SCREENING RIGHTS:

THE DENIAL OF THE RIGHT TO ADJUDICATION UNDER THE CANADIAN HUMAN RIGHTS ACT AND HOW TO REMEDY IT

A Research Paper Prepared for the

Canadian Human Rights Act Review Panel

November 4, 1999

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A. OVERVIEW

This paper reviews the screening function of the Canadian Human Rights Commission. By this we mean the discretionary power accorded the Commission to decide whether a complaint will be referred to the Canadian Human Rights Tribunal for adjudication.

The Canadian Human Rights Commission, like all other human rights commissions in Canada, has no authority to determine if a right has been infringed or to grant a remedy for a violation of a right. Only the Canadian Human Rights Tribunal has the authority to hear and rule on human rights complaints filed under the *Canadian Human Rights Act* ("CHRA"), though their decisions can be appealed to court. Thus, a human rights complaint can only be adjudicated if it is referred to the Tribunal by the Human Rights Commission. Only a small percentage of human rights complaints, in the range of 1 - 2% a year, are adjudicated before the Tribunal. The majority are abandoned or dismissed.[1]

The paper will describe the statutory basis for the screening function of the Commission, how it is exercised by the Canadian Human Rights Commission and how it has been interpreted by the courts. We will describe how the screening function has been experienced by human rights advocates and claimants, focussing particularly on our experience at the Centre for Equality Rights in Accommodation (CERA) and the results of our consultation with other equality seeking groups and human rights advocates.[2] It is important to understand how the screening function is actually

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[1] Taking the number of cases referred to the tribunal as a percentage of the number of complaints filed yields the following: 0 .5% (1996), 1.2% (1997), 1% (1998); see Annual Reports of the Canadian Human Rights Commission, 1996, 1997, 1998.

[2] In addition to CERA's ongoing informal discussions with equality-seekers, in the summer of 1997 and in May of 1998 CERA was funded by the Court Challenges Program of Canada to conduct consultations with equality-seeking groups, practitioners and advocates on an equality rights challenge to the screening function of the Commission. Participants were asked about their experiences with the Commission's screening function, whether they thought that the Commission's screening function was appropriate or problematic and whether they

experienced by claimants and practitioners trying to “get through the screen”, assessing how much they know of the case they have to meet and how they interact with the Human Rights Commission which in most cases will determine the outcome of the complaint.

We will then consider whether the screening function of Human Rights Commissions is unique to human rights regimes or whether it is common in other administrative regimes which confer rights but deny, at the discretion of a commission or other body, access to adjudication. We will also compare the Canadian human rights model with those of other countries. We will then assess whether the screening function is in conformity with sections 7 and 15 of the Canadian Charter of Rights and Freedoms (the Charter). Finally, we will review the findings of International Human Rights Monitoring bodies which have reviewed the screening function of the Human Rights Commission for consistency with principles of international law.

We will argue, on the basis of these considerations, that the screening function accorded the Canadian Human Rights Commission is inherently discriminatory and in violation of principles of fundamental justice - that it discriminates against the disadvantaged groups who rely on the rights in the CHRA by denying them access to adjudication in a manner that would never be tolerated by more advantaged groups and which is without parallel in other administrative law regimes dealing with statutory rights. We will suggest that as long as our human rights enforcement regime denies the right to adjudication of our quasi-constitutional rights, it will inevitably be undermined by the contradiction of discriminating against the groups it is mandated to protect from discrimination and denying adjudication and remedy to the rights which it is charged with promoting and enforcing.

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supported an equality rights challenge to the provisions which grant the Commission the discretion to dismiss complaints on an administrative and discretionary basis. In addition, we spent considerable time discussing the advantages and disadvantages of a system in which complainants would have a right to a hearing and a determination of their rights, whether by the courts, the Tribunal, or both. For a detailed description of the consultation and a list of the participants, see Appendices.

We will then consider options for remedying the problem - where and how human rights complaints ought to be adjudicated and remedied - at the Commission, before the Tribunal or in the Courts. We will consider whether the Tribunal ought to maintain its exclusive jurisdiction or whether complainants should have an option of going to court. We will assess different models of direct access to the Tribunal, considering whether claimants ought to have access to the tribunal only after the Commission has reviewed or investigated a complaint or whether complainants ought to have direct access to the tribunal without filing a complaint with the Commission. Finally, we will consider alternative ways of dealing with issues which have previously been addressed through the Commission's screening of complaints and carriage of complaints before the Tribunal, such as prioritization of complaints, mediation and settlement, avoidance of backlog at the tribunal, representation of the public interest as distinct from individual remedy, reliance on the investigative powers and resources of the Commission to substantiate complaints, ability to deal with well-resourced respondents and provision of legal counsel.

We will suggest that a model providing for direct access to the Tribunal will not only bring our human rights enforcement into conformity with the Charter and international law, and restore human rights to the status they deserve, but it will also be far more efficient. We will argue that most complaints can most effectively be addressed through prompt adjudication, with adequate disclosure and provision of legal representation for complainants and respondents who need it. The Commission, we will suggest, will then be liberated to use its investigative and legal resources to deal more effectively with promotion and public education, as well as with Commission initiated complaints and complaints of which the Commission is requested to assume carriage because they may require investigative powers or resources that are unavailable to the complainant.

B. CONTEXT: THE QUASI-CONSTITUTIONAL STATUS OF HUMAN RIGHTS AND THEIR ADMINISTRATIVE DEMISE

In Canada, human rights legislation has quasi-constitutional status. Indeed, in practical terms, statutory human rights protections, if adequately enforced, could be considerably more important to those facing discrimination than the equality rights that are constitutionally protected in the *Canadian Charter of Rights and Freedoms*.

The Charter does not apply to the realm of private activity.[3] Human rights legislation, on the other hand, applies not only to government but also to non-governmental actors. Most employment, housing and services in Canada are provided by private individuals or corporations. When discrimination occurs in these areas, it is most frequently non-governmental actors who are involved and it is to human rights protections, not the *Charter*, that victims of discrimination must turn for a remedy. The guarantee of equality and non-discrimination in the *Charter*, which is the "broadest of all guarantees" and "applies to and supports all other rights."[4] is only realized in many of the most important areas of our lives through effective human rights legislation. Governments have a constitutional responsibility, emanating from the constitutional guarantee of equality, to protect vulnerable groups from discrimination in the private sphere. [5] While human rights legislation is not given constitutional status in Canada, it is a constitutional interest of the highest order which it protects.

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[3] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

[4] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 185.

[5] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493. Although the Supreme Court declined to assert, in this case, that there is a positive obligation emanating from section 15 of the Charter to maintain statutory human rights legislation and enforcement regimes, we believe that this is the logical conclusion of the Court's adoption of a substantive equality analysis in this case. See B. Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*" (1998) 9:3 *Constitutional Forum* 71; M. Jackman, "Giving Real Effect to Equality: *Eldridge* v. *British Columbia (Attorney General)* and *Vriend* v. *Alberta*" (1998) 4 *Review of Constitutional Studies* 352.

The quasi-constitutional status of human rights, however, has little resonance in the daily practice of human rights claimants and practitioners in Canada. Human rights legislation and procedures have fallen into such disrepute that statutory human rights are often considered illusory rights and a waste of time to try to enforce. Most advocates are so contemptuous of the entire administrative regime surrounding human rights enforcement that they regularly advise potential claimants against even bothering to go to the trouble of filing a complaint. This state of affairs is deeply disturbing. Given the immense importance of statutory human rights protections to the core values of equality, dignity and security, it is a threat to our most basic democratic values to have statutory human rights denigrated to the status of unenforceable rhetoric.

The litany of problems which brought us to this state are well-known - intolerable delays in processing complaints, inept and inefficient investigation, biased or inadequate reports by human rights officers, perfunctory review by the Human Rights Commission and, of course, frequent dismissal of meritorious complaints. The fact that a complaint filed with the Canadian Human Rights Commission has only a 1 - 2% chance of ever being adjudicated, and that even in these few cases, the decision will likely occur several years after the event when an effective remedy may be impossible, would seem to validate the advice given by so many lawyers that it is largely futile to try to claim and enforce these so-called quasi-constitutional rights.[6]

Rather than inspiring concerted effort to remedy a human rights system that has reached the point of acknowledged ineffectiveness and disrepute, however, the recitation of the problems at human rights commissions has become an anthem for inaction and complacency. Many advocates have simply turned away from human rights protections, focussing efforts on the Charter of Rights and other areas of law in

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[6] Even under the expedited process, the average complainant waits 32 months for the Commission to make a decision whether to refer to a tribunal and close to a year for the tribunal decision, see Tamara Witelson, "Retort: Revisiting Bhadauria", (1999) 10 *National Journal of Constitutional Law* 148, citing *Report of the Auditor General to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, 1996) at paragraph 10.39-10.41.

which more effective and timely remedies can be obtained through litigation that can be controlled by equality seeking groups and individuals themselves. Human rights in Canada have come to be viewed more as administrative problems than as core values of our democracy and this widespread cynicism has allowed governments to get away with allowing the situation to continue. Indeed, while a part of the problem is the chronic under-funding of human rights enforcement and promotion, many of us have a hard time putting much energy into lobbying for increased funding to human rights commissions, whose general orientation we see as a part of the problem.

The degradation of human rights to the status of illusory rights in Canada is not primarily an administrative problem with the quality, or even resources, of the Human Rights Commission. The common nature of the problems experienced at human rights commissions across Canada suggests that the issue is more structural than administrative. It is not one particular human rights commission which has fallen into disrepute, but rather the fundamental paradigm and structure of our statutory human rights regimes. For this reason, it would be counter-productive, in our view, for the panel to focus on the myriad of administrative problems with the current system of human rights enforcement in the hopes that tinkering with certain of the statutory provisions will solve the problem. We believe the panel needs to look at the forest, rather than the trees.

C. THE "SCREENING" FUNCTION OF THE COMMISSION UNDER THE CHRA: RIGHTS WITHOUT A REMEDY

We are advancing, in this paper, a fairly straightforward proposition about the screening function of the Human Rights Commission. We suggest that it is not simply an administrative problem but an issue of fundamental human rights which is at the heart of what is wrong with the current human rights regime in Canada. The screening function quite simply leaves the majority of human rights claimants without any legal recourse to have their claim adjudicated. It denies rights of the highest order the most basic protection of the democratic rule of law. Rights without a remedy, as Wilson, J.A. wrote

in her decision at the Ontario Court of Appeal in *Bhadauria*, (subsequently overturned, of course, by the Supreme Court of Canada) citing the British case of *Ashby v. White et al* are not rights at all:

> If the plaintiff has a right, he [or she] must of necessity have a means to vindicate and maintain it, and a remedy if he [or she] is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. [7]

Although the Supreme Court of Canada did not explicitly revoke the common law principle that a right must have a remedy in its subsequent decision in *Seneca College v. Bhadauria*[8], it did find that equality seekers are limited to the human rights system for redress of human rights violations and cannot go directly to the courts or other decision-making bodies for a determination of their rights.[9] The effect of this decision, in light of the discretion accorded the Commission in exercising its screening function, has been to entrench quasi-constitutional rights in Canada within a statutory scheme which severs the right from the remedy and denies the majority of complainants access to adjudication. Complaints must be filed with the Canadian Human Rights Commission and only if the complaint is referred by the Commission to the Human Rights Tribunal will a determination be made as to whether a right under the Act has been infringed and a remedy ordered. Otherwise, the complaint is extinguished without ever being adjudicated. This is the common fate of most human rights complaints in Canada.

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[7] *Bhadauria v. Seneca College of Applied Arts & Technology*, (1979),105 D.L.R. (3d) 107 (C.A.) at 147, citing *Ashby v.Whyte et al.* (1703), 2 Ld Raym. 938, 92 E.R. 126 at 953.

[8] [1981] 2 S.C.R. 181

[9] The Court distinguished *Ashby*, stating that "the present case is not concerned with whether a remedy can be provided for an admitted right but with whether there is a right at all, that is, an interest which the law will recognize as deserving protection." (*Ibid*, at 191-192)

Sections 41 and 44 of the *Canadian Human Rights Act*, like most other human rights acts in Canada, give the Human Rights Commission a unique discretionary power to act in a "screening" role and to prevent the majority of claims from ever reaching the Tribunal. While the Commission is required under section 44(3)(b) of the Act to dismiss complaints that **have not** been substantiated, the Commission has the discretion and ***may*** appoint a Tribunal in cases where the complaint **has been** substantiated. Pursuant to s.44(3) of the Act, the Commission:

> **may** request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal...to inquire into the complaint to which the report relates if the Commission is satisfied
>
> (I) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted...

This is the section under which the vast majority of complaints considered by the Commission are dismissed. What circumstances "warrant" referral to a Tribunal is left unspecified. The Commission has wide discretion to dismiss complaints - even where there is significant evidence substantiating the claim and even in circumstances where the respondent explicitly or implicitly admits to the human rights violation.

It is important, in understanding the impact of the screening function provision, to distinguish the Commission's decision to dismiss a complaint from a determination that a right has not been infringed. When the Commission decides on a discretionary or administrative basis not to proceed with a complaint, the complainant's rights are extinguished **without being determined**.

It is also important to distinguish between problems with the **nature** of the Commission's discretion under the Act and the discriminatory **exercise** of it. While equality-seekers experience many problems with the manner in which the Commission exercises its discretion to dismiss complaints under the Act, the more fundamental problem, in our view, is the nature of the statutory grant of discretion itself. This is what

permits the Commission to determine - on whatever basis it sees as reasonable - whether to refer a complaint to the Tribunal. In the years since the *Bhadauria* decision, the courts have made it clear that the Commission is entitled, under section 44 of the Act to dismiss meritorious complaints for administrative reasons alone. Even a person who has had a right infringed under the Act has no right to a remedy to that infringement before the tribunal if the Commission does not wish to pursue it. In other words, in 98 - 99% of the rights claims filed under the *Canadian Human Rights Act*, the question of whether a right has been infringed is essentially put aside. Whether the complaint is settled, dismissed or abandoned, there is no determination or adjudication of the right. Practically and legally, this results in the displacement of the substance of the rights claim from the determination of its outcome, with profound effects for the integrity of the system and the experience of rights claiming.

D. WHAT THE COURTS HAVE SAID ABOUT THE COMMISSION'S SCREENING FUNCTION: THE STANDARD OF JUDICIAL REVIEW

The problem with the Commission's discretion to dismiss complaints has been exacerbated by the refusal of the courts to interfere with the substance of the Commission's decision to dismiss. The Federal Court of Canada has refused to set aside the Commission's decision to dismiss in cases where:

X the respondent admitted to the human rights violation;

X there was evidence that the Commission spent less than two minutes per case;

X the Commission dismissed on the basis that the claimant refused a settlement offer; and

X the decision to dismiss may have been based in part on the Commission's administrative load.

We have reviewed cases reported in the Federal Trial Reports since 1994 and some unreported decisions involving dismissals of complaints for failing to warrant the appointment of a Tribunal pursuant to section 44 of the Act. Of the at least 42 cases brought between 1994 and the present which we reviewed, 26 applications involved a challenge to the Commission's assessment of the facts of the case (as opposed to only alleging bias or formalistic breach of procedural fairness). Of these 26 applications, only 2 succeeded. Of the two that succeeded, only one, *Schut v. Canada (Attorney General)* succeeded on the basis that the Commission's decision was not justified based on the evidence.[10]

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[10] *Schut v. Canada* (1996), 120 F.T.R. 61 (T.D.) involved an allegation of discrimination in employment on the basis of disability. The visually disabled complainant's job with the Coast Guard was phased out and the Coast Guard refused to place him in the position of Controller. The Respondent defended its actions on the basis of a BFOR. However, the Respondent did not provide any scientific evidence relating to the limitations of a person with visual acuity below a certain level nor any evidence as to the necessity of the visual level required by the Coast Guard for the position in question. In the second successful case, *Gill v. Canada (Public Service Commission)* (1996), 25 C.H.R.R. D/439 (F.C.T.D.), the Court quashed the Commission's decision and sent the complaint back to the Commission for reconsideration holding that the Commission did not address its mind to the "real issue" when it originally assessed the facts of the case. The Commission had dismissed the complaint holding that the complainant had been accommodated. The Commission failed to consider whether the accommodation had been reasonable. In addition, the Court in *Gill* held that the mischaracterization and "slanted" portrayal of the complainant's evidence by the investigator's report vitiated the Commission's decision. The report, therefore, failed to provide the Commission with a fair and adequate basis for its decision.

For examples of recent cases in which the Court refused to set aside the Commission's decision to dismiss on the basis that it was unreasonable, see *Houston v. Air Canada* (1998), 144 F.T.R. 152 (T.D), where the Court refused to set aside Commission's decision to dismiss where investigator had found that the complainant had not been accommodated; and *Holmes v Canada,* [1999] F.C.J. No. 598 (C.A.) where the Federal Court of Appeal held that on the basis of the evidence, the Commission could have legitimately formed an opinion that it was reasonable to proceed, but nevertheless refused to interfere with the Commission's exercise of discretion.

The failure rate of what can be called “evidentiary” challenges to the dismissal of human rights complaints is not surprising when one considers the curial deference and wide berth accorded to the Canadian Human Rights Commission to dismiss complaints. While the Commission's processes must be in accordance with procedural fairness, the courts have left the Commission with a broad discretion to decide whether or not to proceed with a case, regardless of whether the evidence suggests that a right has been infringed.

The Supreme Court of Canada in *S.E.P.Q.A. v. Canada*[11] and more recently in *Cooper v. Canada (Human Rights Commission)*[12] established that the decision of the Human Rights Commission to dismiss a complaint is an administrative rather than a judicial decision and therefore, not subject to the "full panoply of the rules of natural justice". In *S.E.P.Q.A.*, Sopinka J. held that it was the intention of the Act that cases be dismissed "where there is insufficient evidence to warrant appointment of a tribunal".[13] Similarly, in *Cooper* the Court held:

> When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfils a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts.[14]

While the analogy to a preliminary inquiry would suggest a more rigorous standard based on the evidence, courts have generally inferred from the administrative nature of

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[11] (1989), 62 D.L.R. (4th) 385 (S.C.C.).

[12] (1996), 27 C.H.R.R. D/173 (S.C.C.).

[13] Supra note 11 at 428.

[14] Supra note 12 at D/192.

the Commission's decision that they need only ensure that the Commission considered all of the facts, leaving it up to the discretion of the Commission as to whether to proceed to a Tribunal.

In other jurisdictions, lower level courts have suggested a standard of sufficiency which instructs the provincial human rights commissions to refer a case for a hearing where there is a possibility that the case can be substantiated. In *Cook v. British Columbia (Council of Human Rights)*[15], Wood J. developed a test for the determination of whether a complaint should continue based on non-suit motions in civil trials.[16] This approach was followed in *Thibodeau v. P.E.I*[17] wherein Jenkins J. held that the function of the Commission, as a judge in a non-suit motion, "is to determine whether any facts have been established by the plaintiff from which liability *may* be inferred". The standard for determining whether there is sufficient evidence to warrant a hearing espoused in *Cook* and *Thibodeau* and other cases, however, has not been followed by the Federal Court. In *Slattery v. Canada (Human Rights Commission) (No.1)*[18], Nadon J. rejected this more restrictive interpretation of the role of the human rights commission and held that:

> ...the submission of the applicant, that judicial review of the exercise of discretion is warranted for CHRC dismissals of complaints each time that, in the opinion of the reviewing court, the complainant took his (or her) case out of the realm of conjecture, goes too far....

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[15] (1989), 9 C.H.R.R. D/4697 (B.C.S.C.).

[16] While the non-suit test for the determination of whether a complaint should continue has not ultimately been accepted in British Columbia, the discretion of the B.C. Council is still somewhat more limited than that of the CHRA, see *McKenzie v. Howe Sound School District No. 48 (No.1)* (1998), 30 C.H.R.R. D/98 (B.C.S.C.).

[17] (1993), 23 Admin. L.R. (2d) 119 (P.E.I. T.D.)

[18] (1994), 22 C.H.R.R. D/205 at D/226.

Ironically, the court justifies its deference to the Human Rights Commissions with a concern similar to Chief Justice Laskin's in *Bhadauria* that courts should not unduly interfere with specialized tribunals - with the result that complainants are barred from access to the tribunal without judicial recourse. The Federal Court of Canada has applied the decision of the Supreme Court of Canada in *Canada (Attorney General) v.Mossop*[19] that the Canadian Human Rights Tribunal is entitled to some curial deference in its fact-finding capacity, to the decisions of the Commission when it is performing its screening function. The Court has also, without exception, followed the Supreme Court of Canada decision in *Maple Lodge Farms v. Government of Canada* which set the standard of review for discretionary decisions of government bodies as follows:

> It is, as well, a clearly established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.[20]

Therefore, if the discretion has been exercised in good faith and with regard to the relevant considerations, the courts will not interfere unless the discretion has been exercised "in a discriminatory, unfair, capricious or unreasonable manner"[21].

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[19](1993), 100 D.L.R. (4th) 658.

[20] [1982] 2 S.C.R. 2 at 7.

[21] *Slattery, supra* note 18 at D/228 and *Garnhum v. Canada (Attorney General)* (1996), 120 F.T.R. 1 at 13.

The curial deference afforded the decisions of the Commission to dismiss complaints under s.44 of the Act is attributable to both the fact that the Commission has been given wide discretion under the statute to dismiss cases and to the deference generally given to specialized tribunals. The Court explained in *Garnhum* that "this reluctance to interfere is based largely on the notion that such authorities by virtue of their training, experience, knowledge and expertise are better suited than the judiciary to exercise these [discretionary] powers". Similarly, in *Slattery* the Court held that the combination of the grant of discretion and the Commission's role as assessor of facts means that the Court will be loath to interfere:

> In the spirit of the Supreme Court of Canada in *Mossop*, deference must prevail over interventionism insofar as the CHRC deals with matters of fact-finding and adjudication, particularly with respect to matters over which the CHRC has been vested with such wide discretion, as in the case of the decision whether or not to dismiss a complaint pursuant to subpara. 44(3).[22]

The Court's deference to the Human Rights Commission is also motivated by an acknowledgement of the Commission's administrative load. Although the Court held in *Slattery* that the Commission is not permitted to dismiss cases on the basis of administrative concerns such as time and cost alone, the Court in other cases has admitted that the CHRC's administrative load may inevitably factor into the decision to dismiss. In *Kallio v. Canadian Airlines International Ltd* the Court held:

> The Commission has discretion, and must have discretion, in light of the huge volume of matters brought to its attention, to decide which cases do or do not warrant either further consideration or reasons.[23]

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[22] *Slattery*, *supra* note 18 at D/227.

