

# The Effectiveness of Human Rights Commissions and the Need for Jurisdictional Focus

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The views expressed in this paper are completely unsupported by any research or empirical analysis. They are the impressions of the writer who has spent one decade as legal counsel at a human rights commission and another in private practice representing clients involved in human rights proceedings. My experience has been limited to the federal and Ontario jurisdictions.

Any discussion of the efficacy of human rights commissions must begin with a recognition of the great number of human rights complaints that they process annually. Much of their work takes place outside of public view, as many human rights complaints are settled and receive no publicity. Many cases are "resolved" even before the formal process is initiated. Human rights officers routinely become involved in discussions and negotiations with the parties prior to the signing of a formal complaint. Settlements of cases at this stage will not be reported in statistics of the formal complaint caseloads of the commissions.

Commissions also advise many individual members of the public in regard to their rights and problems they are encountering. These contacts, the number of which is very large, will also not appear in the commissions' formal caseloads.

Each year a great number of human rights board hearings are successfully concluded. In 1972, there were only 7 boards of inquiry held in all of Canada. Ten years later, in the year 1982, there were 114 cases reported in the Canadian Human Rights Reporter. In 1994-95, there were some 214 cases.<sup>1</sup>

Human rights commissions provide individuals with a wide range of effective remedies. In the employment context, reinstatement or provision of the next available position is a standard remedy in discrimination cases. Lost wages are not limited by a period of reasonable notice as in wrongful dismissal cases. Employers have been ordered to promote the complainant whom the boards have found has suffered discrimination even where the removal of another individual from the position was required.<sup>2</sup> Remedies are provided in varied contexts throughout a broad spectrum of Canadian life. The Canadian Human Rights Tribunal ordered the Canadian Armed Forces to open up combat positions to women.<sup>3</sup> Tribunals have reviewed immigration decisions as to who may visit or be sponsored as an immigrant to Canada.<sup>4</sup> A board has ordered a Chief of Police of a municipality to issue a parade license he had initially refused.<sup>5</sup> Human rights orders have also varied the rules in children's bowling tournaments to accommodate disability,<sup>6</sup> and

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1. As reported in the Canadian Human Rights Reporter.
  2. *Chander and Joshi v. Dept. of National Health and Welfare*, Canadian Human Rights Tribunal, April 9, 1996, T.D. 5/96; *Karumanchiri v. Ontario (Liquor Control Board)* (1987), 8 C.H.R.R. D/4076.
  3. *Gauthier v. Canada (Canadian Armed Forces)* (1989), 10 C.H.R.R. D/6014.
  4. *Canada v. Menghani (Employment and Immigration Comm.)* (1992), 17 C.H.R.R. D/236.
  5. *Geller v. Reimer* (1994), 21 C.H.R.R. D/156.
  6. *Youth Bowling Council of Ontario v. McLeod* (1990), 14 C.H.R.R. D/120.

decided who should be appointed leader of a brownie pack.<sup>7</sup> Boards have decided whether same sex couples should receive the same spousal benefits as married heterosexual couples,<sup>8</sup> and on what days a milk marketing board should pick up milk from dairy farmers.<sup>9</sup> In sexual and racial harassment cases, human rights boards routinely regulate what co-workers may say to each other.

In recent times, some of the commissions have begun to make changes in their structures and attitudes which have led to improvement in their performance. Especially noteworthy is British Columbia which is implementing a bold and interesting new approach on October 1, 1996 which is certain to be watched carefully by the other jurisdictions. These fresh approaches may make some of the following observations obsolete. It is against this backdrop recognition of the volume, vigor, and scope of the commissions' work, and of their recent efforts at change, that one may raise questions about their performance.

## I. DELAY: THE MAIN PROBLEM

Human rights commissions are widely seen as slow and cumbersome. The Ontario Ombudsman completed an investigation of 38 complaints in May of 1991 and found that there was excessive delay in all of them. She concluded that: "The Commission had failed to effectively carry out its mandate and had denied procedural fairness to both complainants and respondents involved, province wide".

Casual perusal of simple complaints of individual discrimination which proceeded to a formal hearing indicate that in Ontario, delays of more than five years have been routine.<sup>10</sup> The problem is by no means limited to the Ontario Commission. In

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7. *Thambiraja v. Girl Guides of Canada*, B.C. Human Rights Council, December 8, 1995.

8. *Moore and Akerstrom*, Canadian Human Rights Tribunal, June 13, 1996, T.D. 8/96, *Leshner v. Ontario (No. 2)* (1992), 16 C.H.R.R. D/184.

9. *Janssen v. Ontario (Milk Marketing Board)* (1990), 13 C.H.R.R. D/397.

10. *Shreve v. Windsor (City) (No. 2)* (1993), 18 C.H.R.R. D/363  
 date of alleged discrimination: 1985/86  
 date of complaint: August 1986  
 date of board appointment: August 1991

*Simms v. Seetech Metal Products* (1993), 20 C.H.R.R. D/477  
 date of alleged discrimination: August 1986  
 date of complaint: September 1987  
 date of board appointment: November 1992

*Rodley v. Barclay* (1993), 19 C.H.R.R. D/503  
 date of complaint: July 26, 1986  
 date of board appointment: October 27, 1992

Saskatchewan, a straight forward case of an individual who was refused admission to a bar because of race and color with witnesses present took 2-1/2 years to process.<sup>11</sup>

The writer's view is that the main cause of the delay is that there are more complaints than the commissions are able to process efficiently. In the fiscal year 1993-94, the Ontario Commission formally closed 945 files but opened 2,286. In 1994-95, it closed 1,240 files but opened 2,452 files. The fact there are so many complaints leads to a backlog that clogs the system and delays all cases. (The Ontario Commission does not use the term "backlog" but prefers "caseload".) The writer's view is that unless it is recognized that human rights commissions have too many complaints, and unless measures are taken to deal with the commissions' caseloads, they will never be able to operate efficiently.

