBTQ+ community, groups that are overrepresented among the homeless population.

The City, in its campaign against the encampments, used force and the threat of force, including police, bulldozers, destruction of property and other aggressive tactics, to clear these individuals out of the parks.[28] Meanwhile, various municipal initiatives purported to make housing available in order to move these individuals indoors. However, the living spaces that were on offer, including shelters and hotels leased by the City for this purpose, had faced COVID-19 outbreaks, and often had oppressive rules and conditions that made life there unacceptable for many, including intravenous drug users and LGBTQ+ persons who had experienced discrimination at these institutions. Moreover, to the constant frustration of the Encampment Support Network, which provide support for the encamped population, those who sought shelter space were constantly being turned away due to lack of space despite the City's insistence that the shelters were not full.

If access to justice means being secure in fundamental rights and having recourse against those who would undermine one's safety and wellbeing, then the City's response to the encampments was clearly an access to justice problem. The encamped persons, protected in theory by their rights to equality and to life, liberty and security of the person, nonetheless faced state violence that put their lives in danger and fell disproportionately on members of marginalized groups. Access to justice in that case meant articulating, to the satisfaction of the court, the destructive impact that the City's policy was having on these rights. Ultimately, even with the help

[28] Liam Casey, "City Clearout of Toronto Homeless Encampments Leads to Standoff With Residents" (15 May, 2020), online: *CP24* <https://www.cp24.com/news/city-clearout-of-toronto-homeless-encampments-leads-to-standoff-with-residents-1.4941548?cache=almppngbro>. See also, more recently, Tanya Mok, "City Brought Bulldozers and Police to Evict Residents From a Toronto Encampment" (19 May, 2021), online: *BlogTO* <https://www.blogto.com/city/2021/05/police-brought-bulldozers-evict-residents-toronto-encampment/>.

of two expert witnesses on the medical effects of homelessness and COVID-19, this task proved impossible, at least for the purposes of the injunction application, though the case remains before the courts.[29]

Yet another aspect of how COVID-19 has exacerbated pre-existing problems is the issue of mental health. For most of us, the period since March 2020 has been a difficult one rife with isolation and anxiety. Many, too, have faced the additional stress that comes from the economic impact of the pandemic and shutdown, with millions struggling to find or keep jobs, or ejected from already precarious housing situations, as we saw in the encampment case.

Many of my clients have clearly been impacted in their mental health as a result, direct or indirect, of the COVID-19 pandemic. When the pandemic and shutdown hit, some of my clients began racking up multiple criminal charges, including serious violent offences, as they struggled to cope with their mental health in the time of COVID-19. Others had to take leave from their jobs due to stress after supports and critical social services such as childcare suddenly disappeared.

The mental health impact of COVID-19 has not yet been properly measured or understood. When it is, I believe the data will show that the mental health consequences of the pandemic have fallen disproportionately on people who were already marginalized, stigmatized or disadvantaged. This reality of COVID-19 is already apparent to me from my practice.

Before moving on, I will touch on an area where a potential injustice resulting from COVID-19 was averted, at least in part, through public resistance and activism. On April 16, 2021, the Province of Ontario announced it was enhancing enforcement of the stay-at-home order by allowing police to randomly demand individuals' home address and purpose for being outside of

[29] More precisely, what we needed to establish to win the injunction was (1) that there was a serious issue to be tried, (2) that irreparable harm would result absent an injunction, and (3) that the balance of convenience favoured the injunction: *Black*, *supra* note 18 at para. 39.

the home, including being able to stop vehicles for this purpose.[30] The new powers led to widespread public outrage, particularly within the Black community, as police random street checks have historically been a tool of police racial profiling.[31] An advocacy group called the Black Actions Defence Committee (BADC), of which I acted as their legal counsel, announced its intention to launch a *Charter* challenge to the new power, which it stated, "will lead to tragedy in Ontario if not overturned."[32] Other groups, including the Canadian Civil Liberties Association and Canadian Association of Black Lawyers, loudly voiced their objections.[33] Following this immediate backlash, the Province announced the very next day it was amending the regulation to remove the power to conduct random checks.[34] The potential tragedy, predicted by CCLA, CABL, BADC, was averted.

The Ontario's reversal on the controversial police powers was encouraging. Nonetheless, this episode, too, should give us pause. The proposed random carding power, though it never materialized, nonetheless indicates the potential of COVID-19 regulations to disproportionately impact certain groups including racialized people. One can only imagine the nightmare of enhanced racialized policing and access to justice that almost came to be before the province walked back its initial draconian proposal.

