Defining Rights and Wrongs

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Rosanna L. Langer

Defining Rights and Wrongs: Bureaucracy, Human Rights, and Public Accountability

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Introduction

> The fundamental protection of the rights of the individual is not so much in the substantive law as in the procedure by which it is administered.
>
> – Hon. James Chalmers McRuer, former Chief Justice of the High Court of Ontario (1968)

Canadian human rights commissions are subject to seemingly unending criticism. Since the creation of the federal and provincial human rights commissions beginning in the 1950s, a long string of studies, position papers, inquiries, self-evaluations, and reviews have pointed out various shortcomings and recommended changes for resolving systemic problems once and for all.[1] Media reports and commentaries on decisions to file a complaint, accept a complaint, or decide on a complaint appear daily. Editorials and letters to newspaper editors are written. Press conferences are held. There can be no doubt that the domestic processing of human rights complaints attracts a great deal of public attention, scrutiny, and interest.

Despite all this heightened scrutiny, there is much below the surface that we don't know. When people contact the human rights commission or a human rights lawyer, how do they think about and use human rights discourse? How are their experiences characterized by legal actors? What happens when people encounter official understandings of discrimination? How are complaints turned into cases? How are cases shaped by professional and operational considerations? How can these multiple facets of meaning-making be reconciled?

This study is not a manual for reform, although reform is arguably compromised if it fails to account for the experiences of those who seek

out a complaint-processing system and for the practical demands of achieving one. Neither does this book primarily debate the usefulness of domestic human rights commissions or legislation; we must accept that, as creatures of statute, commissions can be abolished or their functions transformed through a legislative vote. Rather, my interest lies in mapping and understanding the interactions among lay comprehensions of rights and of the legal systems where rights are administered.

The relationship between law, public administration, and day-to-day socio-legal practices is a complex and dynamic one. My research provides a snapshot of the social and administrative processes and of the interactions – and the constraints on those interactions – whereby domestic human rights law is accessed and interpreted as a means of resolving individual grievances. The core of this inquiry is how participants' expectations intersect with legal practices and administrative processes to transform experiences into cases. How is law actualized? How do administrative and professional practices constitute "human rights"? How are the functions, purposes, and goals of the public administration of human rights framed, and how are we to evaluate them?

The explicit dimension explored here is the roles played by human rights commission staff and professional intermediaries in shaping, legalizing, and excluding human rights violations, that is, selecting and discarding elements of claimant narratives in order to frame or reject these stories as legal violations. Their roles, conduct, and experiences are situated in turn within the broader context of public administration, which encompasses budget allocation, caseload, the politics that place demands on an administrative system, and a host of practices shading into policy and the spheres of community and provincial party politics. Once these aspects of the domestic human rights complaint process are revealed, it becomes possible to analyze the function, symbolism, and ideology of current practices.

This research focuses on complaints received and processed by the Ontario Human Rights Commission, an "arm's-length" public administrative body created with the specific mandate to investigate and prosecute violations of the Ontario *Human Rights Code*.[2] It holds significant implications, however, for other government bureaucracies mandated to deal with voluminous commonplace claims and driven by the dual value systems inherent in public administration and corporatism.

Overview of This Book

Assertions of rights violations have multiple dimensions and meanings. Domestic human rights legislation covers only some of these. How are

everyday interpretations of discrimination, harassment, and human rights transformed into legal claims? During intake into the current Ontario system for assessing, investigating, and resolving domestic human rights complaints, complaints begin to be transformed into cases in accordance with intake workers' understanding of jurisdictional boundaries. Independent human rights lawyers, guided by their understanding of professional practice, also negotiate the transformation of complaints into cases. The processing of complaints is informed by operational considerations and policies. What constitutes the public interest in human rights enforcement is contested by special interest groups in the policy consultation process. My research reveals that domestic human rights administration is challenged both by the disjuncture between human rights ideals and operational demands and by active destabilization by reform advocates.

To set the stage for an analysis of subjective accounts and normative processes, it is helpful to consider what the Ontario *Human Rights Code* is intended to achieve. Chapter 1 provides a historical overview of the Ontario context for provincial human rights policy and implementation, and a review of statutory, case law, and international rationales for current approaches to human rights enforcement. While the history shows us a legacy of discriminatory practices rightly deserving of state sanction, the language of human rights codes and covenants reveals our aspirations and ideals. Both legacy and ideals also flavour contemporary participants' expectations about state enforcement systems and experiences of human rights violations. This observation is tempered by the professional, institutional, and structural constructs that are at the heart of this study.

In legal research, little attention has been paid to the public administration of statutorily recognized rights other than in the process of judicial review of decision making. It has been argued that legislative and judicial decision review of decision making is remote from its actual implementation through the guidelines, directives, and codes that can be collectively termed "soft law."[3] Alternatively, these elements of soft law provide a means whereby legal influences can be brought to bear on administrative discretion.[4] Examination of the administrative law literature and human rights tribunal[5] and court decisions provides a limited and also somewhat distorted view of human rights decision making. Human rights case law shows only those complaints that the Ontario Human Rights Commission has decided are viable to put forward or those challenged by one or another party. Furthermore, they tell us little about commonplace administrative processes "on the

ground," and even less about the implications of judicial decisions for day-to-day practices.

Recent critiques of Canadian human rights commissions, specifically the Ontario Human Rights Commission, present a picture of administrative processing from a distinct perspective and with specific reform goals. Besides reflecting how human rights commissions are perceived by communities of interest, these studies point to the critical roles played by structural and discretionary forces in shaping complaint processing.

The object of this book is not reform. It merely adds to current policy debates by providing a highly nuanced account of the practice of enforcing human rights law. By exploring the cross-hatch of tensions among aspirational, professional, and systemic objectives in domestic human rights enforcement, and the role of different agents in shaping complaints, this study enhances our understanding of domestic human rights administration and contributes to a growing literature on public administration.

In Chapter 2, the rise of operational imperatives in shaping complaint intake is shown through an analysis of organizational materials and staff understanding of their work. What recent public and internal organizational reviews do not address so much as reveal is the significant influence of the goals of professional intermediaries in human rights implementation. This chapter situates lawyers within a professional community that infuses their understanding of the work they do and their relationship to the Commission. The examination of lawyer representation in the domestic human rights complaint process also raises questions about whether the goals of democratization and rationalization of human rights administration are furthered or subverted by the intervention of professional intermediaries.

A focus on process provides a springboard for asking how conflicts over rights are shaped through multiple interactions, what people know about avenues for making a human rights complaint and how accessible these mechanisms are, and problems that may arise in the systemic translation, management, and implementation of human rights ideals. Chapter 3 examines how complainant, intermediary, and operational interests are met in the active assertion, contest, and construction of viable human rights complaints among multiple participants.

Human rights complaint processing can be distinguished from juridical responses to other types of legal conflict in at least two ways. First, elimination of discrimination and censuring of human rights violations are evolving areas of distinct public interest. As such, they fall into a realm of public law with a high exposure to public opinion. As can be

seen from common parlance and the frequency of rights claims of various sorts, we all consider ourselves experts on rights.