### A. Expanding Jurisdiction

One reason there are so many human rights complaints is the legislative expansion of the prohibited grounds covered by the codes. When the Ontario Code was first enacted in 1961, the prohibited grounds of discrimination were race, creed, color, nationality, ancestry or place of origin.<sup>12</sup> The current Ontario Code contains the following grounds: race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status, handicap, and receipt of public assistance in matters of accommodation.<sup>13</sup>

By contrast, the American *Civil Rights Act* covers only race, colour, religion, sex and national origin.<sup>14</sup> I have heard it said that some of the support to add religion, sex and national origin to the *Civil Rights Act* had the hidden agenda of diluting the attention the Equal Employment Opportunities Commission would be able to devote to race complaints.

While the addition of new grounds adds to the workloads of the commissions, the traditional grounds still contribute the greatest number of complaints. For example in 1994 the grounds "ancestry", "disability" and "sex" accounted for 77% of the complaints filed with the Manitoba Commission, whereas the grounds "source of income" and "sexual orientation" accounted for only 2%.<sup>15</sup>

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11. *McNab v. Calyniuk Restaurants Inc.* (1996), 24 C.H.R.R. D/254 (Sask. Bd. of Inq.).

12. *An Act to establish the Ontario Code of Human Rights and to Provide for its Administration*, S.O. 1961-1962, c. 93.

13. *Ontario Human Rights Code*, R.S.O. 1990, c. H.19.

14. *Civil Rights Act*, 42 U.S.C. s.703(a), 2000e.

15. 1994 Annual Report of the Manitoba Human Rights Commission, at 23.

## B. Expansion of Subject Matter

Another significant reason for the heavy caseloads of the commissions is that the concept of discrimination has broadened, resulting in a great expansion of what social issues are treated as matters of discrimination. Unintentional "adverse effect" discrimination, "poisoned environment" and the "duty to accommodate" have added large categories of cases to the commissions' workload.

Despite the fact that the grounds of discrimination are so varied, and raise such dissimilar issues, the law of human rights is considered a cohesive whole. Legal concepts and principles developed to meet a specific need in a particular context, are applied to very different cases. The result is that the number of cases mushroom.

For example, the "adverse effect" principle was first applied in Canada to the ground of religion. The neutral requirement that employees work on Saturday had an unintentional adverse effect on an employee whose religion forbade working on Saturday.<sup>16</sup> The principle, when applied to grounds such as "age", "family status" and "receipt of public assistance", has an extremely wide potential for application. An Ontario board of inquiry is currently considering a group of complaints that landlord's requirements that tenants' rent not exceed 30% of their income discriminates on the basis of "receipt of public assistance".<sup>17</sup> The Commission is taking the position the 30% requirement is a neutral rule which has an adverse effect on individuals who are in "receipt of public assistance".

Another interesting example is the recent Ontario Board of Inquiry into the complaints of women who object to the sale of "adult men's" magazines in neighbourhood convenience stores.<sup>18</sup> While the Board dismissed the complaints for defects in procedure, the Commission was prepared to argue that the presence of the magazines in the stores creates a "poisoned environment" in which the complainants shop. The "poisoned environment" concept was developed in the employment context to deal with sexual harassment cases in which the victim suffered no tangible job consequences but had to endure pervasive sexual comments and behavior. The number of potential complaints expands exponentially when a concept developed in the context of employment is applied in the realm of services.

## C. Lack of Jurisdictional Focus

While these factors play a role in increasing the commissions' caseloads, my impression is that the commissions' structure and attitudes towards their jurisdiction exacerbates the problem. Rather than resisting the avalanche of complaints, commissions

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16. *Ont. Human Rights Comm. v. Simpson Sears*, [1985] 2 S.C.R. 536.

17. *Kearney v. Bramalea Limited*, and other cases, ongoing.

18. *Findlay v. Mike's Smoke and Gifts (No. 4)*, [1993] 21 C.H.R.R. D/19.

in the past seemed to have constantly strived to enlarge their jurisdiction. They speak of "expanding the envelope" of coverage. An expansive view of their jurisdiction multiplies the cases with which they must deal.

A casual review of cases will show that the commissions have not focused their jurisdiction on matters which evoke the title "human rights". Rather, the writer's impression is that commissions attempt to respond to all injustice by characterizing any unfairness as a "human rights" issue. This results in the commissions taking on a caseload that chokes them and prevents them from dealing expeditiously and effectively with the complaints that the legislature intended them to. For example, the Ontario Commission referred a complaint of an individual with the "flu" to a board of inquiry under the prohibited ground "handicap". The board of inquiry dismissed the complaint, stating:

*In my view, it would be wrong to attempt to stretch the meaning of illness under s. 9(b)(i) of the Code to include the flu. It would be wrong to do so, in part, because of the effect of such a construction on the high purpose otherwise achieved by the interpretation provision in protecting those who are actually or perceived to be materially impaired through illness. Where the Code calls for defined groups to be protected, the Commission would include literally everyone suffering from a few days' illness. I cannot accept that the intent of s. 9(b)(i) is to embrace such kinds of discrimination.<sup>19</sup>*

It may well be that a person with the flu may be the victim of an arbitrary and unjust treatment. However, it must be clear that the legislature did not have protection of those with the flu in mind when it added "handicap" as a ground of discrimination to the Ontario Human Rights Code. Even though the Commission changed its practice after this decision, the Commission had already been expending resources on such complaints for a number of years.

