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# Coercing Justice? Exploring the "Aspirations and Practice" of Law as a Tool in Struggles Against Social Inequalities

Karen Schucher

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COERCING JUSTICE?  
EXPLORING THE “ASPIRATIONS AND PRACTICE” OF LAW  
AS A TOOL IN STRUGGLES  
AGAINST SOCIAL INEQUALITIES

Karen Schucher

A DISSERTATION SUBMITTED TO  
THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF  
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## Abstract

This dissertation examines the role of law as a tool in struggles against social inequalities, by tracing the history of Ontario's human rights legislation and enforcement from the enactment of fair practices statutes in the 1950s through the restructuring of the enforcement regime in 2006. Ontario was the first Canadian province to pass anti-discrimination legislation and to establish a human rights commission enforcement process. This legislation and the commission enforcement process were the models for all other Canadian jurisdictions.

The dissertation approaches the role of law through the framework of tensions between the "aspirations" and the "practices" of law. On the one hand, law holds out the promise of enhancing citizen agency and imposing responsibility for conduct by promoting access to justice through the power of legal norms, institutions, and enforcement and other processes. On the other hand, efforts to fulfill this promise raise questions about the content of legal norms, the operation of legal institutions, the practice of legal processes, and the relationship between law and social power.

The historical record examined in the dissertation shows human rights advocates successfully engaging the power of the state to enact anti-discrimination legal norms, but then facing new challenges in their efforts to engage the power of the state to enforce these norms. Although access to the coercive power of law was a consistent theme in the advocacy for anti-discrimination legislation and enforcement, in practice there has been relatively little access to this power. Both the government agency model, and the tribunal model which replaced it, have emphasized informal, non-public and voluntary resolution over formal, public, more coercive adjudication. The emphasis on private, voluntary resolution of anti-discrimination claims may increase the potential for private social outcomes; however, these social outcomes may also reflect rather than redress imbalances in social power relations. The emphasis on private, voluntary resolution also has the potential to limit the public development of anti-discrimination legal norms. Thus, while anti-discrimination legislated norms have become important tools for citizen agency, this agency has arguably been most effective outside of the formal legal enforcement processes.

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For assistance with my archival research, I thank the librarians and staff at Library and Archives Canada; Janice Rosen, Archives Director of the Canadian Jewish Congress National Charities Committee Archives; and Donna Bernando-Ceriz, Archivist, Melissa Cava, Archivist and former Director Ellen Scheinberg of the Ontario Jewish archives.

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I would not have been able to complete this journey without the patience and grounding provided by my spouse, David Muir and our son, Nathan Gilbert Muir Schucher, who plugged many of the holes created by the time I needed for this work. The PhD path involves sacrifices of many kinds, and much time away from the people you love. No one knows this better than those who share their lives with you.

I dedicate this dissertation to the memory of the women I knew as my bubbies, Rose Schucher and Jean Diner, and to my zaydes Nathan Schucher and Jerry Segall, who provided important role models for my aspirations to live my life as a responsible and caring citizen.

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## Preface

Empowerment, Zeph. What is this new thing? What happened to what we used to call justice?<sup>1</sup>

I entered Osgoode Hall Law School in September 1984, after abandoning the idea of becoming a philosophy academic in favour of pursuing a more activist career. My interest in ethics came with me to law school, informing my goals for studying law and working as a lawyer. As a law student, I took very few “core” courses, focusing instead on what have come to be called “outsider” courses (e.g. courses in feminist legal theory and occupational health and safety) and spending one semester at Parkdale Community Legal Services, the student legal aid community clinic attached to Osgoode. In the context of law school, my interest in ethics became an interest in how law could be used as a tool by people who are relatively socially disempowered – because they are poor, because they are workers, because they are women, because they are racial or religious minorities, because they have disabilities, because they are immigrants and refugees, etc. Many of my law professors were extremely skeptical of the idea that law could be a useful tool for positive social change where that social change was directed at changing some social balance of power. Intellectually, I understood and respected their critique. However, I had decided to find my way by providing legal services, and I refused to be deterred. My goal was to be a “cause lawyer”, to use the descriptor coined by socio-legal commentators.<sup>2</sup>

I articulated and then practiced law for about 14 years, from 1987 to 2002, with the Toronto law firm then known as Cavalluzzo Hayes Shilton McIntyre & Cornish, and now called Cavalluzzo. In my law practice I was involved in successes and failures, but never lost my belief

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<sup>1</sup> Nadine Gordimer, *None to Accompany Me* (New York: Penguin, 1994) at 285.

<sup>2</sup> Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York, Oxford: Oxford University Press, 1998).

that law had some positive role to play in struggles against social inequalities.<sup>3</sup> Both during and after my law practice, I was also involved in a variety of capacities with the Women's Legal Education and Action Fund ("LEAF"), including as co-counsel on their Supreme Court of Canada intervention in *Newfoundland v. NAPE*,<sup>4</sup> and as co-author of their study on the implications of the Supreme Court of Canada decision in *Law v. Canada*<sup>5</sup> for statutory human rights.<sup>6</sup>

Human rights was a significant area of my legal practice, and has continued to be a major area of interest for me after leaving practice. When I originally applied to the LLM programme, I was interested in exploring whether restorative justice methods could be effective in statutory human rights enforcement. In the end my research and thesis did not address that question, although it continues to interest me, especially in light of Ontario's move to a "direct access" process for enforcing statutory human rights claims. The "direct access" debates in Ontario were taking place while I was completing my LLM and turning my thoughts to doctoral work. I was an interested by-stander to the debates, with friends, acquaintances and colleagues on both sides of the debate. My spouse has been a Vice-Chair of the Human Rights Tribunal of Ontario since September 2009.

I understood the concerns on both sides of the "direct access" debate. I had difficulty deciding where I would align myself if I had to take a firm position, and I still do not have a clear

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<sup>3</sup> My LL.M. thesis, *Contesting Women's Solidarity: Human Rights Law and the FWTAO Membership Case* (LL.M. Thesis--York University, 2007), centred on a major legal failure with which I was deeply involved for almost the entire duration of my legal practice.

<sup>4</sup> *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004], 3 SCR 381. LEAF's factum in the Supreme Court of was intervention was published in Fay Faraday, Margaret Denike & Kate M. Stephenson, *Making Equality Rights Real: Seeking Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) 471.

<sup>5</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

<sup>6</sup> Karen Schucher and Judith Keene, "Statutory Human Rights and Substantive Equality: Why and How to Avoid the Injury of the Law Approach" (March 2007):

<http://leaf.ca/wordpress/wp-content/uploads/2010/12/2007-statutory-human-rights-substantive-equality.pdf>.

answer to that dilemma. I understood the significant problems with how the Ontario Human Rights Commission process worked in practice. On the other hand, I heard what sounded to me like naïveté about the realities of legal process in the advocacy supporting “direct access”. My goal in this dissertation is not to criticize, but to analyze and to reflect. The lawyer advocates who participated in the “direct access” debates, and in the five-year review of the move to “direct access” are also “cause lawyers”, who are committed to the potential for human rights law to address social inequalities.

This dissertation evolved from my interest in two opposing questions about law and enforcement. One question is whether the conventional model of “law” creates barriers to a remedial approach to addressing social issues, including human rights issues, and whether there is a role for more restorative justice approaches in more legal process venues. This question grew in part out of my experiences with how people react to allegations of discrimination in a range of different social contexts: the workplace, community organizations, political organizations, and informal social settings. I observed that people are often shocked and offended when they are faced with allegations of discrimination, and that they are typically reluctant to hear the basis for the allegation. They focus on defending themselves against the allegation, instead of being open to considering the potential impact of their conduct. This observation led me to consider whether there is a stigma attaching to allegations of discrimination, which undermines the stated remedial goal of human rights legislation.

The opposing question is whether formal legal process can require people to listen to claims and perspectives they otherwise refuse to acknowledge. This question grew out of my experiences - in the same contexts noted above - with how people often refuse to listen to claims that conflict with their deeply-held interests, perspectives, and values. I was interested in

exploring the utility of legal process as a method for interrupting these “states of denial”,<sup>7</sup> by compelling people at least to listen to things they do not want to hear. Through my experiences as a legal practitioner, I had observed situations where legal process worked effectively to provide a venue for dialogue on competing perspectives, as well as situations where legal process failed to create such a venue.

These two questions coalesced for me around the Ontario initiative to eliminate the human rights commission enforcement model. I wanted to examine this initiative in the context of history of the promise and practice of human rights law that led to this initiative, as well as to consider what the change may mean for future efforts to use statutory human rights as a tool in struggles against social inequalities.

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<sup>7</sup> I borrow the phrase “states of denial” from the work of Stanley Cohen, who examines this question from the perspective of sociology and organizational psychology in *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Blackwell, 2001).

## Introduction

‘We have a tendency’, it has been said, ‘to lose sight of actual living conditions in the logical pursuit of abstract legal doctrines.’<sup>1</sup>

Law, like any remedial mechanism, is more likely to be employed at a distance: courts correcting police rather than internal police disciplinary procedures, war crimes punished years or decades later. Law prefers to articulate procedural rules rather than dictate outcomes. It expresses universal values in the language of rights but abdicates distributive questions to politics and the market. It is more powerful as a shield against abuses than as a sword to achieve substantive goals, as the protector of negative liberties rather than the guarantor of positive ones.

For all its limitations, however, law is indispensable, a source of hope and leverage to those who lack any other.<sup>2</sup>

This dissertation explores the “promise and practice”<sup>3</sup> of law as a tool in struggles for social equality. The central theme of the dissertation is the tension between law as a tool for achieving social goals and law as an end in itself. My interest in these questions is shaped by my own conflicting experiences with law, including my experiences as a social justice legal practitioner. I understand the seductive force of law’s promise, and the depth of disappointment when law fails to deliver on that promise.

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<sup>1</sup> Bora Laskin, “The Problem of Interests by Statute and the Problem of ‘Contracting Out’” (1938), 16 Can. Bar Rev. 669 at 672, quoting Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* (1933) at vi. [Laskin, “Interests by Statute”].

<sup>2</sup> Abel, Richard, “Speaking Law to Power: Occasions for Cause Lawyering” in Austin Sarat & Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York, Oxford: Oxford University Press, 1998) 69 at 103 [Abel, “Speaking Law”].

<sup>3</sup> The phrase “promise and practice” is inspired by Colleen N. Sheppard’s “The Promise and Practice of Protecting Human Rights: Reflections on the Quebec *Charter of Human Rights and Freedoms*” in Nicholas Kasirer and Roderick Macdonald, eds. *Mélanges Paul-André Crépeau*, (Cowansville, Québec : Éditions Yvon Blais, 1997) 641 [Sheppard, “Promise and Practice”]. Similar, but perhaps more cautionary, ways of framing this idea are: Byron Sheldrick’s “perils and possibilities”, in *Perils and Possibilities: Social Activism and the Law* (Halifax: Fernwood Publishing, 2004) [Sheldrick, “Perils and Possibilities”], and Shirley Tillotson’s “attractions and treacheries of human rights law”, in “Human Rights Law as Prism: Women’s Organizations, Unions, and Ontario’s Female Employees Fair Remuneration Act, 1951” (1991) Can Hist’ Rev 532 at 535-544 [Tillotson, “Human Rights as Prism”].

Different points of view about the extent to which law might provide remedies for social inequalities raise questions about how we define social inequalities and about what we expect from law. In relation to human rights law, the kinds of questions that arise include: What are the goals of human rights laws? Are human rights laws designed to facilitate equality of opportunities, equality of outcomes or other objectives? Should all material differences be judged inequalities or only some, and if only some - which ones? What processes should be used to resolve disagreements about which social practices and conditions should be judged discriminatory? In order to examine these questions, we must look at both the promise of law and the practice of law. The “promise” refers generally to the goals established by law; the “practice” refers generally to how these goals are achieved through various approaches to engaging with these goals, including formal processes for enforcing law. However, the categories of promise and practice are not mutually exclusive. Promise both affects process, and is affected by process.

Examining the role of law as a tool in struggles for social equality is significant for social activists and for the choices they make about where and how to pursue struggles for social equality. This analysis is also significant for questions about the role and obligations of the state in furthering social equality goals. My dissertation examines these questions through the example of Canadian human rights law. Canadian human rights law provides an interesting site of inquiry because it claims a direct connection with issues of social inequality, because it has had complex and contested enforcement processes, and because Canadian equality rights advocates are now asking whether

human rights statutes can provide a more effective legal avenue than constitutional equality rights.<sup>4</sup>

My dissertation focuses on law in the form of prescriptive norms, set out in legislation and in decisions of courts and tribunals, and law in the form of a range of processes for enforcing these prescriptive norms, including the institutions and the people involved in these processes. Most of the forms of law I examine have some connection with the state, and the role of the state in law is an important topic in my dissertation. I am not, however, advancing a position that might be considered “legal centric” from a legal pluralistic perspective. I focus on forms of law connected with the state because they play an important role in efforts to use law as a tool for social equality, and because they raise important questions about the public and private action and responsibility. My focus is on these forms of law as tools for social engagement, not on these forms of law in themselves, separate from their role in society.

This chapter is divided into five sections. The first three sections examine the broad themes relating to law and social inequalities which informed my research and which I have explored through my analysis of the research. These three broad themes are: (1) Law: Coercion, Justice, and Social Power, (2) Agency through Law: Legal Norms, Enforcement, and Dispute Resolution, (3) Responsibility at Law: Fault, Remedy,

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<sup>4</sup> My understanding of this development is based on my experiences in legal practice described in the Preface, as well as my experiences in various volunteer roles with the Women’s Legal Education and Action Fund (LEAF) and my experience as a staff lawyer with the Clinic Resource Office at Legal Aid Ontario. In particular, I was a member of a LEAF’s sub-committee on statutory human rights and co-author with Judith Keene of a position paper on how to try to avoid importing the negative jurisprudential developments under s. 15 of the *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 into the statutory human rights context: Karen Schucher and Judith Keene. “Statutory Human Rights and Substantive Equality: Why and How to Avoid the Injury of the *Law Approach*” (March 2007): <http://leaf.ca/wordpress/wp-content/uploads/2010/12/2007-statutory-human-rights-substantive-equality.pdf>.

and Responsive Regulation. In the fourth section of the chapter I provide a brief overview of the role of Canadian human rights law as the specific site of my research. In the fifth and final section, I introduce the three case studies that form the substance of this dissertation, explain the methodology I used to identify and conduct these case studies, and outline the concluding chapter of the dissertation.

## **1 Law: Coercion, Justice and Social Power**

The law, an intrinsically powerful discourse coupled with the physical means to impose compliance on others, can be seen as a quintessential instrument of normalization.<sup>5</sup>

.... the authority of law is seen to derive not from its sanction, but from its integrity.<sup>6</sup>

Coercive power and justice are key elements of law's appeal as a tool in struggles against social inequalities. Social inequalities are often linked with social power imbalances. The coercive power of law holds out the promise of being able to reduce imbalances in social power through access to the power of law.<sup>7</sup> Appeals to justice hold

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<sup>5</sup> Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987), 38 *Hastings LJ* 814 at 838 [Bourdieu, "Force of Law"].

<sup>6</sup> Roderick A. Macdonald, *Prolegomena to a Theory of Legal Relevance* (University of Toronto LLM Thesis, 1975) at 180.

<sup>7</sup> I understand social inequality connected with power inequality to have many dimensions, such as Richard Abel described, for example: "Power inequality assumes many guises. Some have a material base: control of the means of production in the Marxist formulation, wealth and income disparity in the liberal. Both approaches have recently broadened their conception of resources to include intangibles like knowledge, educational credentials, and cultural capital. A second manifestation of inequality reflects differential ability to participate in and influence the polity: the size and organization of interest groups, their material resources and political sophistication, access to the media, ideological position, and incumbency. A third kind of inequality is located in the social system: status differences associated with nationality, language, gender, race, religion, sexual orientation, and physical or mental disability. Public and private forms of power are inextricably connected, sometimes indistinguishable." - "Speaking Law" at 69.



out the promise that the goals sought to be achieved through law are worthy because they seek to reduce injustice and unfairness. Justice is a many-faceted ideal that has both substantive and procedural aspects. Questions of justice are also often linked with questions of morality, and there are recurring debates over when it is appropriate to engage the power of law in relation to morality and what consequences flow from doing so.

The coercive power of law is often linked with state power and, as noted earlier, my dissertation focuses on forms of law that have connections with the state.<sup>8</sup> Although access to this coercive power is one of law's attractions in struggles against social inequalities, there is a range of arguments about the extent to which this power can in fact be harnessed. Since law has been used to create and sustain social inequalities, it is fair to ask whether law can also be engaged to challenge social inequalities. Similarly, it is fair to ask whether it is possible for the state, through law, to act against the interests of dominant social power. Different positions on the question of whether law can be engaged to address social inequalities are informed by different views about how social relations are constituted, different views about the role law as a social institution, different views about which social conditions constitute inequalities that law might address, and different views about whether coercive power is inherently, or necessarily, a bad thing.

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<sup>8</sup> I would argue that coercion is an aspect of any social practice that is considered to be a form of law. However, it is not necessary for me to make this argument because my dissertation focuses on forms of law that all have at least some connection with the state.

Many theorists argue that law is an integral part of a political economy based on social stratification and substantive inequalities and that, in a liberal capitalist society, law functions primarily to maintain social structures that reflect liberal capitalist norms and values. As articulated by Jeanne Gregory with reference to anti-discrimination legislation:

[Anti-discrimination legislation] is on the statute book in order to protect, not threaten, the fundamental structures of capitalist society, and therefore cannot by itself constitute the vehicle for achieving a non-racist, non-sexist society.<sup>9</sup>

These theorists argue that law functions to sustain substantive social inequalities by creating processes through which claims can be asserted, then dismissing these claims and providing ideological rationalizations that legitimate the inequalities. For example, Alan Freeman has argued with reference to anti-discrimination legal doctrine in the American context:

As surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly-funded schools, have no opportunities for decent

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<sup>9</sup> Jeanne Gregory, "Sex Discrimination, Work and the Law" in Bob Fine, Richard Kinsey, John Lea, Sol Picciotto and Jock Young, eds., *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (London: Hutchinson & Co., 1979) 137 at 138, 140 and 150 [Gregory, "Sex Discrimination"]. See also: Alan David Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" in Piers Beirne & Richard Quinney, eds., *Marxism and Law* (New York: John Wiley & Sons, 1982) 210 [Freeman, "Legitimizing Racial Discrimination"]; Judy Fudge, "The Paradoxes of Pay Equity: Reflections on the Law and the Market in *Canada and PSAC*" (2000) 12 CJWL 313 [Fudge, "Paradoxes of Pay Equity"]; Judy Fudge, "What do We Mean by Law and Social Transformation?" (1990) 5 Can. J. L. & Soc'y 47 [Fudge, "Law and Social Transformation"]; Jeanne Gregory, *Sex, Race and The Law* (London, Newbury Park, Beverly Hills, New Delhi: Sage Publications, 1987) [Gregory, *Sex, Race*]; Nicola Lacey, "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" (1987) 14 J.L. & Soc'y 411 [Lacey, "Feminist Perspective"]; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Auckland, Melbourne, New York, Oxford: Oxford University Press, 1990) [Thornton, *Liberal Promise*].

housing, and have very little political power, without any violation of antidiscrimination law.<sup>10</sup>

According to Freeman, law must hold out a “promise of liberation” and “occasionally offer at least illusions of reconciliation and resolution”, but ultimately “fail to deliver on that promise”.<sup>11</sup>

These theorists argue that law can sometimes be successfully used in liberal capitalist societies to challenge formal inequalities, to challenge state-imposed inequalities, and to challenge abuses of state power.<sup>12</sup> Carol Smart, for example, argued that when women have engaged the power of law in sex equality struggles, this power has been most effective when it has been invoked to remove impediments created by law itself.<sup>13</sup> Successful challenges to formal inequalities, to state-imposed inequalities and to abuses of state power do have social impact. For example, Ruth Fletcher has observed with reference to sex discrimination that challenges to formal inequalities are important and do have some substantive effect:

Historically, women were excluded from the category of human ‘likes’ on the grounds of their difference from men and their perceived closeness to nature. When difference was the excuse used to deny women rights, it was almost inevitable that women would argue that they were like men in order to access those rights. The idea that women are the same as men in

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<sup>10</sup> Freeman, “Legitimizing Racial Discrimination” at 210-211. See also Bourdieu, “Force of Law” at 818: “... judicial decisions can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts.”

<sup>11</sup> Freeman, “Legitimizing Racial Discrimination” at 210.

<sup>12</sup> Abel, “Speaking ‘Law’”; Freeman, “Legitimizing Racial Discrimination”; Fudge, “Paradoxes of Pay Equity”; Fudge, “Law and Social Transformation”; Gregory, “Sex Discrimination”; Gregory, *Sex, Race*; Lacey, “Feminist Perspective”; Thornton, *Liberal Promise*.

<sup>13</sup> *Feminism and the Power of Law* (London: Routledge, 1989) at 138 [Smart, *Power of Law*] at 138-139. See also Lise Gottell, “Litigating Feminist Truth: An Antifoundational Critique” (1995) 4 Soc & Leg Stud 99.

the sense that they share membership of the human species was, and still is, a powerful tool in the face of dehumanizing tactics.<sup>14</sup>

However, the argument remains that the power of law cannot be used to transform substantively unequal social relations.

Other theorists focus on the potential harm of using the power of law in struggles against social inequalities. One argument is that excessive reliance on law as a tool can have a negative effect on democratic and other social political processes, and undermine the power of these other processes. In Canada, many of these debates have taken place in relation to the adoption of constitutionally entrenched rights and freedoms in the early 1980s.<sup>15</sup> Another argument is that when efforts are made to use law to define social problems as legal harms, there is a tendency to label people who experience the harms as “victims”, and a corresponding tendency for the victim label to make it difficult for those persons to exercise agency through law.<sup>16</sup> These arguments provide important cautions about the implications of ceding social power to law.

A third group of theorists argues that law is not simply the tool or product of those who already exercise social power but is also a producer of social relations and social power. Law is a social institution with which all people can engage and, therefore, there

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<sup>14</sup> Ruth Fletcher, “Feminist Legal Theory” in Reza Banakar and Max Travers, eds. *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) at 150-151.

<sup>15</sup> See, for example: Judy Fudge, “The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts” in Tom Campbell, K.D. Ewing, and Adam Tomkins, eds., *Sceptical Essays on Human Rights*. (Oxford: Oxford University Press, 2001).

<sup>16</sup> See, for example: Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore: Johns Hopkins University Press, 1988) at 52 [Bumiller, *Civil Rights Society*] and Kathryn Abrams, “Sex Wars Redux: Agency and Coercion in Feminist Legal Theory” (1995) 95 Colum. L.R 304 [Abrams, “Sex Wars Redux”]. Abrams proposed a concept of “partial agency” to capture both the possibility of agency and the reality of constraints on agency. See also Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2010) at 137-138 [Sheppard, *Inclusive Equality*].

is legitimate role for law in struggles against both formal and substantive social inequalities. I would argue that legal practitioners and academics who share this third perspective on law and social power are lawyers who Sarat and Scheingold describe as “cause lawyers”, that is, lawyers who are “not indifferent to the ends to which services are put.”<sup>17</sup> Catharine MacKinnon framed her perspective on this argument in terms of the role of law in defining social relations, accountability, and responsibility:

When law is abandoned to the powerful, corruption and physical force remain the real law, a fact ignored by those who, having a choice, urge abdicating this ground. It is hard to avoid the feeling that women are urged to think law can do nothing for them precisely because it can do so much.

...

In whose interest is it for women to leave a power like this to men? Law can mean community; your people stand behind you, hear you, support you. It can mean reality: what you say happened is found to have happened; your knowledge is validated. It can mean vindication: it is wrong that you were wronged; someone took something that belongs to you; you count. It means hope: what happened to you might not happen again.<sup>18</sup>

Colleen Sheppard framed the argument in terms of the potential for law to shape social relations grounded either in caring for others or lack of caring for others:

Focusing on human relations is consistent with the traditional project of law. Law is deeply implicated in creating, interpreting, rationalizing, applying and enforcing rules of social interaction between individuals and groups. Though not always acknowledged in relational terms, law is integrally connected to the nature, quality and character of human

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<sup>17</sup> Austin Sarat and Stuart Scheingold, “Cause Lawyering and the Reproduction of Professional Authority: An Introduction” in Austin Sarat & Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York, Oxford: Oxford University Press, 1998) 3 at 3 [Sarat and Scheingold, “Cause Lawyering Introduction”].

<sup>18</sup> Catharine A. MacKinnon, “Law in the Everyday Life of Women” in *Women’s Lives – Men’s Laws* (Cambridge: Harvard University Press, 2005) 32 at 42-43.

relationships. It is in this capacity that law has contributed to the absence of caring and the widespread existence of relations of permanent inequality. Ironically, this same capacity also gives law the potential to promote more caring relationships and thereby enhance equality.<sup>19</sup>

Jennifer Nedelsky similarly argued that examining law through the lens of social relations illuminates law's role in shaping social relations and thus creates opportunities to consider how changes in law can help change social relations: "[A] relational approach turns our attention to the ways law inevitably structures relations, in ways that, in turn, affect core values and who can enjoy them."<sup>20</sup> Nedelsky commented that it is "not so much a choice to use law as a means of seeing how law is currently being used and its consequences."<sup>21</sup> She also observed that while law "is an important way power is exercised, shaped, and justified", social relations "structured by law often serve to hide power and to hide the role of the state in that power."<sup>22</sup> Diana Majury has similarly emphasized pragmatic considerations, arguing that law is a social form that cannot and should not be ignored because it is deeply implicated in shaping social struggles and resistance to these struggles:

Using law against itself, seeing law simultaneously as a tool, as foe, and as focus for change, demystifying law as institution, and recognizing law as

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<sup>19</sup> Colleen N. Sheppard, "Caring in Human Relations and Legal Approaches to Equality" (1993) 2 NJCL 305 at 329 [Sheppard, "Caring in Human Relations"]. A relational approach to law and inequality was also a dominant theme more recently in Sheppard, *Inclusive Equality*. In both "Caring in Human Relations" and *Inclusive Equality*, Sheppard also argued that redistribution of income cannot, by itself, ensure greater equality of access to substantive goods, and that this goal requires restructuring of human relations. In her view, once we identify the basic substantive goods or concerns, we have to consider whether individuals and groups have access to these things in accordance with their needs and desires, which ultimately leads to an inquiry into how they are being treated by others in society.

<sup>20</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 72 [Nedelsky, *Law's Relations*].

<sup>21</sup> Nedelsky, *Law's Relations* at 72.

<sup>22</sup> Nedelsky, *Law's Relations* at 72.

presenting multiple sites of struggle rather than a solid one-dimensional monolith may by now be post-modern truisms, but these understandings provide grounding for contemporary feminist legal equality struggles, as in the past the grounding may have been provided by the liberal promise of equal opportunity.<sup>23</sup>

As Majury noted, law can also be used against people in struggles against social inequalities. Sometimes, therefore, there is no choice about whether or not to engage with the power of law.

In my view, all three categories of argument contribute to analyzing the experiences that socially disempowered individuals and groups may have when they try to engage the power of law in struggles against social inequalities. It is also my view that elements of each category tend to be seen when we examine the historical records of efforts by socially disempowered individuals and groups to engage the power of law in their struggles against social inequalities.

## **2 Agency through Law: Establishing, Using and Enforcing Legislated Norms**

Questions about whether people can affect social inequalities by gaining access to the power of law are also questions about whether people can exercise agency through law. Can law be a tool for human agency? If so, how can law be a tool for human agency? Legal norms, and the processes for enforcing these norms, are important tools through which people seek to exercise agency through law. My dissertation focuses

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<sup>23</sup> Diana Majury, “Women’s (In)Equality before and after the *Charter*” in Radha Jhappan, ed., *Women’s Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 101at 102 [Jhappan, *Women’s Legal Strategies*]. I also like Bryan Palmer’s articulation of the idea of “struggl[ing] for law against law”. See “What’s Law Got to do With It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority”(2003) 41 *Osgoode Hall LJ* 465 at 479.

primarily on legislated legal norms, the opportunities for citizen agency in establishing legislated norms, and the legal processes established specifically for enforcing these legislated norms. However, I also examine the ways in which using legal norms as a tool goes beyond specific legal enforcement processes and the tensions that exist between the public and private dimensions of using legislated norms as tools for social equality.

### Agency through Establishing Legal Norms, Legislated and Common Law

Law is not based on the natural existence of a normative order, which all members of society implicitly accept. It is based on the desire to make a normative order, to have some order established, even in the face of continued normative diversity within society at large.<sup>24</sup>

Legal norms have both symbolic and concrete roles. Symbolically, they reflect and help to define social values and morals. Concretely, they provide direction on how people are expected to conduct themselves. All legal norms derive their authority through being established in accordance with accepted procedures. Many legal norms also claim legitimacy on the grounds that they promote justice and, sometimes, morality. Thus, debates and arguments over the content of legal norms are often debates over different views about what justice objectives or moral objectives a legal norm should promote. Legal norms with a direct connection to the state are established by legislation and by common law.<sup>25</sup>

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<sup>24</sup> Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 Osgoode Hall LJ 167 at 177.

<sup>25</sup> Legal norms specific to individual situations can also be set out in “private” legal documents, including contracts and wills, although they too will reflect and comply with the relevant public legal norms.



Access to the power of law through legislation may provide opportunities for citizens to engage the power of the state on behalf of socially disempowered individuals and groups. Legislated legal norms are the most public legal norms because they require state support and they establish expectations for society as a whole.<sup>26</sup> An important role of the state is to generate ideas to improve legislated norms, and such legislative agendas are often part of political parties' election campaigns. Members of the public, as individuals and as groups, can also be involved in the processes for establishing legislation: they can put pressure on government to change or pass legislation; they can participate indirectly in debates about the content of proposed legislative reforms by working with their elected representatives; and they can participate directly in debates about the content of proposed legislative reforms when the state holds public hearings on proposed legislation. The legislative process thus provides an opportunity for citizens to exercise agency by making or opposing efforts to change existing legislated norms or to establish new legislated norms.

Common law norms are established by courts, through litigation. Litigation, as a process, may create the illusion of enhanced agency. It may appear to provide a more direct route to the power of law than the legislative process, which involves and requires the cooperation of the state, acting through many people in many different social

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<sup>26</sup> I use the concept of the public to refer to a collectivity in the sense that this collectivity is subject to the same state government. Within this collectivity, however, there will be many different social groupings, and many different points of view on government decisions and actions. As Andhil Fineberg wrote: "There are many publics. There's the high-minded, unprejudiced public, and the mildly prejudiced public, and the public that hates one group, and the public that hates some other groups, and also a lunatic public whose members can be readily aroused to hate any out-group. To talk about 'the public' or 'the masses' as though they were one great herd of people, innocent of all prejudice and simply deceived by others, is infantile. ... Unprejudiced folk will be found among the rich and among the poor, among the educated and uneducated, among the great and the unknown, among those of every religion and of every race." *Punishment without Crime: What You Can Do About Prejudice* (New York: Doubleday, 1949) at 35.

locations. However, there are many barriers to litigation as well, including access to financial resources and being able to frame the social goal as a legal claim that can be adjudicated. There are also limited opportunities for individuals and groups who are not parties to the litigation to participate in the litigation. In addition, common law norms tend not to have the same symbolic and concrete roles as legislated norms. They tend to be regarded as applying to the particular dispute and the particular parties to the litigation, even when the norm is framed in broad language, e.g. a manufacturer owes a duty of care to the consumers of its products. The courts' primary focus is on the dispute before them and the parties to that dispute, even though they are public adjudicative bodies (created and maintained by the state) and have some obligation to act in the public interest. Common law norms are usually also less accessible to the public, unless they receive significant media attention.

Thus, legislation is generally a more systemic method of establishing legal norms than litigation: when a legislated norm is established, there is in principle no dispute that it applies to society as a whole. Although the process of establishing legal norms through legislation may be more mediated, in a democratic society it can be expected that the process of engaging the power of the state to establish a state-imposed legal norm with broad application to the public will be a mediated process.

#### Agency through Using and Enforcing Legislated Norms

Once a legislated norm has been established, it becomes immediately effective when people act to comply with its requirements. Legislated norms do not have to be

formally enforced in order to be effective; indeed, it would be impossible for legislated norms to be effective if they were effective only when formally enforced: "... the primary objective in laying down standards of conduct is perhaps even more to induce people to comply with them than to deal with the situation when they do not."<sup>27</sup>

Legislated norms can also be effective without recourse to formal enforcement when people invoke them, rely on them, and informally seek compliance with them – all of which are ways in which law can in a sense be informally “enforced” by being used as a tool in people’s daily lives:

[L]egal norms play the role of opening spaces for ongoing engagement about current practice in relation to aspirations that have been identified to be of public significance. Law is elaborated through dynamic interactions on the ground. Law institutionalizes occasions for analysis, reflection, relationship-building, boundary negotiations and institution-building.<sup>28</sup>

Engaging directly with legislated norms is an important dimension of agency through law. For example, if a trade union believes that an employer is failing to comply with legislated norms, the union can raise this concern with the employer and the employer may change its practices to comply with the legislation without the need for formal legal intervention. Similarly, if a tenants’ association believes that a landlord is failing to comply with requirements of residential tenancy legislation, it can bring this to the attention of the landlord and the landlord may change its conduct to comply with the

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<sup>27</sup> T. Hadden, “Contract, Tort and Crime: The Forms of Legal Thought” (1971) 87 *Law Quarterly Review* 240 at 256.

<sup>28</sup> Sheppard, *Inclusive Equality* at 73, quoting Susan Sturm, “Owen Fiss, Equality Theory and Judicial Role” in *Issues in Legal Scholarship, the Origins and Fate of Antisubordination Theory* (2003) art. 18 at 7 (on line).

legislation without the need for formal legal intervention.<sup>29</sup> This form of engaging with legal norms can also be coercive - even when people voluntarily comply with the norm - if this compliance requires them to do things they would rather not do or prohibits them from doing things they would like to do.

However, effective formal enforcement is needed for those situations where people refuse to accept or comply with legal norms. Enforcing legal norms is arguably the paradigm of the coercive power of law, captured by metaphors such as “hard” law (as opposed to “soft” law), and law with “teeth”. Enforcing legal norms connotes forcing people to act in particular ways and imposing consequences when they fail to comply with legal norms. Effective formal enforcement makes it clear that people are expected to comply with the norm. Conversely, lack of effective formal enforcement diminishes the coercive dimension of the legal norm, signaling that it is “soft law” rather than “hard law”. When legal norms are not enforced, this can send a number of messages to society: it can suggest that the legitimacy of the norm may be in question; it can suggest that the norm, although legitimate, is not a high priority; or it can suggest that the norm is not really intended to be a norm but is rather a guideline, with which compliance is voluntary rather than mandatory.

Effective formal enforcement is also important to the impact of legislated norms. Formal enforcement develops the meaning and scope of all legal norms, especially legal norms that are prescribed in more general and abstract terms. However, there is almost always room for argument about what legal norms mean, whether they should apply to

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<sup>29</sup> Individual employees and individual tenants may similarly raise these concerns, although doing so may place them at risk of reprisal.

particular situations, and how they should apply to particular situations. As Roderick Macdonald wrote, “legal rules are not self-evident and self-applying characterizations of human behavior” and “there can be more than one appropriate legal characterization of human conduct”.<sup>30</sup> The meaning and scope of all legal norms is continually shaped when they are placed “at the level of the debate concerning a specific application”<sup>31</sup> – sometimes to be expanded, sometimes to be narrowed.

The state is closely involved in the enforcement of many, if not most, legislated norms. Criminal law norms and their enforcement are arguably the paradigm of the coercive power of state law. A significant element of the rationale for this exercise of coercive power is that criminal law norms address the most harmful, most wrong or most immoral social conduct. The legal processes for enforcing legislated norms generally involve “informal” and “formal” options. The more “informal” options are the alternative dispute resolution processes, usually mediation or negotiation (plea bargaining in the criminal law context). The more “formal” options are the adjudication processes. Courts are the adjudicative bodies for criminal law, some quasi-criminal law, and some civil law (family law, in particular). Administrative tribunals are the adjudicative bodies for most civil administrative law (i.e. non-criminal) and some quasi-criminal law.<sup>32</sup>

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<sup>30</sup> Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice: A Study Paper by Roderick A. Macdonald with commentaries* (Toronto: Queen’s Printer, 1995) at 47-48 [Macdonald, *Prospects for Civil Justice*]. See also Bourdieu, “Force of Law” at 821: “The practical meaning of law is really only determined in the confrontation between different bodies (e.g. judges, lawyers, solicitors) moved by divergent interests.”

<sup>31</sup> Bourdieu, “Force of Law” at 822.

<sup>32</sup> I use the term civil as a broad category, to include all non-criminal and non-quasi-criminal law. As I discuss further below, others might use the term “regulation” or “regulatory” to describe many legislated norms and regimes.

For many legislated regimes, enforcement begins with an informal process that involves making an application or claim to a state agency, with an option for subsequent consideration, review or appeal by a more formal enforcement process.<sup>33</sup> For other legislated regimes, enforcement begins with an application or claim directly to a formal tribunal processes.<sup>34</sup> The rationale most often presented for enforcement by administrative tribunals rather than by courts is to provide greater access to adjudication by establishing processes that are less complex, less expensive, and more efficient.<sup>35</sup> Administrative agency and tribunal enforcement processes also provide the state with a significant level of involvement in enforcing legislated norms, by giving the state a role in shaping how the legislated norms are applied to people's lives.<sup>36</sup> My dissertation explores questions relating to the role of the state in enforcing legislated norms, and the corresponding public and private dimensions of engaging with legislated norms.

### Enforcing Legal Norms, Dispute Resolution, and Law in Context

Because, as noted earlier, the social impact of legal norms is seen primarily through their application to concrete situations, there is a significant public dimension to

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<sup>33</sup> This is the typical structure for a wide range of programmes, including: government benefit programmes, such as social assistance and employment insurance; hybrid benefits programmes such as workplace safety and insurance benefits; employment standards claims; immigration and refugee determination; and the human rights commission model.

<sup>34</sup> For example "direct access" statutory human rights and criminal injuries compensation.

<sup>35</sup> For an important critique of how the administrative tribunal regimes actually operate, see: Ron Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013). For a discussion of access to justice issues in relation to administrative law, see: Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2013).

<sup>36</sup> There are many different types of structure, which provide the state with varying degrees of involvement and control. In some cases, the state is a party to the process and may also have some control over how the process can be used. In other cases, the state is more indirectly involved through its control over how the tribunal is structured, funded, and staffed.

how legislated and common law legal norms are used and enforced. However, this public dimension is in tension with the more private notion of enforcement as dispute resolution. When processes for enforcing legal norms are characterized as dispute resolution, this emphasizes the individuality of the case and de-emphasizes the public interest in knowing how the legal norm was used and applied and what consequences, if any, resulted.

If legislated norms are public norms, any potential violation of a legislated norm is both a “dispute” between the alleged violator and society as a whole, and a dispute between the alleged violator and the persons more directly affected by the violation. Within a dispute resolution framework however, the potential violation becomes a dispute between two parties – the party claiming the violation and the party whose conduct is in issue. Where the state is one of the parties to the dispute, it can be viewed as the representative of society and, as such, asserting an interest in upholding the legislated norm as well as an interest in resolving the particular situation. However, even in cases where the state is a party, the dispute resolution framework creates a tension between the interest in upholding the legislated norm and the institutional pressure to resolve cases.

In the case of some legislated norms, it may also be possible to “enforce” them in more than one formal legal process. Where there is potential for multiple enforcement venues, this can lead to tension between engaging with the formal enforcement process created for that legislated norm and engaging with the legal norm in other enforcement venues, or even in the social context to which the legal norm applies. To borrow

Galanter's phrase, it may be possible to pursue "justice in many rooms"<sup>37</sup>. Some of these rooms may be public rooms, as with the adjudicative venues established and maintained by the state, and for some legislated norms there may be competing public venues for their enforcement. Other rooms may be more private rooms, in the social contexts to which the legal norms apply and with more private enforcement processes: the boardroom, the classroom, the community centre room, the hospital room, the workrooms, etc. Being able to use and enforce legislated norms in a variety of places may create opportunities for pursuing justice. At the same time, when multiple venues are available, there may be questions about whether the legislated norms will be considered in the same way in all these venues, as well as questions about the interrelationships between these venues. My dissertation explores the tension between enforcing legislated norms in their specific, public adjudicative venue and enforcing them in other public and private venues, which is now an important question for the enforcement of statutory human rights in some Canadian jurisdictions, including Ontario.

### **3 Responsibility at Law: Fault and Remedy**

An important goal of seeking agency through law is to use the power of law to hold people responsible or accountable for their conduct - past, present and future. This goal can be masked by the language of rights, which has a strong hold on how legal norms are talked about, understood, and expressed. Like many others, I am cautious

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<sup>37</sup> Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law," (1981), 19 *Journal of Legal Pluralism* 1. Galanter argued for recognizing not only private as well as public venues for addressing legal norms but also private as well as public legal norms.



about the utility and the effects of rights discourse. One of my concerns is that it characterizes rights as things or possessions, that people “have” or “own”. This property-like characterization also suggests that being a “rights holder” is a passive state or status, which is by itself sufficient to produce results.

I am, however, attracted to Anthony Woodiwiss’s social relations formulation, that “...the term ‘rights’ refers to a legally enforceable set of expectations as to how others ... should behave ...”.<sup>38</sup> This formulation emphasizes that rights are relational and dynamic. They are relational because their concrete effect is determined by how people treat each other. They are dynamic because they do not implement themselves and require action through claims and responses to these claims: “... law is an activity and not a thing. Its ‘being’ is in the ‘doing’ of the participants within the practice.”<sup>39</sup>

A social relations approach to engaging with the power of law entails the recognition that legal rights have social impact only if there are corresponding responsibilities, and methods to ensure that these corresponding responsibilities are fulfilled: “The mix of entitlements and obligations we can legitimately claim depends on the kinds of human relationships we can defend nothing more and nothing less.”<sup>40</sup> In the context of struggles against social inequalities, then, another goal of seeking agency through law is to impose responsibilities to make changes. Sometimes the argument is that legal responsibility should reflect and be commensurate with existing social power, so that individuals or groups who have more social power should have more legal

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<sup>38</sup> Anthony Woodiwiss, *Human Rights* (London and New York: Routledge, 2005) at xi.

<sup>39</sup> Dennis Patterson, “Law’s Pragmatism: Law as Practice and Narrative” (1990), 76 *Virginia L R* 937 at 941, quoted in Sheppard, *Inclusive Equality* at 74.

<sup>40</sup> Nedelsky, *Law’s Relations* at fn 128, quoting Joseph Singer, *Entitlement: The Paradox of Property* (New Haven: Yale University Press, 2000) at 216.

responsibility. Sometimes the argument is that legal responsibility should be a vehicle for changing balances in social power, so that legal responsibility should not necessarily reflect and be commensurate with existing power relations.<sup>41</sup>

### Responsibility and Consequences

Legal norms address questions of responsibility by prescribing expectations for conduct and prescribing, or providing guidance on, the consequences that should be imposed when people fail to meet conduct expectations. Punitive consequences and remedial consequences are the two types of material consequences that are generally imposed.<sup>42</sup> Punitive consequences are most common in criminal and quasi-criminal law contexts. Their impact is directed primarily to the person found to have acted contrary to law, who may be required to pay a monetary penalty, to engage in community service, to serve time in prison, or to change their practices to avoid similar wrongdoing in the future. Punitive consequences can also be imposed in civil law contexts, but are much more rare and usually take the form of punitive damages and punitive costs orders.

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<sup>41</sup> Ideologies of responsibility and “responsibilization” have been used against socially disempowered people, often as part of a larger move to diminish social responsibility for inequalities. For discussion of the complexity of shared responsibility in the occupational health and safety context, see: Eric Tucker, “Remapping Worker Citizenship in Contemporary Occupational Health and Safety Regimes” (2007), 37 *Intl J Health Services* 145, and Eric Tucker, “Diverging Trends in Worker Health and Safety Protection and Participation in Canada, 1985-2000” (2003) 58 *Relations Industrielles/Industrial Relations* 395. For discussion of responsibilization and disempowerment in the criminal law context, see, for example: Elizabeth Comack, and Tracey Peter, “How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between Responsibilization and Blaming the Victim” (2005), 17 *CJWL* 283; and Nicola Lacey, “In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory” (2001), 64 *Mod L Rev* 350.

<sup>42</sup> Declarations that a legal norm was violated do not have material consequences. For purposes of this discussion and categorization, I would treat injunctions as remedial consequences.

Remedial consequences are most common in civil law contexts, and their impact is directed primarily to the applicant/claimant who initiated the legal claim. In court-based civil actions, the remedy is usually monetary compensation. In administrative law civil cases, remedies may also include a range of specific performance orders. Although civil remedies are largely understood to be remedial, the person against whom a remedial consequence is ordered may experience that consequence as punitive: for example, a defendant /respondent who is ordered to pay a high damages award to an applicant/claimant may feel that scope of the award also represents punishment for the wrongdoing found by the adjudicator.

In criminal and quasi-criminal cases, the “wrongdoer” is the “recipient” of the consequences, in the sense that the penalty or punishment is imposed directly on the wrongdoer. In civil cases (court and administrative law), the applicant/claimant or “victim” is the recipient of the remedial consequences. In both contexts, however, it is the “wrongdoer” - the defendant/respondent – who is responsible for fulfilling the consequences. It is the defendant /respondent who pays the fine, serves the prison sentence, does the community service, changes practices, provides monetary compensation, and carries out specific performance orders.

Legal responsibility is a central question in the processes for enforcing legal norms. Both formal (adjudicative) and informal (ADR) enforcement processes are concerned with holding people responsible for alleged failure to comply with legal norms. However, these two legal processes take different approaches to the question of legal responsibility.

## Responsibility, Fault and Formal Legal Process

Adjudication requires people to participate in a formal legal process that can result in a judgment that legal norms were violated and in the imposition of consequences for the violation. The adjudicator must pass judgment on the responsibility of the individual(s) whose conduct is in question. In order to pass this judgment, the adjudicator must first determine whether the individual(s)'s conduct was, is, or will be contrary to legal norms (unless responsibility for acting contrary to legal norms is admitted). If the adjudicator finds a past, present, or future violation of legal norms, the adjudicator must then determine what consequence(s) should be imposed. The specific issues the adjudicator will have to consider in addressing the question of responsibility will vary in different legal areas. However, the ultimate question for the adjudicator is whether they should impose legal responsibility on the person against whom a charge has been brought or a claim has been made.

The question of responsibility or accountability is also often connected with questions about the defendant/respondent's intention in relation to the conduct, and their control over the conduct. In order to hold a defendant/respondent responsible, adjudicators usually need to be satisfied that the defendant/respondent knew or knows about the conduct, and had or has at least some ability to control the conduct. This connection between intention, control and responsibility is also linked to a connection between fault and responsibility. Where an adjudicator determines that a defendant/respondent is responsible for conduct contrary to legal norms, that determination is also a determination that the defendant /respondent was in some way "at

fault”.<sup>43</sup> The concept of fault has generally negative connotations. The degree of negativity or stigma associated with a finding of fault for illegal conduct, however, depends on the degree of “badness” or wrongfulness associated with the conduct. As noted earlier, social judgments about whether conduct should be considered bad or wrong are often part of the process of establishing and changing legal norms.

In principle, questions of fault focus primarily on the person responsible for wrongful conduct, the defendant/respondent, whereas questions of remedy focus more on the applicant/claimant, who has been harmed in some way by the wrongful conduct. However, because the applicant/claimant will receive a remedy only if the defendant/respondent is found responsible for illegal conduct, the questions of responsibility and fault remain dominant. In some cases, the degree of harm that an applicant/claimant can establish may influence an adjudicator’s determination about the defendant/respondent’s responsibility for that harm. Nevertheless, questions of responsibility are separate from questions of remedy, even though in practice they may have a synergistic influence on one another. In all civil (including administrative law) adjudicative processes, then, a successful outcome for an applicant/claimant is possible only where the adjudicator decides to impose responsibility on the defendant/respondent. The legal claim asserted by an applicant/claimant is inextricably linked to whether or not the adjudicator will hold the defendant/respondent accountable.

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<sup>43</sup> Some legal norms purport to eliminate questions of fault by imposing absolute liability or to minimize questions of fault by imposing strict liability. Most quasi-criminal legal norms impose strict liability, which provides the defendant /respondent with a due diligence defence of their intention to avoid the illegal conduct. See: Kent Roach, *Criminal Law*, 4d (Toronto: Irwin Law, 2009) at 15-17.

In relation to anti-discrimination claims, Alan Freeman described this focus on the defendant/respondent as the “perpetrator perspective” and argued that this perspective is at least as important as the “victim perspective”:<sup>44</sup>

The perpetrator perspective sees racial [or sex] discrimination as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim.<sup>45</sup>

The perpetrator perspective is dominant in criminal and quasi-criminal prosecution, since the primary focus is on the conduct of the defendant. For the reasons discussed above, I argue that the “perpetrator perspective” is also at least as important as the “victim perspective” not only in relation to anti-discrimination claims, but in relation to all civil (including administrative) adjudicative processes. This is because there will be no remedial outcome for the “victim” unless the adjudicator is willing to impose responsibility on the defendant /respondent.

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<sup>44</sup> Freeman, “Legitimizing Racial Discrimination” at 210-212.

<sup>45</sup> Freeman, “Legitimizing Racial Discrimination” at 211. In “Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination” (2001), *Theor. Inq. L.* 349, Denise Réaume explored tort liability as a comparative model for tracing an expanding recognition of fault and liability in discrimination law. Her goal was to ground an interest-based, non-distributive normative rationale for recognizing unintentional discrimination. She argued that tort law liability standards evolved from malice to intention to negligence, and that a similar progression can be seen in the case of discrimination law. She also argued that the notion of denying a service or benefit simply for the sake of doing so, on the basis of identity, is the unifying harm of discrimination, which she conceptualized as injury to dignity. Her work since has focused on the role of dignity in equality rights claims. See, for example: Denise G. Réaume, “Discrimination and Dignity” in Fay Faraday, Margaret Denike & M. Kate Stephenson, *Making Equality Rights Real: Seeking Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) 123, and Denise Réaume, “Dignity, Equality and Comparison” in Deborah Hellman and Sophia Moreau, eds., *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) 7.

## Responsibility, Remedy and Informal Legal Process

In practice, most legal disputes do not reach the formal, adjudicative process. Their outcome is instead decided through more informal processes of alternative dispute resolution. In more informal legal processes, the parties involved in the legal claim mediate or negotiate and decide for themselves what the outcome should be, sometimes with the assistance of legal representatives, a third-party mediator or a third-party negotiator. The parties may agree to the same types of consequences that an adjudicator can impose, but they may also agree to consequences that an adjudicative body could not, or would not, impose. The settlement agreements that result from these processes are private documents, which receive no publicity unless the parties agree to make them public.

There is a range of different approaches to alternative dispute resolution in civil and administrative law contexts, including rights-based approaches and interest-based approaches.<sup>46</sup> One feature that all informal enforcement approaches share, however, and that differentiates them from adjudication, is that voluntary resolutions do not require an admission of responsibility or liability in order for the parties to agree to remedial or punitive consequences. Achieving such an admission may be a goal for some applicants/claimants, and it is open to the defendant/respondent to agree to include an admission of responsibility or liability as a term of the settlement agreement. Most settlements agreements do not, however, include admissions of responsibility. Most settlement agreements are also not available to the public. Therefore, even if a settlement

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<sup>46</sup> Andrew Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000) at 100-113.

agreement did include an admission of responsibility, that admission would be known only if the parties agreed to make the agreement available to the public.

A second feature that informal enforcement processes share, and that also differentiates them from formal enforcement processes, is that their primary focus is on the outcome: what result can the applicant/claimant and the defendant/respondent agree to that will allow them to avoid formal legal process? In alternative dispute resolution processes, then, consequence is the primary focus of responsibility. In criminal and quasi-criminal contexts, what penalty or punishment will the defendant/respondent agree to accept? In civil contexts (court and administrative law), which remedy or remedies will the defendant/respondent agree to provide to the applicant/claimant? Within alternative dispute resolution processes, the focus on the defendant/respondent is less concerned with passing judgment on whether or not they are at fault and more concerned with whether or not they will agree to accept a penalty or punishment, provide a remedy or remedies, that will satisfy the applicant/claimant (or Crown in the criminal context).

Thus, whereas responsibility as fault is a central question in adjudication, it plays little if any role in alternative dispute resolution processes. Conversely, whereas remedy is an issue in adjudication only if fault is found, responsibility as remedy is the primary focus in alternative dispute resolution processes.

Alternative dispute resolution is a subject of much debate and critique, from many different perspectives, including issues of inequalities in bargaining power and unequal access to legal representation. My dissertation does not engage specifically with these debates, although my research resonates with some of the issues they address. I am,



instead, interested in the ways in which formal and informal enforcement processes have provided opportunities to impose responsibility for discrimination through law.

### Responsibility and Responsive Regulation

The dynamic of informal dispute resolution processes at the level of individual cases has conceptual parallels with the concept of responsive regulation at the societal level, as argued first by Philippe Nonet and Philip Selznick and then by Ian Ayres and John Braithwaite. Nonet and Selznick proposed a framework of three “modalities” of law, with varying degrees of coercion being one of the characteristics defining each type. According to their typology, the most coercive laws are those which establish and facilitate repressive power; the intermediately coercive laws are those which focus on “taming” repression and protecting the integrity of law as an institution; and the least coercive laws are those which are designed to respond to and facilitate “social needs and aspirations”.<sup>47</sup> They characterized this third and least coercive form of law as “responsive law”, because it represents an effort to engage the power of the state in response to people identifying what they wanted from law.<sup>48</sup> They also argued that, “If there is a paradigmatic function of responsive law, it is regulation, not adjudication.”<sup>49</sup> Their rationale was that responsive law is concerned with substantive “legality” rather

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<sup>47</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978) at 14-15 [Nonet and Selznick, *Law and Society in Transition*].

<sup>48</sup> Again, because the “public” is not homogenous, it is important to acknowledge that different people and groups will reflect different social interests and will want state law to do different things.

<sup>49</sup> Nonet and Selznick, *Law and Society in Transition* at 108.

than with “legalization”, which they described as focusing on “the proliferation of rules and procedural formalities.”<sup>50</sup>

Ayres and Braithwaite argued that their concept of “responsive regulation” shared some of the key characteristics of Nonet and Selznick’s, in particular, “flexibility, a purposive focus on competence, participatory citizenship, negotiation”.<sup>51</sup> They also emphasized that they were advocating “a method of regulation rather than of the ends of regulation, a method that is negotiated and flexible”.<sup>52</sup> In their model, the goal is the voluntary assumption of responsibility through processes for negotiating how legal norms will regulate social conduct. They also argued that voluntary compliance will be achieved only as long as a state regulatory agency has coercive methods available and is willing to use these methods.<sup>53</sup> They described this enforcement model as the “Benign Big Gun”: regulatory agencies that “will be more able to speak softly when they carry big sticks” and in which “Paradoxically, the bigger and the more various are the sticks, the greater the success regulators will achieve by speaking softly.”<sup>54</sup>

Tension between voluntary and coercive enforcement methods is a significant theme in my dissertation. There are recurring arguments that voluntary persuasion is the preferred enforcement method, but requires the option of coercive methods in the background to be effective. To borrow the phrase coined by Mnookin and Kornhauser, it

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<sup>50</sup> Nonet and Selznick, *Law and Society in Transition* at 107-108.

<sup>51</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York and Oxford: Oxford University Press, 1992) at 5 [Ayres and Braithwaite, *Responsive Regulation*].

<sup>52</sup> Ayres and Braithwaite, *Responsive Regulation* at 18.

<sup>53</sup> Ayres and Braithwaite, *Responsive Regulation* at 19 and Chapter 2, “The Benign Big Gun” at 19-57.

<sup>54</sup> Ayres and Braithwaite, *Responsive Regulation* at 19.

is voluntarism “in the shadow of the law”.<sup>55</sup> In the statutory human rights context, however, there is a history of state reluctance to employ coercive methods, and this history raises questions about the role of the coercive power of law in struggles against social inequalities.

#### 4 Anti-Discrimination Law as a Site of Inquiry

In Canada, the statutes that carry the label “human rights” are, in large measure, anti-discrimination statutes.<sup>56</sup> Anti-discrimination legislation explicitly aligns itself with social equality goals by linking prohibitions against discrimination with legal rights to equality.<sup>57</sup> Most Canadian human rights statutes were first passed in the 1960s and 1970s, having evolved from earlier anti-discrimination and fair practices legislation that was passed in the 1930s, 1940s and 1950s. These statutes apply to both the private and public sectors, and to defined social areas that generally include employment, goods and services, housing and vocational associations. In structure, they typically create prohibitions against “discrimination” and against certain forms of conduct based on prohibited grounds of discrimination. The prohibited grounds of discrimination in the

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<sup>55</sup> Robert H. Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979), 88 Yale L.J. 950.

<sup>56</sup> Two Canadian human rights statutes also include “civil or political rights” provisions: *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 includes a Bill of Rights (ss. 4-8) and a right to education (s. 13), and the Yukon Territory *Human Rights Act*, R.S.Y. 2002, c. 116, also includes a Bill of Rights (ss. 3-6). The Quebec *Charter of human rights and freedoms*, R.S.Q. , c.C-12 includes “economic, social and cultural rights”: Fundamental Rights and Freedoms (ss. 1-9.1), Political Rights (ss. 21-22 ), Judicial Rights (ss. 23-38), and Social and Economic Rights (ss. 39-48).

<sup>57</sup> Since 1981 this link has been explicit in the language of Ontario’s *Human Rights Code*, which provides for rights “to equal treatment without discrimination”. Section 15 of the *Canadian Charter of Rights and Freedoms*, the equality rights provision, similarly links equality rights with protection against discrimination. “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” [emphasis added]

first provincial statutes were race, religion, and ethnicity. Additional prohibited grounds of discrimination were added over the succeeding decades, beginning with age, sex and marital status in the 1970s, disability and family status in the 1980s, sexual orientation in the 1990s, and gender identity and gender expression in the 2000s.

The prohibited grounds of discrimination are central to Canadian human rights legislation because they represent the social conditions and issues that anti-discrimination legislation is designed to address. These prohibited grounds are intended to represent particular social groups who have experienced and continue to experience discrimination and discriminatory practices: racialized minorities; religious minorities; ethnic minorities; women; persons with disabilities; families with children; single-parent families; lesbian, gay, bisexual, trans and queer persons; and younger and older persons.<sup>58</sup> The range of discriminatory practices includes exclusion from, or low participation in, employment; exclusion from housing; harassment and bullying; profiling; denial of services or inability to get access to services.<sup>59</sup>

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<sup>58</sup> Although the prohibited grounds of discrimination are central precisely because they are intended to respond to social inequalities, there has also been criticism of this categorical approach, especially within feminist legal theory. For just a very small sample of this literature, see: Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 *Queen’s LJ* 179; Marlee Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 *Harv Women’s LJ* 115; Toni Williams, “Re-Forming ‘Women’s’ Truth: A Critique of the Report of the Royal Commission on the Status of Women in Canada” (1990) 22 *Ottawa L Rev* 725. I recognize the challenges posed by trying to fit complex social realities into a categorical framework, and the need to recognize the multiple ways in which social groups experience discrimination depending on the complexities of their social identities. However, I believe that a grounds-based approach continues to be an important way to maintain a focus on social groups and social inequality in human rights law. See, for example: Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 *CJWL* 37, and Colleen Sheppard, “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” (2001) 80 *Can Bar Rev* 893.

<sup>59</sup> There is much commentary on the meaning and role of anti-discrimination or human rights legal doctrine. For a recent collection see: Deborah Hellman and Sophia Moreau, eds., *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013). My dissertation does not engage directly with these questions.

Direct enforcement of human rights statutes has, until recently, been the responsibility of human rights commissions and tribunals in most of Canada's common law jurisdictions.<sup>60</sup> Human rights commissions have traditionally had a mandate to receive and process complaints of statutory violations, to engage in research and policy work, to provide educational services about human rights, and to play a role in the administration of special programmes.<sup>61</sup> In their complaint-processing enforcement role, commissions have been generally required to investigate complaints, to assist the parties in efforts to reach a voluntary resolution and, where the parties cannot reach a voluntary resolution, to decide whether or not the complaint will be referred to a tribunal for a formal hearing. When the commission decided to refer a complaint to a formal hearing, it typically had carriage of the proceedings and was responsible for representing both the complainant's interests and the public interest dimension raised by the complaint. Human rights statutes cannot be enforced directly either through civil actions in the courts or by administrative tribunals. However, the legal protections that human rights statutes establish can be raised in the social contexts where they apply and can be addressed in civil and administrative adjudication.<sup>62</sup>

By the time the equality rights provision of the *Canadian Charter of Rights and Freedoms* came into effect in 1985, the human rights commission enforcement model had

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<sup>60</sup> British Columbia is the one Canadian jurisdiction that has operated both with and without a commission-type institution. For a discussion of the "turbulent history" of human rights in British Columbia, see R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 13-14 and 65-68 [Howe and Johnson, *Restraining Equality*].

<sup>61</sup> Special programmes are also often known as affirmative action programmes.

<sup>62</sup> Human rights legislation can be directly enforced only by using the statutory enforcement process. However, people can attach human rights issues to other legal claims they advance through civil and administrative legal processes (for example, breach of contract, tort, landlord tenant disputes, disputes over government benefits, etc.) and receive additional remedies in relation to the human rights issue if the court or tribunal finds a violation of human rights in addition to a violation of the other legal rights in dispute.

produced several legal victories, some of which equality rights advocates relied on in their arguments about how s. 15 of the *Charter* should be interpreted and applied.<sup>63</sup> However, the human rights commission enforcement model was soon to become the subject of significant criticism, both as a model and in relation to how the model was functioning. Scholars and activists began to ask whether the equality rights provision of the *Charter* offered the promise of a new avenue to pursue social equality through law. However, after several decades of litigation experience with s. 15 of the *Charter*, equality rights advocates have become increasingly disappointed with this legal tool,<sup>64</sup> and there is now renewed interest in reinvigorating human rights statutes as an avenue for pursuing equality through law. In some jurisdictions, of which Ontario is one, this interest has been accompanied by a major change in the process for enforcing human rights statutes. This initiative for change in Ontario is the destination point of my dissertation.<sup>65</sup>

## 5 Dissertation Methodology and Overview

The dissertation is organized around three cases studies through which I examine this tension between the promise and practice of law in struggles for social equality.

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<sup>63</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

<sup>64</sup> See, for example: Beverley Baines, “Equality, Comparison, Discrimination, Status” in Fay Faraday, Margaret Denike & M. Kate Stephenson, *Making Equality Rights Real: Seeking Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) 73 [Faraday, Denike & Stephenson, *Making Equality Rights Real*]; Sheila Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 Can Bar Rev 299; Bruce Porter, “Expectations of Equality” (2006) 33 SCLR (2d) 23; Fiona Sampson, “The Law Test for Discrimination and Gendered Disability Inequality” in Faraday, Denike & Stephenson, *Making Equality Rights Real: Seeking Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) 245; Margot Young, “Blissed Out: Section 15 at Twenty” (2006) 33 Sup. Ct. L. Rev. (2d) 45.

<sup>65</sup> The CHRA Review panel also recommended that the enforcement process under the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 be changed to provide for claims to be filed directly with the human rights tribunal – see *Promoting Equality: A New Vision* (Ottawa, 2000).

Each case study involves a pivotal contribution to the development of Canadian statutory human rights law.

The first case study, which is Chapter One of the dissertation, explores how social activists engaged with law as a tool for social equality in relation to the fair practices statutes passed in Ontario in the 1950s. The first part of Chapter One examines the social activists' quest for fair practices legislation. The second part of Chapter One examines the structure of the enforcement process and the social activists' experiences with enforcement of the legislation. The goal of the fair practices case study is to examine the history of the social activism for fair practices legislation and the history of what ultimately became the human rights commission enforcement model. When I began my research, I learned that the story of the passage of Ontario's fair practices statutes is a subject of considerable academic interest, with a rich literature in a wide range of academic disciplines. Some of this literature discusses questions about law and the role of law, but these questions have not been a central focus in the literature and they are the central focus of my interest. Therefore, I proceeded to conduct my own examination and analysis of key primary source documents, looking at them specifically through the lens of law as a tool for social equality.

My primary source research focused on the archival records of the two organizations which led the social activism for Ontario's fair practices statutes: (1) the Jewish Labour Committee, including in particular the Ontario Labour Committee for Human rights and the Toronto Joint Labour Committee for Human Rights, and (2) the Joint Public Relations Committee of the B'nai Brith and the Canadian Jewish Congress

My research on the Jewish Labour Committee and related fonds was conducted in Library and Archives Canada in Ottawa and the Archives of Ontario. My research on the Joint Public Relation Committee was conducted in the Ontario Jewish Archives in Toronto, which houses the records of the Central Region of the Canadian Jewish Congress, and in the national archives of the Canadian Jewish Congress, which are housed in Montreal.

The second case study, which is Chapter Two of the dissertation, examines the relationship between law and social relations through the *Bell v. McKay* litigation. The first part of Chapter Two examines the history of human rights protection against discrimination in rental housing and the continuing evolution of the human rights commission enforcement model. The second part of Chapter Two examines the *Bell v. McKay* litigation, the first statutory human rights case decided by the Supreme Court of Canada, which raised questions both about the substance of anti-discrimination legislation and the human rights commission enforcement model.

This second case study grew out of my participation in a symposium on the life and work of Dr. Daniel Hill, organized by The Harriet Tubman Institute of York University. My involvement in this symposium subsequently led to an opportunity to co-author an article on the *Bell v. McKay* litigation for the *Canadian Property Law Cases in Context* collection.<sup>66</sup> I chose to include a *Bell v. McKay* case study in the dissertation because doing so provided the opportunity to examine this history in more detail and

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<sup>66</sup> Frank Luce and Karen Schucher, “‘The Right to Discriminate’: Kenneth Bell versus Carl McKay and the Ontario Human Rights Commission” in Eric Tucker, Bruce Ziff and James Mujir, eds., *Canadian Property Law Cases in Context* (Toronto: Osgoode Society for Canadian Legal History, 2012)



more specifically through the lens of the tension between social goals and legal processes. The research for this chapter included legislative history research, case law research on decisions of boards of inquiry under the Ontario *Human Rights Code*, and more archival research in records of the Ontario Labour and Human Rights Committee of the Jewish Labour Committee.

The third case study, which is Chapter Three of the dissertation, examines the tension between legal goals and social goals through the history of the demise of the human rights commission enforcement process in Ontario. The first part of Chapter Three provides contextual background for the Bill 107 debates, by examining key themes in the development of human rights jurisprudence and in the functioning of the human rights enforcement process after *Bell v. McKay*. In the second part of Chapter Three, I examine and analyze the fiercely competing positions in the Bill 107 debates. In the third part of Chapter Three, I review the preliminary assessments of the Bill 107 model in action.

As explained in the Preface, this third case study grew out of my interest in the Bill 107 initiative. In February 2006, the Ontario government announced its intention to eliminate the human rights commission enforcement process and substitute a process in which people would file human rights claims with an adjudicative tribunal. This initiative instigated a bitter debate within the Ontario human rights advocacy community. I was interested in this debate and attended many of the public events at which the different perspectives were debated. What interested me was not the personal acrimony, but the fact that each side had such a deep commitment to the merits of its position. I wanted to examine what values and interests were promoted by each side of the debate, as well as

the potential implications of each side's arguments. For this case study, I researched the socio-legal and political context in which the initiative came forward and the Bill 107 legislative history, including the transcripts of the public hearings.

In the Concluding Reflections on the Promise and Practice of Law, I reflect more generally on how the three case studies contribute to the four themes that informed my research: the relationship between law and social power, the potential for agency through law, the meaning of responsibility at law, and the tension between law as a tool for determining concrete outcomes and law as a process through which to struggle for concrete outcomes.