[23] (1996), 113 F.T.R. 275 (T.D.) at 281.

The administrative load of the Commission may also be an element in the Court's consistent refusal to allow judicial review applications where the applicants have demonstrated that the Commission spent on average 2 minutes or less in deciding whether to dismiss each case and, therefore, have alleged that the decision must be unfair.[24] The Court in these cases has held that the decision - despite the length of time in which it was made - is above review unless it was not made in good faith, relied on improper or irrelevant considerations or failed to consider the relevant information. The Court has refused to countenance whether it is possible for the Commission to consider all of the relevant information in two minutes or less - especially in cases like *Boahene-Agbo* where the complainant had submitted a 588 page binder of evidence to the Commission.

The Court's non-interventionist stance has also meant that it is unwilling to review the weight the Commission accords certain pieces of evidence. Provided it has considered all of the relevant information before it, the Commission is free to ascribe whatever weight it wishes to various factors, without review of the Court. The Court in *Robinson v. Canadian Human Rights Commission*[25] held that the Commission was entitled to consider a comment of the judge who decided the complainant's separate wrongful dismissal action, and, more importantly, that "it is well within the Commission's discretion to ascribe it any weight it wishes". Similarly, the Court in *Owen v. Canada (Attorney General)* held that "it is for the CHRC to determine the weight of evidence and not for the court".[26] In cases where the complainant argues that his or her evidence was not given the probative value it deserved by the Commission and, had the proper weight been attributed, a hearing would have been warranted, the Court will be altogether unwilling to intervene.

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[24] See *Madsen v. Canada (Attorney General)* (1996), 106 F.T.R. 181 (T.D.), *Boahene-Agbo v. CHRC* (1994), 86 F.T.R. 101 (T.D.) and *Aziz v. CHRC* (1995), 103 F.T.R. 223 (T.D.)

[25](1995), 90 F.T.R. 43 (T.D.) at 50.

[26] (1995), 28 C.H.R.R. D/258 (F.C.T.D.) at D/265.

The requirement that the Commission consider the evidence before it appears, therefore, to be formal in nature. In *Cowie v. Canada Post Corp.* the Court was able to dismiss the application for judicial review holding that:

> ...so long as there is an **indication** that the Commission considered the evidence before it, court intervention is not justified. (emphasis added)[27]

In dismissing cases which challenge the CHRC's decision to dismiss on the grounds that there is sufficient evidence to support the complainant's case, the Court will typically, therefore, simply list the evidence which was before the CHRC and assert that this evidence was considered and was sufficient to render a decision. Even in cases where the applicant has argued that the Commission completely ignored the evidence in the complainant's file, the reasoning of the Court appears to be that provided there was the requisite list of materials before the Commission, the Court will refuse to intervene.[28] In addition, it should be noted that the Court does not even require that the entire record of the investigation be before the Commission when it makes its decision to dismiss a complaint on the grounds of insufficient evidence.[29] The CHRC, therefore, is entitled to decide if further proceedings are justified on the basis of the investigator's report and the complainant's and respondent's submissions alone. There is no obligation on the CHRC to, even briefly, ensure that the investigator's interpretation of the evidence was accurate. In *Gill*, the Court was forced to bring to the attention of the Commission that the investigator's appraisal of the evidence was "slanted" and inaccurate. The level of analysis applied to the facts in *Gill*, however, is rare in judicial review applications.

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[27] (1996), 110 F.T.R. 152 (T.D.) at 155.

[28] see *Hogue v. Société canadienne des postes* (1994), 91 F.T.R. 241 (T.D.).

[29] See *Morisset v. Canadian Human Rights Commission* (1991), 52 F.T.R. 190 (T.D.) at 196.

The Commission is also free to consider in its decision information which would not be permitted to be used at the adjudicative stage to justify dismissing a complaint. In *Garnhum*, the Court held that it was open for the Commission to consider - and presumably accord to it whatever weight the Commission pleased - the reasonableness of an offer to settle in dismissing a complaint.

Although the CHRC is entitled to rely on the investigator's report, the report must be able to provide a fair and adequate basis for the CHRC's decision, that is, it must be neutral and thorough. What constitutes "thoroughness", however, is once again not subject to a rigorous standard of review. Nadon J. in *Slattery* held that in developing the required level of thoroughness, the Court must consider the interests of the respondent and complainant in procedural fairness, and also the case load of the CHRC and the interests of the CHRC in maintaining a workable and administratively effective system. He therefore held that:

> Deference must be given to administrative decision makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted.[30]

In addition, where omissions are made by the investigator, such omissions are generally not fatal if the complainant is able to rectify the omission in his or her submissions. A report or investigation, therefore, must be "clearly deficient" in an irremediable manner for judicial review to be warranted. Complainants who argue that their most important witnesses or pieces of evidence were not included in the investigation or the report are

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[30] *Slattery*, *supra* note 18 at D/220.

also most likely without remedy.[31] It is a "rare occasion" when judicial review is warranted because the "Commission has made unreasonable omissions and has failed to consider the evidence before it".[32] The Court has even extended its deference to the Commission to cases where the respondent has admitted to the alleged breach of the Act.[33]

Claimants who feel betrayed by the system and who wish to demonstrate that their complaints are substantiated have at best, therefore, a negligible chance of success if they are to challenge the Commission by way of judicial review. The exercise of discretion by the Commission to dismiss a complaint is, for the most part, unaccountable and unreviewable with respect to the substance of the complaint.

Both at the Commission and before the court on judicial review, the complainant will be struck by the fact that in neither forum is there any significant interest in whether a right under the Act has been violated. The whole point in both fora is to ensure that the Commission exercises its discretion in a manner which is procedurally fair, not whether the substance of the rights claim was properly assessed or whether the outcome itself was consistent with the evidence and the Act. As long as the relevant materials were before the Commission, the decision to dismiss will generally be upheld. It does not matter what evidence was contained in the materials. The question of interest to the courts will be whether the complainants' submissions were placed before the

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[31] See *Robinson, supra* note 25 and *Jennings v. Canada (National Health and Welfare)* (1995), 97 F.T.R. 23 (T.D.); *Miller v. Canadian Human Rights Commission* (1996), 112 F.T.R. 195 (T.D.) at 201.

[32] *Kallio v. Canadian Airlines International Ltd.* (1996), 113 F.T.R. 275 (T.D.) at 280.

[33] In *Owen*, *supra* note 26, the Commission dismissed the case on the basis that although there had been a violation of the complainant's rights, the evidence indicated the applicant had been reasonably accommodated. In a similar case in British Columbia, the B.C. Supreme Court held that once a violation of rights has been admitted, the Commission must refer the case to a tribunal for an Order. In the Federal Court, however, even in cases where

Commissioners, not whether the Commissioners properly considered the submissions, what the submissions contained, or whether the Commissioners were right to dismiss the complaint. It is quite literally a paper shuffle lasting years. In this Alice in Wonderland world, the complainant wonders why everyone is expending so much energy and resources moving paper back and forth and debating about everything except the human rights claim and compliance with the provisions of the Act.

E. WHAT IS IT LIKE TO BE SCREENED? - THE PRACTITIONERS' AND CLAIMANTS' EXPERIENCE OF RIGHTS WITHOUT REMEDIES

The severing of the right from the remedy has had important implications for how the courts have approached Commission's obligations with respect to its screening functions, but it has also had a profound effect on claimant human rights in Canada. Rights and remedies are legal abstractions for elements of human experience and relationships. As explained by Martha Minow:

> Any system of law demands a collective, communal structure for recognizing and enforcing norms. When the system assigns rights to individuals, it actually sets in place patterns of relationships, for legal rights are interdependent and mutually defining.[34]

Professor Jennifer Nedelsky articulates this approach to rights as follows:

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there is an unrefuted violation of a right protected under the Act, the Court has permitted the Commission to dismiss the case without referring it to the Tribunal.

[34] Minow, M., *Making All The Difference, Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at p.277.

> ...all rights, the very concept of rights, is best understood in terms of relationship...what rights in fact do and have always done is construct relationships...of power, of responsibility, of trust, of obligation.[35]

Human rights structure relationships not only by regulating patterns of behaviour but also by putting in place a method of claiming rights and creating a framework for a remedial dialogue between those who are disadvantaged or left out and those who are in positions of power and authority. Each claim, though particular, reiterates a more universal claim to dignity and equality and the particular claim is advanced not just in relation to a named respondent but also in relation to the community as a whole.

We often experience in human rights work the sense of initiating a conversation which would otherwise never take place. A bank refuses an applicant a mortgage based on its income rules. The applicant suggests the rule is not fair or reasonable. The banker says rules are rules. The conversation is over. Human rights protections create the possibility of a new conversation wherein rules are not rules but patterns which can be judged against higher values. Where the process works, claimants may be as astonished to find themselves listened to as respondents are surprised to find themselves having to justify something which they had never questioned.

Whether within families or in our workplaces, the dignity and worth of the individual is linked with the basic entitlement to apply accepted values and rules of universal dignity, security and equality to one's own experience, to petition for change so that these values are respected and to be heard. This does not individualize human rights. It simply grounds them in the relationships which they are supposed to transform.

The hearing of the claim, regardless of the outcome, is itself a validation of the value of inclusiveness and of the dignity and equal worth of the claimant The most serious

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[35] Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1 at p.13.

assault on the values of fairness and equality is thus a systemic or arbitrary denial of the right to petition. Reporting to a claimant that a tribunal considered the evidence and ruled against her, even if the outcome is seen as completely unfair, is less damaging than reporting that the Human Rights Commission simply dismissed the complaint without ever hearing it.

The denial of the right to petition and the silencing of rights claims is the essence of the screening function. Yet this aspect of the system is rarely made transparent or even understood by the public. Respondents treat the dismissal of a complaint as a clear determination that they were in compliance with the Act and the complainant was a troublemaker. And complainants believe that the Commission ruled against them. Some of the best legal reporters in the country continue to report tribunal decisions as decisions of the Human Rights Commission and vice versa.

We read in the *Canadian Human Rights Reporter* about the adjudicated decisions of the 2% of human rights claims that reach the Tribunal. Public and legal commentary on human rights is largely limited to reviews of tribunal decisions. The majority of rights claimants whose claims were extinguished by the Commission are treated as if they did not exist. Yet it is the administrative process leading to extinguishment, not the adjudicative one, which defines the lived experience of human rights for the majority of those who claim them under the CHRA and other human rights legislation in Canada.

In consulting with others about the screening function of the Commission, we have discovered that it is most strongly abhorred by those who have experienced what it is like to be “screened”, either as claimants or practitioners. What seems reasonable to those who exercise the discretion as a means to limit administrative load and establish institutional priorities is experienced quite differently by those on the other side of the screen.

Our own experience of the screening function at the Centre for Equality Rights in Accommodation (CERA) relates primarily to human rights claims in housing.

CERA is one of the few equality rights advocacy organizations which still devotes considerable resources to advancing rights claims under human rights legislation. Many of those facing discrimination in housing who turn to CERA for help have been denied housing, forced in many instances into homelessness by private landlords' discriminatory selection policies or denied access to mortgages or financing by banks. They seek remedies not only to individual discrimination but to important issues of systemic discrimination. Issues of systemic discrimination that have been the subject of numerous human rights complaints include income rules which deny low income households access to the most affordable rental housing as well as mortgage financing; excessive deposit requirements for telephone services or utilities applied to welfare recipients, resulting in denial of basic services; and waiting list systems for subsidized housing which exclude newcomers and young families from subsidized housing; credit and reference requirements which disqualify newcomers from housing and mortgages. These claimants usually have only one forum which can grant them a remedy - adjudication of their complaints before a human rights tribunal. They cannot go to court. They cannot raise human rights through some alternative procedure in another forum. CERA claimants who eventually get their claims adjudicated have almost always succeeded. They have been prepared to wait years for a remedy and have won some very important victories. But the majority of human rights claimants at CERA were never allowed to have their cases adjudicated. In fact, many of the most important systemic issues listed above, though they have been the subject of numerous human rights complaints, have never been adjudicated. Complaints filed which address these issues have never been allowed to be heard by a human rights tribunal.

This is why the problem of the "screening" function of the Human Rights Commission and the issue of access to adjudication appears so stark for us at CERA. For one thing, it is a tremendous drain on our resources. The vast majority of our time representing human rights claimants is spent negotiating claims through the cumbersome processes at the Human Rights Commission. Resources that should be applied to arguing cases before a tribunal are wasted in unsuccessful attempts to get the most important equality issues in housing through the Commission "screen". We have taken cases forward

after months of grass roots organizing to assist single mothers, young families or newcomers to take forward systemic claims addressing issues that are causing widespread homelessness. We have written to the Ontario Human Rights Commission Systemic Unit asking them to take these issues on. We have presented cases and issues to United Nations Committees and presented their recommendations to the Human Rights Commission. None of this has had any effect. Cases which advance any new interpretation or application of the Act are simply dismissed.

The screening function of the Commission is entirely misunderstood if it is viewed as a means to dismiss less significant, individual complaints in order to focus on systemic issues and test case litigation. On the contrary, it is exercised within a context in which the Commission is essentially bound, for administrative reasons, to extinguish, declare abandoned or settle the vast majority of the complaints that are filed. A complex case requiring extra resources is the last thing that investigators want to see land on their desk. This is not a world which fosters expansive and purposive interpretations of human rights provisions in aid of taking on systemic issues or test case litigation. On the contrary, it is a world which promotes narrow statutory interpretations in aid of closing files. Human rights claims are administratively extinguished through a process that is largely impenetrable to the parties, severed from the motivation behind the rights claim or the purposes of the Act.

As noted above, the Act does not confer on intake officers, investigative officers or the Human Rights Commission itself any authority to make a determination as to whether the Act has been breached. Yet in most cases, this is where the outcome of the complaint will be determined - by decisions made by intake officers about whether a fact situation warrants a complaint; by investigating officers about whether an investigation substantiates a finding of a breach of the Act, by legal staff interpreting the statute and case law or by Commissioners reviewing a pile of documents to determine if a complaint is to be referred to a tribunal. The unbridgeable gap between the determination of outcomes, dominated by administrative goals such as file closings, and the determination of rights, seriously prejudices the Commission's ability to promote

and enforce human rights. There is rarely any coherent or constructive consideration of the substance or import of rights claims. Yet the process exhausts considerable resources on all sides - complainant, respondent and Commission alike. All of this labour, however, is primarily in aid of the Commission's objective of ensuring procedural fairness. As long as the necessary paper trail and document exchange is in place, the Commission has done its job.

Human Rights Commissioners have only a few minutes per case to review and discuss the evidence summarized by an investigating officer, consider any advice on statutory interpretation from their legal staff, review submissions from the parties and decide wether to refer to adjudication. The time spent on each case has been estimated from two minutes to 12 minutes.[36] It is difficult if not impossible to have a significant impact with written submissions to the Commissioners, yet this is what complainants and their advocates are limited to. Even the fact that documents are missing every second page may go unnoticed.[37] One rarely sees any indication in the Commission's reasons for dismissing complaints that the complainant's submissions have been addressed or considered at all. Advocating at the "screen" for complainants is a matter of writing into a void, with no indication that there is anyone at the other end paying any attention at all. The dismissal of the majority of claims seems administratively predetermined and individual outcomes appear largely arbitrary.

The experience of rights claiming at the screen is thus the opposite of the transformative or empowering dialogue which we experience when claimants get a

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[36] Tamara Witelson, "Retort: Revisiting Bhadauria,", *supra* note 6 . Witelson generously estimates the average time spent on each complaint reviewed by the Commission in 1996 at 12 minutes. In the case of *Boahene-Agbo v. CHRC* (1994), 86 F.T.R. 101 (T.D.) it was the unrefuted evidence of the claimant that the Commissioners could not have spent more than 1.4 minutes on average considering each case at their meeting in which they made the decision to dismiss his complaint.

[37] *Enniss v. Canada (Minister of Indian Affairs and Northern Development)* (1997), 135 F.T.R. 58 (T.D.)

hearing. The screening function ensures that rights claiming will frequently repeat rather than redress the systemic patterns of social disadvantage and marginalization which are the subject of the claim itself.

Disclosure and The Myth of Facts Devoid of Statutory Interpretation

The most important submissions in the life of a complaint are those which try to head off dismissal by the Commission. This is the stage at which most complaints are extinguished, so as advocates, we feel compelled to try to do everything we can to avoid the "screen".

Human rights advocacy at "the screen" revolves around one document - the investigator's report. This is frequently the only document that is disclosed. Investigators' reports summarize the results of an investigation into the complaint and make a recommendation to the Commission for dismissal or referral to the Tribunal. For the report to be coherent, the investigator must make the case for one recommendation over the other and summarize the evidence in such a way as to justify the result reached. The disclosure of an investigator's report recommending dismissal is thus akin to the disclosure of the other side's argument. It certainly does not constitute disclosure of the evidence one needs to contradict it. This state of affairs does not necessarily emerge from a failure of the officer to be fair or neutral. It is unavoidable that the officer will investigate and report on evidence that is considered relevant and ignore evidence that is not considered relevant. But "relevance" is determined by a number of factors, including the officer's understanding of the allegations, of how the statute would apply and of what is considered necessary to prove or disprove them. Unfortunately, a large number of investigators have little experience, they frequently misunderstand the nature of the allegations, improperly assess what needs to be proven, mis-state evidence and misapply the law.

If complainants wish to challenge the investigator's conclusions, they need access to the evidence, not just to a summary of the evidence that the investigator considers

important, and they need to try to present the evidence necessary to substantiate their allegations to the Commissioners. Yet the Commission does not generally disclose the notes from interviews of the witnesses, their names, or the documents provided to the Commission by the Respondent.

In *Miller v. Canadian Human Rights Commission*, the court held that:

> The rule of procedural fairness requires that a complainant know the substance of the case against him or her. The complainant is not entitled to every detail but he should be informed of the broad grounds of the case. The complainant is not entitled to the investigator's notes of interviews of the statements obtained from persons interviewed. He must be informed of the substance of the case and he has every right to expect that the investigator's report fully and fairly summarize the evidence obtained in the course of his investigations.[38]

The complainant, therefore, must rely on a presumption in law that the investigator's report is fair and accurate and is not entitled to actively ensure that this is in fact the case. The Federal Court of Appeal made this assumption explicit in *Canada v. Pathak*, holding that the Commission is entitled to rely on the investigator's report since "the law presumes that the report of the investigator correctly summarizes all the evidence before him".[39] The court found that to succeed on judicial review, the burden is on the complainant to cast doubt on the accuracy or the completeness of the investigator's report. There is no initial burden or obligation on the Commission to disclose it. Accordingly, any additional helpful information that may be contained in the investigator's documents or witness interviews will in most cases never be known to the complainant.

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[38] *Supra* note 31 at 203.

[39] [1995] 2 F.C. 455 (C.A.) at 461.

Along with the myth that an investigator's report "correctly summarizes" the evidence goes the myth that screening decisions do not involve statutory interpretation. The judicial understanding of the screening process is that it is somehow devoid of the complexities of human rights cases at the adjudicative stage and is based on a simple assessment of "facts". It is on the basis of this myth, in part, that the courts have come to the conclusion that complainants may have their rights extinguished by a Commission decision without the opportunity to review or respond to arguments put before the Commission by respondents.

The Federal Court of Canada has held that "the rules of procedural fairness" do not require "that the Commission systematically disclose to one party the comments it receives from the other". Instead, the test is that the Commission is required to disclose submissions by one party to the other only:

> ...when those comments contain facts that differ from the facts set out in the investigation report which the adverse party would have been entitled to try to rebut had it known about them at the stage of the investigation....[40]

Every human rights claim, of course, involves an interpretation of a set of "facts" in relation to the statute, which of course must also be interpreted. The complainant needs to know how the respondent has argued the facts in relation to the law in order to rebut the case that has been made for the extinguishment of the complaint. Yet the Commission need only disclose submissions containing "new" facts. Arguments based on known facts, however much they may have influenced the Commission, need not be disclosed. Given the result which may be pending for the complainant, this is like denying access to the other side's factum and oral argument at an appeal hearing on the basis that all of the facts are already on the record.

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[40] *Mercier v. Commission Canadienne des Droits de la Personne* (1994), 167 N.R. 241 (F.C.A.) at 253-54.

In *Mercier v. Commission canadienne des droits de la personne*, the Federal Court of Appeal suggested in obiter that:

> It would seem to me that it would be in the Commission's interest, if only to protect itself in advance from any criticism, to require that the parties exchange their respective comments.[41]

The Commission, however, has continued in many cases to withhold submissions from the parties. On the other hand, there are numerous cases in which complainants have judicially reviewed the Commission's decision to withhold a respondent's submission but where the Court refused to quash the Commission's decision to dismiss the complaint on the basis that the Respondent's submission contained no new facts or that the Complainant was sufficiently apprised of the substance of the case that had to be met.[42]

In other cases in which the Commission was found to have failed to meet obligations to disclose "new facts", there has been evidence of a strong institutional reluctance on the part of the Commission to share relevant information with the complainant. In *Enniss v. Canada (Minister of Indian Affairs and Northern Development)*[43] it came to light that the complainant's employer had prepared submissions, which were not disclosed to the

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[41] *Ibid* at 254. In this case the investigator's report recommended the appointment of a conciliator. The respondent replied to the report with submissions which impugned the credibility of the complainant and relied on a number of new facts not contained in the investigator's report. This submission was not disclosed to the complainant but was relied upon by the Commission in its decision to dismiss the complaint. The Federal Court of Appeal quashed the decision of the Commission holding that the complainant was not given sufficient opportunity to know the case she had to meet.