Not all cases are as clear as *Lily Cups*. Commissions routinely deal with relatively "minor conditions" as "disabilities". The Special Parliamentary Committee on the review of the *Employment Equity Act* recognized the tension between minor conditions and severe disabilities in the employment equity context. In its Report to Parliament, the Committee noted:

*People with mild limitations, such as poor eyesight that can be remedied by eye glasses, can identify themselves in such [employment equity] surveys as disabled for the purposes of employment equity and can be included as such in the employer's report.<sup>20</sup>*

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19. *Ouimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19. It should be noted that following this decision, the Commission adopted guidelines to limit the types of medical conditions it would consider as "handicaps" under the Code.

20. *A Matter of Fairness*, Report of the Special Committee on the Review of the *Employment Equity Act*, House of Commons, Canada, May, 1992, at 23.

This same tension between mild limitations and more severe disabilities exists in the human rights process as cases compete for scarce enforcement resources. Conditions that are "ordinary" can be treated as a "disability". After all, no human being is a perfect specimen. All of us have permanent defects and suffer temporary conditions. However, the dividing line between a minor condition and a "disability" under human rights legislation is not easy to define. The statutory definitions seem broad, and the commissions and the courts have generally interpreted them liberally. Ontario's definition of "handicap" includes the phrase: "[...] 'any degree' of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect, or illness [...]" (emphasis added).<sup>21</sup>

An apt example is imperfect eyesight. Tribunals routinely deal with cases where the issue is the proper visual acuity standard to be applied to a particular job. Tribunals have dealt with complaints concerning the proper visual acuity standard for an Armed Forces recruit,<sup>22</sup> for the Regular Officers Training Program,<sup>23</sup> for a bus driver,<sup>24</sup> for a correctional employee,<sup>25</sup> for a fire fighter,<sup>26</sup> for a flight attendant,<sup>27</sup> for food and beverage servers on a railway train,<sup>28</sup> and for an RCMP static guard.<sup>29</sup> Tribunals have also dealt with the standard of binocular vision required of an Armed Forces cadet,<sup>30</sup> as well as the standard of color perception for an airline pilot.<sup>31</sup> It must be noted that one Ontario Board has ruled that a minor impairment in visual acuity not caused by injury, illness or birth defect is not a "handicap".<sup>32</sup>

Medical opinions as to proper visual standards for an occupation differ. Many visual standards imposed by employers may be in need of review and updating. It may well take a hearing to decide on the standard to be applied to a particular job, but is this the mission of human rights commissions? In a sense, it is a compliment to Canada that such subjects are dealt with under the heading "human rights". The question that needs to be considered is whether treating minor defects in eyesight as "disabilities" hampers the commissions' ability to effectively and expeditiously deal with complaints relating to more

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21. *The Human Rights Code, 1981*, S.O. 1981, c. 53, s. 9(b)(i)

22. *Husband v. Canada (Armed Forces)* (1992), 15 C.H.R.R. D/197.

23. *Hebert v. Canada (Armed Forces)* (1996), 23 C.H.R.R. D/107.

24. *McDougall v. Saskatchewan Transportation Co.* (1991), 14 C.H.R.R. D/108.

25. *Phalen v. Solicitor General of Canada* (1981), 2 C.H.R.R. D/433.

26. *Zinck v. Halifax (City) Fire Dept.* (No. 3) (1991), 13 C.H.R.R. D/131 (N.C. Bd. of Inq.)

27. *Cremona v. Wardair (Canada Inc.)* (1991), 14 C.H.R.R. D/262 (CHRT).

28. *Foreman v. Via Rail Canada Inc.* (1980), 1 C.H.R.R. D/111 (CHRT).

29. *Seguin v. Royal Canadian Mounted Police* (1989), 10 C.H.R.R. D/5980 (CHRT).

30. *Canada v. Rosin (Canadian Forces)* (1989), 10 C.H.R.R. D/6236 (CHRT).

31. *Bicknell v. Air Canada* (1980), 5 C.H.R.R. D/1992 (CHRT).

32. *Yeomans v. Ottawa (City)* (1993), 20 C.H.R.R. D/502.



serious conditions which are competing for enforcement resources. One might note that the Canadian Commission took well over three years to investigate several complaints of wheelchair users who did not have access to election polls during the 1984 federal election,<sup>33</sup> and question whether these complaints could have been dealt with more expeditiously if the Commission had not been occupied with so many other complaints.

Attached as Appendix A is a copy of the subject index from the Canadian Human Rights Reporter dealing with "Type Of Disability". The list includes cases involving acne, seasonal allergies,<sup>34</sup> and flat feet. My impression is that the single issue raised most frequently in "disability" complaints is the situation in which the complainant has been refused a job involving physical lifting because he or she has suffered a previous back injury. The question in these cases is whether the complainant has sufficiently recovered to perform a job involving lifting. The irony in these cases is that the complainant is arguing in effect that he or she is not currently suffering from limitations.

I stress that I do not suggest that these are unworthy cases. An individual who has recovered from a back injury should not be unfairly refused a job because of the employer's fear that it will incur Workers' Compensation costs as a result of a further injury to the complainant. It is unfair that individuals are refused employment because their uncorrected visual acuity fails to meet unnecessarily high standards. However, given the reality that commissions cannot deal expeditiously with cases involving more serious disabilities when they are burdened with dealing with such complaints, the question must be asked whether individuals with such complaints should proceed by some other, perhaps private, process. Private causes of action are not a viable option in most cases since the Supreme Court of Canada decided that there is no tort of discrimination and that commissions have exclusive jurisdiction over complaints of discrimination.<sup>35</sup> That decision dealt with a complaint of race discrimination and was rendered in 1981, when there were fewer grounds of discrimination, and long before the recognition of unintentional adverse effect discrimination and other concepts that have immensely expanded the scope of discrimination complaints.