## **Chapter One**

### **Historical Roots of Ontario's *Human Rights Code* and Human Rights Commission Model: Fair Practices Legislation and Enforcement, 1946-1961**

#### **Introduction to Chapter One**

What led a diverse group of social activists in Ontario, in the 1940s and 1950s, to seek the enactment and enforcement of legislation as a tool against racial, religious and nationality discrimination in employment, housing, services, and public spaces? This question is the primary focus of this first chapter, through which I explore questions about the role of law and legal norms, questions about the meaning of social responsibility, and questions about different approaches to legal process. The fair practices legislation which resulted from the social activists' campaigns established prohibitions against discrimination and a state agency enforcement model which laid the groundwork for Canadian human rights codes and the human rights commission enforcement model.

In Part I of the chapter, I discuss the campaigns for fair practices legislation through the lens of law, focusing on why and how the advocates for fair practices legislation saw law as a tool to address direct discrimination in the fundamental social areas of employment, services, and access to public spaces. The advocacy for fair practices legislation involved arguments for state and citizen responsibility to change social norms relating to direct discrimination, and arguments for an enforcement process that gave preference to conciliation over adjudication. In Part II of the chapter, I explore how the fair practices advocates used the new fair practices legislation as a tool against

direct discrimination. Both the structure of the enforcement model and its implementation raised issues about the meaning of legal process and about access to the coercive power of law, issues that continued to be experienced under human rights code enforcement. In the Conclusion to the chapter, I identify four questions that emerge from this early history and that I argue have particular relevance to the evolution of the promise and practice of statutory human rights law in Ontario and in Canada. These four questions continue as themes in the subsequent historical periods that I examine in Chapter Two and Chapter Three.

### **Part I: The Quest for Fair Practices Legislation**

I think it was a mistake to expect too much of the courts. After all, we do not want judges to make law: we want law to be made by the elected representatives of the people.<sup>67</sup>

... while within its own framework equity might perhaps develop new remedies, the responsibility for the protection of new social forces must hereafter be primarily the concern of the legislature and not of the courts. ... where social advance has outstripped legal theory and the gap between the two must be closed, the legislature is better fitted than are the courts to accomplish the result.<sup>68</sup>

Ontario was the first Canadian jurisdiction to pass fair practices legislation and provided the lead for other Canadian jurisdictions, most of which followed suit to pass similar legislation. In legal form, the fair practices statutes were closely modelled on

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<sup>67</sup> A private communication of Ted Jolliffe, leader of the CCF, quoted in James W. St.G. Walker, *Race, Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: The Osgoode Society for Canadian Legal History, 1997) [Walker, "Race"] at 211.

<sup>68</sup> Bora Laskin, "The Protection of Interests by Statute and the Problem of 'Contracting Out'", [1938] XVI Can Bar Rev 669 at 671 [Laskin, "Protection of Interests"].

legislation passed in several jurisdictions in the United States, beginning with New York in 1945. This legal form was a partial departure from earlier Ontario anti-discrimination legislation, discussed below, and also from a competing bill of rights model, as in *The Saskatchewan Bill of Rights Act, 1947*.<sup>69</sup> Ontario's fair employment and fair accommodation practices statutes, enacted in 1951 and 1954 respectively, targeted direct discrimination based on race, religion and ethnic origin.

## 1 From Common Law to Legislation

The early history of Canadian efforts to establish anti-discrimination legal norms through the courts illustrates the limitations of a court-based law reform strategy.<sup>70</sup> With the exception of the famous *Re Drummond Wren*<sup>71</sup> case, the courts were not receptive to claims that exclusionary conduct based on race and religion should be judged illegal.

According to James Walker, in 1916 a group of African Canadians asked the federal government whether racially discriminatory practices were legal and were told by the Deputy Minister of Justice that legislation was silent on this issue and that "The

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<sup>69</sup> The Saskatchewan statute was more extensive in scope, including both civil rights provisions [rights to freedom of conscience, etc. (s. 2), free expression (s. 3), free assembly and association (s. 4), freedom from arbitrary arrest and detention (s. 6), and freedom to exercise the franchise (s. 7)] and anti-discrimination provisions relating to occupations and businesses, land ownership and tenancy, education, and publications [ss. 8-13]. The anti-discrimination provisions were structured as a "right to" participate in these areas without discrimination. For example, the text of the right to engage in occupations and businesses read: "Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination because of the race, creed, religion, colour, or ethnic or national origin of such person or class of persons." The provision relating to publications (s. 14) was structured as a prohibition against discrimination, similar to Ontario's *Racial Discrimination Act, 1944*, discussed below. Saskatchewan later followed Ontario to pass fair practices legislation, although it also retained its *Bill of Rights Act* for the civil rights provisions.

<sup>70</sup> See also Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1929-1960* (Toronto: University of Toronto Press, 2005) [Lambertson, *Repression and Resistance*] at 206, 216.

<sup>71</sup> [1945] OR 778 (HJC) [*Drummond Wren*].

remedy is in the courts”.<sup>72</sup> A number of court cases involving challenges to discrimination were subsequently brought in the 1930s and 1940s. These cases focused on discrimination in two social areas: provision of services and restrictive covenants in relation to property. In some of these cases individuals asked the courts to rule on the enforcement of legislation that was itself discriminatory and on discriminatory enforcement of otherwise non-discriminatory laws. In other cases individuals asked the courts to rule on discriminatory practices by non-state service providers and property owners.<sup>73</sup>

The leading case on services was the Supreme Court of Canada’s now infamous ruling in *Christie v. York Corp.*, decided in 1941.<sup>74</sup> The incident that led to the *Christie* case occurred on July 11, 1936. Fred Christie went with friends to the York Tavern, in Montreal. The waiter said to them: “Gentlemen, I am very sorry I cannot serve colored people”.<sup>75</sup> With the support of the Christie Defence Committee, Mr. Christie sued the York Tavern for \$200 in damages for the humiliation he suffered. The trial judge awarded him \$25 and costs of the action, on the grounds that the Tavern’s decision to refuse to serve Black persons contravened ss.19 and 33 of the *Quebec License Act*.

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<sup>72</sup> Walker, “*Race*” at 143-144.

<sup>73</sup> See, for example: Walker, “*Race*” at Chapters 2 and 5; Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950* (Toronto, Buffalo, London: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999) [Backhouse, *Colour-Coded*]; Stephanie D. Bangarth, “‘We are not asking you to open wide the gates for Chinese immigration’: The Committee for the Repeal of the Chinese Immigration Act and Early Human Rights Activism in Canada” (2003) 84 *Can Hist’l Rev* 395 [Bangarth, “Chinese Immigration Act”].

<sup>74</sup> [1940] S.C.R. 139 at 141 [*Christie v. York*].

<sup>75</sup> For a detailed discussion of the facts of the case and the litigation, see Walker, “*Race*” at 123-124 and 143-168. This type of incident was not unprecedented; Blacks in Canada were regularly denied access to services, public places, housing and employment. This was also not the first time law was engaged to challenge this type of treatment. However, Mr. Christie’s case was the one that went to the Supreme Court of Canada.

Section 33 of the statute stated that "No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers."<sup>76</sup> The Quebec Court of Appeal overturned the trial judgment and the Supreme Court of Canada upheld the Quebec Court of Appeal's decision, with one judge dissenting.

The Supreme Court of Canada's majority reasons opened by defining Mr. Christie as a racialized person: "The appellant, who is a negro, entered a tavern ...".<sup>77</sup> The majority took a technical approach to the question before them in holding that the Tavern's conduct was legal because Mr. Christie "... was not a traveller asking for a meal in a restaurant ... he was only a person asking for a glass of beer in a tavern."<sup>78</sup> This conclusion was informed by the Court's application of the overriding principle that "Any merchant is free to deal as he may choose with any individual member of the public" as long as the merchant did not establish a rule "... contrary to good morals or public order".<sup>79</sup> For the majority of the Court, then, a rule denying service to Black persons was not contrary to "good morals or public order". Bora Laskin published a brief comment criticizing the Supreme Court of Canada's decision in *Christie*, where he wrote: "The principle of freedom of commerce enforced by the Court majority is itself merely the reading of social and economic doctrine into law, and doctrine no longer possessing its 19<sup>th</sup> century validity."<sup>80</sup>

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<sup>76</sup> RSQ 1925, c 25.

<sup>77</sup> *Christie v. York* at 141.

<sup>78</sup> *Christie v. York* at 145.

<sup>79</sup> *Christie v. York* at 144.

<sup>80</sup> See "Tavern Refusing to Serve Negro – Discrimination" (1940) 18 Can Bar Rev 315 at 316. For a discussion of freedom of contract ideology, see Karen Pearlston, "A Restricted Country?: The Racist Legacy of Restrictive Covenants" (1996, unpublished) at 4-7 [Pearlston, "Restricted Country"].

Justice Davis's dissenting reasons opened with a different description of Mr. Christie: "The appellant is a British subject residing in Verdun ...".<sup>81</sup> Although this description effectively erased the question of race, it emphasized Mr. Christie's commonality with the category of British subject - a category of person who would not, as such, have been denied service in the tavern. In Justice Davis's opinion, freedom of contract did not apply to the Tavern's conduct because the sale of alcohol was completely regulated by the government.<sup>82</sup> The government decided which merchants were authorized to sell alcohol, and the government told citizens that they were allowed to purchase alcohol only from merchants with government licences to sell alcohol. According to Davis J., then, the Tavern was required to sell alcohol to all members of the public unless the government gave the Tavern permission to refuse to sell to particular individuals or classes of individuals. Section 43 of the statute prohibited the sale of alcohol to various categories of persons, but none of these categories was based on race.

The scope of freedom of contract was also tested in cases challenging covenants that prohibited the sale of property to Jews and other minority groups. The first case involved Drummond Wren, the head of the Workers' Educational Association, who purchased a piece of land subject to a covenant prohibiting it from being "sold to Jews or persons of objectionable nationality".<sup>83</sup> Mr. Wren brought a court application seeking a

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<sup>81</sup> *Christie v. York* at 146.

<sup>82</sup> *Christie v. York* at 152. The Quebec government's regulation of alcohol was governed by the *Alcoholic Liquor Act*, RSQ 1925 c 37.

<sup>83</sup> *Drummond Wren* at 778. In his biography of Bora Laskin, Philip Girard writes that the case was set up as a test case by the Joint Public Relations Committee of the Canadian Jewish Congress and the B'nai Brith. Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto, Buffalo, London: University of Toronto Press, 2005) at 249- 252 [Girard, *Bora Laskin*]. This discussion is part of a chapter devoted to Laskin's



declaration that the covenant was void.<sup>84</sup> The case was heard by Justice Keiller MacKay, and the published report of the reasons for decision indicates that no one appeared to oppose the application.<sup>85</sup> Justice MacKay concluded that the restrictive covenant was illegal, primarily because it was contrary to public policy. A key source for the public policy relied on by Justice MacKay was the founding Charter of the United Nations, the *San Francisco Charter*, which was adopted in 1945 and contained declarations of principle similar to those subsequently included in the *Universal Declaration of Human Rights*, adopted in 1948.<sup>86</sup> Justice MacKay reasoned that the physical separation or “segregation” of different peoples that could result from restrictive covenants was harmful to the public good, because it could have the effect of deepening divisions among “religious and ethnic groups”. In his view, the court had “... a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity.”<sup>87</sup> Justice MacKay’s decision was not appealed, and was hailed as a great victory by the groups that took the case forward.<sup>88</sup>

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involvement with “Human Rights” in this period (Chapter 11). For other discussions of the case see: Lambertson, *Repression and Resistance* at 210-213 and Walker, “Race” at 201-205.

<sup>84</sup> The Canadian Jewish Congress also intervened in the case, and was represented by J.M. Bennett. Mr. Wren was represented by John Cartwright, who was subsequently appointed to the Supreme Court of Canada, and by Irving Himel.

<sup>85</sup> It seems interesting to me that the fact that the application was not opposed does not appear to figure in literature discussing the history of the case, even though it was noted as important by Schroeder J., in his decision in *Re Noble and Wolf*, [1948] OR 579, aff’d [1949] OR 503; rev’d *sub nom Noble et al. v. Alley*, [1951] SCR 64, discussed below [*Noble v. Alley*].

<sup>86</sup> The *Drummond Wren* case was litigated before the *Universal Declaration of Human Rights* was adopted by the United Nations in 1948. The other key public policy source was Ontario’s *The Racial Discrimination Act, 1944*, SO 1944, c. 51, discussed below.

<sup>87</sup> *Drummond Wren* at 783.

<sup>88</sup> See, for example, Lambertson, *Repression and Resistance*, at 213-214; Walker, “Race”, at 204; and Bruner, “The Genesis of Ontario’s Human Rights Legislation: A Study in Law Reform”, (1979) 37 UT Fac L Rev 236 [ Bruner, “Genesis of Legislation”] at 245.

In the subsequent *Noble and Wolf* case, the vendor, Mrs. Noble, and the purchaser, Mr. Wolf, took joint legal action to void the restrictive covenant in the title to a cottage that was part of the Beach O' Pines summer resort on Lake Huron. They were opposed by a group of cottagers, who defended against the application. Mrs. Noble and Mr. Wolf's claim was dismissed by Justice Schroeder of the Ontario High Court, whose decision was the upheld by the Ontario Court of Appeal. Part of Justice Schroeder's stated rationale for rejecting Justice MacKay's reliance on public policy was that it was not the role of the courts to create new legal norms based on public policy:

In my view it is within the province of the competent legislative bodies to discuss and determine what is best for the public good and to provide for it by the proper enactments. Such matters can with greater propriety and safety be left to the duly elected representatives of the people assembled in Parliament or in the Legislature.<sup>89</sup>

In the Court of Appeal decision upholding Justice Schroeder's ruling, Chief Justice Robertson went even further to state that law generally - without distinguishing between law in the form of judicial rulings and law in the form of legislation - was not an appropriate method of achieving "mutual goodwill and esteem" among people of different races:

Doubtless, mutual goodwill and esteem among the people of the numerous races that inhabit Canada is greatly to be desired, and the same goodwill and esteem should extend abroad, but what is so desirable is not a mere show of goodwill or a pretended esteem, such as might be assumed to comply with a law made to enforce it. To be worth anything, either at home or abroad, there is required the goodwill and esteem of a free people, who genuinely feel, and sincerely act upon, the sentiments they

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<sup>89</sup> *Noble v. Alley* (Wkly Ct) at 598.

express. A wise appreciation of the impotence of laws in the development of such genuine sentiments, rather than mere formal observances, no doubt restrains our legislators from enacting, and should restrain our Courts from propounding, rules of law to enforce what can only be of natural growth, if it is to be of any value to anyone.<sup>90</sup>

In the paragraph preceding this conclusion, Chief Justice Robertson had expressed the view that the restrictive covenant was not criminal or immoral, and did not concern the public interest:

The purpose of clause (f) here in question is obviously to assure, in some degree, that the residents are of a class who will get along well together. To magnify this innocent and modest effort to establish and maintain a place suitable for a pleasant summer residence into an enterprise that offends against some public policy, requires a stronger imagination than I possess. ... There is nothing criminal or immoral involved; the public interest is in no way concerned.<sup>91</sup>

The fact that the property was a summer resort was also an important consideration for Justice Schroeder and the Court of Appeal.

Noble and Wolf were ultimately successful in the Supreme Court of Canada, but for reasons that did not attack the substance of the restrictive covenant, as did Justice MacKay's reasons in *Drummond Wren*.<sup>92</sup> Two of the judges were of the view that the covenant did not touch and concern the land because it did not deal with the use of the

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<sup>90</sup> *Noble v Alley* (CA) at 386.

<sup>91</sup> *Noble v. Alley* (CA) at 386.

<sup>92</sup> In the period between the release of the Court of Appeal's decision and the hearing before the Supreme Court of Canada, Ontario amended the *Conveyancing and Law of Property Act* to prospectively void any covenant restricting sale, ownership, occupation or use of land on the basis of race, creed, colour, nationality, ancestry of place of origin: SO 1950, c 11, s. 1.

land. Four of the judges were of the view that the covenant was void for uncertainty.<sup>93</sup> Justice Locke was the sole dissenting judge in the Supreme Court of Canada appeal. He expressly agreed with the reasons of Chief Justice Robertson in the Ontario Court of Appeal that law was not an appropriate method of achieving “mutual goodwill and esteem” among people of different races. This argument, that the force of law cannot and should not be used to address racial and religious discrimination, thus became an important theme in the subsequent opposition to the social activism for fair practices legislation.

## 2 Social Advocacy for Fair Practices Legislation

Ontario’s fair practices statutes were born of concerted social activism that is a subject of enduring interest in Canadian scholarship.<sup>94</sup> Stories about this social activism have been told and re-told in a range of disciplines, including social work,<sup>95</sup> political

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<sup>93</sup> As expressed by Justice Rand in his reasons, “... it is impossible to set such limits to the lines of race or blood as would enable a Court to say in all cases whether a proposed purchaser is or is not within the ban.”

<sup>94</sup> Indeed, Carmela Patrias suggested that part of the reason why less has been written about the history of the *Saskatchewan Bill of Rights Act* is the comparative absence of social activism in its evolution: “Socialists, Jews, and the 1947 Saskatchewan Bill of Rights” (2006) 87 Can Hist’l Rev 265 at 266 [Patrias, “Socialists, Jews”]. According to Patrias, the initiative for the *Saskatchewan Bill of Rights Act* came from the state, rather than from social activists. This statute was passed by the CCF government, which was elected in 1944. Despite the CCF’s leadership in anti-discrimination initiatives, Patrias and Frager have also argued that there were at the time racist attitudes prevalent within the CCF, particularly in relation to Japanese Canadians: see Carmela Patrias & Ruth A. Frager, “‘This is our country, these are our rights’: Minorities and the Origins of Ontario’s Human Rights Campaigns” (2001) 82 Can Hist’l Rev 1 at 8-9 [Patrias and Frager, “Our Country”].

<sup>95</sup> Joanne L. Griffith, *An Analysis of Community Action and Legislation in the Ontario Human Rights Field* (M.S.W. Thesis, University of Toronto, 1964); Herbert A. Sohn, *Human Rights Legislation in Ontario: A Study of Social Action* (D.S.W. Dissertation, University of Toronto, 1975) [Sohn, *Human Rights in Ontario*]. Griffith wrote that Ontario Human Rights Commission was interested in the social action that influenced governments to pass human rights statutes and encouraged her to undertake her research (at 4). Sohn’s dissertation covered similar ground to Griffith’s work, but more extensively and in more detail. Like Griffith, Sohn’s work was inspired by “... an interest in efforts to promote social legislation” (at iii). Sohn had been on the staff of the Ontario Human Rights Commission and was “... most favourably

science,<sup>96</sup> social history,<sup>97</sup> and legal history.<sup>98</sup> As Patrias and Frager have argued, the actions taken against prejudice and discrimination “. . . were not spontaneous reactions against the horrific consequences of racism that had manifested themselves during the war, but the result of campaigns that were carefully and painstakingly orchestrated by small groups of Anglo-Canadian activists, and especially by key minority groups.”<sup>99</sup>

The accounts of the advocacy for fair practices legislation draw vibrant pictures of highly-energetic and multi-faceted activities and campaigns: activists gathered empirical data to prove the existence of the problems they were asking the government to address; they commissioned opinion polls, magazine and newspaper articles, and radio programmes; they organized lectures, workshops, forums, demonstrations and publicity campaigns; they prepared briefs to governments and sent delegations to meet with elected representatives to discuss their briefs; and they published pamphlets, newsletters, and magazine articles. Many of the documents produced by the advocates provide the primary sources for my discussion and analysis in this chapter.

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impressed by . . . the efforts of Ontario’s social activists to assist the Commission and improve the Ontario Human Rights Code.” Sohn’s dissertation is referred to regularly in the literature.

<sup>96</sup> J.C. Bagnall, *The Ontario Conservatives and the Development of Anti-Discrimination Policy: 1944-1962* (PhD Dissertation, Queen’s University, 1984 [Bagnall, *Ontario Conservatives*]; R. Brian Howe, “The Evolution of Human Rights Policy in Ontario” (1991) 24 *Can J Pol Sci* 783 [Howe, “Human Rights Policy”]. Bagnall’s dissertation is also regularly cited in the literature.

<sup>97</sup> Irving Abella, “Jews, Human Rights, and the Making of a New Canada” (2000) 11 *J Can Hist* 1 *Assoc* 3 [Abella, “Jews, Human Rights”]; B. Kayfetz, “On Community Relations in Ontario in the 1940s” (1994) 2 *Can Jewish Stud* 60 [“Community Relations”]; Lambertson, *Repression and Resistance*, at 197-242, 281-317; Patrias and Frager, ““Our Country””, Walker, “Race”; James W. St.G. Walter, “The ‘Jewish Phase’ in the Movement for Racial Equality in Canada” (2002) *Can Ethnic Stud* 34 1 [Walker, ““Jewish Phase””].

<sup>98</sup> Bruner, “Genesis of Legislation”; Girard, *Bora Laskin*, P.V. MacDonald, “Race Relations and Canadian Law” (1960), 18 *UT Fac L Rev* 115 [MacDonald, “Race Relations”].

<sup>99</sup> Patrias and Frager, ““Our Country””, at 2-3.

## Key Players in the Ontario Advocacy for Fair Practices Legislation

The literature highlights ‘Jews’ and ‘Jewish’ organizations<sup>100</sup> as playing a significant leadership role in the initiatives for Canada’s first anti-discrimination statutes.<sup>101</sup> There were two main Jewish organizational participants: (1) the Joint Public Relations Committee (JPRC) of the Canadian Jewish Congress and the B’nai B’rith, formed in April 1947,<sup>102</sup> and (2) the Jewish Labour Committee of Canada (JLC) and its local Joint Labour Committees for Human Rights that local unions and labour councils established in several urban centers, including Toronto.<sup>103</sup> The JPRC tends to be characterized as the more mainstream organization, whose members were mainly middle-class entrepreneurs and professionals, although Labour Progressive Party (“LLP”) MPP Joseph Salsberg was also an active member of the JPRC.<sup>104</sup> The third key organizational player was the Association for Civil Liberties (“ACL”), which was formed in 1949 and

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<sup>100</sup> Individuals and organizations associated with Jewish identity represent a wide range of class interests, political affiliates and religious orientations. When people are classified as Jews, this social identity is arguably constituted in relation to non-Jews. Put another way, Jews are a collectivity when looked at from the perspective of other religious groups. However, as the literature recognizes, there were important differences among Jews and Jewish organizations, which constituted them as members of other social groups - labour organizations, professional associations, and political allegiances. There are interesting questions about what positions they may have held in relation to a shared Jewish identity as Jews. However I raise this only as a point of interest, and personal experience, since such questions are beyond the scope of this dissertation.

<sup>101</sup> Indeed, Walker calls this period “The ‘Jewish Phase’ in the Movement for Racial Equality in Canada”. See also: Abella, “Jews, Human Rights”; Lambertson, *Repression and Resistance* at 196-242; Patrias and Frager, “‘Our Country’” at 17-34; Patrias, “Socialists, Jews”; Walker, “Race” at 182-199.

<sup>102</sup> In the historical records and the literature, this joint committee is usually referred to as the Joint Public Relations Committee or JPRC. On the other hand, the Ontario Jewish Archives, which houses the archival funds for this organization, refers to it as the Joint Community Relations Committee or JCRC. In my dissertation, I refer the organization as the JPRC.

<sup>103</sup> Girard, *Bora Laskin* at 248-253; Lambertson, *Repression and Resistance* at 201-202; Patrias and Frager, “‘Our Country’” at 17-34; Walker, “‘Jewish Phase’” at 7-16; Walker, “Race” at 198-199. The JPRC is also described as playing an instrumental role in the *Drummond Wren* and *Noble v. Alley* litigation. Kalmen Kaplansky founded Joint Labour Committees for Human Rights in Winnipeg, Toronto, Montreal, Vancouver, Windsor and Halifax as subcommittees of the JLC - Walker, “‘Jewish Phase’” at 8, 10 and fn. 38.

<sup>104</sup> Lambertson, *Repression and Resistance* at 206.

based in Toronto.<sup>105</sup> Many of the individuals who were involved in the JPRC and the JLC also became involved with the ACL's activities supporting the anti-discrimination campaigns. Collectively, these organizations brought together a wide range of players, including adult educators, labour activists, legal academics, politicians, practicing lawyers, religious officials, and social activist groups representing racialized and religious minorities.

A number of individuals emerge in the literature as playing key roles in the campaigns. They include the following individuals: Ben Kayfetz, who became the Executive Director of the JPRC in 1947;<sup>106</sup> Kalman Kaplansky, who in 1946 became the National Director of the JLC and held this position until 1957;<sup>107</sup> Lesley Wismer, Vivien Mahood, Donna Hill, Sid Blum and Alan Borovoy, named in the chronological order in which they held the position of executive secretary of the Toronto Joint Labour Committee for Human Rights;<sup>108</sup> Irving Himel, who was employed for a time at the Workers' Educational Association and later formed the ACL; and Prof. Bora Laskin, at that time a law professor at the University of Toronto, who was one of the chairpersons

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<sup>105</sup> Girard, *Bora Laskin* at 258-259; Lambertson, *Repression and Resistance*, *ibid.* at 225-226; Walker, "Jewish Phase" at 9-10. Girard writes that the ACL was formed to "provide a home for the non-Communist members of the Civil Liberties Association of Toronto."

<sup>106</sup> Girard, *Bora Laskin* at 253; Walker, "Jewish Phase" at 8.

<sup>107</sup> Walker, "Jewish Phase" at 7. In 1957 Kaplansky left the Jewish Labour Committee to join the staff of the Canadian Labour Congress. He also became the Canadian representative to the International Labour Organization, in which capacity he voted against the inclusion of sex as a prohibited ground of discrimination in the *Convention concerning Discrimination in respect of Employment and Occupation*. This is one of several stories I stumbled upon during my archival research about which I hope to conduct further research.

<sup>108</sup> Girard, *Bora Laskin* at fn. 22. See also Bruner, "Genesis of Legislation" at 240-242 and Kayfetz, "Community Relations" at 59.

of the JPRC legal sub-committee.<sup>109</sup> Although it is evident that men were dominant in the organizational leadership roles, Vivien Mahood and Donna Hill made significant contributions during their leadership tenures.<sup>110</sup>

Lawyers in practice and legal academics played key roles in the advocacy for fair practices legislation and were also involved in preparing draft legislation and meeting with members of cabinet.<sup>111</sup> The JPRC established a special committee on law and legal research to study the feasibility of introducing anti-discrimination legislation, the membership of which was primarily lawyers and legal academics.<sup>112</sup> The ACL was run by lawyer Irving Himel, and its board of directors included lawyer Andrew Brewin and Prof. Bora Laskin.<sup>113</sup> Prof. Frank Scott, a law professor at McGill, was a leading thinker about human rights issues as well as an activist in the Co-operative Commonwealth Federation (“CCF”) and civil liberties organizations.<sup>114</sup> Montreal lawyer Manfred Saalheimer, who was on the staff of the Canadian Jewish Congress, was very involved with anti-discrimination issues and wrote a number of important articles on issues raised

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<sup>109</sup> Lambertson, *Repression and Resistance* at 210-211. Girard wrote that Syd Harris shared the role of chairing this committee with Prof. Laskin: *Bora Laskin* at 252.

<sup>110</sup> As I discuss below, discrimination against women was generally not included in the campaigns for fair practices legislation.

<sup>111</sup> Kayfetz wrote that Premier Leslie Frost asked Prof. Jacob Finkelman, who was at that time on the law faculty at the University of Toronto and national chairperson of the JPRC, to submit “. . . a proposal for a fair employment law modeled on the Ontario Labour Relations Act of 1950” - “Community Relations” at 64. Prof. Finkelman later became a vice-chairperson of the Ontario Labour Relations Board and then held office with the Federal Government. Girard wrote that initial draft legislation was prepared by Prof. Laskin and Syd Harris - Girard, *Bora Laskin* at 216 and at 260-261. See also, Patrias and Frager, ““Our Country”” at 24, 26; Walker, ““Jewish Phase”” at 13.

<sup>112</sup> Girard, *Bora Laskin* at 252; Patrias, “Socialists, Jews” at 273.

<sup>113</sup> Girard, *Bora Laskin* at 258-259; Lambertson, *Repression and Resistance* at 210-211; Walker, ““Jewish Phase”” at 9-10; Walker, “Race” at 222.

<sup>114</sup> Lambertson, *Repression and Resistance* at 25-27. The *Saskatchewan Bill of Rights, 1947* was drafted by Morris Shumiatcher, a lawyer who was active in the CCF and joined the Saskatchewan Public Service after the CCF formed a government in 1944; Patrias, “Socialists, Jews” at 283. Patrias also notes that the draft that Shumiatcher prepared underwent significant changes before it was enacted.



in the advocacy for fair practices legislation.<sup>115</sup> Although Saalheimer has not figured in the literature on the history of Ontario's fair practices legislation, I make reference to his work in this chapter.

The account I provide in this chapter focuses on the role of law in the advocacy for fair practices legislation. In telling this story, I refer specifically to the organizations and individuals identified above, who led the campaigns.<sup>116</sup> There appears to have been a significant degree of coordination among the organizations and, as I mentioned above, key individuals often participated in more than one organization. The organizations and individuals appear to have generally agreed on the arguments for fair practices legislation. Sometimes they presented these arguments collectively, such as in briefs and delegations to government; other times they presented them independently, such as in their own publications and speeches.

### Social Solidarity and Universalism

Ideologies of social solidarity and universalism animated the campaigns against racial and religious discrimination. For Jewish activists, in particular, there appear to have been two aspects to their views of social solidarity and universalism. One involved

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<sup>115</sup> For example: Canadian Jewish Congress National Charities Committee Archives (Montreal), Canadian Jewish Congress Organizational Records fonds, CJC0001, Series ZB, Saalheimer, Manfred Saalheimer, "F.E.P. [Fair Employment Practices] Laws for Canada?" in *Information and Comment* (Committee on Social and Economic Studies of the Canadian Jewish Congress), August 1947, No. 6; Manfred Saalheimer, "Laws Also Educate" in *Food for Thought: Group Relations in Canada*, Toronto, October 1949; Manfred Saalheimer, "Canadian Group Relations and the Law: Progress Report for the Year ended June 30, 1954" in *Information and Comment* (Social and Economic Studies Published by Canadian Jewish Congress), October 1954, No. 15 [CJC Nat. Charities Comm. Archives, CJC Org. Records, Series ZB, Saalheimer, Manfred, Human Rights].

<sup>116</sup> Other organizations and individuals may have participated as well, but not in the same leadership capacity.

Jews coming together from a range of social and political backgrounds to work on the campaigns, and finding ways to work together despite differences in social class and political allegiance.<sup>117</sup> The second involved Jewish organizations broadening the scope of the struggle and joining together with other groups to pursue common goals. Jewish activists would have been affected by their own experiences of anti-semitism and discrimination. However, Jewish groups began to conceptualize anti-semitism in more general terms as a form of prejudice and discrimination, and began to make links between anti-semitism and the prejudice and discrimination experienced by other racial and religious groups.

One reason to conceptualize anti-semitism in the more generic language of prejudice and discrimination was to prevent Jews being perceived as a special interest group seeking special treatment.<sup>118</sup> At the same time, the universalizing strategy also seems to have reflected a general concern about the discrimination that other groups faced, and a genuine interest in fighting all forms of discrimination and prejudice.<sup>119</sup> In

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<sup>117</sup> Abella wrote that the alliance between the JPRC and the JLC was “not a happy one” because the JPRC “... composed of middle class businessmen and professionals, never felt comfortable with the combative trade unionist leaders” of the JLC. However, he goes on to say that “in the end, both submerged their differences and joined together to fight the battle for human rights.” See “Jews, Human Rights” at 10. See also Lambertson, *Repression and Resistance* at 283-285. In contrast, the literature suggests that the civil liberties groups that formed to challenge abusive conduct by government in the 1940s and 1950s, in response to perceived threats to national security, were more fragmented and less able to transcend political differences – see, for example, Dominique Clément, “Spies, Lies and a Commission: A Case Study in the Mobilization of the Canadian Civil Liberties Movement” (2000) 7 *Left Hist* 53 [Clément, “Spies, Lies”]. It would appear that at least one reason for this fragmentation was the fact that the conduct in question was more specifically political, and more explicitly engaged with conflict between communists and socialists.

<sup>118</sup> Walker wrote that the specific tactics reflected both a universalist philosophy and the influence of Jewish experience with campaigns against discrimination before 1945, in which they were sometimes perceived as seeking to advance their own cause and as matching the stereotype of “pushy Jews” - see “Jewish Phase” at 3.

<sup>119</sup> In the labour context, for example, Kaplansky linked the struggles against discrimination with the struggles for labour justice: “It was not only a Jewish question. The battle for social justice - the battle against discrimination, for equality – is a battle that concerns the very existence of the trade union

conducting their campaigns, Jewish organizations formed alliances with organizations that represented other affected minority groups, and with other groups that wanted to support the anti-discrimination campaigns.<sup>120</sup> In fact, one of the key focal points of the campaigns for fair accommodation practices legislation was the discrimination against Blacks in Dresden, Ontario, which had originated as the end of the “underground railroad” for fugitive slaves.<sup>121</sup>

The Ontario campaigns for fair practices legislation began in the mid-to-late 1940s. While ideologies of universality and common humanity appear to have unified activists in relation to racial and religious discrimination, other social factors also likely contributed to these unifying tendencies in relation to racial and religious discrimination.<sup>122</sup> Social factors of particular significance were the events of the second world war, the emergence of the CCF as a significant political force in Ontario and

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movement.” – personal interview quoted in Bruner, “Genesis of Legislation” at 238. See also Lambertson, *Repression and Resistance* at 205-206; Patrias and Frager, “Our Country” at 18-20; Walker, “Race” at 198-199. At the same time, several authors also noted that at least some of the collectivities involved in championing anti-discrimination legislation, including the CCF and labour organizations, also faced internal struggles around prejudice and discrimination. In the labour context, it appears that appeals to the common interests of labour were presented as factors that ought to bring workers on board with anti-discrimination struggles. See also Patrias and Frager, “Our Country” at 4-10; Agnes Calliste, “Sleeping Car Porters in Canada: An Ethnically Submerged Split Labour Market” (1987) 19 *Can Ethnic Stud* 1. (See the discussion below for differences between solidarity in relation to race and religion, and solidarity in relation to sex.)

<sup>120</sup> Walker, “Jewish Phase” at 3. For further discussion of these alliances see: Girard, *Bora Laskin* at 253; Lambertson, *Resistance and Resistance* at 223-226; Patrias and Frager, “Our Country” at 4.

<sup>121</sup> Ross Lambertson, “The Dresden Story”: Racism, Human Rights, and the Jewish Labour Committee of Canada” (2001) 47 *Labour/Le Travail* 41 at 61 [“Dresden Story”]. See also Alan Borovoy, “Fair Accommodation Practices Act: The ‘Dresden Affair’” (1956) 14 *UT Fac L Rev* 13 [Borovoy, “Fair Accommodation”]; Patrias and Frager, “Our Country” at 15-16; Walker, “Jewish Phase” at 15-16.

<sup>122</sup> It has also been argued that although the universalizing approach had some benefits in relation to racism and religious discrimination, this approach later came to be regarded as imposing assimilation as a cost of inclusion - see Walker, “Jewish Phase” at 20. See also Stuart Svonkin, *Jews Against Prejudice: American Jews and the Fight for Civil Liberties* (New York: Columbia University Press, 1997) at 178-193 [Svonkin, *Jews Against Prejudice*]. The people Svonkin acknowledges include his father-in-law, Owen Shime, “... whose dedication to social justice gave me [Svonkin] a better understanding of my subject, [and] gave wise counsel when it was most needed.” - at x. (Owen Shime is a well-known Ontario labour arbitrator.)

elsewhere, the potential impact of discrimination on the immigration needed for economic development, and a desire to assert the moral superiority of capitalism over socialism.<sup>123</sup>

In addition, anti-discrimination legislation targeting racial, religious and ethnic discrimination had been on the political agenda in Ontario since the early 1930s.<sup>124</sup> In 1932, the *Insurance Act* was amended to prohibit licensed insurers from discriminating unfairly between risks.<sup>125</sup> Broader anti-discrimination legislation was initially proposed by MPPs Joseph Salsberg and Alex MacLeod, who made it a campaign issue in the 1943 Ontario provincial election and proposed legislating against discrimination in employment, housing, public accommodations and recreation.<sup>126</sup> Instead, a much narrower statute was passed in 1944: despite “the sweep of its title” - to borrow Arnold Bruner’s words - *The Racial Discrimination Act, 1944* contained only one prohibition, a prohibition against discrimination in publications, signs or other representations.<sup>127</sup> In

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<sup>123</sup> See Bagnall, *Ontario Conservatives*; Howe, “Human Rights Policy”; Lambertson, *Repression and Resistance* at 233.

<sup>124</sup> Walter Tarnopolsky argued that the anti-slavery statutes passed in Upper Canada in 1793 and 1833 can be regarded as 19<sup>th</sup> century predecessors to the 20<sup>th</sup> century anti-discrimination legislative measures - see “The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada” (1968), 46 Can Bar Rev 565 [Tarnopolsky, “Iron Hand”] at 567-568. Walker also references a statute passed in Lower Canada in 1832 for the purpose of recognizing Jews as equal subjects - see Walker, “Race” at 183, discussing *An Act to Declare Persons Professing the Jewish Religion Intitled to All the Rights and Privileges of the Other Subjects of His Majesty in This Province* (1832) 1 Wm IV, c 57.

<sup>125</sup> *The Insurance Act, 1932*, SO 1932, c 24, s. 4. For discussions of the history of this amendment, see: Lita-Rose Betcherman, *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties* (Toronto, Montreal, Winnipeg, Vancouver: Fitzhenry & Whiteside, 1975) at 50-51 [Betcherman, *Swastika and Maple Leaf*]; Lita-Rose Betcherman, “The Early History of Canada’s Anti-Discrimination Law” (1973) 7 *Patterns of Prejudice* 19 at 20 [Betcherman, “Early History”]; Walker, “Race” at 193; Walker, ““Jewish Phase”” at 3-4.

<sup>126</sup> ““Jewish Phase”” at 5 and “Race” at 195-197. There had also been an earlier, unsuccessful attempt in 1932 to introduce broad anti-discrimination; instead, the legislature passed a resolution condemning discriminatory notices and advertisements. See Lambertson, *Repression and Resistance* at 220. See also Betcherman, *Swastika and Maple Leaf* at 50-52; Betcherman, “Early History” at 20.

<sup>127</sup> SO 1944, c 51. Bruner, “Genesis of Legislation” at 245.

1948, four years after the *Racial Discrimination Act* was passed, MPP Salsberg introduced a fair employment practices bill as a private member.<sup>128</sup> According to Lambertson, this bill not only died but also had the negative effect on some people of linking fair practices legislation with communism, which by this time had increasingly negative associations.<sup>129</sup>

The *Conveyancing and Law of Property Act* was amended in 1950 to void prospectively any covenant “running with the land” that restricted the sale, ownership, occupation or use of land on the basis of race, creed, colour, nationality, ancestry of place of origin.<sup>130</sup> The *Labour Relations Act* was also amended in 1950, to deem invalid a collective agreement which discriminated on the basis of race or creed.<sup>131</sup> This amendment was part of a package of other amendments to the statute; however, it is interesting to note that in May 1947 the JPRC discussed a plan to meet with MPP Leslie Wismer to discuss adding a non-discrimination clause to collective agreements as a strategy for “mobilizing labour and management” to act against discrimination:

... one technique for consideration by agencies is a non-discrimination clause in collective bargaining agreements as a means of mobilizing labour and management into concrete action against employment discrimination. The consideration of this technique will be urged.<sup>132</sup>

This proposal was not taken up in the 1950 amendments to the *Labour Relations Act*.

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<sup>128</sup> Lambertson, *Repression and Resistance* at 198-200. See also Walker, “Race” at 195-196.

<sup>129</sup> Lambertson, *Repression and Resistance* at 198-200.

<sup>130</sup> Manitoba similarly amended its *Law of Property Act* in 1950: SM 1950, c. 33, s. 1. For further discussion of these amendments see Walker, “Race” at 223-225.

<sup>131</sup> *The Labour Relations Act, 1950*, SO 1950, c 34, s. 34(b).

<sup>132</sup> Ontario Jewish Archives, Fonds 17, Canadian Jewish Congress, Ontario Region, Joint Community Relations Committee, Meeting of the Joint Public Relations Committee of the Canadian Jewish Congress and B’nai B’rith, Central Division, Wednesday, May 28, 1947 [OJA, Fonds 17, CJC, Ont. Region, JCRC].

In addition to these legislative measures, several Ontario municipalities passed regulations or ordinances in the 1940s to prohibit the exclusion of minority groups from public places and access to services.<sup>133</sup> Thus, the campaigns for fair practices legislation did not raise a completely novel idea and there was some ground laid for persuading the legislature to further expand the exercise of its legislative authority on issues of discrimination.

### 3 Discrimination as a Social Issue Requiring Response

The fair practices statutes, like the earlier anti-discrimination legislative measures, were sought in response to specific social conditions. The amendment to the *Insurance Act* was initiated in response to negatively differential treatment of Jews. Ontario's *Racial Discrimination Act* was passed in response to signs, advertisements and publications that read, for example: "Gentiles Only", "No Jews Need Apply", and "Jews and Dogs Not Admitted".<sup>134</sup> The legislation prohibiting restrictive covenants was passed in response to restrictive covenants of the type challenged in the *Drummond Wren* and *Noble v. Alley* cases, discussed above.

The form of discrimination targeted by advocacy for fair practices legislation was what we now call "direct discrimination". Direct discrimination refers to conduct,

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<sup>133</sup> See, for example, Lambertson, *Repression and Resistance* at 237-238; Walker, "Race" at 205.

<sup>134</sup> Betcherman, *Swastika and Maple Leaf* at 50; Lambertson, *Repression and Resistance* at 198; Walker, "Jewish Phase" at 5. There were also unsuccessful initiatives, in both Ontario and Quebec, to obtain legislative measures against hate libel in response to anti-semitic speeches and publications. Manitoba amended its *Libel Act* in 1943 to add a provision allowing persons to sue for an injunction to prevent the continuation of a libel against their race or religion, where the libel was likely to expose them to hatred, contempt or ridicule, and tended to raise unrest or disorder: *An Act to amend "The Libel Act"*, SM 1934, c 23, s. 1. See Betcherman, *Swastika and the Maple Leaf* at 13-19; Betcherman, "Early History"; Lambertson, *Repression and Resistance* at 199-200; Walker, "Jewish Phase" at 4; Walker, "Race" at 193-195

policies and practices that expressly and intentionally cause negative, differential treatment for particular social groups.<sup>135</sup> The focus of campaigns was direct discrimination against racialized, religious and ethnic minorities, in the social areas of employment, services, and use of public spaces. Fair employment practices statutes were sought in response to employers refusing to hire racialized and religious minorities. Fair accommodation practices statutes were sought in response to the exclusion of racialized and religious minority groups from public recreational facilities such as skating rinks, movie theatres, and dance halls; and the refusal to provide services to racialized and religious minorities in places such as restaurants, barbershops and hairdressers. Ben Kayfetz (JPRC) offered the following description of the social conditions and practices that were the focus of campaigns for fair practices statutes:

Those old enough to recall that era will remember that Jews were barred, both formally and informally, from renting or buying houses in certain parts of Toronto and Ontario, that very few Jews were employed in the banks or in insurance (other than as salesmen) and that the large downtown department stores rarely took on Jewish staff. Jewish high school teachers were as rare as hen's teeth: They would be considered for Barrie, Sault Ste. Marie or Thunder Bay but teaching in the metropolis was, if not barred, effectively restricted. One could go down the line specifying many other professions, trades and occupations, and the story would be the same. Discrimination was the norm.

As for Blacks – Negroes as they were known then – the situation was an unhappy one. Young men with education and training were condemned to portering jobs on the railway. Rarely, if ever, did one see any black, brown or Oriental faces behind a wicket or counter in any office, or shop, be it governmental or privately owned. Some firms carried their bias further and never hired Catholics.<sup>136</sup>

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<sup>135</sup> See, for example: Russell Zinn, *The Law of Human Rights in Canada: Practice and Procedure* (Toronto: Canada Law Book Inc., 2013) at 1:20.1-1:20.2.

<sup>136</sup> Kayfetz, "Community Relations" at 57-58. For other descriptions of the discrimination experienced by racialized and religious minority groups, see: Backhouse, *Colour-Coded* at 1-17; Lambertson, *Repression*

Thus, the prohibitions ultimately legislated in the fair practices statutes were a direct response to the concrete social conditions that were the focus of the campaigns for this legislation.

Significantly, although there were also efforts to include sex as a prohibited ground of discrimination in some of the early anti-discrimination statutes, these efforts were not successful. Efforts to draw on a universalizing ideology appear to have worked against women social activists who sought to conceptualize and raise issues about sex discrimination. In the labour context, for example, efforts to distinguish women's experiences from men's were seen as undermining the broader struggles of labour.<sup>137</sup> Similarly, in the political context, efforts to distinguish women's experiences could be seen as undermining broader political struggles. Carmela Patrias and Joan Sangster have argued that although the first draft of Saskatchewan's *Bill of Rights Act, 1947* included sex as a prohibited ground of discrimination, sex was probably removed from the bill out of a desire to maintain protective labour legislation for women, together with generally paternalistic attitudes towards women.<sup>138</sup> Dean Beeby writes that CCF women in Ontario tried to include sex as a prohibited ground in their proposed bill of rights, and that these

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*and Resistance* at 197- 199, 208-209; Patrias and Frager, "'Our Country'" at 1, 11-12, 16; Walker, "*Race*" at 124-151, 183-192.

<sup>137</sup> See Joan Sangster, *Dreams of Equality: Women on the Canadian Left, 1920-1950* (Toronto: McClelland & Stewart Inc., 1989) [Sangster, *Dreams of Equality*] at 213-215; Julie Guard, "Fair Play or Fair Pay? Gender Relations, Class Consciousness and Union Solidarity in the Canadian UE"(1997) *Labour/Le Travail* 149; David Goutor, "A Different Perspective on the 'Labor Rights as Human Rights' Debate: Organized Labor and Human Rights Activism in Canada, 1939-1952" (2011) 36 *Labour Studies* 408.

<sup>138</sup> See Patrias, "Socialists, Jews" at 280-281; Sangster, *Dreams of Equality* at 213-215. See also Patrias and Frager, "'Our Country'" at 3-4, for a brief discussion of the failure to include sex as a prohibited ground of discrimination in Ontario's *Fair Employment Practices Act*.



efforts were undermined by the exclusion of sex from Saskatchewan's *Bill of Rights*.<sup>139</sup>

However, Ontario did pass legislation to address disparities in wages paid to women and men workers who were performing the same work at the same time as it passed its fair employment practices statute.<sup>140</sup>

To the extent that the discriminatory practices targeted by the fair practices campaigns were socially acceptable, they were also in some sense “legal” – implicitly, if not explicitly. Ben Kayfetz characterized these discriminatory practices as “the norm” during that period.<sup>141</sup> Therefore, advocates for fair practices legislation had to advance arguments that discriminatory conduct, policies and practices should no longer be considered socially acceptable and should be legally prohibited.

The advocates for fair practices legislation presented two angles to the argument for changing the social norms relating to this discrimination: the “anti-discrimination” angle and the “fairness” or “equality of opportunity” angle.<sup>142</sup> The anti-discrimination angle was reflected in the subsequent statutory provisions, which were generally structured as prohibitions against discrimination. It was also reflected in language describing the early committees, which were established “to combat racial intolerance”. This more negative side focused on the reasons why discrimination was harmful conduct

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<sup>139</sup> Dean Beeby, “Women in the Ontario C.C.F., 1940-1950” (1982) 74 *Ont Hist* [Beeby, “Women in CCF”]. See also Lambertson, *Repression and Resistance* at 237.

<sup>140</sup> For a discussion of the evolution of Ontario's *Female Employees Fair Remuneration Act* see Shirley Tillotson, “Human Rights Law as Prism: Women's Organizations, Unions, and Ontario's Female Employees Fair Remuneration Act, 1951” (1991) 72 *Can Hist Rev* 532 at 535-544 [Tillotson, “Human Rights as Prism”].

<sup>141</sup> “On Community Relations” at 57-58. See also: Backhouse, *Colour-Coded* at 1-17; Walker, “Race” at 124-151, 183-192.

<sup>142</sup> These two aspects are similarly shared by Canadian human rights statutes and by s. 15 of the *Canadian Charter of Rights and Freedoms*, *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

that should be prohibited. The anti-discrimination side also linked more directly to the persons who engaged in discriminatory conduct and practices, since it was their behaviour that would need to change in order to reduce or eliminate discrimination.

The equality of opportunity side, on the other hand, was reflected in the name of the statutes, calling for fairness in practices relating to employment, services, public spaces, and housing. It was also reflected in the language of “human rights”, which ultimately became the dominant characterization. This more positive angle called attention to the benefits to be gained by eliminating discrimination and to the protective nature of the legislative provisions. The social activists also referenced the recently-adopted *Universal Declaration of Human Rights*,<sup>143</sup> which called for all persons to be treated with equal dignity and equal rights. The equality of opportunity or fairness angle linked more directly to the persons who would benefit from an end to discriminatory conduct and practices.

Kalmen Kaplansky (JLC) described the fair practices advocates as facing the dilemma of whether to emphasize the positive or the negative angle:

... [Les] Wismer touches on the subject which had bedevilled the human rights constituency for many years and is still a problem, namely that of presentation of material. Should it concentrate on the negative, the cases of discrimination, and the hardship and misery caused by it, or should it emphasize the positive, the promotion of unity, of nation-building?<sup>144</sup>

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<sup>143</sup> (10 Dec. 1948), UNGA Res. 217 A (III) (1948).

<sup>144</sup> Library and Archives Canada, Kaplansky, Commentaries by Kalmen Kaplansky 1946-1984, R5491-5-7-E (formerly MG30-A53), volume 20, Notes on Reports of Activities for Improved Human Relations, 1949 at 6 [LAC, Kaplansky, Commentaries 1946-1984, vol. 20, Notes on Reports].

From the very beginning we realized that we should be working for something, rather than against; that we should start on a positive note, rather than a negative one.<sup>145</sup>

He also commented on the semantic differences between the language of racial discrimination and the language of human relations, stating that “improved human relations” was a “euphemism for work against religious and racial tension”;<sup>146</sup> as he stated, committees “should assume a name, which would indicate the positive nature of their work.”<sup>147</sup> In practice, the fair practices advocates relied on both angles in their arguments for changing social norms relating to racial and religious discrimination. However, in their arguments for outlawing discrimination, they tended to emphasize the anti-discrimination angle rather than on the equality of opportunity aspect, consistent with the fact that fair practices could be achieved only if discriminatory conduct was eliminated or reduced.

The advocates for fair practices legislation presented two rationales for prohibiting discrimination, one focused on the negative impact of discrimination and the other on the negative character of discrimination. On the question of negative impact, they argued that the discriminatory conduct and practices were harmful both to the individuals and groups directly affected, and to society as a whole. In relation to the affected individuals and groups, discrimination caused harm by excluding them from access to fundamental social goods – employment, services, and public spaces and by treating them as second-class citizens:

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<sup>145</sup> LAC, Kaplansky, Commentaries 1946-1984, vol. 20, Notes on Reports 1949 at 2.

<sup>146</sup> LAC, Kaplansky, Commentaries 1946-1984, vol. 20, Notes on Reports 1949 at 3.

<sup>147</sup> LAC, Kaplansky, Commentaries 1946-1984, vol. 20, Notes on Reports 1949 at 22.

It is also widely recognized that discrimination in employment is harmful because:

1. It threatens the individual's basic right to earn a living and improve his lot.
2. It bars many people with talent who would be real assets to the community if given a chance. Able workers are kept at the bottom of the economic ladder, when they might otherwise advance to better paying jobs, increase their buying power, and thus bring greater prosperity to the whole community.
3. It produces discontent and resentment among those who are forced in the role of "second-class citizens."<sup>148</sup>

The effect on the morale and mental health of those to whom we allow merely "second class" citizenship is harmful in the extreme. ... The economic conditions alone of groups which are discriminated against and which because of this discrimination cannot find jobs, result in poor housing conditions where ill health, crime and family difficulties are bred.<sup>149</sup>

In relation to society overall, discrimination caused harm by assaulting democracy:

discrimination undermined social unity, freedom, and equal rights.<sup>150</sup> As stated in a

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<sup>148</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 5, 1953, File 4A *An Appeal for a Fair Employment Practices Law in Ontario* (1951) at 2.

<sup>149</sup> Archives of Ontario, George Drew Papers, RG3-17, Box 436, File: "Fair Employment Practices Act", "Memorandum on Unequal Opportunity in Employment in the Province of Ontario and the Need for Fair Employment Practices Legislation" (February 1947) at 3, See also: Library and Archives Canada, Ontario Labour Committee for Human Rights, 1945-1972 fonds, R2870-0-0-E (formerly MG28-I173), Vol. 3, Articles and Speeches Miscellaneous 3-3, Gordon G. Cushing, Address to the National Conference Banquet of the Jewish Labor Committee, Dec. 2, 1950, where Cushing argued that unions needed to advocate against a society with second-class citizenship [LAC, Ont. Labour Comm. for Human Rights, 1945-1972].

<sup>150</sup> "Discrimination in employment breeds other forms of discrimination; it magnifies differences between groups of Canadians by preventing normal intermingling, at work and play; it gives rise to differences in living standards and education. People living in the same community, but kept apart by occupational and social barriers, cannot be expected to understand and respect each other, or to hold the same regard for our democratic society. The effect is to undermine the unity which is so vital to our national welfare". OJA, Fonds 17, CJC, Ont. Region, JCRC, *An Appeal for a Fair Employment Practices Law in Ontario* (1951) at 2. See also OJA, Fonds 17, CJC, Ont. Region, JCRC, *A Brief to the Premier of Ontario*, January 24, 1950 at 3; and LAC, Kaplansky, Commentaries 1946-1984, Vol. 20, Notes on Reports 1948 at 62, quoting from the text of a radio speech given by Vivien Mahood on June 28, 1948: "We must consider the value of a Fair Employment Practices Act, to enforce the right to employment based on qualifications other than race and

research paper prepared by the JPRC, the community dimension of the harm of discrimination was an important element of the arguments about the appropriateness of legislative action:

It is the duty of the state to ensure for each of its members the rights, freedoms and privileges that are his by virtue of his citizenship. Unfortunately, there is confusion in the minds of some of our legislators as to the righteousness of this course. They reason that laws of this nature are resorting to coercion and force which is contrary to democratic principles. It is strange reasoning indeed which condones restriction and denial of basic rights on the one hand, yet fears to prohibit this evil on grounds of 'force.' To discourage crimes against society, we pass laws which fine and penalize. Violations of civil rights are crimes against the community and as such can only be restrained and prevented by appropriate legal action. If the state will not recognize the principle at stake and act appropriately, it is small wonder indeed that the race bigots go on with their evil routine.<sup>151</sup>

Labour activists similarly invoked the values of unity and solidarity in the workplace context, appealing to the importance of workers standing together and not allowing discrimination to become a vehicle for division within the bargaining unit. As Kaplansky (JLC) commented:

We in the labour movement are particularly concerned to see discrimination on the grounds of race or religion minimized. Our strength lies in solidarity. We have no room for racial and religious antagonisms within our ranks.<sup>152</sup>

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religion, remembering always that economic and social discrimination seriously jeopardize our national unity."

<sup>151</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 2 of 1947, Sydney Lawrence Wax, "Civil Rights for All Citizens" (July 1947) at 8.

<sup>152</sup> LAC, Kaplansky, Commentaries 1946-1984, Notes on Reports 1948 at 50, quoting Willard S. Townsend, President of United Transport Service Employees - CIO, the Red Caps Union. See also Claude Jodin's 1948 statement in the "Report to the 63<sup>rd</sup> Annual Convention of the Trades & Labor Congress of Canada on the Activities of the Standing Committee on Racial Discrimination of the Trades and Labor Congress of Canada" at 3, 4: : We feel that our Standing Committee has performed a necessary functio-

The arguments based on harmful impact were usually stated in morally neutral language, and compared the proposed anti-discrimination statutory measures to other examples of civil legal provisions. For example, a pamphlet published by The Committee on Group Relations in Canada noted that: “There are scores of laws to safeguard property and other rights of business. Human rights are no less important than property rights and equally deserve the protection of the law.”<sup>153</sup>

Although harm is arguably not morally neutral, the language of harm is less inflammatory than the language the fair practices advocates used when their arguments were addressed more directly to the question of discrimination as immoral conduct. In these arguments, they described discriminatory practices, and the persons responsible for these practices, as “evil”, “anti-social”, and “diseased”. For example, a 1947 brief to the Ontario Premier stated:

Every additional case of discrimination in employment is a further and ever more dangerous threat to our way of life. But discrimination is an evil that will not disappear if only we are willing to ignore it. It requires serious consideration and decisive action.<sup>154</sup>

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[sic] in the trade union movement of Canada. Through our activities and through the work of local Committees, the trade union movement of Canada is becoming conscious of the need of combatting the evils of race hate and religious prejudice. We are definitely of the opinion that this important educational work should be continued because we felt that these evils are a threat to the very existence of the trade union movement.” Library and Archives Canada, Jewish Labour Committee of Canada 1925-1978 fonds, R3286-0-8-E (formerly MG28-V75), Volume 15 – Correspondence, File 15-11 [LAC, JLC 1925-1978].  
<sup>153</sup> Library and Archives Canada, Canada, Ontario Labour Committee for Human Rights, 1945-1972 fonds, R2870-0-0-E (formerly MG28-I173), volume 13, FEP General, F.E.P., a pamphlet published by The Committee on Group Relations in Canada, at 6.  
<sup>154</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, *A Brief to the Premier of Ontario*, 1947 at 3. See also Stanley Grizzle’s comment: “It may well be the judgment of history that our age has faced no more vital issue than the disease of racial discrimination and its twin toxins – segregation and exclusion.” OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 12 [1960 Files 32A-35, 1961 Files 1-16], 1961 File 16: Fair Employment Practices Activities Ontario Jewish Archives “Discrimination: Our Achilles Heel?”, published by Dept. of Labour at 3.

A document prepared in connection with a 1949 ballot on racial segregation in Dresden, Ontario Canada described “white supremacy” as “one of the most virulent plagues on earth’, a disease, the importation of which needed to be prevented in the same way that Canada maintained “rigid import restrictions on plants and animals from the United States to prevent the spread of disease and germs.”<sup>155</sup> When discrimination was described as a matter of morality, the proposed anti-discrimination provisions were compared with criminal laws that similarly prohibited unacceptable social conduct. As one report stated, “The idea is growing that laws to protect citizens against assault on their human rights and dignity are as necessary as laws to prohibit reckless driving and criminal physical assault.”<sup>156</sup> A 1950 brief to the Ontario Premier presented a similar argument, as follows:

... experience has demonstrated the need to apply legal sanctions to protect society and the individual from conduct which violates their principles. That is why we have laws which make it an offence to kill, to

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<sup>155</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 6, 1949, Document on ballot on race discrimination in Dresden, December 6, 1949. This document was prepared in the context of a proposition to hold a vote in Dresden to determine whether or not service providers should be permitted to continue to deny services to racial and religious minorities. The authors of the document compare voting on discrimination to voting on theft. See also the comparison between racial discrimination and disease from 1960 submissions on racial discrimination in housing: “Racial discrimination is one of the most crippling diseases to a free society. We submit our sincere hope that this Council will adopt and apply the medicinal antidote that we have prescribed here today. OJA, Fonds 17, Box 11, 1960, File 6, *Submissions re: Racial Discrimination in Multiple Housing Accommodations* at 4.

<sup>156</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, vol. 24. Trades and Labor Congress of Canada - Convention Report Relating to Work for Improved Human Relations 1949, Report on the 64<sup>th</sup> Convention of the Trades and Labor Congress of Canada, September 1949 at 7. Cf. CJC Nat. Charities Comm. Archives, CJC Org. Records, Series ZB, Saalheimer, Manfred, Human Rights, Manfred Saalheimer, “Laws Also Educate” in *Food for Thought: Group Relations in Canada*, Toronto, October 1949 at 40; OJA, Fonds 17, CJC, Ont. Region, JCRC, Rabbi Abraham L. Feinberg, “A Fair Employment Practices Law Why It Is Necessary and Feasible” at 3; OJA, Fonds 17, CJC, Ont. Region, JCRC, *A Brief to the Premier of Ontario*, January 24, 1950 at 3.

steal, to bear false witness, to physically assault your neighbour. It is to prevent anti-social forms of conduct. ...

The same is true of anti-social conduct in the form of discrimination practices. Does it not seem strange that we provide protection for the individual and society from physical assault, and yet when the same person is assaulted in a somewhat different way, by the force of discrimination, with possibly much more injurious consequences to him and the members of his race or religion, psychologically, economically and spiritually, we provide no protection at all.<sup>157</sup>

According to Walker, psychologists and social scientists in the 1930s had begun to challenge the widely-held view that some races were by nature inferior to others. They contended that there was no biological or other material basis for the ideology of racial inferiority, and that this ideology should be regarded as a psychological disorder or disease and as a social evil.<sup>158</sup> “Prejudice” was the term that came to be associated with the view that racism was a sickness and an evil attitude; “discrimination” was the term that came to mean the exclusionary social practices that resulted from prejudice. It was discrimination that was the focus of the campaigns for legislation and, as we will see in the next section of this chapter, the fair practices advocates relied upon this distinction

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<sup>157</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, *A Brief to the Premier of Ontario*, January 24, 1950 at 7. Cf. CJC Nat. Charities Comm. Archives, CJC Org. Records, Series ZB, Saalheimer, Manfred, Human Rights, Manfred Saalheimer, “Laws Also Educate” in *Food for Thought: Group Relations in Canada*, Toronto, October 1949 at 39.

<sup>158</sup> Walker, “Race” at 12-21. The studies referred to were: Robert E. Park, *Race and Culture* (Glencoe, IL: Free Press, 1950); Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 2 vols. (New York: Harper & Row, 1944); T. Adorno, E. Frenkel-Brunswick, D. Levinson and R. Sanforo, *The Authoritarian Personality* (New York: Harper Row, 1950); Gordon Allport, *The Nature of Prejudice* (Cambridge, MA: Addison-Wesley, 1954); Thomas F. Pettigrew, “Personality and Sociocultural Factors in Intergroup Attitudes: A Cross-National Comparison” (1958) 2 *Journal of Conflict Resolution* 29. See also: Lambertson, *Repression and Resistance* at 205-206; Patrias and Frager, ““Our Country”” at 17-18; and Abraham L. Feinberg’s description: “*Little Black Sambo*, a children’s book which perpetuates Negro minstrel-show comicality, was for me a scared coloured kid sinking under an overhanging sycamore tree. Although my demand for its removal from the public school reading list aroused patronizing levity in some quarters, I insisted that Canadians must protect young minds against the *virus* whose end-product is a concentration camp and genocide.”- *Storm the Gates of Jericho* (Toronto/Montreal: McClelland and Stewart Limited, 1964) at 66 (emphasis added) [Feinberg, *Gates of Jericho*].



between prejudice and discrimination to support their argument that legislation was an appropriate and necessary measure to address discrimination.

The philosophy of universality and inclusion that underpinned the campaigns for fair practices legislation was an understandable response to ideas and practices which treated racialized and religious minority groups as inferior or second class human beings. The campaigns for anti-discrimination laws in the 1940s and 1950s did not challenge the social structures and social relations through which these practices were constituted and maintained. Walker described the approach to discrimination in these campaigns as reflecting an understanding of prejudice as "... an individual pathology in a democratic society that was fundamentally fair";<sup>159</sup> thus, the anti-discrimination legislation that was passed did not include corrective features to address structural problems in the economy or society which tended to reinforce or support discriminatory practices. This approach to discrimination ideology later came to be characterized as a "formal" response approach to social inequality, because it focused exclusively on responding to overt practices of restriction and exclusion.<sup>160</sup> This approach to discrimination also came to be understood, as Girard writes, "... a mostly unthreatening 'colour-blind' philosophy of

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<sup>159</sup> Walker, "*Race*" at 20.

<sup>160</sup> Walker, "'Jewish Phase'" at 20. He distinguished this philosophy from the philosophies of identity politics and particularism, which he wrote became dominant in the 1960s and later. These later philosophies were to some extent a response to the perception that "inclusion" meant, or required, assimilation and non-differentiation – women to be men, racialized minorities to be white. See, for example, Abella's comment: "It was in these years, recalled the long-time director of the Canadian Jewish Congress, Saul Hayes, that Canadian Jews finally became 'white'." "*Jews, Human Rights*" at 14.

equal treatment rather than proposing more radical measures such as quotas for particular minority groups.”<sup>161</sup>

There were more substantive perspectives on social inequality, but these were not the ones which shaped and informed the anti-discrimination statutes. Stuart Svonkin, writing about the U.S. context, argued that some activists had earlier connected anti-discrimination goals with social and economic equality during the New Deal period.

According to Svonkin, these activists:

. . . argued that *fair* employment depended upon *full* employment, that *fair* education depended upon *full* education, and that *fair* housing depended upon *full* housing. This analysis suggested that prejudice and discrimination might be eliminated, or at least lessened, by extending the social safety net . . .<sup>162</sup>

However, by the late 1940s and early 1950s, arguments in favour of expanding the New Deal welfare state were under attack and these activists retreated to the view that prejudice and discrimination could be addressed within existing political and economic relations.<sup>163</sup> According to minutes of the December 1947 meeting of the Non-Violent Action Committee, Ben Kayfetz (JPRC) reported on his participation in drafting a “race

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<sup>161</sup> Girard, *Bora Laskin*, at 271; c.f. at 262-263. In a similar vein, the equal pay statute was limited to the more narrow requirement that women be paid equal wages when they did the same jobs as men, and did not require employers to pay equal wages when women did jobs of comparable worth to the jobs men did, as the CCF and women’s groups had sought: Tillotson, “Human Rights as Prism” at 542-544.

<sup>162</sup> Svonkin, *Jews Against Prejudice* at 177.

<sup>163</sup> Svonkin, *Jews Against Prejudice* at 177. Carmela Patrias argued that CCF advocacy in relation to human rights was different from advocacy by Liberals and Conservatives, because it was connected to a belief that social and economic rights guaranteed by the state provided the basis for protecting human rights. She also argued that the reason the *Saskatchewan Bill of Rights Act, 1947 Act* did not include social and economic rights when it was enacted was because the government believed that a bill of rights would not be enforceable – and not because it was retreating from socialist principles. According to Patrias, the government believed that social and economic welfare would be more effectively guaranteed by separate social security and health insurance legislation. Patrias, “Socialists, Jews” at 269.

relations” news sheet, expressing the view that the suggested title - “Towards Equality” - was too idealistic, and should be changed to “Equal Opportunity”.<sup>164</sup>

Equal opportunity has come to be characterized, and sometimes denigrated, as being only a formal approach to inequality. It is certainly true that equality of opportunity does not address all aspects of social inequality. However, it is useful to remember that practices of formal inequality contribute to social inequalities and that struggles against formal inequalities were and are an important component of struggles against social inequalities.<sup>165</sup>

#### **4 Why Law?**

The campaigns for anti-discrimination statutes in the 1940s and 1950s were campaigns for state protection and for public action against discriminatory conduct practiced by “private” social actors. The three significant themes in these campaigns were: (a) the normative role of law, (b) public (both state and citizen) responsibility to address discrimination, and (c) the coercive power of law. Many of the arguments advanced by the Canadian fair practices advocates drew on similar arguments made by fair practices advocates in the United States. Both Ben Kayfetz, Executive Director of the JPRC, and Kalmen Kaplansky, National Director of the JLC, were sent to New York

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<sup>164</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 3, 1947, Minutes of Meeting of Non-Violent Action Committee held Dec. 2 1947.