[42] See *Bradley v. Canada (Attorney General)* (1997), 135 F.T.R. 105 (T.D.), *Holmes v. Canada (Attorney General)* (1997), 130 F.T.R. 251 (T.D.), *Coward v. Canada (Attorney General)* (1997), 136 F.T.R. 161 (T.D.).

[43] (1997), 135 F.T.R. 58 (T.D.). See also *Madsen v. Canada, supra* note 24.

complainant, and in these submissions had enclosed a report of the Public Service Staff Relations Board (PSSRB) in relation to the complainant. The findings of the PSSRB had been seriously misrepresented in the submissions, in a manner that was extremely prejudicial to the complainant. The Commission did not notice this misrepresentation and instead relied on the Respondent's summary of its contents and conclusions. The Commission's sole reliance on the Respondent's account of the PSSRB report became clear from the fact, as revealed in the judicial review proceedings, that the Commission had before it only the odd-number pages of the report!

In *Buck v. Canadian Human Rights Commission* the court was confronted again with "the long standing policy of the Commission not to allow parties to take cognisance of submissions that are adverse in interest and to respond to them".[44] *Buck* involved an allegation that the National Research Council had discriminated against employees on the basis of age in a series of lay-offs. The complainant filed an expert statistical report in support of the claim. The respondent filed submissions in response which disqualified the sample group on which the complainant's statistical report had been based. The Commission did not disclose the respondent's submission to the Complainant and proceeded to dismiss the complaint.

The systemic pattern these cases reveal is one in which the Commission, despite its broad powers to extinguish complaints, shows no apparent interest in ensuring that complainants are able to make submissions based on a full disclosure of evidence and argument. This accords fully with the experience of most practitioners. Complainants' submissions on the evidence and substance of their claims tend to be seen as an administrative inconvenience by the Commission and to be minimized as much as possible. The advocate for the complainant is barred from getting access to documentary evidence which is generally disclosed by the respondent only to the Commission. Similarly, we usually have no access to witnesses, witness statements or interview notes - only to summaries prepared by an investigating officer who has

recommended dismissal. Complainants' advocates must argue without knowing what arguments have been advanced by the respondent, what statutory interpretation has been advanced by legal staff or what comments are made to the Commissioners by senior management about the case. Disclosure only occurs if the complainant happens to be one of the few to pass through the screen to the Tribunal, at which point everything is revealed on the basis of adjudicative fairness - to the respondent.

F. THE DISCRIMINATORY NATURE OF THE SCREENING FUNCTION

Our consultations revealed that claimants and practitioners experience the current regime of human rights administration as a form of systemic discrimination. Denying equality seekers access to adjudication of human rights claims is seen as conforming to a systemic pattern of treating the human rights of disadvantaged groups as less worthy of public resources and adjudication than other rights. Like other forms of systemic discrimination, this may be without malice or intent to discriminate and may, in fact, have been the unintended result of a system which was meant to benefit those claiming human rights.

The current system has evolved, in part, as an attempt to relieve those facing discrimination from the individual burden of litigating what we have come to see in Canada not only as individual but also as public interest rights. Human rights commissions have been charged with the responsibility of investigating and taking discrimination claims forward, in part, to ensure that the adjudication of discrimination claims is not tainted by the very imbalance they seek to redress, pitting unrepresented complainants, in a hostile environment, against highly paid and well resourced respondent lawyers. Having made the leap to the "public interest" model of human rights, it seems to some a rational next step to ensure that the Commission has the discretion to decide which cases to take to tribunals. It is felt that a Human Rights Commission has the resources to proceed with only a certain number of complaints and

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[44] (1996) 105 F.T.R. 250 (T.D.) at 159.

that the tribunal does not have the resources to hold hearings into every claim which might possibly be meritorious.

The Commission's screening function is thus seen to prevent the tribunal from becoming backlogged with complaints and to allow the Human Rights Commission to allocate its resources in the most effective areas, providing the Commission with the appropriate discretion to decide which cases warrant the kinds of resources necessary to proceed to a tribunal. It is from this angle that the courts have generally approached the screening function and found it reasonable that complaints can be dismissed on the basis of administrative discretion.

From the standpoint of claimants and practitioners, however, this "administrative" reasoning applied to quasi-constitutional rights seems quite extraordinary. Consider how it plays out, for example, in the context of the relationship between landlords and tenants in which we work at CERA. CERA represents claimants who are denied apartments by landlords on prohibited grounds of discrimination. Those in need of housing have their rights to enter tenancies without discrimination protected and enforced under human rights legislation. If landlords breach their responsibilities under human rights legislation and an allegation of a contravention is substantiated by a tribunal, the prospective tenant will likely have the right to assume a tenancy in the building along with monetary compensation for the losses arising from the discrimination.

Landlords, at the other end of the tenancy contract, have rights as well. The landlord has the right to terminate the tenancy if the tenant breaches certain obligations such as paying the rent, respecting the enjoyment of other tenants, refraining from illegal activities, and so on. Landlords have their right to terminate tenancies and to be compensated for losses arising from tenants' breaches of statutory obligations enforced under the *Tenant Protection Act*[45].

[45] S.O. 1997 s. 7 c.24.

Respective tribunals have been established in Ontario with exclusive jurisdiction to adjudicate these two sets of rights. A prospective tenant alleging a discriminatory denial of a tenancy files a complaint under Ontario's *Human Rights Code*, which can only be adjudicated before a human rights tribunal. A landlord wishing to terminate a tenancy may file an application with the Ontario Rental Tribunal which adjudicates all applications under the *Tenant Protection Act* .

While the Ontario Human Rights Commission only receives, on average, less than 200 complaints of discrimination in housing every year, the Ontario Rental Tribunal receives over 1000 landlord applications for termination of tenancy every week. If the administrative load of human rights complaints is burdensome, surely this one is more so.

Imagine, though, the outrage if the government addressed the serious "administrative" load on the rental tribunal by designing a screening function similar to that at the Human Rights Commission. A few commissioners could "screen" landlords' complaints of tenants' breaches of statutory obligations and refer, on a purely discretionary basis, 20 applications (about 2%) to the tribunal every week for adjudication. The Rental Commission could assume carriage of these cases so the landlords, if they chose, could appear without legal counsel. The other 980 landlords, of course, would be left without any order to terminate the tenancy and without any order for monetary compensation for rent arrears. They would have an opportunity to judicially review the commissioners' decision, but as long as the commissioners had the landlord's application and submissions in front of them, the review would fail. Mediation would be encouraged, but landlords would be forced to accept any settlement at all, since they would know that there is only a remote chance of ever getting to a tribunal. Many landlord lawyers would simply advise against going to the trouble of filing an application.

Of course, such a system would never be accepted. Landlords would be outraged. Media stories would abound about the hardship imposed on landlords with unruly

tenants they could not evict. The government would simply have to come up with the resources necessary to ensure the landlords' right to adjudication.

Consider, though, what it is like to work at CERA We have to tell homeless families who desperately need the remedy to which they are entitled in law that their chances of ever getting to a hearing and receiving a remedy are utterly remote. Why? Because governments in Canada have determined that it would be too burdensome to give every claimant access to a hearing and a remedy for a human rights violation. 150 cases across Ontario is too many and must be screened down to 1 or two per year. We witness the same disregard for the law among landlords that landlords would fear among tenants if they were denied adjudication of their rights. We can not help but ask why something that would never be accepted by more advantaged groups continues to be justified for the most disadvantaged on the basis of the special nature of human rights legislation. Is this really a system which serves the interests of those who rely on human rights legislation, or is it a form of differential treatment which has a lot to do with the relative position and power of those who rely on the statute?

G. COMPARATIVE ADMINISTRATIVE REGIMES

Human rights acts are not unique in conferring exclusive jurisdiction on the administrative regime established by the statute to enforce its provisions. Workers' Compensation Legislation, Labour Relations Statutes, Landlord and Tenant and Rent Control legislation usually confer, to various extents, exclusive original jurisdiction on the administrative regimes established under them and in many cases preclude court actions.[46] Such exclusive jurisdiction has been found to be constitutional by the

[46] *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 ("mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction."); *Reference Re Amendments to the Residential Tenancies Act* (N.S.) [1996] 1 S.C.R. 186 (Director given exclusive original jurisdiction).

Supreme Court of Canada in the case of the Newfoundland *Workers' Compensation Act*.[47]

There are also various types of provisions in most administrative law regimes conferring discretion to dismiss, at an early stage, claims which are trivial, frivolous or vexatious or outside the jurisdiction of the statute or in which there is no evidence to support the allegation. Is the screening function of the Canadian Human Rights Commission really so objectionable or discriminatory in comparison?

It is important, in examining this question, to return to our earlier point that the problem with the screening function under section 44 of the CHRA is not that it constitutes a preliminary determination that the complaint is not valid but rather that it extinguishes the complaint (often after many years) with no determination at all with respect to its validity. This contrasts with a finding by the Commission under section 41 that a complaint is trivial, frivolous, vexatious, made in bad faith or that it is outside the jurisdiction of the Act. Though the broad discretion accorded the Commission's screening function under section 44 has led the courts to adopt a fairly lenient standard with respect to section 41 as well, the nature of the Commission's decision under section 41 is different from that under section 44. A decision to dismiss the complaint under section 41 is based on a determination that the complaint is, for certain enumerated reasons, without merit. A decision under section 44, on the other hand, makes no determination with respect to the merits of the complaint. The Commission simply decides that it will not proceed with the complaint, which may or may not have merit.

Depending on the administrative regime, there are many different ways that allegations of infringements of statutory rights are determined and remedies granted. Investigating officers may make determinations and issue orders, Commissioners may make orders or adjudicative bodies such as tribunals may hold hearings and make orders. At

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47 *Reference re Workers' Compensation Act, 1983 (Newfoundland)* [1989] 1 S.C.R. 922 at 924.

various stages, decision-makers may choose not to proceed with an investigation on the basis that no statutory breach has occurred. What is unique about the human rights regime is not that most complainants are denied a hearing. There are many regimes in which a statutory breach may be determined and remedies granted without a hearing. What is unique to human rights legislation is that there is, in most cases, no determination of whether a statutory right has been infringed.

Examples of Comparative Regimes:

Competition Act

If we consider other examples of "gatekeepers", we find that they are quite different from the screening function of the Canadian Human Rights Commission. Under the Federal *Competition Act*,[48] for example, on application by six residents of Canada over the age of eighteen years of age alleging a breach of various sections of the Act, the Commissioner has authority to hold an inquiry into the alleged breach. As a result of the inquiry, the Commissioner can make recommendations, including referring the matter to the Courts for a determination and order or to the Attorney General for prosecution. The Commissioner functions only as a commission of inquiry and does not make any determinations or orders itself. The Commissioner, though, may discontinue the inquiry if the matter "does not justify further inquiry" (S. 22). This would appear to be analogous to the Human Rights Commission's discretion to dismiss. However, if the Commissioner refuses to hold an inquiry, discontinues an inquiry or, after an inquiry, does not choose to refer the matter to the Attorney General for prosecution or to the courts for a determination, this does not necessarily preclude an applicant from pursuing a civil suit in court.[49] The discretionary aspect in this regime, therefore, relates to the inquiry function of the Commissioner but does not deny access to the adjudicative forum or to a remedy with respect to many areas of protection under the Act.

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48 R.S.C. 1985, c.34, as amended.

49 See for example s.74.08 of the Act which permits individuals to pursue civil remedies for any breach of Part VII.1 of the Act dealing with "Deceptive Market Practices".

Official Languages Act

The *Official Languages Act*[50] establishes a Commissioner who inquires into breaches of the Act and makes recommendations. The inquiry can be initiated by complainants. Section 58 of the Act provides that

> the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,
>
> (a) the status of an official language was not or is not being recognized,
>
> (b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or
>
> (c) the spirit and intent of this Act was not or is not being complied with in the administration of the affairs of any federal institution.

Under section 58(3) and (4), the Commissioner may refuse to continue an inquiry if "having regard to all the circumstances of the case, any further investigation is unnecessary" and may cease or refuse to investigate if the matter is seen to be "trivial, frivolous, vexatious or not made in good faith" or if the subject matter does not fall within the Act.

The refusal by the Commissioner, however, to refuse to investigate or to continue to investigate, does not affect the rights of the claimant to pursue a remedy in court. Section 77 of the Act provides:

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50 R.S. 1985, c.31 (4th Supp.)

Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV or V, or in respect of section 91, may apply to the Court for a remedy under this Part.

Limitation period
(2) An application may be made under subsection (1) within sixty days after

(a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1),

(b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2), or

(c) the complainant is informed of the Commissioner's decision to refuse or cease to investigate the complaint under subsection 58(5),

or within such further time as the Court may, either before or after the expiration of those sixty days, fix or allow.

While a hearing is thus guaranteed under the Act, the hearing may be conducted in a summary manner pursuant to the *Federal Court Act*.

Employment Standards Legislation

While employment standards legislation enjoys exclusive jurisdiction in most provinces, precluding access to court for adjudication of claims, those with claims are not denied a determination of their claim. Under the Ontario *Employment Standards Act* [51], for example, the officer may refuse to issue an order. However, this is properly characterized as a determination that an order is not justified. The claim is not left

51 R.S.O. 1990, c. E.14, as amended.

undetermined, as in the CHRA regime. The officer is empowered to determine if the Act has been violated and to either order remedial action or not.

Under this scheme, a hearing is not required for a determination of a claim. Rather, hearings are held to review determinations made by officers. Moreover, the Ontario Act does not preclude an individual from suing civilly for damages resulting from actions of an employer, but does require that the individual proceed in one or the other forum. Under the British Columbia *Employment Standards Act*[52], when a complainant makes a complaint that the Act has been contravened, the Director of Employment Standards must investigate the complaint (s.76). However, the Director can refuse to investigate or can stop an investigation if the complaint is out of time, is frivolous or vexatious or there is not enough evidence to prove the complaint. If the investigation is not discontinued, the Director makes a determination as a result of the investigation and can order compliance with the Act and other remedies. The Director can also vary or cancel a determination (s.86). Anyone affected by a determination of the Director has a right of appeal to the Employment Standards Tribunal (s.112), though the Tribunal can dismiss the appeal if it is frivolous or vexatious, out of time or outside of the jurisdiction of the Tribunal (s.114). In this scheme, again, the Director is the decision-maker - not the gatekeeper - and any early determination that the complaint is not valid is a determination on the merits of the complaint.

In the Yukon Employment Standards Act[53], the Director or Employment Standards Officer is required to investigate complaints. Section 71(2) of the Act permits the Director or Employment Standards Officer to refuse trivial and vexatious complaints or to cease investigations where there is insufficient evidence to substantiate them. Again, it is the Director, the final decision-maker, who has the authority to cease investigations. If an investigation is complete, then the complaint is either upheld or dismissed by the Director, and the Director may order a remedy. Orders made by the Director can be

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52 R.S.B.C. 1996, c.113, as amended.

53 R.S.Y.1986, c.54, as amended.

appealed to the Employment Standards Board (s.73). No complaints are left undetermined, rather they may be dismissed at a preliminary stage if they are clearly non valid (trivial, outside the jurisdiction, etc.), dismissed at the completion of the investigation as being not substantiated, or upheld, with a remedy granted.

Labour Relations Legislation

Labour relations is another area in which claims (either arising from rights under the relevant labour relations statute or under a collective agreement) are dealt with exclusively by an administrative regime.

Generally, there are two fora in which matters dealing with labour relations are heard. Issues with respect to the interpretation of or adherence by an employer to the terms of collective agreements are generally within the exclusive jurisdiction of arbitrators whose powers derive from the relevant labour relations act.[54] Issues with respect to the process by which a union is certified, the collective bargaining process, the renewal of collective agreements and unfair labour practices are generally within the exclusive jurisdiction of the Labour Relations Tribunal.

For example, under the Ontario *Labour Relations Act, 1995*[55], applications can be made to the Ontario Labour Relations Board (OLRB) by anyone on any matter which implicates their rights under the Act. Once an application has been filed, a labour relations officer is generally assigned to the matter to determine if the matter can be settled or, at least, whether the issues can be narrowed. If the labour relations officer is

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54 For example, under the Ontario *Labour Relations Act, 1995* S.O. 1995 c. 1, Sch. A, section 48 provides that "Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from teh interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable".

55 *Ibid*.

unsuccessful in settling the application, the officer reports this to the Board and in most cases an oral hearing is scheduled.

The OLRB has the power to summarily dismiss applications which are outside of the jurisdiction of the Board under the Act or which otherwise disclose no prima facie case. Where a respondent to an application makes a submission that no prima facie case is disclosed, the OLRB will generally send a notice to the Applicant indicating that the respondent has made such submissions and requesting further submissions from the applicant in writing. Depending on the nature of the reply submissions, the OLRB will summarily dismiss the application, dismiss the respondent's objection or hold a hearing. Regardless of the outcome, however, the process is geared toward ensuring a determination of the rights of the applicant by the Board.

Similarly, while grievances under collective agreements are dealt with across Canada exclusively by administrative decision-makers (whether arbitrators or boards), the decision of the arbitrator or board is a decision on the merits of the grievance. Thus, the exclusivity of the jurisdiction does not deny a complainant access to adjudication.

It is true that unions have the discretion, under most collective agreements, to refuse to bring a grievance to arbitration. In Ontario, however, the validity of this decision can be reviewed by the Ontario Labour Relations Board. At any rate, a screening role which is the result of an agreement with the union to provide representation is not analogous, either in principle or in practice, to a statutory provision permitting a government appointed body to deny access to adjudication at its own discretion. Human rights complainants neither voted to certify the Commission as their representative nor do they have they the power to decertify it. Had they retained this power, we suspect the Commission would have been forced to relinquish its screening authority some time ago.

Pay Equity Legislation

Under Ontario's *Pay Equity Act*[56], when the Pay Equity Commission receives a complaint, the Review Officer is required to investigate the complaint and to endeavour to effect a settlement. The Review Officer can decide that a complaint should not be considered if it is frivolous and vexatious or outside of the jurisdiction of the Act (s.23(3)). If a complaint is dismissed in this manner, however, the complainant can request a hearing from the Hearings Tribunal in relation to the dismissal (s.23(4), s.25(1)(a)). If the Review Officer finds merit in the complaint, the Review Officer can make an order for compliance (s.24). The pay equity officer, unlike a human rights officer, is thus invested with decision-making authority. Any decision to dismiss or cease an investigation into a complaint or any compliance order may be appealed to the Hearings Tribunal. Although the Hearings Tribunal has exclusive jurisdiction, complainants are not left without a determination of a complaint, which may be made by an officer, and further have appeal rights to the tribunal from orders or decisions of officers.

Landlord and Tenant Legislation

Landlord and Tenant and rent control legislation is also frequently an exclusive jurisdiction now. Under Ontario's Tenant Protection Act[57] applications for rent increases, termination of tenancy and other matters may be refused a hearing if frivolous, vexatious, disclosing no cause of action or are filed knowingly with false or misleading information. However, this decision is made by the tribunal, which also has the authority to apply the statute and issue an order. It is not a screen that denies determination of the application but rather a preliminary determination of an application which simply allows for a ruling by the decision-making tribunal without a hearing. As noted above, a reconfiguring of the rental tribunal so as to analogous to the CHRA, denying 98% of applicants access to any determination of their application, would never be accepted by the landlord community.

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56 R.S.O. 1990, c. P.7, as amended.

57 S.O. 1997, c.24.

Workers' Compensation Legislation

Workers' Compensation regimes are another important analogy, in that the Supreme Court of Canada has rejected a claim that forcing injured workers into a regime with exclusive jurisdiction constitutes a violation of section 15. As David Mullan points out, however, Workers' Compensation regimes provide a stark contrast to human rights regimes in that they provide for universal access to adjudication and frequently include generous appeal provisions.[58]

Under the Ontario *Workplace Safety and Insurance Act, 1997*[59] a workplace injury claim is initiated upon the filing of a claim of injury by the employee and the employer and a report from the attending physician. Sometimes the Workers' Compensation Board will make a determination as to compensation within days of receiving the employer, employee and doctor's reports, particularly in cases where there is no conflict between them. In other cases the Board will appoint an investigator to investigate the claim. In cases where the claim is determined to be non-compensable, it is the Board that makes that determination. Decisions of the Board that a claim is not compensable under the Act can be appealed to the Workplace Safety and Insurance Appeals Tribunal.

Similarly, under the British Columbia Workers Compensation Act[60], the Workers Compensation Board has exclusive jurisdiction over compensation claims. A worker cannot sue his or her employer for work-related injury or disease (s.10(1)). Upon a claim being made in relation to work-related injury or disease, the Board makes a determination as to compensation. There are a variety of avenues of appeal from the determination of the Board.

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58 David Mullan, "Tribunals and Courts: the Contemporary Terrain - Lessons From Human rights Regimes" (1999) 24 Queen's L.J. 643 [hereinafter Mullan]

59 S.O. 1997, c.16, Sch. A

60 R.S.B.C. 1996, c.492, as amended.

Conclusions Drawn from the Comparative Regimes

Other administrative regimes with exclusive jurisdiction or screening provisions are quite distinct from the human rights regime. Complainants generally have access to those with the authority to determine that a statutory right has been breached and to order a remedy. Most of these regimes provide for early termination of complaints that are trivial, frivolous, vexatious or outside the jurisdiction of the statute. Where investigation is involved, there is usually provision for declining to proceed with the investigation where there is insufficient evidence to substantiate the complaint. But these are simply early, expedited determinations that certain complaints are unmeritorious and not worth proceeding with - not screening as we know it under section 44 of the CHRA.

If human rights complainants had access to the Human Rights Tribunal, the legislation should provide the Tribunal with the authority to dismiss frivolous or vexatious claims or claims for which there is no evidence through a preliminary procedure, rather than holding full hearings. This would be a screening function analogous to many others which provides for an early determination based on the evidence, not one which denies access to adjudication.