Given the breadth of the statutory definitions of the terms "handicap" and "disability", it may well be that commissions could not decline to deal with such complaints. If they did, they might well be subject to mandamus by the courts. Ultimately, it is up to the legislatures to provide more precise and limiting definitions of the prohibited grounds in the governing legislation to better focus the commissions' jurisdiction.

The commissions do not resist expansion into new areas. Consider the case involving the sale of adult magazines in convenience stores.<sup>36</sup> One might have thought that the Commission would have deferred attempting to apply the "poisoned environment"

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33. *Canadian Paraplegic Assn v. Canada (Elections Canada)* (1988), 10 C.H.R.R. D/5707.

34. *Morgoch v. Ottawa (City)*, (1989), 11 C.H.R.R. D/80.

35. *Bhadhuria v. Seneca College*, [1981] 2 S.C.R. 183.

36. *Supra* note 18.

concept in the realm of services, until it could deal expeditiously with "poisoned environment" employment cases it already had before it.

It is interesting to note that the municipal council had prescribed the standard for the sale of adult magazines in convenience stores by issuing a by-law that the covers of the magazines should be concealed. The existence of the by-law would be regarded as irrelevant by the Commission, because human rights legislation take primacy over other conflicting legislation. The Supreme Court of Canada has decided that human rights statutes prevail over other conflicting statutes<sup>37</sup> even in the absence of an express primacy clause such as Ontario's. Primacy has greatly expanded the number of potential complaints because complaints about acts or decisions taken with statutory authority are not foreclosed.

#### **D. Failure Use Administrative Controls**

Even though a large part of the commissions' caseloads are beyond their control, they have generally failed to use available administrative and procedural mechanisms to turn away complaints. For example, commissions generally have the jurisdiction to extend the time limits within which a complaint should be filed.<sup>38</sup> A fair observation would be that the commissions have extended the time limits indiscriminately. Dealing with tardily filed complaints contributes to the commissions' caseloads and their inability to deal with any complaint in a timely expeditious manner.

Commissions have also contributed to their own workload by dealing with matters that could be resolved in a different forum. Commissions generally have jurisdiction to refuse to deal with complaints that "[...] could or should be more appropriately dealt with under another Act [...]".<sup>39</sup> An alternative process with the potential to deal with many employment complaints is the process of labour arbitration which is ordained by labour relations statutes. But commissions and human rights boards have generally dealt with complaints relating to matters that already have been arbitrated. The boards have reasoned that a private agreement, such as the collective agreement, cannot oust the jurisdiction of the board, that the issues and parties are different in a human rights case, and that the Code entrusts enforcement to the commission which was not a party to the arbitration.<sup>40</sup> In one recent example, an Ontario board of inquiry made fresh findings of fact in 1996

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37. *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150.

38. For example, six months under section 34 of the *Ontario Human Rights Code*, *supra* note 13, and one year under section 41 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33.

39. For example, see section 34(1)(a) of the *Ontario Human Rights Code*, *supra* note 13.

40. *Derkson v. Flyer Industries* (Man. 1977), *Hadley v. Mississauga* (Ont. 1976).

regarding events that took place in 1985 after rehearing evidence heard by a labour arbitrator in 1986 dealing with the same events.<sup>41</sup>

Commissions also generally have the authority to decline to deal with complaints that are "trivial, frivolous, vexatious, or made in bad faith".<sup>42</sup> Commissions rarely if ever use this section because of the understandable reluctance to describe a problem considered serious by the complainant in such terms. Yet, establishing priorities and screening complaints at the outset would allow commissions to dedicate greater resources to more serious cases. One might think that a seasonal allergy in the context of the purpose of the ground "handicap" could well be termed "trivial".

The Ontario Commission under Chief Commissioner Rosemary Brown adopted a strategy of using the Commission's jurisdiction to refuse to investigate a complaint more aggressively and thus allowing the Commission to focus its resources on cases that are considered of a strategic importance. During Ms. Brown's tenure, the Commission began to refuse to deal with complaints which had been or could be grieved under a collective agreement, or which were not filed in a timely fashion. The percentage of complaints closed under section 34 (the provision that allows the Ontario Commission to dismiss a complaint without investigation), went from 3.4% of all closed cases in fiscal year 1992/93, to 27.1% in the fiscal year 1994/95 (the last year for which complete figures are available). These figures illustrate the impact that the use of administrative and procedural controls can have on a commission's caseload.

## II. STRUCTURAL ISSUES

### A. Complaint Based System

Human rights statutes have been criticized for being complainant oriented. The enforcement machinery of the commission is triggered by the filing of an individual complaint. While commissions generally have the jurisdiction to initiate complaints, they seldom do so, probably because they lack specific information about instances of discrimination which would provide them with the required reasonable grounds for proceeding. Justice Lederman of the Ontario Court, General Division, a former President of Canadian Human Rights Tribunal Panel, writing with M. Grottenthaler, has described the system as:

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41. *Naraine v. Ford Motor Company of Canada Ltd.*, unreported. On the other hand, see *Axton v. B.C. Transit* (1996), 26 C.L.L.C. 230-2027, where the British Columbia Human Rights Council decided it had jurisdiction to deal with a complaint the subject matter of which had been previously arbitrated, but applied the principle of issue estoppel to prevent the litigation of issues already decided.

42. Section 34(1)(d) of the *Ontario Human Rights Code*, *supra* note 13; section 4(d) of the *Canadian Human Rights Act*, *supra* note 38.