<sup>165</sup> I repeat Ruth Fletcher’s observation, also noted in the Introduction to my dissertation: “Historically, women were excluded from the category of human ‘likes’ on the grounds of their difference from men and their perceived closeness to nature. When difference was the excuse used to deny women rights, it was almost inevitable that women would argue that they were like men in order to access those rights. The idea that women are the same as men in the sense that they share membership of the human species was, and still is, a powerful tool in the face of dehumanizing tactics.” Ruth Fletcher, “Feminist Legal Theory” in Reza Banakar and Max Travers, eds., *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) at 150-151.

shortly after they were hired to learn about that state's experience with fair practices legislation.<sup>166</sup> Walker argued that Kalmen Kaplansky (JLC) was not initially as keen on legal avenues as either the JPRC or some of his JLC colleagues, with reference to the following exchange between Kaplansky and Vivien Mahood:

On 21 April 1949 Vivien Mahood appeared on a panel discussing fair employment legislation, and was quoted on page 1 of the Toronto Telegram as saying "Education is a catch-all phrase that usually means absolutely nothing. When you get a fair employment law you have something concrete." Kaplansky wrote admonishingly: "Your statement... caught me by surprise. If you are correctly quoted, I doubt whether I can agree with you.... I recognize the value of laws, but I wouldn't dismiss education in such sweeping terms. The Canadian Jewish Congress people are all for laws and I think that their interest is greatly influenced by developments in the United States. I hope to discuss this matter with you fully. . . ." <sup>167</sup>

Despite Kaplansky's initial reluctance, the JLC became an active participant in the campaigns for legislation, and he himself was soon heard using the metaphor of law as a "weapon".<sup>168</sup>

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<sup>166</sup> Ben Kayfetz wrote that his first priority was ". . . to obtain the passage of a fair employment practices law, a piece of legislation that would outlaw racial and religious discrimination in employment, and all my efforts should be bent towards that goal." See "Community Relations" at 57. Kalmen Kaplansky wrote that he spent three weeks in 1946 in the New York office of the Jewish Labour Committee, "absorbing their methods and their literature": LAC, Kaplansky, Commentaries 1946-1984, Notes on Reports 1946-1947 at 1. The following American document contained many of the arguments found in the Canadian materials: LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Volume 13, FEB US Miscellaneous, New York Chapter, American Jewish Committee, *Progress in Democracy* (US). See also Walker, "Jewish Phase" at 7; Lambertson, "Dresden Story" at 50.

<sup>167</sup> Walker, "Jewish Phase" at fn. 43.

<sup>168</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, volume 3, Articles and Speeches: Miscellaneous 1948-1958 3-4, File #3, Part 1 of 2, "Operation of Fair Employment Practices Acts in Canada", An address delivered by Kalmen Kaplansky on June 30, 1955 to Leadership Training Conference of the Brotherhood of Sleeping Car Porters at 1, using the heading "Law—A Weapon in the Struggle for Equality".

The fair practices campaigns were campaigns for law in the form of legislation. The call for legislation evolved, in part, from the experience with law in the form of litigation in the adjudication of the *Noble v. Alley* case. Leslie Wismer (JLC-Toronto), in his report on Justice Schroeder's decision in *Noble v. Alley* wrote:

By placing the responsibility for protective legislation and implementation squarely at the door of the legislators, Justice Schroeder contributed to an invigorated public campaign in this area. What's more he helped an informed public opinion to concentrate on social action and legislation, rather than to rely exclusively on 'good will' approaches and so-called educational devices.<sup>169</sup>

Claude Jodin, President of the Trades and Labor Congress of Canada, similarly wrote in his 1948 report on the Activities of the Standing Committee on Racial Discrimination, that Schroeder J.'s decision "... established the need for legislation, both federal and provincial, which would make it illegal in Canada to discriminate against people because of their religious affiliations or racial origin."<sup>170</sup> As he argued:

We urge all our affiliated Trades and Labor Councils and Provincial Federations of Labor to press for the enactment of the necessary legislation protecting the various racial and religious groups of our country in the exercise of their rights as citizens of a free and democratic Canada.<sup>171</sup>

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<sup>169</sup> LAC, Kalmen Kaplansky, Commentaries 1946-1984, Notes on Reports 1948 at 64, quoting from Wismer's report on the Schroeder judgment in *Canadian Labor Reports* June 1948 issue.

<sup>170</sup> LAC, JLC 1925-1978, Volume 15 – Correspondence, File 15-11, "Report to the 63<sup>rd</sup> Annual Convention of the Trades & Labor Congress of Canada on the Activities of the Standing Committee on Racial Discrimination of the Trades and Labor Congress of Canada" Submitted by Claude Jodin, President (1948) at 3.

<sup>171</sup> LAC, JLC 1925-1978, Volume 15 – Correspondence, File 15-11, "Report to the 63<sup>rd</sup> Annual Convention of the Trades & Labor Congress of Canada on the Activities of the Standing Committee on Racial Discrimination of the Trades and Labor Congress of Canada" Submitted by Claude Jodin, President (1948) at 4.

In much of the advocacy, however, the arguments were framed in general terms as campaigns for “law”, and did not distinguish between law as legislation and law in the form of adjudicative decisions. However, “law” in the context of these campaigns meant legislation and the enforcement of legislation. And since the authority to establish law in the form of legislation rested with the government, the campaigns were directed at enlisting the government’s legislative authority.

### The Normative Role of Law

The fair practices advocates argued that legislation was an appropriate and necessary response to discrimination because of the important role law plays in defining social norms. They described social norms as being “legal” in two ways. First, a social norm was legal if its legality was not challenged. This is a particularly interesting argument, because it rests on a view that legality is a characteristic that automatically or necessarily attaches to conduct, and that conduct is understood to be legal unless its legality has been successfully challenged. In other words, where there was no law against particular conduct, that conduct was presumed to be acceptable and “legal”. Therefore, the fact that there was no law against discrimination meant that discrimination was legal:

An important element in the argument is that suggested in the article by Will Maslow reprinted from Congress Weekly. Namely, that the law by its very neutrality encourages discriminatory practices since it leaves it entirely up to the personal goodwill or ill-will of the individual to deprive other citizens of their basic rights. It unconsciously serves in the creation of patterns of discrimination which are self-prolonging and which tend to

fix themselves in the popular mind as part of the accepted social mores and standards of society.<sup>172</sup>

A case in point is the absence so far -- with the exception of the Province of Saskatchewan -- of legislation outlawing racial and religious discrimination in rental housing. Until Fair Accommodation Practices laws covering this field exist in the various provinces, landlords have no official pronouncement of public policy to guide them in this respect.<sup>173</sup>

A second way in which social norms obtained legal status was when their legality was challenged unsuccessfully. Thus, a failure to obtain legislative change or an adjudicative ruling that a social norm was legal reinforced its legitimacy and its authority:

A restrictive covenant would be useless if the law did not recognize it and give it force.<sup>174</sup>

... the insertion of such a [restrictive covenant] clause in a legal document gives sanction of Law to racial discrimination in the sale of land. It will give comfort to bigots and race haters and will encourage them to insert such covenants at every opportunity. We cannot over-estimate the 'security' that legality gives to these malpractices.

...

To have such a ban upheld by the courts is to give it an authority that it could not possibly obtain otherwise.<sup>175</sup>

Conversely, a judgment of illegality would enhance other efforts to change conduct and prescribe new norms of acceptable conduct. A law prohibiting discrimination would

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<sup>172</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 2, 1947, Memo dated October 29, 1947 from B.G. Kayfetz to Rabi A.L. Abraham Feinberg. Will Maslow was general counsel to the American Jewish Congress and wrote extensively about legal strategies against discrimination.

<sup>173</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 8 (1957 & 1958), 1958 File # 9-B, Bill of Rights File, "Submission presented to the Citizens' Commission on Human Rights by the Canadian Jewish Congress" at the City of Ottawa on December 8th, 1958 at 3 [emphasis added].

<sup>174</sup> LAC, Kaplansky, Commentaries 1946-1984, Notes on Reports 1949 at 114.

<sup>175</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, s. 5-4-1, File 7 Letter dated July 11, 1949, from B.G. Kayfetz to Roy I. Wolf.

mean that discrimination was now considered illegal and would, therefore, establish a new social norm against discriminatory actions:

The enactment of anti-discrimination legislation is a basic sign that labour's community relations work and educational programs are successful. The existence of an anti-discrimination law signifies public acceptance and agreement in the principle that bigotry and intolerance have no place in Canadian life.<sup>176</sup>

From the labour perspective, a law against discrimination would also enable trade unions to assist people in aspects of the employment relationship, or would-be relationship, over which they did not otherwise have the authority to provide assistance, such as the hiring process and for employees in non-unionized workplaces: "Only the law is all pervading. It alone can reach out to and beyond the hiring gate. It alone can reach into the unorganized shop, store or office....".<sup>177</sup>

The fair practices advocates also pointed to the fact that illegality can generate social stigma and argued that it was appropriate to employ the power of legislation to create this stigmazing effect in relation to discrimination. In a 1956 article on the fair accommodation practices legislation, Alan Borovoy wrote: "To do anything which has the stigma of illegality usually involves a certain loss of social prestige and respectability ...".<sup>178</sup> According to Brian Howe, Conservative MPP Allan Grossman supported anti-discrimination legislation in part because "... law would put 'the stigma of indecency on

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<sup>176</sup> LAC, JLC 1925-1978, Volume 13 – Correspondence etc., File 13-12 – Minutes of Meetings: National Committee on Human Rights, CLC including submissions, CLC National Committee on Human Rights, Annual Report for 1959 prepared by Sid Blum, Assistant Secretary at 1.

<sup>177</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 1, File 80 – "Joint Advisory Committee on Labor Relations", "Report of Activities for Improved Human Relations in the Labor Field During the Month of November, 1950, Submitted to the Joint Advisory Committee on Labor Relations" at 3-4.

<sup>178</sup> Borovoy, "Fair Accommodation" at 15.



discrimination.” According to Howe, Grossman believed that law would not end discrimination, but would “... create moral pressure against practices restricting opportunities and freedom.”<sup>179</sup>

The common standards that could be established by legislation were also expressions of certain moral values. Walker wrote that the offence created by the 1932 Ontario *Insurance Act* amendment to prohibit discrimination in insurance contracts “... suggested intriguing notions about public policy and the legislative reflection of common moral values.”<sup>180</sup> In the context of discrimination, moral values were concerned with both preventing harm and promoting good. As noted earlier, when the comparison was between anti-discrimination law and criminal law, the focus was on the role of law in defining the boundaries of moral conduct. Prof. F.R. Scott wrote that “The law can buttress moral principles, and make the path of the wicked more difficult.”<sup>181</sup>; and D.A.L. Smout wrote that restrictive covenants should be treated as illegal and thus unenforceable for reasons of moral impropriety, in the same way that law was used against the wagering contract on the basis of the moral impropriety of gambling.<sup>182</sup>

There were also positive moral values, associated with the social good, that were connected to prohibiting discrimination. From this perspective, the argument was that the power of law could be employed productively and beneficially to shape positive values

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<sup>179</sup> Howe, “Human Rights Policy” at 792-793.

<sup>180</sup> Walker; “Race” at 193.

<sup>181</sup> Scott, “Dominion Jurisdiction” at 521. Later in the same piece, he described unemployment, bad housing, poor education and health as “social evils” – at 534.

<sup>182</sup> “An Inquiry into the Law on Racial and Religious Restraints on Alienation” (1952) 30 Can. Bar Rev. 864 at 871 [Smout, “Restraints on Alienation”].

and positive actions.<sup>183</sup> George Egerton wrote that Prof. Scott offered a “. . . secular jurisprudence centred on human-rights protection by governments and courts”, which incorporated a view of the power of law as a productive social force, and quotes the following statement from a brief authored by him:

We think of law now in terms of ‘social engineering,’ where law is ‘a force itself,’ a ‘constructive and creative influence in society.’<sup>184</sup>

Lambertson referenced a *Toronto Star* editorial on discriminatory covenants, where the argument was made that “. . . tolerance could also be the result of ‘cultivated growth’ and that ‘the law can be made a powerful implement in its cultivation.’”<sup>185</sup>

The fair practices campaigners thus advocated a view of a society in which law had a prominent role in shaping social attitudes and norms of behaviour. And within this framework, the government, as the legislator, had a central role and responsibility.

### Public Responsibility to Address Discrimination

The fair practices advocates also argued that the responsibility to take action against discrimination was a public one in the sense that rested with citizens as well as with the state:

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<sup>183</sup> Borovoy, “Fair Accommodation” at 15.

<sup>184</sup> George Egerton, “Entering the Age of Human Rights: Religion, Politics and Canadian Liberalism, 1945-1950” (2004) 85 *Canadian Hist’l Rev* 451 at 473. The quotation is from Scott’s brief to Canada, Parliament, Senate, *Proceedings of the Special Committee on Human Rights and Fundamental Freedoms* (Ottawa: King’s Printer, 1950) at 15. This view regards “social engineering” as a beneficent project. Some opponents of anti-discrimination legislation were opposed to this very aspect: see, for example, Rainer Knopff, *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1989).

<sup>185</sup> Lambertson, *Repression and Resistance* 18 at 229.

Where lies the solution to this vexing problem [of discrimination]? It would seem that remedial action leads in two directions. One path encompasses the individual and his duty as a citizen of a democratic state; the other path leads to parliament and the protection through legislation of our basic rights and privileges.<sup>186</sup>

The state, as the representative of the public, had a responsibility to pass legislation to protect people from harm and to ensure that people fulfilled their responsibilities to one another. This required the state to take a position that was not neutral on issues about which there could be differing positions among citizens:

Looking back at it from the vantage point of 1959, I think it can be said that this Act [Racial Discrimination, 1944], modest though it was [*sic*] historic in its importance because it established the principle that government is not neutral in these matters and that it is a matter of public policy that citizens do not suffer discrimination because of their birth, ancestry or belief. In practice the act had certain concrete and tangible effects. The unsightly signs such as ‘Gentiles Only’ that had been defacing the landscape of our province became a collector’s item, obsolete – in fact extinct. It was the elimination of these signs that helped clear the air, in my view, and make for a better atmosphere that helped prepare the way for future measures.<sup>187</sup>

... ‘the very fact that there was a law added an entirely new dimension, for it put the state on the victim’s side and made clear that discrimination was wrong.’<sup>188</sup>

Brian Howe argued that the late 1940s and early 1950s saw a shift toward accepting the state as having a positive role to play through law and administration.<sup>189</sup> This changing

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<sup>186</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 2 of 1947, Sydney Lawrence Wax, “Civil Rights for All Citizens” (July 1947) at 3.

<sup>187</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 10 (1959-1960), 1959 File #6: Anti-Discrimination Material, “Document on Establishing anti-discrimination laws” dated February 1959 at 1.

<sup>188</sup> Tillotson, “Human Rights Law as Prism” at 545 quoting William Kaplan, *The State and Salvation: The Jehovah’s Witnesses and Their Fight for Civil Rights* (Toronto: 1989) at 260.

view of the role of the state was reflected in the following passage from a 1947 JPRC document on civil liberties:

... since the time when Dicey so authoritatively enunciated the principle of the rule of law, there has been a marked shift in the emphasis of the constitution from its interest in preserving civil liberties, to the present absorption of the state with the task of services for the general good.

The abandonment of the principle of laissez-faire has altered the nature of much of our law. A system of law, which like the common law is based on the protection of individual rights, is not readily comparable with legislation which has, for its object, the welfare of the public, or a large section of it, as a whole. The common law rests upon an individual conception of society and lacks the means of enforcing public rights as such. The socialization of the activities of the people has meant restrictions of individual rights by the conferment of powers of a novel character upon Government organs .... So far as the provision of the state social services and the regulation of economic conditions have become part of the accepted philosophy of government, the rule of law still means the supremacy of parliament.<sup>190</sup>

Philip Girard argued that during this period, society was becoming more accepting of state intervention in areas of life that were previously considered out of bounds because they were “private”.<sup>191</sup> He commented that this approach to legislation marked a shift away from British examples and towards American legal models which, he says, was evident in many areas of Canadian law in the period after World War II. I would also argue that the legitimacy of fair practices legislation rested significantly on whether or not the regulated conduct was understood to have a “public” dimension.<sup>192</sup> In the case of

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<sup>189</sup>Howe, “Human Rights Policy” at 787.

<sup>190</sup>OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 1 of 1947, “Civil Liberties in Canada” (1947) at 10-11.

<sup>191</sup>Girard, *Bora Laskin* at 270. He also argued that the post world war two period was characterized by a level of comfort and confidence that generated its own tolerance.

<sup>192</sup>For example, as I examine in Chapter Two, during one of the debates in the legislature over proposed statutory amendments to prohibit discrimination in rental housing, Premier Frost described anti-discrimination policy as being directed to the “broad area of commerce” and not to the private aspects of

services regulated by the government -- for example, places of business such as taverns, which required a government licence -- fair practices advocates argued that the state had a responsibility to ensure equal access to services that came under its regulatory authority:

When a person comes to the state for a license to serve the public, it should be on the understanding they serve all the public and not just who they want to serve. It is not a license to do what they like.<sup>193</sup>

More generally, there were arguments about the social context and the need for law to proscribe discrimination in the interests of democracy:

The welfare state concept rests upon the proposition that every member of a democratic community must have an equal opportunity to participate in and reap the benefits of all forms of public intercourse. The differential among men should relate to merit rather than privilege. The welfare state concept also seeks to guarantee to everyone a minimum standard of living. i.e. the acquisition of the fundamental material conditions of a self-respecting and dignified life.

There is little difficulty in relating these principles to anti-discrimination legislation. The objective of anti-discrimination legislation is then seen as the promotion of equal opportunity to participate in and reap the benefits of public activity regardless of race, colour, creed, origin, nationality or place of birth....

The government can properly impose this standard upon all people who exercise any control on the streets of public intercourse. Businessmen put their products on the public market in the hope of a profit. As a condition of the right to participate in the public market, the government would be within the bounds of propriety to require compliance with certain standards of fair play which are designed to promote equality of opportunity for its citizens.

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people's lives, such as how they ran their homes and whom they chose as friends. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 2th Parl., 2nd Sess. No 40 (14 February 1961) at 1100.  
<sup>193</sup> "Committee Votes 6 to 3 Against Race, Creed Bar", *Toronto Telegram*, May 18, 1950, quoting Ald. Nathan Phillips.

... The rights of the business are qualified because of the public nature of this activity and so that the opportunities of public participation may be equalized throughout the community without unfair discrimination.<sup>194</sup>

This argument echoed the dissenting reasons of Justice Davis in *Christie v. York* about state-regulated activities, and went one step further to maintain that the mere act of entering into the public market place as a seller, whether state-regulated or not, imported an obligation not to engage in discriminatory practices while engaged with the market.

Walker characterized this shift during the 1940s and 1950s as the second phase of the movement for racial equality in Canada after the Second World War. He described the first phase as a campaign for “Equal Citizenship”, in which the struggles focused on government conduct that imposed restrictions based on race and ethnicity; he described the second as the “Protective Shield” phase, during which the government was regarded as an ally and was called upon to pass legislation to protect citizens from the discriminatory behaviour of other citizens.<sup>195</sup> At the same time, Walker observed that these two phases were not entirely chronologically discrete, in that the state could and did discriminate at the same time as it was legislating against discriminatory conduct by private actors.<sup>196</sup> Prof. Scott captured this dual nature of the state in a 1949 article,

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<sup>194</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Volume 3, A. Alan Borovoy, “The Role of Legislation in the Fight Against Discrimination” (1960) at 3, reprinted from “Obiter Dicta”, 1960, Vol 1, No. 1 at 37-42.

<sup>195</sup> Walker characterized the third phase as the “Remedial Sword” phase, during which governments were asked to “... correct systemic conditions that produce discriminatory results even in the apparent absence of overt prejudicial acts.” Walker argued that these phases were not strictly chronological and have co-existed; in his view, however, each one predominated during particular periods. The “Equal Citizenship” phase predominated in the 1930s and first half of the 1940s; the “Protective Shield” phase predominated in the second half of the 1940s and the 1950s; and the “Remedial Sword” phase predominated in the 1960s, 1970s, and 1980s. Walker, “Jewish Phase” at 2-3, 20-21.

<sup>196</sup> There also continued to be activism against oppressive conduct by the state, and debates about seeking legislation to protect citizens against abuses of state power. For example, the “Gouzenko Affair”, in which

where he argued that there is no contradiction in recognizing the state as both a potential source of protection and a potential source of oppression; and that there is no contradiction in both calling upon the state to protect the needs of citizens and challenging illegitimate uses of state power:<sup>197</sup>

Preventing the state from taking away liberties does not help the man whose freedom is attacked by a fellow citizen, or whose liberty is destroyed by poverty. Defence against the state and protection by the state are two correlative functions, not contradictory but complementary.”<sup>198</sup>

In the context of the fair practices campaigns, the focus was on the harmful conduct of citizens rather than on harmful conduct by government. In that context, it was argued that the state had a responsibility to protect citizens from one another and that legislation was a vehicle through which the state could define people’s duties to one another.

Bora Laskin raised the question of people’s obligations to one another when he began his 1938 article, “The Protection of Interests by Statute and the Problem of ‘Contracting Out’”, by asking “... whether law is to be regarded primarily as a system of

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the state detained and imprisoned without due process persons suspected of spying against Canada, was one issue around which there were efforts to mobilize civil liberties activism. See, for example: M.H. Fyfe, “Some Legal Aspects of the Report of the Royal Commission on Espionage” (1946) 24 Can Bar Rev 777; Clément, “Spies, Lies”; Lambertson, *Resistance and Repression* at 143-195. Several authors suggest categories for these different struggles against injustice and oppression, variously using the labels “human rights”, “bill of rights”, “freedoms”, “civil rights”, and “civil liberties”. The “bill of rights” and “civil liberties” labels appear to be closely associated with legal protection against state power, although this is not always the case. See, for example: Lambertson, *Repression and Resistance* at 7-9; Bora Laskin, “An Inquiry into the Diefenbaker Bill of Rights” (1959) 37 Can Bar Rev 77 at 79 [Laskin, “Inquiry into Bill of Rights”]; F.R. Scott, “Dominion Jurisdiction Over Human Rights” (1949) 27 Can Bar Rev 497 at 507-508 [Scott, “Dominion Jurisdiction”]; Ziff, Bruce. *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press, 2000) 104-105 [Ziff, *Unforeseen Legacies*].

<sup>197</sup> For an excellent analysis, see Bryan Palmer’s articulation of the idea of “strugg[ling] for law against law”. See “What’s Law Got to do With It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority”(2003) 41 Osgoode Hall L.J. 465 at 479.

<sup>198</sup> Scott, “Dominion Jurisdiction” at 536.

rights or of duties”.<sup>199</sup> According to Laskin, this argument was central because legal rights tend to be associated with guarantees of individual freedom, whereas legal duties tend to be associated with restrictions on that freedom. Duties were paramount, for Laskin, because restrictions on liberty were necessary to enhance liberty:

Law exists for the sake of enlarging the liberty of men, and as a consequence there must be restrictions on the liberty of man; based on this premise, law is to be regarded primarily as a system of duties, involving the proper recognition of the *interests* of others as a necessary limitation upon self-interest. Hardly anyone to-day is disposed to challenge the assertion that law cannot fulfil the function assigned to it unless it ceases to accentuate the recognition of rights and devotes itself to the protection of interests.<sup>200</sup>

Through legislation, law could recognize and protect social interests, identify who was responsible for ensuring that these social interests were recognized and protected, and prescribe the duties required to achieve these goals.

On the role and responsibility of citizens as citizens, the fair practices advocates argued that citizens had a responsibility both to influence the government to fulfill its responsibilities and to address discrimination themselves. Citizens had the ability and the responsibility to press government to pass legislation. Citizens also had the ability and responsibility to speak out against discrimination and take their own action against it. A 1947 brief on the need for fair employment practices legislation emphasized the responsibility of citizens to know about discrimination, to care about discrimination even

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<sup>199</sup> Laskin, “Protection of Interests” at 670.

<sup>200</sup> Laskin, “Protection of Interests” at 669.



if they were not personally affected, and to participate in efforts to eliminate discrimination:

Discrimination in employment is not the concern of only those who are most directly affected. If this were the case, we might be able to turn our heads, pretend it does not exist and minimize its extent and injurious consequences. In a democracy, however, it is everyone's problem and everyone's responsibility because it prevents the fullest and most efficient utilization of our manpower and makes a mockery of our democratic principles and strivings. Every additional case of discrimination in employment is a further and ever more dangerous threat to our way of life. But discrimination is an evil that will not disappear if only we are willing to ignore it. It requires serious consideration and decisive action.<sup>201</sup>

In a 1949 article, Vivien Mahood, executive secretary of the Toronto Joint Labour Committee to Combat Racial Intolerance, emphasized the myriad ways in which citizens could and should act to address discrimination. As she argued: "It is the responsibility of every citizen to learn, and it is the responsibility of every agency of propaganda—meaning the newspapers, radio, school, magazines, movies, books, organizations, to spread the facts, to adopt honesty and justice as their guide, so that knowledge will permeat [sic] the whole structure of our society and make the world a better place for all of us."<sup>202</sup> In the union context, union members were encouraged to become "fire fighters" to spot and speak out against racism.<sup>203</sup> And last, but not least, citizens had an obligation not to engage in discriminatory practices:

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<sup>201</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 1 of 1947, *Brief for Fair Employment Practices Legislation* at 2.

<sup>202</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, File 3-4, Vivien Mahood, "Law vs. Education", August 10, 1949 at 4.

<sup>203</sup> LAC, JLC 1925-1978, volume 7, File 7-22 – Correspondence: J.L.C. 1946, Attachment to letter dated July 14, 1946 from M. Lewis referring to Feb. 7 joint meeting of Council and Union on fighting racial intolerance.

... All the law really does is prevent the employer from running his business in a way that is contrary to the welfare of the country. It simply attempts to make sure that he cannot shirk his public responsibility. After all, free enterprise does not mean unlimited license. The basis of English jurisprudence is the realization that every man owns and operates his property and business subject to the requirements of the public welfare.<sup>204</sup>

The first step, then, was to establish the common standards. The second step was to ensure that those common standards were respected and followed.

### The Coercive Power of Law

The ability to harness the “force” or power of law was a major reason why the fair practices advocates fought for law as a tool. They argued that both education and law were required, and that law was a tool for education as well as a necessary adjunct to education:

One hears repeatedly that ‘we must educate, not legislate’ for tolerance. That argument will not be proposed by anyone engaged in educating for tolerance. Our teaching would be much more effective if it were backed by the force and prestige of law. The one needs the other.<sup>205</sup>

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<sup>204</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Volume 13, FEP General, Special Bulletin of the Joint Labor Committee to Combat Racial Intolerance, dated March 10, 1951.

<sup>205</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 24, File: Toronto Licensing By-law Letter dated May 1950, from the Joint Labor Committee to Combat Racial Tolerance in Toronto to Mayor of Toronto regarding the proposed Toronto Licensing By-Law. See also Rabbi Feinberg argument: “If the refusal to regard the law as an instrument of tolerance was consistently applied to all moral spheres, a part of Ontario’s statute books becomes futile and irrelevant. Laws against theft would need to be revoked because they cannot ‘cure’ dishonesty; laws about gambling are then superfluous because law cannot ‘cure’ people of the itch to make money without working, and laws regulating the consumption of liquor would possess no value because the government cannot ‘legislate’ temperance. The teachers of religion have been urging people not to kill and steal since the Ten Commandments 30 centuries ago—but laws must still be passed against murder and theft, after generations of preaching and teaching.” OJA, Fonds 17, CJC, Ont. Region, JCRC, Abraham L. Feinberg, “A Fair Employment Practices Law Why It Is Necessary and Feasible” at 4.

B'nai B'rith Anti-Defamation League discarded to a great extent the notion that good will can be sold and promoted as soap is and that a sufficient quantity and mass distribution would eventually win over the mass of American people to good citizenship and brotherliness as they have been won over to jello, coca cola or Rinso.<sup>206</sup>

For the fair practices advocates, education was distinguished from coercion. They appear to have understood education as non-coercive because it was a process which encouraged people to act differently but could not force them to act differently. Law, on the other hand, could force people to act differently. However, they advocated for an enforcement that would be primarily non-coercive. Why did they take this position?

The minutes of the first meeting of the JPRC legal sub-committee, established in 1946, record that Prof. Laskin raised the issue of enforcement for discussion and that copies of the legislation in force in New York and Massachusetts were circulated, as well as an American Jewish Congress model bill and a proposed version of the Saskatchewan Bill of Rights, which would be passed the following year.<sup>207</sup> At what may have been the second meeting,<sup>208</sup> the sub-committee members endorsed their preference for legislation “armed with teeth” over legislation that simply established a code of conduct:

The meeting opened with a discussion of policy as to whether the proposed legislation be armed with teeth, or whether it should merely

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<sup>206</sup> Speech drafted for Jacob Finkelman for Windsor Meeting Spring 1951 at 2, Canadian Jewish Congress, Ontario Region fonds, Fonds 17, Joint Community Relations Committee, Box 2, File 53, Ontario Jewish Archives.

<sup>207</sup> Minutes of Meeting of the Legal Sub-Committee of the Research Division of the CJC held July 23, 1946, Canadian Jewish Congress, Ontario Region fonds, Fonds 17, Joint Community Relations Committee, Central Region Legal Committee Minutes Jul. 1946-Nov. 1957, Ontario Jewish Archives.

<sup>208</sup> Unfortunately, there was no way to confirm that the archival records included minutes of all the meetings of the JPRC sub-committee. It is possible, therefore, that there were minutes of other meetings which I did not have the opportunity to review.

establish the principle that employment discrimination is without the law, thereby discouraging discrimination by moral persuasion.

It was felt that the first alternative was necessary to make the bill effective in outlawing unemployment caused by discrimination, and to allow to all groups the exercise of those capacities which could fit the individual to any profession or occupation, no matter what his ethnic or national origin or ancestry, race, color, religion, or creed. The question of specific methods of enforcement was left for later discussion.<sup>209</sup>

Metaphors of “weaponry” and “teeth” were often used to connote the coercive power of law achieved through legislation and its enforcement.

This potential for access to the coercive power of law through enforcement was a key element in the opposition to fair practices legislation.<sup>210</sup> The opponents of fair practices legislation argued that it was not appropriate to use force because, as Robertson CJA expressed in the passages from *Noble and Wolf* quoted earlier, it was neither appropriate nor effective to legislate “morality”, i.e. to try to use force to change attitudes, beliefs and feelings. This argument often appeared in *Globe and Mail* editorials as, for example, in the following 1944 editorial on the *Racial Discrimination Act*:

Bigotry is an affliction which does not respond to repressive treatment.

More to the point, we think, was the Premier’s expressed hope for reform through education. It is in education that the cure to intolerance and discrimination must be sought. ... It is in the schools rather than by

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<sup>209</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, CJC Central Region Legal Committee Minutes Jul. 1946-Nov. 1957, Minutes of the Meeting of the Legal Committee, Economic and Social Research Division held August 6, 1946.

<sup>210</sup> The fair practices advocates of course faced opposition to anti-discrimination legislation on a number of other grounds as well, which included the following arguments: there was no need for legislation because discrimination did not happen; some forms of discrimination were necessary to protect white Christian interests; minority rights should not be protected in majoritarian democracy; free speech was a more important value than equality; and the state has no business in bedrooms and boardrooms. See Lambertson, *Repression and Resistance* at 199, 228.

laws that the Government can best further the ideal of full equality in the enjoyment of man's rights.<sup>211</sup>

A similar position was stated in a 1950 editorial in the *Toronto Telegram*:

Respect for human rights is not to be advanced by restrictive laws which invade the principles of individual liberty, nor is bigotry to be cured by coercion. It is in the schools, rather than in the Legislature, that the right against intolerance and discrimination is to be fought with greatest hope of achieving worthwhile results. Tolerance will come through development of the individual's awareness of the full meaning of freedom and his consciousness of his responsibilities under the rights and privileges of that freedom. It is a state of mind which cannot be created merely by legislation nor by the multiplication of legislative restrictions.<sup>212</sup>

Even a supporter of anti-discrimination legislation expressed the view that the biblical injunction to love thy neighbour "loses its beauty if legally enforceable".<sup>213</sup>

The fair practices advocates had three responses to this opposition: (1) law was directed to changing conduct, not changing beliefs; (2) the power of law enhanced its value as a tool for education; and (3) the proposed fair practices enforcement model

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<sup>211</sup> *Globe and Mail*, November 13, 1944 at 6. The editorial on the Court of Appeal for Ontario decision in the *Noble and Wolfe* case: "There is much to correct on our treatment of minorities in Canada, but force is not the way to do it." – *Globe and Mail*, June 11, 1949. The editorial on the Supreme Court of Canada decision in *Noble and Wolfe*: "The limits within which laws or court actions can be effective are exceedingly narrow. Tolerance is an individual trait and can be cultivated only by education. No law can impose mutual understanding; and if a common ethic promotes a broad social sympathy, no law is necessary." - *Globe and Mail*, November 22, 1950 at 6. And the editorial relating to an incident when services were denied to Harry Belafonte stated: "No more can tolerance be legislated into being; it can only be sown in men's minds and nurtured there by the slow process of education and example, until it grows big and stifles the weeds. And this is a task, not for the powerful, but for the wise in business, in religion, in government, throughout society, who recognize that legislation against intolerance is no more than a symptom of intolerance, and that true tolerance has no need for laws." - *Globe and Mail*, October 14, 1958.

<sup>212</sup> "Legislation has its Limitations in Combating Discrimination", *Toronto Telegram*, February 3, 1950.

<sup>213</sup> Smout, "Restraints on Alienation" at 871. Nevertheless, Smout also wrote that even if it was not possible to "legislate tolerance", there was "... nothing worthless in legislating against certain intolerant practices." – at 872. See also the statement quoted by Rabbi Abraham Feinberg in *Gates of Jericho* at 70: "Laws ain't the answer. It's the Christ in man. Slow but sure!"

would rely primarily on persuasion through education, rather than on coercion through adjudication.

The first argument, that law was aimed at changing conduct not changing beliefs, relied on the distinction between “discrimination” and “prejudice” discussed earlier. Prejudice was the mental attitude or belief that often led to discrimination; discrimination was the conduct that resulted from prejudice. The fair practices advocates agreed that it was not appropriate to try to use coercion to change attitudes and argued that the purpose of fair practices legislation was not to change people’s minds. Education was the remedy for prejudice. Law, however, was an appropriate tool to address discriminatory conduct. A JPRC brief in 1947 expressed the distinction in the following way:

Education is the solution frequently proposed for such problems as discrimination in employment. With this view no one can have any quarrel. The removal of prejudice is, in the final analysis, an educational problem – in the broadest sense and going far beyond actual schooling. But the elimination of those of its manifestations which, like discriminatory employment practices, are seriously injurious to all persons and groups in our midst, is a matter for legislation.<sup>214</sup>

An article focused on fair practices legislation, prepared by The Canadian Association for Adult Education to accompany a radio program broadcast by the Canadian Broadcasting Association on March 17, 1948, explained the distinction as follows:

Many people of goodwill do not give their support to fair employment laws because they are convinced that *it is impossible to legislate against prejudice*. Prejudice directed toward members of minority racial or religious groups has been with us since the beginning of time. ...

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<sup>214</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 1 of 1947, *Brief for Fair Employment Practices Legislation* at 3.

*Education* in all its aspects, and not the passing of another law, must remain our hope of bringing about fundamental changes in outlook. ...

Advocates of legislation have a reply to this argument. A Fair Employment Practices law is not aimed at *prejudice*. Its objective is to eliminate *discrimination-the action* which springs from prejudice. Admittedly no law can force an anti-semitic to be friendly, sympathetic, understanding and fair-minded in his approach to the Jew. But a law *can* prevent the anti-semitic employer from making the Jew suffer economically as a result of his attitude. There is no claim that legislation will suppress intolerance and bigotry.<sup>215</sup>

Thus, the arguments confirmed that people were free to hold onto prejudiced beliefs, but were not permitted to engage in discriminatory conduct based on those beliefs.<sup>216</sup>

Nevertheless, the fair practices activists also expressed the hope that changing people's conduct would, over time, also change their attitudes and thus reduce or eliminate prejudice as well as discrimination:

These legislative measures have had a profound educational effect on the attitude of the people of Ontario toward discrimination. They have

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<sup>215</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, The Canadian Association for Adult Education, "Should We Have Fair Employment Practices Acts in Canada?" to accompany the C.B.C. Broadcast, March 17, 1948 [emphasis in original]. See also: OJA, Fonds 17, CJC, Ont. Region, JCRC, Rabbi Abraham L. Feinberg, "A Fair Employment Practices Law Why It Is Necessary and Feasible" at 3. Alan Borovoy similarly wrote, in 1956: "Besides the usual opposition to such a statute from the racists and bigots, some people contended that 'you just can't legislate brotherhood'. But these opponents of the *Fair Accommodation Practices Act* overlook the fact that the Act does not by itself purport to 'legislate brotherhood'. No one asserts that such legislation can by itself change people's feelings. But it *can* change their outward behaviour." He also argued that this type of legislation can have an educational effect as well. Borovoy, "Fair Accommodation" at 15. [emphasis in original] Many years later, Borovoy repeated this argument in the following way: "... in the real world, most people who do the right thing do so for the wrong reasons. Since I am concerned more with the improvement of behavior than with the purification of souls, that's good enough for me." - Alan Borovoy, *When Freedoms Collide: The Case for our Civil Liberties* (Toronto: Lester & Orpen Dennys, 1988) at 219 [Borovoy, *When Freedoms Collide*].

<sup>216</sup> For example: "In any democracy, no individual has the right to use his religion or his political beliefs to injure others. In the same way, he has not properly the right to exercise his prejudiced feelings to inflict economic hardship on those against whom he directs his prejudice. Every individual – be he Anglo-Saxon, Negro, Chinese, Japanese, Hindu, Protestant, Jew, or Roman Catholics – has the right in a democracy to earn a living and provide for his family. Where prejudice-in-action limits such rights, it should be outlawed." LAC, Ont. Labour Comm. for Human Rights, 1945-1972, F. E. P. [Fair Employment Practices] published by The Committee on Group Relations in Canada, at 12.

promoted both the idea of adherence to the law, and the conviction that discrimination is wrong. They have developed new habits and expectations and have provided effective support to educational work for better group relations in Ontario.<sup>217</sup>

The argument that changes in conduct could also lead to changes in attitude was conceptually linked to their second response to the opposition to using coercion against discrimination. This second response was that the power of law was not only useful as a tool of force but also a useful tool in the educational process:

Such legislation would, in addition, act as a powerful educational force by putting the stamp of public disapproval on acts of intolerance and discrimination and by placing beyond the pale of the law those who commit such acts.<sup>218</sup>

It is also a case of education through legislation. Public discussions on appropriate Government control by which evil practices can be ended, parliamentary debate, and finally administrative and judicial enforcement practices will all in themselves be effective educational processes.<sup>219</sup>

The fair practices advocates' third response to the opposition to coercive measures against discrimination was that the proposed fair practices enforcement model was based primarily on conciliation and would employ coercion rarely, if ever.

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<sup>217</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 3, 1950 Fair Employment Practices File #23-B, *An Appeal for Fair Practices Legislation*, 1951 at 2.

<sup>218</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 1 of 1947. See also: OJA, Fonds 17, CJC, Ont. Region, JCRC, *A Brief to the Premier of Ontario*, January 24, 1950 at 3 and OJA, Fonds 17, CJC, Ont. Region, JCRC, File 7 – Human Rights – 1948-1949, Letter dated July 11, 1949 from Ben Kayfetz to Roy Wolfe. Rabbi Feinberg similarly wrote: “As a noted professor at the University of Chicago declared, ‘Law not only expresses custom, but creates it’. Government can set new patterns of behaviour. Law educates, by fostering a new climate of goodwill and tolerance. At first it controls human nature, then gradually, it alters the forces which determine human nature. Every progressive law leads to spiritual advances in the people who live under its influence.” OJA, Fonds 17, CJC, Ont. Region, JCRC, Rabbi Abraham L. Feinberg, “A Fair Employment Practices Law Why It Is Necessary and Feasible” at 4.

<sup>219</sup> CJC Nat. Charities Comm. Archives, CJC Org. Records, Series ZB, Saalheimer, Manfred, Human Rights, Manfred Saalheimer, “Laws Also Educate” (October 1949) *Food For Thought* at 39.



Conciliation was understood to be a non-coercive, or at least a less coercive enforcement method, and adjudication represented the coercive power of law enforcement. Thus, conciliation was linked more with “education” than with law, and adjudication was linked more with “law” than with education. In an article published in the *Globe and Mail*, responding to an editorial opposing the use of compulsion against discrimination, Gordon Milling, (JLC-Toronto) wrote that conciliation was an educative rather than a coercive process:

The conciliation procedure adopted is in itself educational in theory and practice. Its purpose is to obtain voluntary compliance with the law by demonstrating that ‘employment on merit’ is based on sound business principles; and conversely, that discrimination because of race, religion or ancestry is equally unsound whether from the viewpoint of the firm, the individual or the community.<sup>220</sup>

In a 1967 article on the history of American fair employment practices legislation, Arthur Bonfield argued that the state agency enforcement model was preferred in large measure on the theory that “the expense of the investigation and proceeding would be borne by the government” and that the commission’s powers to issue flexible remedies would better position it to achieve “the legislation’s real objective”, which was to eliminate discrimination.<sup>221</sup> He also wrote, however, that many of the statutes actually passed “were not as imaginative or ambitious” as had been proposed for them and were “wholly inadequate and ineffective because the agencies they created had no enforcement powers

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<sup>220</sup> Gordon Milling, “FEP Education v. Compulsion”, *Globe and Mail*, April 23, 1953, responding to editorial “Compulsion Not the Way”, April 16, 1953.

<sup>221</sup> Arthur Earl Bonfield, “The Origin and Development of American Fair Employment Legislation” (1966-67), 52 *Iowa L Rev* 1043 at 1069, 1070. [Bonfield, “Origin and Development of American FEP”].

...”.<sup>222</sup> In a 2011 article on this same history, David Freeman Engstrom has argued that not all the fair practices advocates in the United States supported an administrative agency enforcement model, and that some would have preferred litigation in the courts.<sup>223</sup> There does not appear to have been a similar difference in points of view in Ontario. In the Ontario context, it was the opponents of fair practices legislation who were opposed to the government agency enforcement model. They argued that if there was going to be anti-discrimination legislation, such legislation should be enforced by the courts.<sup>224</sup>

The fair practices advocates promoted conciliation both as the preferred enforcement method, and as the enforcement method that would be used most often in practice. They relied heavily on the United States model and experience to support these arguments:

It is generally agreed by most informed people on the subject, and this is borne out by experience, that the best method of administering legislation of this kind is through the establishment of a provincial board against discrimination. We would therefore urge that such a board be set up, and like the New York State Commission Against Discrimination, its function should include:

1. Investigation of complaints of discrimination; where the complaint is well-founded, to attempt to conciliate. Failing this, to be in a position to take more effective methods to remove the discrimination. It is interesting to point out that the New York State Commission Against Discrimination has rarely found it necessary to go beyond the stage of conciliation. Even though it has handled many thousands of cases since it was established, the Commission has only found it necessary to prosecute in one case to date.

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<sup>222</sup> Bonfield, “Origin and Development of American FEP”] at 1070-1071.

<sup>223</sup> “The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972” (2011), 64 *Stan L Rev* 1071.

<sup>224</sup> “Racial Tolerance Act could be Strengthened”, *Toronto Evening Telegram*, January 30, 1950; “Court Outside the Law”, *Globe and Mail*, June 28, 1950.

2. To conduct a continuous program of education of the public as to the purpose and nature of the law with a view to creating an area of co-operation and climate of public opinion favourable to the administration of the law, and a broad educational programme to promote understanding and harmony between all members of the community.”<sup>225</sup>

In addition, Will Maslow, general counsel to the American Jewish Congress, wrote that penal statutes were not effective because “District Attorneys are loathe to prosecute and juries to convict.” He also explained that the administrative agency enforcement model, “backed up always by the threat of public exposure and judicially enforced orders” was considered the preferable method for fair practices enforcement because it put the burden of enforcing the community norm on the state rather than on the individual who raised a discrimination claim:

Statutes allowing private individuals to sue are probably the least effective type of measure because the entire burden of litigation is imposed upon the individual and the state assumes the role of referee, not that of one condemning racism.<sup>226</sup>

Conciliation, as a dispute resolution process, was first developed in the labour relations context around the same time as the first fair practices statutes were passed in the United States.<sup>227</sup> In theory, a conciliation process could “voluntarily” persuade the respondent to accept that their conduct was contrary to law, and “voluntarily” persuade

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<sup>225</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC *A Brief to the Premier of Ontario*, January 24, 1950 at 4-5.

<sup>226</sup> Letter dated December 9, 1953 from Will Maslow to Norman Chalmers at 2, Canadian Jewish Congress, Ontario Region fonds, Fonds 17, Joint Community Relations Committee, Ontario Jewish Archives.

<sup>227</sup> It appears that MacKenzie King was significantly involved in developing this dispute resolution model and introducing it to the labour relations context in both Canada and the United States. See Taylor Holland, “Making Reform Happen: The Passage of Canada's Collective-Bargaining Policy, 1943-1944” (2001) 13 J Policy Hist 299.

them to agree to an appropriate resolution - there is, after all, a coercive aspect to having to engage with the legal process at all, when one would otherwise choose not to do so.

The fair practices advocates also argued that discrimination would be easy to “prove” in a conciliation process because it would be easy to persuade the respondent to understand why their conduct was wrong:

Experience with the operations of FEP laws in the United States shows that, actually, discrimination is easy to prove. Most often employers admit it. Discrimination, where practiced, is usually a well established policy, openly acknowledged and recorded in newspaper advertisements, orders to employment agencies, payroll records, and so on. It also often happens that the members of a minority group are never even given an opportunity to interview the employer or his representative.<sup>228</sup>

The JPRC gave a similar account in a report on a meeting with Ontario Premier Kennedy in 1949. In response to the Premier’s questions about how discrimination would be proved if an employer refused to admit to discrimination, the answer given was:

It was pointed out to him that the experience of such statutes in New York and other States proved that a direct personal interview between the state agent and the employer soon got to the root of the matter and that the very fact that the Government showed its interest in fairness of employment was enough to convince employers of the need of such equality.<sup>229</sup>

The fair practices advocates also argued that respondents’ willingness to accept responsibility in the conciliation process was a significant reason for the relatively small number of cases requiring formal hearings in the United States experience:

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<sup>228</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, volume 13, FEP General, F.E.P., a pamphlet published by The Committee on Group Relations in Canada, at #16.

<sup>229</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Reel 6, 1949, Report on JPRC meeting with Premier Kennedy on March 12, 1949.

The large-scale programme of education carried on by the Commission, through the radio, the movies, the press, and the public platform, has greatly contributed to this result [few formal hearings]. But basically the explanation appears to be that the ordinary citizen, if given a chance, will respond intelligently to policies of tolerance and understanding.<sup>230</sup>

Although “sharp teeth” was an essential element of the enforcement process sought by fair practices advocates, they consistently emphasized that recourse to the coercive power of adjudication would be rare. In a 1947-48 Citizens’ Forum document, the authors observed that the fair practices law in New York had sharp teeth but emphasized persuasion and conciliation: “Thus, while the law has sharp teeth, it is most important to note the great stress that is laid upon conciliation and persuasion.”<sup>231</sup> Similarly, a radio broadcast which aired in January 1951 (and for which Pierre Berton wrote the script) presented the argument as follows:

We want to emphasize this, however – these court orders are a last resort. Only a very few cases ever reach the hearing stage. The job of FEPC is not to seek revenge through the law. It is to show people that discrimination in jobs is a silly, wasteful and unnecessary business.<sup>232</sup>

They also argued that the emphasis on conciliation reflected the fact that the purpose of the legislation, and its enforcement process, was not to punish people for engaging in illegal conduct but to eliminate discriminatory conduct and practices.<sup>233</sup>

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<sup>230</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, s. 5-4-1, File 5, Citizens’ Forum, “Should We Have Fair Employment Practices Acts in Canada?”, March 1948 at 5.

<sup>231</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, s. 5-4-1, File 5, Citizens’ Forum, “Should We Have Fair Employment Practices Acts in Canada?”, March 1948 at 3.

<sup>232</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Transcript of “Fair Employment is Fair Play”, Cross Section, January 4, 1951 at 20.

<sup>233</sup> See, for example: “It would be well to keep in mind that the real purpose of legislation is not to punish people who discriminate, but to get them to change their ways. Consequently, the emphasis is placed on

In the end, the government passed fair practices legislation and provided for enforcement of this legislation through a state agency, using a process that began with conciliation but also created the potential for adjudication.

## 5 The Fair Practices Statutes

Ontario's fair practices statutes, like the earlier anti-discrimination statutory provisions, were structured as prohibitions against discrimination on the prohibited grounds of discrimination. The prohibited grounds of discrimination in these first statutes were: race, creed, nationality, ancestry or place of origin ("race, religion or ethnicity"). The *Fair Employment Practices Act, 1951* contained three prohibitions: (1) a prohibition against employers refusing to employ, refusing to continue to employ, or discriminating in regard to employment or to any term or condition of employment, on the basis of race, religion or ethnicity; (2) a prohibition against trade unions excluding, expelling or suspending from membership, or discriminating against a person, on the basis of race, religion or ethnicity; and (3) a prohibition against employment applications or advertisements which expressed any limitation, specification or preference as to race, religion or ethnicity.<sup>234</sup> The statute did not apply to all workers: domestic workers, employees of charitable, philanthropic or religious organizations, and persons employed

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discussion, conciliation and persuasion. The approach used is to try and make the employer understand that discrimination is economically and socially wasteful, morally and religiously wrong; to convince the employer that it is bad for business to hire people for their race or religion rather than for their ability and experience. It is interesting to note that out of 5,200 reported cases in the United States, in only six was it found impossible to settle complaints by conciliation." LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Irving Himel, "The Canada Fair Practices Act" at 2.

<sup>234</sup> SO 1951, c 24, ss. 3 4, 5 [*FEPA*].

by employers with fewer than five employees were all excluded from its protection.<sup>235</sup>

The *Fair Accommodation Practices Act, 1954* contained two prohibitions<sup>236</sup>: (1) a prohibition against denying accommodation, services or facilities customarily available to the public, on the basis of race, religion or nationality, and (2) a prohibition against publishing or displaying signs indicating discrimination or an intention to discriminate, on the basis of race, religion or ethnicity.<sup>237</sup> The *Female Employees Fair Remuneration Act, 1951* prohibited employers from discriminating between female and male employees by paying female employees at a rate of pay less than the rate paid to male employees doing the same work, or substantially the same work, in the same establishment.<sup>238</sup>

What distinguished the fair practices statutes from the earlier anti-discrimination provisions was the enforcement process and the range of consequences that could apply to a failure to comply with the prohibition. In Ontario's early anti-discrimination legislative measures, the failure to comply with the prohibition was a quasi-criminal offence, with punitive sanctions.<sup>239</sup> The fair practices statutes also constituted the failure to comply as a quasi-criminal offence, but also established a civil process which was the primary enforcement method.

The *Fair Employment Practices Act* provided for the creation of a new branch of the Department of Labour, called the Fair Employment Practices Branch (FEPB), which

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<sup>235</sup> *FEPA*, s. 2.

<sup>236</sup> The word "accommodation" did not refer to housing or tenancy, as it often did subsequent in human rights codes and still does in Ontario's *Human Rights Code*. Rather, it referred to public spaces and services, which the subsequent human rights statutes referred to more typically as services and facilities.

<sup>237</sup> SO 1954, c. 28 [*FAPA*], ss. 2,3.

<sup>238</sup> SO 1951, c 26 [*FEFRA*]. Saskatchewan was the one province which passed equal pay legislation that was applicable to "work of comparable character" rather than to work that was equal or the same. *The Equal Pay Act*, SS 1952, c 104, s. 3.

<sup>239</sup> Ontario's *Racial Discrimination Act*. As noted earlier, the enforcement process under the *Saskatchewan Bill of Rights Act* was also quasi-criminal.

became responsible for enforcing all of Ontario's fair practices statutes. The process began with a person submitting a complaint in writing to the FEPB.<sup>240</sup> This complaint could then be referred to a conciliation process for inquiry and resolution, at the discretion of the Minister of Labour acting on the recommendation of the FEPB Director.<sup>241</sup> If the complaint could not be resolved, the Minister, on the recommendation of the FEPB Director, would decide whether or not to refer the complaint to a formal hearing before an administrative tribunal called a commission.<sup>242</sup> If a complaint was referred to a hearing and the tribunal found that the complaint was supported, the tribunal's authority was limited to providing remedial recommendations to the FEPB Director; the FEPB Director would then make recommendations to the Minister of Labour, who had the sole authority to make remedial orders.<sup>243</sup> Violations of the statute and violations of orders made under the statute were separate quasi-criminal offences, punishable by modest monetary penalties.<sup>244</sup> However, prosecutions could be instituted only with the Minister's consent and the Minister could give consent only on the recommendation of the FEPB Director.<sup>245</sup> The fines were a maximum of \$50 for an individual and maximum of \$100 for a corporation or trade union.<sup>246</sup>

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<sup>240</sup> *FEPA*, s. 6(2); *FAPA*, s. 4(2); *FEFRA*, s 3(2). *FAPA* assigned responsibility for investigation to an "officer designated by Cabinet" and, in practice, this was the FEPB.

<sup>241</sup> *FEPA*, s. 6(1); *FAPA*, s. 4(1); *FEFRA*, s 3(1).

<sup>242</sup> *FEPA*, s. 7(1); *FAPA*, s 5(1); *FEFRA*, s 4(1).

<sup>243</sup> *FEPA*, s. 7(3)-(6); *FAPA*, s. 5(3)-(6); *FEFRA*, s. 4(3)-(6). Human rights tribunals in Ontario did not have autonomous jurisdiction to make orders until the *Human Rights Code* was amended in 1971 by *The Civil Rights Law Amendment Act*, 1971, SO 1971, c 50, s. 63.

<sup>244</sup> *FEPA*, s. 8(1); *FAPA*, s. 6(1); *FEFRA*, s 5(1).

<sup>245</sup> *FEPA*, s. 10(1); *FAPA*, s. 7; *FEFRA*, s 6.

<sup>246</sup> *FEPA*, s. 8(1); *FAPA*, s. 6(1); *FEFRA*, s. 5(1).



## Part II: Fair Practices Enforcement

The concept of a Bill of Rights is the static one of protection, not the dynamic one of positive assistance by governments. ... the mere enunciation of rights, important though it is, has little practical value unless it is backed up by adequate enforcement machinery.<sup>247</sup>

While I like the phraseology a great deal, my chief concern in Bills of this sort is the method of enforcement which is provided with them. This I think, is the weakest link in the chain of our demands and while it is a problem not readily solved, I think we should give more and more consideration to the problem of enforcement as opposed to the substantive provisions in such Bills.<sup>248</sup>

With the passage of the fair practices statutes, their advocates had an additional tool to employ in their struggles against direct racial and religious discrimination in employment, services, and public spaces. As Kalmen Kaplansky (JLC) argued, their job now was to make sure that law “on the books” did not just stay on the books, but also became law “in action”:

The vital problem today is whether this protective legislation will remain law on the books only or whether it will be turned into law in action. If the former prevails, then of course, these laws will be worthless. If they can be turned into important instruments for social change then they will ameliorate the living conditions of thousands of Canadian citizens.

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As Roscoe Pound stated: ‘Law can make habits instead of waiting for them to grow.’ It is incumbent upon all men of goodwill to aid the law in this noble purpose of minimizing the effects of bigotry and discrimination and to make human and decent behaviour a lasting habit.<sup>249</sup>

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<sup>247</sup> Scott, “Dominion Jurisdiction” at 503 and 514. See also Howe, “Human Rights Policy” at 789-790.

<sup>248</sup> LAC, Kaplansky, Commentaries 1946-1984, volume 20, Notes on Reports 1946-1947 at 148, quoting Letter dated December 10, 1947 from Morris Schumiachter to Kalmen Kaplansky.

<sup>249</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 3, Articles and Speeches: Miscellaneous 1948-1958, File 3-4, Kalmen Kaplansky, “Operation of Fair Employment Practices Acts in Canada”, An address delivered on Thursday June 30, 1955 to the Regional Zone Leadership Training Conference of the Brotherhood of Sleeping Car Porters (AFL-TLC) at 7 and 9. See also the statement by Reg Gisborn, a United Steelworkers trade unionist and then MPP for the CCF (and later the Ontario New Democratic

The legislation represented a new community standard for conduct, but fair practices advocates recognized but this standard would become real only if there was compliance with it: “The legislation is of course, some help to us insofar as it admits that discrimination is practiced. On the other hand, if it is not used, the legislation loses even this limited usefulness.”<sup>250</sup>

For the fair practices advocates, legislation was a tool for everyone to use, and citizens had a role in both formal and informal enforcement. Indeed, consistent with their argument that both the state and citizens had a responsibility to take action against discrimination, they argued that both the state and citizens had responsibilities in relation to enforcing the new legislation. The enforcement structure made the government responsible for investigating and conciliating complaints, for referring complaints to adjudication by a commission, and for prosecuting violations of the statute or of orders made under the statute. Citizens had a responsibility to encourage people to seek formal enforcement, to ensure that the state fulfilled its formal enforcement mandate, and to seek improvements to the formal enforcement process when they were needed. As Kaplansky (JLC) noted: “Even the Financial Times said, ‘The anti-discrimination bill is a worthy piece of legislation’, although it still insisted that the Government could not enforce such

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Party): “In pressing for fair practices legislation, labor has demonstrated that the principles of brotherhood and equality are not merely ‘lip service’ principles but rules of conduct to be applied and protected in all areas of life. Labor has also stressed the necessity for policing this legislation, publicizing cases that arise and assisting victims of discrimination so that human rights laws live and do not remain still-born on the statute books of the land.” LAC, Ont. Labour Comm. for Human Rights, 1945-1972, File: Ontario Federation of Labour, Fair Employment Practices Conference 1956, Address of Reg Gisborn on Fair Practices.

<sup>250</sup> LAC, JLC 1925-1978, Volume 41, File 41-6 – Correspondence, reports: Toronto Joint Labour Committee to Combat Racial Intolerance, April –June 1952, Letter dated June 3, 1952 from Gordon Milling to Kalmen Kaplansky at 2.

a law. It was up to us to prove that the Government could enforce the Act. This was the next phase of our activities in this area.”<sup>251</sup> Thus, the fair practices advocates pressed the government to be robust in fulfilling its enforcement responsibilities so that the formal structure would have concrete impact on discrimination. They also encouraged citizens, including those directly affected by discrimination, to engage with the legislation in the context of the daily situations where it might apply. For example, Kaplansky (JLC) urged:

... there is a definite need to induce those whose rights are at stake to take advantage of the provisions under the law. There is a tendency on the part of members of so-called minority groups to look with scepticism, nay even cynicism, upon all efforts to pen new opportunities. Then there is also the reluctance on the part of such people to be pioneers, to become only one representative of a minority group in a plant or establishment, where the majority is suspected of being prejudiced. ...

It is necessary for organizations concerned with this problem to encourage and support such individuals. Pioneers are needed to blaze new trails. We should, however, also try to devise ways and means to help not only pioneers, but also ordinary people to do likewise.<sup>252</sup>

The legislation and its enforcement process provided a tool to challenge expressly discriminatory conduct by employers, service providers and those in charge of public spaces and facilities. They could also be used to challenge conduct suspected to be discriminatory using a method for “testing” conduct by employers, service providers and those in charge of public spaces and facilities. The testing method was used when a

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<sup>251</sup> LAC, Kaplansky, Commentaries by Kalmen Kaplansky 1946-1984, R5491-5-7-E (formerly MG30-A53), Vol. 20, Notes on Reports of Activities for Improved Human Relations 1953 at 85-86. Although this statement was made with reference to the federal fair employment practices legislation, the social activists took the same approach to the Ontario legislation as well.

<sup>252</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 3, Articles and Speeches: Miscellaneous 1948-1958, 3-4, File #3 Part 1 of 2, Kalmen Kaplansky, “Operation of Fair Employment Practices Acts in Canada” (1955) at 8.

racialized or religious or ethnic minority was told, for example, that a job had been filled, that a service was not available or that access to a public facility was not available. Fair practices advocates would test these denials by having a White or Christian or Canadian individual apply for the job or request the service or try to enjoy the public space or facility. If the White or Christian or Canadian person's application or request was accepted, this was considered some evidence that the previous denial was discriminatory. Fair practices advocates had used the testing method during the campaigns for fair practices legislation to garner support for their campaigns by gathering evidence of discriminatory conduct.<sup>253</sup> Once the legislation was passed, they continued to employ testing to look for evidence of discrimination, but now with a new tool with which to fight back when they suspected discriminatory conduct. The same three organizations which had led the campaigns for fair practices legislation also led the advocacy around enforcement issues, although the labour organizations may have been slightly more active on these issues.

## **1 Aspiration Meets Practice in State Enforcement of Fair Practices Legislation**

At the same time as the Ontario campaigns for fair practices legislation and enforcement were in full gear, advocacy groups in the United States were beginning to express concerns about how their enforcement model was working. Once the Ontario

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<sup>253</sup> See Pierre Berton, "No Jews Need Apply", *MacLean's*, Nov. 1, 1948, where Pierre Berton reported on potential evidence of discrimination gathered using the testing method. Berton wrote a follow-up piece 12 years later, in which he claimed that the *Fair Employment Practices Act* had resulted in fewer job applicants between rejected over the phone based on a name that was identifiably Jewish (Weinberg) as compared to a name that was identifiably non-Jewish (Craig): Pierre Berton, "Jew and Gentile: An Experiment in Job Hunting", *Toronto Daily Star*, 11 August 1960.

legislation was in place, fair practices advocates in Ontario began to raise similar concerns. The record on enforcement of Ontario's fair practices statutes is not a lengthy one, given that they were operational for less than a decade before the *Human Rights Code* replaced them in 1962. Although the same three organizational players were actively involved in issues of enforcement, they appear to have worked more independently of one another and sometimes to have had different views about some enforcement issues.

#### The United States Experience with Commission Enforcement

In December 1948, a letter circulated by the American Jewish Congress's Commission on Law and Social Action opened with the following sharp criticism of the first three years of enforcement of the New York fair practices statute:

The New York State Committee Against Discrimination has been in existence since July 1, 1945, more than three years. Yet it has failed to issue a single complaint against a single employer, labor union or employment agency. It states that there has been no occasion to do so since all the complaints made to it have been either adjusted or dismissed for lack of merit. Except for one disturbing fact, this would be a happy state of affairs, unparalleled in the history of regulatory legislation. No one knows what cases have been settled, what cases have been dismissed, or upon what basis or grounds the action has been taken. In other words, the public must accept at full face value SCAD's claim that it has not yet encountered a stubborn employer who has resisted its efforts.

We suspect, from our own experience before SCAD, that there are other reasons for the refusal to issue a complaint. SCAD operates on the one premise that it must not antagonize the business community. Accordingly it appeases them in every way. It will take for settlement a mere promise to post notices and to behave in the future. It will not insist that a particular complainant be hired, even though SCAD has found that discrimination has been practiced against him, as long as a promise is effected from the employer that henceforth he will not discriminate.

Second, before SCAD is convinced of discrimination, it insists upon a degree of proof which is generally beyond the ability of the complainant to produce.

It is true that no other state FEPC—Massachusetts, Connecticut, or New Jersey—has issued a complaint but here again, without possessing the same information about their affairs as we do about SCAD, we suspect that they are merely following SCAD’s major strategic lines.<sup>254</sup>

The list of concerns with the commission-based enforcement model was long and grew quickly. The primary concerns were the following:

- Fewer complaints came forward than had been expected;
- The enforcement agency relied too much on individual complaints coming forward and did not exercise the jurisdiction it had to initiate its own investigations and more systemic investigations;
- There was too much delay in the process;<sup>255</sup>
- Relatively few cases were “substantiated” and resolved through conciliation;
- There was very little information available about the resolutions that were achieved during conciliation; and
- Very few cases were referred to a formal hearing.<sup>256</sup>

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<sup>254</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 1, File 51, 1948-1949, Letter dated December 16, 1948, circulated by the Commission on Law and Social Action at 1-2.

<sup>255</sup> The average delay was said to be about three months, a length of time which sounds veritably speedy in comparison with the delays that later became typical in Ontario and across Canada.

<sup>256</sup> Michael A. Bamberger and Nathan Lewin, “The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation”, [1961] 74 Harv L Rev 526; Morroe Berger, *Equality by Statute: The Revolution in Civil Rights*, Revised Edition (New York: Doubleday, 1967) at 175-214; Duane Lockard, *Toward Equal Opportunity: A Study of State and Local Antidiscrimination Laws* (New York: The MacMillan Co., 1968) at 73-101 for fair employment practices legislation (enforcement of fair housing practices legislation and fair public accommodation practices legislation are discussed in separate chapters); Herbert Hill, “Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations” (1964-65) 14 Buff L Rev 22; and Leon H. Mayhew, *Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination* (Cambridge, Mass.: Harvard University Press, 1968).

Fair practices advocates did not think that the surprisingly low number of complaints reflected a corresponding low incidence of discriminatory practices. On the contrary, they believed that there were a number of barriers to individuals coming forward with complaints. These barriers included lack of knowledge about the legislation and about the option for complaint, fear of repercussions for coming forward with a complaint, and lack of confidence in the enforcement process. Fair practices advocates also observed that private pressure on the state agency was required: “Action on the part of a Jewish agency is needed even where a state agency dealing with fair employment practices exists. Experience has shown that the private agency serves as a necessary stimulus for action.”<sup>257</sup> A 1951 Joint Memorandum of the Anti-Defamation League and the American Jewish Congress discussed the negative impact of weak enforcement and suggested that there may have been a brief period when at least some commissions were willing to be more forceful in enforcing the legislation:

It is noteworthy that several state agencies charged with enforcement of such laws have recently shown an increasing willingness to press cases through to public hearing, and to issue cease-and-desist orders requiring abandonment of practices of discrimination found to exist.

...

At first, all complaints filed with these agencies were disposed of by conciliation and mediation. Some of the settlements attained by this method might not have been the best possible, but the agencies seemed to feel it important not to exercise their powers of compulsion and publicity in the initial stages of their operations. This attitude may have encouraged recalcitrance in some respondents who apparently felt that the agencies would rather reach an amicable settlement than be compelled to hold public hearings and issue cease and desist orders. Such recalcitrance in turn, probably led the administrative

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<sup>257</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 4, Reel 3, 1947, Memo dated March 21, 1947 from Manfred Saalheimer to Saul Hayes reporting on the Plenary Session of the National Community Relations Advisory Council meeting in Atlantic City at 3. Saul Hayes was the Executive Director of the Canadian Jewish Congress.

agencies to realize that, in the long run, an anti-discrimination law can be effective only if the enforcing agency shows a willingness to use in appropriate cases all of the enforcement powers spelled out in the law.

A second effect of a willingness on the part of a state agency to compromise complaints is to weaken the confidence of precisely those groups who most need the safeguards created by the laws...

The increased willingness of the administrative agencies to use their ultimate weapons, public hearings and cease and desist orders, is a major advance in the enforcement of state laws against discrimination. The state agencies enforcing such laws have apparently become aware of the value of open hearings in appropriate cases as an educational measure. Few newspaper readers find the summaries of commission reports interesting reading. On the other hand, a press report of a public hearing, with its drama of questioning and cross-examination, involving as it frequently must, respondents who are known in the local community, makes interesting reading matter and serves to inform the public of the existence and operations of the law and the state agency enforcing it. Hearings also serve to encourage persons feeling themselves discriminated against in violation of the law to invoke the provisions of the law.<sup>258</sup>

However, as will be discussed, if there was any shift to greater use of formal enforcement procedures, it seems to have been short-lived.

### The Ontario Experience With Commission Enforcement

Ontario's fair practices advocates had similar experiences and concerns with the commission enforcement to those raised by their counterparts in the United States. They were concerned with the low number of complaints that came forward, with the investigation and conciliation process, and with the low number of complaints referred to adjudication.