The only administrative regimes we have found to have a screening function analogous to the Human Rights regime are complaints procedures designed as mechanisms to ensure quality of services or assist in disciplinary procedures within professional associations. Under the Ontario *Police Services Act*[61], for example, a complainant may lodge a complaint against a police officer for violating the rules of conduct. After a mandatory investigation, the Commissioner will decide whether to appoint a board of inquiry or close the file. The decision to appoint a board of inquiry is discretionary, and a board is only appointed where "it is in the public interest to do so."

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61 S.O. 1991, Chap. 18, as amended.

Similarly, under Ontario's *Regulated Health Professions Act* and the *Health Professions Procedural Code* (Schedule 2 to the RHPA (1991)) complaints are reviewed by the Complaints Committee and are referred, on a discretionary basis to the Discipline Committee which can make a finding of professional misconduct or to the Executive Committee for Incapacity Proceedings. Where the Complaints Committee dismisses the complaint, the complainant can appeal to the Health Profession Review Board.

Certainly the basic scheme in this type of complaints procedure is very similar to procedures under the CHRA. Complaints procedures of this sort, however, are not an exclusive jurisdiction. To the extent that there are individual rights at stake, the complainant is free to either sue civilly or lay a private information to initiate criminal proceedings. In addition, there is often a more meaningful appeal or review mechanism than exists under the CHRA with respect to the decision to dismiss the complaint.

There is an important distinction between "rights-conferring" legislation and other types of statutes, particularly those which are regulatory or disciplinary in nature. Our human rights legislation would seem to result from an unfortunate confusion between a model that is appropriate where a public interest body receives complaints solely in aid of its own regulatory endeavours and one which is appropriate where individual rights and remedies are at stake.

The distinction between statutes which confer rights and those which do not was considered by the Supreme Court of Canada in the *Finlay*[62] case, in reference to the *Canada Assistance Plan Act*. The Court found in that case that while social assistance recipients have enforceable rights to social assistance under provincial legislation, inter-governmental agreements such as CAP do not in themselves confer rights.

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62 *Minister of Finance of Canada v. Finlay* (1986) 33 D.L.R. (4th) 321 at 332.

> although the Plan was enacted for the benefit of persons in need it does not confer any rights on such persons; their entitlement to assistance arises under the provincial legislation.

Even in that case, however, the Court found that Finlay had public interest standing to enforce the provisions of the Act, achieving a systemic remedy though not providing individual compensation. While social assistance recipients under CAP could not achieve an individual remedy against the Federal Government, they nevertheless had a right of access to the adjudication of their claim before the court, through which they could achieve a systemic remedy. Thus, even under legislation that was found to confer no rights, the court did not deny access to adjudication.

Regimes such as police complaints procedures and disciplinary procedures within various professions may be enacted for the benefit of consumers , clients or patients and in aid of the public interest in ensuring appropriate conduct. They do not confer rights or give rise to individual remedies or entitlements. The issue in Police Complaints procedures and professional disciplinary bodies is the "public interest", and in most cases there is no individual right created by the statute. Similarly, a complaint filed with a professional regulating body is not designed to provide any individual remedy but is a means for the profession to be apprised of misconduct and to take appropriate regulatory action. Regulatory regimes such as these do not affect the common law rights for which individuals may claim remedies in court. The screening function in this type of regulatory regime does not extinguish any fundamental rights of complainants or prevent those who have had a right infringed from pursuing a civil remedy.

It seems fair, therefore, to conclude that the central role of the screening function of the Commission in the CHRA and other human rights legislation in Canada subjects the most vulnerable groups in Canadian society to a substandard protection of their rights. It is based on a model of “complaints procedure” that is appropriate only where there are no individual rights at issue and where there is an option of suing civilly in court for any individual remedy. Applying such a model to the enforcement of quasi-

constitutional rights under the CHRA amounts to an unparalleled denial of the right to adjudication and access to justice.

H. COMPARATIVE INTERNATIONAL REGIMES

Preliminary research also suggests that the screening function provided human rights commissions in Canada is also an aberration internationally. Even in other common law countries, domestic human rights regimes generally permit individuals to pursue a determination of their rights or involve structures in which rights claims are in practice supposed to be determined on their merits, rather on the basis of administrative considerations.

Equal Employment Opportunites Commission, U.S.A.

The Equal Employment Opportunities Commission in the United States is charged with the administration of Title VII, which prohibits discrimination on the basis of race, colour, religion, sex or national origin in employment practices. If a complaint filed with the Commission is dismissed, however, or if the Commission does not proceed with a civil action within 180 days of the filing of the complaint, the complainant may proceed to file a civil action. Thus, the Equal Opportunities Commission cannot prevent a complainant from proceeding to have a judicial determination made as to whether a right was infringed.

Equal Opportunities Commission, U.K.

Similarly, in the United Kingdom, there is no discretion accorded the Equal Opportunities Commission to prevent a complaint of sex or racial discrimination from proceeding either to an industrial tribunal (in the case of employment discrimination) or in civil proceedings as any other claim in tort (in the case of discrimination in education,

the provision of goods and services, and by barristers.) The Commission has the discretion as to whether or not it will assist individual litigants.[63]

New Zealand Human Rights Commission

The complaint process in New Zealand is similar to Canada's in that the first step involves the filing of a complaint with the Commission. Once a complaint is filed with the Commission, the Commission determines whether the complaint is within its jurisdiction. If it is, the Commission attempts to conciliate the complaint. If conciliation is impossible or unsuccessful, the complaint is investigated. The complaints division has the discretion not to investigate a complaint if, in the opinion of the Complaints Division, the complaint is frivolous or vexatious or trivial or "having regard to all the circumstances of the case, it is unnecessary to investigate further"[64]. When the Complaints Division decides not to investigate a complaint, it must inform the complainant of the reasons for that decision. In such cases, the complainant then has the right to pursue the complaint directly before the Complaints Review Tribunal.

The complaints division investigates complaints with a view to determining whether the complaint has substance. Where the Complaints Division is of the opinion that the complaint has substance, the complaint is referred to the Proceedings Commissioner. The Proceedings Commissioner has the discretion to proceed with a complaint before

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63 Section 75(2) of the SDA provides that "Assistance by the Commission may include (a) giving advice; (b) procuring or attempting to procure a settlement of any matter in dispute; © arranging for the giving of advice or assistance by a solicitor or counsel; (d) arranging for representation by a person...". Section 79(4), Sch. 4, para. 7 of the RRA added (e) any other form of assistance which the Commission may consider appropriate. For a discussion of the strategic investigative roles of these two Commissions, see Alison Harvison Young, "Keeping the Courts at Bay: The Canadian Human Rights Commission and Its Counterparts in Britain and Northern Ireland: Some Comparative Lessons", (1993) 43 U.T.L.J. 65 (1993). In her article Professor Harvison Young notes that in its law reform submission, *Report on Fair Employment,* the Standing Advisory Commission on Human Rights (Northern Ireland) considered the right to a hearing essential (at p.116).

64 New Zealand Human Rights Act 1993, No. 82, s.76(2).

the Complaints Review Tribunal. When the Proceedings Commissioner decides to take a complaint forward, the Commission has carriage of the complaint and the complaint is litigated at the expense of the Commission. If the Proceedings Commissioner decides not to take the case forward, the complainant can bring the complaint to the Tribunal at his or her own expense.

Human Rights Legislation in Australia

In Australia, various State human rights regimes provide for direct access to human rights adjudication. The South Australia *Equal Opportunity Act, 1984*, for example, establishes the Equal Opportunity Commission to investigate and conciliate complaints which have been filed, in writing, with the Commission. The Commission has the discretion to investigate and conciliate the complaint. If the Commission believes a complaint to be frivolous or vexatious, misconceived or lacking in substance, the Commission may, on notice to the complainant, decline to take any action with respect to the complaint. Where, however, the investigation by the Commission demonstrates that the complaint has substance and conciliation is unsuccessful, the Commission *must* refer the complaint to the Tribunal. Where complaints have been referred to the Tribunal by the Commission for hearing and determination, section 95(9) of the Act provides that:

> ...the Commissioner must, on the request of the complainant, assist the complainant, personally or by counsel or other representative, in the presentation of the complainant's case to the Tribunal (emphasis added).

In cases where the Commission has declined to take action, the complainant has three months from the date of notification by the Commission to request in writing for the complaint to be referred to the Tribunal. Upon such request, the Commission must refer the complaint to the Tribunal for a hearing and determination. The complainant, however, cannot request assistance from the Commission.

The most similar jurisdiction to Canada's seems to the be Federal system in Australia. The Australian commonwealth *Sex Discrimination Act, 1984*, *Disability Discrimination Act, 1992* and *Racial Discrimination Act, 1975* use the Human Rights Commission to investigate and conciliate complaints and do not guarantee a right to a hearing. However, complaints which cannot be conciliated and which have substance are referred to the Commission for a hearing.[65] In practice, the threshold for what constitutes a claim with substance is fairly low. Claims are considered to have sufficient substance to warrant referral provided that, on the face of the complaint, the claim has a greater than remote chance of success. Once claims are referred to the Human Rights and Equal Opportunity Commission for a hearing, claimants must pursue and present their cases on their own. There is a limited availability for legal aid funding for claimants, but many claimants represent themselves. Claimants may also be represented by community legal centres, including specialty legal centres, such as women's and disabiilty rights centres, which will take forward certain claims.[66]

Conclusions Drawn from Comparative International Regimes

While we would not necessarily hold up the U.S., U.K., Australia or New Zealand human rights regimes as exemplary in other regards, they underline the aberrant nature of the denial of access to adjudication in Canadian human rights regimes. In these and other jurisdictions, a person alleging discrimination contrary to law generally has access to an

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65 Section 57(1)(c) of the Sex Discrimination Act, 1984 provides that the Commissioner shall refer a matter to the Commission for a hearing if it "is of the opinion that the nature of a matter is such that it should be referred to the Commission". This language is also found in s.76(1)(c) of the Disability Discrimination Act, 1992 and 24(e)(1)(c) of the Racial Discrimination Act, 1975.

66 Telephone conversation with a legal staff member at the Human Rights and Equal Opportunity Commission. The staff member indicated at the HREOC legislation would soon be changing and that claimants who have been referred to a hearing will have to take their cases to the federal court. This legislative amendment arose from a judicial decision that the orders of the Commission were unenforceable. A review of the 1996/1997 Annual Report of the Commission suggested that approximately 10-15% of the cases go to a hearing and approximately 20-30% are declined on the basis that they are frivolous and vexatious or lacking in substance.

appropriate court or tribunal to have a determination made as to whether a right has been infringed whether or not the relevant commission decides to proceed or not. Such a remedy is seen as fundamental to the rule of law in free and democratic societies.

I. INCOMPATIBILITY OF THE SCREENING FUNCTION WITH THE CHARTER

The legal and experiential concerns with the screening function outlined above translate into a strong basis for a Charter challenge to the denial of access to the tribunal under the CHRA. The *Charter* violation revolves around the central argument that the screening function of the Commission is inconsistent with the "Rule of Law" maxim that rights must have a remedy.

Broadly, this violation of the rule of law can be seen to be unconstitutional in two ways. First, it violates section 15 of the Charter because it is the disadvantaged groups protected under section 15 who bear the burden of this breach of the rule of law. Second, it violates section 7 of the Charter because access to adjudication to enforce basic rights in law is a fundamental component of liberty and security of the person. It should only be possible to bar human rights claimants from the courts if the alternative adjudicative procedure to which they are relegated accords with the principles of fundamental justice.

Breach of Section 15 of the Charter

The failure to provide access to a hearing and to an effective remedy violates the equality rights of those protected by the CHRA in a number of related ways.

First, as discussed in the section on comparative regimes, the CHRA constitutes discriminatory differential treatment, subjecting those who rely on human rights

protections to an inferior form of administrative justice.[67] Equality-seekers are thus treated differently than more advantaged groups who do not rely on the protections of human rights legislation and who rely on other administrative regimes which guarantee access to adjudication.

This differential treatment, which results in equality-seekers being denied access to the tribunal to achieve a remedy for their rights violations, has a discriminatory or adverse effect analogous to being denied the protection of the legislation itself. In *Vriend v. Alberta*[68], the Supreme Court of Canada recognized that the adversity of being denied a remedy within the human rights system is heightened by the fact that a civil remedy to discrimination is precluded.

> The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual

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67 In its decisions in *Eldridge* v. *British Columbia (Attorney General)* [1997] 3 S.C.R. 624 [hereinafter *Eldridge*] and *Vriend, supra* note 5, the majority of the Supreme Court affirmed for the first time that section 15 guarantees both "substantive" and "formal" equality. The Court's application of the two concepts was most clearly articulated in *Vriend*, where it found that the exclusion of sexual orientation as a prohibited ground of discrimination violated both formal and substantive equality of gays and lesbians. Under the formal equality analysis in *Vriend*, the Court finds that the relevant comparison is between gays and lesbians and other groups who have an analogous need for human rights protection from discrimination. To include the other groups in the legislation but exclude gays and lesbians is a violation of formal equality because gays and lesbians are treated differently than analogous groups which are protected. The substantive equality analysis, on the other hand, compares gays and lesbians with heterosexuals - those who need the protection with those who do not - and finds that the failure to prohibit discrimination because of sexual orientation has a discriminatory effect on gays and lesbians, who need the protection, compared to heterosexuals, who do not. The formal equality comparison will generally be a comparison of a disadvantaged group with others which, in a similar circumstance or with comparable needs, are treated more favourably. The substantive equality comparison will assess the differential effect of failing to provide a benefit or protection based on the distinctive needs and disadvantage of the disadvantaged group. The discriminatory effect may be based on the fact that the benefit or protection is needed or required by the disadvantaged group in order to enjoy meaningful equality, either in public services (*Eldridge*) or in the private sphere (*Vriend*). Advantaged groups, by comparison, may have no comparable need or requirement.

> orientation are denied recourse to the mechanisms set up by the IRPA to make a formal complaint of discrimination and seek a legal remedy. Thus, the Alberta Human Rights Commission could not hear Vriend's complaint and cannot consider a complaint or take any action on behalf of any person who has suffered discrimination on the ground of sexual orientation. *The denial of access to remedial procedures for discrimination* on the ground of sexual orientation must have dire and demeaning consequences for those affected. This result is exacerbated both because the option of a civil remedy for discrimination is precluded and by the lack of success that lesbian women and gay men have had in attempting to obtain a remedy for discrimination on the ground of sexual orientation by complaining on other grounds such as sex or marital status. Persons who are discriminated against on the ground of sexual orientation, unlike others protected by the Act, are left without effective legal recourse for the discrimination they have suffered. (emphasis added)[69]

While the Court in *Vriend* only considered the benefit of being permitted to "seek" a legal remedy through the filing of a human rights complaint, clearly any provision which has the effect of denying such a remedy to disadvantaged groups must be considered to have a discriminatory effect on those groups who seek it.

Being subjected to unremedied discriminatory treatment, of course, engages directly the dignity interests that the Supreme Court has recently articulated as being at the core of section 15 and the concept of discrimination. Further, the Human Rights Commission's monopoly over litigation of rights claims, through which the individual rights of equality seekers are appropriated by a "public interest body" in order to allow the Commission to decide whether a claim is worth pursuing and, if so, to take carriage of it away from the claimant is arguably based on an outmoded paternalism. Notwithstanding their obvious lack of resources to take cases forward, the idea that equality seekers are somehow

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68*Vriend, supra* note 5.

69 *Vriend, supra* note 5 at para. 97.

incapable of addressing issues of injustice and discrimination through their own initiative and organizations seems somewhat outdated in the era of major systemic challenges by equality seeking groups under section 15 of the Charter. An approach more consistent with dignity and equality interests would at least provide individuals and groups with a choice as to whether they wish the Commission to assume carriage of their claim, and with resources to proceed on their own where that is considered more appropriate. As the Supreme Court of Canada recently stated in *Law v. Canada (Minister of Employment and Immigration)*[70]:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

This is not to say that the Commission's public interest role is not important, but rather that the idea that such public interest must reside **solely** with the Commission is an inherently discriminatory notion which demeans the citizenship rights of disadvantaged groups and in fact, exacerbates the very marginalization and powerlessness which, according to Justice Wilson in *Andrews*, the equality provisions of the Charter are intended to remedy.

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70 [1999] 1 S.C.R. 497 at para. 51

As David Mullen has noted:

> One potential overarching principle is that denying at least some victims of discrimination access to the regular courts for compensation is justifiable only when there is there is a viable, well-funded, effectively working system of administrative justice. To the extent that Human Rights Commissions are falling far short of providing generally accessible and adequate relief, the system may be fatally flawed - a species of government action that perpetuates inequality and discrimination, rather than providing relief from those evils. Indeed, this argument may be strengthened by the extent to which Human Rights Commissions play not only an initial gatekeeping role in deciding which complaints proceed to a hearing, but also have exclusive control over the carriage of the proceedings thereafter.[71]

A second line of argument under section 15 is based on the emerging notion of substantive equality under section 15, which is less pronounced in the *Law* decision but stands out in the *Eldridge* and *Vriend* decisions. The screening function in the CHRA violates the substantive equality rights of equality-seekers by failing to provide disadvantaged groups with the protection that they need in order to enjoy meaningful equality. This test for equality was applied for the first time in *Eldridge* wherein the Court interprets *Andrews* as holding that section 15 guarantees "a measure of substantive and not merely formal equality".[72] In *Vriend,* the unanimous Court in *Eldridge* is described as affirming "the *Charter*'s requirement of substantive, not merely

71 Mullan, *supra* note 58, at 654.

72 *Eldridge supra* note 67, at 615.

formal, equality" and recognizing, as well, that "substantive equality may be violated by a legislative omission."[73]

The unique nature of the quasi-constitutional rights at stake and the vulnerability of the constituencies protected require the most thorough protection in law. Whether or not any other administrative regimes may be similar in structure to the CHRA is, under a substantive equality analysis, somewhat irrelevant. The point in the substantive equality analysis is to determine if the denial of adjudication to the majority of complaints is simply inadequate protection, leaving equality seekers vulnerable to discrimination and thus perpetuating inequality.

Our consultations and our own experiences at CERA have made it clear that the virtual unenforceability of human rights under the present system means that equality-seekers must cope with widespread discrimination that is rendered immune from effective challenge. The disrepute of the human rights enforcement process is such that most potential complainants do not bother filing complaints. It is the most disadvantaged individuals who are least likely to be able to withstand the lengthy delays and abuses at human rights commissions. Respondents to human rights complaints routinely ignore complaints because they know the chances of a referral to a tribunal hearing are remote. A dismissal by the Commission is taken by respondents as vindication of their policies. Accordingly, the excessive discretion accorded human rights commissions to dismiss complaints perpetuates discriminatory attitudes and behaviour toward disadvantaged groups and exacerbates present inequalities.

Section 15 places positive obligations on Parliament to provide meaningful, rather than illusory protections from discrimination.[74] If Alberta, after adding the ground of sexual

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73 *Vriend, supra* note 5, at para. 83.

74 In this regard, it is our view that the Court's new approach to substantive obligations emanating from section 15 of the Charter ought to be informed by the international human rights norms, discussed later in this paper, which obligate State Parties to provide effective legal remedies.

orientation, simply exercised a discretion never to proceed with sexual orientation complaints, a further section 15 challenge would surely be successful because the discriminatory effect of a systemic denial of adjudication and remedy would be considered by the Court to be essentially the same as denying coverage of the right itself. A failure to provide effective protection against discrimination by omitting the most fundamental aspect of any human rights protections, access to adjudication and remedy, thus has an adverse effect on those who rely on such protection and violates their right to substantive as well as more formal equality protections in Canadian law.

The Regime is not Protected by s.15(2) of the Charter

It would be difficult, in our view, for the government to succeed either under section 15(2) (or under section 1) in arguing that the CHRA is legitimately a distinct regime which treats equality-seekers "differently" because its overall purpose is to ameliorate disadvantage. In other words, the CHRA cannot be defended on the basis that it is an ameliorative program under section 15(2) of the Charter or that the "harm" created by the screening function is part of a larger benefit.

Accepting that human rights legislation may treat equality seeking groups differently in order to ameliorate conditions of disadvantage does not preclude the courts from reviewing particular provisions to ensure that they are rationally connected with the broader purposes. Indeed, the fact that the Act establishes an administrative system on which disadvantaged groups rely ought to **attract** judicial scrutiny to ensure that these groups are afforded full equality in all aspects of this "separate" regime. This principle was affirmed with respect to parallel special program provisions in human rights legislation by the Ontario Court of Appeal's decision in *Roberts* where Weiler J.A. states that "government programs which provide a benefit to disadvantaged persons, but which result in the infringement of other rights not central to their purpose, are properly subject to judicial review".[75] The court in Roberts applied a rational connection test to

75 *Roberts v. Ontario* 117 D.L.R. (4th) 297 at 337, 340.

any discriminatory provision in relation to the ameliorative purposes of the program itself.

The fact that the screening function is not rationally connected to the ameliorative purpose of the regime or that it does not minimally impair the right of access to adjudication is obvious from the fact that the Act denies the complainant the *choice* of proceeding to the tribunal when the Commission decides not to proceed. This is the norm internationally and appears not to create any undue burden on tribunals or courts in other jurisdictions. If ameliorative programs benefit disadvantaged groups, the accepted approach is to let them choose to enjoy this advantage, not to force them, against their will, to submit to it. Under either section 15(2) or section 1, the courts may find that certain distinctive aspects of the legislative regime, such as the exclusive jurisdiction of the tribunal or the ability of the Commission to take carriage of complaints, may be justified as ameliorative of disadvantage, but it is difficult to imagine how the coercive aspects of the system or the denial or an optional procedure for adjudication can ever be justified as being a necessary component of such a system.