*[...] an ad hoc, hit and miss approach to dealing with group inequality in our society. Only those circumstances about which an individual complains and then sues for the benefit of the group will be brought forward.*<sup>43</sup>

Professor Bill Black, a special advisor to the Minister responsible for human rights in British Columbia, has recently written:

### 1. Limits on the Accessibility of a Complaints-based System

*For a complaint to be filed and accepted, several elements are necessary. A person must have some indication that discrimination may have occurred. That person must also have the knowledge, resources and initiative necessary to contact the B.C. Council of Human Rights. For a complaint to succeed, the investigative process must be capable of gathering the necessary evidence.*

*This process, no matter how finely tuned and effective, inevitably misses many sources of inequality. A particular individual who is an unsuccessful applicant for a job may have no indication that the rejection resulted from a discriminatory barrier, even when such a barrier exists. The inequality may only become apparent if the cumulative effect of hiring decisions over time is examined or if the entire selection process is assessed. Since no single applicant will have this information, it is unlikely that anyone will file a complaint when the under-lying cause is a series of subtle systemic barriers.*

*Even if particular individuals do have an indication that a barrier to equality affected hiring decisions, they often will not file a complaint. They may not even know that the Human Rights Act exists. Language barriers may discourage them from contacting the B.C. Council of Human Rights. They may fear that knowledge of the complaint will become public and cause them to be labelled as a "troublemaker", making it harder for them to obtain other jobs. Many participants at the public meetings during the Review expressed a fear of retaliation, and some told stories of actual retaliation. Whether such a fear is legitimate or not in the particular circumstances, it will often cause a person to decide not to contact the Council.*

*A particularly serious concern is that those people who experience the most severe inequality are less likely than others to file a complaint. Past discrimination often has denied these people the education that would give them the skills to use the complaints process. People struggling with poverty may not have the time or resources to make a complaint. For some, discrimination is such an everyday occurrence that a long and strenuous effort to deal with a particular event seems beside the point. Experience with other government programs and institutions*

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43. See Mr. Justice S.N. Lederman & M.E. Grottenthaler, "The Evolving Public Policy Elements of Remedies for Human Rights Code Violations" J. Berryman, ed., in *Remedies: Issues and Perspectives* (Scarborough: Carswell, 1991) 335 at 349-350.

*sometimes creates distrust of all governmental agencies, including the B.C. Council of Human Rights.*

## 2. Focus on the Individual in Investigations

*If a complaint is filed, the investigation may not uncover the underlying cause of the discrimination. The focus of the investigation is almost always on the events directly relevant to the decision about the complainant. Once those facts are determined, there is little incentive to go further. If, for example, the evidence shows that the person who filed the complaint was justifiably rejected for a job, the investigation probably would not examine the selection process to see if it was unfair to other applicants. In addition, the parties may agree to a settlement consisting of a monetary payment, leaving the systemic barriers in place.<sup>44</sup>*

Justice Abella stated in her Royal Commission Report on Equality in Employment:

*The traditional human rights commission model, which valiantly signalled to the community that redress was available for individuals subjected to deliberate acts of discrimination, is increasingly under attack for its statutory inadequacy to respond to the magnitude of the problem. Resolving discrimination caused by malevolent intent, on a case by case basis puts the human rights commission in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest.<sup>45</sup>*

This viewpoint leads to the conclusion that human rights statutes should be complemented by more modern pro-active and systemic approaches such as employment equity statutes. In fact, it was Justice Abella in her Royal Commission Report who coined the term "employment equity".

The point can be illustrated. Instead of allowing individuals with mobility impairments to complain about instances where they have experienced lack of access, the law might simply prescribe the standards of access that all public buildings and public facilities must provide. The *Ontario Pay Equity Act* requires all employers to which it applies to take the initiative to ensure that their compensation structures are free of gender bias, rather than waiting for individuals to file complaints as is necessary under the equal pay provisions of the *Canadian Human Rights Act*.

In a complaint based system, having the commission deal with one's complaint has come to be seen as an individual's right. The fact the commissions lack jurisdiction

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44. "B.C. Human Rights Review: Report on Human Rights in British Columbia", December, 1994 at 15-16.

45. R. Abella, *Equality in Employment: A Royal Commission Report* (Ottawa: Supply and Services Canada, 1984) at 8.

to arbitrarily support only those complaints they consider of strategic public interest and turn away all others has the result that complainants define much of the commissions' agendas. People who complain, and not the commissions, decide how the commissions expend their resources. One reason for the expansion of the number of complaints is that individuals and groups are able to formulate their issues in terms of human rights because of the breadth of the concepts and liberalness of interpretation applied to them.

As will be discussed later, the new B.C. model seems to respond to this problem.

## B. Concurrent Roles

Human rights commissions face the challenge of playing many roles. The Cornish Task Force noted that even the Ontario Commission "[...] expressed dissatisfaction over the confusion and conflict caused by the many roles the commission has to play".<sup>46</sup> The commissions provide public education and advance social policies. At the early stage of the process, they draft the complaints that are filed by individual complainants. They are supposed to be a neutral investigator of complaints and act as impartial conciliator mediators attempting to settle complaints. Then, the commission is the neutral decision maker as to whether a complaint should go forward to a full hearing. If the case proceeds, the commission becomes the "prosecutor" and in effect represents the interest of the complainants. Complainants, regardless of their financial status, are represented free by the commission.

In my view, the fact that the commission becomes the ally and representative of complainants at the ultimate enforcement stage permeates the commission's entire process and demeanor. The Ontario Human Rights Commission, in its 1991-1992 Annual Report (the latest one available), referred to itself as being "[...] *technically* in a neutral position between complainants and respondents [...]" (emphasis added).<sup>47</sup>

The perception of many respondents that the commissions, while "technically" neutral, actually act as advocates of the complainant is exacerbated by the selection of persons for appointment to the commission. Professor Bill Black said:

*Part-time commissioners are usually chosen for their knowledge of broader human rights issues, their involvement in community affairs and education, and their knowledge of particular communities within the larger community.*<sup>48</sup>

The community affairs experience that many part-time commissioners have is involvement with and representation of a particular group protected by the Code. The

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46. "Getting Human Rights Enforced Effectively: An Issues Paper", Ontario Human Rights Code Review Task Force, at 6.