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<sup>258</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 5, 1952, File 9, Fair Employment Practices Correspondence, Joint Memorandum of the American Jewish Committee and the Anti-Defamation League of B'nai B'rith dated September 17, 1951 at 1, 2, 5-6.



In relation to the lower-than-expected number of complaints, Ontario fair practices advocates echoed their American colleagues in rejecting the conclusion that a small number of complaints reflected a low incidence of discrimination. They similarly preferred to explain the low number of complaints by pointing to factors such as lack of knowledge about the right to bring a complaint and reluctance on the part of individuals to bring complaints.<sup>259</sup> The fair practices advocates argued that the government had a responsibility to educate the public about the new legislation, and they argued that there should be less reliance on individual complaints by providing for complaints by third parties and by enabling the state agency to initiate its own investigations.

The question of public education was a major issue in the advocacy for fair practices enforcement. The minutes of the August 1946 meeting of the JPRC Legal Committee record the view that “Educational work is not necessarily tied up with the Act, though it has been incorporated in the New York and Massachusetts legislation.”<sup>260</sup> There is evidence that labour and CCF activists, at least, believed that Ontario’s legislation should have included provisions requiring education about the new law:

During debate on the bill in the legislature, CCF members expressed grave doubt that the proposed law would prove effective without the establishment of a full-time Fair Employment Practices Commission. They pointed out that bills presented by the opposition had been defeated by the argument that “discrimination could be only eliminated by education”. Now the government was completely neglecting the need for education.<sup>261</sup>

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<sup>259</sup> LAC, Kaplansky, Commentaries 1946-1984, volume 20, Notes on Reports for March 1952 at 7.

<sup>260</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Minutes of the Meeting of the Legal Committee, Economic and Social Research Division, held on August 6, 1946 at 2.

<sup>261</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 3, Articles and Speeches Miscellaneous 3-3, “FEP Act Becomes Law in Ontario A Canadian Labor Reports News Release June 18 1951” at 1, 2.

When Ontario's fair practices statutes were enacted, they did not expressly require the government to conduct education campaigns about the new legislation, and the government did not independently undertake education campaigns for either statute. By contrast, the federal fair employment practices statute, passed in 1953, included a provision for undertaking educational programmes, and the federal government did carry out educational programs that included written materials and an eight-part radio series.<sup>262</sup> Labour fair practices activists believed that the Ontario government had a similar obligation to provide public education, even if this obligation was not specifically required in the legislation, and pointed to the federal model as a good example to follow:

The provincial FEP and other anti-discrimination laws lack any substantive provisions for educational work. Thus far the Provincial governments concerned have failed in their duty to make the provisions of these laws widely known to the public at large and to the potential and actual victims of discrimination;... There is no need to elaborate on this point - a law which is not popularized becomes a dead law. It is therefore the duty of the governments concerned to institute, without any further delay, a proper educational campaign which would make the intent of the legislation and the provisions of the Acts known to as many people as possible.<sup>263</sup>

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<sup>262</sup> CJC Nat. Charities Comm. Archives, CJC Org. Records, Series CA, Box 49, Fair Employment Practices May-Dec. 1953; FEP Jan.-Apr. 1953, *The Canada Fair Employment Practices Act* (Queen's Printer, 1953); LAC, Ont. Labour Comm. for Human Rights, 1945-1972, FEP Material, *Legislation for Fair Employment Practices in Action; Report of the Joint Public Relations Committee, Central Region, 1952-1954* at 2.

<sup>263</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 3, Articles and Speeches: Miscellaneous 1948-1958 3-1, File #1 Part 1 of 2, "A Survey of Group Relations in Canada", An address by Kalmen Kaplansky to be presented on May 1st, 1954 at the Third Annual Fair Employment Practices Conference of the Ontario Federation of Labor at 4-5. See also: "I think Premier Frost should take a lesson from the way the Federal Department of Labour handles its Canada FEP Act. Honest, able, and sincere officers, not only handle complaints under this Act, but the Department also has a widespread educational program, through radio programs, leaflets, booklets, display panels - with which they tell employers and trade unions under their jurisdiction - as well as the general public - what the Canada Fair Employment Practices Act is - and why it was passed." LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 3, Articles and Speeches: Miscellaneous 1948-1958 3-2, File #1 Part 2 of 2, Address by Sam Hughes, President, Ontario Federation of Labour, to Fourth Annual Fair Practices Education Conference of the O.F.L. in St. Catharines, Saturday, April 30<sup>th</sup> 1955 at 3.

The call for public education about the legislation also provided another opportunity for fair practices advocates to emphasize the complementary relationship between law and education, and the role of legislation as a tool for achieving compliance through education:

Out of this experience [anti-discrimination education], organized labour has learned the great value of education as a part of the legislative process as well. It has also learned the great value of legislation as part of the educational process. That is why organized labour has consistently urged governments to not only pass fair employment practices laws but also to provide for broad educational programs to parallel their administration.”<sup>264</sup>

Although lack of knowledge about the legislation may well have been a barrier to individual complaints, Ontario fair practices advocates - like those in the United States - believed that there were other barriers as well, in particular, fear of repercussions and difficulty in managing the process alone. They emphasized the role of advocacy organizations in supporting individuals to bring complaints forward and their position was confirmed by the commissions themselves. At a 1956 Canadian Conference of Commissions Against Discrimination, it was even suggested that it was more important in Canada than in the United States for private agencies to support fair practices complainants:

The role of the private agency in the field of FEP in Canada assumes greater importance than in the States because of the weaknesses in budget

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<sup>264</sup> LAC, Kaplansky, Commentaries 1946-1984, Vol. 20, Notes on Reports of Activities for Improved Human Relations 1953 at 86-87, quoting from Labour on Guard editorial from “What Labour is Doing About Discrimination” issue.

and staff of the public agencies. Some of the private agencies' functions are self-evident: (1) public support and public pressure for more effective FEP Departments; (2) maintaining close personal liaison with the government persons responsible for administering FEP laws; (3) publicizing fair practices laws and doing practical educational work, e.g. Conferences, reports to labour councils, etc.; (4) channeling complaints and advising complainants. The State Commissions mentioned that they had not received too high a proportion of complaints by referrals from private agencies. This may have been due, in part, to the agency settling the complaint themselves – but this was doubted. In Canada, perhaps the great majority of legitimate complaints reach the government through referral from private agencies.<sup>265</sup>

It is not necessary to try to decide whether or not private organizations had to play a greater role in Canada than in the United States. The relevant point is that the state enforcement process needed not only individuals coming forward with complaints but also private support for these individuals.

One study reported that 51% of the 311 complaints that were submitted under Ontario's fair employment and fair accommodation practices statutes in the period between 1951 and 1959 came as referrals, and that these referrals were mostly made by trade unions, the JLC, and the JPRC.<sup>266</sup> In a 1955 report, Frank Hall, Chair[man] of the Canadian Labour Congress's Human Rights Committee, claimed that labour organizations were responsible for processing and bringing forward 75%-90% of

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<sup>265</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 7 (1956 & 1957), 1956 File 5, Notes on Conference of Commissions Against Discrimination held in Toronto June 4-6, 1956 at 2.

<sup>266</sup> The percentage of cases referred was not a constant figure but increased and decreased during this period as follows: in the period from 1951-1953, the government received 57 complaints of which 81% (54) were referred; in the period from 1953-1955, the government received 133 complaints of which 24% (32) were referred; in the period from 1955-1957, the government received 51 complaints of which 76% (39) were referred; in the period from 1957-1959, the government received 60 complaints, of which 55% (33) were referred. See Sohn, *Human Rights in Ontario* at 146. I have included data up to 1959, although Sohn's data continues through until 1971.

complaints and stated that individuals needed assistance to ensure that their complaint was properly handled.<sup>267</sup>

The labour activists argued for enforcement by way of third-party complaints and state-initiated investigations, to supplement individual complaints. Both of these options reflected the view that there was a public interest in obtaining compliance through enforcement and a corresponding public responsibility to ensure that there were multiple ways for the discrimination to come to the enforcement agency's attention:

While it is essential to provide a procedure for the settlement of individual complaints, we question whether it is wise to restrict the operation of the administrative agency to this single avenue of approach. After all it is to be recognized that a violation of the law is not merely an offence against an individual but an offence against the people of Canada. It becomes therefore the duty of the administration to obtain compliance with the law whether or not the initiative has come from an aggrieved individual.<sup>268</sup>

There is some evidence that Prof. Jacob Finkelman did not support allowing third parties to bring complaints: "While I am not entirely happy about the limitation as it now exists, nevertheless I feel it is unwise under present conditions to open the door to certain groups who may exploit alleged cases of violation for improper purposes."<sup>269</sup> However, other fair practices advocates continued to argue for this change and when Ontario's *Fair*

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<sup>267</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Volume 14 - Correspondence File 14-22 Correspondence Frank Hall Chairman CLC Human Rights Committee 1956-1959, Report on developments in Fair Practices Field Canada Since 1955 at 1.

<sup>268</sup> LAC, Ontario Labour Committee for Human Rights, 1945-1972 fonds, R2870-0-0-E (formerly MG28-I173), FEP Act Federal, Association for Civil Liberties brief on proposed federal legislation at 2.

<sup>269</sup> Untitled document described as Professor Finkelman's views [on the proposed federal fair practices legislation] at 7, Canadian Jewish Congress, Ontario Region fonds, Fonds 17, Joint Community Relations Committee, 1953, Box 5, File 4A, Ontario Jewish Archives. On the other hand the JPRC Legal Committee had recommended including provision for third-party complaints in the proposed legislation: Minutes of the Meeting of the Legal Committee, Economic and Social Research Division held on August 6, 1946 at 1, Legal Committee Minutes July 1946 - November 1957, Canadian Jewish Congress, Ontario Region fonds, Fonds 17, Joint Community Relations Committee, Ontario Jewish Archives.

*Accommodations Practices Act* was passed, it authorized inquiries into “the complaint of any person that a contravention of this Act has taken place”,<sup>270</sup> which is to be distinguished from a complaint made by an individual alleging that they had been the subject of discriminatory conduct.

State-initiated investigations were also seen as having the advantage of approaching issues in a more systemic way.<sup>271</sup> For example, the historical record suggests that the Fair Employment Practices Branch achieved success in eliminating discriminatory questions from applications for employment and employment questionnaires, by taking a proactive and systemic approach to addressing this problem: they required employers to submit these documents for review, advised employers of any changes required, and could follow-up to ensure that the changes were in fact made:

From 16,000 to 18,000 letters had gone out to employers throughout Ontario asking them to submit their employment application forms to have the Department scrutinize them for their propriety under the new regulations. Mr. Fine said that 98% of the firms reached had replied. The interpretation of the regulations on application form wording had been very strongly applied. Photographs of applicants were among those things forbidden.<sup>272</sup>

The agency’s work on application forms was described by Ben Kayfetz (JPRC) as “probably the biggest job achieved by the FEP Act”.<sup>273</sup>

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<sup>270</sup> *FEPA*, s. 4(1).

<sup>271</sup> CJC Nat. Charities Comm. Archives, CJC Org. Records, Series CA, Box 49, File 452, Fair Employment Practice 1952, Letter dated November 26, 1952 from B.G. Kayfetz to E.Z. Palteil.

<sup>272</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 4, File: Minutes (JCRC Only) 1951 2, Minutes of Meeting of the JCRC held on November 27, 1951.

<sup>273</sup> CJC Nat. Charities Comm. Archives, CJC Org. Records, Series CA, Box 49, FEP Jan.-Apr. 1953 452, Letter dated January 19, 1953 from B.G. Kayfetz to Saul Hayes at 2.

Increasing the number of complaints was, however, only part of the strategy to improve enforcement. The labour activists also had concerns about how complaints were handled when they did come forward. They claimed that the state did not take its enforcement responsibilities seriously when complaints did come forward and that this sent a message that fair practices legislation did not need to be taken seriously:

While the labour movement accepted the introduction of the Fair Employment Practices Act as a step in the right direction, we are not satisfied with the Act in operation. Very little has been done along educational lines to acquaint the people of Ontario with the purposes of the legislation, and investigations under the Act have been half-hearted and slow. It seems to us that no effort is being made by the government either by education or law enforcement, to inform the people of Ontario as to the evils of discriminatory practices.<sup>274</sup>

The labour activists and ACL also had concerns both about the structure and the implementation of the enforcement process. Their structural concerns were that there was not a separate agency entrusted with fair practices enforcement, and that the Fair Employment Practices Branch of the Department of Labour, which was responsible for enforcing all of the fair practices statutes, was under-resourced. Early on, the JPRC Legal Committee had expressed the view that the expense of establishing a separate

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<sup>274</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 20, File: Fair Practices Conference Ontario Federation of Labour 1954, "A Statement of Legislative Proposals of the Ontario Federation of Labour, CCL., to the Premier and other Ministers of the Government of Ontario" at 5. And as Kaplansky (JLC) argued in 1954: "... even those who are familiar with the provisions of the acts do not consider them in the same light as other legislative and administrative enactments. The feeling still prevails that even though these acts are on the statute books, they do not have to be observed in the same manner as other laws. ... Primarily ... it is the duty of the Provincial Government to enforce to the letter the provisions of its own legislation, if these acts are not to become a mockery. Delay, procrastination, biased and inefficient investigations, tend to place these laws in disrepute. And it is only natural that if one branch of the law-making machinery breaks down, it undermines the entire fabric of laws in our society." LAC, JLC 1925-1978, Vol. 34, File 34-12, Address by Kalmen Kaplansky Address to the First Fair Practices Education Conference of the AFL-TLC, October 31, 1954 at 3, 4.

commission made this an unrealistic option, and suggested responsibility for enforcement could be given either to the Attorney General's office or to an existing agency, such as the Industry and Labor Board.<sup>275</sup> Although during their campaigns for the legislation the fair practices advocates requested a separate agency, there is some evidence that, after both fair practices statutes were in place, the JPRC may not have believed that a single and separate enforcement agency was necessary.<sup>276</sup> However, the labour and ACL activists were strongly of this view and repeatedly included this in their requests for improvements to the enforcement process.

On the issue of resources, the Fair Employment Practices Branch was staffed on a part-time basis; only the Director's position was full-time. Fair practices advocates argued that this level of resources did not provide the new branch with adequate staffing to function effectively, and that inadequate staffing levels contributed to delays in the process.

On the question of implementation, the fair practices advocates had concerns about delays in the enforcement process, about the quality of investigations conducted, and about the reluctance to refer complaints for adjudication.<sup>277</sup> There is little detail about the precise extent of the delays experienced, but it is reasonable to surmise that staffing levels would have had an impact on how quickly the process functioned.

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<sup>275</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Central Region Legal Committee Minutes Jul. 1946-Nov. 1957, Minutes of the Meeting of the Legal Committee, Economic and Social Research Division held August 6, 1946.

<sup>276</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, CJC Central Region Legal Committee Minutes, July 1946 - Nov. 1957, Minutes of the Special Legal Committee on Anti-Discrimination Laws Held on Sept. 28, 1955 at 2.

<sup>277</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Letter dated February 26, 1951 from The Association for Civil Liberties to Premier Frost.



Expressed concerns about the quality of investigations seem to have reflected a broad concern about the outcome of complaints in the conciliation process, even though the fair practices advocates do not appear to have specifically framed their concerns in relation to the outcomes of conciliations. In a 1961 study, Herbert Sohn reported that 156 complaints were filed under the *Fair Employment Practices Act*, of which 105 involved allegations that the employer asked questions that violated the statute, or used advertising or an application form that violated the statute. Of the remaining 51 complaints, Sohn provided information on the outcomes for 45 of the cases, as follows:

- four complaints were found to be valid;
- three complaints were found to be outside the protection of the statute;
- three complaints could not be interpreted, established or denied; and
- 35 complaints were found to be invalid.<sup>278</sup>

It appears that in the four cases where the complaints were found to be valid, a resolution was achieved by voluntary settlement. As with the United States data, there is no information about the substance of the complaints and no explanation for why over 75% of the complaints were found to be invalid. In the absence of such information, there is no way to assess whether more than four cases could or should have been found to be valid. Nevertheless, these complaint resolution data raise questions about whether the low rates of substantiated complaints were primarily due to lack of merit or whether, in some cases at least, the government agency was not able to gather sufficient evidence to establish a

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<sup>278</sup> Herbert A. Sohn, *Fair Employment Practices in Ontario: Knowledge of and Attitudes Toward the Fair Employment Practices Act Expressed by Employers Charged under the Act* (M.S.W. Thesis, School of Social Work, University of Toronto, 1961) at 69-77 [Sohn, *Fair Employment Practices*].

*prima facie* case of discrimination, or whether those dealing with the complaints lacked the requisite understanding or expertise to deal with them properly. In his retrospective reflections on this period, Kalmen Kaplansky (JLC) commented that the emphasis on conciliation had the pragmatic objective of seeking to minimize opposition to fair practices legislation, but was not easy in practice:

It is characteristic of our defensive and cautious attitude during these days that Wismer underlined the work [*sic*] "conciliation", totally ignoring the punitive aspects of the proposed legislation. This was our main selling point - that legislation would provide for investigation and conciliation, based on the notion that most offenders in this area were people of good will and that once their discriminatory actions were revealed, and brought to their attention and explained, they would cease being discriminatory and there would be no need for any punitive action. It was a good approach to minimize opposition to legislation, but experience proved that it wasn't that easy.<sup>279</sup>

On the issue of referrals to adjudication, there is no record of any fair employment practices or equal pay cases being referred to either of the two adjudication options, namely, civil hearing before a commission or quasi-criminal prosecution in court. The few cases that did find their way to adjudication were fair accommodation practices cases, and these were only referred as a result of pressure from fair practices activists. As Claude Jodin stated, for example:

While we have no quarrel with the conciliation processes used in the handling of the complaints, it seems to us that when decisive action has to be taken by the Department of Labor in approving court action, there seems to be very little willingness to go through with this necessary process on the part of the Department of Labor. Generally we have a feeling that the Department of Labor has to be forced in actuality by

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<sup>279</sup> LAC, Kaplansky, Commentaries 1946-1984 volume 20, Notes on Reports 1948 at 45.

public opinion to take the necessary action. We look forward for a much more sympathetic approach on the part of the Government to enforce its own legislation.<sup>280</sup>

Two infamous cases in 1955 highlighted this tension between rigorous enforcement and caving to prevailing community views. They involved two Dresden restaurant owners who openly refused to comply with the fair accommodation practices legislation after it was passed. At the commission hearing, the restaurant owners admitted that they had not complied with the law and that they had no intention of doing so. Alan Borovoy wrote that the government initially refused to make the commission's report public or to prosecute, and released the report only in response to public pressure. The government also agreed to prosecute only after more public pressure and controversy. The magistrate convicted the restaurant owners, but this conviction was overturned on appeal. In one of the appeal cases, the appeal judge held that there was no express intention to deny service because the complainant was not specifically told that she would not be served but was only left unserved. In the other case, the judge held that there was no denial of service because the server said they were "too busy" to provide service. The judge also held that the restaurant owner could not be held responsible for the actions of the servers and that there was not enough evidence to show that the conduct was because of race or color.<sup>281</sup>

One of the hotel owners was prosecuted again the following year, this time

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<sup>280</sup> LAC, JLC 1925-1978, Vol. 15, Correspondence, File 15-15, Address by Claude Jodin, Joint Labour Committee for Human Rights (1959) at 2-3.

<sup>281</sup> Borovoy, "Fair Accommodation" at 15-20. The judge who decided the first appeal was Grosch J., who happened also to be a member of the Beach O'Pines Protective Association which defended the restrictive covenant in *Noble v. Alley* – see Pearlston, "Restricted Country".

successfully.<sup>282</sup> However, in 1958, the government withdrew a prosecution against a Chatham hotel owner that was initiated after a waiter in the hotel restaurant had refused to serve three black customers on the grounds that the hotel had a policy against serving “Negroes”. The government’s stated reason for withdrawing the prosecutions was that it did not have evidence to establish that the hotel owner was responsible for the refusal to serve.<sup>283</sup>

The Ontario government’s approach to enforcing the fair employment and fair accommodation statutes was similarly experienced in relation to the equal pay legislation. Labour activists reported that they were disappointed with how equal pay legislation was enforced by the government and that most issues were being addressed under collective agreements:

Experience under this legislation has been unsatisfactory. Labour leaders who have processed the one or two complaints filed under the act in Ontario felt that the complainants did not receive redress and were inadequately protected. Most equal pay complaints are processed under equal pay provisions in collective bargaining agreements.

However it is felt that the laws have had beneficial effects in educating the employer and the public to the injustice of different scales of pay for women doing the same work as men.”<sup>284</sup>

Shirley Tillotson has written that no commissions were appointed on any of the 12 equal pay cases in which complaints were brought, and that the only cases which resulted in any improvements in women’s wages were cases in which the employer voluntarily

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<sup>282</sup> *Regina Ex. Rel. Nutland v. McKay* (1956), 5 D.L.R. (2d) 403 at 409 (Ont. Co. Ct.).

<sup>283</sup> For discussion of these cases see Borovoy, “Fair Accommodation” and MacDonald, “Race Relations” at 124-125.

<sup>284</sup> LAC, JLC 1925-1978, Volume 14 - Correspondence , File 14-22 Correspondence Frank Hall Chairman CLC Human Rights Committee 1956-1959, “Report on Developments in Fair Practices Field in Canada Since 1955” at 3.

agreed to the improvement. She also wrote that Louis Fine, who was appointed director of the Fair Employment Practices Branch in 1951, took a very narrow approach to interpreting the statute and displayed hostility to initiatives to enforce it.<sup>285</sup> Her overall conclusion was that the statute had some limited educational benefits and achieved some minimal improvements in women's wages, but that the potentially coercive enforcement methods were not available when employers or bureaucrats were hostile to women's claims.<sup>286</sup>

According to Morris Schumiachter, the Saskatchewan government was similarly reluctant to apply formal enforcement of the Saskatchewan *Bill of Rights, 1947*, under which quasi-criminal enforcement was the only adjudicative option. In a 1949 letter to Heinz Frank at the Canadian Jewish Congress, Shumiachter recorded that there had been no prosecutions, that discriminatory advertisements were dealt with by warnings, and that proving discrimination in employment would be almost impossible and reached the conclusion that there was little opportunity for coercive enforcement.<sup>287</sup>

Ontario labour activists argued for two changes to address their enforcement concerns. One request was that the government establish a separate agency, appropriately

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<sup>285</sup> Tillotson, "Human Rights as Prism" at 544-546.

<sup>286</sup> Tillotson, "Human Rights as Prism" at 557.

<sup>287</sup> "Thus, it is seen that the principal value of an Act of this sort arises from the educational value which it obviously has. It is impossible to legislate people into the Kingdom of Heaven, or to improve them materially simply by writing pious hopes or desirable principles into the statute book. What such legislation does accomplish, however, is that it serves notice upon all persons in the province to the effect that the vast majority of people in the province, through their Legislature, subscribe to certain very definite principles. Among these principles is one which regards the rights of all persons within the province to be equal, and which disapproves of the practice of discrimination against any minority group. The sanction of public opinion then is brought to bear upon those persons who would engage in practices connoting racial discrimination. Herein, lies one of the principal advantages of the statute." LAC, Kaplansky, Commentaries 1946-1984, Volume 20, K. Kaplansky Notes on Reports 1949 at 7, 9.

staffed in terms of numbers and expertise.<sup>288</sup> Their second request was that the government establish a Citizens' Advisory Committee to work with the agency. The role of the Citizens' Advisory Committee would be to lend community expertise to the government's anti-discrimination education and enforcement activities.<sup>289</sup> The call for a Citizens' Advisory Committee reflected the position that there was a subject-matter expertise in discrimination that was different from legal expertise and that was relevant to the implementation and enforcement of anti-discrimination legislation. A Citizens' Advisory Committee would also provide an opportunity for citizens to be directly involved in the work of the agency responsible for enforcing the fair practices legislation.

Establishing a separate fair practices enforcement agency, with appropriate staffing, might in principle reduce delays and improve the conciliation process. It was less likely, however, that a separate fair practices enforcement agency would change how the state approached the role of adjudication in the fair practices enforcement process.

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<sup>288</sup> For example: "It is high time that Premier Frost appointed a separate commission, a special branch of his government, to deal with and administer all the anti-discrimination legislation that Premier Frost is so proud of. The men on this commission should be men of high calibre, especially competent and experienced in work concerning prejudice and discrimination, and inter-group relations. Where such special Commissions have been appointed in several of the Northern States, many of them in existence for many years - there has been no hint of the kind of inefficiency and reluctance to act; reluctance to carry out its own anti-discrimination legislation - that this province is plagued with; and has been plagued with ever since the legislation was passed." LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 3, Articles and Speeches: Miscellaneous 1948-1958 3-4, File #3 Part 1 of 2, "The Conservative Government and the Dresden Issue" at 5.

<sup>289</sup> For example: "We expressed to the Minister our feeling that in this legislation, where so much emphasis is placed on education, persuasion and conciliation to secure compliance, a Citizens' Advisory Committee can serve a valuable function. The establishment of an advisory body would make available to his Department, on a regular basis, the experience of community, church, labour and employer organizations in dealing with problems of prejudice and discrimination. It would afford the interested non-governmental bodies an opportunity to meet with the Department to discuss such matters as the special problems of discrimination which might exist in certain occupational or geographic areas of employment: new and more effective methods of providing information on fair practices legislation to the public, and the assistance of voluntary agencies in furthering the elimination of discrimination." OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 8 (1957 & 1958), 1957 File 15: Fair Employment Practice Correspondence, "Talk by Frank Hall, Chairman, Standing Committee on Human Rights, Canadian Labour Congress" at 4-5.

The Ontario government's reluctance to employ the coercive power of law was consistent with its stated policy that the purpose of the legislation was to eliminate discrimination through persuasion, not prosecution:

The Minister of Labour has stated, when the Act was introduced, it was not considered as a means of prosecuting and obtaining convictions for breaches of it but designed to encourage the people of this province to eliminate discrimination because it is undesirable in human society.<sup>290</sup>

This policy was, of course, entirely consistent with the arguments about enforcement that the fair practices advocates made during their campaigns for the legislation. However, although the fair practices advocates may have argued – and even expected – that there would be little need for recourse to adjudication through commission hearings or prosecution, it is equally clear that they sought access to the coercive power of law for those situations where it was needed.

The fair practices enforcement model placed the state in the middle of disputes to which it was not directly a party. Referring cases to adjudication, whether to a commission hearing or to a prosecution, effectively required the state to align itself with the complainant. These facts, alone, may have made some government officials reluctant to engage the coercive power of law. However, there was another potential barrier to dealing with discrimination cases through adjudication. Direct discrimination, the conduct targeted by fair practices legislation, has an “intent” or mental component as well as a conduct component. Where a claim of direct discrimination can be established, the

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<sup>290</sup> LAC, JLC 1925-1978, Vol. 23, File 23-8, “Information on The Fair Accommodation Practices Act for O.F.L. Human Rights Conference November 23 & 24, 1957” prepared by J.F. Nutland, Officer at 2.

nature of the wrong is that people are treated in a negative way because of their race, religion or national origin. Therefore, establishing a claim of discrimination required evidence of both a respondent choosing to engage in differential treatment based on prohibited grounds of discrimination and the conduct that flowed from this intent.

Direct discrimination claims are relatively straightforward where a respondent admits to intentional differentiation or where there is publicly available evidence of intentionally differential treatment. Examples of publically available evidence included signs, advertisements, and written policies that explicitly contemplate or require differential treatment based on prohibited grounds of discrimination.<sup>291</sup> However, where intent to differentiate was not openly expressed and the respondent did not admit to the intent, it would have been very difficult, if not impossible, to prove direct discrimination. A 1949 article captured the fundamental challenge associated with proving individual claims of direct discrimination in the absence of clear evidence or an admission:

... discrimination may exist independently of malice or intention to discriminate.

Nevertheless, the essential element of discrimination in its legal context is the mental process of the alleged discriminator. An employer who has decided to hire a white rather than a Negro stenographer has made a choice adversely affecting the Negro. But the choice is in itself not discriminatory unless race is a consideration in the formulation of that choice. It is in identifying these mental processes in individual cases that legal proof of discrimination can be distinguished from its sociological counterpart. The sociologist, whose primary interest is group behavior, is not concerned with whether single actions within a total behavior pattern are themselves acts of discrimination. He looks primarily to the social effects of the general pattern to determine whether the pattern is discriminatory. In dealing with the unequal treatment of Negroes and

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<sup>291</sup> Subject to a potential defence that there is a reasonable and *bona fide* justification for the differential treatment.



whites in a particular region, community, or industry, the sociologist has a collection of single instances of unequal treatment from which he may detect race as the single element always accompanying the unequal treatment. Thus by an inductive process he may conclude that race, the common element in one group as well as the distinguishing element between the groups, is the cause of the unequal treatment. The lawyer, on the other hand, because he is, in many cases, forced to deal merely with a single instance of unequal treatment is deprived of other instances with which he can make a comparison. As a result he must look directly to the mental processes of the alleged discriminator in order to determine whether there has been discrimination.<sup>292</sup>

When fair practices advocates argued in the campaigns for legislation that discrimination would be “easy” to prove, their claims depended on the respondent admitting to differential treatment based on a prohibited ground of discrimination, or the availability of other evidence of differential treatment based on a prohibited ground of discrimination. As has been noted, the cases under the fair practices statutes involved individual complaints of direct discrimination. With these cases, if there was no publicly

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<sup>292</sup> “An American Legal Dilemma – Proof of Discrimination” (1949-1950) 17 U. Chi. L.Rev. at 109-110, published as a Note prepared by the Editorial Board, with no specific author identified. In his 1997 book, *From Direct Action to Affirmative Action: Fair Employment Law and Policy, 1933-1972* (Baton Rouge and London: Louisiana State University Press, 1997) at 119-120, Paul Moreno similarly captured this tension between individual discrimination claims, the group aspect of individual discrimination claims, and systemic approaches to understanding discrimination as follows:

“... the commission was created to protect individuals against arbitrary discrimination in employment, but often concerned itself with opening opportunities for minority groups in entire industries. This confusion was perhaps inherent in the problem of protecting individuals from suffering discrimination based on their membership in a racial group. ... Underneath these differences about individual or group focus, and the appropriate administrative machinery, lay the fundamental question of the nature of discrimination. The individual complaint procedure was based on the idea that discrimination consisted of discrete, identifiable instances of unequal treatment, while the pattern-centered approach implicitly regarded discrimination as systemic, unintentional, and impersonal.

The implications of these ambivalent approaches were profound, bringing into question the nature of discrimination. ... the civil rights groups suggested that discrimination was not an act by particular employers against individuals, but a group phenomenon, with blacks as a group needed protection... The commission likewise was confused on whether it should apply a legal standard to individual cases, or a sociological approach to groups.”

available evidence of intentional differentiation and if the respondent took the position that the conduct was not linked to a prohibited ground of discrimination, discrimination could be proved only if the adjudicator was prepared to decide that the respondent's explanation for their conduct was not a reasonable alternative to an inference or a presumption of intentional differentiation. The difficulty of proving discrimination was undoubtedly at least one factor that affected both the conciliation outcomes and decisions about taking unresolved cases to adjudication.

## **2 Fair Practices Advocates' and Citizens' Enforcement Role and Responsibilities**

The fair practices advocates believed that they, and all citizens, had a responsibility to ensure that the fair practices goals were fulfilled and that attention was brought to bear on situations where the goals were being contravened. Labour activists argued that they had a responsibility to step into the public education breach created by the government's failure to provide education about the legislation:

Lack of information about the Act is seen as one reason for the small number of formal complaints, according to a recent editorial in the *Toronto Star*. The Ontario Federation of Labor, in this year's brief to the Ontario government, asked that the Department of Labor undertake a program of public education along the lines followed by the New York State Commission Against Discrimination. In the meantime, it has been the policy of the Toronto Committee to carry on educational activities in the local unions, and to provide as much information about the FEP Act as is possible within the limitations of our resources. ...<sup>293</sup>

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<sup>293</sup> LAC, Kaplansky, Commentaries 1946-1984, Vol. 20, Reports on Activities for Improved Human Relations, 1952, Report for March at 7.

Labour activists also saw themselves, as well as their memberships, as having responsibilities to ensure that violations were noticed and that appropriate responsive measures were taken:

It is the duty of our national and local officers, committeemen and shop stewards to explain the provisions of these laws to the members at large and to be on the look-out continually for infractions of these laws and regulations. Only when there is a sufficient number of people constantly on the alert, ready to help in case of need, prepared to approach the proper authorities for the purpose of enforcing these laws, only then can we hope to translate these acts into living instruments for the improvement of the lot of our people. This is where education and social action have such an important part to play in eradicating intolerance and injustice.<sup>294</sup>

Labour activists held annual fair practices conferences and established or maintained existing committees to continue anti-discrimination education and advocacy.<sup>295</sup> They argued that fair practices statutes “belonged” primarily to the people for whose benefit they were enacted. They urged racial and religious minority workers to understand that fair practices provisions were their rights, and they emphasized that workers needed to assert these rights in order for them to be effective:

Complete protection is not yet available, but Canada has gone a long way towards establishing the basic rights of workers to fair employment practices. These are your rights; the laws were passed for *your* protection

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<sup>294</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, Vol. 3, Articles and Speeches: Miscellaneous 1948-1958 3-1, File #1 Part 1 of 2, “A Survey of Group Relations in Canada”, An address by Kalmen Kaplansky, to be presented on May 1st, 1954 at the Third Annual Fair Employment Practices Conference of the Ontario Federation of Labor at 5-6.

<sup>295</sup> LAC, Kaplansky, Commentaries 1946-1984, Vol. 20, Notes on Reports 1952, Report for April at 1-2, referencing the First Ontario Federation of Labour Conference in 1952.

– it is up to you to safeguard these rights and keep them from falling into disuse.<sup>296</sup>

In a 1952 address to the Ontario Federation of Labor Convention, Eamon Park, who was at that time the Legislation Representative for the United Steelworkers of America and co-chair of the Toronto Joint Labour Committee to Combat Racial Intolerance, described unions as having a responsibility to work directly with their memberships as well as to assist with seeking enforcement of the new legislation.<sup>297</sup>

The JPRC also saw itself and citizens at large as having responsibilities relating to enforcement, but they focused more on responsibilities relating to enforcement as such than responsibilities for education. Ben Kayfetz described the JPRC and all citizens as having a responsibility to ensure that statutes, once enacted, were then implemented:

I feel we would be more than derelict in our duty if we sat back and were satisfied with the existence of these statutes on the books. We must as B'nai B'rith members, as Jews and as citizens consolidate the advances and gains that have been made and only through a more intense follow-up

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<sup>296</sup> LAC, Ont. Labour Comm. for Human Rights, 1945-1972, File 3-5, *These Are Your Rights Under Federal and Provincial Fair Employment Practices Legislation* (Montreal: Canadian Labour Reports, 1954) at 10.

<sup>297</sup> “The responsibility of the unions in working under the F.E.P. Act is a two-fold one. First comes the responsibility of dealing with complaints of discrimination at the local level. The actual process of making a complaint to the F.E.P. Branch is not very complicated; but it is essential that local union officers know how to go about it, and understand what is to be expected from the governmental agency in following up the complaint. ... A second part of our responsibility is that of educating ourselves in the direction of better understanding each other’s backgrounds and problems, so that petty frictions and hostilities within our own ranks will be reduced to a minimum. Honest differences of opinion are bound to exist in any democratic organization. But democratic organizations have no place for antagonism based on a person’s nationality, racial origin, or religious conviction. ...Lobbying and public relations activities can be carried out by a few people. Educational activities, on the other hand, demand the co-operation of everyone.” LAC, JLC 1925-1978, volume 13, File 13-19 – Correspondence, Address by Eamon Park to OFL 1952 Convention at 3, 4.

and personal implementation can we help make these statutes an effective instrument for better citizenship.<sup>298</sup>

Saul Hayes described the JPRC as focusing its resources on law rather than on education.<sup>299</sup> In 1956, Prof. Albert Rose, a professor of social work at the University of Toronto, expressed the view that there was an over-representation of lawyers on the JPRC, that the JPRC had become disconnected from the community, and that the work of the JPRC had become too focused on individual cases and did not give enough attention to bigger questions, including job discrimination.<sup>300</sup> In his response, Ben Kayfetz (JPRC) acknowledged that lawyers, including legal academics, constituted 40% of the JPRC's membership, but disagreed with that the JPRC's work had shifted away from important issues, including job discrimination, and maintained that lawyer members had not skewed the Committee's work.<sup>301</sup>

The high proportion of lawyers involved with the JPRC is interesting and noteworthy. It is not surprising that these lawyer members, and the MPP representatives, would have been interested in pursuing legislation and its enforcement as tools in the

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<sup>298</sup> B.G. Kayfetz Speech about the Enactment of the Fair Accommodation Practices Act at 6, Canadian Jewish Congress, Ontario Region fonds, Fonds 17, Joint Community Relations Committee, 1954 Box 6, 1954, File 24, Ontario Jewish Archives.

<sup>299</sup> "The J.P.R.C. does not spend much energy on general educational programmes in the firm conviction that it cannot amass the resources necessary. It therefore concentrates on law and social action as its highest priority for action. It goes all-out to eliminate discrimination. It is not as concerned with prejudice believing the resources necessary to eliminate prejudice are too elusive. It stimulates only such education programme as directly relates to its legal and legislative agenda." LAC, JLC 1925-1978, File 20-8 – Canadian Jewish Congress National Office 1955-56 Assembly Papers – Jewish Community Relations – General Assembly – Nov. 1956 Saul Hayes, "Jewish Community Relations in Canada", Item #4 at 5-6.

<sup>300</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 7 (1956 & 1957), File 11: Central Region J.P.R.C. Correspondence Letter from Albert Rose to Sydney Harris dated Nov. 15, 1956. Prof. Rose also expressed the view that there were not enough women on the JPRC.

<sup>301</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 7 (1956 & 1957), File 11: Central Region J.P.R.C. Correspondence Canadian Jewish Congress, Memo from B.G. Kayfetz to S.M. Harris dated Nov. 22, 1956.

struggle against discrimination. However, I see no evidence in the historical record that they were interested in law for its own sake. In my view, the JPRC lawyer members were early “cause lawyers”, interested in the potential of law as a tool for social action and for achieving concrete social improvement.

In 1958, the Ontario legislature passed *The Ontario Anti-Discrimination Commission Act, 1958*. This statute provided for the creation of a new agency, the Ontario Anti-Discrimination Commission, which would have authority to advise the Minister of Labour on the administration of the fair practices statutes, to make recommendations designed to improve this administration, and to develop and conduct an educational programme to give the public knowledge about the statutes and to promote the elimination of discriminatory practices.<sup>302</sup> The effect of this change was to create some government “educational” responsibilities, but also to separate these from the “enforcement responsibilities”, which remained with the FEPB of the Department of Labour.

In 1961, the government passed legislation to rename the new commission the Ontario Human Rights Commission, but without changing its role or responsibilities.<sup>303</sup> In his statement to the legislature introducing this proposed change, Premier Frost emphasized the more positive and universal connotation of the different nomenclature:

Arising out of our people’s basic belief in justice for men and women of all races and creeds, various laws have been enacted to give formal expression to our concept of human rights, to strengthen the fabric of our

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<sup>302</sup> SO 1958, c 70, s. 3.

<sup>303</sup> *The Ontario Anti-Discrimination Commission Amendment Act, 1960-61*, SO 1960-61, c 63, s 2.

freedom and guarantee of equality of opportunity for all, regardless of race or religion.

...

In order to strengthen the educational arm of our program, the Ontario Anti-Discrimination Commission will be re-named the Ontario Human Rights Commission. This will be in line with the positive approach to human rights which encompasses all of the people of Ontario.<sup>304</sup>

The fair practices statutes were absorbed into the Ontario *Human Rights Code* in 1962, as the first Canadian anti-discrimination human rights statute.

### **Conclusion to Chapter One**

Advocates for fair practices statutes sought this legislation as a tool to redefine particular social norms and to provide a legal process for addressing conduct that failed to comply with the redefined norms. In form, the fair practices statutes were also part of a developing new approach to civil law, where the state was responsible for administering and enforcing legal norms rather than the courts. The brief history of Ontario's fair practices raises several questions about the promise and practice of this new form of law as a tool in struggles against social inequalities.

Four questions stand out for me in relation to the subsequent evolution of human rights law and practice in Ontario. One question concerns the extent to which the fair practices statutes moved beyond the quasi-criminal roots of their predecessor anti-discrimination legislation. The second question concerns the equivocal role of the coercive power of law in the enforcement model and implementation. The third question

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<sup>304</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 26<sup>th</sup> Parl., 2<sup>nd</sup> Sess. No 40 (14 February 1961) at 1100.

concerns the tensions between public and private roles and responsibilities in using law to address social inequalities. The fourth and final question concerns the extent to which individual claims reflected the social experiences of discrimination and could provide meaningful redress for this discrimination.

On the question of the relationship between fair practices statutes and their anti-discrimination predecessors, Walter Tarnopolsky characterized Ontario's *Racial Discrimination Act* and other early anti-discrimination legislation as quasi-criminal statutes.<sup>305</sup> He argued that the quasi-criminal enforcement process was not very effective for a number of reasons: victims of discrimination could not initiate criminal actions; it was difficult to meet the evidentiary test of proving beyond a reasonable doubt that the prohibited conduct had occurred; judges were reluctant to convict; and the sanction was a fine, which did not provide a remedy for the victim of discrimination.<sup>306</sup> In Tarnopolsky's view, the fair practices legislation and the enforcement model they established were a significant improvement over the earlier anti-discrimination legislation because they were civil statutes which shifted the focus away from determining fault on the part of the alleged perpetrator and instead towards providing remedies for the victim.<sup>307</sup>

It is also interesting that in one of the few prosecutions under the *Fair Accommodation Practices Act*, the defendant challenged the constitutional validity of the legislation on the ground that it was *ultra vires* the provincial legislature because it was in

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<sup>305</sup> Tarnopolsky, "Iron Hand" at 568-569.

<sup>306</sup> See also the similar observations about court enforcement in the United States context in Will Maslow and Joseph B. Robison, "Civil Rights Legislation and The Right for Equality, 1862-1952" (1953) 20 Univ. Chicago L.R. 363 at 406

<sup>307</sup> Tarnopolsky, "Iron Hand" at 568-569.



fact criminal legislation. County Court Justice Lang dismissed the argument, and in the course of doing so expressed the view that the statute did not deal with the promotion of public morals or the prevention of public wrongs but, rather, that it “create[d] a new civil right”.<sup>308</sup>

When we assess the historical record, though, we may ask whether the fair practices statutes did, in fact, move that far away from their quasi-criminal roots. It is true that in legal form the primary enforcement process under the fair practices was a civil process. The ultimate goal of this process may also have been to provide a remedy for the “victim” of discrimination rather than to punish a “perpetrator” of discrimination. However, if the respondent to a complaint did not agree in conciliation to provide a remedy, a remedy could be provided only if there was a judgment that the respondent engaged in discrimination, and the focus of this judgment was the person whose conduct was under legal scrutiny. Moreover, since the form of discrimination targeted by the fair practices legislation was direct discrimination, an intentional element was necessary to establish a violation of the legal norm. Therefore, it was more complicated in the enforcement context to maintain the distinction between discriminatory conduct and prejudicial attitudes that had been central to the argument for using law against discrimination. This intentional component also bore some resemblance to the *mens rea* component of discrimination as a quasi-criminal offence.

On the question of the equivocal role of coercion in the fair practices enforcement process, this equivocation was embedded in the advocacy for legislation, in the

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<sup>308</sup> *Regina Ex. Rel. Nutland v. McKay* (1956), 5 DLR (2d) 403 at 409 (Ont. Co. Ct.).

enforcement model adopted, and in the implementation of the model. The underlying premise of the advocacy and the model was that access to coercive power was a necessary element of the scheme but an element that would have effect more in principle than in practice. The fair practices enforcement model also placed access to coercion exclusively in the hands of the state, putting the state in the middle of the dispute between complainant and respondent. The short history of fair practices implementation demonstrated significant reluctance on the part of the state to use the coercive power of legal process, raising questions about whether there really was access to coercive power and, if there was not, what might be the impact of lack of access to coercive power on the enforcement process as a whole.

On the question of the tensions between public and private roles and responsibilities in using law to address social inequalities, the campaigns for fair practices legislation and enforcement illustrate a rich approach to the public and social responsibility, including the state, community and social organizations. The role of the state in the enforcement processes was also important in relation to this question, as it was in relation to the question of access to the coercive power of law.

On the question of the relationship between individual claims and systemic discrimination, the historical record shows that this tension was recognized as soon as the legislation and enforcement model were in place, along with tension between the competing roles of legal process and other methods of working to address the systemic dimensions of discrimination.

Some of these tensions remained after the enactment of the statute creating the Ontario Human Rights Commission. In Chapter Two, I examine the interaction between social relations, legal norms, and legal process in the context of the effort to extend fair practices protection to include discrimination in rental housing, and the resulting litigation that challenged the legitimacy of both the promise and the practice of human rights legislation in Ontario. This second case study focuses in particular on questions relating to the on-going connection between human rights law and criminal law, and tensions between public and private dimensions of law and legal processes.

## Chapter Two

### **Social Relations, Legal Norms and Legal Process: Ontario's *Human Rights Code*, Human Rights Commission and *Bell v. McKay*, 1956-1972**

#### **Introduction to Chapter Two**

[T]he case analysis demonstrates the opportunity for choice in legal method: choice as to which precedents are relevant and which approach to statutory interpretation is preferred; and choice as to whether the ideas of the mainstream or those of the margins are appropriate. .... Thus, the opportunity for choice of outcome, positive as it appears, will not automatically lead to legal results which successfully challenge “vested interests” or the “status quo,” especially in relation to the law itself.<sup>309</sup>

Examining legal norms through the lens of social relations invites us to examine how the requirements of legal norms are designed to shape social relations, and to give effect to particular social values. Examining how legal processes respond to claims based on these legal norms invites us to consider how legal process can either support or undermine the effect of legal norms.

For example, fair accommodation practices legislation drew upon the common law obligation on innkeepers to serve all travelers, unless the innkeeper could demonstrate a justifiable reason for refusing service. This common law obligation developed in the context of a constituting “innkeeper” and traveler” as social roles, and constituted a corresponding social relation between “innkeeper” and “traveler”. The rationale for the legal obligation was grounded in the material realities of being a traveler

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<sup>309</sup> Mary Jane Mossman, “Feminism and Legal Method: The Difference it Makes” in Martha Albertson Fineman and Nancy Sweet Thomadsen, eds., *At the Boundaries of Law* (New York & London: Routledge, 1991) at 296-297.

in medieval England.<sup>310</sup> It did not develop from the particular circumstances of an individual innkeeper or an individual traveler. However, the fact that a legal obligation was grounded in the constitution of a social relation did not mean the obligation would always be accepted, or that its enforcement would be straightforward or uncomplicated. Once legal process became involved, there were a plethora of avenues to resist and challenge the requirements that the legal obligation sought to impose.<sup>311</sup> In his 1968 article, Henry Molot examined how individuals sought to avoid enforcement of the obligation by arguing that they were not innkeepers within the meaning of the legal definition of an innkeeper, or that the person making the claim was not a traveler within the meaning of the legal definition of a traveler.<sup>312</sup>

Ontario's fair practices legislation established new legal and social norms for important social relations – social relations between employers, employees, and trade unions; social relations between services providers and service recipients; and social relations between citizens and those responsible for access to public spaces and facilities. In Chapter One, we saw that the advocates for fair practices legislation experienced frustration and disappointment over how the legislation was implemented and enforced. In this chapter, I examine how the themes of criminal law and public responsibility

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<sup>310</sup> A. Alan Borovoy, "The Fair Accommodation Practices Act: The 'Dresden' Affair" (1956) 14 University of Toronto Fac. L. Rev. 13 at 13 [Borovoy, "Fair Accommodation"]. Borovoy was a third year law student at the University of Toronto when he wrote this article. See also Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press, 2000) at 105-106 [Ziff, *Unforeseen Legacies*].

<sup>311</sup> The *Christie v. York Corp.* case, and the litigation under Ontario's *Fair Accommodation Practices Act* discussed in Chapter One, provide similar examples of how legal process can be used to narrow legal obligations.

<sup>312</sup> "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation" (1968) 56 Can. Bar Rev. 612 at 614-621 [Molot, "Duty of Business"]. Nevertheless, in this article, Molot also argued that the common law could be developed to provide more extensive protection against the denial of public services than the protection offered by the then relatively new human rights legislation – see at 626ff.

played out in the struggle to extend fair practices legislation to rental housing and then to enforce this new protection. This history culminated in the *Bell v. McKay*<sup>313</sup> litigation which challenged both the substantive protection and the method by which it was enforced. In Part I of the chapter, I discuss the litigation which tested the scope of the *Fair Accommodation Practices Act* and the subsequent legislative history by which protection against discrimination in rental housing was incrementally added to the statute. In Part II, I examine how Ontario's first *Human Rights Code* incorporated the substantive protections and enforcement process from the fair practices statutes. In Part III, I review the three human rights tribunal decisions that interpreted and applied the Code's rental housing protection prior to the *Bell v. McKay* litigation. In Part IV, I examine the *Bell v. McKay* litigation, with a particular focus on analyzing the tribunal and court decisions in the case.<sup>314</sup> In Part V, I examine the legislative responses to the Supreme Court of Canada decision in *Bell v. McKay*. In the Conclusion to this chapter, I reflect on the ways in which questions about public responsibility, the Code's dual civil and criminal dimensions, and the vagaries of legal process, continued to shape the promise and practice of human rights law in Ontario.

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<sup>313</sup> *Bell v. Ontario (Human Rights Commission)*, [1971] SCR 756; rev'g *sub nom Regina v. Tarnopolsky, Ex parte Bell*, [1970] 2 OR 672 (CA); rev'g [1969] 2 OR 709 (HCJ) [*Bell v. McKay*].

<sup>314</sup> For discussion of the litigation from a more socio-historical perspective, see Frank Luce and Karen Schucher, "'The Right to Discriminate': Kenneth Bell versus Carl McKay and the Ontario Human Rights Commission" in Eric Tucker, Bruce Ziff and James Muir, eds., *Canadian Property Law Cases in Context* (Toronto: Osgoode Society for Canadian Legal History, 2012).

## **Part I: Achieving Legislative Protection for Rental Housing**

Ontario's *Fair Accommodation Practices Act* prohibited "... the denial of accommodation, services or facilities customarily available to the public" on the basis of the prohibited grounds of discrimination – race, religion and ethnic origin.

Discrimination in rental housing had been on the fair practices advocates' radar from the beginning and it was one of the social issues they targeted for fair practices legislation.

Once the *Fair Accommodation Practices Act* was passed, fair practices advocates hoped it would be available as a tool to challenge discrimination in rental housing. However, it was not clear whether the statutory language would be interpreted to apply to the social relation between landlord and tenant. In this part of the chapter, I review the commission decision which held that rental housing was not accommodation, services or facilities customarily available to the public and the subsequent efforts to change the legislation to achieve this protection.

### **1 *Forbes v. Shields*, 1956: Early Interpretation of Fair Accommodation and Rental Housing**

The only way for labour human rights activists to formally test whether they could use the *Fair Accommodation Practices Act* against rental housing discrimination was by way of a complaint under the statute. It is not clear on the historical record whether or not the case which answered this question was set up simply to test the landlord, or whether an individual seeking the tenancy subsequently obtained support

from the labour human rights activists. What is clear is that the individual affected did receive this support.

District Court Judge Douglas C. Thomas was appointed as a commission to hear and decide the complaint of Sidney Forbes against S.L. Shields.<sup>315</sup> In his July, 1956 decision, Justice Thomas described the complainant, Forbes, as a “Canadian citizen”, a “negro”, and an “educated man”, who held “a responsible position as a sales organizer.”<sup>316</sup> He was looking for new housing accommodation for himself, his wife, and their two children. Forbes responded to an advertisement in the *Toronto Daily Star* by making an application at Edi-Lou Apartments, which managed several large apartment buildings in Toronto, on Bathurst St., between Wilson and Sheppard. A representative acting on behalf of the owner showed Forbes a three and one-half room apartment that was for rent and available. Forbes returned two days to see the apartment with his wife and two children. Shortly afterwards, he completed an “application and agreement to lease” form and gave the owner’s representative a cheque for \$25. Forbes was to lease the apartment for one year beginning June 1, 1956 and was given colour charts to help him and his family choose re-decorating colours.

Later that week, Shields telephoned Forbes to advise him that the apartment was not available as it had been previously rented. Forbes went in person to speak again with the owner’s representative and to speak with Shields, both of who told him the apartment had already been rented. When Forbes offered to rent a more expensive apartment that

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<sup>315</sup> In the *Matter of the Fair Accommodation Practices Act, SO 1954, c 28, s.2 and an Alleged Discrimination Practiced by S.L. Shields against Sid Forbes*, unreported Report of Judge Douglas C. Thomas, Commissioner, dated July 16, 1956 [*Forbes v. Shields*].

<sup>316</sup> *Forbes v. Shields* at 1.



he was given to understand was available, he was told that this apartment too had already been rented. Forbes refused to accept the return of his cheque from Shields, who later sent it by mail to Forbes. During the investigation of Forbes' complaint under the *Fair Accommodation Practices Act*, Shields "denied any intention of discriminating ... and excused his actions on the ground that the Complainant has two children and that he ... was trying to 'cut down on' the number of children in the apartment building."<sup>317</sup>

The Commission hearing was held in July 1956, at which Forbes was supported by the Toronto Joint Labour Committee for Human Rights and represented by lawyer Andrew Brewin; lawyer G.R. Dryden represented the respondent. After reviewing the facts set out above, the Commissioner pointed out that it was "... significant to note the words 'children welcome' in the advertisement ...".<sup>318</sup> He wrote that he had "no hesitation ... in drawing from the facts, as I found them, the logical and irresistible inference that the Complainant was denied accommodation by the Respondent because of his colour."<sup>319</sup> In Justice Thomas' view, the evidence was "inconsistent with any other conclusion".<sup>320</sup> However, at the beginning of the hearing, counsel for the respondent had brought a motion objecting to the application of the statute to his client's apartment unit.

Many of the arguments Forbes' counsel relied on to oppose the respondent's motion echoed those advanced by the fair practices advocates in their campaigns for anti-discrimination legislation. As recorded in the decision, these arguments were:

- the purpose of the statute;

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<sup>317</sup> *Forbes v. Shields* at 2.

<sup>318</sup> *Forbes v. Shields* at 2.

<sup>319</sup> *Forbes v. Shields* at 2.

<sup>320</sup> *Forbes v. Shields* at 2.

- the *Universal Declaration of Human Rights*;
- the “broad outlook of emphasizing public policy rather than mere private morals and behaviour”;
- the legislation against restrictive covenants and other anti-discrimination legislation “illustrating the intention of the Legislature to furnish the weapons to strike at discrimination whenever and where it becomes apparent”; and
- “... when the owner of accommodation opens it to the public ... [it] is far removed from the case where the principle of privacy can keep out the operation of the Statute.”<sup>321</sup>

Justice Thomas rejected these arguments, granted the respondent’s motion, and dismissed Forbes’s complaint on the grounds that it was not covered by the legislation. His “duty” was to “find what the law is with respect to the facts of the instant case and not what it should be and to report accordingly”; his report did not “... concern itself with fundamental human rights and public policy.”<sup>322</sup> He summarized Forbes’s position as “... amount[ing] to the proposition that any owner who, for profit, opens up accommodation to the public comes under the Statute”<sup>323</sup> and then rejected it, stating: “I fail to see how the common type of apartment house, such as that owned by the respondent” could “possibly be considered” as open to the public or as a place to which the public is customarily admitted.<sup>324</sup> For Justice Thomas, apartment units and apartment buildings were the essence of privacy since “the whole scheme of operation of

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<sup>321</sup> *Forbes v. Shields* at 3.

<sup>322</sup> *Forbes v. Shields* at 3.

<sup>323</sup> *Forbes v. Shields* at 3.

<sup>324</sup> *Forbes v. Shields* at 3.

such places is designed to ensure maximum privacy to those persons who have their lodgings in them.”<sup>325</sup> He could not accept that an apartment building owner would “throw his buildings open to the public” simply because he “uses the medium of the press or places a sign on his lawn to advertise a vacancy”.<sup>326</sup> On the contrary, Justice Thomas endorsed the view that an apartment building owner “reserves the right to scrutinize a prospective tenant and to reject him if, for any reason (and there may be many reasons having nothing to do with race, creed or colour), he deems it advisable to do so.”<sup>327</sup>

For Justice Thomas, the “plain meaning” of the statutory language required the conclusion that the legislation did not apply to the apartment unit, and he had not received any extrinsic aid that would have permitted him to reach any other conclusion.<sup>328</sup> An extrinsic aid to statutory interpretation is any information that goes beyond the text of the statute and can include legislative history, similar legislation from other jurisdictions, international legal instruments, and jurisprudence.<sup>329</sup> Both Forbes and Shields presented extrinsic aids to support their arguments, but Justice Thomas did not rely on any of them. Instead, he relied on his own interpretation of the statutory language. Given his pronouncement that the “plain meaning” of the statute did not include Forbes’ complaint, it seems unlikely that any extrinsic aid would have persuaded him to reach a different conclusion.<sup>330</sup>

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<sup>325</sup> *Forbes v. Shields* at 3.

<sup>326</sup> *Forbes v. Shields* at 3.

<sup>327</sup> *Forbes v. Shields* at 4. (emphasis added)

<sup>328</sup> *Forbes v. Shields* at 4.

<sup>329</sup> Ruth Sullivan, *Statutory Interpretation* 2d (Toronto: Irwin Law, 2007) at 279-280.

<sup>330</sup> *Forbes v. Shields* at 4.

The fundamental difference between Justice Thomas's analysis and the labour human rights activists' analysis lay in how they characterized the space to which access was sought. Justice Thomas focused on apartment units as spaces that were already occupied by tenants, even though Forbes was not seeking access to a rented unit where people lived; he was seeking access to an empty unit that was available for rent. The labour human rights advocates argued that there should be public access to vacant units available for rent in the sense that all members of the public should be prospective tenants and, in particular, that it should be illegal to deny racialized and religious minorities access to these vacancies.

Looked at another way, the effect of Justice Thomas's analysis was to treat the entire apartment building and all its rental units as the landlord's home, so that the landlord should be able to have absolute control over the persons with whom the landlord "shared" their home. This approach disregarded two social realities. First, landlords who owned apartment buildings typically did not live in these buildings. Second, tenants were not guests of the landlord, but persons with whom the landlord entered into a commercial social relation, similar to the commercial social relations between a grocery store owner and their customers, a movie theatre owner and their customers, and a restaurant owner and their customers, for example. The social relation between landlord and tenant may have been more on-going than these other commercial social relations, but it was a commercial social relation nonetheless. The landlord ran a business of providing places to live in exchange of payment for rent. Justice Thomas's analysis completely ignored this key factor, in favour of supporting a position that a landlord should be free to pick

and choose tenants on whatever basis they wished, including rejecting tenants from racial and religious minority groups.

Justice Thomas's decision in *Forbes v. Shields* sparked a campaign to extend the reach of fair practices legislation to include protection against discrimination in rental housing. Legislative protection came incrementally, through a succession of four amendments over a period of six years, beginning in 1961 and ending in 1967.

## **2 Legislative Amendment to the *Fair Practices Accommodation Act***

To support their campaigns for legislative protection against discrimination in rental housing, the Toronto Labour Committee for Human Rights conducted several surveys of discrimination in housing, the overall results of which were that approximately 50% of Toronto landlords or their representatives admitted to having discriminatory rental policies and practices.<sup>331</sup> In written submissions urging the government to extend legislative protection to rental housing, a group of organizations, including the Toronto Labour Committee, emphasized both the need to ensure that all people were able to enjoy “the fruits of their employment”, such as housing, and the need to ensure unity and democracy by making sure that no people were “unwanted as a householder” because of their race, religion, or ethnicity.<sup>332</sup>

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<sup>331</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 11, 1960, File 6, *Submissions Re: Racial Discrimination in Multiple Housing Accommodations* (1959/1960) at Appendices I and II.

<sup>332</sup> OJA, Fonds 17, CJC, Ont. Region, JCRC, Box 11, 1960, File 6, *Submissions Re: Racial Discrimination in Multiple Housing Accommodations* (1959/1960) at 2. The Association for Civil Liberties was a signatory to the submission, but the Joint Public Relations Committee was not. The JPRC submitted its own brief on the need to include housing in fair practices legislation: Ontario Jewish Archives, Canadian Jewish Congress, Ontario Region fonds, Fonds 17, Joint Community Relations Committee, Box 8 (1957 &

The first provision prohibiting discrimination in rental housing was enacted in 1961 as an amendment to the *Fair Accommodation Practices Act*. This provision prohibited discrimination in the occupancy of “any dwelling unit in any building that contains more than six self-contained dwelling units”.<sup>333</sup> When Premier Leslie Frost introduced the amending Bill for first reading, he drew a connection between the proposed rental housing protection amendment and legislation previously enacted to prohibit restrictive covenants, both of which have a connection with where people are able to live and make their homes. Premier Frost also emphasized the need to achieve the right balance between people’s personal lives and public policy.<sup>334</sup> On the public policy side of the equation was the concern to address discrimination, and in his remarks Premier Frost also made reference to apartheid in South Africa as a “cause of deep concern” and noted that 1961 was the 100<sup>th</sup> anniversary of the beginning of the civil war in the United States.<sup>335</sup> On the people’s personal lives side of the equation, Premier Frost noted that the government should “not interfere with the rights of people to choose their own friends and to operate their own homes as they see fit.”<sup>336</sup> Thus, Premier Frost explained, the government chose to extend legislative protection to buildings with six dwelling units because such buildings were “public” rather than “private” accommodation:

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1958), 1958 File 5: CJC Central Region Joint Public Relations Comm. Anti Discrimination Mt., Submission to Premier of Ontario re Accommodation dated Jan. 21, 1958.

<sup>333</sup> *The Fair Accommodation Practices Amendment Act*, 1960-61, S.O. 1960-61, c. 28, s. 2a.

<sup>334</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 26<sup>th</sup> Parl., 2<sup>nd</sup> Sess. No 40 (14 February 1961) at 1100 [*Hansard*, 14 Feb. 1961].

<sup>335</sup> *Hansard*, 14 Feb. 1961 at 1099.

<sup>336</sup> *Hansard*, 14 Feb. 1961 at 1100.

Accordingly, we have confined this legislation, insofar as apartments are concerned, to the type of accommodation which can really be termed public accommodation. ... This involves no interference with the life of an individual in his own home which is, after all, his castle. It involves no interference with the little person who rents rooms or flats in his own home.

This legislation is directed, instead, toward the broad area of commerce and public accommodation. This general public policy is in line with the thinking which has been accepted so widely in the evolution of our human rights code to date.<sup>337</sup>

Interestingly, Premier Frost's underlying rationale aligned with the arguments made by the fair practices advocates, namely, that activities taking place in the marketplace were public activities and properly subject to regulation. During the second reading debate, he described the proposed amendment as extending "a prohibition of discrimination to apartment buildings which can be fairly described as being in the business of providing public accommodation".<sup>338</sup>

What became the main issue in the debate on this first provision and subsequent amendments to it, was whether or not all rental housing accommodation should be covered by anti-discrimination legislation regardless of the number of units being rented. The debate on the 1961 amendment focused on the government's decision to draw the line at six units rather than some lower number.<sup>339</sup> Progressive Conservative MPP Grossman urged his colleagues to reach unanimous agreement instead of muddying the

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<sup>337</sup> *Hansard*, 14 Feb. 1961 at 1100.

<sup>338</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 26<sup>th</sup> Parl., 2<sup>nd</sup> Sess., No. 55 (1 March 1961) at 1619 [*Hansard*, 1 March 1961].

<sup>339</sup> *Hansard*, 1 March 1961 at 1619-1628; Ontario, *Legislative Assembly, Official Report of Debates (Hansard)*, 26<sup>th</sup> Parl., 2<sup>nd</sup> Sess., No. 68 (15 March 1961) at 2157-2159.

waters by haggling over the minimum number of units required for legislative protection to apply:

This suggestion of 3, someone thinks it should be 4, someone thinks it should be 5, and someone thinks it should be two units – the danger is, of course, it is going to be thrown into the arena of politics, and the bill will be found unacceptable. And if the hon. member thinks I am wrong, let me be quote from the London *Free Press* on this legislation:

Prime Minister Frost has introduced legislation which may put Ontario in the forefront of North America in the matter of eliminating discrimination from public accommodation because of race, creed or colour. The proposed amendments to The Fair Accommodation Practices Act will prohibit such discrimination in rentals for apartment buildings of more than 6 units. The bill has been supported by all parties in the Legislature, despite the fact it might have been questioned on the ground that this comes close to an infringement on private rights.<sup>340</sup>

The CCF brought an unsuccessful motion to draw the line at two units rather than six and the amendment passed with the line drawn at more than six self-contained dwelling units.

### **3 *Human Rights Code* Protection Against Discrimination in Rental Housing**

When the *Human Rights Code* was enacted the following year, in 1962, it included the new protection against discrimination in rental housing but with slightly revised wording.<sup>341</sup> The line was still drawn at more than six units, but the protection applied to “any apartment” rather than to “any dwelling unit”. Three years later, in 1965, a further amendment was passed to expand the legislative protection by reducing the

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<sup>340</sup> *Hansard*, 15 March 1961 at 2158-2159.

<sup>341</sup> *The Ontario Human Rights Code, 1961-62*, SO 1961-62, c 93 [*Code* (1962)]. The discrimination in rental housing provisions were also modified to include protection against discrimination in terms and conditions of occupancy, in addition to protection against discrimination in providing occupancy: *Code*, s. 3(a),(b).



minimum number of units required from more than six, to more than three.<sup>342</sup> Again, the debate focused on the minimum number of units required to attract statutory protection.<sup>343</sup> This time the CCF sought to eliminate any minimum number units and draw the line simply at all “self-contained dwelling units”. Just as Premier Frost had referred to South African apartheid and the civil rights movement in the United States in 1961 when the first proposed rental housing protection was introduced, CCF leader MPP Donald MacDonald introduced his motion by referring to an 1852 anti-slavery speech given by George Brown and to the civil rights march from Selma to Montgomery, Alabama. In discussing his motion, MPP Donald MacDonald also proposed the following analysis of “self-contained”:

We concede that if a dwelling is not self-contained – in other words, if it is without separate entrance and without separate facilities – an owner has the right to decide, in effect, with whom he is going to share his home. That is his basic right. But if there is a separate entrance and if there are separate facilities, then he does not have the right to discriminate against those who may seek to rent that property because he does not happen to like their race or their colour or their creed.<sup>344</sup>

At that time, the CCF considered the defining features of a “self-contained” dwelling unit to be a “separate entrance” and “separate facilities”. (As will be discussed, this definition would have precluded the statute’s application to the rental unit at issue in *Bell v. McKay*, because it did not have a separate entrance.)

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<sup>342</sup> *The Ontario Human Rights Code Amendment Act, 1965*, S.O. 1965, c. 85, s. 2. This amendment also added protection against discrimination in commercial units.

<sup>343</sup> Ontario, *Legislative Assembly, Official Report of Debates (Hansard)*, 27<sup>th</sup> Parl., 3<sup>rd</sup> Sess., No. 53 (22 March 1965) at 1487-1491 (*Hansard*, 22 March 1965); Ontario, *Legislative Assembly, Official Report of Debates (Hansard)*, 27<sup>th</sup> Parl., 3<sup>rd</sup> Sess., No. 74 (13 April 1965) at 2207-2208.

<sup>344</sup> *Hansard*, 22 March 1965 at 1487.