Second, responses to complaints in Canada are predominantly, but not exclusively, managed through independent administrative agencies that are empowered to enforce a statutory regime. Of significant interest, therefore, is how participation is conceptualized, shaped, facilitated, and constrained by staff and legal practitioners through legislation, enforcement procedures, policy developments, and operational considerations – in sum, the social, structural, and ideological constructs of the domestic human rights process. Chapter 4 reaches towards the larger question underpinning current approaches to the implementation of human rights, and asks: What *is* the public interest in human rights enforcement, and is it being met? Through an examination of agency materials, case law, field study interviews, and public administration literature, articulations of the public interest are identified and explored to show how the public interest is actively defined and debated in the processes of a public administrative body charged with the protection of domestic human rights.

I interviewed a total of ten lawyers, nine Ontario Human Rights Commission Inquiry and Intake staff and six complainants who responded to publicity about my study in Toronto over the course of 2001-02. These interviews, which were one to two hours in length, were recorded and transcribed and then analyzed both thematically and by subject group. In part, these interview transcripts provided me with further conceptual and thematic direction.

I began this project with an expectation about lay definitions of rights and encounters with a legal regime. I anticipated a one-way process of transformation from social problem to legal violation as lay complainants encountered official understandings. What has emerged is considerably more complicated, as I unearthed multiple realities overlapping to form the whole of an administrative complex. The field study data reveal a cross-hatch of themes and tensions. Domestic human rights administration has proved to be a locus of challenge to state control of the legal ordering of discriminatory social conduct.

Some of the prominent themes found in this study include the interaction between cultural and legal understandings of discrimination, how bureaucratic gatekeeping is practised through the selective inclusion and exclusion of cases, management of clients by agency staff and lawyers, the influence of professional communities on the outcome of individual cases, and the contest among advocacy groups claiming to represent the public interest. These themes contribute to the book's

central focus on the social construction, through administrative processes, of the meaning of legal events. Long before the likelihood of adjudication, the law is interpreted and applied to messy human affairs and conflicts and their resolution, raising issues of the understanding that staff, lawyers, and clients have regarding role, institutional demands, entitlement, processing, and closure. Not only does each actor or participant contribute to this process from his or her own social and professional location but these perspectives also fuse in a collective process of interpretation and refinement. "Law" is the outcome of these processes.

Within a context that accounts for law as an institutional discourse of power and the subjective agency of individuals in the social construction of the meaning of "law" events, this study finds an active contest among complainants, intermediaries, and others as to meaning, validity, and justiciability. It draws on small but rich literatures on how day-to-day practices and interactions between frontline agency staff, legal intermediaries, and citizens create legal meaning, and on how interactions between bureaucracies and special interest groups influence legal policy and procedural choices. The scope of this work thus encompasses both an empirical focus on the workings of a single agency and a qualitative analysis of the roles and understandings of professional intermediaries and administrative staff. These actors' experiences of the legal system within which they work are played out amid pressing operational demands, professional aspirations, and a deeply symbolic discourse, which inform the construction of relatively few legal claims from a huge body of complaints made to a public administrative agency.

Defining Rights and Wrongs

1
An Overview of Public Administration of Human Rights Enforcement in Canada

> Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes.
>
> – Supreme Court of Canada (1998)

The development and introduction of anti-discrimination legislation in Canada must be considered in the context of endemic racial discrimination in Canadian life. Before, during, and even after the Second World War, officially sanctioned policies to preserve the position of the Anglo-Protestant urban majority through harshly restrictive immigration controls ensured that undesirable "non-assimilables" entered Canada as second-class citizens, if at all.[1] The "non-preferred" immigrants of this era were Jews, Asians, and Blacks. Immigration officials and others decried these undesirables for competing for jobs with Anglo-Canadian, British, or the more desirable northern European immigrants. In 1931, for example, an Order-in-Council "effectively banned all non-agricultural immigrants unless either British or American."[2] Official policies echoed and legitimized the exclusionary racism and anti-Semitism of both French and English Canada. Opinion polls ranked immigrants that Canadians preferred to keep out: of those canvassed in 1946, 60 percent of Canadians listed Japanese as the most undesirable immigrants, 49 percent listed Jews as the next most undesirable people, and 31 percent identified Negroes as undesirables.[3]

For those undesirables already on Canadian soil, racism and discrimination were commonplace and widespread. J.W. Walker states: "From the late nineteenth-century until the middle of the twentieth, racism

infused Canadian institutions, government policies, and public behaviour."[4] Legislators introduced various restrictive limitations on enfranchisement,[5] eligibility for public office, business licensing,[6] business location, primary[7] and post-secondary education,[8] professional designation, employment,[9] and union membership. The ideology of freedom of contract also removed significant sets of social relationships, such as employment and the exercise of private property rights, from state governance, thereby allowing discriminatory practices to flourish. In Ontario, these beliefs were used to support racially exclusionary practices, such as refusing to rent accommodation to minorities, prohibiting property conveyance to Jews,[10] and barring Blacks and Jews from restaurants, theatres, hotels, resorts, beaches, and parks.[11] Private lawsuits did not provide a remedy. For example, in *Franklin v. Evans,*[12] the plaintiff was unsuccessful in his suit for damages "for the insult and injury caused ... by the refusal of the defendant, a restaurant-keeper ... to serve the plaintiff, a negro, with luncheon in the defendant's restaurant." *Christie v. York Corporation,* decided by the Supreme Court of Canada on the eve of the Second World War,[13] authoritatively confirmed that a businessman deciding to refuse service to "coloured persons" was not acting contrary to good morals or the public order. Freedom of commerce was upheld by the Court in finding no liability on the part of a Montreal tavern refusing to serve a glass of beer to a Black man.

Ontario enacted its first law banning racial discrimination in publication, broadcast, or signs in 1944.[14] The *Racial Discrimination Act* was a quasi-criminal statute dealing exclusively with the prohibition of commonplace racially and religiously discriminatory "Whites Only" signs and advertisements. Regardless of the illegality of advertising one's intentions, racially exclusive practices continued after the war, with many reported incidents of Ontario Blacks and Jews being discriminated against in employment, education, rental accommodation, provision of common services in restaurants and barbershops, and exclusion from public skating rinks and dance halls.[15] And despite Canada's becoming a signatory to the United Nations Charter and the *Universal Declaration of Human Rights* in 1946, and the laudable finding in *Re Drummond Wren*[16] that racially restrictive land covenants were contrary to public policy and international law, freedom of contract was soon reasserted in Ontario as a policy that took precedence even over international expressions of universal human rights. In *Noble and Wolf v. Alley,*[17] Schroeder J. of the Ontario High Court held that a restrictive covenant barring sale, transfer, lease, or rental of a vacation property at Beach O' Pines, Lake Huron, to "Jewish, Hebrew, Semitic, Negro, or coloured persons" was

valid. The Ontario Court of Appeal affirmed his finding unanimously, with the *obiter dictum* of Robertson C.J.A. that although "mutual goodwill and esteem among the people of the numerous races that inhabit Canada is greatly to be desired," this cannot be achieved through legislation.[18] The restrictive covenant in *Noble and Wolf v. Alley* was found invalid for uncertainty by the Supreme Court of Canada,[19] but the Court declined to declare that racially restrictive covenants were illegal on moral or public policy grounds.[20]

Regulatory Choices in the Evolution of the Ontario *Human Rights Code*

As can be seen from this brief overview, racism and anti-Semitism were endemic to Canadian society in the first part of the twentieth century, reflected and reinforced in law, political life, and official policy and decision making. In the discourse of the era, this intolerance was often expressed in terms of citizenship and denunciation of the idea of hyphenated citizenship and second-class citizenship. Reliance on private law remedies, and even the introduction of human rights legislation to change discriminatory views and practices, were by no means assured of success.