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[30] O. Reg. 294/21.
[31] Nick Westoll, "COVID-19: Ontario's Temporary Increased Police Powers Raise Concerns About Random Stops, Carding" (16 April, 2021), online: *Global News* <https://globalnews.ca/news/7765412/covid-19-ontario-temporary-police-powers-carding/>. For the racialized impact of random checks, or "carding", see the Honourable Michael H. Tulloch, *Independent Street Checks Review* (Toronto: Queen's Printer for Ontario, 2018).
[32] Black Action Defence Committee Inc., "BADC Press Release: BADC to Launch Charter Challenge of the Provincial Emergency Order of April 16, 2021" (17 April 2021).
[33] Canadian Association of Black Lawyers, "CABL's Statement Regarding the Province of Ontario's Broadening of Police and Peace-Officers Street Check Powers" (19 April, 2021), online: <https://cabl.ca/wp-content/uploads/2021/04/CABLs-statement-re-the-Province-of-Ontarios-Broadening-of-Police-and-Peace-Officers-Street-Check-Powers-1.pdf>.
[34] O. Reg. 298/21.

3. What Can Be Done?

Above, I have laid out some of the systemic barriers I have dealt with in my practice that constrain racial justice and access to justice, both under COVID-19 and more generally. The question now is what can be done to break down these and other barriers and eliminate, or diminish, the impact of systemic discrimination on people's ability to realize and enjoy their basic rights.

There are, of course, innumerable things that governments and others could do differently in order to decrease racial discrimination and other forms of systemic injustice. Take the encampment case, to name just one example. There, the City pursued a policy of forcing homeless people out of the only relatively safe place available to them in order to free the parks up for recreational use by comparatively privileged people. This was a troubling example of government's indifference to the marginalized. A different political approach, affording more flexibility to the people in the parks, may have made our application unnecessary. So, too, could a fundamentally different political attitude toward the underlying housing and homelessness crises. In other words, these are political problems with political answers. A big part of that is community organizing, which has little to do with the administrative process as such.

For the purposes of this paper, however, I stick to my role as a litigator and legal advocate, and I consider a few legal and procedural tweaks that could improve the problems of racial justice and access to justice which I have encountered, many of which I have set out above. I offer four such proposals.

My first proposal relates to the Human Rights Tribunal. The proposal is simple: damages awards should be higher, particularly general damages awards for injury to dignity, feelings and self-respect, which is the Tribunal's way of recognizing the inherent harm done by

discrimination.[35] Many of my Tribunal cases deal with racial profiling and discrimination in the provision of various services. General damages in this area where the discrimination is by police generally range from $5,000[36] to $40,000,[37] with the higher end reserved for serious use or threat of force. Where the discrimination is by someone other than police, awards are even lower, ranging from $2,000[38] to $15,000[39] (In fact, the low-water mark of $2,000 comes from my own case, which I discuss above, in which I was carded at the courthouse). Importantly, too, the Tribunal does not have the power to award costs.

These awards are too low. A $2,000 or $5,000 award does little to ameliorate the harm done by discrimination and will most often not be worth the trouble of litigating, particularly where costs are not available. The message that this sends to service providers is that supposedly "minor" acts of discrimination, like the carding I experienced at the courthouse, will generally go unchallenged. What this means is that justice, for many who experience this kind of discrimination, is not practically accessible unless they find a lawyer prepared to take on their case pro bono or at a significant discount. Some do, including many of my clients. Many, however, will not be able to find that crucial legal help.

My second proposal is that more studies and reports need to be done, particularly by official bodies like the Human Rights Commission, into different kinds of racial and other discrimination in various sectors. The Commission has published fairly extensively on police racial profiling and discrimination, and these studies have proven useful tools in my practice for putting the systemic reality of police discrimination in front of the Tribunal and other bodies.[40] However,

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[35] See *Human Rights Code*, R.S.O. 1990, c. H.19 s. 45.2.
[36] *Abbott v. Toronto Police Services Board*, 2009 HRTO 1909.
[37] *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220.
[38] *Pieters v. Peel Law Association*, 2010 HRTO 2411.
[39] See for example *Longboat v. 708179 Ontario Inc.*, 2012 HRTO 2170.
[40] *Supra* notes 1-4. See also *R. v. Le*, 2019 SCC 34 at paras. 89-97.

establishing this crucial context is more difficult in other sectors. Courts and tribunals will take judicial notice of racial discrimination and bias generally, but more specific systemic or institutional problems, such as widespread consumer profiling, often go unacknowledged.