Breach of section 7 of the Charter

Section 7 of the Charter guarantees to everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The right to be free from discrimination and the right to a remedy for a violation of one's human rights is not only an equality right but also a liberty right and a protection of each affected individual's security of the person. The right to freely choose employment, services and accommodation without being subject to discrimination is obviously fundamental to liberty. Similarly, the physical and psychological effects of discrimination frequently impact on the health, welfare and, therefore, the security of the person of those who rely on the CHRA for protection.

As David Mullan has suggested, an overarching application of the Charter to administrative law regimes with exclusive jurisdiction may be that if the government bars access to the courts to enforce particular rights in law, the administrative regime that replaces the courts must meet standards of fundamental justice.[76]

As Dickson C.J. explained in *British Columbia Government Employees Union v. B.C.(A.G.)* with respect to Charter rights:

> The rights and freedoms guaranteed by the *Charter* and the courts are directed to provide a remedy in the event of infringement. To paraphrase from the European Court of Human Rights in *Golder v. United Kindgom*...it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.[77]

Or as noted in the same case at the Court of Appeal level, "It follows that in order for the courts to effectively discharge the duties imposed by its independent status it is imperative that a citizen have full and unfettered access to the courts".[78]

If access to the courts is fundamental to liberty, the *Bhadauria* decision violates the first part of section 7 by barring certain claimants from the courts. Such an action can be justified if the establishment of an alternative administrative regime is in accordance with the principles of fundamental justice. The application of s.7 to human rights proceedings in which respondents wait years before the complaint is determined has

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76 *see BCGEU v. B.C.(A.G.)* (1986), 17 C.R.R. 51 (B.C.C.A.) at 54, see Mullan, *supra* note 58.

77 [1988] 2 S.C.R. 214 at 229

recently been considered by the British Columbia Court of Appeal in *Blencoe v. British Columbia (Human Rights Commission).*[79] As David Mullan points out, if the application of section 7 to respondents' interests adopted by the British Columbia Court of Appeal is upheld on appeal to the Supreme Court, "it would not take too much for a later court to turn the proposition around and treat the privacy and dignity of victims of discrimination as being threatened by a process that is simply taking too long to respond to their complaints of degrading treatment,"[80] or, even worse, denying them access to any adjudication at all.

Perhaps the highest principle of fundamental justice is the rule of law itself. As the Supreme Court noted in the Quebec Secession Reference:

> Our Constitution has an internal architecture, or what the majority of this Court in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the Provincial Judges Reference, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the Manitoba Language Rights Reference, supra, at p. 750, we held that "the principle is clearly implicit in the very nature of a

The CHRA and other human rights legislation, of course, applies to governments as well. Complaints that are screened may frequently be complaints against the government. It is important to understand how vulnerable is the rule of law when a government appointed body, requiring government funding, is given a discretion to deny

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78 See *BCGEU v. B.C.(A.G.), supra* note 76 at 54.

79 (1988), 31 C.H.R.R. D/175 (B.C.C.A.).

claimants access to adjudication on the basis of administrative and caseload concerns. This has been particularly evident in our work under the Ontario Human Rights Code.

In 1992 the Ontario Human Rights Review Task recommended that every complainant be guaranteed access to adjudication before a tribunal. The New Democratic Party Government in power at the time refused to amend Ontario's Human Rights Code, however, and instead implemented a legislative review of the Human Rights Commission's operations by the Standing Committee on Government Agencies. The Standing Committee on Government Agencies directed the Human Rights Commission in February, 1994 to make a priority of getting rid of the backlog of complaints by using its discretion under section 34 of the Ontario Code "not to deal with" certain complaints.[81] In other words, to relieve the Commission's investigative load, it was directed to use its discretion to refuse to investigate more complaints. The Ontario Human Rights Commission, with a newly appointed Chief Commissioner sympathetic to the government, happily complied.

In the year following the Legislative Committee's direction, the Ontario Commission exercised its discretion "not to deal with" an unprecedented 336 complaints, compared to 97 the previous year. Between 1994 and 1998, during the primary years of the Commission's highly touted "backlog clearance", the Commission used its discretion to "not deal" with over 300 complaints each year, refusing to investigate a total of 1314 complaints in four years of "backlog clearance", allegedly on the basis that these complaints, mostly prepared by Commission staff or, less frequently, by counsel for complainants, were frivolous, vexatious, made in bad faith, outside the jurisdiction of the Commission or more appropriately dealt with in another forum. During that period of time 761 complaints were dismissed after investigation and 1441 were "withdrawn", usually after Commission staff informed complainants that they would be recommending that their complaint would "not be dealt with" or "dismissed".

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80 Mullan, *supra* note 58.

81Standing Committee on Government Agencies, "Report on Agencies, Boards and Commissions (No.20)", 3rd Session, 35th Parliament, July 28, 1994.

When the Ontario Human Rights Commission's success at reducing delay and backlog is assessed, we ought to consider the price paid in terms of the rule of law. During the most active years of the backlog clearance, from 1994 to1998, 24 of closed complaints were "not dealt with" under s.34 of Ontario's Code, (equivalent to s. 41 of the CHRA), 14% were dismissed under s. 36 (equivalent to s. 44 of the CHRA) and 34% were withdrawn or abandoned. Only 25% were settled and 3% referred to a board. This unprecedented assault on the rights of complainants to fair adjudication was explicitly justified by the Commission on the basis of direction it had received from a legislative committee.[82]

Some of the most important systemic challenges brought forward by CERA during the years of backlog clearance at the Ontario Human Rights Commission have been against the Ontario government itself. All have been dismissed under the aggressive dismissal policy adopted in response to the government's own directions to the Human Rights Commission.[83] The Government of Ontario, of course, is well aware of the Commission's policy and has refused to settle any of our complaints against it, even for no monetary compensation and minor policy change.

The Supreme Court's recent reflections on the importance of the rule of law thus have a particular resonance for us in relation to the Commission's screening function and how it

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82Ontario Human Rights Commission Annual Report 1997/98 page 65 (Table 6: Complaints Closed by Year and Disposition). In its 'Guidelines on the Application of Section 34 of the Ontario Human Rights Code (Draft) prepared in 1996, the Commission notes, as background, that "the Standing committee on Government Agencies reviewed the Commission's operations and called on the Commission to use Section 34 more rigorously." On the basis of this, the Commission accepts as a guiding principle that "section 34 must be applied with the utmost rigour of the law or through the strict enforcement of the rules under section 34." It notes that, in most cases, section 34 "does not deal with the merits of a complaint."

83 Moreover, as many of our systemic cases deal with discrimination on the basis of receipt of social assistance, we are not able without significantly developing the jurisprudence to frame our cases against the government of Ontario into Charter challenges.

can be used to undermine government accountability to the highest order of statutory rights:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.
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> In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference, supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

K. INTERNATIONAL AND DOMESTIC HUMAN RIGHTS REVIEW

In recent years, CERA and other human rights groups have turned increasingly to international human rights fora as an important supplement to our domestic human rights advocacy. We find that the broader perspective of international human rights cuts through unnecessary complexities and government obfuscation to expose the ways in which Canadians sometimes rationalize the unreasonable. At both the U.N. Committee on Economic Social and Cultural Rights and the U.N. Human Rights Committee, we have witnessed this process with respect to the "screening function" of human rights commissions in Canada. When Committee members heard explanations of what in Canada is seen as a complex issue, they found it difficult to understand what was so complicated about denying access to adjudication.

In November, 1998, at the Third Periodic Review of Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights*, the U. N. Committee on Economic, Social and Cultural Rights stated its position on this complex matter in one sentence:

> Moreover, enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups.[84]

Four months later, at the fourth periodic review of Canada's compliance with the *International Covenant on Civil and Political Rights*, members of the Human Rights Committee attended a meeting with Canadian NGOs prior to the oral questioning of the Canadian delegation to review NGO concerns and ask questions about issues of concern to them. Lord Colville, from the United Kingdom, directed his questions to the

adjudication of complaints under Canada's human rights legislation. He asked if he was correct in understanding that the *Canadian Human Rights Act* allows the Human Rights Commission to "screen" complaints and that the Commission has the discretion to proceed to the tribunal with only those complaints which it considers appropriate. "Yes, that is correct," we answered. "But complainants can still go the tribunal on their own", he said. "No," we explained, "they can only appear before the tribunal if the Commission refers the case to the tribunal." Somewhat surprised by this, he noted that " the complainants can still can go to court if they so choose," he said. "No," we explained, "the Supreme Court ruled in the *Bhadauria* decision that complainants cannot go to court with human rights complaints." Lord Colville was flaberghasted. "What an extraordinary decision!" he exclaimed, asking to review a copy of it.

After questioning the Canadian delegation about this issue, The Human Rights Committee subsequently, in its concluding observations, made it clear that the screening role of the Commission is incompatible with international human rights norms, specifically the guarantee under the ICCPR that State Parties provide an "effective remedy" for human rights violations:

> The Committee is concerned with the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant. The Committee recommends that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination.[85]

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84 *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, *Canada*, Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.31, 4 December 1998.

85 *Concluding Observations of the Human Rights Committee, Canada*, (1999) Human Rights Committee, 65th Session, CCPR/C/79/Add.105. Article 2 of the ICCPR requires each State Party to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy..." and to "ensure that any person claiming such a remedy shall have this right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to

The concerns raised by international human rights bodies express what appears to be an emerging consensus of experts, practitioners and claimants within Canada that the screening function of the Commission is incompatible with basic human rights norms. A number of extensive consultations conducted by researchers, task forces and commissions have found strongly held views among equality seekers across Canada that the screening power of the Commission to dismiss complaints must be abolished.[86] The report of the Ontario Human Rights Code Review Task Force put the emerging consensus most succinctly:

> At its public hearings and in the submissions it received, the single, strongest recommendation made to the Task Force was for claimants to have direct access to a hearing process they directed.
>
> The Task Force agrees with this recommendation. The Task Force believes that it is unconscionable for the *Code* to give people and groups fundamental equality rights and then deny them access to a hearing to claim those rights.[87]

Where provinces have failed to act, it is imperative on the Federal Government to take a lead in responding to the concerns of international monitoring bodies and the ever

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develop the possibilities of judicial remedy". Article 3 of the ICCPR guarantees the equal enjoyment of Covenant rights by men and women. Article 26 of the ICCPR guarantees that "all people are equal before the law and are entitled without any discrimination to equal protection of the law" and prohibits discrimination.

86 Beatrice Vizkelety, "Discrimination, the Right to Seek Redress and the Common Law: A Century Old Debate" (1992), 15 Dalhousie L.J. 304 at 312; Kaye Joachim, "Reform of the Ontario Human Rights Commission" (1997) University of Toronto, Centre for the Study of State and Market, WPS #30; *Equality Now: Report of the Special Committee on Visible Minorities in Canadian Society*, March 1984, at 138; Brian Howe and Malcolm Andrade, "The Reputations of Human Rights Commissions in Canada" (1984) 9:2 *Canadian Journal of Law and Society* 1.

87 Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Queen's Printer, 1992) (Mary Cornish, Chair).

louder chorus of those within Canada demanding that the enforcement of human rights in Canada conform with basic norms of international human rights, the Canadian Charter of Rights and the fundamental principle of the rule of law.

PART II

A NEW HUMAN RIGHTS SYSTEM

A. GUARANTEEING ACCESS TO ADJUDICATION OF RIGHTS: APPROACHES TO REFORM-

In the sections above we have discussed the many serious problems with the screening function of the Commission. The question now is: how best to resolve these problems? We have argued that the common law, constitutional law and international law, as well as the principles and goals of human rights protection and the nature of the rights at stake, all require an "as of right" access by human rights claimants to an adjudication of their rights.

It is first important to recognize that the right of access to adjudication cannot be accomplished simply by altering the way in which the Commission exercises its discretion to screen complaints. While the harm caused by the screening function may be measured in part by the number of claimants denied a hearing, the very idea of denying any claimant access to adjudication is wrong and unconstitutional. Narrowing the discretion, altering the standard of judicial review or tinkering with the way in which the screen is applied will not resolve the fundamental problem we have described, nor achieve compliance with Charter or with Canada's international human rights obligations. This would be like trying to correct a discriminatory policy by applying it to fewer people. The harm would be reduced but the violation would remain.

Every human rights claim ought to have access to adjudication in a democracy based on the rule of law. This does not mean that every claim must proceed to a hearing. Mediation and conciliation are important options and pre-hearing motions could result in some complaints not proceeding to a hearing. But these options must be exercised within the context of a basic right of access to justice.

There are different ways, however, by which guaranteed adjudication of human rights claims can be achieved. In considering the options for guaranteed adjudication, we need to consider how functions which are presently carried out through the Commission's screening function could be redefined. Questions we have asked ourselves, and consulted with others about, include:

i) Where should human rights claims be adjudicated?

ii) What roles ought the Human Rights Commission to perform?

iii) How will the investigation and litigation of cases be conducted and funded?

iv) How will extra-jurisdictional, trivial or obviously unsubstantiated claims be dealt with?

v) What role would mediation and conciliation play and how would alternative dispute resolution be managed?

vi) How might hearings be expedited and how would backlog at the Tribunal be avoided?

In assessing these questions, there are a number of principles which we have applied. As well as guaranteeing a right to adjudication of rights claims, any new system should deal with human rights claims in a manner which:

* *guarantees a full and fair hearing*: Claimants and respondents must be given the opportunity to fully make their case and be heard;

* *respects the values and purposes of the Act*:: The process of claiming rights under the CHRA must itself respect and promote the dignity, security and equality of every person and group;

* *is accessible and inclusive*: It is critical that claimants and respondents be able to access the human rights process with relative ease and that their experience of the process not be one of alienation or exclusion;

* *ensures effective disclosure and access to information:* The process must make it possible for the claimant to obtain information necessary to reasonably pursue the claim and for each party to know the case they must meet prior to the hearing;

* *supports fair and constructive mediation and conciliation efforts within a context of promoting compliance with the Act:* The system must avoid pointless litigation and promote compliance with the Act through mediation and conciliation wherever possible;

* *avoids putting excessive time and resources into unmeritorious complaints*: In addition to guaranteeing a determination on the merits, the system must deal expeditiously with trivial or manifestly unmeritorious complaints;

* *provides timely and effective remedies*: The adjudication of rights claims needs to focus on the remedial nature of the Act and on formulating remedies and orders which achieve practical results in a timely manner;

* *facilitates challenges to systemic discrimination:* In order to fulfill the public interest purposes of the Act, the adjudication of claims should ensure that systemic discrimination is effectively addressed along with individual remedies;

* *is efficient and straightforward:*: Any new human rights adjudication structure should be designed to be as efficient as possible without undermining rights and avoid the unnecessary complexity or duplication.

B. WHERE SHOULD HUMAN RIGHTS BE ADJUDICATED?

If complainants under the CHRA are entitled in law to a determination of their rights, where should these rights be determined or adjudicated? There are basically three alternative venues to consider: i) the Human Rights Commission; ii) the Human Rights Tribunal and iii) the Courts. These three venues gives rise to a number of different options or combinations.

i) Determination of Rights at the Human Rights Commission

Throughout this paper, we have emphasized that the essential legal problem with the screening function is that rights are extinguished at the Human Rights Commission without being determined there. We have noted that the Human Rights system is unique in comparison to other rights conferring, administrative law regimes because in those, investigators, Commissioners or Directors empowered to dismisses complaints or terminate investigations have decision-making and remedial authority.

A somewhat cynical response to the constitutional concerns with respect to the rule of law and the absence of determination of rights would be to simply give human rights officers and/or the Commission the authority to make a determination of whether the Act has been breached and give officers and/or the Commission the authority to order remedies, as in Employment Standards or Labour Relations.

Such a resolution of the screening problem, however, would, in our view, be a form of "equality with a vengeance." It would down-grade quasi-constitutional rights to the level of regulatory enforcement of "standards" and give more power to officers who already exercise too much influence over the outcome of complaints. Administrative law

regimes which give investigating officers these types of powers are not regimes which are charged with determining quasi-constitutional rights. It is well accepted in Canada and most other jurisdictions that human rights complaints deserve full, oral hearings before an impartial tribunal. It would be incongruous if a discrimination complaint against the Government of Canada, which could have been brought forward as a section 15 challenge under the Charter and receive full court hearing, could be decided by a relatively untrained human rights officer, without a hearing.

On the other hand, to require the Human Rights Commission to hold hearings would simply add more duties to a body which seems already burdened by too many conflicting roles and confuse the tribunal and the Commission's roles. It seems preferable to have human rights complaints adjudicated by the specialized adjudicative body that is already in place for that purpose and leave to the Commission those tasks which do not require judicial neutrality.

One alternative is to invest in the Commission the power to determine how a complaint ought to be dealt with - for example, by way of a full hearing before the Tribunal, a summary proceeding at the Tribunal or in court, or a full scale systemic investigation followed by a hearing.[88] Under this model, complaints would be filed with the Commission which, upon reviewing or, where necessary, investigating them, would refer the complaint to the appropriate forum. Such a model is a viable response to the constitutional issues raised by the screening problem as long as it does not involve the Commission exercising any power to extinguish rights on a discretionary basis and ensures that every rights claim has access to adjudication.

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88 These options are more fully explored below where we consider the Tribunal's ability to fashion different hearing processes to ensure expeditious hearings and avoid backlog and delay (see Section E The Role of the Tribunal.). Summary proceedings may entail the early dismissal of all or part of a claim at a pre-hearing, without evidence or witnesses, where the claim is outside the jurisdiction of the Tribunal, or frivolous and vexatious on its face. Abbreviated hearings may also be appropriate where the parties can agree to narrow the issues in dispute to one or two points. Such agreements can be facilitated by pre-hearing mediation.

On the other hand, as will be further discussed below, we have practical concerns that maintaining any kind of role for the Commission which places on it an obligation to investigate or review every complaint would not sufficiently relieve the Commission of its present administrative burden in order to free up necessary resources for the tribunal. In order to make knowledgeable decisions about which complaints are systemic and which are not, the Commission would have to review and investigate complaints and hear submissions from the parties. This can be accomplished more efficiently at the prehearing stage of the tribunal process, by the tribunal itself.

An adjudicative model, rather than an investigative model for managing and processing human rights claims has tremendous advantages in terms of efficiency, in that it allows complainants and respondents to place relevant information and argument before an adjudicator directly, rather than requiring an investigator to compile and assess all information before any hearing is held. To remove the Commission's screening role while insisting that it investigate or review every complaint seems to us to lose the opportunity afforded by the current review to circumvent not only the legal problems of the screening function but also the administrative backlogs it creates.

ii) Adjudication by Courts

Another way of resolving the problems associated with the screening function is to guarantee access to the courts. Such an option could either replace adjudication by the Tribunal or function as an adjunct to it.

There are a number of important concerns about courts taking on a role in the adjudication of rights claims at the initial level. The experience of most advocates with whom we have consulted, including those who have litigated Charter equality cases in the lower courts, has been that lower courts lack competence in human rights jurisprudence and lack an appreciation of the complexity of human rights issues. This can lead not only to bad results but also to serious inefficiencies. Litigating equality issues before judges who rarely see them means that each case involves a large

component of judicial education. The concepts of adverse effect discrimination, of positive duties to accommodate and the nature of bona fide qualification and undue hardship defences are second nature to most human rights tribunal members but run counter to much of the legal training and experience of judges. A failure to understand the dynamics and complexities of human rights cases in the courts would, we fear, result in decisions - both procedural and substantive - which may impoverish the jurisprudence and subvert the fundamental public interest goals of the CHRA.
Most equality advocates consulted find that a specialized human rights tribunal is a more receptive and appropriate forum for the adjudication of human rights complaints than the courts. Human rights tribunals are perceived as less hostile and intimidating for claimants than courts and are more amenable to non-lawyers acting as advocates. The existence of specialized tribunals has also allowed for effective input by human rights specialists, many of whom would not choose to be or might not be chosen as judges.

Despite the increased experience of some judges in equality rights litigation after almost fifteen years of *Charter* equality jurisprudence, expert human rights tribunals are considerably more knowledgeable about and sensitive to human rights issues than the courts. Courts tend to focus on individualized compensation while human rights tribunals are better able to understand and respond to human rights cases that do not immediately sound in damages and are more experienced and comfortable proposing creative remedies as authorized by sections 53 and 54 of the CHRA.

Adjudication in the courts tends to be more expensive and more complex than adjudication before tribunals, involving filing fees, complex forms and procedures. Civil cost rules which do not apply at the Tribunal would have major implications on the viability of complainants taking cases forward. Once a complaint is filed with the court, it would potentially be costly for a complainant to even withdraw the action and get out of the litigation. The court environment would encourage complainants to retain lawyers with civil law experience, yet many would not be well versed in human rights law. All of this creates a more expensive and less efficient environment for the adjudication of human rights claims.

iii) Access to Courts as a "Safety Valve"

Even if it is accepted that in general the specialized Human Rights Tribunal is the best qualified and most effective adjudicative body to hear human rights claims, this does not necessarily mean that the Tribunal needs to have exclusive jurisdiction over first level human rights adjudication. There are important arguments to consider in favour of maintaining access to the courts as a kind of "safety valve." A number of equality seekers and advocates with whom CERA has consulted on this issue feel that there should be an option for the complainant to proceed in either forum - the tribunal or the court.

If the tribunal system is truly more accessible and more favourable to human rights claims, then equality seekers will use it rather than the courts. This has been the case in Quebec, where experiences in courts with human rights claims have been largely negative for complainants. As a result, complaints have almost always proceeded through the Human Rights Commission and the tribunal. So why bar the court option? If the tribunal system were to become dysfunctional for whatever reason, through inappropriate appointments or inadequate funding, at least rights claimants would have an alternative forum. Choice is generally something which is an advantage to disadvantaged groups.

Many equality seekers are wary, given the experience of the last thirty years, of any system which deprives rights claimants of choices "for their own good". Whether or not the courts could be relied upon to provide the best result in every case, these groups query whether it is still important to protect one's right to have one's day in court, if that is what is needed or chosen in a particular circumstance. Being barred from the courts has a negative historical resonance for constituencies who have historically been deprived of access to justice.