The prejudiced attitudes of the majority did not go unchallenged, however.[21] The Jewish Labour Committee of Canada, an organization of trade unions with a predominantly Jewish membership, had concluded that "fair practices" legislation in the United States provided a working model for addressing the problem, and, in partnership with the Canadian Congress of Labour and the Trades and Labour Congress of Canada (now merged as the Canadian Labour Congress [CLC]), established the Labour Committee on Human Rights (LCHR).[22] The interests of this group focused on social action, legislation, and education to achieve social justice. Concerted activism by the LCHR, the newly formed Association for Civil Liberties, the National Unity Association, the Negro Citizenship Association,[23] and Japanese and church groups included test cases organized by sociologist and LCHR national director Sid Blum. In addition, large representative deputations to municipal councils were organized by Blum's LCHR successor, Alan Borovoy, to petition for anti-discrimination legislation.[24] This social activism, along with an evolving international consciousness about the importance of human rights, led to the establishment of the public administration of anti-discrimination legislation. Historian George Egerton asserts that the clamour for protection for human rights was increasingly heard from mainstream church organizations, "social gospellers," and the

Co-operative Commonwealth Federation (CCF); he pointed, for example, to the 1944 consultation report by the United Church of Canada, "Church, Nation, and the World Order."[25]

In May 1947, partly in order to divert pressure being exerted by civil libertarians, the federal Liberal government appointed a Special Joint Committee of the Senate and House of Commons on Human Rights and Fundamental Freedoms.[26] In response to egregious practices, the province of Ontario introduced the *Fair Accommodation Practices Act,*[27] prohibiting discrimination in services, facilities, and accommodations customarily admitting the public.[28] The appointment of County Court judges to hear complaints enhanced the credibility of boards of inquiry set up under the *Act*, but even after the passage of the *Act,* these judges often failed to exhibit a requisite sensitivity to the nature of discriminatory harm. For example, *R. v. Emerson* and *R. v. McKay*[29] were early test cases where a racial mix of activists sought service in two Dresden, Ontario, restaurants to collect evidence that Blacks were being denied service there, contrary to the *Act.* Although both proprietors were convicted in Magistrate's Court, both appeals were quashed by Grosch J., the County Court judge who was soon identified as one of the property owners who had fought to uphold the racially restrictive covenant attacked in *Noble and Wolf v. Alley.* The judge noted that there had already been, at the direction of the Attorney General, a public investigation into the "alleged" conduct of the two restaurateurs and, if service was in fact denied, "there quite possibly could also be reasons other than colour."[30] He therefore held that the prosecution had not satisfied the onus of proving a violation beyond reasonable doubt. Despite the allegations of bias associated with Grosch J.'s involvement in the earlier property covenant case, neither the Attorney General nor the Minister of Labour appealed his decisions. The activists soldiered on, however, and were able to obtain a conviction against one of the proprietors in the following year.[31] It was to be the sole conviction under the *Fair Accommodation Practices Act.*[32]

It is evident that both judges and politicians were often reluctant to see discrimination as truly illegal behaviour. While criminal prosecution had the advantage of public carriage of a complaint, it had the disadvantage of requiring a criminal standard of intent – namely, intent beyond a reasonable doubt – and in these early iterations of actionable harm, the only enforcement machinery lay within the discretion of senior political officials. Furthermore, even if criminal intent could be proved, the individual complainant got no remedy; any fines went directly to the public coffers. In part to address these limitations, the reach

of human rights policy in Ontario after the Second World War was extended through non-criminal statutes pertaining to specific areas of activity (such as employment or housing) or specific grounds (such as equal pay regardless of sex) and eventually through consolidated human rights codes.

In addition to the *Racial Discrimination Act* and the *Fair Accommodation Practices Act,* other early anti-discrimination legislation in Ontario originated in the labour and employment context.[33] This made good sense as discrimination in employment has consistently accounted for the overwhelming majority of complaints to the Ontario Human Rights Commission (OHRC). Furthermore, the *Act to Promote Fair Employment Practices in Ontario*[34] introduced a conciliation model based on the conciliation and commission board hearing system of the Ontario *Labour Relations Act,*[35] as did the *Fair Accommodation Practices Act* three years later.[36] Conciliation and settlement were also the preferred models for resolving discrimination complaints, with the appointment of a commission (at the discretion of the Minister of Labour, on the recommendation of the Director of the Fair Practices Branch of the Department of Labour) only in exceptionally flagrant cases.[37]

In 1958, the Ontario legislature passed an act to establish an anti-discrimination commission, whose primary purpose was to publicize all human rights legislation in Ontario.[38] With the consolidation of all fair practices statutes, the commission's powers were broadened to include administration of the law as well as education. The OHRC was established in its current form in 1961. In 1962, all anti-discrimination statutes were consolidated into the Ontario *Human Rights Code*.[39] Originally responsible to the Minister of Labour, the five commissioners appointed by the Lieutenant Governor in Council or their three-person staff could, after receiving a formal written complaint and after intensive interview and investigation by staff, make efforts to conciliate and settle individual cases. If the settlement approach proved unsuccessful, the Commission could recommend to the Minister that a Board of Inquiry be appointed. The Board possessed powers similar to those of a Conciliation Board under the Ontario *Labour Relations Act,* including compelling witnesses, taking evidence, and attempting to settle matters between parties; it could order that discriminatory practices cease, or prosecute to obtain a conviction, after which a fine could be levied. With the new focus on conciliation, however, the first director boasted that there had been only four Boards of Inquiry and no prosecutions under the consolidated *Code* in its first two years of implementation.[40] The positive influence of the Commission, however, was held to be

reflected in its willingness to investigate and dispose of approximately forty-seven complaints alleging discrimination *outside of its jurisdiction* in the first two years of operation.[41]

In 1972, sex and age discrimination were added to race and religion as prohibited grounds under the *Code*. After a comprehensive review in 1976,[42] a revised *Code* (proclaimed in 1982) added physical and mental handicap, pardoned criminal record (in employment), and receipt of social assistance (in housing), as well as prohibitions on race and gender harassment. The social areas covered**,** including provision of goods and services and equal access to facilities, were also expanded. Until 1971, the approach to enforcement was individualized and assumed that discrimination was direct and intentional, although generally misguided. The US Supreme Court decision in *Griggs v. Duke Power Company*[43] held, however, that intent was not required and that the impact of adverse treatment could constitute discrimination. Although not precedential in Canadian law, this decision had important implications for understandings of constructive (or unintentional) and systemic (or group) discrimination under the *Code,* and the enforcement process was modified in 1972 to enable the Commission itself to initiate complaints.[44] The Commission review of 1976 reaffirmed the agency's multiple goals:

> 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.[45]

For the common law provinces, however, the Supreme Court of Canada affirmed in *Board of Governors of Seneca College v. Bhadauria*[46] that there is no independent right of action springing from the public policy objectives expressed in the *Code,* nor is there an intentional tort of discrimination protecting plaintiffs against the unjustified invasion of their interests. The Court held that the substantive and elaborate enforcement provisions of the *Code* form a comprehensive regime. The judgment of the Court, delivered by then Chief Justice Laskin, declared:

> [N]ot only does the *Code* foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the *Code*.[47]

The provincial *Human Rights Code* thus represents a comprehensive and exclusive enforcement scheme, which precludes the parallel development of a tort of discrimination.[48]

Further reorganizations of the administrative structure brought Ontario human rights administration into compliance with evolving principles of fairness in administrative law, by severing the Commission from the Board of Inquiry[49] and enhancing both the participation and rights of complainants. Thus, although its primary purpose was to change hearts and minds on a large social scale, the design of the Commission enforcement procedures from the 1970s onward was a way of ensuring that individuals who suffered injustice had access to a publicly carried and accessible process, one that was not subject to exclusionary legal standards of proof and that offered constructive remedies.

The consolidated *Code* sought to overcome the disenchantment with criminal standards of enforcement and judges' reluctance to impose them by focusing on the objectives of investigation and conciliation, with adjudication only if necessary. Once a comprehensive *Code* was in effect, however, expansionist rights-conscious reform movements arose in the 1960s and especially in the 1970s.[50] Broad social and political developments – such as the second-wave women's movement, immigration patterns resulting in a more diverse Canadian society, and international initiatives in self-determination and human rights – account in large part for a growth in rights-consciousness.[51] The dominant idea that discrimination was essentially misguided and that it was responsive to education and persuasion[52] gave way to conceptualizations of enforceable rights to fair treatment.[53]

The shift in orientation from containment of discriminatory practices to expansion of rights protection was matched by a move towards administrative fairness and procedural rights, motivated by the desire to protect individuals from the discretionary power of administrative agencies.[54]

The extension of procedural rights[55] coupled with inconsistent funding through the 1980s[56] and 1990s led to an unresolved tension between expansion, a mounting caseload, and increased formalism. M.K. Joachim, former legal counsel to the Commission, recounts that several operational reviews through the 1980s recommended a reordering of priorities to emphasize policy development, systemic initiatives, and

improved case-processing methods. Onetime budget increases associated with these studies went instead towards the processing of mounting backlogs of individual cases. Although the Commission saw a steady increase in case openings throughout the 1980s, case closings began to lag. After a 1991 Ombudsman Report concluded that the backlog amounted to a failure to properly enforce the *Code,* the Ontario Minister of Citizenship allocated $4.23 million over two years to a special task force effort to clean up the backlog. Although $6.4 million over three years was promised, the funding was terminated after two years. In the same fiscal year, 1991/92, case openings jumped by one-third, from 1,971 in 1990/91 to 2,535 in 1991/92.[57] They remained at the higher levels until 1996/97, when they dropped suddenly to 1,916. Coincidentally, the budget was cut by 7 percent for the 1996/97 fiscal year (representing a loss of approximately $500,000). Case openings remained low through the rest of the 1990s, until another sudden increase of 37 percent, from 1,775 in 2000/01 to 2,438 in 2001/02. Unfortunately, the budget did not keep pace. Thus, by 2002 year-end reporting, the Commission had opened the same number of cases as in 1994/95, but with $1.2 million less in its budget.[58] Staffing followed a similar pattern. As of 30 April 1992, the Commission had a total of 241 employees;[59] by 2002, it had only 127. Most of the cuts in staffing were made before 1997.[60]

A policy of fiscal restraint led to charges by reformists that political will was lacking to make the Commission "an effective agent of social rights."[61] The introduction of the *Canadian Charter of Rights and Freedoms*[62] in 1982 and the implementation of its equality section (s. 15) three years later fuelled a widespread debate about rights that continues to the present.[63] The Commission itself asserted that the number of public inquiries and new case intakes in the 1990s increased significantly as a result of improved public awareness of human rights and an increase in *Code* violations resulting from changing workforce demographics and economic recession.[64]

What explains the particular shape the response has taken? The first attempts at legislative solutions for endemic racism were not promising, in both the criminal and private law spheres. The introduction of the quasi-criminal *Racial Discrimination Act* and resoundingly unsuccessful attempts to prosecute through private law contract and tort regimes showed that judges reflected their social environment and, in considering discrimination claims, could be distracted by common law and criminal law principles. They were not likely candidates to promote expansive anti-discrimination values. Incorporating human rights

enforcement into existing state structures such as the Labour Ministry limited the scope of human rights application and left prosecution to the discretion of senior civil servants. The creation of an independent commission could address discrimination in a specialized, systematic fashion, with the agency's own agenda integrating the multiple functions of education, policy development, investigation of systemic discrimination, and processing of individual complaints. A historical review indicates that the early dispute resolution approach is well established, and was based on the prototype in the field of labour relations, where parties often have ongoing relations and seek remedies crafted to individual circumstances. It has also been found that providing an effective remedy or accommodation to the complainant was more important than punishing a delinquent respondent.[65] Finally, we see the close association of rights-advancement groups – such as Jewish, Black, trade union, civil liberties, and Christian organizations – and the OHRC, with the Commission often relying on these groups to carry out field research and bring instances of discrimination to its attention. These groups continued to provide human rights expertise and play a collaborative role in advancing rights discourse in the community at large.

The expansion of rights coverage has been accompanied by increasing caseloads and also, not surprisingly in an era of fiscal restraint where social programs are concerned, by criticisms across the country about the way human rights are administered. Since the mid-1990s, several reviews have been critical of the Ontario Human Rights Commission in particular and of the Canadian human rights enforcement process more generally. They provide a portrait of complaint handling in an administrative environment constrained by expectations about procedural fairness and operational efficiency and held to an ideal standard promised by the subject of the Commission's mandate. The main issues addressed in these reviews[66] centre on access, gatekeeping, delay, conflicts among the multiple agency roles of investigation, settlement, and enforcement, and the inadequacies of the current model in addressing systemic discrimination cases.

Because of widespread criticism of the human rights process, the Ontario government established in December 1991 an independent task force, chaired by lawyer Mary Cornish, to review and recommend reforms to enforcement procedures under the Ontario *Human Rights Code*. The preliminary issues paper inviting submissions[67] summarized the primary concerns with complaint processing at that time, including Commission monopoly over complaints, role confusion, emphasis on settlement, delay, and ineffective remedies. After extensive hearings and

consultations across the province,[68] the Ontario Human Rights Code Review Task Force reported in June 1992 (the *Cornish Report*). Not surprisingly, the primary concerns articulated in the original call for submissions were confirmed.