Although the CCF did not succeed in 1965 to eliminate the three-apartment requirement, this requirement was subsequently removed by a further amendment in 1967. This amendment was introduced as following through on a commitment made in the Speech from the Throne and was passed without debate.<sup>345</sup> It was the final amendment to the rental housing discrimination provisions prior to the *Bell v. McKay* litigation. With this last amendment, the protection was extended to “any self-contained dwelling unit”, thus also returning to the phrase “dwelling unit” instead of the term “apartment”. As we will see, the meaning of “self-contained dwelling unit” was one of the two central questions at issue in the *Bell v. McKay* proceeding.

## **Part II: *Human Rights Code* Enforcement Tensions – Civil or Criminal, Conciliation or Adjudication, Public or Private**

Ontario’s first *Human Rights Code* (“*Human Rights Code*” or “Code”) was passed in 1962, bringing together in one statute the *Fair Employment Practices Act*, the *Fair Accommodation Practices Act*, the *Female Employees Fair Remuneration Act*, the *Ontario Anti-Discrimination Commission Amendment Act* and the *Ontario Human Rights Commission Act*. As with the fair practices legislation, Ontario was again the first jurisdiction to pass this type of human rights legislation. The Code largely re-enacted the substantive provisions of the fair practices legislation on the basis of the same prohibited grounds of discrimination.

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<sup>345</sup> *The Ontario Human Rights Code Amendment Act, 1967*, S.O. 1967, c. 66, s. 1. Ontario, *Legislative Assembly, Official Report of Debates (Hansard)*, 27<sup>th</sup> Parl., 5<sup>th</sup> Sess., No 58(10 April 1967) at 1907.

The enforcement process under the Code also retained the same general structure as the fair practices enforcement process. As under the fair practices statutes, the Code's enforcement model provided for a civil process and a quasi-criminal process, but with a clear preference for the civil process. Despite this clear preference for civil process signaled in the legislation and implemented in practice, there was on-going tension between the civil and criminal dimensions of Code liability and enforcement. Within the Code's civil process, there was provision for conciliation and adjudication but, as under the fair practices statutes, with a clear preference for conciliation over adjudication. The relationship between conciliation and adjudication also created tensions between the competing goals of these two enforcement processes. In this part of the chapter, I provide an overview of the Code enforcement process and then examine in more detail issues relating to the tension between civil and criminal dimensions and the tension between conciliation and adjudication processes.

## **1 Overview of Code Enforcement**

Under the Code, the Ontario Human Rights Commission ("OHRC" or "Commission") was responsible both for the complaint-processing functions that had previously been carried out by the Fair Employment Practices Branch of the Ministry of Labour and for the educational and policy functions it had received when it was

established in 1958 as the Anti-Discrimination Commission.<sup>346</sup> Dr. Daniel Hill was the OHRC's first director and a champion of the Code's enforcement model.

The civil enforcement process began with a written complaint filed with the Commission. In principle, the Commission had discretion to decide whether or not to investigate the complaint; but if it decided to investigate, the Code imposed a mandatory requirement that it "endeavour to effect a settlement", i.e. the Code required conciliation.<sup>347</sup> In practice, it appears that the OHRC investigated all cases, including cases that were not within its jurisdiction in the hope that they might be able to facilitate a resolution nonetheless.<sup>348</sup> Hill provided the following as examples of the types of settlements investigators tried to achieve during conciliation: to offer the complainant a rental unit where the complaint involved discrimination in rental housing; to offer the complainant immediate or forthcoming employment where the complaint involved discrimination in employment hiring; to provide the complainant with a haircut where the complaint involved denial of haircutting services; to offer the complainant accommodation in the current or following season where the complaint involved denial

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<sup>346</sup> The Commission operated under the auspices of the Ministry of Labour until 1981, when administration of the Code and the Commission were transferred to the Cabinet, but in practice operated under the Ministry of Citizenship and Culture. In 2006, when the entire enforcement process was changed, administration of the Code was moved to the Ministry of the Attorney General.

<sup>347</sup> *Code* (1962), s. 12(1).

<sup>348</sup> Daniel G. Hill and E. Marshall Pollock, "Human Rights Legislation in Ontario" (1967) 9 *Race & Class* 193 at 198-199 [Hill and Pollock, "Human Rights Legislation"]. Marshall Pollock was at that time a lawyer with the Department of the Attorney General. In this article, Hill and Pollock wrote that as of 1967 the Commission had dealt with approximately 2000 complaints outside its jurisdiction, either by investigating, settling or referring them to other agencies. Dan Hill had previously published a very similar version of this article, co-authored with T.M. Eberlee who at that time was the Assistant Deputy Minister of Labour: T.M. Eberlee and D.G. Hill, "The Ontario Human Rights Code" (1963-1964) 15 *UTLJ* 448 [Eberlee and Hill, "Human Rights Code"]. Hill also published a version of this paper in 1969, under his name only but noting that the section on compliance and enforcement was jointly written by himself and Marshall Pollock: Daniel G. Hill, "The Role of a Human Rights Commission: The Ontario Experience" (1969) 19 *UTLJ* 390.

of resort accommodation.<sup>349</sup> Hill also argued that the Commission's responsibilities for conciliation, enforcement and education were inter-related and could not be placed into self-contained silos. For example, he noted that in order for investigators to be effective, they had to be "prepared to discuss stereotypes, argue against irrational views regarding races and nationalities, and in general know something about the vast literature that is now developing in community and race relations."<sup>350</sup>

The board of inquiry took the place of the "commission" under the fair practices statute.<sup>351</sup> The decision to appoint a board of inquiry was made by the Minister of Labour on the recommendation of the Commission, where a settlement could not be reached. Both the Commission's recommendation and the Minister's decision were discretionary decisions. The board's role was to "investigate the matter" and make recommendations to the Commission if it found that the complaint was supported by the evidence. The Commission would then make recommendations to the Minister of Labour, who had the authority to "issue any order he deems necessary to carry the recommendations of the board into effect". Similarly to the commission under the fair practices legislation, the board was required to "give the parties full opportunity to present evidence and to make submissions", and had the same powers as a conciliation board under the *Labour Relations Act*. These powers were to summon witnesses and compel them to give evidence, to accept whatever evidence it deemed appropriate whether or not such evidence was admissible in a court of law, and to enter and inspect

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<sup>349</sup> Hill and Pollock, "Human Rights Legislation" at 197.

<sup>350</sup> Hill and Pollock, "Human Rights Legislation" at 199.

<sup>351</sup> HRC 1962, s. 13(1)-(7).

premises.<sup>352</sup> At a board of inquiry proceeding, the case for the complainant was presented by the Commission, who was represented by a Commission employee or by a lawyer retained and paid for by the Commission.

The persons appointed to act as board of inquiries were typically County Court judges and law professors. Judge D.C Thomas, who decided the Sidney Forbes case, was the first board of inquiry appointee under the Code. The Code did not provide any recourse for challenging a board of inquiry decision; however, it also did not cloak the board of inquiry with any privative clause language, which the fair practices legislation had provided for the commission.<sup>353</sup>

Finally, quasi-criminal prosecution was available as the other adjudicative option. Similarly to the fair practices statutes, it was an offence to contravene the Code and it was an offence to contravene an order made by the Minister. As under the fair practices statute, prosecution required the Minister's consent.

## **2 Conciliation: The Velvet Glove**

The features of the Code's enforcement model, both in structure and in implementation, were very similar to the model advocated by the fair practices advocates. Hill endorsed and advocated the primary role of the civil enforcement process, and of conciliation and settlement within that enforcement process, stating that the OHRC

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<sup>352</sup> *Labour Relations Act*, RSO 1960, s 202, s. 28.

<sup>353</sup> The fair practices statutes included the following protective language for commissions: "... and no order shall be made or process entered or proceeding taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise to question the appointment of the commission, or to review, prohibit or restrain any of its proceedings." *The Fair Employment Practices Act*, 1951, SO 1951, c 24, s. 71; *The Female Employees Fair Remuneration Act*, 1951, SO 1951, c 26, s. 4(1); *The Fair Accommodation Practices Act*, 1954, SO 1954, c 28, s. 5(1).

“place[d] a distinct priority on persuasion and conciliation”.<sup>354</sup> He used the metaphors of the “velvet glove” and the “iron fist” to characterize conciliation and adjudication, respectively.<sup>355</sup> The velvet glove of conciliation was a form of legal process because it was a component of the formal enforcement process. However, similarly to the fair practices advocates, Hill characterized conciliation as being more in the nature of an educational process and associated “law” more clearly with the Code’s adjudicative processes. In his description of conciliation, Hill maintained that its goal was to provide an opportunity for respondents to recognize, acknowledge and then change their prejudicial attitudes.

Hill described the interrelationship between conciliation and adjudication – or education and law – as a “judicious blending of the ‘velvet glove’ and ‘iron hand’”:

Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people. ... Human rights on this continent is a skillful blending of educational and legal techniques in the pursuit of social justice.<sup>356</sup>

Tarnopolsky added his own commentary on this passage, arguing that discrimination was practiced not only by “bigots” but also by “fine ‘upright, gentlemanly’ members of society” whose actions were driven “not so much out of hatred as out of discomfort or

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<sup>354</sup> Hill and Pollock, “Human Rights Legislation” at 203.

<sup>355</sup> Hill and Pollock, “Human Rights Legislation” at 196.

<sup>356</sup> Dr. Daniel Hill, “Human Relations”, June 1965, published by the Ontario Human Rights Commission at 4, as quoted in Tarnopolsky, “Iron Hand in Velvet Glove” at 572 [Hill, “Human Relations”].

inconvenience, or out of the fear of loss of business”.<sup>357</sup> The goal of conciliation was to provide people who engaged in discrimination with “an opportunity to re-assess their attitudes, and to reform themselves, after being given the opportunity of seeing how much more severe is the injury to the dignity and economic well-being of others, than their own loss of comfort or convenience.”<sup>358</sup> Tarnopolsky also borrowed Hill’s metaphors to coin the phrase the “the iron hand in the velvet glove”, substituting the word “hand” for “fist”.<sup>359</sup>

Hill wrote that “the Commission’s policy [was] to keep formal correspondence to a minimum and to place strong reliance upon personal contact and discussion.”<sup>360</sup> He emphasized that the investigation procedures were intended to be neither rigidly formal nor “loose and unprofessional”. He further emphasized that it was the Commission’s policy that the investigator “concentrates rather less on the issue of legal guilt than on the issue of effectuating a satisfactory settlement.”<sup>361</sup> On this point, Hill endorsed and quoted with approval the Ontario Federation of Labour’s (“OFL”) position that de-emphasizing a respondent’s liability was critical to the success of conciliation, as set out in a 1962 brief on “Standards for Proper Enforcement of the Ontario Human Rights Code” authored by Sid Blum:

[Accordingly, we submit that the conciliation process should concentrate less on the issue of legal guilt and more on the issue of a satisfactory

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<sup>357</sup> Tarnopolsky, “Iron Hand in Velvet Glove” at 572.

<sup>358</sup> Tarnopolsky, “Iron Hand in Velvet Glove” at 572.

<sup>359</sup> Walter S. Tarnopolsky, “The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada” (1968) 46 Can. Bar. Rev. 565 [Tarnopolsky, “Iron Hand in Velvet Glove”].

<sup>360</sup> Hill and Pollock, “Human Rights Legislation” at 195.

<sup>361</sup> Hill and Pollock, “Human Rights Legislation” at 195.



settlement.] If a respondent is asked whether he has committed a discriminatory act, almost invariably he will deny it. Once having denied it, his very self-respect will impel him to resist conciliation overtures. A settlement would be perceived as an admission of guilt.<sup>362</sup>

Blum also wrote that the conciliation officer should begin by “furnish[ing] respondent with face-saving devices.” Such devices could include telling the respondent that “discrimination occurs subconsciously without evil intent”, or that “these situations result more from accidental tradition than from malicious design”, or that “Someone in his organization has made an inadvertent mistake”, and that the Commission was consulting the respondent because they believe the respondent will “want to rectify the difficulty”.<sup>363</sup> This strategy would allow the respondent to “maintain and demonstrate his innocence without any loss of face to the officer or the Department.”<sup>364</sup>

This OFL brief would have been submitted when the OHRC was first beginning to implement its new, complaint-processing role under the Code. In the brief, Blum referred to an article by Albert Rose reporting on research about how employers viewed fair practices legislation.<sup>365</sup> According to Blum, Rose’s research supported the conclusion that prejudice had increased rather than decreased, and that employers were

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<sup>362</sup> S. Blum, Executive Director, Human Rights Committee, C.L.C., *Submission of the Committee on Human Rights of the Ontario Federation of Labor, C.L.C., to the Ontario Human Rights Commission: Standards for Proper Enforcement of the Ontario Human Rights Code*, June 13, 1962, quoted in Eberlee and Hill, “Human Rights Code” at 449-450.

<sup>363</sup> Library and Archives Canada, Jewish Labour Committee of Canada 1925-1978 fonds, R3286-0-8-E (formerly MG28-V75), File 26-25, “Submission of the Committee on Human Rights of the Ontario Federation of Labour, C.L.C. to the Ontario Human Rights Commission – ‘Standards for Proper Enforcement of the Ontario Human Rights Code’” June 13<sup>th</sup>, 1962 at 6-7 [LAC, JLC 1925-1978].

<sup>364</sup> LAC, JLC 1925-1978, File 26-25, “Submission of the Committee on Human Rights of the Ontario Federation of Labour, C.L.C. to the Ontario Human Rights Commission – ‘Standards for Proper Enforcement of the Ontario Human Rights Code’” June 13<sup>th</sup>, 1962 at 7.

<sup>365</sup> This appears to have been the same Prof. Albert Rose who several years earlier had raised concerns about the over-representation of lawyers on the JPRC – see Chapter One at 134.

finding ways to circumvent the legal requirements.<sup>366</sup> Blum continued by emphasizing the difficulties associated with being able to prove discrimination in the employment context, given the many variables involved in selecting an employee.

This conciliation-heavy framework placed the focus on providing remedies for discrimination and simultaneously reduced, or even eliminated, the focus on establishing legal responsibility. One question the framework did not answer was what factual basis a conciliation officer would need before they could present “face-saving” proposals to a respondent. Would it be sufficient for a conciliation officer to rely on a complainant’s perception that their race or religion or nationality was a factor in how they were treated? It may be reasonable to suggest that a complainant’s perception of how they were treated should have been sufficient to require a respondent to explain their conduct. However, requiring a respondent to explain their conduct would not have fit well within the conciliation process as it was described. Requiring a respondent to explain their conduct was more in the nature of determining whether to assign legal responsibility and, if legal responsibility was assigned, to determine what consequences should attach to that legal responsibility. The description of the conciliation process, on the other hand, suggested that the goal of conciliation was to bypass the legal responsibility step and go directly to consequences.

It is also reasonable to suggest that “face-saving” strategies would serve a “face-saving” purpose only if the respondent believed they could bear legal responsibility for

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<sup>366</sup> LAC, R2870-0-0-E, File 26-25, *Submission of OFL Committee on Human Rights to OHRC re enforcement “Submission of the Committee on Human Rights of the Ontario Federation of Labour, C.L.C. to the Ontario Human Rights Commission – ‘Standards for Proper Enforcement of the Ontario Human Rights Code’”* June 13<sup>th</sup>, 1962 at 3-4.

their conduct. If a respondent denied legal responsibility and was not open to discussing the matter, it is not clear how face-saving strategies would encourage them to be interested in discussing remedies. Some respondents might agree to discuss resolution for practical reasons, but that is not the same as agreeing to discuss and resolve in order to save face.

According to a 1977 study by Philip Stenning, approximately 44% of the complaints processed by the Commission between 1962 and 1970 were voluntarily resolved, approximately 40% were dismissed, and approximately 5% involved boards of inquiry.<sup>367</sup> As with the fair practices enforcement data, there is no information about the content of the settlements for the cases that settled. Stenning's comment was that "we may with good reason be somewhat surprised (and even perhaps a little suspicious) at the very high percentage of formal complaints which have been resolved in this way by the Commission."<sup>368</sup>

### **3 Board of Inquiry Adjudication: The Iron Fist or Hand**

Despite the efforts devoted to conciliation, not all complaints did reach a voluntarily resolution. When the Commission could not facilitate a voluntary resolution, it then had to decide whether or not to proceed to adjudication – the "iron" hand or fist of law – or to dismiss the complaint. Although in principle both the civil board of inquiry hearing and the quasi-criminal court prosecution could provide this "iron" hand or fist, it

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<sup>367</sup> *Conciliation to Judgement: The Role of Boards of Inquiry under the Ontario Human Rights Code, 1962-1974* (LL.M. Thesis, York University, 1977) at 108 [Stenning, *Conciliation to Judgement*]. Stenning's analysis did not account for the remaining 11% of complaints.

<sup>368</sup> Stenning, *Conciliation to Judgement* at 263-264.

is clear that when Hill and Tarnopolsky used the iron hand or iron fist metaphor, they were referring to the board of inquiry hearing.

The role of board of inquiry adjudication within this framework was not entirely clear. It is clear that both the civil and criminal adjudicative processes were considered the options of last resort, but there was no clear discussion of why that was the case. The OHRC could have implemented a policy and practice of preferring conciliation and devoting significant efforts to conciliation, but also making equal use of adjudication when best efforts at voluntary resolution did not succeed; however, that does not seem to be what they did.

Tarnopolsky emphasized that the option of access to the iron hand was a necessary component of the Code's enforcement model where conciliation could not produce a result:

However, if persuasion and conciliation fails, then the law must be upheld, and the law requires equality of access and equality of opportunity. This is the "iron hand in the velvet glove".<sup>369</sup>

Dan Hill, in his 1963-64 publication describing the OHRC enforcement process, wrote that the threat of a board of inquiry public hearing, which would generally be attended by the press, could be effective in persuading some otherwise unwilling respondents to settle; these would typically be respondents who wished to avoid negative public exposure because they operated businesses that relied on public goodwill.<sup>370</sup> However, this argument did not appear in subsequent versions of this article. As with the fair

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<sup>369</sup> Tarnopolsky, "Iron Hand in Velvet Glove" at 573.

<sup>370</sup> Eberlee and Hill, "Human Rights Code" at 450.

practices advocacy, the focus appears to have been on the fact that there was in practice little recourse to adjudication. In his 1967 article on the Code's enforcement process, Hill wrote that the OHRC used "sanctions only when the expressed wishes of the public [were] purposely being thwarted."<sup>371</sup> Hill did not explain what he meant by the "expressed wishes of the public" or what he meant by these express wishes "purposely being thwarted". However, the statement suggests that the primary purpose of adjudication was a public purpose, and thus connected with enforcing legal norms, rather than the more "private" purpose of resolving an individual complaint. The threat of recourse to a public airing of the complaint either in a board of inquiry hearing or a prosecution, together with the associated financial and other burdens of being required to participate in litigation, could have enhanced the persuasive impact of face-saving strategies for some respondents.

However, it is not clear how often the threat of public adjudication was used as an aid to resolution through conciliation. In his 1967 article explaining the Code's enforcement model, Hill wrote that only 15 of the approximately 1000 formal complaints investigated were referred to a board of inquiry, and that nine of these 15 cases were settled either before or during the board of inquiry hearing.<sup>372</sup> According to Stenning, as noted earlier, only 5% of the complaints processed by the Commission between 1962 and 1973 involved boards of inquiry.<sup>373</sup> As with the fair practices enforcement data, there is

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<sup>371</sup> Hill and Pollock, "Human Rights Legislation" at 203.

<sup>372</sup> Hill and Pollock, "Human Rights Legislation" at 195, 197. Philip Stenning wrote that complaints were settled without a hearing in approximately one-half of the cases where a board of inquiry was appointed.

<sup>373</sup> A board of inquiry was appointed in some, but not all, of the cases that "involved" a board of inquiry. Moreover, in some but not all of the cases where a board was appointed, the complaint proceeded to a formal hearing before and decision by the board of inquiry. According to Stenning, there were few board

no information about the reasons why cases were dismissed. And since we do not know why cases were dismissed, we cannot know whether any of the cases that were dismissed could instead have been referred to a board of inquiry or to prosecution. However, there is a clear implication that this was in fact the case, i.e. not every case that could have been referred to adjudication was referred to adjudication.

Difficulties associated with proving discrimination may also have been a factor in decisions about whether to refer a complaint to a board of inquiry. In a 1972 article, John Sopinka wrote that discrimination was “seldom susceptible of direct proof”.<sup>374</sup> The article was clearly focused on direct discrimination and highlighted two key challenges. First, in most cases discrimination could be established only by circumstantial evidence, which required the board of inquiry to make a choice between drawing or not drawing an inference that discrimination was involved:

A judge trying a divorce case once said that people do not commit adultery on a street corner. Neither do they openly admit discrimination by advising the prospective purchaser, tenant, employee, customer or guest that he is being refused because of race, creed, etc.

Discrimination must, therefore, be proved by circumstantial evidence, that is, it must be inferred from a series of circumstances from which the Board is asked to conclude that discrimination exists.<sup>375</sup>

Sopinka also wrote that proving direct discrimination often required successful cross-examination of the respondent:

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of inquiry appointments between 1962 and 1966, more appointments from 1967 through 1969, and then few again from 1970 on. Stenning also reported that approximately 1% of the cases that were decided by a board of inquiry resulted in ministerial orders, and approximately 1% of the complaints resulted in prosecutions. Stenning, *Conciliation to Judgement* at 248, 109.

<sup>374</sup> “Proving Discrimination in Boards of Inquiry Under Ontario Human Rights Code” (Feb. 1972) Vol. 12, No. 20 *Human Relations* 12 at 12 [Sopinka, “Proving Discrimination”].

<sup>375</sup> Sopinka, “Proving Discrimination” at 12.

Due to the availability of explanations, the task of the cross-examiner is to demonstrate that the explanation has been manufactured.<sup>376</sup>

Having to rely on evidence obtained through cross-examination is obviously not an ideal situation for a legal representative. Thus, it is possible that in at least some cases the Commission decided to not to refer to adjudication because the case would be difficult to prove.

#### **4 Civil and Criminal Dimensions**

In his 1968 “Iron Hand in the Velvet Glove” article, Tarnopolsky argued that discrimination should not be an offence under the Code. He wrote that making discrimination an offence undermined the primary goals of conciliation and voluntary, remedial resolutions:

... the primary object of human rights legislation is to obtain compliance through an agreed settlement. This requires negotiation and conciliation. This process is foreign to criminal law. When the act of discrimination is made a crime, the whole process of negotiation, conciliation, and settlement could be likened to compounding a criminal offence.<sup>377</sup>

Hill, on the other hand, argued that the fact of separate civil and quasi-criminal adjudicative options “doubly insulates the respondent from any bureaucratic evil by giving him the opportunity of making answer and defence to the allegations at two separate and distinct stages and before two separate and unrelated independent

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<sup>376</sup> Sopinka, “Proving Discrimination” at 13.

<sup>377</sup> Tarnopolsky, “Iron Hand in Velvet Glove” at 586.

tribunals.”<sup>378</sup> It is not clear that a respondent would have perceived as “opportunities” the prospect of defending themselves twice against allegations of discrimination. For reasons that I discuss further below, it is also not clear whether a respondent would, in fact, have had two opportunities to defend themselves.

Stenning argued that, although a “rigid distinction” between criminal law and civil law is “neither self-evident nor inevitable”, criminal courts tend to give priority to the more public purpose of enforcing legal norms and “control of deviance” whereas civil courts tend to give priority to the more private purpose of “the settlement of private disputes”.<sup>379</sup> Stenning did not explore why criminal law enforcement may be regarded as focusing more on public goals than on private concerns; one reason that may be suggested, however, is the central role of the state in the criminal enforcement process. Stenning also argued that the Commission’s enforcement role led to human rights complaints having both a public aspect, relating to upholding legal norms, and a private aspect, relating to the resolution of the individual situation:

Every complaint which comes before a Board of Inquiry under the Code is, to some extent, really two complaints, or at least one complaint with two distinguishable aspects – a public allegation of deviance, and a private dispute between the complainant and the respondent. This situation is one which inevitably arises from the intervention of any third party (in this case the Commission) in what was, ‘prior to such intervention’, a purely private dispute between two parties.<sup>380</sup>

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<sup>378</sup> Hill and Pollock, “Human Rights Legislation” at 198.

<sup>379</sup> Stenning, *Conciliation to Judgement* at 139, 140.

<sup>380</sup> Stenning, *Conciliation to Judgement* at 134.



By characterizing a human rights complaint's public dimension as a "public allegation of deviance", Stenning appears to have defined the anti-discrimination legal norm as a criminal legal norm. This characterization suggests that even though the Code's prohibition of discrimination was both civil and criminal, the criminal dimension subordinated or even eliminated the civil aspect of the prohibition.

The other public dimension of the Code's enforcement was the central role of the OHRC at both conciliation and the board of inquiry hearing. This public dimension also had a parallel with criminal law enforcement, in that the state was directly involved in the enforcement process. Tarnopolsky emphasized this public dimension when he wrote that community vindication was achieved through the fact that a public agency was responsible for facilitating the provision of remedies for individual complainants:

The consolidation of human rights legislation into a code to be administratively enforced by an independent commission insures community vindication of the person discriminated against. This is important to the community itself because of the broad educational value of equal treatment. However, it is important to the people who have suffered from discrimination, because without such active community involvement, the mere proclamation of human rights tends to soothe the conscience of the majority, without producing tangible changes.<sup>381</sup>

According to this view, even though conciliation was a private process which did not result in a public judgment about the legal norm in question, it had a public dimension because of the state's direct involvement in facilitating this process.

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<sup>381</sup> Tarnopolsky, "Iron Hand in Velvet Glove" at 572.

### **Part III: Board of Inquiry Decisions on “Self-Contained Dwelling Unit” and Civil Remedies for Discrimination**

By the time the complaint in *Bell v McKay* reached the Commission, three board of inquiry decisions had addressed the question of whether a rental unit in a house was a “self-contained dwelling unit” and thus covered by the Code. In all three decisions, the boards of inquiry had no difficulty, or no significant difficulty, concluding that race was the reason for the denial of accommodation. The significant issues were whether the units in question were covered by the Code and, if so, what consequential recommendations should be made to the Minister.

#### **1 “Self-Contained Dwelling Unit”**

In all three cases, the boards of inquiry concluded that the rental units were self-contained and therefore covered by the Code and two of the decisions provided detailed analyses for their conclusion on this issue.

The first case, *Mitchell v. O’Brien*, was decided by Dean Walter Tarnopolsky as the board of inquiry.<sup>382</sup> The complainant, Miss Mitchell, was a black woman. The rental unit was located on the third-floor of a house in Ottawa, and consisted of one bedroom, one kitchen, and a shared bathroom on the second floor. In addition to sharing a bathroom, the unit shared a common entrance, common stairs and common hallways. Miss Mitchell’s application for the tenancy was refused by the family living on the second floor, who appears to have been acting as an agent for the landlord; Miss Mitchell

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<sup>382</sup> *Mitchell v. O’Brien*, unreported decision of a Board of Inquiry appointed under the *Human Rights Code*, SO 1961-62, c 93, dated July 11, 1968 [*Mitchell v. O’Brien*].

had no interaction with the landlord and the complaint was brought against the landlord's "agents".

The reasons for decision record that the board and the parties took a view of the premises as part of the proceeding.<sup>383</sup> In describing what he observed, Dean Tarnopolsky noted that there were doors to the living room, dining room and kitchen on the ground-floor unit, although he did not say whether there were locks on these doors. The agents lived in the second-floor unit. Dean Tarnopolsky noted that the third-floor rental unit could be "lived in" without entering any of the agents' second-floor "living quarters". For Dean Tarnopolsky, "living" meant preparing food, sleeping, and eating. Using a common stairway and common bathroom were not part of living, in Dean Tarnopolsky's opinion, because:

Neither a hallway, nor a staircase, nor a bathroom can be described as living quarters in the sense of either eating, sleeping, or sitting and relaxing for the purposes of extended conversation or some form of diversion like a radio or television.<sup>384</sup>

After reviewing the legislative history, Dean Tarnopolsky concluded that first the inclusion and then the removal of the words "apartment" and "building" demonstrated a legislative intention to "expand its application so that now the provision applies to any building, including a private home."<sup>385</sup> On his reading of the legislative history, the government would have expressly excluded "private homes" if it had not intended s. 3 of the Code to apply to them.

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<sup>383</sup> *Mitchell v. O'Brien* at 11.

<sup>384</sup> *Mitchell v. O'Brien* at 12.

<sup>385</sup> *Mitchell v. O'Brien* at 10-11.

Dean Tarnopolsky then turned to interpret the key phrase - “self-contained” - to determine which types of private home rental accommodation the legislature intended to include and to exclude. He offered the following legal “test”, that in his view captured the legislative intention about which type of rental unit was to be excluded from the scope of the legislation: “accommodation consisting of a room or rooms wherein the tenants live as part of the landlord’s family”.<sup>386</sup> He then identified the following concrete situations as possible examples of units where the tenant would be living “as part of the landlord’s family”: where the tenant shared meals with the landlord; where the tenant had access to the landlord’s living room; where the tenant had one or more rooms “in the midst of rooms occupied by the landlord and his family.” On the other hand, in Tarnopolsky’s view, sharing an entrance hall, stairway or bathroom did not constitute living as part of the landlord’s family and, thus, did not remove a unit from the category of self-contained. He noted that there were common hallways and stairways in most apartment buildings, and that there were shared bathrooms in many older homes converted into multiple dwelling units, as well as in some older apartment buildings.

Legal “tests” are typically statements that rationalize a conclusion about legal liability and responsibility. Even where the test offers “factors” to consider, application of the “test” and the “factors” always (or almost always) involves some discretionary judgment on the part of the adjudicator. Those familiar with legal method and process can easily speculate about how Dean Tarnopolsky could have reached the opposite conclusion. On the question of the shared bathroom, Dean Tarnopolsky could have

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<sup>386</sup> *Mitchell v. O’Brien* at 11.

reasoned that use of a bathroom is very much a part of daily “living”; he might also have added that a bathroom is a quintessentially private space which loses that character if it has to be shared. On the question of common entrances, stairways and hallways, he could have reasoned that a person’s living quarters include how they obtain access to their living quarters. Dean Tarnopolsky may also have noted that this type of rental unit required people to live in much closer proximity to one another than did rental units in apartment buildings. Moreover, where a tenant lived in part of a house with no internal locks on the doors that tenant could, in principle, enter any of the other living quarter rooms in that building. Thus, Dean Tarnopolsky’s conclusion was as much a conclusion about whether or not a landlord or their agent should be able to exclude a racialized or religious minority tenant because they did not want to have to pass that tenant in the hallways and did not want to have to share a bathroom with that tenant. If Dean Tarnopolsky had believed that the landlord’s agents should not have had to pass a Black tenant in the hallways and share the bathroom with a Black tenant, his reasoning and conclusion would undoubtedly have been different.

In the second case, *Laws and Mundebe v. Domokos*, Prof. E.E. Palmer applied Tarnopolsky’s analysis to a similar factual context, where the rental unit consisted of two rooms on the third floor and a shared bathroom on the second floor.<sup>387</sup> His decision is more significant for how he addressed the remedies issue, which I discuss below.

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<sup>387</sup> *Laws and Mundebe v. Domokos*, unreported decision of a Board of Inquiry under the Human Rights Code, SO 1961-62, c 93, dated January 3, 1969 (E.E. Palmer) [*Laws and Mundebe v. Domokos*].

The third case, *Duncan v. Szoldatits*, was decided by Prof. Horace Krever as the board of inquiry.<sup>388</sup> The complainant, Miss Duncan, was denied rental accommodation in a second-floor flat consisting of one bedroom, one kitchen and a shared bathroom. The second-floor bathroom was shared by the second and third floor tenants. The landlord and her family lived on the first floor. They had access to the second-floor bathroom as well as to a bathroom in the basement. The tenants were permitted to use laundry facilities in the basement, and they had to pass through at least one room occupied by the landlord's family in order to reach the laundry room. This case was decided several months after the *Mitchell v. O'Brien* case. Prof. Krever referred to Tarnopolsky's decision with approval, but presented his own - albeit quite similar - analysis.

Similarly to Dean Tarnopolsky, Prof. Krever reviewed the legislative history and concluded that it showed "an unmistakable pattern in the evolution of legislative intention in human rights legislation".<sup>389</sup> Prof. Krever focused in particular on the removal of the word "apartments" and the removal of any minimum number of units. He proposed that the modifier "self-contained" be interpreted more in relation to the word "dwelling" than in relation to the word "unit", and articulated the following legal "test" for "self-contained dwelling unit": "whether the tenant will be intruding into the landlord's routine family life". A dwelling unit was self-contained if the tenant could "live a complete and normal life in the rented quarters", "liv[ing] unto himself" and not becoming a "part of the landlord's household".<sup>390</sup> By contrast, a unit was not self-contained where the tenant

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<sup>388</sup> *Duncan v. Szoldatits*, unreported decision of a board of inquiry under the Ontario Human Rights Code, SO 1961-62, c 93, dated November 1968 (Prof. H. Krever) [*Duncan v. Szoldatits*].

<sup>389</sup> *Duncan v. Szoldatits* at 11.

<sup>390</sup> *Duncan v. Szoldatits* at 11-12.

“share[d] the landlord’s hearth”.<sup>391</sup> Prof. Krever categorically rejected “the necessity of a private and exclusive access to and from the quarters” for a unit to be self-contained,<sup>392</sup> and similarly rejected the common entrance hall and shared bathroom as being inconsistent with the dwelling being self-contained. Although at one point Prof. Krever described the tenants’ access to the basement laundry room as requiring them to “invade the privacy” of the landlord, he did not view the tenants’ access to the basement laundry facilities as making “the tenant part of the landlord’s household.”<sup>393</sup>

## 2 Civil Remedies for Discrimination

The decisions also contain interesting analyses of the appropriate remedial consequences for discrimination in this factual context. Both Dean Tarnopolsky and Prof. Krever remarked that the question of remedial recommendations presented perhaps their greatest challenge.

In *Mitchell v. O’Brien*, Dean Tarnopolsky wrote: “... I find it very difficult to know what could be done in the circumstances to assuage the injury suffered by Miss Mitchell.”<sup>394</sup> He rejected prosecution as an option because it would not provide the complainant with compensation: “The threat of prosecution may be a deterrent, but it is [*sic*] ineffective salve to heal the wounds of one who has suffered discrimination.”<sup>395</sup>

Following the precedents for recommendations made in similar previous cases, he recommended that the respondent be required to write two letters: a letter to the

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<sup>391</sup> *Duncan v. Szoldatits* at 11.

<sup>392</sup> *Duncan v. Szoldatits* at 12-13.

<sup>393</sup> *Duncan v. Szoldatits* at 13.

<sup>394</sup> *Mitchell v. O’Brien* at 14.

<sup>395</sup> *Mitchell v. O’Brien* at 14.

complainant apologizing for the discrimination and inviting her to assume the next vacancy, and a letter to the OHRC undertaking to comply with the Code. However, he noted that it was difficult for the OHRC to monitor this type of undertaking and, at the suggestion of counsel for the OHRC, also made the following recommendations: that the respondent be required to notify the YMCA/YWCA, the Jamaican Canadian Association and the OHRC of future vacancies for at least one year; that the respondent be required to invite the YMCA/YWCA and the Jamaican Canadian Association to refer prospective tenants; and that the respondent be required to include the phrase “no colour or race bar” in future advertisements of a rental vacancy. Finally, he recommended that prosecution be considered in the future if the respondent refused to agree to these undertakings or if there was evidence of discrimination in the future.

In *Duncan v. Szoldatits*, Prof. Krever wrote, “I confess that this had been the hardest part of my task.”<sup>396</sup> Similarly to Dean Tarnopolsky, he rejected prosecution as “inadequate” for three reasons: prosecution provided “limited solace” to the complainant for the “grievous insult suffered”; there was no “educational value” to payment of a fine; and there would be problems of proof in a prosecution.<sup>397</sup> He then went on to describe how his thinking had shifted on the question of making recommendations for action against a respondent who did not accept that their conduct was discriminatory. Prof. Krever wrote that, prior to finalizing his decision in *Duncan v. Szoldatits*, he believed that the types of recommendation the Commission proposed (and that Dean Tarnopolsky accepted in *Mitchell v. O’Brien*) made sense only where the respondent accepted these

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<sup>396</sup> *Duncan v. Szoldatits* at 14.

<sup>397</sup> *Duncan v. Szoldatits* at 14.



recommendations voluntarily. According to this (former) view, it did not make sense to recommend actions requiring compliance with the Code where a respondent “refused to acknowledge that she had discriminated, or, if she had, claimed a right to do so.”<sup>398</sup> Similarly, he believed that “it was difficult to justify a prosecution for failing to obey a ministerial order” since that would require the respondent “in effect, to act hypocritically.”<sup>399</sup>

What turned the tide for Krever were the opportunity for further reflection and his review of the *Report of Governor Rockefeller’s Committee to Review New York Laws and Procedures in the Areas of Human Rights, dated March 27, 1968*, which had been submitted to him in another matter where he chaired the board of inquiry. He described this report as emphasizing that “enforcement machinery” was “the greatest deficiency in human rights legislation”, and he urged the OHRC to give “serious attention” to the report.<sup>400</sup> What he found most useful about the Report was its emphasis on providing redress to the victim as the “paramount concern”: “It is not, at this late date, sufficient merely to expose discrimination in the hope that such exposure will have an educational effect in diminishing the incidence of discrimination in our society.”<sup>401</sup> He further explained that by the time he came to write the decision in the *Duncan* case, he had come

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<sup>398</sup> *Duncan v. Szoldatits* at 15.

<sup>399</sup> *Duncan v. Szoldatits* at 15. An illustration of how Prof. Krever implemented his former view was evident in the case of *Walls v. Loughheed*, unreported decision of a board of inquiry under the *Human Rights Code*, SO 1961-62, c 93, dated August 21, 1968. After commenting on the ineffectiveness of both prosecution and compliance orders, Krever recommended that the respondent be ordered to pay the complainant \$153 to compensate for the travel expenses he incurred when he was looking for rental accommodation to relocate from Essex to Windsor.

<sup>400</sup> *Duncan v. Szoldatits* at 15.

<sup>401</sup> *Duncan v. Szoldatits* at 16.

to believe that the board of inquiry's recommendation powers "permit[ted] more by way of enforcement than I felt at the time of the hearing."

In the result, Prof. Krever made the following recommendations: (1) that the respondent be asked to write a letter of apology to the complainant; (2) that the respondent be asked to write to organizations and social services agencies interested in minority group rights to advise them that she no longer had a discriminatory rental policy; (3) that the respondent be required to offer the complainant the next available vacancy and, if the complainant was not able to take this vacancy, to provide the complainant with financial and non-financial assistance in finding accommodation the next time she was required to move; and (4) that the OHRC publicize the results of the board of inquiry proceeding as widely as possible and, in particular, to include publicity in German-language and Hungarian-language publications, since the respondent had stated both that she did not accept racialized tenants and that she wanted to rent only to tenants of Hungarian or German ethnic origin.<sup>402</sup>

Nevertheless, despite his change of heart about the scope of enforcement available under the Code, Prof. Krever was not prepared to recommend that the requirement to write letters (his first and second recommendations) be incorporated into a Ministerial order if the respondent refused to comply with them. He remained of the view that this type of recommendation made sense only with the respondent's voluntary compliance.

In *Laws and Mundebe v. Domoko*, Prof. Palmer granted the Commission's request for recommendations that the respondent send letters of apology to the complainants and

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<sup>402</sup> *Duncan v. Szoldatits* at 16-17.

cooperate with the Commission in any future investigations or consultations. He also granted the Commission's request for a recommendation that the respondent offer the first available vacancy to the complainants and inform the Commission when the vacancy became available. However, he did not grant the Commission's request for recommendations that the respondent send letters to community agencies informing them of future vacancies, or that the respondent be required to assist the complainants to find alternative accommodation, or that the respondent be required to pay the complainants' expenses in obtaining alternative accommodation.<sup>403</sup>

The *Bell v. McKay* complaint involved a similar rental unit to the ones involved in the three board of inquiry decisions, and one of the issues in the litigation was whether or not it was a "self-contained dwelling unit". Therefore, these three board of inquiry decisions were undoubtedly an important part of the context in which the Commission responded to the human rights complaint in the *Bell v. McKay* case.

#### **Part IV: The *Bell v. McKay* Litigation**

The *Bell v. McKay* litigation evolved from a human rights complaint involving a denial of accommodation in a rental unit located on the upper two stories of the landlord's home. The Code complaint did not settle and was referred to a board of inquiry which convened in April 1969. The board of inquiry proceeding hearing was aborted by a successful application to the High Court of Justice to prohibit the hearing on the grounds that the Code did not apply to the rental unit. The High Court of Justice

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<sup>403</sup> *Laws and Mundebe v. Domokos* at 3-4.

decision was reversed by the Court of Appeal for Ontario in November 1969, but then restored by the Supreme Court of Canada in 1971.

The litigation focused on two central issues. The first issue was whether the Code applied to the rental unit because it did not have a separate entrance. Underlying this issue was the broader question of the extent to which the law should regulate landlords' choice of tenants. The second issue was whether the landlord's liability should be decided, at least in the first instance, by the board of inquiry. Underlying this issue were broader questions about the Code's enforcement process, including the role of prosecution. The High Court of Justice decision focused on the refusal to proceed by way of prosecution and on the question of whether the unit was self-contained. The Court of Appeal decision focused almost exclusively on the OHRC's civil process, including the board of inquiry's role in determining whether the Code applied to Bell's rental unit. The Supreme Court of Canada decision placed most emphasis on the process question but also effectively ruled on the meaning of "self-contained dwelling unit".

## **1 OHRC Investigation and Conciliation**

The landlord, Kenneth Bell, worked at the Christie bakery plant.<sup>404</sup> In 1965, he and his wife bought a three-storey house where they had been living on the ground floor as tenants since 1957. Bell and his wife continued to live on the ground floor and rented the upper two floors as a flat. The rental flat consisted of a kitchen, a bathroom, and one bedroom on the second floor of the house, and a second bedroom on the third floor.

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<sup>404</sup> Unless otherwise indicated, the facts of the case described below are based on the accounts provided in the reported decisions.

Access to the rental unit was through the common, main door to the house and the ground floor hallway to the staircase. The landlord's three rooms on the ground floor opened to this common hallway and were not kept locked. Since purchasing the house, Bell and his wife had rented the flat three times, each time to a married couple. When the flat became vacant in December 1968, Bell placed an advertisement in the *Toronto Daily Star*.

Carl McKay, a young Black man from Jamaica, responded to the advertisement by telephone and was told the unit was available. When he appeared to see the unit the following day, together with another young Black man, they were told the unit had been rented. A woman named Nancy Sharp, described as McKay's girlfriend, went to see the unit later that same day and was told it was still available. McKay then filed a human rights complaint, claiming that he was denied rental accommodation on the basis of race, colour and national origin. Although Ms Sharp was not expressly described as white, it is presumed that she was white given the prohibited grounds of discrimination alleged in the complaint.

The record suggests that OHRC investigator Brett Mann met with McKay and Bell the day after the complaint was submitted. In a letter to Bell following up on this meeting, Mann wrote:

The Commission has conducted a thorough investigation into Mr. McKay's complaint and has found sufficient evidence supporting Mr. McKay's allegations of discrimination to warrant further involvement of the Commission in this matter. The commission views this matter most seriously and I would seek to meet with you at your earliest convenience to discuss possible terms of settlement and conciliation.

From that point forward, Bell was represented by legal counsel, William Cuttell. Cuttell responded to Mann's letter, advising that he would accept the invitation to participate in a discussion but he first wanted to know what Mann meant by "terms of settlement and conciliation", since he could not see "... that Mr. Bell has any liability in the matter which could be the subject of any settlement ...". Mann responded that the OHRC had conducted an investigation and "...produced sufficient evidence to justify Mr. McKay's complaint". He stated that the OHRC routinely attempted to resolve complaints "in an amicable manner" and considered more formal options "only as a last resort". He further advised that "typical terms of settlement" in a complaint like McKay's would include a written apology, an offer of the next available vacancy, and financial compensation for expenses resulting from the denial of rental accommodation. Cuttell appears not to have responded to this letter.

One month later the Assistant Director of the OHRC, Herbert Sohn, wrote to Cuttell to advise him that the matter would be submitted to the next regular meeting of the Commission if it was not resolved before then. Cuttell responded that he had discussed the matter with Bell and investigated the premises himself, and had advised Bell that he had not violated the Code and was not liable for any monetary payment. In Cuttell's view, the OHRC should proceed by way of prosecution if it wished to take the matter further. OHRC investigator Mann subsequently advised Bell and Cuttell that the OHRC had decided to request the appointment of a board of inquiry "to conduct a public hearing". Cuttell then wrote to the Minister of Labour, asking the Minister to refuse to appoint a board of inquiry and to authorize a prosecution instead. He argued that a board

of inquiry was not necessary because the OHRC had already conducted an investigation. He also argued that it was improper for the OHRC to suggest that a breach of the statute could “be cured” by payment of money, an apology or the promise of future accommodation.

The Minister of Labour, Dalton Bales, responded to Cuttell’s letter. He began by explaining that the Code was “... not punitively-oriented. It is basically educational and conciliatory, using prosecution proceedings as a final resort.”<sup>405</sup> He continued by saying that the board of inquiry was designed to protect the respondent and ensure the appropriateness of the commission’s investigation:

... a board of inquiry is another step in ensuring that the respondent is safeguarded and that the allegations of discrimination and the Commission’s investigatory procedures are carefully examined in a hard case.<sup>406</sup>

Therefore, Bales was declining Cuttell’s request to proceed to prosecution and was proceeding to appoint a board of inquiry. However, he invited Cuttell to put his request for prosecution to the board of inquiry chairperson for consideration.

Mann subsequently informed Bell and Cuttell that Dean Walter Tarnopolsky had been appointed as a board of inquiry and that the hearing had been scheduled. Cuttell responded by putting on the record his position that the board of inquiry did not have jurisdiction to proceed because the Code did not apply to Bell’s flat, because there was nothing further to investigate, and because prosecution was the proper enforcement route.

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<sup>405</sup> Library and Archives Canada, Supreme Court of Canada fonds, Case Files, R972-18-80E, S. Bell v. Ont. Human Rights Commission, 11748, Letter from Dalton Bales to William Cuttell, dated March 13, 1969 [LAC, SCC, Bell v. OHRC]. The Court of Appeal decision summarizes the Minister’s letter to Cuttell.

<sup>406</sup> LAC, SCC, Bell v. OHRC, Letter from Dalton Bales to William Cuttell, dated March 13, 1969.

He further wrote that “... any further investigation of the matter is nothing more nor less than persecution directed to achieving a settlement at the expense of my client, or persecution which violates fundamental principles of justice.” It appears that neither Bell nor Cuttell gave the OHRC any information about Bell’s position on the merits of the complaint during the investigation.

What harm would there have been for Bell in meeting with the OHRC to discuss the complaint? On the one hand, one can understand how Bell would have felt that a judgment had already been made against him and that there was no purpose in meeting with the OHRC if he wanted to dispute his liability. As the Ontario Court of Appeal subsequently commented, the OHRC’s correspondence contained “unfortunate expressions, as, for example, the declaration of guilt of Bell”.<sup>407</sup> The wording of the OHRC’s correspondence also raises questions about the extent to which the Commission’s practices were consistent with its approval of Sid Blum’s view, discussed above, that conciliation overtures would be undermined if a respondent believed that they were required to admit to a discriminatory act.

On the other hand, though, what did Bell stand to lose by participating in a conversation with the OHRC, especially if he were accompanied by legal counsel? It is possible that he could have persuaded the OHRC that race was not a factor in his decision not to rent the unit to McKay. It is possible that the OHRC might have agreed to a minimalist settlement, for example, a simple apology to McKay for any

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<sup>407</sup> *Bell v. McKay* OCA at 680. As noted earlier, the Court of Appeal’s use of the term “guilt” is one of many such linguistic uses that reflected the continuing association between criminal law and human rights liability, even by those who expressly rejected this association.



misunderstanding. It is difficult to see how Bell would have been further behind if had participated in a conciliation meeting. At worst, he would have been unable to persuade the OHRC that there was nothing to resolve, and the OHRC would have been left to decide whether or not to refer the complaint to a board of inquiry.

What Bell's refusal to participate in conciliate illustrates, though, is that the OHRC model depended on respondents' compliance; and that resort to the "iron fist" was thus controlled not only by the OHRC but also by respondents.

## **2 Board of Inquiry Proceeding: Dean Tarnopolsky**

The board of inquiry hearing into McKay's complaint proceeded as scheduled on Monday April 21, 1969, chaired by Dean Tarnopolsky.<sup>408</sup> According to Cuttell, by the time the hearing commenced there were about 20-30 spectators and at the end of the hearing three men identified themselves as newspaper reporters.<sup>409</sup> Cuttell refused to address the substance of the complaint at the board of inquiry hearing, because his position was that the Code did not apply to a rental unit of the type in Bell's house. His further position was that Dean Tarnopolsky was required to decline to proceed with the hearing because the board of inquiry did not have jurisdiction in the matter. As a remedy, Cuttell requested that the board of inquiry disqualify itself and ask the Minister to refer the case for prosecution.

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<sup>408</sup> The transcript of the board of inquiry proceeding is the source for the discussion that follows: LAC, SCC, Bell v. OHRC Transcript of Board of Inquiry Proceedings, April 21, 1968.

<sup>409</sup> LAC, SCC, Bell v. OHRC, Affidavit of Cuttell on the prohibition application. Cuttell stated that he did not inform anyone other than his client about the hearing.

Cuttell advanced six arguments to support his motion. His first argument was that Bell could not be guilty of an offence under the Code because the Code did not apply to his rental unit. His second argument was that Bell's denial of accommodation was not based on race, religion or ethnic origin but for some other reason. He would not say what this other reason was, reserving that information for the "proper time", but maintained that it was a ground on which Bell was entitled to act. His third argument was that the board of inquiry was an improper process because the board only had power to investigate and the OHRC had already completed an investigation into McKay's complaint.

Cuttell's fourth argument was that the board of inquiry's appointment was contrary to the right to be presumed innocent under s. 2 of the *Bill of Rights*, because the proceeding would definitely expose Bell to the "indignity of cross-examination" and would probably expose him to the "impertinence of having his home invaded". According to Cuttell, Bell could do nothing to protect himself against this violation because the board of inquiry did not have the power to convict or acquit him. Dean Tarnopolsky interrupted this submission to confirm that Cuttell was not arguing that the board of inquiry was a criminal proceeding. Cuttell agreed this was correct, which was also consistent with his position that Bell's conduct, if it was to be the subject of a legal process, should be determined by a criminal or quasi-criminal proceeding and not the board of inquiry civil process.

Cuttell's fifth argument was that it did not make sense to discuss possible settlement when there had not yet been a finding of "guilt". His sixth and last argument

was that it would be improper to agree to a settlement, which was a possible outcome of the board of inquiry proceeding, because a person cannot “buy their way out of prosecution”. From the contemporary vantage point, it is difficult to know how Cuttell understood the process and meaning of settlement. On the one hand, it is easy to understand how and why people connect settlement with liability - why would someone agree to a settlement requiring them to do something if they believed they had no legal liability for doing anything wrong. On the other hand, and while that perception undoubtedly remains, settlements can also be a more practical outcome for a respondent than proceeding through formal litigation, even if there is a strong likelihood that the litigation will be resolved in the respondent’s favour.<sup>410</sup>

Throughout the process, Cuttell appears to have been very anxious that he might inadvertently say or do something that would trigger jurisdiction for the board of inquiry. Even at the end of the hearing, after it was clear that Cuttell was likely going to bring a prohibition application but before he provided the paperwork for this application, there was an issue relating to formally identifying the complaint. Dean Tarnopolsky suggested that Cuttell’s record for the prohibition application would benefit from having McKay’s complaint formally identified. He offered to accept the complaint if Cuttell agreed to its validity; alternatively, he proposed that McKay be called as a witness simply for purposes of identifying the complaint. Cuttell appears to have felt that the chairperson was trying

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<sup>410</sup> Moreover, as Marc Galanter argues in “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law & Society Rev.* 1, “repeat players” often use settlement to manipulate the litigation process to their advantage by, for example, forcing settlements to avoid having a legal precedent set against them.

to trick him into doing something that he did not want to do and that might derail his prohibition application:

MR. CUTTELL: All right, as long as I am not put in any position as agreeing to anything that goes on with this Board, and then I am content, as long as I am not asked to consent to anything before this Board, I am content.

...  
THE CHAIRMAN: Well, I am prepared to call [the complainant] into the witness box, unless Mr. Cuttell waives doing so. ...

MR. CUTTELL: As I understand, sir, you are asking me to do something.

THE CHAIRMAN: Well, no, I am just suggesting that if you don't waive proof of the complaint itself, then I will call the complainant to swear him and - - -

MR. CUTTELL: All right, that is fair enough for him. I will waive.

Robin Scott, a lawyer with the Civil Division of the legal services branch of the Ontario Ministry of the Attorney General, represented McKay and the OHRC. Scott did not address Cuttell's arguments one-by one, but took a more global approach. He argued that many boards of inquiry had already been appointed and exercised jurisdiction to inquire into complaints involving similar housing arrangements. He objected to what he described as Cuttell's analogy to criminal or quasi-criminal proceedings, reflected in Cuttell's use of the term "guilty" to describe Bell's potential civil liability under the Code. Scott argued that board of inquiry proceedings were "administrative" in nature, their function being to "investigate facts upon which administrative action may later be taken by Commission or Minister". In his view, the statutory language established the

opportunity for the board of inquiry to receive evidence and submissions from both parties, and its role was to attend to the rights of both complainant and respondent.

Dean Tarnopolsky rejected Cuttell's arguments and proposed remedy. He emphasized that the board of inquiry process and the prosecution process were separate and independent options under the Code. He stated that the board of inquiry did not have jurisdiction to recommend prosecution in the absence of hearing evidence and submissions. He similarly declined to rule on Cuttell's argument that the Code did not apply to Bell's rental unit since he had not been provided with any evidentiary basis on which to decide this question. In relation to the board of inquiry's appointment, he relied on s. 13(1) of the Code which stated that once the Minister appointed a board of inquiry, "'... it shall be presumed conclusively that the board was appointed in accordance with this Act."<sup>411</sup> Finally, he was doubtful that the *Bill of Rights* could apply to a board of inquiry proceeding, both because it was federal legislation and because the rights that Cuttell sought to invoke appeared to apply only to criminal proceedings.

Dean Tarnopolsky also concluded that the board of inquiry hearing could proceed, even in the absence of one of the parties, except in the face of a prohibition application in the courts. Not surprisingly, Cuttell had come prepared with the documentation to commence a prohibition application. Thus, the board of inquiry process was adjourned *sine die*, pending the outcome of the prohibition application.

Although in my view Bell would not have exposed himself to any real harm by participating in a conciliation meeting with the OHRC, the question of what harm Bell

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<sup>411</sup> *Code* (1962), s. 13(1).

might have been exposed to had he not objected to the board of inquiry proceeding is more complicated. In light of Dean Tarnopolsky's decision in *Mitchell v. O'Brien*, it is reasonable to assume that he would have found Bell's rental unit to be self-contained and thus subject to the Code. It also seems likely that Dean Tarnopolsky would have found race to be a factor in Bell's decision to refuse to consider McKay as a tenant. Dean Tarnopolsky would then have had to decide which actions to recommend to the Minister. It is possible that Dean Tarnopolsky would have accepted Bell's request for prosecution and recommended prosecution as a course of action. However, even if Dean Tarnopolsky could have been persuaded to recommend prosecution, it seems very unlikely that he would have recommended prosecution alone, given the priority he attached to providing redress to complainants. It is much more likely that he would also have recommended one or more actions to provide a remedy or remedies for McKay.

If the Minister had both made remedial orders and initiated prosecution, a further decision would have had to be made about whether to prosecute Bell for contravening the Code, or for failing to comply with a Ministerial order, or both. If the Minister consented to prosecution for contravening the Code, it is reasonable to speculate that this would have provided Bell with a fresh opportunity to establish his liability.<sup>412</sup> This would be consistent with Hill's view that a board of inquiry proceeding and a prosecution were completely separate proceedings, the implication being that it would have been possible for a board of inquiry and a court to make different findings on the same

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<sup>412</sup> It is possible that the doctrines of *res judicata* or issue estoppel would not have applied because the parties to the proceeding would have been different, the onus of proof would have been different and the standard of proof would have been different. Donald J. Lange, *The Doctrine of Res Judicata in Canada* 3d (Markham: LexisNexis Canada, 2010) at 27, 131, 187.

evidence. As discussed earlier, in his academic writing Dean Tarnopolsky also accepted the potential for separate board of inquiry and prosecution proceedings, but viewed this as a disadvantage rather than an advantage. He was concerned that the Code's dual civil and criminal liability created the potential for conflicting liability decisions given the different standards of proof that applied to civil and criminal proceedings.<sup>413</sup> He was particularly concerned about the consequences for the credibility of the Code's enforcement process if in the same case a board of inquiry found liability and a prosecution in court did not: "If this were to happen, great discredit may result to the administration of human rights provisions."<sup>414</sup>

Thus, if Bell had been subjected to a prosecution for contravening the Code, he may have escaped liability. However, based on the limited information available, it appears that this outcome would have been less likely if Bell had been prosecuted for contravening a Ministerial order than if he had been prosecuted for violating the Code itself. The Code did not expressly recognize the possibility of challenging the validity of a ministerial order in the context of a prosecution for failure to comply. Moreover, one case precedent appears to have held that a minister's order could not be challenged on prosecution.<sup>415</sup> Cuttell could have reasonably believed that he would not have been able to challenge the validity of the order if Bell were prosecuted for contravening a Ministerial order and, therefore, would have had reasonable basis for concern about

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<sup>413</sup> Tarnopolsky, "Iron Hand in Velvet Glove" at 585-586.

<sup>414</sup> Tarnopolsky, "Iron Hand in Velvet Glove" at 585-586. This concern was another reason why Tarnopolsky was opposed to making contravention of the Code an offence. He did not expressly say whether his concern also applied to the offence of contravening a Ministerial order.

<sup>415</sup> The prosecution decision in question, *Re Loughheed* (April 29, 1969), was an unreported decision referred by to Justice Stewart in his decision on the prohibition application. The *Loughheed* decision was not available to me for independent review.

potential jeopardy to his client by participating in a board of inquiry proceeding and then proceeding to prosecution.

### **3 High Court of Justice Prohibition Application: Justice Stewart**

Bell's prohibition application was heard by Justice Stewart of the High Court of Justice in May 1969. Co-counsel Nelles Starr and Cuttell represented Bell at the High Court of Justice. Marshall Pollock, a lawyer with the Ontario Department of the Attorney General, represented the Commission at the High Court of Justice.

In the context of the prohibition proceeding and subsequent appeals, Bell's position was that McKay and his friend looked like youths and students and he did not wish to rent youths and students. He preferred "mature persons" or married couples as tenants because his chattels were unprotected and his wife was alone in the house when he worked the night shift. He acknowledged that he had been untruthful when he told McKay the unit was rented, saying that "this is the simplest method and avoids discussion and argument". According to Bell, the vacancy for which McKay applied was ultimately filled by a "45-year-old Semitic Egyptian".<sup>416</sup>

Justice Stewart's decision reflected a deep concern with both the substantive possibility that the Code could have applied to Bell's rental unit and with the process possibility that Bell could have been denied "the right" to have his liability determined by a court in a quasi-criminal prosecution instead of by the board of inquiry. For Justice Stewart, Bell had two rights at stake. One was the right to control access to his property;

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<sup>416</sup> *Bell v. McKay* (HJ) at 710.



the other was the right to have this substantive property right determined by a court in a quasi-criminal prosecution.

On the question of whether the Code applied to Bell's rental unit, Justice Stewart's decision records that Pollock did not make submissions on this issue; Pollock's sole argument was that the court did not have jurisdiction to prohibit the board of inquiry because its function was administrative rather than judicial or, alternatively, that the application was premature. Thus, it appears that Pollock did not provide Justice Stewart with the OHRC perspective on why the rental unit was self-contained. Given the tone and content of Justice Stewart's comments on this issue, however, it seems unlikely that he would have been persuaded by the views of board of inquiry chairpersons Dean Tarnopolsky, Prof. Krever and Prof. Palmer. Justice Stewart undoubtedly believed that a landlord in Bell's situation should not be forced to rent to a racialized or religious minority tenant:

It is equally as important that the rights of a middle-aged white Canadian homeowner be protected as those of a young, black, Jamaican tenant. Neither more important or less important. Equally. And perhaps it is time that this was made clear.<sup>417</sup>

In his view, the Code was "never intended to limit an arbitrary choice of tenants in a man's house to whom he rents unseparated rooms."<sup>418</sup> A landlord renting a non-self-contained dwelling unit should be able to "exercise an untrammelled and biased choice

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<sup>417</sup> *Bell v. McKay* (HCJ) at 718-719.

<sup>418</sup> *Bell v. McKay* (HCJ) at 711.

of those who dined at his table, or slept under his roof.”<sup>419</sup> The landlord would not be able to “protect the property, his chattels or the person of his wife from ill-disposed tenants” because the tenant would in principle have access to the landlord’s rooms.<sup>420</sup>

On the process question, Justice Stewart’s evident outrage over the Minister’s refusal to grant Bell’s request for a court trial seems to have been driven by his characterization of the Code as quasi-criminal legislation and by his antipathy toward non-court adjudication. Justice Stewart repeatedly used criminal law language to characterize the nature of the legal wrong and the Code’s civil process. He characterized the complaint as a “charge”; he described the OHRC’s position as reflecting a decision that “Mr. Bell was guilty of an offence against the Ontario Human Rights Code”; he described a board of inquiry as having the power to “force a person accused of an offence under the Code to give evidence against himself ... without any real protection from any *Evidence Act* ...”; and he described the board of inquiry’s potential recommendation as including “what punishment should be inflicted”.<sup>421</sup> This language echoed Cuttell’s submissions to the board of inquiry and likely reflected the arguments that Starr and Cuttell presented in court.

According to Justice Stewart, if discrimination was a quasi-criminal offence then Bell was entitled to the legal process protections provided by prosecution in court: the presumption of innocence until proven guilty, protection against self-incrimination, and the standard of proof beyond a reasonable doubt. None of these protections was available

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<sup>419</sup> *Bell v. McKay* (H CJ) at 713.

<sup>420</sup> *Bell McKay* (H CJ) at 711.

<sup>421</sup> *Bell v. McKay* (H CJ) at 710, 713, 716, 717,

in the board of inquiry proceeding, in Justice Stewart's view. In a board of inquiry proceeding, according to Justice Stewart: McKay would have been considered "more equal" than Bell;<sup>422</sup> Bell could have been forced to testify against himself; the tribunal had the power to enter Bell's home and to "interrogate people outside of any formal hearing"; and the tribunal could make findings on the basis of any evidence it wished to consider, whether or not such evidence would have been admissible in court.<sup>423</sup> For Stewart J., this board of inquiry process was a travesty of injustice:

I do not think any comment is necessary on the danger inherent in such powers and that the finding of this board can be the basis of actions deleterious to the person and property of the subject.<sup>424</sup>

Justice Stewart was also outraged by the fact that there were no statutory limitations on the orders available to the Minister and, since he assumed – not unreasonably perhaps – that there was no doubt as to how Bell's liability would be determined, he was certain that the Minister would have made orders against Bell:

If ever there has been absolute power given to one man it is here, and Lord Acton has made further comment by me unnecessary. There is no limitation in the nature or scope of the order, the amount to be made payable, the extent of the incursion into the real property rights of the citizen, or otherwise howsoever.<sup>425</sup>

Justice Stewart also invoked the then-recent report of the Honourable J.C.

McRuer, Commissioner of the Royal Commission Inquiry into Civil Rights. This inquiry

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<sup>422</sup> *Bell v. McKay* (HCJ) at 718,

<sup>423</sup> *Bell v. McKay* (HCJ) at 715.

<sup>424</sup> *Bell v. McKay* (HCJ) at 715.

<sup>425</sup> *Bell v. McKay* (HCJ) at 716.

had been established by the government in response to growing resistance to administrative law models and, in particular, opposition to proposed legislation that would have increased the powers of the Ontario Police Commission in order to address organized crime.<sup>426</sup> The overall mandate of inquiry was to study the extent to which Ontario laws resulted in unjustified encroachment on the personal freedoms, rights, and liberties of the individual.<sup>427</sup> The Report included both general discussion of broad principles and specific discussions of particular agencies and tribunals. By the time of the *Bell v. McKay* prohibition hearing, the first two volumes of the Report had been published, and Volume Two included some preliminary, specific discussion of the OHRC. Justice Stewart referenced the Report as providing support for his concern about the Code's very limited access to court proceedings. He described the Code as "...generally so contrary to the principles set forth by the Honourable J.C. McRuer's advice ... that the policy of not granting access to the Court is understandable."<sup>428</sup>

Justice Stewart was not wrong to highlight McRuer's general support for individual rights protected by the courts. However, McRuer's preliminary assessment of the OHRC process was generally positive and not opposed to the Code's emphasis on conciliation and voluntary persuasion. McRuer described the Code as "an outstanding

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<sup>426</sup> Luce and Schucher, "Right to Discriminate" at 128-129.

<sup>427</sup> Honourable J.C. McRuer, Commissioner, *Royal Commission Inquiry Into Civil Rights, Report Number One, Volume One* (Toronto: Queen's Printer, 1969) at 1. McRuer's understanding of the role of law would not probably have included room for law as a tool in the hands of social activists in struggles against social inequalities. In his view, "Law as the expression of the power of the State, and its enforcement, are not weapons but shields serving to protect and regulate the respective rights, freedoms and liberties of individuals, *inter se*, from whom the authority of the State is derived. Excessive or unnecessary power conferred on public authorities corrupts and destroys democratic institutions and gives life to all forms of tyranny— some petty and some extreme." – at 3.

<sup>428</sup> *Bell v. McKay* (H.C.J.) at 714.

piece of legislation” and wrote that the OHRC experience was “most useful and instructive when considering what can be accomplished by educative and persuasive processes without the imposition of sanctions.”<sup>429</sup> McRuer acknowledged that he had yet to provide a more complete assessment of the “adequacy of the safeguards for the rights of the individuals”<sup>430</sup> under the Code; this further assessment was published a few years later in Volume Three of the Report and is discussed later in this chapter.

Finally, Justice Stewart described the Code’s prosecution option as a “legislative beartrap” and, thus, not a viable legal process option or an “opportunity”, as described by Hill.<sup>431</sup> Justice Stewart focused on the potential prosecution for contravening a Ministerial order. He described this option as a legislative beartrap because it was his understanding that an individual who was prosecuted for contravening a Ministerial order could not challenge the validity of the order as part of that prosecution – and this understanding appears to have been correct, based on the limited information available. Justice Stewart does not appear to have considered the prosecution option for contravention of the Code, other perhaps than to suggest that this option was available only with consent of the Minister, which was also correct. Justice Stewart’s overall concern, then, was that the Code did not provide Bell with a right to have his liability determined within the procedural framework of a quasi-criminal prosecution and did not permit a court to review a board of inquiry’s findings, either directly or in the context of a prosecution.

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<sup>429</sup> Honourable J.C. McRuer, Commissioner, *Royal Commission Inquiry Into Civil Rights, Report Number Two* (Toronto: Queen’s Printer, 1969) at 1556 [McRuer, *Royal Commission Report #2*].

<sup>430</sup> McRuer, *Royal Commission Report #2* at 1556.

<sup>431</sup> *Bell v. McKay* (H.C.J.) at 713.