We know from the experience of the last two decades that when the human rights system fails, those who rely on it lack the political clout to ensure that something is done about it. Exclusive jurisdiction for the Tribunal means that those who rely on the Tribunal have no options to exercise if the system fails. There may be dangers down the road for human rights, such as political appointments to the Tribunal by governments anxious to reverse gains made in this area. These could alter our current assumptions that Tribunal jurisprudence and expertise is superior to that of courts.

In addition, the separateness of the system can insulate it from external, evolving norms. Approaches to damages in human rights cases, for example, might benefit from access to courts. The experience of courts in deciding interlocutory matters such as injunctions may bring human rights adjudication up to higher standards in terms of timely remedy . If there is a good enough reason for the claimant to attempt to overcome the barriers to the courts, such as by obtaining test case funding or organising community support, perhaps the structure of the system should not deny the claimant that choice.

Another concern about maintaining an exclusive jurisdiction for the Tribunal over human rights is the increasing overlap between Charter claims and human rights claims. A CHRA challenge to a government program or to employment discrimination within the Federal Government may also be advanced as a Charter claim under section 15 or, where the benefits relate to a liberty or security interest, as a section 7 claim.[89] The *Gosselin* case in Quebec, alleging a breach of sections 7 and 15 of the Charter as well as a breach of the Quebec Charter's provisions related to social condition and social and economic rights is the type of challenge to government benefit programs which

89 *Perera v. Canada* (1997), 97 C.L.L.C. 230-016, [1997] F.C.J. No. 199 (Fed. T.D.), reversed in part [1998] 3 F.C. 381, 158 D.L.R. (4th) 341 (Fed. C.A.).

ought to be possible under federal jurisdiction as well.[90] Allowing these claims to be brought together avoids compartmentalizing rights and permits the interdependence of rights in the Charter and in human rights legislation to carry over into concrete litigation strategies. Many applicants may wish to advance a Charter challenge and allege a breach of the CHRA as an alternative argument, particularly if the alleged discrimination is on a ground explicitly enumerated under the CHRA and not under section 15. Since similar remedies may obtain under the Charter and the CHRA, it is cumbersome and inefficient to have separate proceedings addressing similar evidence, one before the Court and the other before the Tribunal - involving essentially the same allegation.

Presently, most systemic challenges to government benefit programs are proceeding as section 15 challenges simply because under the Charter, the litigants can get access to courts and to an effective remedy while under the CHRA they cannot. If the Human Rights Commission's screening function is eliminated, however, so that such claims can be brought in a timely fashion before the Canadian Human Rights Tribunal, the issue of parallel Charter and CHRA claims will become increasingly common. It would seem to make sense, in these circumstances, that overlapping or alternative claims be heard together.

A number of commentators have pointed out that the Human Rights Tribunal no longer has exclusive jurisdiction anyway. Though the *Bhadauria* decision has not been reversed, it has certainly become frayed at the edges.[91] Insisting on exclusive jurisdiction in the CHRA may thus be seen as a denial of the current reality, a stubborn refusal to abandon a seriously leaking ship. Allegations of breaches of human rights legislation routinely arise in other fora. Wrongful dismissal actions now regularly proceed on the basis of allegations that the dismissal was discriminatory and prevalent

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90*Louise Gosselin c. Procureur général du Québec* (6 April 1999) Montreal 500-09-001092-923 (C.A.); [1992] R.J.Q. 1657 (C.S.) at 1658 (C.S).

91 Tamara Witelson, *supra* note 6; Ken Norman, "Looking Through a Glass Darkly: Concurrent Jurisdictions in Workplace Human Rights Systems," (1999) 7*Canadian Employment and Labour Law Journal* 1.

delays in the human rights system have made it impossible to insist that other proceedings be stayed until the human rights complaint is extinguished by the Commission or adjudicated at the Tribunal.[92] Perhaps the permeation of human rights norms into other areas of the law, which is the reality anyway, should be encouraged by permitting civil suits to be brought in court when complainants choose to exercise that option.

Strategic Considerations with respect to the Court Option

These important arguments in favour of opening up the court option, however, must be considered in light of broader strategic issues. We must bear in mind that for most human rights complainants, the court option will not be viable. The practical impact of the availability of the court option in Quebec has been minimal. There may be too many dangers in proposing that human rights complainants have a full-fledged option of going to court to justify the relatively minor practical gains. If we could be assured that a Tribunal access option would always be properly funded and maintained, having a court option might be attractive. But opening up the court option could have repercussions, either in the short or the long term, for the sustainability of the Tribunal.

Although the Tribunal may offer more economical and efficient adjudication of human rights claims than courts, the Tribunal requires a special budget. The cost of adjudicating human rights claims in court would, on the contrary, be lost in a larger allocation. When government departments are searching for ways to cut specific allocations, it will always be tempting to cut the Tribunal's budget or to eliminate it altogether on the grounds that the court option is available.

Faced with a choice between direct access to the courts or direct access to a properly funded Tribunal, we clearly favour direct access to the Tribunal. It is more competent,

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92 McKinley v. B.C. Tel (1996) 20 C.C.E.L. (2d) 169, [1996] B.C.J. No. 982 (B.C.S.C.), additional reasons at (1996), 20 C.C.E.L. (2d) 185 (B.C.S.C.), affirmed (1997), 31 C.C.E.L. (2d)

efficient and accessible than the courts. Do we believe that the option of direct access to a court may be an important safeguard in case the "administrative process itself fails"[93], as we believe it has done once already? Yes. But in the context of a full fledged review of the Act, we are more concerned that the addition of a court option might dissuade the government from providing universal direct access to the Tribunal. Experiences of equality seekers of human rights tribunals have been relatively positive. The problem with the administration of human rights has not been the specialized tribunal system but the screening function of the Commission which prevents us from getting access to the Tribunal. We should be careful to ensure that the government does not throw out the baby with the bath water.

Giving Tribunals Authority to Hear Charter Claims

With respect to the issue of overlapping claims under the Charter and the CHRA, there is a way of addressing that without abandoning the Tribunal's exclusive jurisdiction over human rights claims. The CHRA could be amended to establish that the Tribunal has jurisdiction to hear both Charter claims related to the constitutionality of provisions of the CHRA itself and Charter claims brought in conjunction with claims under the CHRA. In this way, a case like the *Gosselin* case in Quebec, where an allegedly exclusionary denial of benefits also engages Charter rights, could be brought under the CHRA and also under sections 7 and 15 of the Charter. Human Rights Tribunal members are, in general, better versed in the relevant Charter jurisprudence for such claims than are trial judges. The greater experience that most tribunal members have with equality jurisprudence and, increasingly, with international human rights law would be a positive influence on Charter jurisprudence in these areas and may encourage a more fertile relationship between the two areas of law.

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214 (B.C.C.A.).

93 Hudson N. Janisch, "Bora Laskin and Administrative Law: An Unfinished Journey" (1985) 35 *UTLJ* 557 at p.563.

iii) Direct Access to the Human Rights Tribunal

In light of the concerns expressed above, the preferred option for the adjudication of human rights claims remains the specialized human rights tribunal. The tribunal has the experience and competence to provide full and fair hearings of human rights claims while at the same time making major structural and administrative adjustments which will allow it to take on a number of the roles that are currently performed, less efficiently, by way of the Commission's screening function.

Hearings before the Tribunal are informal and accessible enough to provide claimants and respondents with the sense of a transparent process in which they are heard - something that is sorely missing in the current process at the Commission. This allows for the rights claiming process itself to promote respect for dignity, security and equality. Tribunals are capable of ensuring and overseeing effective disclosure and access to information in a manner that will be significantly less costly and time consuming than the current model, in which lengthy investigations are conducted in every case. Pre-hearing case management and disclosure conferences would allow for full and timely disclosure and scheduling of witnesses. Tribunals are more capable than the Commission of promoting mediation and conciliation because the right to adjudication provides increased motivation. Our experience is that trained adjudicators are better able to promote mediation within the context of compliance with the Act because they understand more sophisticated statutory interpretation.

The tribunal would also be capable of making quick and timely determinations with respect to frivolous or vexatious complaints rather than allowing such complaints to drag on in investigations at the Human Rights Commission. The tribunal can be given the power to provide timely and effective remedies, including injunctive relief and has the experiential background to properly address the remedial nature of the Act.
Further, the tribunal is best qualified to adjudicate systemic discrimination cases, recognizing the role of the Human Rights Commission and of equality seeking groups in

developing and bringing forward such cases and the broader public interests at stake in human rights claims.

We recommend that the Tribunal maintain exclusive jurisdiction over human rights adjudication, without, however, foreclosing the consideration of human rights violations in other contexts, such as employment law.

C. DEVELOPING A MODEL FOR DIRECT ACCESS TO THE TRIBUNAL

There are two approaches to providing complainants with “direct access” to the tribunal. The first approach would allow complaints to be filed with the Human Rights Commission and require that the Commission make a decision within a given time frame as to whether it will assume carriage of the complaint before the tribunal. If the Commission declines to proceed, complainants could proceed on their own to the tribunal. A second approach would allow complainants to proceed on their own to the Tribunal without filing a complaint with the Commission and create other mechanisms for the Commission to take carriage of certain complaints or to intervene in cases before the tribunal.

The first approach would maintain most of the Commission’s present activities but would resolve the primary legal problem with the screening provision by providing delayed access to adjudication wherever the screening function is applied. The second approach would eliminate the requirement that the Commission screen or review every complaint, allowing the complaint to proceed directly to the Tribunal. There are important implications in both models for the role of the Human Rights Commission.

i) Permitting Access to the Tribunal Only After the Complaint is Rejected by the Commission - the Quebec Experience

Prior to the *Ménard* decision in Quebec, complainants under the Quebec Charter had the option of proceeding, at their own cost, to the tribunal once a complaint had been dismissed by the Commission.[94] Since the decision in *Ménard* , which is under appeal, complainants have only been allowed to proceed to the tribunal if the Commission has found that the complaint was substantiated but exercised its discretion not to proceed for some other reason.

Some indication of the implications of direct access after dismissal of a complaint is thus derived from an analysis of the Quebec experience prior to the *Ménard* decision, in the years between 1991-96. We should caution at the outset, however, that direct access has not been accompanied, in Quebec, by the types of institutional support, such as the provision of assistance with representation, pre-hearing discovery and case management which we would hope would accompany such a provision under the CHRA The Quebec Charter is explicit, in fact, that complainants may proceed at their own expense and has no time limit for the Commission to render a decision. Thus, many of the complaints which have proceeded to tribunal after being screened by the Commission are proceeding after significant delays.

In Quebec the direct access option has operated, essentially, as an adjunct to the system of complaint processing that exists in other jurisdictions rather than as an entirely different model for complaints processing and adjudication. The Quebec Commission, like other human rights

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94 *Ménard* c. *Québec(Tribunal des droits de la personne (C.A..)* July 24, 1997, No. 200-09-0000557-956.

Section 84 states:

> Where, following the filing of a complaint, the commission exercises its discretionary power not to submit an application to a tribunal to pursue, for a person's benefit, a remedy provided for in sections 80 to 82, it shall notify the complainant of its decision, stating the reasons on which it is based.
>
> Within 90 days after he receives such notification, the complainant may, at his own expense, submit an application to the Human Rights Tribunal to pursue such remedy and, in that case, he is, for the pursuit of the remedy, substituted by operation of law for the commission with the same effects as if the remedy had been pursued by the commission.

commissions in Canada, screened out the majority of complaints during the period of direct access- only about 2% were referred to the tribunal.[95] Less than half of the Tribunal's caseload consisted of complaints which the complainant, rather than the Commission, brought forward.[96]

Despite its serious limitations, access to the Quebec Human Rights Tribunal for complainants whose complaints had been dismissed by the Commission has provided an important check on the effects of the screening function. This is particularly the case for the most disadvantaged members of society challenging broad issues of systemic discrimination - precisely the types of issues which advocates of a Human Rights Commission monopoly have suggested would be lost with "direct access".

One of the most pressing issues for social assistance recipients in the present climate of public hostility and prejudice is the discriminatory denial of labour rights and basic civil rights through workfare programs. This has arisen, in large part, because of the Federal Government revoking the requirement in the now defunct Canada Assistance Plan, that social assistance programs not force people to work against their will to receive benefits. The denial of labour, civil and privacy rights to workfare participants in Canada has been identified by both the United Nations Committee on Economic, Social and Cultural Rights and the United Nations Hum,an Rights

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95 The Quebec Government reported to the United Nations Committee on Economic, Social and Cultural Rights that from 1994 to 1997 inclusive, 3,529 *Charter*-based complaints were opened at the Commission and 60 were adjudicated. (*Review of Canada's Third Report on The Implementation of The International Covenant on Economic, Social And Cultural Rights: Responses to the supplementary questions emitted by the United Nations Committee on Economic, Social and Cultural Rights* (E/C/12/Q/CAN/1) *on Canada's third report on the International Covenant on Economic, Social and Cultural Rights* (E/1994/104/Add17, Response of the Government of Quebec to Question 10)

96 Frédérique Poirier and Lucie Lamarche, "L'accèss au Tribunal des droits de la personne du Québec: une fréquence modulée," Revue du Barreau, Tomme 57, No. 4 (Nov-Dec, 1997) 785 at 816.

Committee as a issue of great concern, indeed, a violation of Covenant rights.[97] The has only been adjudicated under domestic human rights legislation, however, because in one province, social assistance recipients had, for a few years, independent access to adjudication, even though it was at their own expense, and after the delay of a Commission investigation and decision.

Lambert v. *Quebec (Ministere du tourisme) (No. 3)*[98] was a systemic challenge to workfare regulations in Quebec as a discriminatory denial of minimum wage and other labour standards on the ground of social condition. The complaint was dismissed by the Human Rights Commission but subsequently adjudicated and upheld at the tribunal after the complainant proceeded on his own, with the assistance of counsel experienced in this area of law and of supportive organizations. It is the only human rights case in Canada to consider the discriminatory denial of labour protections to participants in workfare. Another systemic issue of great concern to disadvantaged groups is the discriminatory denial of mortgages and credit to low income applicants or people on social assistance. Often, such denials are on the basis of "minimum income" requirements or what are referred to as "gross debt to income" ratios. Single mothers, social assistance recipients and other low income households have virtually no access to affordable home ownership in Canada because these universally applied restrictions deny them access to mortgages at banks, trust companies and credit bureaus. Single mothers trying to hang onto a home after a separation, who have been successfully paying 60% of income toward mortgage costs on a pre-existing mortgage, will be denied a new mortgage on the basis of their income alone. While over 57% of single parent renters in Canada pay more than 30% of their income on rent, financial institutions will generally not consider them for a mortgage if the mortgage payments would be higher than 32% of the applicant's income. Thus, low income households will be prevented from making their housing more

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97 *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, *Canada*, *supra* note 84 at paragraphs 31 and 32; *Concluding Observations of the Human Rights Committee, Canada*, (1999), *supra* note 85 at paragraph 17;

98 *Lambert c. Québec (Ministère du Tourisme du Québec et ministère de la Main-d'oeuvre, de la Sécurité du revenu et de la Formation professionnelle*) (1997) R.J.Q. 726, under appeal, 29 C.H.R.R. D/246 (Que. Trib.).

affordable on the basis of arbitrary “affordability” criteria. These policies among financial institutions are at least in part a result of mortgage insurance policies of Canada Mortgage and Housing Corporation, which restrict insurance to households paying less than 32% of income to mortgage costs.

The use of similar minimum income criteria by landlords have been found to contravene Quebec’s and Ontario’s human rights legislation, constituting discrimination because of receipt of public assistance (Ontario), social condition (Quebec), civil status (Quebec), as well as sex, race, marital status, family status, age and citizenship (Ontario).[99] Tribunals have found that there is no evidence of any correlation of risk of default with a lower income or a higher percentage of income paid on housing costs. Challenges by CERA on behalf of single mothers on social assistance against discrimination against single mothers on social assistance by banks have been dismissed by the Canadian Human Rights Commission on the basis that social condition is not included in the CHRA.

In Quebec, in 1989, when Francine D’Aoust, a single mother on social assistance, was refused mortgages by banks and credit bureaus, in some cases because of these “income criteria” and in others, apparently, simply because she was a social assistance recipient, she decided to file a complaint under the Quebec Charter against the Caisse Populaire de Buckingham on the ground of social condition. The Human Rights Commission dismissed her complaint three years later. Ms. D’Aoust, however, proceeded on her own, unrepresented, to the human rights tribunal. This may be the only case ever adjudicated in Canada dealing with discrimination by financial institutions against welfare recipients or people living in poverty.[100] The tribunal found that discrimination because of "social condition" includes protection from prejudicial assumptions made about people on social assistance and people with low incomes. It

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99 *Quebec (Comm. des droits de la personne)* v. *Whittom* (1993), C.H.R.R. D/349 and *Kearney et al.* v. *Bramalea Limited et al.*, [1998] 21 O.H.R.B.I.D., Decision No. 98-021.

100 *D'Aoust c. Vallieres*, 19 C.H.R.R. D/322. Frédérique Poirier and Lucie Lamarche, *supra* note 95 at 867.

noted that the mortgage payments would have been significantly lower than the rent that Ms. D'Aoust was paying at the time.[101]

These two cases provide an important indicator of the extent to which maintaining a commission monopoly of carriage of systemic discrimination claims prevents many important systemic challenges, particularly challenges by poor people to government policies from being brought forward. Nevertheless, as Lucie Lamarche and Frederique Poirier have pointed out, there are limitations to what direct access to the tribunal, after dismissal by the Commission, accomplished in Quebec, particularly in the absence of assistance with legal representation.[102] A disproportionate number of unrepresented claimants who proceeded to the Quebec Tribunal had their complaints dismissed on procedural grounds. Complaints taken forward without the Commission had a lower rate of success than those which the Commission had selected to take forward. This is to be expected, since the Commission tends to proceed with the strongest cases. But the Quebec data, though based on a small sample size, suggests that those who elect to proceed on their own after having had a complaint dismissed by the Commission may not be representative of the most disadvantaged complainants, particularly in a situation where there is no legal representation. Where the Human Rights Commission had strategically addressed discrimination because of social condition and income in housing, for example, women had clearly benefited from having their cases taken forward to the tribunal by the Commission. By contrast, women appeared to be under-represented among those claimants who proceeded on their own. [103]

It is to be expected that the small number of claimants who proceed to a tribunal in defiance of a Commission decision to dismiss, after a significant period of time has elapsed, will not necessarily be the most strategic complaints. The complaints will not be

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101 *Ibid*, at D/324-325.

102 Frédérique Poirier and Lucie Lamarche, *supra* note 95 at 860-867.

103 Frédérique Poirier and Lucie Lamarche, *supra* note 95.

as strong in terms of evidence as those that are “cherry picked” by the Commission and the most disadvantaged claimants are the least likely to survive the delay in waiting for the Commission decision. Complainants proceeding on their own after a Commission dismissal are likely to be somewhat prejudiced by the Commission’s previous investigation and negative appraisal of the evidence. Where unrepresented, these complainants are more likely to lose on procedural issues and probably on substantive issues as well. Where complainants hire lawyers at their own expense, those who proceed are more likely to withdraw their complaint at some point when they realize that it is costing more in legal fees than can be gained in damages.[104]

While the *Lambert* case shows what is possible with strategic, collaborative action by equality seekers independently of the Commission, it is clear that without the necessary resources for equality seekers to develop strategic, test cases, direct access can lack a focused litigation direction or strategic challenges to systemic discrimination.

It seems, on balance, that while direct access following investigation and dismissal by the Commission is an important safety valve, it does not effectively address many of the structural problems related to the screening function of the Commission. This means that many of the administrative and resource related benefits of direct access are sacrificed, and makes it less likely that the government will allocate significant resources to providing claimants with the representation and assistance they need to make direct access work as well as it can.

The Administrative Inefficiency of a Commission Investigation Model

What is often not recognized by those who are not involved in taking complaints forward under the present system is how the screening function wastes time and resources which could be put to much better use in an adjudicative setting. In many cases, the bulk of the evidence which would be presented at a tribunal has already been assembled by the

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104 *Ibid*, at 815-816.

complainant when the complaint is filed. Yet there are months or years spent shuffling paper back and forth with the Commission, with the complainant and his or her representative trying to get an investigator to review the relevant documents, interview the appropriate witnesses and understand the relevant law. The evidence of the complainant, supportive witnesses and documentary evidence is then summarized by the investigating officer for presentation to the Commissioners. The complainant's representative must then prepare extensive submissions to try to correct all of the mistakes made by the investigating officer. In the majority of cases, all of this "preparation" is wasted as the case is simply dismissed, abandoned or settled. In most cases it would be easier and less costly for the complainant and his or her representative to appear before an adjudicator and present the evidence themselves, rather than engage in this seemingly endless process of exchanging telephone calls and evidence with an investigating officer of the Commission.

The same is true at the respondent side. Investigators' reports consist largely of summaries of evidence supplied by the complainant and evidence supplied by the respondent. It would be far more efficient, in most cases, for both parties to disclose the evidence to each other and present it to an adjudicator. This leaves all of the resources that are currently expended on the investigation and screening function available to provide important institutional support for both complainants and respondents in direct access to the tribunal.

Even on systemic cases, our experience is that it is usually left up to the complainant and his or her representative to assemble the relevant evidence and convey it to the investigator. The Commission often has a limited budget at the investigation stage to retain expert evidence, so it is up to the complainant to direct the investigator to sources of expert evidence and statistical data needed to substantiate a systemic claim. Thus, the vast majority of the time spent on "investigation" is actually spent providing one's case to the investigator.

Because of the relative inexperience of investigators, and because their focus is on closing files rather than on investigating substantive issues, the process of presenting one's case prior to the screening function is also marked by many inefficiencies. The officer often misunderstands the nature of the allegations and what is required to prove them or needs a considerable amount of education in the area addressed by the rights claim. At least half the time spent with investigating officers seems to be spent on areas which, if we had the freedom to present our own case before a tribunal, would never be addressed because they are irrelevant to the allegations. It is difficult to over-estimate the inefficiencies of having to present one's case to the Commission through an investigating officer rather than presenting it directly to a knowledgeable adjudicator.