47. Ontario Human Rights Commission Annual Report 1991-1992 at 41.

48. "B.C. Human Rights Review: Report on Human Rights in British Columbia", December, 1994 at 36.

transition from being involved in a particular community to neutral decision maker is a difficult one. The Ontario Legislature's Standing Committee on Government Agencies noted that:

*For the Commission to be effective, it must be perceived to be impartial and neutral. In this light, it is important that the membership of the Commission be balanced. If the public believes that the composition of the Commission is weighted in favour of complainants or respondents, its credibility will suffer. For example, currently only one of the nine Commissioners represents employers, though employers are often the respondents named in complaints filed with the Commission.<sup>49</sup>*

As a consequence, the Standing Committee recommended that the Government appoint members to the Commission to reflect not only the diversity of the individuals and groups who appeal to the Commission but of those who are subject to its decisions as well.

### **C. Part Time Administration**

While commissions generally have a full-time Chief Commissioner or Chair, the statutory authority to make all decisions related to complaints processing is generally vested in the whole commission composed primarily of part-time commissioners. The Ontario Standing Committee indicated that part-time commissioners ordinarily serve a three-year term, that the full Commission meets on average eight times a year in three-day sessions to deal with policy matters, complaints initiated by the commission, and the management of contentious issues. In addition, a panel of three commissioners meets once a month to make decisions about cases.<sup>50</sup> In other jurisdictions the commission usually sits as a whole. In the short time that is available to them, the part-time commissioners are unable to carefully review the files relating to a large number of complaints whose fate they decide. Not only have they not observed the witnesses, they will not have read the actual witness' statements or reviewed the actual evidence obtained by the investigator. Rather, they review digested renditions of the evidence prepared by staff. While the parties may make written submissions to the commissioners, these, too, are often digested by staff.

The infrequent nature of their involvement makes it difficult for the part-time commissioners to gain the necessary experience, both practical and theoretical, to make effective decisions. It will usually be years before the commissioners are able to review the results of their decisions to move cases to a hearing. Once the commissioners have acquired the experience and expertise, their terms of office expire, and new part-time commissioners are appointed.

Professor Bill Black noted that one reason cases are delayed is that they must wait for the next regular meeting of commissioners and that often the workload is so heavy

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49. "Report on Agencies, Boards and Commissions (No. 20)" at 93-94.

50. *Ibid.* at 62-64.

that commissioners do not have time to take an active part in activities such as education and community liaison, though they were appointed because of their skills and experience in these areas.<sup>51</sup>

Human rights cases are important. Human rights jurisprudence is substantial. Human rights statutes have quasi-constitutional status. Yet, the most important decisions regarding case processing are made by part-time commissioners who make their decisions on the basis of summary written reports. A side effect is that the commission staff expends enormous resources preparing digested reports and briefing material for the commissioners. The paper burden on staff diverts their time and attention away from processing complaints.

The control of the complaints process by part-time commissioners has a negative effect on the role of commission counsel. To fully appreciate this, it is necessary to be familiar with recent decisions critical of commission decisions.

In *Kamani v. Canada Post Corporation*, a Canadian Human Rights Tribunal found there "wasn't a scintilla of evidence to support the complaint":

*Any diligent review of this case would have led to a conclusion that none of the prohibited grounds in the Canadian Human Rights Act played a part in the dismissal of the complainant from her employment. The Commission failed to make out even a prima facie case or anything close to it at the hearing [...] when it became apparent to counsel that the investigator had without justification, refused to accept what the witnesses had said to her [...] it should have been obvious that there was no probative evidence to substantiate the complaint. The circumstances did not warrant an inquiry and the Commission should not have pursued this matter to the bitter end... why wasn't this case weeded out either by the Commission or at a later stage, by Commission Counsel in preparation for the hearing? [...]*<sup>52</sup>

The Tribunal's remarks in the *Kamani* case were quoted and endorsed by the Tribunal in *Sehmi v. Via Rail Canada* which also said:

*The Tribunal would also like to express its regret, as it was apparent that a brief review of the record would have led to the conclusion that the case involved a disciplinary measure and not a practice contrary to the Act.*<sup>53</sup>

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51. "B.C. Human Rights Review: Report on Human Rights in British Columbia", December, 1994 at 36.

52. *Kamani v. Canada Post Corporation*, Canadian Human Rights Tribunal, T.D.# 20/93.

53. *Sehmi v. Via Rail Canada*, T.D.# 9/95, May 24, 1995 at 8.



In *Dhanjall and Canadian Human Rights Commission and Air Canada*<sup>54</sup> another Canadian Human Rights Tribunal discussed the proper role of commission counsel. The Tribunal said:

*[...] When he appears before the Tribunal, counsel for the Commission has a specific role to play. This role is quite different from the role of counsel for the Respondent or even from that of the complainant, who remains a party distinct from the Commission. This role, the role of Crown Counsel in criminal proceedings, as described by Sopinka J. in Stinchcombe, supra at 341, is that of "Minister of Justice", prompted first and foremost by considerations of public interest, rather than that of an "adversary".*

In *Human Rights Commission (Ont.) v. House*, the Ontario Divisional Court exhorted commission counsel to carry out their roles as "Ministers of Justice" and not as "adversaries". The Court said:

*[...] That the role of Commission Counsel is analogous to that of the Crown in criminal proceedings which is not to obtain a conviction but to place before a jury credible evidence relevant to what is alleged to be a crime.*<sup>55</sup>