Justice Stewart's understanding of the Code processes was correct from a technical and descriptive perspective. His analysis also reflected a judicial approach to law and legal process, rejecting the alternative approach reflected in the Code enforcement model. Justice Stewart did not accept the fundamental policy issues raised by the Code enforcement model, and made no effort to understand or engage with them.<sup>432</sup>

#### **4 Court of Appeal for Ontario: Justice Laskin**

In the appeal to the Court of Appeal for Ontario, Bell appears to have been represented by Starr alone, whereas Pollock was joined by Senior Crown Counsel, Frank Callaghan, in representing the OHRC. Bell's arguments received a completely opposition reception from the Court of Appeal than the reception they had received from Justice Stewart. Although the Court of Appeal did not specifically address the merits of the substantive issue, it did communicate an entirely different sensibility towards the Code. In the decision authored by Justice Laskin, the Court acknowledged that the Code had "drastically changed" the common law position of employers, owners of housing accommodation and owners of places to which the public was customarily admitted, and did not exhibit Justice Stewart's concern about this fact.<sup>433</sup> Moreover, in concurring separate reasons (not included in the reported version of the decision), Justice Evans

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<sup>432</sup> For a critique of the McRuer Report for giving preference to judicial legalism see John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968), 18 UTLJ 351.

<sup>433</sup> *Bell v McKay* (CA) at 682.

wrote that he was “unable to ascertain from the evidence” how Stewart J. reached his conclusion that the premises were not self-contained.<sup>434</sup>

The Court of Appeal focused most of its attention, however, on the procedural issue. According to Justice Laskin, the primary argument advanced on behalf of Bell was that the Code’s civil enforcement process deprived Bell of his “rights at law” and was “so offensive to democratic principle as to justify a Court to prohibit its invocation.”<sup>435</sup> Justice Laskin described this argument as a “startling proposition”.<sup>436</sup> Similarly, in response to the argument that Bell had a right to be “confronted by his accusers in a summary conviction Court” and should not be required to participate in the board of inquiry process, Justice Laskin wrote: “This contention is unacceptable.”<sup>437</sup> In Justice Laskin’s view, it was an open question as to whether a board of inquiry finding or ministerial order could be challenged in the context of a prosecution, and he left those issues to be determined in a case that squarely raised them.<sup>438</sup>

The Court of Appeal’s decision clearly reflected a different perspective from Justice Stewart’s on what constituted legitimate “substantive due process”:

[T]he Courts of this country have no mandate to enforce their own, let alone Bell’s, notions of substantive due process to nullify legislation which is competently enacted under the constitutional distribution of legislative powers; at the most, they may, where the legislation is open to such construction, enforce procedural due process in line with principles worked out by common law techniques.<sup>439</sup>

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<sup>434</sup> *Bell v. McKay*, [1969] OJ No. 725 (CA) at ¶39.

<sup>435</sup> *Bell v. McKay* (CA) at 682.

<sup>436</sup> *Bell v. McKay* (CA) at 682.

<sup>437</sup> *Bell v. McKay* (CA) at 682.

<sup>438</sup> *Bell v. McKay* (OCA) at 682.

<sup>439</sup> *Bell v. McKay* (OCA) at 682-683.

In this to and fro between the courts and the legislature, the Court of Appeal's view was that Bell could not claim "legal immunity from administrative procedures prescribed by a competent Legislature for effectuating a policy which has been translated into substantive statutory prescriptions."<sup>440</sup> However, it is arguable that deference to the legislature, as such, was not the principal value underlying this endorsement of the Code and its enforcement process. Given Justice Laskin's mistrust of the courts' ability to enforce social legislation, it seems most likely that he did not find the board of inquiry process in any way offensive, either in general or in relation to any common law prescriptions. Justice Laskin would also have viewed the Code's primary purpose as being civil and remedial, rather than criminal (or even "quasi-criminal") and punitive. Therefore, he would not have been sympathetic to the argument that Bell's interest in protecting himself against liability for discrimination was a paramount legal process value.

## **5 Supreme Court of Canada: Justice Martland**

The Supreme Court of Canada ("SCC") overruled the Court of Appeal decision, with Justice Abbott and Justice Hall dissenting, in separate reasons. The SCC majority decision, written by Justice Martland, represented a return to a more narrow view of the Code, somewhere between the approaches of Justice Stewart and the Court of Appeal. The overwhelming theme of the decision was boundaries and respect for boundaries. The majority described the Code as seeking "to prevent certain kinds of discrimination in

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<sup>440</sup> *Bell v. McKay* (OCA) at 683.



respect of specified fields. It applies only to the fields thus defined.”<sup>441</sup> The Court repeated that the Code was “specifically limited by its terms to dealing with such discrimination when it occurs in relation to defined fields of operation” and then listed several fields to which the Code did not apply: free expression of opinions, employment of domestic servants, and rental of non-self-contained dwelling units.<sup>442</sup>

The majority decision characterized the main issue in the case as whether the Supreme Court of Ontario had the authority to prevent the board of inquiry from proceeding where the complaint alleged discrimination in an area not covered by the Code. However, by the time it came to this question, the majority decision had already discussed the meaning of self-contained dwelling unit and expressed the opinion that Bell’s rental unit was not self-contained.<sup>443</sup> The majority based this opinion on their analysis of the legislative history, concluding that because the Code had twice previously used the language of “apartments” in apartment buildings, the government intended self-contained dwelling units to be those “similar to an apartment in an apartment house”.<sup>444</sup> Thus, the SCC reached the completely opposite conclusion on the significance of the legislative history to the conclusion reached by the boards of inquiry when they examined this same legislative history. Whereas the boards of inquiry saw the removal of the word “apartment” as signaling an intention to broaden the scope of legislative protection, the SCC attached no significance at all to the removal of the word “apartment” from the legislation; for the SCC, the meaning of “apartment” was exactly the same as “self-

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<sup>441</sup> *Bell v. McKay* (SCC) at 760.

<sup>442</sup> *Bell v. McKay* (SCC) at 768.

<sup>443</sup> *Bell v. McKay* (SCC) at 768.

<sup>444</sup> *Bell v. McKay* (SCC) at 767-768.

contained dwelling unit”. Thus, the Court effectively based its interpretation of the legislation on a version of the statutory language that was no longer in effect.<sup>445</sup>

On the process issue, the SCC majority held that both the board of inquiry and the court on a prohibition application had the authority to decide the question of whether or not the Code applied to Bell’s unit, and that it was up to Bell to decide whether he was willing to go through the board of inquiry process or whether he preferred to have this question determined first by a court.<sup>446</sup> This view aligned well with the Court’s previous conclusion that the Code did not apply to Bell’s unit and, thus, *ex post facto* legitimated Bell’s course of action. The decision did not express any views about the nature of the Code’s enforcement process, did not discuss the dual civil / quasi-criminal options, and did not address Bell’s claimed right to have the matter decided by way of prosecution.

Justice Hall’s dissenting reasons adopted the Court of Appeal’s reasons.<sup>447</sup>

Justice Abbott framed his dissenting reasons with reference to upholding correct boundaries for legislatures and courts. Legislatures had authority to define the jurisdiction of an administrative tribunal; courts had responsibility to ensure that the tribunal remained within its jurisdiction.<sup>448</sup> However, it is not clear how he applied these principles to Bell’s situation. He stated that the board of inquiry did not have adjudicative authority, implying that the board was not subject to prohibition. He also wrote:

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<sup>445</sup> Ian Hunter was very critical of the SCC’s use and interpretation of the legislative history. See Ian Hunter, “Judicial Review of Human Rights Legislation: *McKay v. Bell*” (1972), UBC L Rev. 17 at 30 [Hunter, “Judicial Review”].

<sup>446</sup> *Bell v. McKay* (SCC) at 774-775.

<sup>447</sup> *Bell v. McKay* (SCC) at 780.

<sup>448</sup> Justice Abbott made these points by quoting a lengthy passage from the decision of McRuer CJHC in *Re Jackson and Ontario Labour Relations Board*, [1955] OR 83: *Bell v. McKay* (SCC) at 779-780.

Whatever view one may take of the desirability or efficacy of such an inquiry or of the inconvenience it may cause to persons concerned, these are questions which the Courts are not called upon to determine. The language of s. 13 is plain and, in my opinion, effect must be given to it.<sup>449</sup>

In the end, it is not clear what remedy Justice Abbott believed would have been available for Bell if he had participated in the board of inquiry process and faced ministerial orders as a result of that process.

With the SCC decision, the litigation came full circle back to the result imposed by Justice Stewart, for slightly less inflammatory reasons but mostly likely with a similar ideological sub-text. However, the SCC did not have the last word on the subject.

### **PART V: After the *Bell v. McKay* Litigation**

The Code's protection against discrimination in rental housing and its enforcement provisions were both amended following the SCC decision in *Bell v. McKay*. As will be discussed, the legislature overturned the court's interpretation of a self-contained dwelling unit but maintained the Code's enforcement model, making no changes to the fundamental principles or structure of the process.

In a letter to Tory candidates in the 1971 provincial leadership contest, Alan Borovoy, then General Counsel to the Canadian Civil Liberties Association, asked candidates to express public support for a legislative amendment to override the SCC decision and to express public support for the Commission and its work.<sup>450</sup> He argued

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<sup>449</sup> *Bell v. McKay* (SCC) at 780.

<sup>450</sup> Archives of Ontario, Ontario Civil Liberties Assoc. fonds, RG 76-3, Letter from Alan Borovoy to Tory Candidates, Feb. 10, 1971 [AO, Civil Liberties].

that the effect of the SCC decision was to deny the Code's protection to low income members of minority groups, since rooming houses and "flats" were typically less expensive than rental units in apartment buildings. He also made the argument about the public nature of the market, which was a consistent theme for fair practices and human rights advocates:

Of course, the Canadian Civil Liberties Association is as concerned as anyone to protect from legislative intrusion the right of privacy. But the landlord who offers part of his property for rent on the public market, has by that act willingly surrendered a portion of his privacy. ... Surely, he cannot have it both ways. He cannot simultaneously declare part of his building available for rent on the public market and maintain that the same part is subject to his right of privacy. In our respectful opinion, it is most appropriate for the law to insist that once a portion of property is put on the public market all dealings with respect to that portion of property must be governed by public standards of fair play.<sup>451</sup>

The one possible exception Borovoy proposed was the situation where the tenant was essentially a companion of the landlord, evidence of which would be that the tenant was free to use most or all of the landlord's space. On the question of the OHRC, Borovoy praised the Commission for its work in the field of "race relations", stating that the Commission had achieved something that very few other government agencies had achieved: "...an admirable balance between vigorous enforcement and restrained fairness. It has effectively championed the interests of complainants and judiciously safeguarded the rights of respondents."<sup>452</sup> He expressed concern that the work of the Commission might suffer because "Judicial reversal can undermine communal respect."

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<sup>451</sup> AO, Civil Liberties, Letter from Alan Borovoy to Tory Candidates, Feb. 10, 1971.

<sup>452</sup> AO, Civil Liberties, Letter from Alan Borovoy to Tory Candidates, Feb. 10, 1971.

The Code's rental housing protection was amended in 1972, without opposition. The amended provision eliminated the "self-contained dwelling unit" language and replaced it with the phrase "housing accommodation". The amended provision further defined housing accommodation to mean "any place of dwelling" other than one in a building where the owner or the owner's family lived and the tenant shared a bathroom or kitchen with the owner or the owner's family.<sup>453</sup> Bell's rental unit would, in my view, have been captured by this new language, since Bell's tenant was not required to share a kitchen or bathroom with him and his wife.

On the procedural side, the final volume of the report of the Royal Commission Inquiry into Civil Rights was published in 1971. In this report, McRuer continued to endorse the Code's enforcement model. He emphasized that the purpose of the Code "can best be accomplished by an investigatory procedure rather than by an adversary one" and expressed continuing approval of the OHRC's emphasis on conciliation:

In the administration of the Act the emphasis has been rightly placed on education and conciliation. The area of human behaviour covered by the Act is a field for law enforcement that has many social aspects making it quite different from that covered by ordinary criminal law. Respect for the dignity of the individual human being is something that cannot readily be enforced by sanctions, although sanctions are necessary as a last resort to enforce compliance and minimum standards.<sup>454</sup>

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<sup>453</sup> *The Ontario Human Rights Code Amendment Act, 1972*, SO 1972, c 119, s. 4.

<sup>454</sup> J.C. McRuer, Commissioner, *Royal Commission Inquiry Into Civil Rights, Report Number Three, Part V* (Toronto: Queen's Printer, 1969) at 1980 [McRuer, *Royal Commission #3.5*].

In the passage above, McRuer appears to have characterized the *Human Rights Code* as a form of criminal law, albeit a somewhat different form of criminal law. At a later point in his commentary, however he wrote that the Code was more like “health legislation”:

This legislation is more like health legislation, than criminal legislation. There are a great many health statutes and by-laws designed to maintain health standards that are enforced by inspection, warning and agreement to improve facilities, but these nevertheless make it an offence to fail to maintain prescribed standards.<sup>455</sup>

Although this comparison appears to have been intended to shift the focus away from criminal law and toward civil law, it made no reference to the remedial dimension of the Code and identified criminal liability as the only potential form of liability. McRuer also disagreed with Tarnopolsky’s view that the discrimination should not be an offence under the Code, writing that it made the legislation “more meaningful to say in express terms ‘thou shalt not discriminate’ and to provide that if you do sanctions will flow.”<sup>456</sup> At the same time, however, McRuer recommended that failure to comply with a Minister’s order not continue to be an offence; alternatively, if it did continue to be an offence, he recommended that the order should be subject to challenge in the context of a prosecution for failure to comply with it.<sup>457</sup>

This continuing link with criminal law was also reflected in McRuer’s recommendations for changes to the adjudication component of enforcement. He described the respondent in a case where conciliation failed as a “person accused of

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<sup>455</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1983.

<sup>456</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1983.

<sup>457</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1984-1985.

wrongdoing” and recommended that persons in this situation “should have a clear right of resort to the ordinary courts where the issue of his guilt may be decided rather than his guilt being determined on the mere order of the Minister.”<sup>458</sup> McRuer was not recommending that the board of inquiry process be eliminated; he was instead recommending that a Minister’s order be enforceable in civil court and that the person against whom the order was made – described as the “alleged offender” – be able to challenge the basis for the order.<sup>459</sup>

McRuer acknowledged that concerns about the Code’s enforcement process had been raised in the *Bell v. McKay* litigation, but he did not recommend any changes of the kind that Bell’s counsel and Justice Stewart clearly preferred. In his view, the conciliation procedure was “well designed to safeguard civil rights and to protect individuals from unnecessary prosecution.”<sup>460</sup> McRuer did appear to agree that there were some concerns relating to the board of inquiry process, but he did not recommend any changes to that process itself. Instead, he appeared to be of the view that the concerns would be addressed by ensuring that the respondent could challenge the basis for Ministerial orders either in a civil proceeding to enforce the order or in a prosecution for failure to comply with the order.<sup>461</sup> Moreover, he responded to Bell’s counsels’ and Justice Stewart’s concerns about the potential for self-incrimination by expressing the opinion that a respondent who was “sufficiently advised” could take advantage of the

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<sup>458</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1982.

<sup>459</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1984.

<sup>460</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1981-1982.

<sup>461</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1982, 1984-1985.

*Evidence Act*.<sup>462</sup> Indeed, McRuer's only recommendations for the board of inquiry process were recommendations to give the Commission even more power in that process in the following ways: by giving the Commission power to consider the board of inquiry report; by making it a condition precedent that the Commission consider the board of inquiry report before it was recommended to the Minister; and by giving the Commission power to change or rescind board of inquiry recommendations.

When the *Civil Rights Law Amendment Act* was passed in 1971 to implement McRuer's recommendations, it included amendments to the Code.<sup>463</sup> Some, but not all, of McRuer's recommendations for the human rights enforcement were implemented; indeed, the main components of the Code's enforcement process emerged intact. The amendments:

- expanded the Commission's investigatory powers [s.12(4)];
- identified the Commission, the complainant, and the respondent(s) as parties to a board of inquiry proceeding and specifically gave the Commission carriage of the complaint [s. 13b(1)];
- made clear that a member appointed to a board of inquiry could not have participated in the prior Commission investigation [s. 13b(3)];
- provided for the recording of oral evidence presented to a board of inquiry [s.13b(4)];

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<sup>462</sup> *Royal Commission Inquiry Into Civil Rights, Report #3.5* at 1984.

<sup>463</sup> *The Civil Rights Law Amendment Act, 1971*, SO 1971, s. 63.



- required a board of inquiry's findings of fact to be based exclusively on evidence in accordance with the newly-minted *Statutory Powers Procedure Act, 1971* [s. 13b(5)];
- gave the board of inquiry exclusive jurisdiction to determine any question of fact, law, or both, required to reach a decision about whether the Code was contravened [s. 13b(6)];
- gave the board the authority to decide whether or not a party contravened the Code and the authority to make orders required to constitute full compliance with the Code, to rectify injuries caused, and to provide compensation for injuries [s. 13c(a)(b)]; and
- provided a right of appeal from a board of inquiry decision to the Supreme Court of Ontario on questions of law, fact, or both [s.13d(1)(4)].

These amendments not only maintained the Code's enforcement model but also arguably strengthened the board of inquiry process to which Cuttell, Starr and Justice Stewart had been so opposed and to which the Supreme Court of Canada declined to give preference. However, although the Code's enforcement process remained formally intact, this model had already raised a number of questions about the role of anti-discrimination legislation in governing social relations and the meaning of legal responsibility in relation to anti-discrimination legislation.

## Conclusion to Chapter Two

When law becomes involved in governing social relations, there will be many opportunities for decisions to be made, and for questions about who should be given the power and control to make these various decisions. Ian Hunter's 1972 commentary on the SCC's decision described it as a "pernicious" result rooted in "muddled logic", and as a hypocritical, "shortsighted essentially ethnocentric result".<sup>464</sup> He wrote that the decision led to the Code's protections being "effective for those who need them least", because the type of rental housing provided by Bell and other landlords was the "lowest cost urban housing" most needed by members of minority groups who were often immigrants and poor.<sup>465</sup> Hunter repeated this view in an article published in 1979, albeit in a somewhat more muted tone, writing that the result of the decision was "anomalous" for the same reason: that the Code would not apply to lower cost urban housing, which was "economic necessity" for racialized minorities.<sup>466</sup> By contrast, in the same article, Hunter castigated the 1974 British Columbia board of inquiry decision in the *Gay Alliance Toward Equality v. Vancouver Sun* case.<sup>467</sup> The complaint in that case was against a newspaper that refused to publish an advertisement for a gay rights magazine. The newspaper's argument was that the advertisement would offend many readers. The board of inquiry rejected this argument as "ludicrous". Prof. Hunter described the board

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<sup>464</sup> Hunter, "Judicial Review" at 30, 31.

<sup>465</sup> Hunter, "Judicial Review" at 30.

<sup>466</sup> Ian A. Hunter, "The Origin, Development and Interpretation of Human Rights Legislation" in R. St. MacDonald and John P. Humphrey, *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) 77 at 92 [Hunter, "Origin, Development and Interpretation"].

<sup>467</sup> *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 SCR 435, aff'g (1977), 77 DLR (3d) 487 (BCCA). The board of inquiry decision was upheld on judicial review but then reversed on appeal to the British Columbia Court of Appeal and then the Supreme Court of Canada.

of inquiry's conclusion "one of those arrogant, self-righteous assertions that increasingly characterize decisions of human rights inquiries and that must give pause to even the most ardent supporter of the legislation."<sup>468</sup>

Why did Hunter see the social issue of minority group access to low-cost rental housing as an issue of concern, but not the issue of a newspaper refusing to publish an advertisement for a gay rights magazine? Perhaps he had more sympathy for newspapers than for landlords? Perhaps he believed that access to housing was a more serious social issue than access to newspaper advertising? In fairness, part of Hunter's rationale was that the existing BC human rights legislation did not expressly protect sexual orientation as a prohibited ground of discrimination. However, the Supreme Court of Canada responded similarly in *Bell v. McKay*, in finding that the Ontario Code did not apply to non-self-contained dwelling units, and that Bell's rental unit was not self-contained. In the same way that Hunter had different views about how human rights legislation should apply to two different social issues – low-cost rental housing for racialized minorities, on the one hand, and social inclusion of gays, on the other hand - the Ontario High Court of Justice, Court of Appeal for Ontario and Supreme Court of Canada in *Bell v. McKay* had different views about how human rights legislation should apply to the social issue of access to rental housing.

The *Bell v. McKay* litigation also raised other issues about decision-making authority involved in legal regulation of social relations: issues about the respective authority of legislatures and adjudicative bodies to decide how to approach the

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<sup>468</sup> Hunter, "Origin, Development and Interpretation" at 89.

substantive and procedural regulation of social issues; and issues about the respective authority of administrative agencies and citizens to decide questions about access to the processes where legal responsibility and consequences are at stake. In his commentary on the Supreme Court of Canada's decision in *Bell v. McKay*, Peter Hogg focused on the question of who had the authority to decide whether Bell's rental unit was self-contained - should this authority have rested with the board of inquiry or with the courts.<sup>469</sup>

On the question of the dual civil and quasi-criminal dimensions of the Code, the *Bell v. McKay* litigation mirrored on-going issues about the nature of human rights legal norms and the legal processes for enforcing these norms. Discrimination was constituted by statute to be simultaneously a civil wrong and an offence, and the Code created both civil liability and quasi-criminal liability for discrimination. The civil wrong was enforced primarily through the conciliation-board of inquiry process, with a clear emphasis on providing remedies for the complainant through a process that was private and, preferably, voluntary. The offences were enforced (to the limited extent that they were used) through prosecution in court. On the one hand, the clear intention was that the focus of the Code and its enforcement would be civil and remedial rather than criminal and punitive. On the other hand, the language of criminal law continued to be pervasive. This criminal law language was not only used by Bell's counsel, Justice Stewart and the McRuer Report, but also by those who advocated for a remedial and non-punitive approach: Dan Hill described the written human rights complaint as "a statement

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<sup>469</sup> P.W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971) 9 Osgoode Hall LJ 203.

of charges” and the respondent to a complaint as “the accused”;<sup>470</sup> Sid Blum used the word “guilt” to describe legal responsibility for discrimination;<sup>471</sup> board of inquiry chairpersons described the complaint as “charges”,<sup>472</sup> discriminatory conduct as an “offence”,<sup>473</sup> and respondents as “offenders”<sup>474</sup> and as “found guilty of discriminatory practices”,<sup>475</sup> and even Justice Laskin, in the Court of Appeal decision in *Bell v. McKay*, referred to the OHRC’s letter as containing “the declaration of guilt of Bell”.<sup>476</sup> Tarnopolsky alone seems to have refrained from this use of criminal law language, although he too drew a comparison between human rights law and criminal law on the question of the using law to address morality:

Opponents of human rights legislation have often argued that the law cannot legislate morality. However, this overlooks the fact that our Criminal Code is based to a large extent upon a commonly accepted moral code.<sup>477</sup>

It could be said that this continuing use of criminal law language was simply a semantic legacy of the original quasi-criminal law roots of anti-discrimination. However, I believe it is more than this. I believe this language reflected on-going tension between the dual civil and criminal perspectives on human rights legal norms, with the civil perspective

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<sup>470</sup> Dan Hill, “Protecting Human Rights in Ontario, 1793-1968” (1968) 8 Human Relations 8-9, as quoted in McRuer, *Royal Commission #2* at 1556, 1557.

<sup>471</sup> At 162 above.

<sup>472</sup> *Laws and Mundebe v. Domokos* at 1.

<sup>473</sup> *Laws and Mundebe v. Domokos* at 2, 3; *Duncan v. Szoldatits* at 13.

<sup>474</sup> *Duncan v. Szoldatits* at 15.

<sup>475</sup> *Duncan v. Szoldatits* at 15.

<sup>476</sup> *Bell v. McKay* OCA at 680.

<sup>477</sup> Tarnopolsky, “Iron Hand” at 567.

focusing more on their remedial goals and the criminal perspective focusing more on their role in defining public norms for social conduct.

Finally, the Code's public goal of norm enforcement and private goal of resolving individual claims had the potential to be into conflict with one another. A remedial outcome that was considered appropriate from the perspective of private dispute resolution, because it satisfied the parties, might not be considered appropriate from the perspective of public goals if, for example, it did not include public recognition of legal responsibility, and vice versa.<sup>478</sup> As discussed above, under Dan Hill's leadership the OHRC's perspective on the implementation of its public role within the Code's enforcement model gave priority to the more private purpose of complaint resolution. Since we do not know anything about the content of these settlements, we do not know to what extent they sought to balance the Code's competing public and private purposes.

For those cases that proceeded to a board of inquiry hearing, board chairpersons were faced with having to determine how to balance the Code's competing public and private purposes. Stenning reported that some chairpersons, such as Tarnopolsky, resolved the conflict by defining the separate purposes in relation to one another, that is, by "... defining the compliance enforcement purpose primarily in terms of the achievement of a settlement between the parties"<sup>479</sup>. Other chairpersons believed that the conflict was irreconcilable because it reflected competing policy "paradoxes" which by definition called for contradictory processes and resolutions:

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<sup>478</sup> Stenning, *Conciliation to Judgement* at 135.

<sup>479</sup> Stenning, *Conciliation to Judgement* at 140.

... the Act embodies a series of policy paradoxes. On the one hand, public respect for the policies embodied in the statute is enhanced by publicity, yet at the same time the opportunity to preserve confidentiality and anonymity, and to avoid stigma, is an inducement to a respondent to agree to a settlement. Second, because there is an individual complainant on whose behalf the proceedings are instituted, a premium is properly placed upon obtaining effective relief for him. Moreover, the hazards of litigation generate pressures for both sides to compromise their differences with the result that the complainant may forego some degree of vindication. Yet to the extent that the complainant abandons his claim, the Commission's objectives remain unfulfilled. To this extent, pursuing the private interests of the complainant may be inimical to the full achievement of public purposes.<sup>480</sup>

This passage captures what I would suggest are better described as tensions, than as paradoxes.<sup>481</sup> I would also suggest that these tensions were not, and are not, unique to the Code but are shared by most, if not all, legal norms and their enforcement. It may be the case that some legal norms and related enforcement processes are considered to be more “public” than others; for example, criminal and quasi-criminal legal norms and processes are often held out as paradigmatic of public law.<sup>482</sup> However, all legal norms have a public dimension, since they all seek in some way to govern social relations by establishing public expectations and requirements.

This tension between public and private goals and processes was a key issue in

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<sup>480</sup> *Ruest v. International Brotherhood of Electrical Workers*, Report of a Board of Inquiry (Professor H. W. Arthurs) under the Ontario *Human Rights Code*, dated April 9th, 1968 at 24, quoted in Stenning, *Conciliation to Judgement* at 142.

<sup>481</sup> I prefer to characterize these competing values and goals as tensions rather than paradoxes because the concept of tensions is more dynamic and more suggestive of the processes by which law in action engages with these competing goals and values. The concept of paradoxes is more static and suggests that it is possible, or should be possible, to create legal processes that do not have to contend with paradoxical challenges. My work assumes that conflict over issues of social inequality is on-going, and that law is one tool with which people engage with conflicts over social inequalities. I recognize that other ideological perspectives may hold the view that it is possible to create societies without conflict, but I do not share this view.

<sup>482</sup> Stenning, *Conciliation to Judgement* at 127-134.

the developments that ultimately led to the dismantling of the OHRC enforcement model in Ontario, the subject of the next chapter.



## Chapter Three

### Statutory Human Rights and Access to Justice: From “Gatekeeper” to “Direct Access”, 1972-2012

#### Introduction to Chapter Three

To purport to give someone a ‘right’, and then insist that he may only dispose of that right in ways which are consistent with a government agency’s perception of the dictates of social policy, however, is inherently problematic.<sup>483</sup>

I feel I should also return for a moment to the matter of litigiousness. It has been argued that not enough human rights cases go before a tribunal. But there are other observers who find the system *too* litigious, in other words that too many cases wend their way through tribunals and the courts, with the additional delays and potential harm to both complainant and respondent that they may involve. The question who is right will not be settled here today. My only plea is that we not simply *assume* that the gate keeping functions of commissions that intervene before complaints reach a tribunal are necessarily all bad.<sup>484</sup> [emphasis in original]

The decades following the *Bell v. McKay* litigation saw three significant developments in the Canadian statutory human rights regimes. The first two developments expanded the scope of the legislation to respond to more social conditions. The third development, in some provinces, was to change the processes for enforcing statutory human rights. Developments relating to the enforcement process were provoked by questions about which legal process best provides “access to justice” for

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<sup>483</sup> Philip Stenning, *From Conciliation to Judgement: The Role of Boards of Inquiry under the Ontario Human Rights Code, 1962-1974* (LL.M. Thesis, York University, 1977) at 149 [Stenning, *Conciliation to Judgement*].

<sup>484</sup> Max Yalden, “Looking Back – Looking Forward” in *Le Tribunal des droits de la personne et le Barreau du Québec. L'accès direct à un tribunal spécialisé en matière de droit à l'égalité: l'urgence d'agir au Québec? / Access to a Specialized Human Rights Tribunal: an Urgent Need to Act in Quebec?* (Cowansville: Éditions Yvon Blais, 2008) 55 at 79.

statutory human rights claims.<sup>485</sup> Should a government agency be responsible for resolving claims submitted by individuals and groups? Or should claimants be able to bring their claims directly to a tribunal, with government support provided by funding the tribunal and funding legal services for claimants? These were the principle questions that dominated discussions that began in the late 1980s about the role of statutory human rights as a tool in struggles against social inequalities. On their face, these questions focused primarily, if not exclusively, on the enforcement of human rights statutes, and engaged little with the promise of human rights statutes. However, this development raised questions not simply about the practice of human rights law, but also about how this practice relates to and interacts with the promise of human rights law.

As we saw in Chapter Two, the human rights commission model of claims resolution that evolved from the similar state agency fair practices enforcement model, embodied several tensions that reflected competing goals and values:

- tension between “public” goals and interests and “private” goals and interests;
- tension between “voluntary” legal processes and more “coercive” legal processes;
- tension between “social” goals and values and “legal” goals and values; and

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<sup>485</sup> As we know from Chapter Two, in the context of human rights commission enforcement models, a human rights claim is called a “complaint” and a person who brings a human rights claim is called a “complainant”. I prefer to use the terms “claim” and “claimant”, rather than “complaint” and “complainant”, even though they are not technically accurate in relation to commission enforcement models. In my view, the “complaint”/“complainant” terminology labels a claimant as a “whiner” and a “victim”. The “complaint”/“complainant” terminology also ignores, or at least de-emphasizes, the relational dimension of legal claims. The “complaint”/“complainant” terminology no longer applies in jurisdictions which have moved away from commission enforcement models.

- tension between the commission’s claims-resolution function and its other “enforcement” responsibilities.<sup>486</sup>

In Ontario, questions about which legal process best provides “access to justice” for statutory human rights claims led to the adoption in 2006 of a new model of claims resolution, which its proponents call a “direct access”<sup>487</sup> enforcement model, and the corresponding elimination of the OHRC’s responsibility for claims resolution. Central to the “direct access” model is the replacement of the human rights commission’s claims resolution role with a process in which persons bring statutory human rights claims directly to an adjudicative tribunal.

The case for “direct access” in Ontario evolved in a context of wide-ranging critiques of how human rights commissions carried out their claims resolution role. Proponents of “direct access” relied on these criticisms to support their arguments for moving to a “direct access” model. However, the case for “direct access” went beyond criticisms of how the commission-based model was implemented; it challenged the fundamental structure of a model in which a claim is adjudicated only at the behest of a third-party agency. Many human rights activists had lobbied for moving to a “direct access” model and supported the draft legislation when it was introduced, but others were strongly opposed to moving to this model. Thus, the Ontario government’s introduction

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<sup>486</sup> I describe the human rights commission claims resolution process in the past tense because it no longer exists in Ontario (or in British Columbia). However, many of the observations about the human rights claims resolution process apply not only to its operation in Ontario but to its operation in jurisdictions across Canada. Therefore, these observations would continue to apply in jurisdictions which continue to maintain the human rights commission complaints resolution model.

<sup>487</sup> “Direct access” is a contested descriptor and goal. Opponents of the “direct access” model do not accept that it provides direct access to adjudication. As we will see later in the chapter, they argue that this model simply replaces the commission as gatekeeper with new gatekeepers to the tribunal.

of Bill 107, the draft legislation to implement a “direct access” model, led to a fierce and often acrimonious debate within the human rights advocacy community over whether this proposal, if implemented, would enhance or diminish access to justice for statutory human rights claims (“Bill 107 debates”).

This chapter examines the Ontario move to “direct access” through the lens of four tensions identified above, as well as the tension under the new model between the role of the Human Rights Tribunal of Ontario (“HRTO”) and the role of other adjudicative tribunals in addressing claims of discrimination. The chapter is divided into three parts. In Part I, I analyze the contextual background for the move to “direct access” in Ontario. In Part II, I analyze Ontario’s move to a “direct access” model in 2006. In Part III, I examine themes that have emerged in the first years of Ontario’s experience with the “direct access” model. Ontario’s move to a “direct access” model provides opportunities to reflect on different approaches to the role of legal process in struggles against social inequalities. It also provides opportunities to reflect on the tension between the substantive goals of social struggles and the formal goals of legal process that may result from engaging with law in struggles against social inequalities.

## **Part I: Contextual Background to Ontario’s Move to “Direct Access”**

The statutory human rights landscape evolved considerably in the period between the Supreme Court of Canada decision in *Bell v. McKay* in 1971 and Ontario’s move to “direct access” in 2006. In this part of the chapter, I examine themes in three areas that had particular implications for the move to “direct access” and that played a role in the Ontario debates on this question. These three areas are: (1) developments in the substantive scope of the Code’s protection, (2) developments in the practice of engaging with the Code in formal legal processes outside the OHRC claims resolution process, and (3) critiques of the commission-based claims resolution model.

### **1 Expanding the Substantive Scope of Statutory Human Rights**

The scope of Ontario’s statutory human rights protection expanded in two significant ways in the post-*Bell v. McKay* period – through the addition of prohibited grounds of discrimination to the Code, and through the recognition of adverse effect and systemic discrimination in addition to direct discrimination.<sup>488</sup> The addition of prohibited grounds of discrimination to the Code began with age, sex and marital status in 1972,<sup>489</sup> followed by disability and family status in 1981,<sup>490</sup> sexual orientation in 1986,<sup>491</sup> and

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<sup>488</sup> There were similar expansions in the substance of statutory human rights in all Canadian jurisdictions.

<sup>489</sup> *The Ontario Human Rights Code Amendment Act, 1972*, SO 1972, c. 119. This amending statute repealed *The Age Discrimination Act*, SO 1966, c 3, which was passed in 1966 to prohibit discrimination in employment on the basis of age, where age was defined to mean between 40 and 65 years of age, and *The Women’s Equal Opportunity Act*, RSO 1970, c 501 passed in 1970, to prohibit discrimination in employment on the basis of sex and marital status.

<sup>490</sup> Ontario’s Code was re-enacted in 1981 as the *Human Rights Code, 1981*, SO 1981, c 53, which was then incorporated in the 1990 statutory revision as the *Human Rights Code*, RSO 1990, c H.19 [*Code* (1990)]. When the Code was re-enacted in 1981, the substantive statutory provisions were re-framed as rights “to equal treatment without discrimination” in the following social areas: s. 1 (goods, services,

most recently gender expression and gender identity in 2012.<sup>492</sup> Incorporating more prohibited grounds of discrimination expanded the range of social conduct and practices that could potentially be challenged under the Code, and expanded the range of social groups with a direct stake in the potential of the Code to address social inequalities.<sup>493</sup>

Expansion of the legal understanding of discrimination to include not only “direct discrimination” but also “adverse effect discrimination” and “systemic discrimination” began in 1985 with the Supreme Court of Canada decision in *Ont. Human Rights Comm. v. Simpsons-Sears*.<sup>494</sup> The historical record suggests that the limits of the legal concept of direct discrimination were understood from the beginning. The stated intention of expanding the legal concept of discrimination was to extend the anti-discrimination legal norm to include other social conduct and practices. As we will see, there are challenges with proving all forms of discrimination.

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facilities), s. 2, 4 (accommodation), s. 3 (contract), s. 5 (employment), s. 6 (trade union, occupational association, self-governing profession).

<sup>491</sup> *Equality Rights Statute Law Amendment Act, 1986*, SO 1986, c 64, s. 18.

<sup>492</sup> *Toby's Act (Right to be Free from Discrimination and Harassment because of Gender Expression or Gender Identity, 2012*, SO 2012, c 7, s. 1.

<sup>493</sup> In recent years, there has also been much debate about whether poverty should be recognized as a prohibited ground of discrimination in human rights legislation. In these debates, this proposed new category is often called “social condition”. In *Promoting Equality*, the CHRA Review Panel recommended that social condition be added as a ground of discrimination to the *Canadian Human Rights Act*: Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa, 2000) at 106-113 [CHRA Review Panel, *Promoting Equality*]. A consultation report on economic and social rights prepared by the OHRC canvasses differing views about the potential effectiveness of adding social condition as a ground of discrimination – see Ontario Human Rights Commission, *Human Rights Commissions and Economic and Social Rights*, <http://www.ohrc.on.ca/english/consultations/economic-social-rights-paper.shtml>. The Quebec *Charte des droits et libertés de la personne*, CLQR, c C-12 includes provisions dealing with “economic and social” rights. However, Colleen Sheppard argues that social condition will have limited effect as a prohibited ground of discrimination unless it is interpreted to recognize the material disadvantage that flows from being a social assistance recipient. See Colleen N. Sheppard, “The Promise and Practice of Protecting Human Rights: Reflections on the Quebec *Charter of Human Rights and Freedoms*” in Nicholas Kasirer and Roderick Macdonald, eds. *Mélanges Paul-André Crépeau*, (Cowansville, Québec : Éditions Yvon Blais, 1997) at 106-113 [Sheppard, “Promise and Practice”].

<sup>494</sup> [1985] 2 SCR 536 [*Simpsons Sears*].

## Direct Discrimination and Legal Responsibility

As we know from the preceding chapters, conduct and practices may be judged discriminatory under Canadian human rights law when there is a link between the conduct or practice and one or more prohibited grounds of discrimination. Legal responsibility for direct discrimination is predicated on a respondent's intention to engage in conduct or practices that are directly or expressly linked to one or more prohibited grounds of discrimination. In disputes over legal responsibility for direct discrimination, it is not necessary to prove that a respondent intended to cause harm, but only that the respondent intended the conduct which the legal prohibition deemed to be harmful. It is also not necessary for a claimant to prove that a prohibited ground of discrimination was the sole reason for the conduct or practice, as long as it was a factor in how the claimant was treated.

Where there is no expressly demonstrable connection, and a respondent refuses to acknowledge a connection, an adjudicator may sometimes be persuaded to infer an intended connection. In some situations, the adjudicator may reject a respondent's denial that their conduct or practice was linked to one or more prohibited grounds of discrimination. In other situations, an adjudicator may conclude that the respondent made an "unconscious" link between their conduct or practice and one or more prohibited grounds of discrimination.<sup>495</sup> Despite all these refinements, however, there is a long-

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<sup>495</sup> See, for example, *Shaw v. Phipps*, 2010 ONSC 3884, upholding *Phipps v. Toronto Police Services Board*, 2009 HRTO 877 (liability decision) and *Phipps v. Toronto Police Services Board*, 2009 HRTO 1604 (remedy decision). "Unconscious discrimination" is analyzed as a form of direct discrimination by arguing that people are responsible for both their conscious and their unconscious biases. In relation to their unconscious biases, they have a responsibility to make themselves aware of unconscious biases and find strategies to eliminate the impact of these biases. See, for example: Charles R. Lawrence III, "The Id,

standing recognition that in the absence of direct evidence of the respondent's intention, it is generally difficult to persuade an adjudicator that one or more prohibited grounds of discrimination was in some way a factor in the respondent's conscious or unconscious mind.

### Adverse Effect Discrimination and Legal Responsibility

With adverse effect discrimination, the analytical underpinning of legal responsibility purports to shift away from the respondent's intention and towards the impact of the conduct or practice on the claimant. There are two key aspects to this analytical framework. The first aspect is that the conduct or practice alleged to be discriminatory is "neutral" on its face, because there is no direct or explicit connection with prohibited grounds of discrimination. The second aspect is that it is not necessary for the respondent to have intended the conduct or practice to have a disadvantageous impact linked with prohibited grounds of discrimination. Béatrice Vizkelely described direct discrimination as requiring a "causal connection" between the conduct or practice and prohibited grounds of discrimination, and adverse effect discrimination as removing this causal connection.<sup>496</sup> In *Ont. Human Rights Comm. v. Simpsons-Sears*, Justice

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the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987), 39 *Stan L Rev* 317; Charles R. Lawrence III, "Unconscious Racism Revisited: Reflections on the Impact and Origins of 'The Id, the Ego, and Equal Protection'" (2008), 40 *Conn. L Rev* 931. See also Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Doubleday Canada, 2011).

<sup>496</sup> "Discrimination, the Right to Seek Redress and the Common Law: A Century-Old Debate" in Justice Walter S. Tarnopolsky, Joyce Whitman, Monique Ouellette, eds., *Discrimination in the Law and the Administration of Justice / La Discrimination dans le Droit et l'Administration de la Justice* (Montreal: Éditions Thémis, 1993) 555 at 567-568 [Vizkelely, "Discrimination, the Right to Seek Redress"].



McIntyre wrote that impact on the claimant should be the central concern in assessing responsibility for discrimination:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.<sup>497</sup>

However, legal responsibility for adverse effect discrimination still requires a link between the challenged conduct or practice and one or more prohibited grounds of discrimination. If the respondent's intention to make this link is no longer required, the link has to be established in some other way.

In the absence of express or deemed intention by the respondent to link their conduct or practice with prohibited grounds of discrimination, it may be possible to establish this link if the facts support a conclusion that the respondent intended the link but found a way to hide their intention behind what appears on the surface to be "neutral" conduct or practice. Bill Black has suggested that the concept of adverse effect discrimination was in fact initially developed to circumvent this type of situation: "... the Courts seem originally to have developed their approach to systemic discrimination as much to avoid problems of proof of intent as to cover effects that are truly unintended . .

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<sup>497</sup> *Simpsons-Sears* at para. 12.

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*Comm. v. Simpson Sears*:

The idea of treating as discriminatory regulations and rules not discriminatory on their face but which have a discriminatory effect, sometimes termed adverse effect discrimination, is of American origin and is usually said to have been introduced in the *Duke Power* case, *supra*, in the Supreme Court of the United States. In that case the employer required as a condition of employment or advancement in employment the production of a high school diploma or the passing of an intelligence test. The requirement applied equally to all employees but had the effect of excluding from employment a much higher proportion of black applicants than white. It was found that the requirements were not related to performance on the job, and the Supreme Court of the United States held them to be discriminatory because of their disproportionate effect upon the black population....

...

To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), injustice and discrimination by the equal treatment of those who are unequal ...<sup>499</sup>

In its subsequent 1999 landmark decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (“*Meiorin*”), the Supreme Court of Canada similarly commented that the categories of direct and adverse effect discrimination are not mutually exclusive, inasmuch as an intention to discriminate does not need to be expressed but can be couched in non-expressly discriminatory actions.<sup>500</sup>

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<sup>498</sup> William W. Black, “Human Rights Reform in B.C.” (1997) 31 UBCL Rev. 255 at note 11, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>499</sup> In the Court’s decision, these paragraphs appear in reverse order. *Simpsons Sears*, paras. 16, 13.

<sup>500</sup> [1999] 3 SCR 3 [*Meiorin*] at para. 29.

While the difficulties associated with proving direct discrimination may have been the origin of the doctrine of adverse effect discrimination, this basis for liability is not really any different than the basis for liability for direct discrimination. Once it is accepted that there can be legal responsibility for conduct or practices that are intentionally linked with prohibited grounds of discrimination, it is not a leap to find legal responsibility where a respondent was deliberately seeking to masquerade direct discrimination in the form of “facially neutral” conduct or practice. The more difficult, and authentic, adverse effect situation is where the facts do not support a conclusion that the respondent was seeking to avoid liability for discrimination. In this situation, the human rights claim is that facially neutral conduct or practice adversely affects an individual or group because of one or more prohibited grounds of discrimination.

For example, what was at issue in the *Ont. Human Rights Comm. v. Simpsons-Sears* case was a workplace rule requiring full-time employees to rotate through Friday evening and Saturday work shifts. The employee, Theresa O’Malley, who alleged a Code violation, was a Seventh Day Adventist whose religious observance made it impossible for her to work on Friday evenings and Saturdays. The workplace rule was facially “neutral” because it did not explicitly target persons affiliated with particular religions for disadvantageous impact. The SCC held that link with a prohibited ground of discrimination was established on the basis that the claimant’s religion made it impossible for her to meet the requirements of the workplace rule. Underlying this finding was the Court’s willingness to accept the requirements of religious practice as a basis for exemption from a workplace rule applying to all employees. Put another way,

underlying this finding was Court's willingness to say to the employer that the impact of the rule on the claimant was something for which the employer may have to account, even though the employer in no way intended this impact.<sup>501</sup>

The Court could have refused to find the link between the impact and the prohibited ground of discrimination, by finding that the cause of the impact was the neutral work rule and not the claimant's religion. This alternative analysis may sound disingenuous and contrived; however, there are many cases where this type of reasoning has been applied to deny a link with prohibited grounds of discrimination.<sup>502</sup>

As noted earlier, the connection between conduct or practices and prohibited grounds of discrimination is at the heart of the legal recognition of discriminatory harm. With direct forms of discrimination, the respondent's intent creates the link between the conduct or practice and prohibited ground(s) of discrimination. With claims of adverse effect discrimination, the lynchpin is a link between the negative effect of the conduct or practice and one or more prohibited grounds of discrimination. A legal finding of responsibility for adverse effect discrimination thus requires either the respondent's

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<sup>501</sup> The question of the link between the respondent's conduct and prohibited grounds of discrimination was not the central issue in the *BCGSEU* case. At issue in the *BCGESU* case was a workplace rule that required all forest fighter employees to pass new physical fitness tests, including a test of aerobic capacity. The grievance arbitrator accepted the Union's evidence that women employees would generally not be able to pass the aerobic capacity test. In the courts, the central issues were whether the standard was justified because it was *bona fide* and reasonable and provided for individual testing and, if not, whether the remedy was limited to exempting the individual grievor from the application of the standard.

<sup>502</sup> See, for example, Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike, and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law Inc., 2006) 409 [Faraday et al, *Making Equality Rights Real*]. Wright's analysis focuses on the use of problematic comparisons; cf. Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dumps Section 15" (2006), 24 Windsor YB Access Just 111. See also Elizabeth J. McIntyre, Karen Schucher and Fay Faraday, "The Arbitrator as Human Rights Adjudicator: Has *Meiorin* Made a Difference?" (2000-2001) Labour Arbitration Yearbook 31.

acceptance of a link between the unintended negative effect and prohibited grounds of discrimination, or an adjudicative finding that there is this link. When adverse effect discrimination claims are addressed through formal legal process, the question of linking the conduct or practice with prohibited grounds of discrimination is tied to the question of whether or not the adjudicator is prepared to impose legal responsibility for the truly unintended impact of conduct or practices.

In principle, the recognition of adverse effect discrimination had the potential to expand the scope of social conduct and practices that might be challenged under the Code, and there have been certainly been situations where the doctrine of adverse effect discrimination has been successfully used through formal legal process. More often, though, it has been difficult in practice to persuade adjudicators to accept these claims.<sup>503</sup> One reason why it is difficult to establish adverse effect claims through formal legal process is the adjudicative preference for finding some intentionality as the basis for imposing legal responsibility. Therefore, although intent is not formally a requirement to establish adverse effect discrimination, from the beginning it has played a subterranean role in the process of determining when and why “facially neutral” conduct or practices should be judged discriminatory. Adverse effect discrimination claims are also difficult to establish in formal legal process because they typically put into question social

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<sup>503</sup> On the difficulties of “providing” or establishing adverse effect discrimination claims, see also Vizkelety, “Discrimination, the Right to Redress” at 584 and Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2010) at 147 [Sheppard, *Inclusive Equality*]. For a period of time after adverse effect was first held to be conduct prohibited by the Code, there was a substantive reason for distinguishing between the legal categories of direct and adverse effect discrimination because they attracted different remedial consequences. The Supreme Court of Canada decision in the *Meiorin* case eliminated this distinction. However, the separate legal categories continue to serve the purpose of making clear the range of conduct and practices that may constitute discrimination under statutory human rights.

conduct and practices that are considered “normal” and, therefore, should not be judged harmful and unlawful.

Thus, the conceptual underpinning of adverse effect discrimination gives rise to questions about how formal legal process responds to claims based on adverse effect discrimination. One reason adjudicators might hesitate to impose legal responsibility is because they believe it is unfair to hold people responsible, and require them to provide remedies, where they had no actual or constructive understanding that their conduct or practice could result in discriminatory harm.<sup>504</sup> A second reason adjudicators might hesitate to impose legal responsibility is because, by imposing a judgment of discrimination on conduct or practices considered “normal” and not harmful, they effectively establish a new norm relating to discriminatory harm. It can therefore be argued that adjudicators will make the linkage between conduct or practice and prohibited grounds of discrimination in two possible situations: (1) where they can find some element of intent or proxy for intent,<sup>505</sup> or (2) where they are persuaded that it is

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<sup>504</sup> A similar concern about the reintroduction of intent as a requirement to establish a prima facie violation of s. 15 of the *Charter* has also been the subject of considerable commentary. See, for example, paras. 20-24 of the Factum of the Intervener Women’s Legal Education and Action Fund and accompanying references in *Newfoundland (Treasury Board) v. N.A.P.E.* in Faraday et al, *Making Equality Rights Real* 471 at 476-477 (Fiona Sampson and I were LEAF’s co-counsel in this case); Sheila McIntyre, “The Equality Jurisprudence of the McLachlin Court: Back to the 70s” in Sanda Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Canada: LexisNexis Canada Inc., 2010) 129; Bruce Ryder, Emily Lawrence and Cidalia Faria, “What’s Law Good For? An Empirical Overview of Charter Equality Rights Decisions” (2004) 24 SCLR (2d) 103.

<sup>505</sup> Similarly, although the more recent doctrinal development, which imposes a proactive obligation on respondents to anticipate discriminatory impact in their conduct and practices, is a positive development, it too introduces an element of intent similar to the reasonable foreseeability element of negligence law. Vizekeley considered and rejected a comparison with negligence principles as basis for liability for adverse effect discrimination: “Discrimination, the Right to Seek Redress” at 569-572. As noted in the Introduction to this dissertation, Denise Réaume reconsidered this question in “Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination” (2001) *Theor Inq L* 349. Réaume has since moved away from this tort-type analysis of discrimination and now focuses on a dignity-based analysis of discrimination- see, for example: Denise G. Réaume, “Discrimination and

appropriate to impose a judgment of discrimination on conduct or practice previously considered “normal” and unharmful.

In the end, there are significant challenges to successfully advancing both direct and adverse effect discrimination claims. In the case of direct discrimination, the challenges are more connected with problems of proof than with problems of the conceptual basis for liability. In the case of adverse effect discrimination, in my view the challenges are more connected with the conceptual basis for liability, and with the fact that liability is more a question of adjudicative fiat than a question of proof.

#### Systemic Discrimination and Legal Responsibility

Lastly, systemic discrimination was also recognized as a new category of discrimination with potential to expand the substantive scope of Code protection. Systemic discrimination is often connected with adverse effect discrimination; indeed, adverse effect discrimination is sometimes incorrectly used as a synonym for “systemic discrimination”. Similarly, “individual” discrimination is often connected with direct discrimination, and direct discrimination is sometimes incorrectly used as a synonym for individual discrimination. As Colleen Sheppard explained, systemic discrimination includes both adverse effect and direct discrimination:

The legal concept of “systemic discrimination” emerged in the 1980s to describe discrimination that is pervasive, linked to structural inequalities, and institutionalized in social and organizational practices

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Dignity” in Fay Faraday, Margaret Denike & M. Kate Stephenson, *Making Equality Rights Real: Seeking Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) 123 and Denise Réaume, “Dignity, Equality and Comparison” in Deborah Hellman and Sophia Moreau, eds., *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) 7.

and procedures. Though sometimes considered synonymous with adverse effect discrimination, it is a broader concept that often results from both adverse effect discrimination (inequitable policies and practices) and direct discrimination (e.g. recurrent and pervasive harassment, overt exclusions and mistreatment) within a particular workplace environment, school, occupation, or profession [or other social area covered by statutory human rights]. ...

... What is so disconcerting about systemic discrimination is the ways in which it often imperceptibly reproduces, reinforces, and legitimizes inequality and exclusion. Inequitable opportunities, resources, and socio-economic conditions result in unequal accomplishments, which then appear to justify the initial inequitable distribution of social goods. Accordingly, stereotypes and prejudices are perpetuated by the conditions of exclusion and inclusion, making social privileges and advantages seemingly fair. The complex interplay between intentional and unintentional discrimination means that unraveling the two is almost impossible. The idea of systemic inequality embraces both.”<sup>506</sup>

The concept of systemic discrimination reflects the argument that discrimination in society is not an exceptional or isolated event, but is pervasive and deeply embedded in social structures and practices. This does not mean, however, that individual claims of discrimination arise only in situations where discrimination is in fact an exceptional or isolated event. Individual claims may also come forward in contexts where they are simply one instance of systemic issues.

In the Bill 107 debates, the categories of “systemic” and “individual” claims, rather than direct and adverse effect claims, were predominant, but in ways that are not always entirely clear. In some cases, the categories seem to have been used correctly: that is, systemic discrimination was used to refer to claims of widespread discrimination - whether the form of discrimination was direct or adverse effect or a combination, and individual claims was used to refer to claims by individuals about their individual

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<sup>506</sup> Sheppard, *Inclusive Equality* at 21-22.



circumstances - even though in some situations such individual claims might also involve systemic discrimination. In other cases, the categories seem to have been used incorrectly: that is, they seem to have been used as substitutes for adverse effect and direct discrimination. Acknowledging the conceptual distinctions underpinning these different categories is important to analyzing how legal process responds to these different types of claim. At the same time, the interplay between direct, adverse effect, individual, and systemic claims of discrimination can be confusing, and this confusion sometimes obscured aspects of the competing perspectives in the Bill 107 debates.

## **2 Access to a Range of Legal Processes for Advancing Human Rights Claims**

The legal process for addressing statutory human rights claims and issues was the second area in which there were important developments after *Bell v. McKay*. The first development related to the potential for using civil court legal processes either to enforce the Code itself, or at least to seek remedies for discrimination outside the OHRC process. The second development related to the potential for using other administrative law processes to enforce the Code or to address human rights issues that were connected with other issues being addressed. These developments raise questions about the practice of human rights, or how legal process engaged with statutory human rights. They also raise questions about the tension between statutory human rights as a discrete area of law and as an area of law that informs a wide range of social conduct and related areas of law.

No Civil Action for Discrimination: *Bhadauria v. Seneca College*

A potential role for the courts in providing an enforcement avenue for statutory human rights protections was dealt a significant blow by the 1981 decision of the Supreme Court of Canada in *Seneca College of Applied Arts and Technology v. Bhadauria* (“*Bhadauria*”).<sup>507</sup> Pushpa Bhadauria commenced a civil action claiming that Seneca College discriminated against her at common law on the basis of ethnic origin, and breached the Code by failing to grant her an interview on any of the ten job competitions she applied for in a four-year period. Seneca College successfully brought a motion to strike out the statement of claim. Two issues were raised on the appeal to the Ontario Court of Appeal: (1) whether or not the claim could give rise to a civil cause of action based on a common law duty not to discriminate, and (2) whether or not a claimed violation of the Code could give rise to a civil cause of action. In reasons written by Justice Bertha Wilson, the Court addressed the first issue first, holding that there was a common law duty not to discriminate:

I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights. If we accept that "every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin", as we do, then it is appropriate that these rights receive the full protection of the common law. The plaintiff has a right not to be discriminated against because of her ethnic origin and alleges that she has been injured in the exercise or enjoyment of it. If she can establish that, then the common law must, on the principle of *Ashby v. White et al.*, supra, afford her a remedy.

I do not regard the Code as in any way impeding the appropriate

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<sup>507</sup> [1981] 2 SCR 181; rev'g *sub nom Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology* (1979), 27 O.R. (2d) 142 CA [“*Seneca College v. Bhadauria*”].

development of the common law in this important area. While the fundamental human right we are concerned with is recognized by the Code, it was not created by it. Nor does the Code, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather the reverse since s. 14a [enacted 1974, c. 73, s. 5] appears to make the appointment of a board of inquiry to look into a complaint made under the Code a matter of ministerial discretion.<sup>508</sup>

In the Court of Appeal's view, the rights protected by the Code were public policy, for which the common law must provide a remedy. These rights were not "created" but "recognized" by the Code; the codification of these rights could not impede developments in the common law; and the Code did not exclude the possibility of common law remedies for discrimination. In light of this conclusion, the Court did not address the second issue as to whether the Code itself could be enforced by way of civil action.

The Court of Appeal decision was reversed by the Supreme Court of Canada, in reasons written by Chief Justice Laskin, who rejected both the possibility of a common law civil action for discrimination and the possibility of enforcing the Code by way of civil action rather than by way of the OHRC process. Chief Justice Laskin appears to have rejected the Court of Appeal's distinction between founding a civil action on the "public policy" of legislation and founding a civil action on an alleged breach of legislation, for reasons based entirely on the Code's enforcement scheme:

There is, in my view, a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute.

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<sup>508</sup> *Seneca College v. Bhadauria* (OCA) at 150.

...

It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation--one in no sense analogous to a duty of care in the law of negligence--to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach.

...

I confess to some difficulty in understanding the basis of the learned justice's observation that "While the fundamental human right we are concerned with is recognized by the Code, it was not created by it" (or, I assume, by its predecessors). There is no gainsaying the right of the Legislature to establish new rights or to create new interests of which the Court may properly take notice and enforce, either under the prescriptions of the Legislature or by applying its own techniques if, on its construction of the legislation, enforcement has not been wholly embraced by the terms of the legislation ...<sup>509</sup>

In Chief Justice Laskin's view, the Code and OHRC claims resolution process occupied the entire field of discrimination law, leaving no room for common law, civil court processes:

In the present case, the enforcement scheme under The Ontario Human Rights Code ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to full curial enforcement by wide rights of appeal which, potentially, could bring cases under the Code to this Court.

...

I would have thought that [Ministerial discretion to request the appointment of a Board of Inquiry] fortifies rather than weakens the Legislature's purpose, being one to encompass, under the Code alone, the enforcement of its substantive prescriptions. It is unnecessary to consider here how far the Minister's discretion is untrammelled, or whether a clue

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<sup>509</sup> *Seneca College v. Bhadauria* (SCC) at 188, 189, 193-194.

to its character is afforded by the ensuing provisions for appeal to the courts from a decision or order of a board of inquiry.

The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.<sup>510</sup>

Chief Justice Laskin acknowledged the possibility of breakdown in the OHRC claims resolution process, but held that this was not in itself a justification for allowing civil actions based on the Code.<sup>511</sup>

There is a possibility of a breakdown in full enforcement if the Minister refuses to appoint a board of inquiry where a complaint cannot be settled and, further, whether penalties on prosecution will be sought also depends on action by the Minister. I do not, however, regard this as supporting (and no other support was advanced by the respondent) the contention that the Code itself gives or envisages a civil cause of action, whether by way of election of remedy or otherwise. The Minister's discretion is simply an element in the scheme.<sup>512</sup>

From the perspective of competing legal processes, the decision in *Bhadauria* can be read as a vindication of the OHRC claims resolution process, a process that the SCC had been so willing to override in its *Bell v. McKay* decision one decade earlier. From the perspective of effective legal process, Chief Justice Laskin's analysis does appear to be predicated on an assumption that the OHRC claims resolution process was reasonably

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<sup>510</sup> *Seneca College v. Bhadauria*, SCC at 194.

<sup>511</sup> The facts of the decision state that Ms Bhadauria never filed a claim with the OHRC, but say nothing about whether this was a deliberate choice. According to Philip Girard, Ms Bhadauria had previously made 22 complaints to the OHRC about earlier job applications, none of which had been referred to a board of inquiry. *Bora Laskin: Bringing Law to Life* (Toronto, Buffalo, London: University of Toronto Press, 2005) at 496 [Girard, *Bora Laskin*].

<sup>512</sup> *Seneca College v. Bhadauria* (SCC) at 188.

functional.<sup>513</sup> More significantly in relation to the “direct access” initiatives that later evolved, Chief Justice Laskin’s reasons also suggest that his analysis assumed that claims would be referred to adjudication if they could not be resolved by agreement. Put another way, it seems fair to read the decision as upholding the view that claimants should have access to all dimensions of the legal process, but that it is appropriate for access to be gained by way of an administrative law process rather than in the courts.

In principle, the decision in *Bhadauria* foreclosed the option of using civil actions to pursue discrimination claims.<sup>514</sup> Over time, courts began to chip away a bit at the potential impact of *Bhadauria* in situations where discrimination claims could be attached to another civil wrong.<sup>515</sup> The *Bhadauria* case did, however, continue to prevent civil claims that alleged a tort of discrimination or that rested directly and exclusively on an alleged human rights statutory violation. More recently, in *Honda v. Keays*, the Supreme Court of Canada opened the door to revisiting *Bhadauria*’s rejection of a common law tort of discrimination:

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<sup>513</sup> Philip Girard speculated that even if evidence of dysfunction in the OHRC process had been presented, this would not have changed Chief Justice Laskin’s approach or conclusion. In Girard’s view, with which I agree, Chief Justice Laskin “... would likely have replied the involving the courts was no panacea – witness the decision of the B.C. Court of Appeal in the Gay Alliance case just two years earlier. If an agency was broken it should be fixed, not ignored.” Girard, *Bora Laskin* at 496.

<sup>514</sup> As Philip Girard wrote, the decision in *Bhadauria* was, and continues to be, controversial – *Bora Laskin* at 492-496. For commentary on the *Bhadauria* issues and decisions see: Vizkelety, “Discrimination, the Right to Seek Redress” at 558-561; Maureen E. Baird, “*Pushpa Bhadauria v. the Board of Governors of The Seneca College of Applied Arts and Technology*: A Case Comment” (1981) 39 UT Fac L Rev 96; Dale Gibson, “The New Torts”(1979) 11 CCLT 141; Ian Hunter, “Civil Actions for Discrimination” (1977) 55 Can Bar Rev 106; Ian A. Hunter, “The Stillborn Tort of Discrimination” (1982) 14 Ottawa L Rev 219; Ian B. McKenna, “A Common Law Action for Discrimination in Job Applications” (1982) 60 Can Bar Rev 122.

<sup>515</sup> See, for example, *L’Attiboudeaire v. Royal Bank of Canada* (1996), 88 O.A.C. 70 (C.A.); Anne L. MacTavish and Andrew J.F. Lenz, “Civil Actions for Conduct Addressed by Human Rights Legislation – Some Recent Substantive and Procedural Developments” (1996) 4 CLELJ 375; Janice B. Payne and Christopher C. Rootham, “Are Human Rights Commissions Still Relevant” (2005) 12 CLELJ 65 at 72-75.

I agree that it is not necessary to reconsider *Bhadauria* in the present appeal. But in my opinion Laskin C.J. went further than was strictly necessary in *Bhadauria*....

The development of tort law ought not to be frozen forever on the basis of this obiter dictum. The legal landscape has changed. The strong prohibitions of human rights codes and of the Charter have informed many aspects of the development of the common law.<sup>516</sup>

There are opposing perspectives on whether or not there is any meaningful benefit either to recognizing a tort of discrimination or to enabling people to use civil actions for the sole purpose of enforcing statutory human rights.<sup>517</sup> From an access to justice perspective, civil actions are generally not considered to be the most accessible form of legal process because they tend to be more expensive and more complex than administrative legal processes.<sup>518</sup> Most human rights advocates also continue to believe that tribunals are generally more effective at addressing human rights issues than courts are. In Ontario, the question has for now been answered by a policy decision made in connection with the Bill 107 process. When the Code was amended to implement the “direct access” model,<sup>519</sup> it was also amended to allow civil courts to decide and provide remedies for Code claims, provided that the civil action is not “based solely on an infringement of” the Code, and that persons cannot make an application to the tribunal

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<sup>516</sup> [2008] 2 SCR 362 (“*Honda v. Keays*”) at paras. 118, 119.

<sup>517</sup> For some critique of *Honda v. Keays* see Geoffrey England, “Evaluating the Implications of *Honda Canada v. Keays*” (2008) 14 CLEJ 327 at 351-355 and note 71. For discussions, that are more favourably oriented to civil actions for discrimination, see: Larry Chartrand, “The Crumbling Wall of *Bhadauria*: If Not Today, Tomorrow” (2009) 44 SCLR 107 and Rakhi Ruparelia, “I Didn’t Mean it That Way!: Racial Discrimination as Negligence” (2009) 44 SCLR 81.

<sup>518</sup> In Ontario, this issue is also complicated by the ever-increasing jurisdiction of the Small Claims Court, which is now set at the \$25,000 and is expected to increase in the future.

<sup>519</sup> The amending statute enacting Bill 107 was the *Human Rights Code Amendment Act, 2006*, SO 2006, c 30. However, I will refer to these provisions by referring to them as they have been integrated in the *Code* (1990).

under the Code where their human rights claim is settled or decided in the context of a civil action.<sup>520</sup> These provisions essentially codify the *Bhadoria* outcome, as qualified by subsequent cases that permitted statutory human rights claims and issues to be integrated with a civil action based on other claims.

### Addressing Statutory Human Rights Claims in Other Social and Legal Contexts

The second development in the practice of statutory human rights was an increasing engagement with these issues in other legal contexts and processes. When the Code was re-enacted in 1981, a new provision was added which acknowledged that Code claims could arise in other contexts. This provision, s. 34(1), gave the Commission the authority to decide not to deal with complaints that, in its opinion, “could or should be more be appropriately dealt with under an Act other than this Act”.<sup>521</sup> This new power gave the Commission another tool with which to manage its claims resolution caseload.

Collective agreement grievance arbitration processes, in particular, became a key area where human rights issues were frequently raised and litigated. The integration of human rights claims and issues in grievance arbitration has had significant impact on grievance arbitration.<sup>522</sup> This integration has also produced some important developments in substantive human rights doctrine, with application beyond the collective agreement context, the most significant example being the *Meiorin* case.

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<sup>520</sup> *Code* (1990), ss. 34(11), 46.1.

<sup>521</sup> *Code* (1990), s. 34(1). Section 34 was repealed by Bill 107.

<sup>522</sup> See, for example: Fay Faraday, “The Expanding Scope of Labour Arbitration: Mainstreaming Human Rights Values and Remedies” (2005) 12 CLELJ 355 [Faraday, “Mainstreaming Human Rights”]; Michael Lynk and Lorne Slotnick, “The Final Frontier: Labour Arbitrators and Human Rights Remedies” (2000), 40 Labour Arbitration Yearbook 40; Guylaine Vallée, Michel Coutu and Marie-Christine Hébert, “Implementing Equality Rights in The Workplace: An Empirical Study” (2002), 9 CLELJ 77.



Furthermore, the integration has raised significant issues about the scope of union responsibility for human rights issues in the workplace, and about competing legal forums for addressing human rights issues in unionized workplaces.<sup>523</sup> In relation to grievance arbitration, the OHRC adopted a policy in 1993 of exercising its discretion under s. 34(1) so as not to deal with most claims by unionized employees.<sup>524</sup>

The Supreme Court of Canada has resoundingly endorsed the authority of non-human rights tribunals to address human rights that are raised in connection with the other issues before the tribunal. In the *Parry Sound v. OPSEU* case,<sup>525</sup> the SCC upheld a grievance arbitrator's ruling that a probationary employee could challenge her dismissal from employment on human rights grounds, even though the collective agreement denied probationary employees the right to grieve employment termination. The employee, Joanne O'Brien, went on maternity leave during her probationary period, and the employer terminated her employment within a few days after she returned to work. When the employee and the union grieved the employment termination, the employer took the position that the arbitration board did not have jurisdiction to review the termination of probationary employees. The main issue in the case was whether the

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<sup>523</sup> See, for example: Shelley McGill and Ann Marie Tracey, "Building a New Bridge Over Troubled Waters: Lessons Learned from Canadian and U.S. Arbitration of Human Rights and Discrimination Employment Claims" (2011) 20 *Cardozo J. of Int'l & Comp. Law* 1; Elizabeth Shilton, "Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013) 38 *Queen's LJ* 461; Elizabeth Shilton, "'Everybody's Business': Do the *Renaud* Rules Still Govern in Modern Canadian Workplace Human Rights Enforcement?" (forthcoming *Canadian Lab. & Emp. L.J.*) [Shilton, "Everybody's Business"]. See also Martin Malin, Sara Slinn, and Jon Werner, "An Empirical Evaluation of the Adjudication of Statutory Human Rights Claims before Labour Arbitrators and Human Rights Tribunals in Ontario: A Report" (30 July 2014).