There are also considerable inefficiencies created by the lack of an oral hearing at the "screening" stage. A witness whose evidence would take half an hour of a tribunal's time requires numerous phone calls to set up an interview, travel time by an investigating officer, an interview, the transcription of notes or the preparation of a witness statement and a summary of the evidence written up for disclosure to the parties and the report to the Commission.

Providing for direct access to the tribunal only after the Commission has investigated the complaint only adds an additional layer to the current process. It does not eliminate all of the expense and mis-allocation of resources that results from human rights investigators trying to compile information on what, in most cases, the complainant and respondent already know, and could, with reasonable resources, be presented directly to an adjudicator. Even a delay of a few months creates problems in locating witnesses and getting necessary documentary evidence.

Appearing at the tribunal only after a complaint has been rejected by the Commission also creates a potential prejudice against the complainant and may rob the hearing of some of its potential for preserving the dignity and sense of worth of participants on both sides. Respondents would be provided with an investigator's report claiming that the evidence does not substantiate the complaint. This will encourage the respondent to feel

resentful of the whole process and feel “twice tried” on the same complaint. The complainant will be made to feel stubborn or selfish in seeking damages for a complaint which the Commission found to be unsubstantiated. The investigator’s report can be used by the respondent against the complainant in the hearing and the investigator could even be subpoenaed as a respondent witness. Rather than being empowered by a process that finally allows the complainant to receive a hearing, the complainant will frequently be maligned for stubbornly refusing to admit defeat after the Commission dismissed the complaint and may experience the Commission as being a hidden adversary in the whole process.

In short, the benefit of access to the tribunal could be severely limited if it only occurs after a Commission investigation and a decision by the Commission to dismiss the complaint. While the screening function would no longer be formally determinative of the complaint, in that the rights would not be extinguished, the structural problems with the screen would, to some extent, remain and the exciting possibilities of an adjudicative model of complaint processing would be largely unrealized.

ii) Direct Access to the Tribunal Without the Commission Investigating all Complaints

iii)

The second option, of direct access to the tribunal without first proceeding through any investigative function of the Commission seems preferable for a number of reasons. It avoids delaying the adjudication of complaints while the Commission investigates them, freeing up significant resources currently expended on Commission investigation and allows mediation and case management functions to be clearly reassigned to the Tribunal to avoid duplication. Finally, it liberates the Commission from a position of administrative neutrality to become an effective advocate for compliance with the Act, particularly on systemic issues.

Allowing complainants to proceed directly to the tribunal if they so choose need not foreclose the possibility of the Commission investigating complaints of discrimination where the Commission's investigative powers and resources are required. Nor does it foreclose the possibility of the Commission initiating complaints and investigations into systemic discrimination.

For a variety of reasons -- substantive, administrative and some strategic -- we believe that the best response to the concerns raised in this paper is a system which gives complainants the right to go directly to the Human Rights Tribunal with a human rights claim while at the same time preserving the Commission's important role in selecting certain issues on which to focus its investigative and litigation resources.

Step #1: Where to Initiate the Complaint is the Choice of the Claimant

In our proposed model, there are two ways to initiate a complaint. A claimant can file a complaint directly with the Tribunal or the claimant can file a request that the Commission to investigate and take carriage of a complaint.

Complainants who face issues of discrimination which they believe need the Commission's investigative powers and resources to address should have the right to submit a request to the Commission that it investigate and take carriage of a complaint. If the Commission decides that it desires to take carriage of the complaint before the Tribunal, this should be permitted. If the Commission exercises a discretion not to take carriage of such complaints within a set period of time, however, the claimant could proceed to the Tribunal. The use of the Commission to initiate systemic challenges, should be an option of the complainant, not a requirement. There are many issues which would be better litigated by equality seeking groups themselves, who have experience in particular issues and have developed coherent litigation strategies under the Charter and human rights legislation. It is more efficient and effective to provide these groups with necessary resources to take certain cases forward rather than to give the Commission a monopoly over systemic cases.

On the other hand, it is important that the Commission be aware of all complaints so that it can properly perform its functions. While the Commission should have a right to intervene in any case, representing what it considers the public interest, it should not have the right or the obligation to assume carriage of every systemic claim, nor should it be burdened with investigating every complaint to determine if it is systemic or not. There is, at any rate, no clear divide between individual complaints and systemic complaints. Charging the Commission with the task of dividing complaints into "systemic" and "individual" would be inefficient and counter-productive.

Rather than insist that all complaints be filed with and investigated by the Commission, it makes more sense to simply require that all complaints filed with the Tribunal also be copied and forwarded to the Commission. The Commission can then review these complaints and decide whether to intervene in the hearing processes. This will allow it to be involved at the pre-hearing stage as well, to be apprised of evidentiary issues raised and to consider in what manner it wishes to be involved, if at all.

Why Request that the Commission assume Carriage of a Complaint?

The primary role of the Commission should be to identify and investigate issues of systemic discrimination and, where appropriate, take them before the Tribunal. In cases where equality seekers lack the resources to challenge a systemic issue, or need the Commission's investigative powers and capacities, they would have the option of filing a complaint with the Commission and requesting that the Commission investigate it and take carriage of it. In other cases, equality seeking groups may chose to take carriage of the complaint themselves. In these cases, the Commission would have a right to intervene in an *amicus curiae* capacity.

Where a complainant requests the Commission to investigate a complaint, it is proposed that the Commission be required by statute to determine within a specified period of time (eg. two months) whether it will undertake the investigation and subsequently, whether it

will assume carriage of the complaint. Where the Commission decides that it will not take a complaint forward the complainant would be free to pursue the complaint before the Tribunal. The exercise of the Commission's discretion should be framed so as to make it entirely clear to complainants, respondents and the public that the Commission's decision as to whether to take carriage of a complaint does not reflect its merits. The Commission will have the discretion to refuse to proceed with an entirely meritorious complaint solely on the grounds that in the opinion of the Commission, it can be resolved through adjudication before the tribunal.

Why File a Complaint with the Tribunal?

Under the proposed system, the processes at the Tribunal would be designed to ensure expeditious adjudication of complaints. Accordingly, it makes no sense to force all claimants to file their claims with the Commission and then wait a period of time before they know whether they will be advancing their claim on their own. Further, as noted above, we are of the view that equality seekers themselves may have good reason to want to advance certain claims without relinquishing carriage to the Commission.

Step #2: The Pre-Hearing - The Tribunal Takes Control of the Process

From the perspective of providing access to effective remedies as well as conserving Tribunal resources, the adjudication process should be made as simple, accessible and efficient as possible. This can be achieved by a number of methods, including by granting the Tribunal wide discretion over its own procedure and instituting a pre-hearing and case management process early on in the proceedings.

The purpose of the pre-hearing meeting is to give the Tribunal the opportunity to assist the parties in canvassing the benefits of referral for mediation, determining the legal issues and factual evidence which will be necessary to the case and to exercise its powers to order the production of documents, the investigation of systemic issues by the Commission or an expert, and the appointment of a Tribunal officer to mediate or

conciliate the complaint if the parties are willing. At the request of the Respondent, the Tribunal may also determine whether the complaint is frivolous and vexatious on its face or out of time and whether time limits ought to be extended.

The pre-hearing meeting is a mandatory step. It should take place within a short time period after the initial filing of the complaint, for example within two months. A time period within which the pre-hearing must occur would benefit both respondents and claimants. Respondents would benefit from the early dismissal of frivolous claims. Claimants would benefit from the early confirmation of the prima facie validity of the claim. An early pre-hearing process would also send an important signal to the parties that the claim will proceed in a timely manner and may encourage the parties to consider alternative dispute resolution options early on in the dispute.

Step #3: The Tribunal's Continued Role in the Progress of the Case (Investigation, disclosure and other interim measures)

It will be necessary for the Tribunal to continue to oversee the progress of the claim by allowing the parties to appear before it or be convened by telephone conference call to deal with interim issues. Claimants may need assistance in obtaining necessary evidence. Orders of the Tribunal (enforceable if necessary in the Court) will be essential to ensuring that there is full disclosure and a fair hearing despite the very real imbalances of power between complainants and large corporate respondents. The Tribunal should also have the power, on an interim basis, to order injunctive relief.

Step #4: The Hearing

Like other administrative adjudicative bodies, the Tribunal will have control over its own procedure and will be able to manage and direct the conduct and course of the hearing to ensure efficiency and quick resolution. The Tribunal can control the conduct and litigation strategies of the parties, for example by limiting the testimony of witnesses where the testimony is inappropriate or unhelpful. We do not believe that present trends

toward ever longer and more expensive hearings are necessarily beneficial, particularly when these expenses have been used to justify the screening out of the majority of claims. Tribunals will need to be assertive about the fact that complainants and respondents alike must be cognizant of the allocation of public resources to the process, and ensure that evidence is presented quickly and efficiently.

D. THE ROLE OF THE COMMISSION

The Commission's role in a structure which permits direct access to human rights adjudication will be as important, if not more important, than its current role. The Commission's functions will continue to be essential to the public interest goal of promoting human rights and preventing systemic discrimination in Canadian society.

Commentators and advocates from a range of disciplines and perspectives have noted over the years the diminished ability of human rights commissions across Canada to devote adequate time and resources to functions other than complaints processing.[105] Human rights commissions have been criticized for failing to aggressively target systemic discrimination and to pursue human rights education. Issues of the most disadvantaged and marginalized workers and major systemic issues affecting access to federal services and benefits, or access to credit, utilities or telecommunications have not been dealt with because potential claimants lack the resources or the knowledge of their rights necessary to initiate claims. The Commission, because of its multiplicity of roles, has become essentially reactive rather than proactive, and thus incapable of the kind of outreach necessary to apply equality principles to the issues faced by the most marginalized and disadvantaged groups.

105Kaye Joachim, *supra* note 86 at 23-25, 35; Constantine Passaris, "Human Rights Commissions in Canada: A New Vision for a New Century", (1995) 8 Can . J. Admin. Practice 295-309 at 303;.

In our proposed model, the Commission will have much greater freedom to initiate its own investigations and litigation in a proactive way. The Commission may choose to target areas of discrimination for which there are gaps in the current jurisprudence or it may elect to initiate investigative reports on issues identified by claimants who have requested the Commission to assume carriage of complaints. Either way, the Commission would have an enhanced ability to shape and pursue its public interest priorities through the process of investigation and litigation of cases of systemic discrimination. Similarly, the Commission would have greater resources to promote human rights through education and other policy initiatives.[106] The Commission would also develop policy guidelines and other concrete tools to guide employers, banks, and other respondent groups, including labour arbitrators, in their assessment and understanding of human rights in particular factual contexts. It would be helpful if the Commission engaged in more systemic mediation, bringing together key actors in various spheres such as banking or telecommunications and encouraging corporate codes of conduct consistent with the provisions of the CHRA.

In its role in receiving and reviewing certain complaints, the Commission should not be burdened with any obligation to investigate a complaint prior to deciding whether to take carriage of it. The Commission should be permitted to inform complainants at any time in the process that it does not wish to proceed with the complaint. The Commission's decision should not be reviewable. Since, under the proposed, model, the complainant has access to adjudication and necessary resources to take a complaint forward at the tribunal, it is unnecessary to have judicial review of the Commission's decisions.

E. THE ROLE OF THE TRIBUNAL

a. Avoiding Backlog and Delay

106 According to its Annual Reports for 1996, 1997 and 1998, the CHRC has allocated approximately 21-22% of its total budget to Human Rights Promotion and has allocated at least twice that amount to complaints processing.

One of the major concerns about a direct access model is that tribunal resources would be exhausted in dealing with frivolous and vexatious complaints or that the backlog at the Commission would be transferred to the Tribunal. We believe this fear to be grossly exaggerated. Part of the solution, is to ensure good quality advice and representation to complainants and respondents. Our experience is that most potential claimants, if they have access to advice they can trust, are not interested in proceeding with hopeless causes. Similarly, there would be significant savings if respondents had access to good advice about their obligations under human rights legislation. Considerable resources are currently exhausted because neither complainants nor respondents have access to good advice.

It is also important, as noted above, to ensure that the Tribunal is able to expeditiously dismiss complaints which ought not to proceed. The Tribunal should be able, of its own motion, to determine that a particular case is outside of its jurisdiction or out of time. The pre-hearing process could take many forms and the Tribunal may wish to decide on a case by case basis which form is most appropriate: it could be by conference call, an informal meeting, an expedited hearing or in writing.

Mediation of all cases other than those for which the Commission assumes carriage would become part of the Tribunal's responsibility in our proposed model. If the parties are open to mediation or conciliation, the Tribunal member could order the appointment of a mediation or conciliation officer at that time. The tribunal itself would be responsible for assigning staff and/or panel members to provide mediation and conciliation.

The Tribunal at the pre-hearing meeting may also be able to suggest a form of adjudication of the claim that does not involve a full hearing or narrows the issues through an agreed statement of fact. For example, the Black report suggested that in cases where there is an agreed statement of facts or well-defined issues of law, it might be appropriate for the Tribunal to make a ruling on the basis of the positions of the

parties at the pre-hearing meeting or on the basis of written submissions after the meeting.[107]

b. Investigation and Disclosure

Under a Tribunal direct-access model, where the Commission is not involved, claimants and their representatives will be responsible for presenting the evidence to substantiate the claim. Unlike the Commission, the claimant will not have the powers under s.43 of the Act to enter premises and order the production of documents. The investigation of complaints, particularly in cases of systemic discrimination must be facilitated by the new Act and by the rules of procedure of the Tribunal.

There are a number of ways in which the new regime could be structured to facilitate the full investigation of claims. First, there ought to be a process by which the parties can seek disclosure or discovery of documents. This could be achieved through a process of written interrogatories or simply a statutory disclosure rule requiring claimants and respondents, within a certain period of time, to outline the evidence upon which they intend to rely in the hearing and to produce relevant documents on request. Prior to the hearing, it may also be desirable to require the parties to list the names and a summary of the evidence of the witnesses whom they intend to call.[108] In the words of the

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107William Black, *B.C. Human Rights Review: Report on Human Rights in British Columbmia* (Victoria: Government of British Columbia, 1998) at 129.

108 The Tribunal may consider developing a procedure to prevent the disclosure of the names of witnesses in cases where disclosure may cause harm to the witness. For a discussion of such considerations and discovery practices under the Commission system, see V. Kazmierski, "Needing Closure on Disclosure: Application of R v. Stinchcombe in Human Rights Proceedings", (1997) 6 Dalhousie Journal of Legal Studies 307.

Commission, “trial by ambush is in no one’s interest”.[109] Both the Black Report and the Cornish Report recommended mandatory documentary disclosure rules.[110]

The Tribunal will most likely need to take an active role in overseeing the disclosure and investigation as the case proceeds. While claimants or respondents may request the production of documents, it is by no means guaranteed that the other party will comply with such requests. The parties will need to have access to the Tribunal to obtain orders for production. In cases where systemic issues are involved, it may simply not be possible for the claimant to adequately investigate the claim. In such cases, the Tribunal should be empowered to order the extensive production of documents by the respondent or to order the Commission or an independent expert hired at the cost of the Tribunal to investigate the claim.

The Tribunal’s role in the discovery process will also be to protect claimants or respondents from harassing requests for disclosure from the other party. In other words, if a party is faced with unreasonable requests for disclosure, the party can approach the Tribunal for a clarification of their obligations or for an order dismissing the disclosure request.

Where it appears to the Tribunal to be necessary, the Tribunal should have the power to order oral examinations for discovery.

In certain cases, the investigation and discovery process may be somewhat time consuming for the Tribunal. This is time and money well spent and will, in the end, save considerable resources and wasted time on adjournments at the hearing stage. The civil trial process has demonstrated that discovery procedures make for shorter, fairer and

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109 *Dhanjal v. Air Canada*, [1996] C.H.R.D. No. 4 (Q.L.) at para.195.

110 Black Report, *supra* note 106 at 126-7, Cornish Report, *supra* note 87 at 128.

more orderly proceedings.[111] Discovery procedures also encourage parties to know their own and the opposing party's case prior to the hearing, thus making it possible for settlement discussions to occur in a context of full information.

c. Other Interim Orders and Remedies

Tribunals lack the power to order injunctive relief. Without the ability to order interim remedies, the Tribunal is helpless to prevent ongoing discrimination until the final determination of the claim. The harm to the claimant in the meantime can be very serious.

There are other cases where an interim order would halt an allegedly discriminatory practice and result in little or no prejudice to the respondent. For example, in cases where telecommunications or utilities companies require a deposit from low income persons, an order requiring the company to provide service without the deposit would be necessary pending the determination of a human rights claim.

d. Mediation

Mediation and conciliation have recently been promoted as a panacea for Commission backlogs and indeed, more effective mediation has been helpful in this regard at many human rights commissions. For complainants in a system in which they will likely have no access to adjudication, the opportunity to be heard and to achieve some sort of remedy afforded through mediation may be the most positive outcome of a complaint.

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111 M.R. Gorsky, "Discovery Due Process Under the Ontario Human Rights Code", (1983) 21:1 *U.W.O.L.R.* 55 at 80.

Mediation and conciliation, however, cannot be fair or effective if they occur in a legal vacuum or where the Human Rights Commission confuses the public interest in promoting compliance with the Act with a public interest in closing files. Mediation and conciliation can only produce just results which conform with the goals of the CHRA if they occur in the shadow of the law -- in the shadow of a fully functioning and effective enforcement mechanism. The Human Rights Commission ought not to be coercing claimants into settlements with the threat of dismissal hanging over their heads (including dismissal for refusing a reasonable offer of settlement) but of promoting broad compliance with the Act. This is much more likely to occur with mediation and settlement at the tribunal stage rather than at the Commission.

A Tribunal direct access model will rely on constructive mediation and conciliation processes to resolve a large number of complaints where a hearing is unnecessary. Mediation should still be an option available at any stage of the hearing and there should be a mediator assigned to each case throughout its life at the Tribunal. The Commission, of course, would be a party to mediation discussions in systemic cases for which it has assumed carriage. In all cases, the Tribunal ought to refuse to ratify a settlement which fails to address outstanding issues of systemic discrimination or to achieve compliance with the Act.

e. Costs

One of the advantages of the Tribunal system over access to the courts that has been raised time and again by equality-seekers is that claimants under the current regime are not exposed to cost orders. This feature of the current regime should be maintained. It is important, however, that the tribunal processes be structured so as to be accommodating of this distinctive nature of human rights claims. A respondent must be entitled to a quick and expeditious dismissal of any claim brought for improper motives. Complainants must have immediate remedies available where respondents are

intentionally using tactics of delay and obstruction. Either party ought to be able to raise issues of cost and resources before the Tribunal and the Tribunal ought to be charged with the responsibility of ensuring that the hearing is fair, not only in terms of procedure, but also in terms of resources. Where a systemic case involves significant costs to respondents who are unable or ought not to have to bear the entire cost, there should be an independently administered pool of funding to which the respondent may apply to provide resources necessary for the full and proper hearing of the issue. Our experience is that equality seekers derive no advantage from a system in which respondents with limited resources feel that they are unfairly pitted against deep publicly funded pockets when they are randomly chosen for the litigation of a systemic issue of broad application. Similarly, the Tribunal may suggest that complainants request the assistance of the Human Rights Commission or access other sources of funding in cases where the complainant has inadequate resources. These are issues which ought to be properly before the Tribunal "case manager" as critical issues in ensuring fair hearings.

F. THE INTERESTS OF POOR COMPLAINANTS: FUNDING AND SPECIALIZED ORGANISATIONS

The greatest concern in a model which guarantees the right to a hearing by leaving claimants to bring their cases on their own is that claimants will lack the resources to make this right meaningful. A further concern is that the current system ensures that at every tribunal hearing there will be Commission counsel who is knowledgeable about human rights and who provides considerable guidance and influence on the hearing. Without knowledgeable and effective representation on both sides, the hearing will be less efficient and the outcome less fair.

Under the current system, the Commission takes carriage of the complaint but does not represent the claimant. However, because the Commission has carriage of the complaint, complainants are generally not provided with financial assistance for representation. Only in British Columbia, where the Commission does not assume

carriage of complaints before the tribunal, is legal aid provided for human rights claimants. Legal aid used to be provided in Quebec, but is generally no longer available for human rights cases, even where the claimant proceeds without the Commission.[112]

Under the proposed model, the Commission will continue to assume, at the request of the claimants, carriage of certain claims which raise timely and important issues of systemic discrimination. We would expect that since the Commission will be relieved of its complaint processing and screening function that it would be in a position to devote the same level of resources to litigation before the Tribunal.

Thus, the proposed system ought not to mean any lesser role for the Commission in taking claims forward. We do not, therefore, see a cause for alarm that permitting complainants direct access to the tribunal will relinquish the benefit of the Commission's public interest litigation. Most claimants never received representation by the Commission and in fact many have been forced to retain lawyers to assist them in being heard by the Commission itself and convincing the Commission to refer their claim to a Tribunal.[113] The necessity of claimants retaining independent counsel has been recognized by the Tribunal. In *Cashin v. Canadian Broadcasting Corporation* (No. 2) (1990), 12 CHRR D/222 (C.H.R.T.) per Susan Ashley, the Tribunal held:

> "It should be noted also, as was done in my 1985 decision, that because of the position of the Commission in initially refusing to proceed with this complaint, Ms. Cashin was forced to retain her own counsel at her own expense, rather than having her complaint carried by the Commission. I urged the Commission to pay

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112 Poirier and Lamarche, *supra* note 95 at 867

113 For a fuller discussion of cases where complainants are forced to retain legal counsel, see N. Gupta, *Reconsidering Bhadauria: A Re-examination of the Ontario Human Rights Commission and the Courts in the Fight Against Discrimination* (Faculty of Law, University of Toronto, 1993)[unpublished] at 50-54.

her legal fees, having no authority to order it under the Act, but am advised by counsel for the Commission that this was not done".