The Task Force heard that those who had made rights complaints were critical of excessive delays at every stage and felt disempowered by a lack of knowledge about the status of their case. Both complainants and respondents felt pressured to settle. There was strong support for some type of hearing process, but one that was informal and non-legalistic. It was suggested that the process of making a complaint should empower people to change deep social patterns of exclusion and power imbalances. Many commented on the lack of widespread and effective public education about human rights. Criticism was aimed at the exclusion of equality-seeking groups and unions in filing claims or consulting on education initiatives – not surprising, given the enhanced roles of these groups in the consultation process.[69] The Commission was characterized as remote from the daily lives of those who experience discrimination, and a number of submissions recommended the establishment of community-based human rights centres.[70]

The *Cornish Report* went on to outline an extensive proposal for a new human rights enforcement process. This model would be community-based, with equality rights advocacy centres assisting complainants. It would have the Commission ("Human Rights Ontario") play a strategic, proactive role in addressing systemic discrimination, and it provided for access to a permanent tribunal of specialist human rights arbitrators, with its own investigative officers and mediators. This proposed restructuring was never implemented.

Many of the concerns articulated in the *Cornish Report* continue to plague provincial commissions. In general terms, community and advocacy groups feel that they ought to have ownership over discrimination claims, over how these claims are pursued, and over the agenda of public human rights bodies. There is a strident desire for the human rights complaint process to be both efficient and transformative. Donna Young, for example, asserted in her 1992 report on racism in the Ontario Human Rights Commission itself that legal counsel could be faulted for "a lack of imagination or an unwillingness to use novel legal arguments."[71] This comment reflects one of several conflicting ideas about the goals of human rights legislation and practice, namely, providing a vehicle for the advancement and expansion of equity goals. It is often difficult to reconcile what we know and try to articulate in legislation about structural inequity with how we conceptualize issues on

an individual basis. Yet this difficulty – tension between the general and the particular – also reflects a more acute tension in human rights legislation, which stems from a recognition of structural inequity yet conveys the impression that an absence of discrimination is the norm.[72]

In 1993, academics R.B. Howe and M. Andrade surveyed 182 community organizations across Canada with an interest in human rights legislation. They asked about the reputed performance of provincial human rights commissions with respect to complaint handling and educational programs. The groups were questioned on "the effectiveness, responsiveness, and fairness" of the commission in their particular provinces.[73] The authors hypothesized that satisfaction would be correlated with levels of funding, but instead found that "regardless of the level of public funding, interest groups expressed a general lack of satisfaction with commission effectiveness."[74] The general problems reported involved excessive delays and case backlogs, inadequate commission initiatives on systemic discrimination and race relations, and timid policy approaches on the part of senior officials. Ontario, with the largest commission in Canada, received the poorest effectiveness rating. The Ontario commission was criticized for its high complaint dismissal rates, delays in investigation, multiple roles, and lack of knowledge and understanding of Aboriginal cultures and traditions. Howe and Andrade also heard that the many levels of bureaucracy were a source of irritation and frustration.[75] Interestingly, the community groups perceived their own influence on the commissions in their provinces to be ineffectual.[76]

The government of British Columbia has commissioned several reports in order to identify necessary reforms. In 1993 and 1994, human rights scholar William Black conducted two important reviews. The 1993 report made a series of recommendations with respect to screening, intake, investigation, mediation, settlement, and staff training, with an eye towards minimizing delays, improving case management, and supporting staff development.[77] At the time, BC had a Human Rights Council, which received and adjudicated complaints. Industrial Relations officers from the Ministry of Skills, Training and Labour carried out the key functions of investigation and mediation. Complainants were represented, without means testing, by lawyers appointed by the Legal Services Society of BC. The Council was not empowered to initiate cases on its own, nor could it represent the public interest in litigation. Although some educational programs had been initiated under its guidance, the Council had no statutory mandate for education, and no resources for education, research, or policy development.

Process delay remained a common concern in the 1994 *Black Report*; at the same time, there were complaints that investigation was not as thorough as it should have been. According to the *Black Report,* the mediation process received mixed reviews, with some participants finding it an effective conflict resolution method and others suggesting that it created a feeling of powerlessness.[78] A variety of groups pointed to the overlap between human rights and other areas of law and the need for these protections to mesh more smoothly. Participants at almost every meeting recommended establishing some permanent consultation mechanism through which the community groups could share their practical expertise with the agency.

While Black noted that the provincial human rights legislation can make a large contribution towards modifying broad patterns of inequality, he also observed that solutions often require the joint action of many parts of government, that the enforcement machinery is complaint-based and thus not driven by its own priorities, and that proving individual or even systemic complaints may require the identification of barriers that may not come to the attention of the individual, the respondent organization, or the Human Rights Council. He proposed a larger role for community organizations in providing human rights advice, screening cases, and assisting those who are considering filing a claim. He also proposed supporting these organizations through the provision of financial assistance, training, and materials.

The 1996 BC *Human Rights Code*[79] was largely the product of the 1994 *Black Report*. The structures for adjudication, administration, and education were separated and the purposes of the *Code* were clearly expressed. In 1997, the province created the BC Human Rights Commission and the BC Human Rights Tribunal, replacing the BC Council of Human Rights. A Chief Commissioner and Deputy Chief Commissioner, both Order-in-Council appointments, shared a mandate to hold public hearings and consultations to promote, monitor, and assist in implementing employment equity and other special programs. A Commissioner of Investigation and Mediation performed a gatekeeping function, with responsibility for accepting, screening, investigating, mediating, and either dismissing or referring complaints for adjudication. Although the *Code* provided discretion to do so, policy precluded referring a complaint to a hearing without investigation. In accordance with Black's recommendations, the BC Human Rights Advisory Council was created to ensure that public concerns were brought to the Commission's attention and to inform the public about the work of the Commission. Five

years later, during a period of government downsizing, BC abolished the Commission. Complainants are now able to proceed directly to the BC Human Rights Tribunal, which exercises its own screening functions.

The BC "Direct Access" model, the first of its kind in Canada, provides for a voluntary early settlement process, which can be converted to an adjudication by written agreement of the parties. If the complaint is not settled or dismissed by the Tribunal, it proceeds to a pre-hearing conference. Hearings are held in person before a single member or three-person Tribunal panel. In addition, the Ministry of Attorney General contracts with the BC Human Rights Coalition and the Community Legal Assistance Society to act as gatekeepers against unwarranted complaints, to assist complainants in filing complaints, and to provide legal representation at the Tribunal for complainants who fit their criteria.[80] Fewer than 50 percent of complainants are represented by the BC Human Rights Coalition.[81] It is too early to assess the consequences of this contracting-out of some functions and elimination of others, but some studies point to several obvious changes: the involvement of an authoritative public body at an early stage has been eliminated; the burden now falls on complainants to establish the merits of their case at an early stage; and gatekeeping is not rendered unnecessary but is merely shifted to the Tribunal.[82] It bears mentioning that there is no statutory assurance of legal representation, nor is there a clear public accountability mechanism for the contractors.