<sup>524</sup> Faraday, "Mainstreaming Human Rights" at 362-364. See also Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000-2001) 26 *Queen's LJ* 43 at 56.

<sup>525</sup> *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] 2 SCR 157 [*Parry Sound v. OPSEU*].

arbitrator had jurisdiction over the grievance by virtue of s. 48(12)(j) of the *Labour Relations Act, 1995*, which provides that a labour arbitrator has power “to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.”<sup>526</sup> The decision records that the OHRC intervened in the Supreme Court of Canada appeal to ensure that it did not lose jurisdiction, and took the position that there should be concurrent jurisdiction for both the Code’s statutory enforcement process and labour arbitrators. As part of its analysis upholding the arbitrator’s jurisdiction, the Court reasoned that unionized employees would have less protection in relation to human rights in the workplace if these rights could not be addressed through grievance arbitration and had to be pursued under the Code’s enforcement process:

... Put simply, there are certain rights and obligations that arise irrespective of the parties' subjective intentions. These include the right of an employee to equal treatment without discrimination and the corresponding obligation of an employer not to discharge an employee for discriminatory reasons. To hold otherwise would lessen human rights protection in the unionized workplace by allowing employers and unions to treat such protections as optional, thereby leaving recourse only to the human rights procedure.<sup>527</sup>

Labour arbitration has arguably been the main site where statutory human rights have been addressed outside the Code’s enforcement process. However, it is also arguable that integration of human rights in labour arbitration has provided a model for

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<sup>526</sup> *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, s. 48(12)(j).

<sup>527</sup> *Parry Sound v OPSEU* at paras. 36-37.

the integration of human rights issues in other tribunal and civil contexts.<sup>528</sup> The point is demonstrated by the second Supreme Court of Canada decision endorsing the authority of non-human rights tribunals to address human rights issues. The case of *Tranchemontagne v. Ontario*<sup>529</sup> involved the Ontario Social Benefits Tribunal, a statutory tribunal that deals with appeals involving social assistance benefits claims. The issue in this case was whether a provision of the *Ontario Disability Support Program Act, 1997* that excluded coverage for disability related to substance abuse was contrary to the Code.<sup>530</sup> The Attorney General was the respondent and took the position that the tribunal did not have the authority to decide this question. The SCC disagreed.<sup>531</sup> The Court confirmed that statutory human rights issues can and must be considered in the context where they arise and held that the tribunal was not only authorized, but also obliged, to address human rights issues and challenges that arise in connection with the disputes it is statutorily mandated to decide:

The Code is fundamental law. ... the adjudication of Code issues is no longer confined to the exclusive domain of the intervener the Ontario Human Rights Commission ("OHRC"): s. 34 of the Code. The legislature has thus contemplated that this fundamental law could be applied by other administrative bodies and has amended the Code accordingly.

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In its present form, the Code can be interpreted and applied by a myriad of administrative actors. Nothing in the current legislative scheme suggests

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<sup>528</sup> Other contexts include professional regulation, e.g. *Siadat v. Ontario College of Teachers* (2007), 83 O.R. (3d) 401 (Div Ct), and tenant-landlord regulation, e.g. *Walmer Developments v. Wolch* (2003), 67 O.R. (3d) 246 (Div Ct).

<sup>529</sup> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513 [*Tranchemontagne v. Ontario*].

<sup>530</sup> SO 1997, c 25, Sch B, s. 5.

<sup>531</sup> The Social Benefits Tribunal and Divisional Court ruled that the tribunal did not have jurisdiction. The Court of Appeal for Ontario ruled that the tribunal did have jurisdiction but was not the most appropriate forum.

that the OHRC is the guardian or the gatekeeper for human rights law in Ontario. ... [I]n *Charette*, I noted how allowing many administrative actors to apply human rights legislation fosters a general culture of respect for human rights in the administrative system: see para. 28; see also *Parry Sound*, at para. 52. These pronouncements are consistent with the legislature's removal of the exclusive jurisdiction clause for the OHRC, as well as its current policy of permitting the OHRC to decline jurisdiction where an issue would be best adjudicated pursuant to another Act: see s. 34(1)(a) of the Code. It is hardly appropriate for this Court to now argue with this legislative policy shift towards concurrent jurisdiction, and seek to restore exclusive jurisdiction for the OHRC.<sup>532</sup>

The *Tranchemontagne* holding was not based on a novel legal proposition. As early as 1971, the Supreme Court of Canada held that courts and administrative tribunals have both the authority and the obligation to consider and potentially apply laws that are relevant to the claims and issues in the case they are deciding.<sup>533</sup> However, in *Tranchemontagne* the Court went even further, to suggest that the non-statutory human rights tribunal would usually be the most appropriate adjudicative body to address the human rights issue in the context of the whole claim to which it was connected:

Where a tribunal is properly seized of an issue pursuant to a statutory appeal, and especially where a vulnerable appellant is advancing arguments in defence of his or her human rights, I would think it extremely rare for this tribunal to not be the one most appropriate to hear the entirety of the dispute. I am unable to think of any situation where such a tribunal would be justified in ignoring the human rights argument, applying a potentially discriminatory provision, referring the legislative challenge to another forum, and leaving the appellant without benefits in the meantime.<sup>534</sup>

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<sup>532</sup> *Tranchemontagne v. Ontario* at paras. 13, 39.

<sup>533</sup> *McLeod v. Egan*, [1975] 1 SCR 517.

<sup>534</sup> *Tranchemontagne v. Ontario* at para. 50.

The *Tranchemontagne* decision thus had significant implications for the competing authority over human rights issues that would emerge with the adoption of an enforcement model providing “direct access” to a statutory human rights tribunal.

Integrating human rights issues within legal processes outside the OHRC process highlighted the argument that human rights issues are not “separate” and “discrete” issues which can only be addressed in a separate and dedicated legal process. Indeed, the ultimate goal of human rights protections should be to affect conduct and practices in the important social areas of employment, housing, public spaces and services. On the one hand, then, it should be possible to address human rights issues in the social contexts in which they arise, using the legal processes that are part of those social contexts. On the other hand, there is debate about whether human rights issues will be addressed adequately if they are determined by non-human rights adjudicators. With the move to “direct access”, there is also debate about the role of the statutory human rights tribunal in relation to other legal processes where human rights issues may be raised. I will return to all of these issues later in this chapter, and in my concluding reflections.

### **3 Critiques of the Commission-Based Claims Resolution Process**

Human rights commissions in Canada were (and in some provinces still are) mandated to carry out multiple responsibilities, which typically include(d): claims resolution, education, policy development, and research. It is possible to look at all of these responsibilities as different forms of “enforcement”, inasmuch as they can all provide opportunities for using the legislation to respond to social inequalities. However,

enforcement is more traditionally understood as a form of legal process, and the claims resolution function was the only one carried out using legal process.

There is nothing to suggest that any one of these responsibilities was in principle considered more important than the others. Over time, though, commissions' claims resolution responsibilities consumed increasing proportions of their resources, eventually reaching the point where commissions typically spent most of their resources on their claims resolution role. At the same time, and despite the significant allocation of resources to claims processing and resolution, there was growing dissatisfaction with how commissions were carrying out this responsibility; there was also growing disgruntlement with the relative lack of attention being paid to commissions' other responsibilities.

As we know from the earlier chapters, there was a typical structure to the commission-based claims resolution process. The process was "reactive", rather than proactive, in that its function was to receive claims and respond to claimants seeking remedies under the Code. When a claim was received, the commission was typically mandated to investigate the claim and assist the parties to try to achieve a voluntary resolution. If the commission could not facilitate a voluntary resolution, it then decided whether or not to refer the claim to formal adjudication before a tribunal. If the commission decided not to refer the claim to formal adjudication, which was typically the case, the claimant's only recourse was to ask the commission to reconsider the non-referral decision or bring an application in court for judicial review of the non-referral decision. Although commission decisions not to refer to adjudication were occasionally reversed, this did not happen often. Moreover, judicial review in particular is an

expensive legal process, and would not have been an option for most human rights claimants.

Between 1989 and 2004, seven Canadian common law jurisdictions conducted government-sponsored reviews of their statutory human rights regimes.<sup>535</sup> New Brunswick was the first province to conduct a review, in 1989, with a follow-up review in 2004.<sup>536</sup> It was followed by Ontario in 1991,<sup>537</sup> Alberta<sup>538</sup> and British Columbia in 1994<sup>539</sup> (with a second review in British Columbia in 2001<sup>540</sup>), Saskatchewan in 1996,<sup>541</sup> the Federal government 2001,<sup>542</sup> and Nova Scotia in 2002.<sup>543</sup> All of these reviews addressed questions relating to enforcement of human rights legislation, at least to some extent. They reported similar concerns with how the commission-based claims resolution model was working, but came to different conclusions about how these concerns should be addressed. Several of the reviews also addressed questions relating to substantive

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<sup>535</sup> This discussion does not include the Québec regime. For more information on that regime, see: A. Coté, A. and L. Lemond, *Discrimination et commission des droits de la personne* (Montreal: Saint-Martin, 1988); Lamarche, L. *La regime quebecoise de protection et de promotion des droits de la personne: Elements de reflexion pour un bilan* (Cowansville, Qué.: Éditions Y. Blais, 1996); Commission des droits de la personne et des droits de la jeunesse, *Après 25 ans: La Charte Québécoise des droits et libertés*, Vol. 1 Bilan et recommandations (Québec, 2003).

<sup>536</sup> Charles Ferris, *Towards a World Family: A Report and Recommendations Respecting Human Rights in New Brunswick* (Fredericton, 1989) [Ferris, *Towards a World Family*]; New Brunswick Human Rights Commission, *Position Paper on Human Rights Renewal in the Province of New Brunswick* (February 2004).

<sup>537</sup> Ontario Human Rights Code Review Task Force (Chair: M. Cornish), *Achieving Equality: A Report on Human Rights Reform* (Toronto: Ministry of Citizenship, 1992) [Cornish, *Achieving Equality*].

<sup>538</sup> Alberta Human Rights Review Panel, *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (June, 1994) [Alta. HR Rev. Panel, *Equal in Dignity*].

<sup>539</sup> Bill Black, Special Advisor, *B.C. Human Rights Review, Report on Human Rights in British Columbia* (December 1994) at 85-114 [Black, *B.C. Human Rights Review*].

<sup>540</sup> Deborah K. Lovett, Q.C. and Angela R. Westmacott, *Human Rights Review: Prepared for Administrative Justice Project* (British Columbia, 2001) [Lovett and Westmacott, *Human Rights Review*].

<sup>541</sup> Saskatchewan Human Rights Commission, *Renewing the Vision – Human Rights in Saskatchewan* (Saskatoon, 1996) [Sask. HRC, *Renewing the Vision*].

<sup>542</sup> Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa, 2000) [La Forest, *Promoting Equality*].

<sup>543</sup> Nova Scotia Human Rights Commission, *Moving Forward with Human Rights in Nova Scotia: The Path for the Future* (November 2002) [NS HRC, *Moving Forward*].

protection. However, with the notable exception of the 1994 report for British Columbia, the reviews generally did not draw links between questions of substantive protection and questions of enforcement.<sup>544</sup>

The reports emphasized six areas of concern, which I group into three categories. The first category of concern was low rates of referral to tribunal adjudication and undue pressure to settle claims. The second category of concern was conduct of the investigation and related settlement processes and, in particular: extreme delays and backlogs, unevenness in the quality of investigations and duplication of investigation for cases referred to tribunal adjudication; and tension and confusion between the commissions' roles as "advocate" and as "neutral" investigator. The third category of concern was excessive focus on individual claims and inadequate attention to systemic discrimination issues.<sup>545</sup> These areas of concern often involved interrelated issues about the design of the process and how the process worked in practice.

#### Concern About Low Rates of Referral to Adjudication

Critics of the commission-based claims resolution model dubbed it the "gatekeeper" model. It was empirically accurate to describe the commission as a gatekeeper to the tribunal, because that is what it did. However, the "gatekeeper" label was not meant to be a neutral moniker. Critics of the model did not like the fact that there

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<sup>544</sup> See also M. Kaye Joachim, "Reform of the Ontario Human Rights Commission" (1999) 13 Can J Admin Law & Prac 51 at 64-80 [Joachim, "Reform of OHRC"].

<sup>545</sup> See, for example: Rosanna L. Langer, *Defining Rights and Wrongs: Bureaucracy, Human Rights, and Public Accountability* (Vancouver: UBC Press, 2007) at 9 [Langer, *Defining Rights and Wrongs*].



was a gatekeeper to the tribunal, nor did they like how commissions exercised their gatekeeping function.

The concern about limited access to tribunal adjudication had both design and operational aspects. From the design perspective, the human rights claims-processing model was built on the view that most claims would, and should, be resolved by voluntary agreement and that recourse to formal adjudication would, and should, be the exception. From the operational perspective, given the very high proportion of cases not referred to adjudication, one can speculate that there may have been some elision between what would happen and what should happen, i.e. the expectations about what “would” and “should” happen became the reality of what did happen. Most claims that resolved were resolved by agreement; very few of the cases that did not resolve by agreement were referred to adjudication for determination.

From the operational perspective, there were a number of concerns. One issue was the process commissions used to make their referral decisions. Commissions based their decisions on reports prepared by staff and on written submissions from the claimants and respondents; there was never an opportunity for oral submissions. Commissions provided no reasons for their decisions not to refer a claim for adjudication. The “behind closed doors” nature of the process, and lack of reasons for the non-referral decision, fuelled arguments that commissions routinely denied access to formal adjudication to claimants with meritorious claims. It should be no surprise that this process was perceived as procedurally unfair; nor did the process instill confidence in the substance of the non-referral decisions. At the same time, in the absence of concrete information about

the substance of settlements and about why cases were not referred to adjudication, it is impossible to do any meaningful analysis of the cases that were not referred. In the absence of reasons for non-referral decisions, there is no way of knowing to what extent meritorious claims may not have been referred to adjudication. It is also impossible to know whether commissions could have provided reasons for non-referral that would have satisfied most claimants.

A related operational concern was the allegation that commissions placed undue pressure on the parties, and particularly on claimants, to agree to voluntary resolutions. With a model that both structurally and operationally gave preference to voluntary resolution of claims, it is perhaps not surprising to hear that claimants experienced pressure to agree to settlements of their claims. To say that there was undue pressure to settle, however, is to assert – or at least to suggest - that claimants were pressured to settle for an outcome that was less favourable than the result they should have received. It seems clear that at least some claimants experienced dissatisfaction with the conciliation process and its outcomes. Again, however, since there is no concrete information about the types of settlements to which claimants were being asked to agree, there is no way to analyze their content and try to assess their substantive fairness or unfairness. As discussed in Chapters One and Two, lack of access to information about settlements has been a chronic challenge in the commission-based enforcement process. The Ontario review report recommended that settlements be publicly available unless the

claimant requested confidentiality or the mediator felt that confidentiality would be appropriate.<sup>546</sup>

### Concern About Conduct of the Investigation Process

Access to a publicly-resourced investigation process was a hallmark of the commission-based claims resolution model. The reviews tended to note three areas of concern with the conduct of the investigation and related settlement processes: (1) delay and inconsistent quality, (2) confusion about the commissions' various roles, and (3) pressure to agree to voluntary resolutions (addressed above).

Delay was a primary concern, and there is no question that the commission-based investigation and related settlement processes were often subject to significant delays. Concerns about the quality of investigation were more vague and difficult to assess. Insufficient staff, created by inadequate funding of human rights commissions, was often identified as a significant cause of the delay and of other operational problems, and there is no reason to doubt that commissions could have been better funded.<sup>547</sup> Underfunding alone cannot, however, explain all the delay that plagued the commissions' process. The claims-resolution function was a legal process, and delay is a pervasive problem for all

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<sup>546</sup> Cornish, *Achieving Equality* at 118.

<sup>547</sup> Ron Ellis, for example, described the Ontario Human Rights Commission as being "starved every year of the resources that would actually be required to meet its statutory responsibilities in a reasonably timely manner" – see "Super Provincial Tribunals: A Radical Remedy for Canada's Rights Tribunals" (2002) 15 Can J of Admin L & Prac 15 at 24. See also R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto, Buffalo, London: University of Toronto Press, 2000) at 70-100 [Howe and Johnson, *Restraining Equality*]. According to Kaye Joachim, only 1% of the Ontario budget was generally allocated to the OHRC: "Human Rights Reform" at 106.

Canadian legal processes, whether in the courts, before government agencies, or at administrative tribunals - it is not a problem unique to the commissions.<sup>548</sup>

In the *Blencoe v. British Columbia (Human Rights Commission)* case, the Supreme Court of Canada expressed concern about the delays for which the commission claims resolution process was notorious, but was not willing to provide a remedy and also did not accept lack of resources as the sole explanation:

To summarize, it cannot be said that the respondent's s. 7 rights were violated nor that the conduct of the Commission amounted to an abuse of process...

Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases....<sup>549</sup>

I share Rosanna Langer's view that it is important to put the concerns about how commissions conducted their investigation and settlement processes into a larger context of legal process generally. As Langer commented, the claims resolution process was carried out "... in an administrative environment constrained by expectations about procedural fairness and operational efficiency and held to an ideal standard promised by

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<sup>548</sup> Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice: A Study Paper by Roderick A. Macdonald with commentaries* (Toronto: Queen's Printer, 1995).

<sup>549</sup> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at paras. 134-135.

the subject of the Commission's mandate."<sup>550</sup> Langer focused in particular on the competing goals of human rights legal practitioners:

The community of human rights practitioners shares an understanding that the current structure of human rights administration in Ontario is deeply flawed and that appropriate reform would involve a significantly enhanced role for legal representatives and advocacy. Collectively, these practitioners may be considered one of the organizational pressures faced by the Commission, but many comments made by lawyers condemning the current structure of human rights administration indicate that there is much more at work than the faults of the system itself. [T]hese intermediaries have multiple layers of motivation in taking and discouraging individual cases, based on client advocacy, professional advancement, and desire for social change.<sup>551</sup>

I focus more generally on questions about the enforcement role of the OHRC in relation to broader questions about the role and operation of legal process. There are innumerable ways in which the formal requirements of legal processes can result in delay. For example, parties can bring motions and make procedural requests that, when granted, will result in delays. In the context of the human rights commission claims resolution process, the strong preference in favour of voluntary resolution also likely contributed to delays. Since respondents would have known there was little likelihood of a human rights claim being referred to adjudication, there was little if any incentive for them to engage efficiently with the conciliation process.

The concern about commissions playing conflicting roles, and the confusion that resulted from these conflicting roles, was more of a structural concern. Human rights

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<sup>550</sup> Langer, *Defining Rights and Wrongs* at 9. Langer argued that the critiques of human rights commissions fail to take account of other relevant factors, such as, increased privatization, increased role for lawyers, etc. at 19-20.

<sup>551</sup> Langer, *Defining Rights and Wrongs* at 63.

commissions were clearly expected to be advocates for human rights in their education, research and policy-development capacities. Their role in relation to individual claims was more complicated. Critics argued that commissions understood themselves as playing a neutral role in relation to individual claims, which created confusion for individuals in the claims resolution process. Another perspective on this question was that commissions were neutral in relation to individual claims in the sense that they were not advocates for individuals, but that they were advocates in relation to the human rights issues that could be raised by individual claims. This is perhaps a subtle distinction, and it goes to the question of who decides the human rights merits of an individual claim - a key feature of the commission-based model, which “direct access” proponents reject.

#### Concern About Insufficient Focus on Systemic Discrimination

Some of the reviews argued that the emphasis on claims resolution also had the effect of improperly determining the commission’s priorities – both in relation to method of enforcement and in relation to substantive issues.<sup>552</sup> Critique of the disproportionate emphasis on individual claims resolution was also linked to a concern that systemic discrimination did not receive enough attention. One aspect of this concern was the view that claims resolution, as a legal process, was not an effective or preferable method for addressing systemic discrimination. It was not always clear, however, whether the concern arose from the idea that claims tend to be focused on individuals rather than groups, or whether it arose from the idea that claims resolution processes tend to be

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<sup>552</sup> Black, *BC Human Rights Review* at 16-17; La Forest, *Promoting Equality* at 51.

reactive rather than proactive. Although the claims resolution model often focused on individuals, this model did not necessarily preclude group claims, third-party claims, and commission-initiated claims. As discussed earlier in the chapter, it is also possible to raise systemic issues in the context of individual claims.

The second aspect of the argument was that positive or proactive enforcement methods are better equipped to address systemic discrimination. The individual claims model tended to be characterized as a reactive or responsive approach because it was activated as a response to claims when they came forward. Positive or proactive measures, on the other hand, can be pursued at any time and are usually systemic in nature. They include research, policy development and education, as well as standard-setting and related compliance processes, and affirmative action measures. The reviews generally agreed that commissions were not devoting enough attention to education, research and policy functions, and that these functions needed to be given more “enforcement” priority. They generally recommended that the commissions’ research, policy and educational roles should be maintained, invigorated and expanded.<sup>553</sup> A number of the reviews also suggested greater use of regulatory measures such as standard-setting, both under human rights statutes and under other statutes, such as building codes.<sup>554</sup>

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<sup>553</sup> Cornish, *Achieving Equality* at 64-82; Alta. HR Rev. Panel, *Equal in Dignity* at 54-55; Black, *BC Human Rights Review* at 26-28; Sask. HRC, *Renewing the Vision* at 83-87; La Forest, *Promoting Equality* at 41-45.

<sup>554</sup> Ferris, *Towards a World Family* at 112, 139; Cornish, *Achieving Equality* at 173-180; Black, *BC Human Rights Review* at 183-185; Sask. HRC, *Renewing the Vision* at 10; La Forest, *Promoting Equality* at 34-38.

#### **4 Human Rights as a Shared Responsibility**

In addition to recommending changes or improvements to the human rights legal regime, a number of reviews of statutory human rights regimes also suggested that there is a need to share or spread responsibility for addressing discrimination and inequality. According to these reviews, responsibility could be shared by expanding the enforcement avenues for human rights statutes, as well as by incorporating anti-discrimination and equality goals into more statutes and statutory provisions. The reports generally encouraged measures that create alternative enforcement avenues for addressing human rights claims and issues. For example, where collective agreements include anti-discrimination provisions, the grievance-arbitration procedure can in some cases be available for employee claims. The Federal review went one step further to recommend that an internal responsibility model be required for all workplaces with more than five employees. It recommended that the internal responsibility system include an internal claims-resolution mechanism, and that the human rights tribunal be allowed to dismiss a claim unless the claimant could show that the internal system either failed to deal fully with the human rights issues or failed to provide an adequate remedy.<sup>555</sup> In relation to the public school system, the Saskatchewan review argued that human rights education is a fundamental proactive strategy for eliminating discrimination and achieving equality, but recommended that schools and schools boards have primary responsibility for providing this education.

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<sup>555</sup> La Forest, *Promoting Equality* at 32-33. The Nova Scotia review recommended that an internal responsibility system be considered in the future: NS HRC, *Moving Forward*.



On the question of additional legislative measures, one option suggested in the reviews was to incorporate anti-discrimination and equality-promoting provisions into other statutes. For example, anti-harassment provisions could be added to occupational health and safety legislation.<sup>556</sup> This strategy can both provide additional substantive protection and make available the enforcement avenues under the other statute. For example, if harassment provisions were added to occupational health and safety legislation, government enforcement avenues available under this legislation could be available for harassment claims. Similarly, if building codes included accessibility requirements, these requirements could be enforceable under building code enforcement mechanisms. Some reviews also identified a need for more statutes, such as employment equity and pay equity legislation.<sup>557</sup> Employment equity and pay equity statutes in Canada have typically sought to prescribe proactive measures for addressing discrimination in access to employment (in the case of employment equity legislation), and sex discrimination in wages (in the case of pay equity legislation).

## **5 Recommendations for Statutory Human Rights Enforcement**

Four of the seven reviews supported the commission-based claims processing model, but with appropriate changes to ensure that the commissions substantially

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<sup>556</sup> In Ontario, the *Occupational Health and Safety Act*, RSO 1990, c O.1 was amended in 2009 to add some protection against workplace harassment, but not specifically relating to human rights prohibited grounds of discrimination - *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009, SO 2009, c 23.

<sup>557</sup> Black's *BC Human Rights Review* did not specifically recommend the adoption of pay equity and employment equity legislation because analysis of these measures was beyond the scope of the review mandate, but recommended that the government study these options, at 17-18. The Sask. HRC, *Renewing the Vision* review did recommend the adoption of pay equity and employment equity legislation, and also encouraged the creation of complaint procedures outside the human rights legislation, for example, including anti-harassment provisions in occupational health and safety legislation, at 10, 96-97, 114.

improved their performance of this role: New Brunswick (1989), Alberta (1994), British Columbia (1994), and Saskatchewan (1996). In the case of New Brunswick and British Columbia, the recommendation to maintain a commission-based model flowed from slightly different contexts than in the other provinces. In New Brunswick, the commission did not previously have gatekeeper authority. The 1989 review recommended that it be given this authority, which it was, and a subsequent 2004 review did not recommend any changes to the structure of the enforcement process.<sup>558</sup> In the case of British Columbia, there had been a commission-based complaints processing model, which was dismantled in 1983 and replaced with a system that had some structural similarities but was significantly scaled down.<sup>559</sup> The review conducted in 1994 by Bill Black recommended a return to the commission-based model that British Columbia had previously had and that was more similar to models across the country.<sup>560</sup> A second review was conducted in British Columbia in 2001, as part of an Administrative Justice Project undertaken by the British Columbia Ministry of the Attorney General. The report prepared as part of this review was intended to inform the work of at least two other projects, a Workplace Tribunals Review and an Agency Appointments Policy Paper, and was not expected itself to make recommendations.<sup>561</sup> However, British Columbia was subsequently, in 2003 the first Canadian province to implement a “direct access” model.

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<sup>558</sup> Ferris, *Towards a World Family*; NB HRC, *Position Paper on Human Rights*.

<sup>559</sup> For a discussion of the “turbulent history” of statutory human rights enforcement in British Columbia, see Howe and Johnson, *Restraining Equality* at 13-14 and 65-68.

<sup>560</sup> Black, *BC Human Rights Review*.

<sup>561</sup> Lovett and Westmacott, *Human Rights Review* at 5-6, 10-14.

Although the Saskatchewan review recommended maintaining the commission enforcement model, it included an additional recommendation that had elements of a “direct access” model, by proposing that human rights claimants have the option of going to the tribunal at their own expense and without commission representation.<sup>562</sup> In addition, although Saskatchewan still maintains a commission-based model, in 2011 the Saskatchewan government eliminated the statutory adjudicative tribunal and amended the statute to provide for the commission to refer cases to court for adjudication.<sup>563</sup> Finally, the Alberta review did not recommend any changes to the commission’s role, but did recommend staffing increases to address the delays and backlog in the process.<sup>564</sup>

The Ontario (1991) and Federal (2001) reviews recommended eliminating the commissions’ claims-processing role and replacing it with a ““direct access”” model that would establish a process for claimants to file claims directly with an adjudicative tribunal. The Nova Scotia review report recommended that consideration be given in the future to moving to a “direct access” model.<sup>565</sup> The analysis in the Ontario review is discussed in more detail in the next part of this chapter, to which I now turn.

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<sup>562</sup> Sask. HRC, *Renewing the Vision* at 42-49, 58-59.

<sup>563</sup> *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ss. 29.5-29.8.

<sup>564</sup> Alta. HR Rev. Panel, *Equal in Dignity*.

<sup>565</sup> NS HRC, *Moving Forward* at 5.

## **Part II: Ontario's Move to Bill 107 and "Direct Access"**

Ontario's move to "direct access" began in 1991 with an initiative led by a group of more than 40 community groups called the Coalition for Human Rights Reform.<sup>566</sup> This initiative led to the creation of the Ontario Human Rights Code Review Task Force ("Cornish Task Force"), which issued its report ("Cornish Report") and recommendations in 1992.<sup>567</sup> The Cornish Report recommended a complex, tripartite structure composed of an adjudicative tribunal, community-based legal services organizations, and a body similar to the OHRC focusing on systemic issues, education, policy development, and research.

The NDP government that established the Cornish Task Force did not take up these recommendations. Instead, it passed employment equity legislation, a proactive approach, which required employers to analyze their workforces through a diversity lens and develop plans to achieve statutory diversity goals. This employment equity legislation became a high profile issue in the next provincial election and may have played a role in the successful 1995 campaign of the Progressive Conservative Party, led by Mike Harris. The new government acted quickly to repeal the employment equity legislation and, not surprisingly, did not take up any of the Cornish Report recommendations during its two terms in government.

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<sup>566</sup> In "Reform of the OHRC" Joachim also reviews other government initiatives to study and try to address concerns with the OHRC and its processes, beginning in 1985 (at 83-90). There is also a paper dated 1995, authored by the Coalition for Reform of the Ontario Human Rights Commission and titled "Dysfunction in the Human Rights Complaint System", which describes concerns with the OHRC complaint-processing process: on-line at <http://www.law.utoronto.ca/scholarship-publications/conferences/archives/administrative-design>.

<sup>567</sup> Cornish, *Achieving Equality*.

In the 2003 election campaign, the Liberal party included a commitment to move the Ontario Human Rights Commission and Code from the Ministry of Citizenship to the Ministry of the Attorney General, which “has the authority to treat human rights issues with the gravity they deserve.”<sup>568</sup> Also in 2003, British Columbia became the first Canadian jurisdiction to implement a “direct access” model. The BC version of the model not only replaced the commission enforcement process with tribunal adjudication but also completely dismantled the human rights commission in British Columbia.<sup>569</sup>

In January 2005, the University of Toronto Faculty of Law hosted a conference, titled “Administrative Design and the Human Rights Process in Ontario: Can We Do This Better?”, at which all of the presenters were supporters of moving to a “direct access” model.<sup>570</sup> In February 2006, Ontario Attorney General Michael Bryant announced the government’s intention to “modernize” Ontario’s human rights system. Like the “direct access” model implemented in British Columbia, the model proposed for Ontario would take the claims-processing role away from the OHRC. Unlike the approach taken in British Columbia, Bill 107 proposed maintaining the OHRC, but with a modified mandate.

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<sup>568</sup> Juliet S. Robin, “Modernising Ontario’s Human Rights System: The *Human Rights Code Amendment Act, 2006*” in Le Tribunal des droits de la personne et le Barreau du Québec, eds., *L’accès direct à un tribunal spécialisé en matière de droit à l’égalité: l’urgence d’agir au Québec? Access to a Specialized Human Rights Tribunal: an Urgent Need to Act in Quebec?* (Québec: Les Éditions Yvon Blais Inc.: 2008) 321 at 326 [Robin, “Modernising Ontario”. The OHRC had previously been under the authority of the Ministry of Labour. Ms Robin was Senior Counsel to the Ministry of the Attorney General.

<sup>569</sup> For more discussion on the British Columbia “direct access” model see Heather M. MacNaughton, “Direct Access: The B.C. Experience” in *Le Tribunal des droits de la personne et le Barreau du Québec*, eds., *L’accès direct à un tribunal spécialisé en matière de droit à l’égalité: l’urgence d’agir au Québec? Access to a Specialized Human Rights Tribunal: an Urgent Need to Act in Quebec?* (Québec: Les Éditions Yvon Blais Inc.: 2008) 169 [MacNaughton, “The B.C. Experience”]. MacNaughton was chair of the British Columbia Human Rights Tribunal when she wrote this article.

<sup>570</sup> The materials from this conference are archived on-line at <http://www.law.utoronto.ca/scholarship-publications/conferences/archives/administrative-design>.

Many human rights activists, as well as the OHRC itself, supported the move to a “direct access” model in Ontario. However, other human rights activists strongly opposed the proposed change, and the introduction of Bill 107 led to a divisive and acrimonious debate within the community of human rights advocates. Opponents of the proposed move to “direct access” also voiced concerns that the Attorney General had failed to carry out a proper consultative process before moving forward with this initiative, and repeatedly called on the Attorney General to halt the Bill 107 process, go back to the drawing board, and engage in a consultative process. The Attorney General denied these accusations, and maintained that he had consulted widely before moving forward.

Bill 107 was introduced for First Reading on April 26, 2006. Second Reading began on May 8, 2006, but was then adjourned to May 30, 2006; it continued on June 5 and June 6, 2006, when the motion passed and the bill was referred to the Standing Committee on Justice Policy. Although the bill was vigorously opposed by some advocates, Attorney General Bryant repeatedly signaled that there was no room for debate over whether or not to move to a “direct access” model, but only over how to move to that model.

Public hearings were held in London, Ottawa and Thunder Bay in August, and were scheduled for Toronto in November and December. In an article published in the *Toronto Star* on October 16, 2006, journalist Ian Urquhart queried whether the government might shelve Bill 107 after losing a by-election in Parkdale-High Park in September. He wrote:

... my sources say the bill, while not quite dead, is in critical condition. However, as word of this began to leak out this month, supporters of the bill, heretofore mostly silent because they assumed a government with a majority would tough out the criticism, began their own counter-lobby.

In recent days, McGuinty has been on the receiving end of anxious letters from a variety of supporters of Bill 107.

"I urge you to demonstrate the leadership that is called for at this time," Catherine Frazee, the highly respected former head of the human rights commission, wrote to McGuinty. "I urge you to stay the course."  
"Please do not lose courage on this important legislation," wrote representatives of more than 40 legal clinics in a joint letter to the premier. A letter from a group of eminent citizens - including former Supreme Court judge Claire l'Heureux-Dube, June Callwood, three senators, and five law deans and professors - noted that the United Nations Human Rights Commission has urged Canada to adopt the very reforms contained in Bill 107.

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And the Ontario Bar Association issued a hopeful-sounding press release last week that commended McGuinty and Bryant "for having the courage to bring forward pioneering legislation that, if passed, will fix a broken human rights system." The conditional phrase, "if passed," is not usually needed with a majority government.<sup>571</sup>

The Toronto hearings scheduled for November proceeded as scheduled, but the December dates were cancelled, leaving the key spokesperson against "direct access", David Lepofsky of the Accessibility for Ontarians with Disabilities Act Alliance ("AODAA"), without an opportunity to make oral submissions to the Committee.<sup>572</sup> Instead, the bill was referred for Third Reading, which it received on December 4 and 5, 2006. The Bill received Royal Assent on December 20, 2006 and came fully into force on June 30, 2008, providing for an 18-month transitional period.

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<sup>571</sup> "Is rights' reform bill on life support?", *Toronto Star*, 16 Oct 2006: A17.

<sup>572</sup> As I discuss further below, the AODAA presented extensive written submissions throughout the legislative process.

## **1 Who were the Key Players in Ontario’s 2006 “direct access” Debates?**

There was no direct correlation between the positions taken in the “direct access” debates and different areas of social inequality. Indeed, disability rights advocates arguably had the highest public profile in the debates and they found themselves on both sides of the question. The move to “direct access” was supported by Catherine Frazee - disability rights activist, former Chief Commissioner of the OHRC and one of the few non-lawyers who had a high profile in the debates, and by two specialty legal clinics focusing on disability rights issues - ARCH Disability Law Centre and the HIV and Aids Legal Clinic Ontario. Opposition to “direct access” was in large measure led by the AODAA, and supported by community-based disability activists.

Most of the key spokespeople on both sides of the “direct access” debate were lawyers. Some of these lawyers were specifically human rights practitioners; others practiced in community legal clinics; one was a government lawyer, whose human rights advocacy was done in his personal capacity. These lawyers would all describe themselves as human rights advocates, sharing a common goal of achieving access to human rights justice, and they would all be publicly recognized as human rights advocates. Like the lawyers involved in the campaigns for fair practices legislation and enforcement, they are “cause lawyers”. Yet they also held radically different views about what access to human rights justice meant, and the debates over the proposed move to “direct access” were both divisive and publicly acrimonious.

The key spokespeople supporting the proposed move to “direct access” were private practice lawyers Mark Hart and Geri Sanson, and legal clinic lawyer Katherine



Laird, who at that time was with the Advocacy Centre for Tenants Ontario (“ACTO”), a specialty clinic.<sup>573</sup> Many other legal aid clinics supported the proposed “direct access” model, both general service community clinics across the province and other specialty clinics, including ARCH Disability Law Centre and the HIV & AIDS Legal Clinic (Ontario).<sup>574</sup> Other supporters of moving to a “direct access” model included Raj Anand (a human rights practitioner who served briefly in the late 1980s as Chief Commissioner of the OHRC), the Advocates’ Society,<sup>575</sup> the Centre for Equality Rights in Accommodation (CERA), a coalition of women’s anti-violence and other equality rights organizations, and the Ontario Bar Association, represented by its Civil Liberties and Human Rights Section.

The key spokesperson for the opposition to Bill 107 was David Lepofsky, speaking through the AODAA. He was joined by legal clinic lawyers Avvy Go (with the Metro Toronto Chinese & Southeast Asian Legal Clinic) and Margaret Parsons (with the African Canadian Legal Clinic), the South Asian Legal Clinic of Ontario and Parkdale Community Legal Services, and also supported by the Native Women’s Association of

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<sup>573</sup> Mark Hart and Geri Sanson were in private practice together, having both previously worked in the legal services department of the Ontario Human Rights Commission. Mark Hart subsequently became a vice-chair of the Human Rights Tribunal of Ontario, while Geri Sanson remains in private practice. Katherine Laird became counsel to the Chair of the Human Rights Tribunal of Ontario after the Code was amended to create the “direct access” model, and then the Executive Director of the Human Rights Legal Support Centre.

<sup>574</sup> A joint community legal clinic written submission to the Standing Committee was endorsed by 48 general service community legal clinics and 7 specialty legal clinics: “Joint Community Legal Clinic Submission –Standing Committee on Justice Policy – Legislative Hearings on Bill 107, An Act to Amend the Ontario Human Rights Code” (November 2006).

<sup>575</sup> Advocates’ Society, “Submission on Bill 107” (November 2006).

Canada (“NWAC”) and the Ontario Native Women’s Association (“ONWA”).<sup>576</sup> The Canadian Federation of Independent Business, the League for Human Rights of B’Nai Brith Canada and 519 Anti-Violence Programme also opposed Bill 107.<sup>577</sup>

Organized labour does not appear to have taken an official position on Bill 107. The Ontario Federation of Labour co-sponsored at least one community forum raising concern about Bill 107, but did not make oral or written submissions to the Standing Committee.<sup>578</sup> Several large trade unions supported Bill 107 in written submissions to the Standing Committee: the Canadian Auto Workers, the Elementary Teachers’ Federation of Ontario, the Ontario Secondary School Teachers’ Federation, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.<sup>579</sup> The Ontario English Catholic Teachers’ Association opposed Bill 107 in written submissions, as did several labour councils.<sup>580</sup>

The Ontario Public Service Employees Union, Local 710 (Thunder Bay) made brief

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<sup>576</sup> NWAC and ONWA, “The Proposed ‘Direct Access’ Model Equals Less Access to Human Rights for the Most Marginalized and Disadvantaged in Ontario! – Joint Submission by the Native Women’s Association of Canada (NWAC) and Ontario Native Women’s Association (ONWA)” (August 2006).

<sup>577</sup> Canadian Federation of Independent Businesses, “Submission on Bill 107” (November 2006) [CFIB, “Bill 107 Submission”]; League for Human Rights of B’Nai Brith Canada, “Submission on Bill 107” (August 2006); “Submission of the 519 Anti-Violence Programme Concerning Bill 107, the Proposed Ontario Human Rights Code Amendment Act” (November 2006).

<sup>578</sup> The OFL co-hosted “A Community Forum on the Need to Rescue the Ontario Human Rights Commission” held on April 5, 2006 at the United Steel Workers Hall, with guest speaker Mary-Woo Simms, former Chief Commissioner of the by then dismantled British Columbia Human Rights Commission.

<sup>579</sup> Canadian Auto Workers, “Submission on Bill 107” (November 2006); Elementary Teachers’ Federation of Ontario, “Submission on Bill 107” (November 2006); Ontario Secondary School Teachers’ Federation, “Submission on Bill 107” (November 2006); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, “Submission on Bill 107” (November 2006).

<sup>580</sup> London and District Labour Council, “Submission on Bill 107” (August 2006); Oxford Regional Labour Council “Submission on Bill 107” (August 2006); St. Thomas & District Labour Council, “Submission on Bill 107” (August 2006); Sarnia & District Labour Council, “Submission on Bill 107” (August 2006); Thunder Bay & District Labour Council, “Submission on Bill 107” (August 2006).

written to the Standing Committee, which did not explicitly oppose Bill 107 but which recommended instead a model which would provide a choice between filing claims with the commission or with a tribunal.<sup>581</sup>

The high profile of human rights practitioners as supporters of Bill 107 gave rise to some criticism that these practitioners were driven by self-interest rather than the public interest. Attorney General Michael Bryant dismissed this criticism in the following way when he introduced Bill 107 for second reading:

I've cited a number of people in support of this model, but I want to pause with respect to some of those endorsements and respond to a particularly invidious line of inquiry that has been brought by both of the opposition parties in trying to label some the people who support this model as somehow acting in their own self-interest. Those who support this have been dismissed as lawyers by the leader of the official opposition and by the justice critic in the third party. Certainly, the former chief commissioner of the Ontario Human Rights Commission, Catherine Frazee, doesn't happen to share the profession that is being castigated here.

But I want to say something about the people who work in the human rights system. Believe you me, if they wanted to act in their self-interest, they would be in a different area of law. They would be practising something else; they would not be in the area of human rights. People who work in the human rights field, who have devoted their careers, their talents and their energies to that area, do so out of a spirit of social justice and for assistance, trail-blazing, championing in many cases the underdog, people who are victims of human rights discrimination. I think it would be helpful in the debate going forward if that really invidious line of argument did not play the prominent role it has played thus far, because it does not, firstly, in any way characterize the people who have lent their name and support to this social justice reform.<sup>582</sup>

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<sup>581</sup> Ontario Public Services Employees Union, Local 710, "Submission on Bill 107" (August 2006).

<sup>582</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38<sup>th</sup> Parliament, 2<sup>nd</sup> Session, No 72A (8 May 2006) at 1610 online.

Attorney General Bryant was correct to challenge the argument that support for “direct access” was driven by self-interest on the part of human rights practitioners. To the extent that this “invidious line of criticism” might have been based on a stereotype of practicing lawyers as highly-paid – or even excessively-paid - professionals, this stereotype is generally not a good fit for the human rights practitioners and legal clinic lawyers who supported Bill 107. At the same time, to the extent that Ontario’s “direct access” model would include some public funding specifically for legal services, there was the potential for some benefit to practitioners.

Nonetheless, the lawyer dominance critique reflects the extent to which the Bill 107 debate was focused much more on legal process than on social issues. Relatively few human rights social activist groups were active participants in the debates, and relatively few of the submissions to the Standing Committee addressed the social issues relevant to the Code and its enforcement.<sup>583</sup> These absences may to some extent be explained by the extent to which the Bill 107 debate was focused on legal process rather than on social issues. One wonders, however, whether non-legal social advocacy organizations did not consider the Bill 107 debate - and thus the important questions about the Code and the OHRC - as significant to their work.

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<sup>583</sup> The written submissions to the Standing Committee by the African Canadian Legal Clinic, “Submissions on Bill 107” (November 2006) and the Canadian Hearing Society, “Submissions on Bill 107” (August 2006) did include discussion of the social issues at stake.

### Additional Note on the OHRC

In the context of the Bill 107 debates, supporters and opponents of “direct access” agreed that the commission-based claims resolution process was not working, although there does seem to have been some difference of opinion about the degree to which the process was not working.<sup>584</sup> There was also significant consensus about how the process was not working. However, the fact that there were human rights advocates who supported retaining the commission-based process indicates that they believed the process was capable of functioning effectively and consistently with human rights goals and values. It is impossible to assess in the abstract whether or not their confidence was misplaced. One of the ADOAA’s recommendations was that an independent review and audit of the OHRC process be conducted to determine the source of the problems and how to reform the process.<sup>585</sup>

The OHRC was ready to relinquish its claims processing role in 1992, when the Ontario review was being conducted. In the period between the release of the Ontario review report and the move to “direct access” in 2006, the OHRC continued to be willing to relinquish its claims processing role, unless the government legislated procedural requirements that would enable the OHRC to exercise more control over the process. These changes never came.

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<sup>584</sup> In their submission to the Standing Committee, the AODAA indicated that they did not agree with all the statistics or with the interpretation of the statistics relating to the OHRC’s performance, although they did agree that the OHRC process was not working well and needed substantial reform.

<sup>585</sup> Accessibility for Ontarians with Disabilities Act Alliance, *Submission to the Standing Committee on Justice Policy on Bill 107, The Proposed Ontario Human Rights Code Amendment Act* (November 28, 2006) at 34 [AODAA, *Submission to Standing Committee*]: on-line <http://www.aodaalliance.org/reform/default.asp>.

During the public hearings on Bill 107, MPP Peter Kormos took great exception to the accusations or suggestions that the OHRC was abusing its gatekeeper role:

The government and its collaborators have made a concerted effort to generate a myth around the Human Rights Commission and its staff, a myth that quite frankly allows no other inference than widespread incompetence or outright corruption.

This ain't Telus Corp. It's not a huge corporate body with hundreds of staff; it's a pretty small group of people. You see, Chair, if there's incompetence or corruption by the front-line staff, there's incompetence and corruption by their managers and there's incompetence and corruption by the chairs of the commission. What a ridiculous, what an absurd allegation. It is beyond belief. It is incredulous. That's how this government has been marketing this legislation.<sup>586</sup>

However, there is no evidence that the OHRC was interested in “clearing its name” in 2006, when a “direct access” model was on the verge of being adopted.

## **2 Moving Adjudication from the Exception to the Norm**

Unmediated access to formal adjudication is at the heart of “direct access” models for resolving statutory human rights claims. Examining the arguments made by “direct access” proponents provides an opportunity to reflect on the contribution of formal legal processes to the aspirational promises of law.

Within the Canadian legal system, formal legal process generally refers to a process in which there are disputing parties, one of whom bears the burden of proving two things: (1) that the other party is responsible for engaging in conduct or practices

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<sup>586</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Standing Committee on Justice Policy, Human Rights Code Amendment Act, 2006 (23 November 2006) at 0950 online [*Hansard*, Justice Policy Ctte Hearings, 23 November 2006].

which are contrary to law, and (2) that the other party should be held to account through the imposition of a consequence, either remedial or punitive or both. The process creates a triad consisting of opposing disputants and an impartial adjudicator.<sup>587</sup> While there is a wide range of formal legal process practices, they all share this general structure. For persons who wish to advance legal claims, formal legal process offers the potential opportunity to tell their story and, if their claims are accepted, to receive a remedy or to have some other consequence imposed.<sup>588</sup> Formal legal process is potentially coercive in its power to require parties to listen and respond to each other's perspectives, and its power to impose consequences for illegal conduct and practices.

Proponents of "direct access" focused on the claimant perspective and the benefits for claimants of having unmediated access to formal legal process. They emphasized three goals: (1) empowerment, (2) control, and (3) being heard. All these goals reflected a concern for individual and group agency, and the potential for law to be a vehicle for social agency. Access to formal legal process would be empowering for claimants because it would connect them more directly with the power of law. As discussed in Chapters One and Two, there were structural similarities between the commission-based enforcement process and the criminal justice system. In the commission-based model, as in the criminal justice model, the person(s) claiming to have been negatively affected by conduct or practice are on the sidelines; they are not in charge of directing how the legal

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<sup>587</sup> There is much discussion about the extent to which adjudicators are and can be impartial. See, for example, Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987), 38 *Hastings LJ* 814 at 843; Sheilah L. Martin and Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto, Calgary, Vancouver: Carswell, 1987).

<sup>588</sup> As we saw in Chapter Two, formal legal process will not always allow a claimant to tell the story they want to tell.

process will address their claim. Thus, the Bill 107 supporters' argument for empowerment and control for claimants was also an argument for abandoning an enforcement framework in which the claimant's interest was inextricably tied to the "public" interest, and in which the "public" agency determined how the claimant's interest should and would be addressed and resolved.

The goals of empowerment and control were closely connected in the arguments made by "direct access" proponents. The commission-based model was criticized for being "paternalistic" and for "disempowering" claimants, because it gave the commission control over deciding whether or not a claim had sufficient merit to warrant a particular voluntary resolution or to be referred to adjudication. In the OHRC's 1992 submission to the Cornish Task Force, empowering "equality-seekers"<sup>589</sup> was one of twelve fundamental principles proposed to guide "establishing a fair and practical enforcement system":

2.2.7 Recognizing the inherent imbalance of power within society, the human rights complaint resolution system must be built from the perspective of the equality seeker, and must be enacted to empower the equality-seeker.<sup>590</sup>

In elaborating on this principle, the submission described the commission-based process as "paternalistic" and out-moded:

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<sup>589</sup> The OHRC explained that its use of the terms "equality-seeker" and "equality-seeking group" was "in the context of a substantive equality model": Ontario Human Rights Commission, *Submission to Ontario Human Rights Code Review Task Force* (May 5, 1992) at 3, fn 1 [OHRC, *Submission to Cornish Task Force*]: on-line at <http://www.law.utoronto.ca/scholarship-publications/conferences/archives/administrative-design>.

<sup>590</sup> OHRC, *Submission to Cornish Task Force* at 3.



The process established by the Code should empower the communities whose interests are protected and promoted under the legislation. The paternalistic model, which may have seemed progressive and innovative in the 60's, is now out of step with our developing understanding of equality, as well as with current standards of administrative and procedural fairness.

Equality-seekers are entitled to a process which respects their right to frame the issues according to their own experience, to settle complaints on their own terms, or alternatively, to present their own complaints at a public hearing. The equality-seeker must have the right to decide if (s)/he wants a private remedy, a public interest remedy or both.<sup>591</sup>

The Cornish Report echoed the importance of empowerment by describing the Code as playing a role in providing redress for imbalances in social power resulting from social disadvantage:

Many individuals and community groups called for a system that will give a stronger and more empowering role to people who make rights claims. Equality means more than just treating people the same on the surface. It means changing deep patterns of exclusion and power imbalances and bringing about more equal relationships in society. The process of making a claim should empower people to bring about such a change.<sup>592</sup>

People of colour, people with disabilities, people on public assistance, women, and other minority groups lack social, legal, political, and economic power. It is precisely because of this imbalance of power that the *Code* was passed with the specific purpose of breaking down discriminatory barriers and bringing about the full and equal participation of these groups in all aspects of society.<sup>593</sup>

Joanne Birenbaum and Bruce Porter, in their research paper prepared for the La Forest Review, described the experience of dialogue at a hearing as empowering, in contrast with the disempowering dialogue of the commission screening process:

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<sup>591</sup> OHRC, *Submission to Cornish Task Force* at 21.

<sup>592</sup> Cornish, *Achieving Equality* at 22.

<sup>593</sup> Cornish, *Achieving Equality* at 45.

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 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.<sup>594</sup>

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.<sup>595</sup>

They also emphasized the need to recognize the right of “equality-seekers” to frame their own claims:

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.<sup>596</sup>

Geri Sanson, in her oral submissions at the Justice Policy Standing Committee hearings on Bill 107, explicitly connected the goals of empowerment and control over the process in the following way:

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<sup>594</sup> Joanne Birenbaum and Bruce Porter, “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) at 23 [Birenbaum and Porter, “Screening Rights”]: on-line at <http://www.law.utoronto.ca/scholarship-publications/conferences/archives/administrative-design>.

<sup>595</sup> Birenbaum and Porter, “Screening Rights” at 99.

<sup>596</sup> Birenbaum and Porter, “Screening Rights” at 106.

But for women, apart from the delay -- and you've heard lots about that -- this is an issue of empowerment. This is something that the women's movement refers to as agency. That means they do not want a paternalistic, patronizing, anachronistic process which is going to say, "There, there. We'll tell you what's good for you." They want the right to make their own choices and decisions, they want the right to control how their case is managed, and they want to [sic] right to be able to speak directly to the decision-maker.<sup>597</sup>

Another common critique was that this paternalistic approach to enforcing legal rights was unique to human rights, as the CERA noted in their oral submissions to the Bill 107 public hearings:

The present system of human rights [in Ontario] is based on an outdated notion of rights and of rights claimants. It is a paternalistic system that appropriates control of the process from the claimant and invests significant powers in a bureaucracy. In no other area of the justice system is there so little control by the person whose rights are infringed.<sup>598</sup>

The goals of empowerment and control were ultimately connected to a claimant having the right to have their claim proceed to adjudication, i.e. to a hearing. The "direct access" model in effect turned the commission-based model upside-down, by making the formal legal process a primary goal and an entitlement, instead of a rare necessity. This model did not mean that "direct access" proponents expected every claim in fact to proceed to a hearing and to be decided by an adjudicator. They expected informal legal processes to be a part of a new system; they also expected that some number of claims

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<sup>597</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Standing Committee on Justice Policy, Human Rights Code Amendment Act, 2006 (16 November 2006) on-line at 1130 [*Hansard*, Justice Policy Cttee, 16 November 2006].

<sup>598</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Standing Committee on Justice Policy, Human Rights Code Amendment Act, 2006 (22 November 2006) on-line at 1130 [*Hansard*, Justice Policy Cttee, 22 November 2006].

would continue to be resolved through informal legal process and not proceed to formal legal process. It did mean, though, that the decision to proceed to a hearing would be the claimant's decision rather than the Commission's decision.

The Cornish Report described as “unconscionable” the fact that the commission-based process denied claimants the right to a hearing:

The Task Force believes 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.<sup>599</sup>

CERA described the hearing as “... an opportunity to tell [a claimant's] story to a decision-maker. Under the current system, it's very difficult for [CERA's] clients to be able to tell their story to a decision-maker.”<sup>600</sup>

Being able to tell one's story would not necessarily result in a positive outcome for the claimant, but it would give the claimant the opportunity to test their story against the requirements of law. Birenbaum and Porter described this opportunity as a form of engaging with law through conversation. Their description of this conversation illustrates the potentially coercive aspect of the formal hearing, which can provide claimants with an opportunity to call respondents to account for their conduct and practices:

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

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<sup>599</sup> Cornish, *Achieving Equality* at 108.

<sup>600</sup> *Hansard*, Justice Policy Cttee, 22 November 2006 at 1109.

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.<sup>601</sup>

The Cornish Report also argued that an additional potential benefit of placing formal adjudication at the centre of the legal process would be to increase the number of voluntary settlements. The rationale was that placing the decision to proceed to adjudication within the control of the claimant would significantly alter the dynamic of the conciliation process. If adjudication was inevitable rather than improbable, there was much more at stake for both claimants and respondents if a settlement could not be reached. As the Cornish Report stated: “The imminence of hearing has often proven to be a strong incentive to settlement.”<sup>602</sup>

In the “direct access” model’s central focus on claimant access to adjudication, there is a clear link between the opportunity to present a claim to a decision-maker and the opportunity to receive a remedy from that decision-maker. Indeed, Bill 107 supporters sometimes suggested that access to a hearing would inevitably lead to a “remedy”. The primary emphasis, though, was on gaining access to the decision-making process – to the opportunity to “tell” one’s “story” and to require the respondent to respond to that story. In my view, this argument resonates with Sarat and Scheingold’s category of “individual client” cause lawyers, whom they contrasted with “impact” cause lawyers. Sarat and Scheingold argued that individual client cause lawyers emphasize the client goals to be achieved through cause lawyering, while impact cause lawyers emphasize the social

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<sup>601</sup> Birenbaum and Porter, “Screening Rights” at 20.

<sup>602</sup> Cornish, *Achieving Equality* at 119.

goals to be achieved through cause lawyering.<sup>603</sup> I would argue that “direct access” proponents more closely resemble Sarat and Scheingold’s category of “individual client” cause lawyers than their category of “impact” cause lawyers. For “direct access” proponents, the primary emphasis was on furthering client control and client goals, with no real attention given to what those goals were or to the broader social impact of those goals. I acknowledge that it would be unfair to say that “direct access” supporters were indifferent to how claimant control over claims resolution would affect substantive outcomes for claimants, and would more generally address issues of social inequality. However, it is interesting to note their virtual silence on questions of substantive outcome, both for clients and for social groups.

It was understood that there would be exceptions for claims clearly not within the jurisdiction of the Code and tribunal. There was also some discussion about whether the tribunal should have some ability to refuse to hear “unmeritorious” claims. However, there was extensive debate over a provision in the original version of the bill that would have given the tribunal considerable authority to dismiss a claim without a hearing. This provision was removed from the final version of the bill, leaving to the tribunal the authority to develop rules to provide for summary processes for certain kinds of claims. The final statutory wording states that the HRTO must afford the parties “an opportunity to make oral submissions in accordance with the rules” before finally disposing of an application within its jurisdiction.<sup>604</sup> Pursuant to this power, the HRTO has developed

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<sup>603</sup> Austin Sarat and Stuart Scheingold, “Cause Lawyering and the Reproduction of Professional Authority: An Introduction” in Austin Sarat & Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York, Oxford: Oxford University Press, 1998) 3 at 15.

<sup>604</sup> *Code* (1990), s. 43(1), (2)1.

Rule 19A to establish a “Summary Hearing” process for claims that either the Tribunal or a party believe have no “reasonable prospect” of success: “The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed.”<sup>605</sup>

Bill 107 opponents were not specifically opposed to formal legal process. They agreed that more claims should proceed to adjudication; they argued that more cases would be referred to adjudication with a better-functioning commission-based model; and they suggested that there were situations when cases should automatically be referred to adjudication, or when claimants and respondents should be entitled to make their own decision to proceed to adjudication. They did not, however, share the view that “direct access” would empower claimants, and they did not place value simply on giving – or appearing to give – claimants control over the process.

#### Note on Respondents

The arguments for “direct access” were made primarily on behalf of individuals and groups seeking to bring claims and seek remedies. Little attention was directly paid to the interests of respondents during the Bill 107 debates. Where there was reference to the effects of a “direct access” model on respondents, Bill 107 proponents asserted that a “direct access” model would work better for respondents as well as for claimants. This can be contrasted with the arguments made in the fair practices campaigns and in the

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<sup>605</sup> Human Rights Tribunal of Ontario, *Rules of Procedure*, Rule 19A.1

OHRC's description of its processes in the 1960s, when the stated disadvantages of formal legal process related primarily to the impact of formal legal process on respondents.

As discussed in Chapters One and Two, one disadvantage of formal process was that it would encourage respondents to focus on defending themselves and the propriety of their conduct, instead of focusing on examining the nature of their conduct and providing remedies and solutions for its negative impact. A second and related disadvantage was the potential for formal legal process to expose a respondent to adverse publicity; informal resolution processes offered respondents the benefit of avoiding this potential adverse publicity. Although the effects of formal legal process on the respondent were the direct focus of this concern, a respondent's resistance to efforts to resolve a claim would of course also have negative implications for claimants who might have wanted to achieve a voluntary resolution.

Concern about the potential impact of formal legal process on respondents has also given rise to a perceived need for a high level of due process when formal legal processes are engaged in the human rights context. This perceived need arises, at least in part, from the continuing concern about the stigma that can result from a finding (or even an allegation) that a respondent has violated a human rights statute. The La Forest Report, in the context of considering the appropriateness of confidentiality clauses in settlement agreements, described a human rights claim as having a stigmatizing effect on the respondent:



Confidentiality clauses for settlements may be contrary to the public interest in educating the public about human rights issues. However, respondents would normally want to avoid the stigma of a finding, or even an accusation of discrimination.<sup>606</sup>

Similarly, during the Bill 107 debates, this concern was emphasized by the then-Chair of the HRTO, Michael Gottheil:

Being involved in a human rights complaint, whether as a complainant or a respondent, is a very serious matter. While an individual human rights complaint certainly has a public element, being involved in a complaint can be an intensely personal affair. It affects economic rights, oftentimes the ability to work free of harassment and discrimination, or indeed the ability to work at all. It involves, for the complainant, issues of dignity and self-worth and, for the respondent, the stigma of being labelled a violator of human rights.<sup>607</sup>

The argument that there is a stigma associated with “being labeled a violator of human rights” resonates strongly with the arguments made in the 1940s, 1950s and 1960s for preferring conciliation over adjudication. It also resonates with what I see as a continuing association between discrimination and questions of fault, immorality, and criminal law, also seen in the arguments for fair practices legislation and in the *Bell v. McKay* litigation. This association continues despite the *Simpsons Sears* analysis of statutory human rights, which sought to de-emphasize a respondent’s legal fault in preference to the opportunity for a respondent to correct a problem that has been created by their conduct or practice.

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<sup>606</sup> La Forest, *Promoting Equality* at 81.

<sup>607</sup> *Hansard*, Justice Policy Cttee, 16 November 2006 at 1050. In their written submission to the Standing Committee, the CFIB stated: at 3 “... the proposed legislation creates an unfair and grossly prejudicial system that assumes guilt until proven innocent.” – “Submission on Bill 107” at 3.

It is also arguable that the special status that began to be accorded to human rights legislation in the early 1980s had the negative effect of increasing the potential stigma associated with discrimination. Beginning with the 1982 decision of the Supreme Court of Canada in *Insurance Corporation of British Columbia v. Heerspink*,<sup>608</sup> the jurisprudence developed a rhetoric of human rights legislation as having elevated status: it was “fundamental”, “special”, “not quite constitutional but certainly more than the ordinary”.<sup>609</sup> Looked at from the perspective of social inequalities, this rhetoric focuses on the positive and remedial benefits associated with human rights legislation. Looked at from the perspective of imposing liability and legal responsibility, however, I believe this rhetoric had the effect of elevating the bar for procedural fairness concerns for respondents, in the same way as criminal law does. Both the New Brunswick and the LaForest reviews linked the elevated status of human rights legislation with an elevated concern for procedural fairness. While these comments can apply to the interests of both claimants and respondents, in relation to respondents it is my view that they reflect the concerns about stigma and liability for discrimination. The LaForest review stated:

Since the Act was passed, the courts have recognized human rights issues to be almost constitutional in nature. This heightens the importance of the process used for determining whether there has been a breach of the Act.<sup>610</sup>

The New Brunswick review stated:

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<sup>608</sup> [1982] 2 S.C.R. 145 [*Heerspink*].

<sup>609</sup> For example: *Heerspink* at 157-58 and *Simpsons-Sears* at para. 12.

<sup>610</sup> La Forest, *Promoting Equality* at 46.

Paralleling the need for a fast, efficient and economical investigative function is the belief that the New Brunswick Human Rights Commission must be respectful of the principles associated with due process. This respect is especially significant in view of the fact that the Commission is charged with the administration of a near constitutional document.<sup>611</sup>

These two perspectives on according elevated status to human rights legislation also resonate with the two perspectives on using legislation against discrimination in the arguments for fair practices legislation: the positive perspective focused on fairness and the negative perspective focused on harm. The harm perspective is linked with arguments that discrimination is wrong, immoral and unacceptable conduct, which in the context of formal legal process tends to attract more rigorous procedural requirements. As Sheila McIntyre has argued, individuals and groups who benefit from the dominant worldview respond to claims of discrimination by trying to reduce them to a small number of grave allegations. Since these allegations are grave, they cannot be dealt with informally but require a high degree of formality and legal due process.<sup>612</sup>

Thus, the need to attend to the interests of respondents flows both from the potential stigma attaching to discrimination and from the fact that the legal process may hold respondents accountable and require redress from them. And where due process requirements are enhanced to protect the interests of respondents, this change will affect

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<sup>611</sup> Ferris, *Towards a World Family* at 209.

<sup>612</sup> Sheila McIntyre, "Studied Ignorance and Privileged Innocence: Keeping Equity Academic" (2000) 12 C.J.W.L. 147 at 195. McIntyre developed her argument in relation to the handling of claims of sexism and racism in the graduate Political Science department at the University of British Columbia. See also Peter Fitzpatrick, "Racism and the Innocence of Law" (1987) 14 JL & Soc'y 119 and Margaret Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989), 52 Mod L Rev 733. Thornton's description of the Australian experience is strikingly similar to Ontario's.

claimants as well. They will face heavier burdens to establish that “normal” conduct or practices are contrary to law, and to establish entitlement to the remedy or other consequence they seek to have imposed.

### **3 Public Wrong and Public Process: Public “Prosecution” or Public Funding**

As we know from Chapters One and Two, public responsibility for addressing discrimination was a central theme in the rationale for enacting fair practices and then human rights legislation, and a central theme in the OHRC enforcement model. We also know that the argument for public responsibility to address discrimination had its roots in the argument that discrimination harms both society and the individuals and groups who are directly affected.

Public responsibility for discrimination was also a central theme in the Bill 107 debates, with both sides claiming that their model would further the public responsibility to address discrimination. For Bill 107 supporters, public responsibility was to be maintained through funding the tribunal, through the provision of publicly-funded legal support for claimants at the tribunal, and through maintaining the OHRC as a public advocate for human rights. Bill 107 opponents disagreed, and argued that the “direct access” model privatized statutory human rights enforcement by taking away the commission’s role as public investigator and public prosecutor, and the commission’s responsibility to pursue public interest remedies.

For “direct access” supporters, unmediated access to an adjudicative tribunal was the central goal, but this unmediated access to an adjudicative tribunal was never a stand-

alone proposition. They argued that “direct access” to an adjudicative tribunal had to be accompanied by publicly-funded legal assistance and representation. Some “direct access” supporters expressly linked the requirement to provide publicly-funded legal assistance to claimants to the argument that there is a public responsibility to address discrimination because discrimination causes public harm. For example, the Cornish review maintained that publicly-funded legal representation was a vehicle for recognizing discrimination as a public harm and fulfilling the public responsibility to address this harm:

... it has been public policy for many years that human rights claimants should receive publicly funded assistance to bring their claims forward. This was evident in the creation of the Ontario Human Rights Commission with its mandate to investigate and try to settle claims and at times assign lawyers to argue claims before Boards of Inquiry.

... it is important that the good and essential features of the system are not lost in the reform process.

The public commitment to funding representation for human rights claims is crucial and should be continued. It represents an important statement by Ontarians that discrimination is a societal problem requiring publicly funded solutions.

... many if not most people who make a human rights claim need assistance and support. Often they feel hurt, angry, confused and afraid. Without assistance they cannot enforce their rights. Opening up access to a hearing may be a hollow achievement if support and advocacy are not provided.<sup>613</sup>

The South Ottawa Community Legal Services legal clinic, in their oral submissions to the Standing Committee, compared public responsibility to fund human right enforcement

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<sup>613</sup> Cornish, *Achieving Equality* at 50.

with the public responsibility to fund criminal law enforcement:

All claimants who are victimized by illegal acts of discrimination should not have to bear those costs of righting the wrong. The same way we protect our society from criminal violations, we must protect society from discrimination. It is a social commitment, not an individual cost.<sup>614</sup>

Some “direct access” proponents also argued that there was a broader public interest in providing legal assistance to claimants because this would enable the adjudicative process to run fairly and more smoothly. As Raj Anand stated in response to a question from NDP MPP Peter Kormos:

Without the public interest element in the form of a legal support centre to advise, assist and represent complainants in the human rights process, I say that the system falls to the ground, and it falls to the ground for exactly the reason that you've indicated: that there's less of a public interest.<sup>615</sup>

Similarly, in an article written after Bill 107 was passed, Michael Gottheil and Katherine Laird expressly connected this public interest dimension in part to the public harm of discrimination:

The greatest challenge perhaps is the need to balance the public interest role that the Tribunal is required to play under the Code and the more narrow function of individual dispute resolution. In the end, however, these two mandates are not that divergent. While there is a public interest in eliminating discriminatory policies and barriers, and in promoting equality, there is likewise a public interest in ensuring that individuals have timely access to a Tribunal that can resolve human rights claims

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<sup>614</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Standing Committee on Justice Policy, Human Rights Code Amendment Act, 2006 (9 August 2006) at 1700.