The point that the commissions and commission counsel should participate in cases as the disinterested Crown, and not with the zeal of a litigant anxious to win is an important one. It is good that the courts and tribunals remind the commissions of this expectation. However, there is a distinction between Crown counsel in criminal proceedings and commission counsel that must be noted. Crown counsel has the responsibility to act impartially in the public interest, but also has the authority to do so. Crown counsel can stay or withdraw a charge based on his or her assessment of the merits of the case during preparation or during the hearing. On the other hand, in a human rights case, statutory authority over case processing is vested in the commissioners. While commission counsel may form a view of the merits of the case after reviewing the evidence and hearing the witnesses, the commission's position in the case has been determined by the statutory decision maker, "the Commission", composed primarily of the part-time commissioners. Commission counsel lacks authority to change the Commission's position. Moreover, Commission counsel's "client" is unavailable to give timely instructions. Commission counsel's "client" only comes together perhaps once a month and the agenda for the Commission's meetings is set well in advance. A written report would have to be prepared well enough in advance to be included in the "Agenda Book" provided to the commissioners prior to their meeting. Even if the commissioners, with their busy schedules, were inclined to reexamine decisions that they had already made it is unlikely they could do so prior to the continuation of the litigation.

While technology may make it possible for commissioners to make a decision without coming together, commissions have not used such techniques. The fact is that vesting statutory authority over complaints in a commission composed of part-time

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54. *Dhanjall and Canadian Human Rights Commission and Air Canada* T.D. #4/96, April 4, 1996.

55. (1993), 67 O.A.C. 72 (Ont. Div. Ct.).

members hampers commission counsel in acting as "Ministers of Justice" in the public interest.

British Columbia's bold and fresh approach effective October 1, 1996 should solve many of these problems. British Columbia first became disenchanted with the standard Canadian model for the delivery of human rights in 1984 when the British Columbia Human Rights Commission was summarily eliminated. Since then, British Columbia has had a Human Rights Council rather than a commission.

Under the new model, the British Columbia Human Rights Commission will be composed of a Chief Commissioner, a Deputy Chief Commissioner, and a Commissioner of Investigation and Mediation. As well, there will be a Human Rights Advisory Council composed of members of the public, which will meet occasionally to bring concerns of the public to the Commission and to advise the Minister and the Commission on any human rights issues in the province. The Advisory Council will have no staff.

Decisions about complaints processing will be made by the full-time "Commissioner of Investigation and Mediation". The Chief Commissioner and Deputy Chief Commissioner will have the role of developing and conducting programs of public education and information, research, holding public hearings and consultations regarding matters relevant to the Code, and of initiating complaints. Thus, a full-time professional will make all decisions about case processing. Cases will proceed routinely with only the complainant and respondent as parties, thus reducing the expenditure of the Commission's resources. The Deputy Chief Commissioner may elect to become a party to the complaint. This will enable the Commission to support those cases it considers of particular strategic interest, while allowing individuals to pursue redress in cases that do not raise the greater public interest. Thus the Commission, and not complainants, will determine the Commission's agenda. For this new system to work as effectively as its design allows, the Commission will have to adopt a disciplined jurisdictional focus.

### III. THE HEARING STAGE

The problem of delay continues to exist after the commission has referred complaints to a hearing. Except in British Columbia and Quebec, adjudicators are appointed on an ad hoc basis to hear and determine individual complaints. In the past, many individuals appointed as boards of inquiry have been full-time law professors who would schedule cases on the days when they had no classes. Together with the schedules of counsel, this often results in complaints being scheduled in blocks of one or two or three days at a time.<sup>56</sup>

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56. *Broadfield v. DeHavilland/Boeing of Canada Limited* (1993), 19 C.H.R.R. D/347:

dates of hearings: May 29, 1990 (by conference call), October 1, 24, 29, 1990, November 23, 30, 1990, December 11, 12, 1990, April 5, 9, 1991, May 23, 24, 1991, June 20, 1991, November 1, 15, 22, 1991.

The number of persons eligible for appointment as an ad hoc nature is large compared to the number of boards actually appointed. There were 58 members on the federal Tribunal Panel as of July 1, 1996, and there were 26 tribunals appointed in 1995. In Ontario for the year 1994/1995, there were 48 persons eligible to be appointed, and there were 37 complaints referred to a board.<sup>57</sup> These figures show how the ad hoc nature of their appointment and the infrequent schedule of their sittings makes it difficult for the adjudicators to gain expertise in taking control of a hearing and conducting it efficiently.

While in theory administrative tribunals are established to provide "expert" decision making in a specialized area, the practical reality is that ad hoc boards must be appointed repeatedly in order to acquire such expertise as well as proficiency in conducting a hearing.

Moreover, there is a wide range of technical subjects which are central in human rights cases. Equal pay cases involve job evaluation, compensation, and complex statistical issues. Disability cases involve medical issues. There is no sense in which ad hoc boards can be said to possess any more expertise in such matters than the courts. In a different context, the Supreme Court of Canada has recognized the difficulty ad hoc decision makers have in acquiring expertise and experience by stating that ad hoc adjudicators are to be accorded less deference on judicial review.<sup>58</sup>

When human rights codes were first enacted beginning in the 1960's, it was perhaps feasible that ad hoc boards could hear and determine the few complaints that went to a hearing. In 1996, it is nothing short of scandalous that human rights cases are not decided by full-time professionals. The importance of human rights cases is reflected by the quasi-constitutional status of human rights statutes. By contrast, labour relations boards have had full-time adjudicators that hear and determine labour cases in their own premises for decades.