The *Canadian Human Rights Act* review (the *La Forest Report*), chaired by retired Supreme Court justice Gérard La Forest, was a blue-ribbon task force assembled by the Minister of Justice and composed of William Black of BC; former member of the Canadian Human Rights Commission and lawyer Renée Dupuis; and former member of the Canadian Human Rights Tribunal Harish Jain. Their mandate was to review the *Act,* the complaints-based model, and the powers and procedures of the Canadian Human Rights Commission, and to make recommendations for change. The panel developed an extensive research mandate and solicited expertise on the issues, particularly that of adding the ground of social condition to the *Canadian Human Rights Act* and continuing to exempt the *Indian Act* from its provisions. They also held extensive consultations with individuals, groups, organizations, employers, government departments, and provincial and territorial commissions. Funding was provided where participation would be dependent upon it.

The *La Forest Report* reviews the findings of the Auditor General of Canada's 1998 audit of the Canadian Human Rights Commission processes,

which focused on the individual complaint system. The Auditor General's report concluded that the approach that had evolved was "cumbersome, time-consuming and expensive."[83] The Auditor General found that in the ten-year period between 1988 and 1998, 67 percent of complaints were "not dealt with" or dismissed, and 6 percent were sent to a tribunal. The Commission was plagued with delays: in 1997 and for most of the 1990s, almost one-half of its caseload was considered to be backlogged, where the investigation was ongoing more than nine months after the complaint had been signed. Several times, the Commission had received extra funds to reduce the backlog. The panel heard that the record of the Commission in initiating and pursuing systemic complaints was poor. The pressure to process individual complaints, as in most if not all of the provincial jurisdictions, had consumed most of the available resources.[84] It must be kept in mind, however, that the Canadian Human Rights Commission is also responsible for enforcing the *Employment Equity Act,* the other major federal legislation for remedying systemic discrimination through the achievement of a representative workforce. The La Forest panel also heard from those making submissions that the process must be more transparent, more streamlined, more flexible, and more authoritative. The most serious issues identified by the panel were delays, perceived conflict of roles, perceptions that meritorious cases were being dismissed, and the Commission's inability to allocate its own resources. The *La Forest Report* notes:

> There is also a recognition of the growing remedial power of the Tribunal and the realization that not only does the system serve a public interest role by reducing discrimination, but it can also provide private justice in the form of full compensation. Lack of access to the Tribunal reduces individual opportunity for private justice and consequently the credibility of the process with human rights groups and other non-governmental organizations.[85]

The *Report* advocated a new direct access claim model with the establishment of a legal clinic to assist with complainant representation. The Commission would continue to handle inquiries[86] and assist in drafting complaints, or it could choose to commence a public inquiry into a matter raised by an individual. The full-time Canadian Human Rights Tribunal[87] would initiate a pre-hearing process with the discretion to decide in favour of hearings of different types. The panel supported a statutory compliance scheme, with the Commission using and expanding its already considerable powers for setting binding and non-binding

regulatory standards to supplement the claims process. The panel advised that language and structures creating a positive duty on employers and service providers to promote equality and eliminate discrimination were more consistent with the broad purposes of the *Act* than were simple prohibitions. This supported the general thrust of the panel, which was to endorse and emphasize internal workplace responsibility models, early investigation and resolution, and a unified statutory scheme in the highly unionized federal jurisdiction. To date, however, there has been no implementation of the panel's recommendations to eliminate the Commission's investigative function, to establish a legal clinic, or to appoint a full-time Tribunal panel.

What are the implications of these studies? Human rights enforcement in the provincial and federal domains is situated at a lively juncture of politics, public pressures, legal sanction, and policy allocations, and remains subject to competing interests and expectations. In postwar Canada, the premise of a policy-based administrative framework for protecting against rights violations was considered positive, but it has come under increasing criticism. In targeting case management issues, these studies also reveal the tangible consequences on human rights enforcement of balancing enhanced procedural rights and constraints based in fiscal restraints.

Some of these criticisms require further examination and discussion so that they can be placed in the context of both considerations of administrative law norms and the broader issue of achieving satisfactory dispute settlements. The question of whether procedural justice is adhered to, problems in informal dispute-resolution practices that are not unique to human rights cases, and the complications resulting from delays caused by the parties themselves are issues that are given short shrift in most accounts. We now return to a central tension in human rights administration, namely, the conflict between the real and the ideal, and between the system in place and expectations and perceptions of what that system can achieve. By the measures of procedural justice, the goals of informal dispute-resolution practices, and party-generated delay, among other criteria, the evaluation of publicly administered human rights systems remains troubling but indeterminate.

Inappropriate gatekeeping is a criticism faced by most human rights commissions across the country, but the Ontario commission has the unenviable status of receiving the most inquiries and complaints.[88] It typically recommends less than 5 percent annually to a tribunal.[89] The observation that the OHRC practises vigorous gatekeeping should not be surprising, but this criticism is often based on the perception that

the Commission dismisses meritorious complaints because of scarce resources.[90] Any consideration of its gatekeeping function with regard to the merits of individual cases is difficult to assess without also committing to a position on whether every case should be heard and adjudicated and in what fashion.[91]

The reform literature bases its arguments for direct access to a tribunal on the elevation of human rights to quasi-constitutional status. The *La Forest Report* observes:

> Claims for direct access to the Tribunal or the courts seem to be based on the idea that the courts have ruled that each case is a breach of a quasi-constitutional right and therefore is deserving of adjudication as a matter of public justice. At the same time, claimants seek a remedy in their own particular cases as a matter of private justice. Consequently, advocates of a direct access approach see a screening function aimed at prioritizing complaints for their public utility as infringing on the public justice value of each and every complaint and at the same time preventing individuals from attaining private justice, which in most cases is extremely valuable to complainants.[92]

The authors of a research paper on the Canadian Human Rights Commission's screening function commissioned by the *Canadian Human Rights Act* Review panel argue that "the screening function and the systemic denial of a right to a hearing severs the substance of human rights claims from the determination of their outcomes."[93] This perhaps overstates the case. The duty to act fairly, in Ontario and federally, encompasses various procedural safeguards. The Ontario *Human Rights Code* dictates that reasons be given for decisions to "not deal with" a complaint and to "not refer" a complaint to a Board of Inquiry.[94] An opportunity to request reconsideration is provided for in the statute. Obviously, some screening process must be applied to the flood of putative complaints. Nor do all complaint-based scenarios lend themselves to a single resolution formula. Clearly, direct access to an oral hearing is not the approach to balancing public and private interests envisioned in the current or historic structure of human rights enforcement, as detailed earlier in this chapter. Whether it represents a future trend remains to be seen.[95]

Another significant area of criticism, both in the *Cornish Report* and elsewhere, is that parties are pressured to settle cases that might more appropriately be heard and decided by a tribunal. The word "settlement" – that is, a process of (typically but not exclusively) monetary negotiation, settlement, and payment – is a familiar term of art to legal

professionals, and human rights "settlements" raise issues similar to those in other areas of practice, issues such as pressure, quantum, and satisfactory substantive resolution. Our evaluation of the quality of settlements is further complicated by a consideration of the public interest, which will be addressed more extensively in Chapter 4. As R.A. Macdonald observes, however: "Any given interpersonal conflict is at the same time a reflection of a social conflict."[96] For this reason, some influential writers in the field prefer the term "dispute processing" to "dispute resolution" or "settlement." W. Felstiner writes, for example:

> My aversion to "dispute settlement" is based on the conviction that a significant amount of dispute processing is not intended to settle disputes, that a greater amount does not do so and that it is often difficult to know whether a dispute which has been processed has been settled, or even what the dispute was about in the first place.[97]

While much, much more has been written on the nature and problems of disputing, it is sufficient here to observe that these problems are not unique to the human rights field. Satisfactory outcomes of settlement are problematic even in more commonplace disputes; the criticism here, however, is that human rights complainants and respondents are pressured into settlements. In 1994, the Centre for Equality Rights in Accommodation (CERA) submitted to the Standing Legislative Committee of Ontario on Government Agencies that human rights complaints of a complex nature were discouraged and that complainants were often encouraged to accept minimal settlements even though the settlement would not adequately cover the harm suffered. The CERA submission stated, for example, that there is an assumption by human rights commission investigators that only a "perfect tenant" could have a sustainable complaint against a landlord.[98]

Similarly, the Advocacy Resource Centre for the Handicapped (ARCH)[99] observed an increase in the number of individuals discouraged from filing a formal complaint with the Commission, pressure on complainants to accept unconscionably low settlements, and encouragement to accept "nuisance settlements" offered by employers who are simply seeking the cheapest, most expeditious route to terminating the complaint without acknowledging fault or responsibility.[100] The Commission has been censured before about exerting undue pressure on parties to settle by declining to set a Board of Inquiry in a particular case.[101]

These findings raise troubling questions about complainants' experiences of the quality of complaint resolution, but the issue is complicated

by whether or not legal representatives participate in the negotiation, by the fact that the monetary amount of remedial damages is limited by the statute, and by the huge modern shift towards incorporation of alternate dispute resolution (ADR) processes into most areas of legal disputes. The role of intermediaries in complicating the investigation process ought not to be overlooked. As Lovett and Westmacott reported from British Columbia, although the process generally contemplates a limited number of submissions, consisting of the complaint, the respondent's response, and a reply from the complainant, parties manipulate the system by filing multiple submissions in a process that one senior legal counsel referred to as "submission volleyball." This practice leads to protracted investigation and increases legal and administrative costs for processing complaints.[102] Eliminating the carriage function of an administrative body such as a commission is likely to displace rather than eliminate this practice. It has been recently observed in British Columbia that as the number of cases appearing before the Human Rights Tribunal has increased, the caseload is coincidentally overweighted with procedural rather than substantive matters.[103]

Perhaps the most damning criticism is that the commissions, premised on citizen access, present an inaccessible complaint-handling process. The Cornish task force found that the Ontario Human Rights Commission is a complex and often closed system:

> The Task Force found that people were confused and frustrated because they had great difficulty getting clear information about the status of their claim or the Commission's policies and procedures on a given point. With the current highly centralized Commission system, it often takes months or years, with a claim passing through numerous hands, before a final decision is given rejecting a claim as lacking merit. The claimant never gets to see the decision makers face to face or to hear directly their reasons for rejecting the claim.[104]

The *Cornish Report* further observed that parties were not sufficiently informed or kept abreast of the investigation of their complaint, and that they were shut out of the investigation and decision-making processes.

The cumulative impression conveyed by the *Cornish Report,* the 1994 *Black Report,* the *La Forest Report,* and others[105] is that of cumbersome and opaque bureaucracies with considerable, often definitive influence on complainants. The reports point to the processing of human rights complaints as a significant dimension of clients' and practitioners'

experiences, and to current local practices as producing a formative experience virtually independent of the harm of human rights violations themselves. These claims will be explored more deeply in Chapter 4. The critiques all argue for radical reforms to human rights enforcement and almost consistently recommend the elimination of the individual complaint-handling functions of the commissions and their replacement with direct access to an adjudicative tribunal. Most advocate state funding of legal representation for complainants, either through a tariff model, specialized legal clinics, or a combination model.[106] While this book does not come to any conclusion on the issue of independent legal representation for complainants, it is worth noting that none of these briefs suggest simplifying the complaint process to ensure that complainants can represent themselves.[107] The recommendations therefore all propose an enhanced role for lawyers, and propose a shortcut to an adversarial forum.

Overall, the expressed concerns were reduced to a single issue, namely, the role of the commission in handling complaints. General dissatisfaction with the commission is the central theme of most of these reform briefs, and this has several implications for the public administration of rights enforcement. Criticism of the operation of the commission and pressure for reform and reinvention constitute a significant part of the complex social, political, and policy environment in which complaints are processed and in which staff and independent human rights advocates do their day-to-day work. Dissatisfaction with and disempowerment through a monopolistic complaint-processing framework are linked to mistrust of the administrative institution, abandonment of complaints, appeals of decisions, and general challenges to the legitimacy of the institution.

While these reviews form a significant background for any consideration of human rights enforcement, it is useful to consider what is missing from them. Arguments *against* the public administration of human rights support arguments *in favour of* privatization; the privatization of rights enforcement, combined with juridical rather than administrative standards of procedural fairness, coincidentally enhances the role of intermediary legal representatives. The displacement of specialized staff to the benefit of human rights lawyers and advocates is rarely considered or evaluated in this reform literature. Also missing are considerations of other potential consequences associated with the radical transformation of rights enforcement, including the further judicialization of rights, further burdens on the court system, the severance of

rights enforcement from the public interest, and the often superior legal resources of respondents, which can be used to delay proceedings or to render remedies ineffective.

A different view of the public administration of rights enforcement, from the perspective of administrative law jurisprudence, is explored in the next section. If we accept the original premise of positive value in an administrative rationale for discretionary and policy-based decision making and processing of cases at a sub-juridical level, the case law tempers the strident criticism of reformists with a framework for decision making based on current jurisprudential standards of fairness.

The Structuring and Accountability of Administrative Decision Making

While reform-based critiques might paint a troubling assessment of the administrative process, bodies such as human rights commissions are established, in large part, in order to "render justice" with fewer formalities and with less associated infrastructure and expense than a court-based system would require. Administrative law views bureaucratic decision making from a perspective whose central question is: "What are the standards to which we hold administrative decision making that affects the rights, interests, or benefits of individuals?" The predominant standard is that of fairness. Like the principles of fundamental justice, the body of jurisprudence that has developed around statutory decision making invokes the concept of fairness entrenched in the principles governing our legal system. It has been held that "there is a general right to procedural fairness, autonomous of the operation of any statute."[108] From an administrative law perspective, the obligation to "accord procedural decencies"[109] has considerable force, with the sense that "hearing all the evidence and listening to all of the various perspectives on a question will produce better and fairer outcomes." In the absence of explicit legislative exclusion, procedural fairness is "a transcendent norm that applies to a broad range of governmental decision-making."[110] Courts must respect the choice of procedures made by the agency, but in *Baker v. Canada (Minister of Citizenship and Immigration)*,[111] the Supreme Court of Canada articulated the content of the duty of fairness required of administrative decision makers:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting

> their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

Actions of a statutory body such as a human rights commission may be reviewed by a judge for error, but only on an application for judicial review or a motion to quash the appointment of a board of inquiry. The object of administrative independence is to achieve a balance between predictability, fairness to the parties, and efficiency.[112] A consideration of case processing from the administrative law jurisprudence thus provides a very different perspective from that found in the reform advocacy literature reviewed in the previous section.