<sup>615</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Standing Committee on Justice Policy, Human Rights Code Amendment Act, 2006 (15 November 2006) at 1120 [*Hansard*, Justice Policy Cttee, 15 November 2006].

fairly and expeditiously, through a transparent and understandable process.<sup>616</sup>

More often, though, the rationale for publicly-funded legal assistance for claimants was based on the need to provide meaningful access to justice by increasing the likelihood of claimants being able to present their claims effectively. For example, in the La Forest Report, the requirement to provide legal assistance to claimants was based on evidence that claimants in the United Kingdom and Quebec were rarely successful without legal representation:

In our view, providing assistance to claimants is key for the “direct access” model to be successful. As noted above, the experience in the United Kingdom and Québec have shown that unrepresented claimants are rarely successful, partially because respondents are often large well-resourced corporations or governments. This will be particularly true in the federal sector. The practical result of no assistance would be to deny access. The human rights tribunal process is often complicated and requires experience in human rights in order to assemble and argue a case successfully. In the human rights context many claimants do not speak either official language or have disabilities that may make it difficult for them to access the system.<sup>617</sup>

It goes without saying where one party to litigation has legal representation and the other party does not, the party with legal representation generally has a better chance to achieve a successful outcome. In the human rights enforcement process, moreover, claimants are already at a disadvantage in relation to respondents because of the particular challenges

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<sup>616</sup> Michael Gottheil and Katherine Laird, “Direct Access to a Specialized Tribunal: The Ontario Experience” in *Le Tribunal des droits de la personne et le Barreau du Québec. L'accès direct à un tribunal spécialisé en matière de droit à l'égalité: l'urgence d'agir au Québec? / Access to a Specialized Human Rights Tribunal: an Urgent Need to Act in Quebec?* (Cowansville: Éditions Yvon Blais, 2008) 145 at 168 [Gottheil and Laird, “Direct Access”].

<sup>617</sup> La Forest, *Promoting Equality* Report at 74. The Cornish Report expressed the view that much of this advocacy could be provided by paralegals: Cornish, *Achieving Equality* at 28, 140.

of proving both direct and adverse effect discrimination; this disadvantage is compounded if the claimant does not have legal representation and the respondent does.

The first reading version of Bill 107 made a very weak commitment to public funding for legal representation, so that obtaining a clear commitment for this public funding became a key issue during the public hearings.<sup>618</sup> The argument that claimants needed legal assistance in order to have meaningful access to an adjudicative process was repeated throughout the Bill 107 debates.

Bill 107 opponents agreed that it was essential to provide financial support to claimants. Conservative MPP Christine Elliot, for example, described legal support as “...the linchpin, the fundamental piece of this legislation that has to be right in order for it to be successful.”<sup>619</sup> However, they were skeptical about the government’s statements that there would be funding for legal representation for all claimants. More significantly, Bill 107 opponents contended that the “direct access” model structurally privatized statutory human rights enforcement by shifting the enforcement responsibility on to claimants. They argued that Bill 107 took away “victim’s rights” to a public investigation and a public prosecution, and took away the commission’s responsibility to seek public interest remedies:

The *Human Rights Code* now gives every discrimination victim who files a timely and non-frivolous complaint the right to have the Human Rights Commission publicly investigate his or her human rights complaint....

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<sup>618</sup> The original version of Bill 107 only provided the government with discretionary authority to enter agreements for the provision of legal services in tribunal proceedings: 46.1 (1) The Minister may enter into agreements with prescribed persons or entities for the purposes of providing legal services and such other services as may be prescribed to applicants or other parties to a proceeding before the Tribunal.

<sup>619</sup> *Hansard*, Justice Policy Ctte Hearings, 23 November 2006 at 1120.



Section 33 of the *Code* now gives the Commission extensive investigatory powers, including the ability to enter businesses, to interview witnesses, to request documents, and to seek a search warrant to compel access to relevant documents and other physical evidence.

...

At the Human Rights Tribunal hearing, the Commission is the public prosecutor. The Commission has carriage of the case to prove that the complainant was the victim of discrimination. ... The prosecutor therefore effectively represents the complainant's interest as well as that of the public.

...

In contrast, Bill 107 would totally abolish the complainant's right to have his or her case investigated by the Human Rights Commission. Bill 107 would repeal s. 33 of the *Code*. That takes away from the Commission its power and duty to investigate human rights complaints. Bill 107 would force all discrimination victims to go directly to the Human Rights Tribunal, without a prior Human Rights Commission public investigation of their human rights complaint.<sup>620</sup>

Bill 107 opponents also compared the benefits of the commission-based enforcement system to the benefits of the criminal justice system. A representative for Parkdale Legal Services, a student community legal clinic attached to Osgoode Hall Law School, described the benefits of state-controlled enforcement in the following way in their oral submissions to the Standing Committee:

The second conceptual flaw is the shift that Bill 107 requires toward the privatization of human rights disputes. The current system, underfunded and flawed as it is, still conceives of each and every violation of human rights as being a harm to the crown or to society at large. There is a public prosecutor at the tribunal to represent that societal interest in maintaining a society free of discrimination. When I explain this to my students, I compare it to criminal law: The police investigate the crime and, where there is sufficient evidence, the matter is passed to crown counsel for prosecution. Crimes are suffered by victims, but they are also violations against society. There is a deep public interest in maintaining a society free of crime, and a very similar system is currently in place for human

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<sup>620</sup> AODA, *Submission to Standing Committee* at 3.

rights. There is a slight difference, as noted by Mr. Shulman: In the human rights system the victim remains a party and can participate actively if they are able to do so. But if they cannot actively participate, the public prosecutor is there to proceed against the offender.<sup>621</sup>

This comparison between statutory human rights enforcement and criminal justice enforcement underscored the link between discrimination as public harm and public responsibility to address this harm. At the same time, as it always did, the language of “offender” and “prosecution” undermined the remedial perspective on human rights and instead fed the fault and stigma perspective. As discussed earlier, comparisons have been drawn from the beginning between the structure of the commission enforcement model and the structure of the criminal justice enforcement model.<sup>622</sup> In both models, responsibility for enforcement rests with the state, and the state is in theory advancing the interests of both the community and the “victim”,<sup>623</sup> although the “victim” in the commission-based enforcement model had more status than the “victim” in a criminal justice process.<sup>624</sup>

Bill 107 opponents agreed that human rights claimants have an interest in their claims and the resolution of their claims. However, they had confidence in the ability of

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<sup>621</sup> *Hansard*, Justice Policy Cttee, 22 November 2006 at 1240.

<sup>622</sup> There may also be similarities with some regulatory enforcement models. I focus on similarities with the criminal justice model since this is the model with which comparisons have been made throughout the history of human rights enforcement.

<sup>623</sup> There has been much debate over the role of victims within criminal justice process, and some expansion of their ability to participate in the process in recent years. One of the reasons I have been interested in restorative justice approaches is because they seek to fully integrate the interests of “victims” or claimants, “perpetrators” or respondents, and the community. See, for example: Jennifer Llewellyn, Bruce P. Archibald, Donald Clement and Diane Crocker, “Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation” (2014) 36 Dal LJ 281.

<sup>624</sup> In the commission-based model, the commission had exclusive authority over whether or not a claim was referred to adjudication and generally had “carriage” of the claims they did refer to adjudication. However, the human rights claimant was a party to the proceeding before the tribunal, and entitled to have separate legal representation if they had the financial ability to obtain it.

an improved commission to properly further the claimant's interest and, at the same time, the public interest. Similarly, they did not in principle object to the commission playing a gatekeeper role, as long the performance of this role was improved. They believed that the commission-based process could be made to work properly.

Bill 107 opponents also argued that the "direct access" model would not eliminate gatekeeping as such but would simply transfer the gate-keeping function from the commission to the tribunal, as well as to whichever body would be responsible for deciding how to allocate public funding for legal representation at the tribunal and to private lawyers who might consider taking human rights cases:

The Government suggests it's eliminating the "gatekeeper" who decides whether a discrimination victim gets a hearing on his or her human rights complaint. However, the Government's plan doesn't eliminate the gate-keeping role. It just moves it from the Human Rights Commission to the Tribunal. Also, private lawyers and Legal Aid clinics will become gatekeepers, when they decide which human rights complainants they will or won't represent.<sup>625</sup>

Proponents of Bill 107, on the other hand, flatly rejected the commission's gatekeeper role. They also fundamentally disagreed that the commission, as public investigator and public prosecutor, was in fact representing the claimant's interests. In their view, the commission represented the claimant's interest only to the extent that the claimant's interest aligned with the commission's view of the public interest; the role of the commission was not to represent the claimant but to represent the public interest raised by the claimant's claim. Put another way, the commission-based process was not

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<sup>625</sup> AODAA, *Submissions to Standing Committee* at 72.

tied to what claimants sought but to the commission's judgment about what claimants sought or should have sought.<sup>626</sup>

This objection went to the core of the tensions between public and private interests and responsibilities embedded in the commission enforcement model, and to the division between “direct access” supporters and their opponents. The debate was not about whether the commission-based process could be made to function better. The debate was a philosophical (or ideological) debate about different perspectives on the role of the state in legal processes for addressing statutory human rights claims, as illustrated in the following exchange between Liberal MPP David Zimmer and Mark Hart, representing the Association of Human Rights Lawyers:<sup>627</sup>

**Mr. Zimmer:** How is it that experts with the same background, dealing with the same problems with the same good ambitions in place, can be so different in their approach to the problem?" I know that's a philosophical query, but I'd be interested in your reaction.

**Mr. Hart:** It's a very important question and a very interesting question. There is a fundamental structural and philosophical difference between the two sides of this debate. What I'm encouraging this committee to have consideration of is the fact that these very debates, in terms of different approaches to trying to address these well-documented problems, have been debated before. They were debated in the context of the widespread consultations, both in the Cornish report and the La Forest report. These blue-ribbon task forces, with people who have a tremendous amount of expertise in the areas, considered all of the back and forth and conflicting

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<sup>626</sup> Nina Gupta notes that the claimants in three precedent-setting cases had to retain their own legal representatives to force the commissions to take their cases forward: the *Robichaud* and *Cashin* cases in the federal sector and the *Leshner* case in Ontario - Neena P.A. Gupta, *Reconsidering Bhadauria: A Re-examination of the Roles of the Ontario Human Rights Commission and the Courts in the Fight Against Discrimination* (University of Toronto: LLM Thesis, 1993) at 53 [Gupta, *Reconsidering Bhadauria*]. David Lepofsky also had separate legal assistance provided by Mary Cornish and Greg Sitch, in his human rights claim against the Toronto Transit Commission: *Ontario Human Rights Commission v. Lepofsky*, 2005 HRTO 36.

<sup>627</sup> The Association of Human Rights Lawyers is an informal association of claimant-side human rights lawyer advocates.

views and, having considered all of that, came to conclusions which are now embodied in Bill 107.<sup>628</sup>

Bill 107 supporters divided public responsibility for discrimination into two categories: public responsibility in relation to individual claimants, and public responsibility in relation to society as a whole. In relation to individual claimants, they argued that the state has a responsibility to facilitate the independent social agency of human rights claimants in their efforts to engage law to address social inequalities; this aspect of the state's public responsibility would be fulfilled by maintaining an adjudicative tribunal and by providing claimants with legal support to bring claims to this tribunal. In relation to society as a whole, they argued that the public responsibility was to continue the OHRC as a public advocate for human rights, with a particular focus on systemic discrimination. Opponents of Bill 107 did not separate the public responsibility to claimants from the public responsibility to society. For them, public responsibility to address discrimination was simultaneously a responsibility to individual claimants and a responsibility to society, to facilitate remedial outcomes, in the public interest, through public investigations and public prosecutions.

#### **4 The Commission's New Role: Legal Process vs Education, Policy, Research**

During the Bill 107 debates, opponents of "direct access" raised concerns that Bill 107 would result in dismantling the commission, as had happened in British Columbia. However, there is no suggestion that eliminating the commission was ever part of "direct

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<sup>628</sup> *Hansard*, Justice Policy Cttee, 15 November 2006 at 1010.

access” advocacy in Ontario; what advocates for “direct access” wanted to eliminate was the commission’s role in claims processing. A continuing role for the OHRC, or a similar body, appears to have been consistently contemplated by Ontario “direct access” advocates.<sup>629</sup> In the Ontario “direct access” model, the commission was to be the third pillar in the human right access to justice system, in which the other two pillars would be the adjudicative tribunal and the provision of legal support for claimants. There were also two consistent themes relating to the proposed role for the commission. One was that the commission would be focused on systemic discrimination. The second related to the methods by which the commission would carry out its role, and whether the methods would include litigation as well as education, policy development and research.

Human rights advocates, regardless of their position on “direct access”, shared the view that the systemic dimensions of discrimination were the most pressing concern. They also shared the view that these systemic dimensions included both direct and adverse effect forms of discrimination. Moreover, as noted earlier, one of the critiques of commissions was that the predominant focus on their claims resolution function had led them to pay insufficient attention to systemic discrimination issues, and one of the arguments put forward by advocates for “direct access” was that removing Commission’s responsibility for claims resolution would allow them to direct their attention to systemic issues. The Cornish Report presented the argument as follows:

[The Commission’s] role has been reactive, not proactive, and geared to individual cases of discrimination, not systemic discrimination.

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<sup>629</sup> The La Forest Report also recommended maintaining the federal commission, with a role similar to the role envisioned for the commission in Ontario’s “direct access” model.

Placing almost all the resources into pursuing individual claims and leaving out a broad, strategic approach is costly, time-consuming, and unlikely to bring about positive results. Even if an individual claim is successful, it usually changes the circumstances of the individual only and makes little difference in overcoming widespread, systemic discrimination in society.

...

The absence of a systemic approach to achieving human rights for all has worked to the detriment of everyone concerned.

...

Under the new system proposed by the Task Force, Human Rights Ontario [proposed new name for the OHRC] will no longer have responsibility for handling individual claims. It will therefore have the ability to concentrate on its other significant equality responsibilities.<sup>630</sup>

Katherine Laird (representing ACTO) emphasized the Commission's responsibility for systemic discrimination in her description of the three pillars to the Standing Committee:

Catherine [Frazee] said it so much better than I could, but what is important to people in these circumstances is "direct access" to a hearings tribunal, access to publicly funded legal services, a commission that will fight the systemic battles, the public interest battles, will intervene, launch applications and will educate employers and landlords and service providers and government.<sup>631</sup>

The argument advanced by Bill 107 proponents rested on a distinction between "individual claims" and "systemic claims". In their framework, the category of individual claims represented claims brought by individuals and groups, which might raise exclusively individual issues or which might also raise systemic issues. The goal of Bill 107 advocates was to remove the Commission's role in processing and "gate-keeping" individual claims, and to have it focus exclusively on systemic discrimination issues. This framework did not set up a dichotomy between individual and systemic

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<sup>630</sup> Cornish, *Achieving Equality* at 67-68.

<sup>631</sup> *Hansard*, Justice Policy Cttee, 16 November 2006 at 1150.

claims, inasmuch as individual and group claimants could bring systemic discrimination claims directly to a tribunal. What it did do, though, was remove the Commission from having a direct role in relation to individual claims.

The AODAA rejected this analysis, arguing that the effort to distinguish between individual and systemic cases in this way was misplaced and misguided because “individual” claims are often indicators or instantiations of systemic discrimination. The AODAA argued that removing the Commission’s responsibility for individual claims processing would cut off its ability to become aware of and to address the systemic discrimination issues raised by these individual cases:

Under the current system, for the Commission to be involved in a case, there is no need to specifically categorize a case's issues as "individual" or "systemic." The Human Rights Commission as investigator, conciliator or public prosecutor can address all issues which arise from a complaint. Every violation of the *Code* is treated as potentially raising societal concern.

Bill 107 effectively limits the Commission's mandate and prosecutorial powers or focuses it on "systemic" matters. This is based on the false premise that from the outset, human rights cases and issues can be easily divided into either of two categories, either "systemic" cases or "individual" cases. ... The Bill's provisions then design parts of the human rights system on the basis of this problematic categorization of human rights cases. Making things worse, Bill 107 doesn't define "systemic" matters.

It is fundamentally wrong to design a human rights enforcement system on this elusive and unhelpful categorization of human rights cases. Those individuals who are victimized don't present themselves to the human rights enforcement system with a label of "systemic complaint" or "individual complaint" stamped on them. A case might begin as a single report of a seemingly isolated incident. If properly investigated, a broader pattern of discrimination could be revealed, or a deep-rooted, hitherto-unseen practice can have produced this result. Many, if not most so-called



"systemic" cases come to light because an individual complained about an individual incident of mistreatment.<sup>632</sup>

Barbara Hall, Chief Commissioner of the OHRC, responded to this argument in her oral submissions to the Standing Committee, by maintaining that the OHRC's priorities in addressing systemic issues had been unduly shaped by individual claims rather than by proactively working to identify systemic issues:

But I think one of the challenges of the current system is that we have identified systemic issues primarily based on what has come before us as individual complaints, and we have tended to focus on what's come in the door as opposed to working more closely with communities out there to identify what the systemic issues are and how they can be strategically proceeded with or addressed. Our priorities, in a sense, are set by what comes in the door, and I believe that there are many situations where we miss issues because communities are not connected to the process, are not aware of those rights, do not believe that there's a way of addressing them. As I said in my comments, we need to go out and work more closely with communities and set our priorities through that relationship.<sup>633</sup>

When Bill 107 proponents said that the Commission would focus on systemic issues in a "direct access" model, this argument was another way of saying that the Commission would no longer have responsibility for individual claims. There is no evidence they meant that systemic discrimination would be the exclusive responsibility of the Commission, or that individuals could not raise systemic discrimination issues in their claims to the tribunal. They appear to have meant that the Commission's independent role related only to systemic discrimination. What remains unclear in the debate on this point, however, is exactly what Bill 107 advocates meant when they distinguished

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<sup>632</sup> AODAA, *Submissions to the Standing Committee* at 67.

<sup>633</sup> *Hansard*, Justice Policy Cttee, 15 November 2006 at 1050.

“individual” claims from “systemic” issues. When they talked about individuals and individual claims, were they referring to claims that affected only one individual, or a few individuals? If so, how did their emphasis on improving enforcement for individual claims mesh with the position that systemic discrimination issues are the most important concern?

On the question of how commissions would fulfill their responsibility to address systemic discrimination, considerable emphasis was placed on using education, policy development, and research as key tools. For example, the La Forest Report stated:

In this Report, the Panel has been particularly concerned with the issue of systemic discrimination. We have described a number of ways that the goal of equality can be furthered within the federal sector. Human rights education and promotion is perhaps one of the most powerful tools for addressing equality issues, particularly in the area of systemic discrimination which is based on attitudes and assumptions that are held and acted on, often unknowingly. Giving people this knowledge should be the first step towards eliminating the problem.<sup>634</sup>

The Cornish Report also emphasized the important role for strategic education:

One strong common thread throughout the consultation was a call to use strategic education initiatives to enforce the Code. Research conducted for the Task Force by the Urban Alliance on Race Relations finds that “[f]ew people know what rights are protected under the Code.” “[T]he best anti-discrimination laws with the strongest of provisions are ineffective if no one knows about them, understands them or is able to use them.” Many respondents said that education would enable them to improve their performance in ensuring equality.

...

The Task Force believes that the strategic use of education initiatives is an important part of the new human rights enforcement system. Human Rights Ontario has a unique and important role to initiate and oversee education activities which will advance its overall strategic plan for the

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<sup>634</sup> La Forest, *Promoting Equality* at 44.

enforcement of human rights. Human Rights Ontario should focus on educational initiatives which are most likely to concretely contribute to the reduction of systemic discrimination in the strategic areas it has identified.

Education can help to establish the proper environment of understanding for dealing with and redressing systemic discrimination and therefore avoiding the filing of claims.<sup>635</sup>

However, the Cornish Report insisted as well that the commission retain investigatory powers and powers to take cases forward. The original version of Bill 107 did not make provision for the Commission to take cases to the tribunal or to seek to intervene in cases at the tribunal. These powers were added as amendments following the Standing Committee hearings, with the result that Ontario's "direct access" model includes a role for the Commission within the adjudicative process, both as an initiator of claims and as a potential intervenor in claims initiated by others.<sup>636</sup>

The assumptions underlying "enforcement" by way of claims resolution are very different from the assumptions underlying "enforcement" by way of research, policy and education. Research and policy development assume that there are, or may be, social problems which should be studied and for which remedies should be proposed. Education similarly assumes that there are, or may be, social problems to be addressed and that information and training can contribute to providing remedies for these problems. The resolution of claims, on the other hand, does not necessarily assume that there is a problem to be addressed. From the claimant's perspective, the ultimate goal of a claims resolution process is to require the respondent to provide a remedy for a problem

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<sup>635</sup> Cornish, *Achieving Equality* at 173.

<sup>636</sup> *Code* (1990), s. 35.

the claimant identifies. Unless the respondent voluntarily agrees to provide a remedy, however, the legal process will first need to determine whether there is a problem and whether the respondent should be judged responsible for that problem. In a claims resolution process, then, the first question to be addressed is whether the claim raises a problem to be addressed.

This aspect of the “direct access” debate again illustrates the extent to which the debate was disconnected from the substantive goals for statutory human rights enforcement. The most important problem was said to be systemic discrimination, best addressed by the Commission - but the most important goal was obtaining individual access to adjudication. This aspect of the debate underlines questions about the role of the Code and the role of legal process in addressing social inequalities resulting from systemic discrimination. In addition, the attribution of fundamental importance to human rights laws adds a further layer of complexity to the tensions among these different enforcement processes. From the research, policy and education perspectives, the importance of human rights underscores the importance of pursuing proactive enforcement activities. In relation to claims processing, however, the importance of human rights raises different considerations, such as the heightened due process concerns discussed earlier.

### **Part III: Ontario’s “Direct Access” Model Post-Implementation**

Ontario’s “direct access” model has been in place since June 2008. The implementation of Bill 107 saw the continuation and growth of the HRTO, the continuation but diminution of OHRC, and the establishment of a Human Rights Legal Support Centre (HRLSC). The HRTO has received on average 46% of the budget allocation for the three-pillared human rights system, and the HRLSC and OHRC have each received approximately 27% of this budget allocation.<sup>637</sup> The funding allocation for Ontario’s three-pillared human rights system has increased from the level of funding provided to the previous commission-based system by approximately 40%, although it remains to be seen whether that level of funding will be maintained during periods of fiscal restraint.

The HRTO is one of seven adjudicative tribunals within the Ontario Social Justice Tribunals cluster.<sup>638</sup> It has an Associate Chair and 21 full-time Vice-Chairs, who provide both mediation and adjudication services. Mediation at the HRTO is voluntary, but encouraged; the tribunal’s Practice Directions allow a Vice-Chair to try to engage the parties in mediation even where one or both parties indicate that they are not willing to participate in mediation:

If the applicant or a respondent does not indicate a willingness to participate in mediation, the HRTO will determine whether, nonetheless,

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<sup>637</sup> Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (Toronto: Queen’s Printer for Ontario, 2012) at 176 [Pinto, *Human Rights Review*]: on-line [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human\\_rights/Pinto\\_human\\_rights\\_report\\_2012-ENG.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf).

<sup>638</sup> The other six tribunals in this cluster are the Child and Family Services Review Board, the Custody Review Board, the Landlord and Tenant Board, the Ontario Special Education (English) Tribunal, the Ontario Special Education (French) Tribunal, and the Social Benefits Tribunal. The clustering of administrative tribunals was introduced in 2009 with the enactment of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Sch 5. Michael Gottheil is currently the Executive Chair of the Ontario Social Justice Tribunals cluster.

mediation appears to offer an opportunity for a fair, just and expeditious resolution. If so, the HRTTO may contact the parties and discuss the possibility of engaging in mediation. The decision to participate in mediation remains voluntary.<sup>639</sup>

The Tribunal's Rules of Practice also provide hearing dates can be used for mediation-adjudication with the agreement of the parties<sup>640</sup>

The HRLSC was set up to be an independent agency and not a clinic within the Legal Aid Ontario system. Its statutory objects are:

(a) to establish and administer a cost-effective and efficient system for providing support services, including legal services, respecting applications to the Tribunal under Part IV;

(b) to establish policies and priorities for the provision of support services based on its financial resources.<sup>641</sup>

The legislation does not stipulate that the HRLSC can provide services only to applicants, but the Centre has so far implemented its mandate to provide services exclusively to claimants.

The Commission has been continued with its revised mandate, and downsized to conform to its more-than-50% reduction in budget.

Bill 107 called for a review of "the implementation and effectiveness of the changes" to be conducted three years after the legislation came into effect, i.e. three years after June 30, 2008.<sup>642</sup> In August 2011, Attorney General Chris Bentley appointed

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<sup>639</sup> Human Rights Tribunal of Ontario, *Practice Direction on Scheduling of Hearings and Mediations, Rescheduling Requests, and Requests for Adjournments*, Scheduling Mediations.

<sup>640</sup> Human Rights Tribunal of Ontario, *Rules of Procedure*, Rules 15 and 15A.

<sup>641</sup> *Code* (1990), s. 45.12.

<sup>642</sup> *Code* (1990), s. 57(1).

Andrew Pinto to conduct this review of the “direct access” model. Andrew Pinto is a human rights practitioner who was a public supporter of Bill 107. His Report was released in November 2012.

Pinto provided some comparative data on the number of cases resolved through mediation and the number of cases decided through adjudication. The data on voluntary resolution were as follows: in the Commission process, approximately 71%-73% of claims were resolved voluntarily during the period from 1997-1998 through 2007-2008; in the HRTO process, approximately 65% of claims were voluntarily resolved during the period from 2009-2010 through 2011-2012.<sup>643</sup> The data on access to adjudication are more difficult to compare, because the Report did not (and could not because of the structural differences between the two processes) present the same data for both processes. I have chosen to compare the data for referrals to adjudication in the OHRC process with the data on decisions on the merits in the HRTO process, as these data are the most closely comparable in my view. In the Commission process, approximately 5% of claims were referred to the tribunal (some of these would have settled after referral) during the period from 1997-1998 through 2007-2008.<sup>644</sup> In the HRTO process approximately 5% of the decisions made by the Tribunal during the period from 2009-2010 through 2011-2012 were final decisions on the merits of the cases; 29% of the decisions were decisions dismissing claims on a preliminary basis; the remaining decisions were deferrals, withdrawals, other procedural issues, reconsideration decisions,

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<sup>643</sup> Pinto, *Human Rights Review* at 42, 60, 203, and 213.

<sup>644</sup> Pinto, *Human Rights Review* at 9, 203.

and breach of settlement decisions.<sup>645</sup> The HRTO does not yet have a long track record. However, it is interesting that on average 5% of claims were referred to adjudication in the OHRC process, and on average 5% of claims in the HRTO process have so far resulted in decisions on the merits.

Pinto reported that during the period from June 30, 2008 to March 31, 2012, the HRTO found discrimination on average in 40% of the cases it decided.<sup>646</sup> He did not express a view on whether a rate of 40% for findings of discrimination was reasonable or disappointing. He also did not compare this success rate with the success rate under the commission-based enforcement system; in my view it would have been impossible for him to conduct a meaningful comparison, since the OHRC would have referred to adjudication only cases it believed to be meritorious. Although the Commission did not win every case, its screening function would have affected the proportion of meritorious cases proceeding to adjudication. With a significant increase in the number of cases proceeding to adjudication, it would not be surprising to see some decrease in the rates of success.<sup>647</sup> However, it is difficult to assess whether the success rate would be higher if, for example, more applicants had legal assistance.

On the issue of legal representation, Pinto reported that 35% of applicants, on average, had legal representation in proceedings at the HRTO (both mediation and adjudication), as compared to 85% of respondents.<sup>648</sup> Pinto correlated data on applicants

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<sup>645</sup> Pinto, *Human Rights Review* at 214.

<sup>646</sup> Pinto, *Human Rights Review* at 214.

<sup>647</sup> Heather McNaughton similarly noted diminishing success rate with the increase in the number of cases proceeding to adjudication under the BC direct access system: McNaughton, "The B.C. Experience" at 193-194.

<sup>648</sup> Pinto, *Human Rights Review* at 46.



succeeding at the tribunal with the data on applicant representation, and concluded that applicants had some form of legal representation in 66% of the cases where they were successful, and no representation in 44% of cases in which they were successful. He interpreted these data to suggest the following:

The insight that arises from my analysis of the 143 Tribunal cases is that, while representation by a lawyer (from the [HRLSC] or otherwise) can make an important contribution to the success of a case before the Tribunal, it may not be as important a factor as has traditionally been believed. Out of the 50 cases in which applicants won, they were self-represented in 44% of them. This is a significant percentage of self-represented applicants who successfully argued their own case. Of course, we should also not overstate the case for self-representation keeping in mind that, in the 93 cases in which applicants lost, they represented themselves 72% of the time. The conclusions I draw are: (a) applicants fare relatively better with legal representation at Tribunal hearings; however (b) applicants who are self-represented can still fare reasonably well.<sup>649</sup>

There may be other relevant considerations, as well, that this analysis did not address.

First, at least some of the applicants who were “self-represented” at a hearing may have received assistance and coaching from the HRLSC to help them prepare to “represent themselves”.<sup>650</sup> Second, at least some of the claims may have been ones on which the HRLSC would not provide any legal services since the claim did not raise a human rights issue or a meritorious human rights issue. Pinto reported that the HRLSC was only able

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<sup>649</sup> Pinto, *Human Rights Review* at 108.

<sup>650</sup> I generally do not accept “self-representation” as a legitimate category in the context of a legal process where one party has a legal representative and another party does not have a legal representative. This does not mean I believe that all legal representation is competent. This also does not mean I believe that a person without legal training can never be effective in advancing their own interests. However, where one party has legal representation and another party does not, I believe it is more accurate to describe the party without legal representation as “unrepresented” rather than “self-represented”, since I believe there is an imbalance of power between a formally trained legal representative and a person without legal training.

to provide representation at the HRTO to 12% of all applicants and, even though he affirmed that it was appropriate for the HRLSC to assess the merits of claims and provide services accordingly, he described this rate of representation as too low.<sup>651</sup> Nevertheless, he did not make a specific recommendation about what level of representation would reflect a better balance. He did, however, recommend that the HRLSC work with the HRTO to provide more duty counsel mediation services to applicants.<sup>652</sup>

In examining what the OHRC has done in its new role, Pinto observed that the Commission has rarely exercised its power to bring cases to the HRTO or to seek to intervene in cases at the HRTO. He described the Commissioners as being conflicted on the extent to which they should engage in litigation strategies:

Commissioners explained that they have debated and held divergent views on the appropriate balance between litigation and cooperative strategies to effect positive change. To date, the consensus of the Commission has been that collaboration with respondents is more effective than confrontation.

...

Litigation is seen as a last resort that, if used unwisely, could result in the Commission setting the clock back on much of the progress it has achieved.<sup>653</sup>

Pinto expressed the view that the OHRC should engage more with litigation, making more use of its power to initiate cases and to seek leave to intervene in cases, emphasizing that the OHRC's mandate includes strategic litigation:

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<sup>651</sup> Pinto, *Human Rights Review* at 93-110.

<sup>652</sup> Pinto, *Human Rights Review* at 117.

<sup>653</sup> Pinto, *Human Rights Review* at 128, 129.

Ontario followed the recommendations of the Cornish Report and La Forest Report to reorient the Commission to championing human rights in the province without the burden of mandatory involvement in each and every individual human rights case. However, that did not mean abandoning strategic litigation in select applications with systemic dimensions – particularly where an individual or group of individuals would have great difficulty in obtaining justice without the Commission’s involvement.<sup>654</sup>

Ironically, perhaps, one of Pinto’s rationales for this view was that more OHRC participation at the HRTO could reduce the high rate of “self-represented” claimants:

Another reason why the Commission should be more actively engaged at the Tribunal is to incrementally reduce the high rate of self-represented applicants at the Tribunal. As discussed earlier, in the last 4 years since the *Code* reforms, the Centre has only been able to represent (as opposed to give advice to) 12% of all applicants before the Tribunal. If the Commission took on greater responsibility of representing applicants with cases (a) involving the public interest; (b) involving a systemic deprivation of rights; and (c) where the applicants would otherwise have difficulty advancing and proving their case, I anticipate this would make a small but strategically important contribution towards reducing the high number of self-represented applicants in the system.

The Commission was preserved, in part, not only to promote human rights through education and outreach, but also through inquiries, applications and interventions. During the second reading of Bill 107, the Attorney General introduced amendments that enhanced the Commission’s powers in the area of conducting investigations, intervening in and bringing applications if, in the Commission’s opinion, it was in the public interest.

The Commission cannot champion human rights without becoming more involved in litigation at the Tribunal, specifically by initiating cases against recalcitrant respondents.<sup>655</sup>

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<sup>654</sup> Pinto, *Human Rights Review* at 130.

<sup>655</sup> Pinto, *Human Rights Review* at 131.

Pinto's overall conclusion was that the Bill 107 reform was a "qualified success".

He also commented that there continued to be strong opposition to the reform:

In conducting the Review, I heard from many Ontarians with strongly held views on how the human rights system should work. My characterization of the Code reforms as a qualified success is unlikely to change the minds of those firmly committed to the previously enforcement model where the Commission played a predominant role in complaints. Indeed, I do not believe that the values that animate the previous and present Ontario human rights system are entirely reconcilable, which suggests that my Report will contribute to, but not end the underlying debate.

...

Those who believe that human rights breaches are almost entirely about a public wrong will favour an approach closer to the criminal public prosecution model whereby the state takes on the entire responsibility for "prosecuting" the human rights breach. Those who believe that human rights disputes are closer to private civil disputes, albeit with a public dimension, will favour an approach that apportions responsibility for dispute resolution to the parties and the state. The approaches are not really reconcilable and the public policy options flow from this fundamental difference of characterization.<sup>656</sup>

Pinto also noted that the role of the three-pillared human rights system must also be assessed in relation to the other legal venues where human rights issues are addressed, with specific reference to grievance arbitration and internal workplace procedures. Pinto found it beyond the scope of his mandate to assess how the statutory human rights system interacts with other "methods of human rights dispute resolution", but expressed the view that this interaction must be considered in future reform efforts.<sup>657</sup>

As discussed earlier in this chapter, human rights issues were being addressed in multiple legal venues by the time Bill 107 was implemented. This reality raises issues for

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<sup>656</sup> Pinto, *Human Rights Review* at 192, 193.

<sup>657</sup> Pinto, *Human Rights Review* at 195.

potential human rights claimants about whether or not they can raise claims in multiple venues and, if they cannot raise claims in multiple venues but must select one, which is the best venue to select. To the extent that decisions of the Supreme Court of Canada involving access to non-human rights tribunals appear to offer claimants more and different options about where they can pursue human rights claims, it may seem that potential claimants have access to multiple venues in which to pursue human rights issues. However, having potential access to multiple venues does not mean that claims may be simultaneously, or even sequentially, pursued in more than one venue. Several decisions of the Supreme Court of Canada suggest that any appearance of multiple forums is illusory; the Court is more likely to take an exclusive jurisdiction approach to potential multiple venues, and to leave claimants who made the wrong choice without any venue at all.<sup>658</sup>

The HRTO has the power to dismiss an application, in accordance with its rules, “... if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application”;<sup>659</sup> the reality of multiple legal venues in which human rights issues can be raised has produced hotly contested issues for the HRTO in terms of whether it has a special, and potentially supervisory role, in relation to human rights issues, or whether it is simply one of many adjudicative bodies that can address human rights issues. Recent decisions of the Supreme Court of Canada appear to have resolved

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<sup>658</sup> Karen Schucher, “Human Rights Statutes as a Tool to Eliminate and Prevent Discrimination: Reflections on the Supreme Court of Canada’s Jurisprudence” (2010) 50 SCLR 387 at 416-421. See also Shilton, “Choice, but No Choice” and Shilton, “Everybody’s Business”.

<sup>659</sup> *Code* (1990), s. 45.1

this issue against according human rights tribunals any special over supervisory role where human rights issues have been addressed by other tribunals or by courts, although some chinks may remain.<sup>660</sup> These decisions also seem to confirm that although human rights issues can be raised in multiple venues, in most cases claimants will only be able to select one of these venues, and this selection will not always be easy.

### **Conclusion to Chapter Three**

The evolution of statutory human rights that led to the critiques of the human rights commission claims resolution process and the Bill 107 debates paint a complex picture of the promise and practice of human rights law. This historical record provokes questions about tensions between the role of law as directing particular social outcomes and the role of law as providing a process in which parties can argue about what the social outcomes should be. In my view, it also demonstrates increasing tension between social goals and legal goals - to what extent do social goals become subordinated to legal goals and to what extent might legal goals be subordinated to social goals? Were advocates for “direct access” pursuing social equality goals through law, or were they seeking to engage with legal process in order to pursue social equality goals?

As I note earlier, it may be unfair to criticize the Bill 107 debates for their heavy focus on legal process and for failing to include discussion about the substantive issues to which these processes are addressed. However, it does seem fair to ask what it means to

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<sup>660</sup> *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 SCR 125. *Figliola* was followed by the HRTO in *Paterno v. Salvation Army*, 2011 HRTO 2298 and *Gomez v. Sobeys Milotn Support Centre*, 2011 HRTO 2297.

debate the relative merits of different legal processes in the absence of debate over the substantive goals that may be pursued through these legal processes. This focus on legal process suggests that process has, in some sense, taken the place of substance.

This historical record also provokes questions about the role of different forms of legal process, and demonstrates on-going tensions between public and private goals, and between informal and formal legal processes. In this context, I discuss my concluding reflections on how the three case studies contribute to examining the potential for law as a tool in struggles against social inequalities.

## Concluding Reflections on the Promise and Practice of Law

“Justice means children with full bellies sleeping in warm beds under clean sheets.” I have often reflected upon the wisdom of Mari Matsuda’s words, which remind us of the importance of articulating the meaning of human rights concepts in concrete, everyday terms. For if we cannot translate the rhetoric of justice, democracy, human rights and equality into the concrete contexts of everyday injustices, we will not be able to build upon these norms to effect social change.<sup>661</sup>

The history of statutory human rights in Ontario (and Canada), as examined through the preceding three case studies, paints a complex picture of the promise and practice of anti-discrimination law as a tool for achieving concrete justice. In these Concluding Reflections, I reflect on this history in relation to the three themes discussed in the Introduction - law and social power, agency through law, and responsibility at law – together with the overlaying theme of tensions between public and private aspirations, and public and private processes for pursuing these aspirations.

In the first section of these Concluding Reflections, I examine the themes of law, social power, and agency in relation to tensions between the aspirational significance of the coercive power of law and its equivocal role in the practice of statutory human rights.

In the second section of these Concluding Reflections, I examine the theme of

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<sup>661</sup> Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2010) at 3 [Sheppard, *Inclusive Equality*]. See also: “... it is not enough simply to aspire; the reason we frame our aspirations as we do is because we conceive them as actually informing our practices. Translating aspiration into action requires us to take account of the diverse sites of these practices and of the processual modes inherent in these sites. We cannot, I argue, recuse ourselves from the hard work of deriving a menu of possible procedural and institutional forms by and through which the paths pointing in the direction of these aspirations may be traced.” - Roderick A. MacDonald, “Pluralistic Human Rights? Universal Human Wrongs” in René Provost and Colleen Sheppard, eds. *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer Science+Business Media, 2013) 15 at 17.



responsibility at law in relation to tensions between the moral condemnation and remedial dimensions of the aspirations and practice of legislated human rights norms. In the third and final section of these Concluding Reflections, I return to questions of law, social power and agency through law in relation to tensions between law as an end in itself and law as a tool for social outcomes.

## **1 The Equivocal Power of Law**

If access to the power of law is a key element of law's appeal as a tool in struggles against social inequalities, as I argued in the Introduction, what does the historical record examined in this dissertation suggest about access to the power of law in the context of statutory human rights? In my view, this historical record demonstrated considerable achievement in harnessing the legislative power of the state to enact anti-discrimination legal norms, and a more complex experience with efforts to harness the power of law to enforce these legislated norms.<sup>662</sup> In particular, this record demonstrated that the most coercive power of law - the adjudicative process – has been the power least used in the practice of human rights law. While adjudication is not the only way to use legislated norms, it has been the primary way for legislated norms to develop public, concrete meaning. Thus, the enforcement record raises questions about how “public” the OHRC enforcement process really was, and questions about the role of social power in the everyday efficacy of engaging with legislated human rights norms.

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<sup>662</sup> I do not suggest that the struggles to persuade the state to pass anti-discrimination legislation were easy, as they were not, and those struggles continued in the advocacy for providing human right protection to other social groups by adding more prohibited grounds of discrimination to the *Code*.

The anti-discrimination legislated norms established by fair practices legislation, and then the *Human Rights Code*, were and continue to be very open-ended. These norms contain only two statutorily prescribed elements - the social areas covered by human rights statutes, and the requirement for a link between social conduct or practices and prohibited grounds of discrimination. The social areas are broad and have for the most part been broadly interpreted since *Bell v. McKay*.<sup>663</sup> In terms of the link between conduct or practices and prohibited grounds of discrimination, the legal norm was first targeted at direct discrimination, that is, at conduct and practices that were intentionally linked with prohibited grounds of discrimination. This understanding of discrimination has remained an important paradigm, but was never explicitly written into the statutory language. The open-ended statutory language thus created ample room for adjudicators to decide that adverse effect discrimination came within the legislative protection as well. The open-ended nature of anti-discrimination legislated norms similarly created the potential for many different concrete situations to come forward as claims of discrimination. How those claims were and are received is a question of the practice of human rights law.

The extent to which legislated norms may increase the social power of relationally disempowered individuals and groups is a question of how the norms can be used and are used. Like all legal norms, anti-discrimination legislated norms receive concrete meaning, and have social impact, through their application to everyday conduct and

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<sup>663</sup> Two arguable exceptions to the broad interpretation of social areas covered by human rights legislation are the decisions in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 and in *Gould v. Yukon Order of Pioneers*, [1996] 1 SCR 571.

practices. The case studies discussed in this dissertation showed citizens using human rights legislated norms and legal processes in two ways as tools in struggles against discrimination: they engaged with the process for direct enforcement of statutory human rights, and they introduced anti-discrimination norms into other legal processes through which the norms have, in effect, been indirectly enforced. Citizens have also engaged directly with legislated human rights norms outside of legal processes, using them as a tool in a range of ways to inform social conduct and practices. Citizens' experiences with these three ways of engaging with anti-discrimination legal norms reflect different ways in which the power of the state has, or has not, been available to facilitate citizens' agency in struggles against discrimination.

Turning first to citizen agency in relation to processes for direct enforcement of statutory human rights, the human rights commission enforcement model enlisted the power of the state directly in the enforcement of human rights claims. From one perspective, the human rights commission model enhanced the agency of relationally disempowered citizens by connecting claimants directly with state power. However, this model also connected respondents directly with state power. In effect, the state was inserted between the claimant and the respondent, and the state had to decide to what extent it would engage the coercive power of law in favour of claimants and against respondents. This model therefore gave the state considerable power to determine which concrete instances of social conduct and practices would be considered contrary to the anti-discrimination legal norm, and which would not.

The historical record has told us that the state rarely engaged the most coercive enforcement power, namely, adjudication. Therefore, we can say that in practice the formal legal process was rarely used to develop the meaning of the legal norm in relation to everyday social conduct and practices. This also meant that the commission enforcement model rarely used the state's most coercive power to engage the adjudication process on behalf of claimants. However, the historical record also told us that we can only speculate about the reasons for state reluctance to refer more cases to adjudication, since there is no evidence of the state's rationales for dismissing cases that did not resolve voluntarily. We can speculate that in at least some cases the state decided to dismiss a claim to avoid taking on the challenges and costs of litigation. We can also speculate that in some cases the respondent's social power may have been a factor in the state's decision not to refer a claim to adjudication.<sup>664</sup>

In order to gain more access to the coercive power of law, citizens turned to using legislated human rights norms in legal processes outside the direct statutory human rights enforcement process. Although initially these efforts were blocked, as in the *Bhadauria* case, legal processes outside the human rights commission enforcement process increasingly became a more effective route to using legislated human rights norms to advance claims of discrimination. This method allowed citizens to engage more directly

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<sup>664</sup> As Philip Girard has noted, questions have been raised about whether "expert agencies" did in fact operate to the advantage of socially disempowered groups or whether they operated as a "... kind of buffer zone in which the state mediated and deflected the claims of those groups, and behind which capital accumulation and inequality could proceed more or less unimpeded". In particular, he referred to the theory of "agency 'capture'", according to which "administrators easily fell under the sway of sophisticated and talented business advocates with whom they shared much in terms of social background and education." - *Bora Laskin: Bringing Law to Life* (Toronto, Buffalo, London: University of Toronto Press, 2005) at 295. Girard's references for this point include Judy Fudge and Eric Tucker, *Labour before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: University of Toronto Press, 2001).

with the power of the legislated norm because they could, in principle, exercise more independent agency over how they wanted to frame the claim and how far they wanted to pursue the claim. In practice, of course, their actual ability to advance claims depended on the social power available to them, including financial resources, and it is no coincidence that much of this litigation was initiated and supported by trade unions. These efforts to pursue legislated human rights norms in non-human rights legal processes did not affect the legal power of the norm, as such. However, having non-human rights adjudicators develop the meaning of these norms by applying them to concrete situations was, in effect, a form of indirectly enforcing the norm and, as I discuss later, questions have been raised about the implications of having non-human rights adjudicators significantly involved in developing the meaning of legislated human rights norms.

Citizens have also engaged directly with legislated human rights norms without any recourse to legal process. As expressed in the following passage from a 1977 report of the Ontario Human Rights Commission, legislated norms are tools in and of themselves, which may enhance citizens' social power by providing evidence of the state's endorsement of expectations for social conduct and practices:

Legislation on human rights can and should perform several functions in relation to community consensus. It should sum up and declare public policy, officially and unequivocally. It should, thereby, encourage people to take a personal stand against imagined or real pressures to 'go along with' discriminatory practices. It should provide legal redress for individuals and minority groups whose rights are being over-ridden. It should create peaceful means for resolving inter-group tensions that might otherwise seek more explosive solutions. Human rights legislation should in itself be an expression of the decent values of its community and

provide support by example and by law for better public understanding and respect for these values.<sup>665</sup>

Legislated human rights norms are well known and have become part of the social landscape. They have, for example, been used as educational and organizing tools, been incorporated into employment contracts, policies, and practices, and been incorporated into service standards, including education policies and practices.

Taken as a whole, then, the historical record prior to the implementation of the “direct access” model in Ontario suggests that the power of law enhanced the agency of socially disempowered citizen primarily through the establishment of legislated norms and through citizen engagement with these norms outside the statutory enforcement process. This observation suggests that citizens’ ability to use law was shaped not only by legislated norms and legal processes for enforcing these norms, but also by the existing social power they brought to their engagements with law. The legislated norm establishes a tool, but the extent to which this tool can be used effectively continues to be informed by social power independent of the norm and of legal processes.

Because the statutory enforcement process relied primarily on the more private voluntary resolution method than on the more public adjudication method of resolving claims, the practice of the statutory enforcement process also had limited effect on developing public concrete meanings for legislated human rights norms.<sup>666</sup> The

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<sup>665</sup> Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto: Queen’s Printer for Ontario, 1977) at 20.

<sup>666</sup> The OHRC summarized some settlement agreements in its Annual Reports. Undoubtedly the OHRC retained data on settlement outcomes, as Andrew Pinto stated in his Report, but these data were for the most part not publicly available: *Report of the Ontario Human Rights Review 2012* (Toronto: Queen’s Printer for Ontario, 2012 at 64 [Pinto, *Human Rights Review*]).

preference for voluntary resolution in the OHRC enforcement process thus resulted in the public norms remaining largely abstract, and their concrete meanings remaining largely private.<sup>667</sup> Philip Stenning similarly argued that infrequent recourse to adjudication stunted the development (and in his view the acceptance) of anti-discrimination legislated norms, although, he made this point in relation to the even less frequent recourse to adjudication through prosecution. I agree with Stenning that infrequent recourse to adjudication in the statutory enforcement process has affected the development of legislated human rights norms, but I do not share his view this development could or should have happened only through prosecutorial adjudication rather than through board of inquiry adjudication.

A large proportion of cases continues to be resolved informally under Ontario's "direct access" model. One of Andrew Pinto's recommendations was that (anonymized) content of these settlements be made publicly available, so that there can be more public awareness of how the legislated norms are being used in concrete situations. I agree with this recommendation. Although information about settlement outcomes would not formally contribute to developing the public meaning of the legislated norms, this information could provide some guidance as to how others might try to use the norm.

Will there be more use of the coercive power of law with the implementation of "direct access" enforcement in Ontario and, if so, will this be a positive development? In principle, the "direct access" model creates more potential for adjudication. It is interesting, then, that the initial data suggested little difference between the OHRC model

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<sup>667</sup> I recognize that this point may be relevant to all legal processes where many cases are resolved through alternative dispute resolution which, at this historical juncture, may be most - if not all - legal processes.

and the “direct access” model in terms of the proportion of cases adjudicated on the merits. Indeed, it is arguable that the “direct access” model in practice to date looks considerably like the OHRC model, with the exception that the state is no longer directly involved and the process moves more quickly. At the same time, more cases are being adjudicated, with the result that there will be more decisions on the merits of claims and these decisions will affect the public development of legislated human rights norms.

Adjudication is important for publicly demonstrating how legislated norms can be used – or not used. However, for individuals and groups who have at least some ability to compete with the social power of the individuals or groups against whom they wish to bring claims, informal resolution processes may ultimately be more effective. The findings in the Pinto Report about the disparity between claimant and respondent legal representation at hearings also provide a basis for some concern about how the HRTO adjudication process will contribute to the development of human rights legal norms. In my view, the greatest potential for engaging with the adjudicative process will probably lie with social activist groups and advocacy organizations; and their ability to exercise this potential will depend on whether they choose to make their resources available for engaging with formal legal process. Thus, it remains to be seen how Ontario’s “direct access” model will in practice contribute to the public definition of the concrete aspirations of legislated human rights norms.



## **2 Moral Condemnation, Remedy and Responsibility**

As I argued in the Introduction, an important goal of seeking agency through law in struggles against social inequalities is to establish norms for responsible conduct and practices and methods for imposing responsibility when those norms are not fulfilled. The historical record examined in the case studies demonstrated a strong focus on public responsibility, but also a changing understanding of what public responsibility meant in the context of statutory human rights. The historical record also demonstrated a tension between moral condemnation and remedial aspirations as motivators for accepting and imposing responsibility through legislation and legal process.

The advocacy for fair practices legislation drew on a rich and robust analysis of public responsibility, emphasizing both state responsibility and citizens' responsibility. Fair practices advocates argued that discrimination was both a public harm and a private harm, and the analysis of discrimination as public harm was seen in all three cases studies as a rationale for the commission-based, public enforcement model. Fair practices advocates also drew a parallel between anti-discrimination law and criminal law, and relied on this comparison both to support the argument that discrimination was conduct requiring moral condemnation and to support the argument for a strong public role in enforcing anti-discrimination legislation. The parallel between anti-discrimination law and criminal law continued to be drawn throughout the historical record; however, in subsequent periods it was relied on primarily as part of the rationale for a state-controlled enforcement model. Advocates for "direct access" challenged the view that public responsibility for discrimination required a state-controlled enforcement process similar

to the criminal law enforcement model. They argued that public responsibility would be fulfilled by state funding for an adjudicative process, claimants' access to this process, and a continuing role for the OHRC as a public advocate for human rights. Opponents of "direct access" continued to support the commission-based model as the appropriate model of public responsibility and the appropriate method for fulfilling public responsibility to address discriminatory conduct and practices.

Moral condemnation of discrimination, the second basis for the comparison between anti-discrimination and criminal law, was an important element of the advocacy for fair practices legislation. We saw that this more negative perspective on the need for anti-discrimination legislation was also in tension with a more positive perspective, which sought to place anti-discrimination legislation within a remedial framework rather than a punitive framework. In the subsequent periods, we saw continuing efforts to emphasize remedy over fault. An important argument underlying the OHRC preference for voluntary, private resolution over more coercive, public adjudication was that moral condemnation, and the consequent social stigma, would have a negative impact on the potential to achieve remedies for claimants. The Supreme Court of Canada's reasons for recognizing adverse effect discrimination similarly emphasized that discrimination should be approached from a remedial perspective rather than a fault-based perspective, and that the consequences for discrimination should be remedial rather than punitive, focusing on compensation for past harm and prevention of future harm. We saw a similar

analysis of the appropriate consequences for discrimination in the board of inquiry decisions examined in Chapter Two.<sup>668</sup>

Despite the repeated emphasis on remedy over fault, however, it is my view that there continues to be a link between discrimination and moral condemnation. I suggest that the historical record examined in the case studies resonates with Angela Harris's argument, in the context of anti-racism struggles in the United States, that success in attaching moral opprobrium to discrimination has had the consequence of undermining effective enforcement of anti-discrimination laws:

The elevation of antiracism to a fundamental moral principle in American life represents the strongest repudiation yet of centuries of race-based slavery, violence, exploitation, and exclusion in constitutional and political discourse. Yet the moralization of antiracism has at the same time limited its potential effects. Socially, it allows everyone who is not actually a racist skinhead or member of the Klu Klux Klan to feel innocent, to condemn racism without taking any responsibility for one's own unwitting complicity with it. Legally, it insulates vast expanses of American life from scrutiny and attributes discriminatory effects to preference, 'private' bigotry, or the faults of racial minorities themselves.<sup>669</sup>

In my view, the moral condemnation associated with discrimination contributed to enhancing the social importance attached to the anti-discrimination legislated norms in the Ontario (and Canadian) context. At the same time, this moral condemnation contributed to the challenges of addressing discrimination through adjudicative processes.

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<sup>668</sup> *Ont. Human Rights Comm. v. Simpsons-Sears* [1985] 2 SCR 536. This same analysis was used also to support the recognition of systemic discrimination in *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 (often referred to as the *Action Travail des Femmes* case) and to support vicarious liability for discrimination in *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84.

<sup>669</sup> Angela P. Harris, "Equality Trouble: Sameness and Difference in Twentieth-Century Race Law" (2000) 88 *Cal L Rev* 1923 at 2012.

Thus, from the responsibility perspective as well from the agency perspective, the historical record on anti-discrimination legislation and enforcement has demonstrated reliance on voluntary assumption of responsibility over imposition of responsibility through formal legal process.

Establishing a new legal norm for conduct and practices called upon citizens to accept responsibility by ensuring that their conduct and practices complied with the new legal norm. The spectre of moral condemnation has produced an emphasis on voluntary resolution as the most effective route to remedial outcomes. For cases that reach formal adjudication, emphasizing remedy over fault has not mitigated the challenges associated with establishing responsibility for discrimination through statutory adjudication processes. Concerns about the stigma attached to a finding of discrimination affect both direct and adverse effect discrimination claims, and call for a heightened concern to ensure procedural fairness for respondents. Direct discrimination claims are further plagued by the challenges associated with proving a respondent's intention. Adverse effect discrimination claims are further plagued by the challenge of holding people responsible for negative impact of conduct and practices otherwise considered "normal" and acceptable:

[T]he social and cultural relations of any particular workplace can be assessed as ongoing and unfolding social and cultural processes, practices and values present in a society as a whole. This is to treat 'power' as a 'concrete' social form and relation with a specific history and locale – not as an abstract concept, and this is the only way to point out the systemic socio-structural and historical aspects of sexism or racism. This moves our understanding of oppression from intentionality (good/bad people story) to a more fundamental notion of social organization, where such

experiences are routinely possible because they are intrinsic to the properties of certain organizations.<sup>670</sup>

It is difficult for adjudicative processes to engage with claims that challenge everyday norms and seek to have these norms judged discriminatory because of their unintended, differential impact on particular groups and individuals. In this regard, it is useful to recall that advocates for “direct access” argued that the OHRC had an important role in tackling these forms of discrimination and that its methods would likely focus on education and policy development rather than on litigation.

It may be interesting to explore, however, whether questions of responsibility and fault in relation to discrimination are considered differently when human rights issues are addressed outside the statutory human rights enforcement process. Are non-human rights adjudicative bodies concerned about questions of fault and potential moral condemnation resulting from findings of discrimination? Or is their approach to discrimination and human rights issues driven by how they approach the interaction between human rights issues and the social context in which the human rights issues are being raised? For example, when labour arbitrators are asked to address human rights issues, they are required to consider whether, and if so how, human rights issues might change their analysis of the collective agreement issue(s). Is it possible that they do not view findings of discrimination through the lens of moral condemnation, and that they are more concerned with how to assess the social impact of imposing responsibility? And if so, is it possible that this different orientation contributes to questions, which I consider in the

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<sup>670</sup> Himani Bannerji, “In the Matter of ‘X’: Building ‘Race’ into Sexual Harassment” in *Thinking Through: Essays on Feminism, Marxism and Anti-Racism* (Toronto: Women’s Press, 1995) at 131.

next section, about whether human rights issues can be “properly” decided by non-statutory human rights legal processes?

### **3 Social Goals in Tension with Legal Goals**

One way of looking at human rights statutes is that they promise concrete changes in the lives of people who have experienced various forms of negative and exclusionary treatment because they are identified with particular social categories or groups. Another way of looking at human rights statutes is that they do not “prejudge” their concrete goals, but rather create a method for citizens to come forward and seek changes through the legal process. I suggest that the historical record examined in this dissertation demonstrates a shift away from viewing human rights legislation as a tool for achieving specific social outcomes and toward viewing human rights legislation as a tool for seeking to define and then achieve social outcomes. The first approach clearly gives priority to social outcomes over law. The second approach does not abandon social outcomes, but can lead to tension between legal process as a goal in itself and legal process as a tool for achieving social outcomes. I also suggest that this shift reflects three developments in the promise and practice of human rights. The first development was the expansion of the potential social conduct and practices about which discrimination claims might be raised; the second development was the increasing recourse to enforcing legislated human rights norms outside the statutory human rights enforcement process; and the third development was an evolving sense that there is a distinct value in the

process of engaging with law for the purpose of achieving social impact, separate from the social impact that may or may not be achieved in that process.

As we saw in Chapter One, anti-discrimination legislation was first sought as a response to a specific form of social conduct and practice. Advocates for fair practices legislation argued for law as a tool to achieve specific, concrete changes for racialized, religious and ethnic minority individuals and groups. Their advocacy “prejudged” the concrete goals for the law in the sense that they were campaigning for the legislation as a tool to assist them in achieving already-defined social goals. As the scope of human rights legislative protection was expanded to include more prohibited grounds of discrimination and to recognize adverse effect discrimination, there was no longer a clearly-defined paradigm of discrimination, as there had been in the advocacy for fair practices legislation. Enlarging the scope of human rights legislative protection also significantly expanded the range of social conduct and practices that might be challenged as discriminatory. Recognition of adverse effect discrimination, in particular, made it more difficult to “prejudge” concrete goals for human rights law because, unlike direct discrimination for which there was a relatively clear paradigm, there was no clearly-defined paradigm of adverse effect discrimination that could correspond to the many potential claims.

As the universe of social conduct and practices that might be found discriminatory grew, it arguably became easier for social discourse to rely on the more abstract, legal norms as shorthand for the social conduct and practices that could be challenged using the legal norm. It similarly became easier to view the role of law as not being to

prescribe particular social outcomes but instead to create a forum in which to use the legislated norm to argue for particular social outcomes. Within the commission-based enforcement model, the OHRC's role as arbiter of what social outcomes should be required by the legislated norms became increasingly more complex as the scope of human rights legislative protection expanded. Through its policy documents, the OHRC has demonstrated considerable leadership by providing guidance about how and why social conduct and practices should or might be considered discriminatory.<sup>671</sup> However, as we know from the historical record, the OHRC (and human rights commissions across Canada) provided relatively little leadership in seeking to develop the concrete meaning of the legislated norms through adjudication.

A shift away from viewing legislation as prescribing concrete social outcomes to viewing legislation as establishing a framework and process for citizens to argue for concrete social outcomes was also consistent with the arguments against state imposed social outcomes, which increasingly dominated public discourse beginning in the 1980s.<sup>672</sup> At the same time, this shift is also consistent with the responsive regulation arguments for more participatory processes of norm establishment and enforcement. Increasing the citizen participation in norm development and enforcement also resonates with different approaches to who has "expertise" in the nature of social issues and potential remedies for social harms: advocates for "direct access" viewed claimants as

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<sup>671</sup> The OHRC's policies are generally lengthy research documents, providing detailed analysis of the particular issue and much discussion about the meaning of the legislated norm in social practice: [www.OHRC.on.ca](http://www.OHRC.on.ca). The Bill 107 amendments to the *Human Rights Code*, RSO 1990, c H.19 [*Code* (1990)] included a provision which permits the HRTO to consider OHRC policies at its discretion, and requires the HRTO to consider OHRC policies when asked to do so by a party or intervenor: s. 45.5.

<sup>672</sup> For example, see: Brenda Cossman and Judy Fudge eds., *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).



being the primary experts about the claims they wished to advance, whereas advocates for maintaining the OHRC model saw the OHRC as having expertise and an important role in contributing to the development of legislated human rights norms. These shifts are all consistent with the tension between striving to achieve social outcomes through common, public norms and striving to achieve the best specific resolutions of individual claims, which will often best be achieved voluntarily and have little or no public audience or impact.

The possibility of addressing human rights issues outside the statutory human rights process opened up new opportunities to develop legislated human rights norms. This development also raised new questions about the role of statutory human rights enforcement and the relationship between direct and indirect enforcement of legislated human rights norms. By the time the “direct access” model was implemented in both British Columbia and in Ontario, statutory human rights enforcement was no longer the only legal process venue for addressing legislated human rights norms. Pursuing human rights “justice in many rooms”<sup>673</sup> created opportunities for the meaning of legislated human rights norms to be considered directly in their own contexts. As Colleen Sheppard has written:

... an integrated approach to enforcing anti-discrimination norms is considered particularly important with regard to systemic or structural discrimination, which is not easily redressed through retroactive complaints processes that tend to focus on discrete and severe incidents of discrimination. From this more pluralist perspective, the legal norm of equality is subject to interpretation and application by numerous

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<sup>673</sup> I borrow this phrase from Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering and Indigenous Law,” (1981), 19 J Leg Pluralism & Unofficial L 1 [Galanter, “Many Rooms”].

institutional actors; legal interpretation and enforcement are not the exclusive domain of lawyers and adjudicators. Indeed, legal norms will be most effectively enforced when they form the normative backdrop for institutional decision-making. In such a context, anti-discrimination law operates indirectly as facilitative law. Law enforcement does not simply refer to formal, state-based processes. Rather, legal norms and principles become embedded in the institutional culture and practice of everyday life.<sup>674</sup>

Engaging with human rights legal norms in their social context is consistent with the idea that human rights legal norms do not and should not belong simply to human rights legal process, since their ultimate purpose is to achieve positive social impact in the concrete social situations to which they apply. The argument from this perspective is that human rights legal norms have greater potential for social impact if they also permeate the concrete social contexts to which they apply, and if they are engaged with through the various legal and non-legal processes that are part of those social contexts. This argument gives priority to the social goals that may be achieved using legislated human rights norms as a tool.

The competing argument is that non-statutory human rights adjudicators may dilute the potential force and impact of human rights legal norms, by subordinating them to other norms specifically related to the social contexts in which the human rights norms are being engaged. As discussed in Chapter Three, this argument has so far not been successful - it is now generally thought to be a good thing for human rights issues to be addressed in their social contexts, and human rights adjudication has not received special status or authority. However, “direct access” is still in the early stages, and new issues

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<sup>674</sup> Sheppard, *Inclusive Equality* at 133-134. See also Galanter, “Many Rooms”, and in particular at 16-25.

may well arise as the system matures. For example, at some point there may be conflicts between how the HRTO addresses human rights issues and how non-statutory human rights adjudicative bodies address them. It also remains to be seen whether the perception of better access to statutory human rights enforcement will affect how individuals, associations and organizations view their independent responsibility for human rights issues. For example, will trade unions and other organizations that stepped into the enforcement void now try to unburden themselves of some of this responsibility? Thus, it seems likely that there will be further elaborations of the relationship between statutory human rights enforcement and indirect enforcement of human rights issues in other legal venues.

Finally, there is the question of the distinct value of access to legal process as a tool in struggles against social inequalities. As I argued in Chapter Three, it is my view that supporters of “direct access” were more focused on claimant access to legal process than on the social goals that might be achieved through this access, whereas opponents of “direct access” were more focused on achieving social goals than on achieving access to legal process. The arguments for “direct access” emphasized citizen agency and the potential for greater citizen participation in defining social equality goals and developing the meaning of legislated human rights norms. Two key challenges to fulfilling these goals, anticipated during the Bill 107 debates and now emerging with the implementation of “direct access”, are the ability to ensure that “direct access” provides meaningful access to legal process and the potential for access to legal process to become a substitute for achieving social outcomes. The arguments against “direct access” placed greater

emphasis on social outcomes than on legal process, and on substantive public responsibility for achieving social outcomes. However, the historical record suggests that the state enforcement process was rarely, if ever, effective, and a weak public enforcement system can have a negative impact on enforcement of human rights legal norms in other contexts.

As the new system continues to evolve, I believe it is important to find a better way of tracking and communicating what the “direct access” system is achieving in substantive terms. The fact that all HRTO decisions are publicly available through CanLII is small comfort for everyone, including people who might want to provide legal services to human rights applicants and respondents. There are currently approximately 13,250 HRTO decisions published on CanLII for the period from 1 January 2008 through 31 August 2014.<sup>675</sup> A significant proportion of these decisions address a wide range of procedural issues, which can sometimes be as important as substantive issues. Although there are a few human rights textbooks, none of them is really designed to assist people find their way through the fast-growing human rights jurisprudence. There are, however, many people who read most, if not all, of these decisions, including people at the Human Rights Legal Support Centre and people at the Ontario Human Rights Commission. In my view, it would be useful to find a way to capture the time people are investing in

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<sup>675</sup> CanLII’s HRTO database provides continuous coverage from 1 January 2000; there are 273 decisions on this database for the period from 1 January 2000 through 31 December 2007. The CanLII database for the British Columbia Human Rights Tribunal (“BCHRT”) provides continuous coverage for the period from 1 January 2008 through 31 August 2014 and, by contrast, contains approximately 2,575 decisions. Although the BCHRT releases fewer decisions than the HRTO, its output is still a significant number of decisions to follow.

reading these decisions and turn their efforts into a useful public guide to the substance and procedure of human rights enforcement at the HRTO.

I conclude by returning to Diana Majury's cautionary call to "Using law against itself, seeing law simultaneously as a tool, as foe, and as focus for change, demystifying law as institution, and recognizing law as presenting multiple sites of struggle rather than a solid one-dimensional monolith ...".<sup>676</sup> Law is many things, always a work in progress, and not something that can be ignored. As Carol Smart has suggested, law is "... a refracted agency, full of contradictions and largely unpredictable in its outcomes, which in turn responds to different pressures at different times."<sup>677</sup> I am not sure I would say that law is "largely" unpredictable, but it certainly can be unpredictable at least as often as it can be predictable. And law is always a work in progress because of its on-going responses to different social conditions and pressures. Thus, law can be a powerful tool in struggles against social inequalities, but it is a tool to be used with caution. Claims that challenge social power will be often be resisted by the "siren call of abstract formalism" and of legal process for its own sake.<sup>678</sup>

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<sup>676</sup> Diana Majury, "Women's (In)Equality before and after the *Charter*" in Radha Jhappan, ed., *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 101at 102, also quoted in the Introduction to this dissertation.

<sup>677</sup> C. Smart, "Reflection" (2012), 20 *Fem Leg Stud* 161 at 164.

<sup>678</sup> I borrow this phrase from Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in Fay Faraday, Margaret Denike & M. Kate Stephenson, *Making Equality Rights Real: Seeking Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) 99.

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