Currently, if an applicant seeks to contextualize their claim in relation to an institutional problem of discrimination, they must seek out and produce scholarly research, if available, and/or call an expert witness, which can be a costly and difficult process. I referred above to a recent case dealing with real estate discrimination.[41] There, we tried to call an expert on race in real estate and enter a series of scholarly reports as evidence. All were rejected by the Tribunal.[42] If the Commission had conducted meaningful, in-depth research into consumer profiling in real estate and other sectors, we might not have had the same problem, and applicants with cases like ours would be better able to point to their experiences as part of a larger, systemic problem. In the absence of such research, subtle manifestations of discrimination often become practically invisible to the evidentiary process.

My third proposal is related to my second, as it is also about expertise. The Human Rights Tribunal and other bodies competent to address discrimination claims should have a greater emphasis on, and openness to, expertise in discrimination. There are two aspects to this: first, in the staffing of the tribunal itself. Adjudicators should only be drawn from people with knowledge and expertise in human rights and discrimination issues. The second part of this emphasis on expertise, in addition or in the alternative, is for tribunals to be more open to hearing expert evidence, particularly when brought by those alleging institutionalized discrimination, as a routine part of adjudication. This expertise will supplement that of the Tribunal itself and make the whole process more accepting and understanding of the complex reality of racism. Discrimination is as

[41] *Walkes*, *supra* note 16.
[42] *Ibid* at paras. 15-29.

subtle and pernicious as it is widespread. Specialized knowledge of how discrimination works, and of where and how it manifests itself, is a crucial part of bringing it to light for the purposes of law. This, in turn, impacts access to justice.

My fourth proposal is that, in tribunal proceedings, preliminary screening tools like summary hearings at the Human Rights Tribunal should be used sparingly or not at all to screen out human rights claims in the nature of racial profiling. Currently, Rule 19A of the Human Rights Tribunal Rules of Procedure enables the Tribunal, independently or on the request of the respondent, to assess applications and dismiss those deemed to have "no reasonable prospect" of success, analogous to summary dismissal motions in civil litigation.[43] This rule is often used against racial profiling claims which, due to the subtle nature of this kind of discrimination, may not set out an obvious case from the pleadings alone.[44] In some cases, these preliminary proceedings lead to credible claims of racial profiling being dismissed before evidence can even be produced.[45]

Clearly, this practice is troubling from an access to justice standpoint. Dismissing an application without a hearing means foregoing all context and seeing the pleadings in a vacuum without evidence. Moreover, whether or not the claim is dismissed at the summary hearing stage, the addition of this preliminary hurdle places that much more friction into the adjudicative process, thereby straining access to justice in the system as a whole. Racial profiling applications in particular, being especially context-sensitive and often involving particularly subtle forms of differential treatment, should not be subject to this additional procedural strain.

[43] Other jurisdictions have analogous provisions. See for example section 27(1)(c) of BC's *Human Rights Code*.
[44] See for example *Collins v. Movati Athletic (Group) Inc*., 2020 HRTO 849.
[45] For a particularly concerning example of a racial profiling claim rejected at summary hearing, see the "shopping while black" case of *Shirley v Staples Canada Inc.*, 2016 HRTO 521.

I offer these four examples of procedural tweaks in addition to the many other, perhaps more obvious answers to the access to justice problem: greater resources for legal clinics, legal aid, and other accessible legal resources; improved mental health services for low-income people; stronger relationships between legal service providers and community groups;[46] training, education, and meaningful human rights policies at pubic and private institutions; a change in political culture of legal practice, law societies, law schools, and other legal bodies. All of these are crucial parts of the conversation about access to justice and I do not mean to supplant or diminish their importance. Rather, I offer the proposals above as additional, targeted lessons gleaned from my particular experience as a racial justice lawyer and advocate. I put these ideas forward as part of the broad rethinking of access to justice that I hope this conference will contribute to.

[46] See Julie Mathews & David Wiseman, "Community Justice Help: Advancing Community-Based Access to Justice" (2020), online: *Toronto Community Legal Education Ontario* <https://cleoconnect.ca/wp-content/uploads/2020/07/Community-Justice-Help-Advancing-Community-Based-Access-to-Justice_discussion-paper-July-2020.pdf>. See also Aidan MacNab, "Enhanced Access to Justice Needs More Than Lawyers and Paralegals: Report" (14 July 2020), online: *Law Times* <https://www.lawtimesnews.com/resources/professional-regulation/enhanced-access-to-justice-needs-more-than-lawyers-and-paralegals-report/331429>.