The Ontario Standing Committee recommended that the Ontario Human Rights Code be amended to create a full-time standing board of inquiry to hear complaints under the Code.<sup>59</sup> Amendments to the Ontario Code were proclaimed in force on April 17, 1995 creating an Office of the Boards of Inquiry comprised of full and part-time members.<sup>60</sup> The Board has its own premises and shares hearing rooms with the Pay Equity Commission of Ontario. The B.C. Human Rights Council had its own premises and hearing rooms and the members of the B.C. Council were full-time adjudicators. Under the reform in B.C., there will be an independent Human Rights Tribunal with full time adjudicators and its own premises. Alberta established a standing human rights tribunal

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57. "Human Rights Boards of Inquiry: Annual Report 1994-1995", Appendix A, Appendix B.

58. *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230.; *United Brotherhood v. Bradco*, [1993] 2 S.C.R. 316.

59. "Report on Agencies, Boards and Commissions (No. 20)" at 87.

60. *An Act to amend the Statutes of Ontario with respect to the provision of services to the public, the administration of government programs and the management of government resources*, S.O. 1994, c. 27.

in July 1996 to replace the ad hoc boards. These initiatives should be followed in the rest of the country.

The system in Quebec avoids many of the foregoing problems and should be considered by other jurisdictions when legislative reform is undertaken. In Quebec, the Human Rights Tribunal is composed of judges of the Court of Quebec who "[have] notable experience and expertise in, sensitivity to and interest for matters of human rights and freedoms [...]".<sup>61</sup>

Having a free standing administrative tribunal with its own office and staff has many advantages. The Ontario Board of Inquiry has issued Rules of Procedure designed to make the hearings more efficient. They regulate matters such as pre-hearing disclosure. The existence of a full-time Board of Inquiry facilitates the implementation of a case management process. The Ontario Board offers a mediation opportunity prior to adjudication. Of 46 mediations held in the fiscal year 94/95, 31 cases were settled. This is a 67% settlement rate.<sup>62</sup>

The Canadian Human Rights Tribunal has a permanent President and a permanent office staff and facilities but is still composed of ad hoc adjudicators. While the Canadian Tribunal lacks the statutory authority to issue rules, the existence of a permanent President and staff has made possible the issuance of guidelines regarding the procedures of the Tribunal. A permanent president and staff also makes possible the implementation of orientation and training programs for new ad hoc members. The Canadian Tribunal began offering such programs in the last two years.

#### IV. OUTMODED TERMINOLOGY

In the writer's view much of the terminology of human rights is outmoded and unnecessarily value laden. Human rights cases raise high feelings and resistance, in part, because respondents do not want to be labelled "discriminators". The original meaning of "discrimination" when human rights codes were first enacted has been described as an "evil motive".<sup>63</sup> In international news, "human rights" violations involve grave and heinous acts. Public perceptions of what "human rights" involve and public disdain of individuals who have been found to infringe human rights legislation have been molded by these meanings.

The judgmental and high sounding meaning of "human rights" is not apt for many of today's cases. While "evil motive" discriminators still exist and are to be

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61. *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 100.

62. "Human Rights Board of Inquiry: Annual Report 1994-1995" at 10.

63. W.S. Tarnopolsky, "Discrimination in Canada: Our History and our Legacy" in W.S. Tarnopolsky, J. Whitman & M. Ouellette, eds., *Discrimination in the Law and the Administration of Justice* (Montréal: Éditions Thémis, 1994) 2 at 4-21.

condemned, the modern concept of "discrimination" is a legal construct. An employer who bears no ill will to any individual or group and who does nothing but implements a perfectly sensible employment rule which is rationally connected to the performance of the work is said to "discriminate" if the rule has an unforeseen adverse effect on a particular employee because of his or her special characteristics. For example, an employer whose business operates on Saturday becomes "guilty" of *prima facie* "discrimination" if an employee converts to a religion that observes Saturday as the Sabbath.<sup>64</sup>

A great many of current human rights cases involve mundane employment issues on which reasonable well intentioned persons might differ. An employer who is committed to employment equity for disabled persons but decides on the basis of medical advice that an applicant with a bad back should not be hired for a particular job becomes a "discriminator" if the human rights board subsequently accepts different medical testimony. An employer and union become discriminators if they considered alternatives to accommodate the special needs of an individual worker, and decided with the utmost good faith that the interference to the collective agreement would be undue, if a board subsequently disagrees with that judgment. And so forth.

In the writer's view, terminology which is less confrontational, would enhance the prospect of early resolution of many complaints. Respondents whose actions are motivated by prejudice should be distinguished from those who act with the utmost goodwill.

Justice Lederman and M. Grottenthaler have observed and said:

*[...] The traditional litigation model is clearly an inappropriate one. There is no lis between two parties. There is no wrong done, in many cases, by the employer. The criteria may have been adopted in good faith... the litigation model immediately puts the employer on the defensive. Litigation is the traditional method of redressing civil "wrongs". Legal requirements work in a negative fashion; constraints backed by penalties. This can create resentment on the part of an employer that feels that it has not discriminated intentionally against anyone. This feeling is exacerbated by the fact that unintentional discriminators are lumped in with intentional discriminators in the legislative scheme. The employer goes out of its way to justify the employment criteria so as not to be labelled a wrongdoer.*<sup>65</sup>

## CONCLUSION

Human rights commissions seem to be perpetually backlogged and slow. Measures such as bureaucratic restructuring, additional staff and resources and more training for investigators do not seem to make any significant lasting difference. The

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64. *Supra* note 16.

65. *Supra* note 43 at 350.

problem is that human rights commissions are overwhelmed by too many complaints. While there are many reasons for this, commissions have exacerbated matters by being too receptive to additional complaints. What may be needed is a rudimentary re-examination of what commissions do, and a focussing of the commissions' resources on matters truly fundamental to their jurisdiction. The new B.C. model which allows the Commission to get involved in only those cases it chooses should be watched closely.