There is a considerable body of human rights tribunal decisions to the effect that, in the absence of allegations of abuse of process, bias, bad faith, or delay, a human rights board has no business reviewing the way that a human rights commission has conducted itself in investigating complaints. The commission must satisfy itself as to its jurisdiction. In addition, while a board of inquiry may be required to assess the impact of the commission's handling of the case on the fairness of the proceeding, it has no supervisory jurisdiction over the commission.[113] For a board to scrutinize the conduct of the commission on the basis of fairness, a party must demonstrate that the commission's handling of the case was so prejudicial that it affected the fairness of the hearing itself. The question is not whether the investigation itself was fair but whether its demonstrated unfairness will affect the fairness of the hearing.[114] Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.[115]

The old prerogative writ of *mandamus* was originally used by the King's Court to order a court or administrative body to do its duty, but could potentially be used on occasions where the law had no specific remedy but where there ought to be one, where defects were recognized in processes of administering justice, and in particular where procedural delay without adequate explanation prejudices the rights of individuals. This type of administrative recalcitrance amounts to an abuse of process independent of whether a fair hearing can follow.[116] A board of inquiry has the power to stay or dismiss a proceeding because of abuse of process by any party, including the commission that has carriage of the complaint. Abuse of process may be found in improper conduct, either in litigation or at the investigation stage of a proceeding.[117] Abuse of process may also

be constituted by delay, but it has to be such inordinate delay that it causes actual substantial prejudice that brings the human rights system into disrepute.[118]

The commission itself may also be subject to claims alleging bad faith based on the manner in which it conducted an investigation. To establish bad faith, however, there must be evidence of ulterior or sinister motive. It goes far beyond an allegation of neglect or dereliction of duty to imply a dishonest or improper purpose.[119]

As this discussion demonstrates, non-statutory administrative processes by and large fall below the radar of administrative law decisions. The doctrine of procedural fairness arises from the inherent supervisory jurisdiction of the courts, whereas abuse-of-process jurisprudence flows from applications of the old equity writs applying for intervention in the decision-making processes of tribunals. Neither of these points clearly to court of tribunal jurisdiction over administrative processes. Reviewability is generally restricted to a consideration of whether the rules were followed. Thus, administrative law advances the view that a commission is its own master with regard to policy making and implementation in practice. In this respect, administrative law is bound to provide a limited and distorted view because, although acknowledging their existence, it has little occasion to comment on the political and social constraints within which the agency conducts itself.

The relative paucity of such discussions points to the dominant assumption reflected in case law that, in the absence of mishandling by a commission, or abuse of process by a party, complaint processing lies entirely within the discretion of the commission itself. We are left with a sense that intake, investigation, and settlement initiatives taken within the administrative regime might be conducted in an "in-the-trenches" fashion. There is little indication in the case law that mechanisms such as guidelines, directives, and memoranda exist to structure and implement the statutory mandate and modify practices in accordance with judicial rulings. In the very few cases that a commission sends to a board of inquiry, the absence of discussion leaves the impression that there is an administrative void in the period between complaint and recommendation of the board. The social and operational contexts in which complaints are constructed and investigations conducted are absent from the narratives comprising the case law.

With an average of only 4 percent of cases annually being recommended to a board of inquiry, it is readily arguable that these cases represent a distorted sample. They probably reflect those most resistant to settlement between the parties, cases hinging on the credibility of

key witnesses, those viewed by the commission as being relatively important to the public interest, and/or those that are most complex. It is doubtful that they are a representative selection of routine cases. Long before the very few are recommended to a board of inquiry for disposition, the roles of commission staff and independently retained lawyers in shaping complaints in conformity with the Human Rights Code, exercising discretion about complaint viability, and mediating complainants' experiences with the administrative complex are crucial but virtually invisible. The following chapters aim to make the roles of these state agents and intermediaries explicit.

Conclusion

The history of anti-discrimination legislation and enforcement in Ontario illustrates the importance of the public administration of human rights. The government showed itself to be receptive to undertaking a leadership role in developing rights protections when the judiciary would not. In addition, the public administration of human rights blends, but not without difficulty, the principles of public access, expertise, conciliation, fairness, and the upholding of the public interest. While the case law indicates that public administration has not impeded the development of a jurisprudence of procedural fairness in human rights practice, it is largely silent about regular administrative practices. Other than the occasional censure, there is little indication of a dialogue among the judiciary, human rights boards of inquiry, and senior officials as to the methods of implementing their statutory authority.

Recent studies have examined possibilities for radical reform of the existing commission/tribunal structure, including elimination of the screening and investigative functions of the commission. Community councils have been suggested, along with alternative structural roles for equality advocacy groups. The idea of individuals initiating complaints independently of the commission is often touted as a solution to gatekeeping, administrative delays, incompetent investigations, and general paternalism. Observers have looked at the establishment of a permanent tribunal as a vehicle for improved service delivery, finding this option either hopeful[120] or ineffective[121] in meeting the goal of redressing individual complaints. The impacts of funding restraints and the rise of a business-oriented discourse[122] of governance have been evaluated, with observers finding no correlation between funding and reputation or between funding and efficiency, as measured by reduction in case closure times. While the need to combat systemic discrimination is uniformly recognized, there is little discussion of how commissions

might manage the substantial investments in time and money associated with the investigation, research, and redress necessary to pursue such cases.

There are thus revealed palpable tensions in human rights enforcement between the ideal and the real, as evidenced by the rise of rights consciousness on the one hand and state program delivery on the other, and between formalism and informalism, as illustrated by the rise in procedural justice guarantees on the one hand and the emphasis on conciliatory approaches on the other. There are conflicts between civil servants' values and lawyers' values.[123] While administrators must balance fairness, efficiency, transparency, and the public interest, and are granted the discretion to define their own policy frameworks to achieve this balancing act, lawyers are concerned with the aggressive pursuit of their clients' interests, and so favour reviewable decision making and the minimization of discretion. There is also a trend towards the legalization and judicialization of rights enforcement, manifested in interpretive convergence between human rights statutes and *Charter* norms. Some of these difficulties are examined in the recent reviews and elsewhere, but many of these critiques call for the elimination of the role of the commissions in gatekeeping, investigating, and carriage of individual complaints. It is not self-evident how substituting a cadre of independent legal specialists for a comprehensive agency model will improve on the existing approach, however beleaguered, nor is it evident that governments are receptive to the idea of sponsoring legal representation for complainants. The sole model of the latter is found in BC, where an independently contracted human rights clinic provides information, education, and intake but cannot initiate complaints or resolve disputes on its own. At this time, the clinic represents no more than about half of human rights complainants in the province.[124] The longer-term effects of uncoupling state development of human rights policies with case management remain unknowable.

How do these tensions play out in the routine processing of cases? How are different ideas about human rights implemented in daily practice? What is missing from this timely debate is an understanding of how human rights claims are constituted by administrative and professional policies and practices**.** An exploration of the roles of different intermediary agents, both inside and outside the commission, will fill an important gap in our knowledge of the routine processing of complaints.