Similarly, in *Oliver v. Department of the Environmental* (Parks Canada) (1989) 11 CHRR D/456 (CHRT), the Tribunal commented:

"The tribunal is of the view that it was only due to Mr. Oliver's representation by his own counsel, Mr. Hackland, that he was able to achieve his success that he has before this Tribunal. It was Mr. Hackland's representation that successfully obtained for Mr. Oliver the opportunity to appear before this Tribunal.".

These cases reveal what advocates and equality-seekers know to be true: claimants have always needed representation, if not before the Tribunal, then to assist them in opposing the dismissal of their complaints by the Commission. Our hope is that a new system, rather than leaving complainants unrepresented before Tribunals, will finally recognize the importance of effective representation not only for claimants but for the effective functioning of the whole system.

Over the years, numerous approaches to securing representation for individual claimants have been suggested. The Cornish Task Force in 1992 recommended that individual claimants be assisted by Equality Rights Centres, community organisations (called human rights partners), community legal clinics and legal aid certificates. In British Columbia, where claimants are not represented by the provincial Commission, claimants rely on lawyers paid at a legal aid rate. As the Black Report explains: “the B.C. Council of Human Rights cannot appear at the hearing or represent the claimant...[i]nstead, special arrangements have been made through the Legal Services Society for legal aid to be supplied to claimants” and to respondents who are eligible on the basis of need.[114]

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114 *Supra* note 106 at 131.

The problems with legal aid assistance in British Columbia raised by the Black Report included:

X a lack of safeguards to ensure that the lawyer acting in the case has sufficient experience and knowledge in human rights;

X the disabling effects of the severe limits on the number of hours that lawyers can charge, which prevent lawyers from taking on or adequately presenting complicated cases of systemic discrimination.

The Black Report concluded that "the present arrangements for legal representation are clearly deficient and some form of specialized clinic or agency would be an essential component of an adequate system of legal representation".[115] The report proposed the creation of Human Rights Legal Clinics which would directly represent claimants in their geographical area and would serve as a resource for other lawyers representing claimants.

We believe that the specialization of legal service providers to claimants and respondents, combined with a legal aid type fee for service system, is the best approach to ensuring that parties to human rights claims are properly represented. Good quality representation for both sides entails significant savings. Settlement is more likely, investigation is expedited and efficient hearings are encouraged. Inappropriate claims are avoided.

Despite the geographic and cultural diversity of those who bring forward claims under the CHRA, specialized centres are still workable. CERA represents complainants from all over Ontario, interacting primarily by telephone with clients. We prepare human rights complaints, mediate with respondents and prepare pleadings and evidence with the assistance of claimants whom we may not meet in person until a case goes to a tribunal.

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115 *Ibid* at 133.

The disadvantages of distance are usually more than compensated for by the advantages of specialized knowledge of the issues.

CERA also co-ordinates the work of the national Charter Committee on Poverty Issues. It is routine for us to get calls from all over Canada from lawyers or advocates representing claimants on poverty related issues, wanting information on what has been done to date on a particular issue. The existence of specialized centres such as ours provide a great cost savings in individual litigation. Even with legal aid coverage for individual practitioners, there would be considerable savings in having advocacy centres which are able to consult with potential claimants and their practitioners. It is particularly important when dealing with so broad a geographical reach that each case not reinvent the wheel. Modern communications technology and lower long distance rates makes it quite possible to provide effective representation over significant distances.

It is also important to recognize the important role of lay advocates in human rights cases. Legal training is not a prerequisite to effective human rights advocacy. The broad purposes of the CHRA are best promoted by ensuring that human rights are not conceived of narrowly as legalistic rules but rather engage broad issues of public policy and shared values. There has been consideration in the past of offering university courses leading to qualifications in human rights advocacy. Such training could easily surpass the training a prospective lawyer receives in human rights in law school. Human rights advocacy needs people who are engaged by the broader dimension of human rights. It will be important for any new system to encourage non-lawyers to become effective advocates.

It will also be important to recognize, in the funding of representation, the effective role that equality seeking groups and existing organizations can play in taking forward claims under the CHRA. A program similar to the Federal Court Challenges Program, if not the program itself, ought to permit funding for challenges brought forward under the CHRA.

In many cases, such challenges would be less expensive than Charter cases and could develop important strategic litigation in this sphere.

CONCLUSION

In the first part of this paper, we assessed whether the screening function of the Commission violates basic constitutional and international human rights norms. In this context, any argument in favour of denying rights claimants access to adjudication based on administrative convenience or budgetary constraints is completely unacceptable.

We end, however, with the insight that adjudicating rights in a fair and open context, utilizing the considerable skills of claimants and their advocates at the same time as providing them with necessary resources in support of their advocacy is ultimately more administratively efficient than a cumbersome system requiring that every complaint be investigated and screened by the Human Rights Commission. Human rights enforcement and promotion are unquestionably under-resourced in Canada and we do not recommend that this situation continue. But a direct access model would ensure that more claims are adjudicated, both systemic and individual, and that enforcement of the CHRA would be considerably improved, even if the budget was not enhanced.

The original idea of human rights commissions assuming responsibility for investigating all human rights complaints, selecting the ones to take forward and retaining a monopoly on all human rights litigation was likely rooted in a sincere desire to relieve those who are most disadvantaged in society of the burden of challenging discrimination. But we cannot relieve these groups of the burden of challenging discrimination. It is equality seekers themselves who are best qualified to identify discrimination, to challenge it and to develop appropriate remedies. The point is not to relieve them of the burden but to ensure that they have the opportunity to take their claims forward and have them heard, free of the many systemic barriers which are now put in the way of advancing their claims.

Our consultations have discovered that equality seekers want a partnership with a Human Rights Commission based on a recognition of their own capacities, not a

paternalistic system in which the Commission assumes carriage of all of their issues or sets itself up as the “screen” to determine if their complaints are meritorious. The Charter of Rights has shown the considerable capacity of equality seekers to be strategic in their litigation approaches, to prioritize their issues and to develop considerable expertise within their constituencies to handle the most complex court challenges.

Many of the most substantive equality issues affecting the most disadvantaged in society, however, have still to be addressed. Our hope is that a transformed CHRA could take a lead in ensuring that our human rights system provides access to justice for the most disadvantaged groups and begins to re-frame our approach to human rights, both procedurally and substantively, so as to better incorporate their claims to dignity, security and equality. It all starts with ensuring that the rights claims enjoy the right to be heard.

APPENDIX "A"

CERA'S CONSULTATIONS ON THE SCREENING FUNCTION OF HUMAN RIGHTS COMMISSIONS IN CANADA

Background

CERA has made a priority of advocating for reform of the human rights sytem in Canada and Ontario in order to make them work. For over a decade we have appeared before legislative committees to advocate change. We were an active participant on the Advisory Committee to the Ontario Human Rights Code Review Task Force, preparing research for the Task Force and working extensively on the development of proposals for a new model in Ontario. By the mid-1990s, however, when no action had been taken either provincially or federally, we decided that litigation may be the necessary catalyst for change.

A Charter Challenge to the "Screening" Provisions of the CHRA

Accordingly, CERA has been actively reviewing, consulting on and in the process of developing a constitutional challenge to the "screening" provisions of the Ontario *Human Rights Code* and the *Canadian Human Rights Act*. We have received test case funding for this challenge from the Ontario Legal Aid Plan Test Case Funding Committee and we have received (in three separate grants) Case Development, Program Promotion and Access and Negotiation Funding from the Court Challenges Program of Canada to conduct research and consult with equality-seeking groups about a section 15 challenge to the screening function of the Commission.

In particular, as part of the development of the constitutional challenge to the two Acts, CERA held two consultations with equality seeking groups and advocates in 1997 and 1998, funded by the Court Challenges Program of Canada, with respect to the screening function of human rights commissions and alternative models to the federal and Ontario

regimes. The August 1997 consultation involved in-depth telephone interviews and the May 1998 consultation involved a two day workshop in Toronto.

The questionnaire used in the August 1997 consultation and the agenda for the May 1998 consultation are attached hereto as Appendices B and C. The list of participants in the 1997 and 1998 consultations are attached as Appendices D and E respectively.

As can be seen from the attached consultation questionnaire (1997) and agenda (1998), consultation participants were, broadly speaking, asked the following questions:

1. Did they think that a court challenge to the screening provisions of the CHRA was appropriate?

2. If yes, did they agree with the proposed remedy of a guaranteed access to adjudication model in which claimants could take their cases directly to a Tribunal or did they think claimants should be permitted to take their claims to Court or to both adjudicative bodies?

3. Did they agree with the proposed s.7 and s.15 Charter and international human rights arguments in support of the challenge?

Summary of the Results of the Consultations

(1) Experiences with the Canadian Human Rights Commission

There was unanimity among those consulted both in 1997 and 1998 that there are serious problems with the Canadian Human Rights Commission and with the Commission's broad discretion to dismiss complaints. All of the participants to CERA's consultations confirmed that meritorious claims are regularly dismissed by the Commission. One participant to the 1997 consultation stated that of the approximately 60 (in its view, meritorious) complaints it had filed with the Commission over the past 10

years, only 2 had reached a hearing. Participants complained about the practice of the Commission pressuring complainants into settlements by indicating to the complainants that their complaint would be dismissed if the settlement offer was not accepted. Many participants expressed great frustration at the investigation process, the lengthy delays and the failure of the Commission to deal with the merits of each individual case. Various participants to the 1997 consultation indicated that they had given up on on assisting claimants in filing complaints since they had determined that it was a waste of their time and resources. Other participants indicated that they continued to assist claimants in pursuing claims before the Commission because without representation and assistance, the chances of the claimant having their case properly investigated and considered by the Commission were slim. Participants to the 1998 consultation agreed that although the Commission is intended to obviate the necessity of claimants finding independent representation, it was often necessary for claimants to have advocates in order to push their cases through the CHRA system and have their claims substantively considered on their merits.

(2) Response to the Litigation Approach and the Legal Arguments

In response to whether a Charter challenge was an appropriate strategy to address the problems with the CHRC, there was a similarly overwhelmingly positive response to the proposed Charter challenge to the screening function of the Commission. The few respondents who had doubts about the Charter challenge did so on the basis that they thought law reform would be a better method of addressing the problems with the Commission's screening function than litigation. For example, two respondents felt that the problems with the CHRA were too extensive to be addressed adequately by litigation. Other participants emphasized that they believed that a law reform effort should be part of a two-pronged approach and that law reform should pursued at the same time as Charter litigation. In fact, only one participant to both consultations was unequivocally opposed the Charter challenge on the basis, in principle and practically, human rights enforcement mechanisms should not leave claimants to take their cases forward on their own without guaranteed access to resources and support.

Of the 22 in-depth interviews conducted in the summer of 1997, 18 participants felt sufficiently strongly about the problems with the screening function of the Commission that they beleived that the Charter challenge should be brought even if there was a chance that the case might lose. The overwhelming sense of the participants was that there would be no significant downside to losing the case since the Canadian human rights system is in such a shambles that things couldn't get any worse than they already are. In addition, a number of participants indicated that even if the case did not succeed, the publicity and exposure of the abuses of the Commission that would be generated by the litigation would make the case worthwhile.

Overall, in the August 1997 and particularly in the May 1998 workshop, it was generally agreed (even by those who had concerns about or opposed the remedy requested) that the arguments in support of the proposed Charter challenge were viable, with a strong foundation in law, and that the lack of access to justice and denials of due process suffered by human rights complainants was compelling.

(3) Responses to the Remedy of Guaranteed Access to the Tribunal

In terms of responses to the "guaranteed access" remedy, the proposed remedy presented to the consultation participants for response was as follows:

> a) Declaration that sections 41, 44 and 49 of the Act violate sections 7 and 15 of the Charter by denying the applicants the right to a determination of their complaint in a timely manner;
>
> b) Declaration that the right to a determination by a tribunal must be read into s.49 of the Act, such that if the Commission (i) decides not to investigate the complaint pursuant to section 41 or (ii) decides to dismiss the complaint pursuant to section 44(b) or (iii) does not render a decision

> under section 41 within 90 days or a decision under section 44 within one year; the complainant may, within 60 days, submit an Application to the President of the Human Rights Tribunal and on receipt of such an Application the President shall appoint a Tribunal to inquire into the complaint.

In general, there was strong support for the proposed remedy. Those familiar with the experience in Quebec were particularly supportive of the proposed challenge, stating that the ability of individuals and groups to proceed to the tribunal in Quebec whenever the Commission dismisses a complaint has acted as an important corrective to any policies of the Human Rights Commission which may ignore or overlook important issues and lead to the dismissal of meritorious complaints.

The discussions from which it became evident that there was overall support for the remedy included discussions in which the participants spent a considerable amount of time considering the benefits of and disadvantages to the guaranteed access model. In particular (especially in the May 1998 consultation) a number of concerns were considered in-depth: the role the Commission would play in a direct access model, the resource implications of a direct access model, whether the direct access model should include direct access to the courts and the advantages and disadvantages to low-income complainants of the proposed remedy. The majority of consultation participants - after having discussed these considerations and concerns - remained strongly in support of pursuing a remedy of guaranteed access to the Tribunal through litigation.

APPENDIX "B"

QUESTIONNAIRE SENT TO RESPONDENTS
ON WHICH IN DEPTH INTERVIEW WAS BASED

QUESTIONNAIRE FOR TELEPHONE INTERVIEW:
CERA CONSTITUTIONAL CHALLENGE TO HUMAN RIGHTS COMMISSION'S "GATEKEEPING" POWERS

1. Do you assist equality seekers in filing human rights complaints?

   If yes, how many complaints do you file a year, and with which Human Rights Commission? How would you describe your experience with the Human Rights Commission?

   If not, is this because you do not recommend filing complaints?

2. Have you had a case in which there was evidence to substantiate the complaint and yet the complaint was dismissed?

   If yes, did you judicially review the decision of the Commission to dismiss the complaint?

   [Quebec: If yes, did you take the complaint to the tribunal on your own? What was the outcome?]

3. What do you think are the chances of success for the proposed challenge?

4. What concerns do you have if we were to lose the case?

5. What concerns do you have, if any, if we were to win the case?

6. Do you feel that the issue would be better addressed through law reform rather than litigation?

7. i) A challenge to the Human Rights Commission's broad exercise of "gatekeeper" discretion might be brought instead by way of judicial review application. We could argue that any complaint for which there is any possible basis for a finding of discrimination must be referred to a Board of Inquiry by the Human Rights Commission. Do you feel there would be a greater or lesser likelihood of success for such an argument than with the proposed constitutional challenge?

   ii) Would such a ruling on judicial review be preferable to the proposed remedy striking down of the "gatekeeper" discretion or would it be less desirable?

8. Do you agree with the argument that the gatekeeper function of human rights commissions in Canada (outside of Quebec) is unique in its scope and absolute control of access to a determination of rights?

Can you think of any analogous administrative systems in Canada or elsewhere in which rights claims are subject to this type of administrative discretionary power?

9. Do you agree that it is preferable to gain access to the human rights tribunal rather than the courts on human rights complaints, or do you feel that it would be preferable to challenge the Supreme Court of Canada decision in *Bhaduria* (as it was pre-Charter) and argue that claimants should have the right to take cases to the court if the Human Rights Commission does not proceed to the tribunal within a reasonable period of time.

10. Are you aware of any human rights claimants whose complaints have been recently dismissed by the Canadian Human Rights Commission where the evidence seems to have substantiated the complaint? Would these claimants be interested in participating in the proposed constitutional challenge?

11. Do you have any other concerns or suggestions with respect to the legal arguments or remedy proposed?

12. Can you direct us to any sources of evidence which would be useful in exposing the effect of the gatekeeper discretion provided to the Canadian Human Rights Commission?

APPENDIX "C"

HUMAN RIGHTS ADVOCATES WORKSHOP

ON

A PROPOSED CONSTITUTIONAL CHALLENGE TO THE "GATEKEEPER" PROVISION OF THE *CANADIAN HUMAN RIGHTS ACT*

University College Union
79 St. George Street

AGENDA

DAY 1

Friday, May 8, 1998

I.	**8:30am - 9:15am**	**Coffee, Snacks, Conversation**
II.	**9:15am -10:00am**	**Introduction to the Issues** **Bruce Porter** * Why CERA is proposing the challenge * Experiences CERA brings to the case * Summary of the issues to be discussed * Identification of other issues requiring discussion

III. 10:45am - 11:30am Assessing the Problem of the Gatekeeper

* General discussion of gatekeeper discretion; how it is exercised in various jurisdictions; how it has been interpreted by the courts; experiences of workshop participants
* Is challenging the gatekeeper discretion the proper focus?

IV. 11:30am - 11:45am BREAK

V. 11:45am - 1:15pm Relevant Comparisons: Quebec and International Jurisdictions

* Overview of the system and state of the law in Quebec, in particular the *Lambert* and *Ménard* cases
* The use (or lack of use) by equality seekers in Quebec of the direct access provision and why
* *Ménard*: cause for concern for proposals for a
* *Bibeault St. Jacques* and other cases: How deal with competing jurisdictions and/or adjudicators?
* Litigation, strategic and other links between Quebec cases and other provinces?
* How unique is the Canadian gatekeeper internationally?: UK, US, New Zealand,

VI. 1:15pm - 2:30pm LUNCH

VII. 2:30pm - 3:00pm Relevant Comparisons: Domestic Administrative Regimes

* Is the gatekeeper unique compared to other administrative regimes in Canada?
* How are gatekeeper provisions in human rights legislation distinct from similar provisions in other areas?

VIII. 3:00pm - 4:15pm **The Ajudication of Human Rights: Courts or Tribunals?**

* Direct access to tribunals: Advantages and human rights tribunal systems
* Direct access to courts: Advantages and disadvantages
* Assessing the impact of *Bhaduria, S.E.P.Q.A.* and
* Should we be challenging Bhaduria and seeking direct access to the courts?
* Assessing the impact of direct access to courts or tribunals on human rights claimants

IX. 4:15pm - 4:30pm **BREAK**

X. 4:30pm - 5:30pm **The Role of the Commission**

* What are the features of the human rights commission which we want to preserve?
* Could we achieve what we want with the commission maintaining carriage of all complaints before the tribunal?
* How do we avoid the pitfalls of a private model?
* Assessing the short and long term impacts of the in Canada

DAY 2

Saturday, May 9, 1998

I. 9:00am - 9:30am **Coffee and Informal Discussion**

II. 9:30am - 11:30am **Framing the Charter Argument**

* **Conceptualizing the s.15 argument**:

(1) Illusory rights without an effective remedy: The obligation to provide substantive protection CHRA as a comparatively inferior administrative
(3) International human rights argument:

Duty to protect from discrimination and
to provide effective remedies
(4) Alternative arguments?

* **Conceptualizing the s.7 argument**:

- Liberty, security and fundamental justice
- Arbitrariness and inconsistency of the
the gatekeeper discretion
- Access to adjudication or determination of rights
as a component of fundamental justice

* **Discussion of strategies for approaching s.1**

* **Characterization and Identification of the**
- organisations, individuals or both?

III. 11:30am - 11:45am BREAK

IV. 11:45am - 12:30pm The Remedy: Strategic Considerations

* Discussion regarding the specifics of the
proposed remedy
* reading-in vs. a declaratory order

V. 12:30pm - 1:30pm LUNCH

VI. 1:30pm - 4:30pm ROUNDTABLE

**Strategic Issues in Human Rights Litigation
Of Interest to Participants**

**Information Regarding Initiatives Participants
Are Involved In**

May Include:

1. Assessing the Impacts of Recent Decisions

In *Vriend, Cooper*, *Ménard* and others

2. Strategies for Improving Human Rights in

Sould social and economic rights be included in human rights legislation or protected

Ways to broaden the ambit of human rights legislation

3. Future Directions in Human Rights

4. Making Better Use of International Human

5. Interest in a listserve?

VII. 4:30pm - 4:45pm **Sum up and Thank You**
Bruce Porter

APPENDIX "D"

In Depth Interview List

1. Lynne Toupin, from N.A.P.O. in her personal capacity

2. Jennifer Scott, from L.E.A.F., in her personal capacity

3. Dianne Richler, Canadian Association for Community Living

Bernie Farber, Canadian Jewish Congress

5. Michelle Williams, African Canadian Legal Clinic

6. Patty Bregman, Advocacy Resource Centre for the Handicapped

7. Michael Janigan, Public Interest Advocacy Centre

8. Jerry Vink, Newfoundland Labrador Human Rights Association

9. Frances Kelly, Community Legal Assistance (British Columbia)

10. Donna Greschner, Faculty of Law, University of Saskatchewan

11. Indra Singh, Minority Advocacy Rights Council

12. Kripa Sekhar, Saskatchewan Action Committee on the Status of Women

13. Judith Keene, Clinic Resources Office

14. Susan O'Donnell, Peter Bowden, British Columbia Human Rights Coalition

15. Orville Endicott, Ontario Advocacy Coalition

16. Avy Go, Metro Toronto Chinese & Southeast Asian Legal Clinic

17. Stella Savage, Scarborough Legal Services

18. Amy Go, N.A.C.

19. Tom Clark, Interchurch Committee for Refugees

20. Cindy Wilkey, Ursel & Wilkey

21. Graham Webb, Judith Wahl, Advocacy Centre for the Elderly

22. Vince Calderhead, Metro Community Law Clinic (Halifax)

23. Craig Scott, Faculty of Law, University of Toronto

24. Anne Bayefsky, Centre for Refugee Studies, York University

25. Hugh Sher, Council of Canadians with Disabilities

26. Bruce Feldthusen, Faculty of Law, University of Western Ontario

MAILING LIST (CONFIRMED INTEREST BY PHONE)

1. National Association of Women and the Law
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   Ottawa, Ontario
   K1N 7B7

   Attention: Louise Shaughnessy

2. Saskatchewan Action Committee on the Status of Women
   2343 Cornwall Street
   Regina, Saskatchewan
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   Attention: Kripa Sekhar

3. Advocacy Centre for the Elderly
   2 Carlton Street, Suite 701
   Toronto, Ontario
   M5B 1J3

   Attention: Graham Webb

4. Council of Canadians with Disabilities
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Attention: Mel Graham

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