The Public Interest in Addressing Systemic Discrimination in British Columbia:

A Comparison of Human Rights Enforcement Models

by

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ABSTRACT

Systemic discrimination has been a central topic in human rights in Canada ever since the Royal Commission, chaired by Judge Rosalie Abella (as she was then), brought it to the forefront of the human rights agenda over two decades ago. Since that time human rights commissions have struggled with the dilemma of how to effectively address systemic discrimination. Most recently, the issue of systemic discrimination played a significant role in British Columbia, in the introduction of the first direct access enforcement process in Canada.

This thesis is intended to stimulate discussion about the public interest in effectively addressing systemic discrimination, particularly in British Columbia. It assesses the merits of two models of enforcement. The first is the Commission Model, in which a human rights commission administers and enforces the claims process, and promotes human rights through public education and preventive initiatives. The second is the Direct Access Model, in which an adjudicative body is solely responsible for the administration and adjudication of all stages of human rights claims. Additionally, an analysis/critique is provided of areas that, while not directly attributable to differences between the two Models, are nevertheless critical for effectively addressing systemic discrimination. The analytical methods relied on include interviews with professionals whose work involves human rights, and an extensive literature and case review.

The conclusion of this thesis is that neither Model by itself sufficiently addresses systemic discrimination. While the commission process appears to offer strengths absent in direct access, specifically in public interest related provisions, the implementation of these provisions results in theoretical rather than actual strengths. The major strength in the direct access model is the autonomy provided to parties over the course of their claims. However, the absence of provisions for addressing the public interest in systemic claims, reinforces the privatized nature of the direct access process, and severely impedes its effectiveness. It is only through the synergy of the two Models, augmented and supplemented by proactive non-enforcement initiatives that systemic discrimination can be effectively addressed. Recommendations are made for addressing identified gaps, aimed at the enforcement process in British Columbia.
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"It is in the Shelter of Each Other that the People Live."

Irish Proverb

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Finally, this thesis is dedicated to the memory of my grandparents, especially my grandmother Lillian Pearl Partridge, whose influence in my life and unconditional love and support gave me both roots and wings.
The Public Interest in Addressing Systemic Discrimination in British Columbia: A Comparison of Human Rights Enforcement Models

INTRODUCTION

The traditional human rights commission model, which valiantly signaled to the community that redress was available for individuals subjected to deliberate acts of discrimination, is increasingly under attack for its statutory inadequacy to respond to the magnitude of the problem. Resolving discrimination caused by malevolent intent on a case by case-by-case basis puts human rights commissions in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest.¹

The above frequently cited quote on the failure of human rights law to adequately address systemic discrimination originates from a 1984 Royal Commission report on employment equity commonly known as the "Abella Report" after Chair Judge Rosalie Silberman Abella (as she was then).² The Abella Report is widely viewed as raising awareness of systemic discrimination in Canada and as having identified the need for the implementation of broad proactive measures in addressing such discrimination.³

Systemic discrimination and the dilemma of how to effectively address it, has been a major issue on the human rights enforcement agenda off and on for the

² Abella Report, Ibid.
³ See for example, Ian B. McKenna, "Legal Rights For Persons With Disabilities in Canada: Can the Impasse Be Resolved?" (1997) 29 Ottawa L. Rev. 153 at 15; also, Brian Etherington, “Promises, Promises: Notes on Diversity and Access to Justice” (2000), 26 Queen’s L.J. 43 at 4, footnote 11 [Promises, Promises].
last two decades since the Abella Report. Systemic discrimination has long been considered the 'problem child' of provincial and federal human rights commissions across the country with commissions alternately criticized for focusing too much attention on systemic discrimination at the expense of individual discrimination claims\(^4\) or more frequently for failing to give it sufficient attention.\(^5\) As a result, commissions have attempted to address the issue of systemic discrimination for some time now by adopting a systemic discrimination focus and by implementing related systemic related initiatives, which are frequently abandoned or de-emphasized in times of political change and fiscal restraint.\(^6\)

The difficulties experienced by commissions in adopting a systemic approach are well documented, notably in the form of various reports commissioned by government which have resulted in a multitude of systemic related recommendations. As an example, in 1992, the Ontario human rights system


\(^5\) See for example, R. Brian Howe and David Johnson, Restraining Equality: Human Rights Commissions in Canada (Toronto: University of Toronto Press, 2000) at 124-125 [Restraining Equality].

\(^6\) R. Brian Howe and David Johnson, Restraining Equality, ibid., at 124-126; see also Kathleen Ruff, “Role of Human Rights Commissions” (1986) 4:2 Just Cause 10 at 11 regarding the impact of economic recession on commission approaches to systemic discrimination.
came under sharp criticism from a Provincial Task Force, which had been struck to address serious public concerns that had come to the government’s attention, indicating a general loss of confidence in the human rights process.  

One of the reoccurring criticisms heard by the Task Force was that the Ontario Human Rights Commission’s focus on individual claims was perceived by stakeholders, particularly community groups, as undermining the Commission’s ability to respond to systemic discrimination claims. The resulting report of the Task Force, commonly referred to as the “Cornish Report”, after the Chair Mary Cornish, recommended a major shift in focus in the enforcement system from individual claims, towards the development of specific initiatives aimed at addressing systemic discrimination. The Cornish Report led to changes in the human rights process in Ontario, including in the implementation of systemic initiatives, many of which were later abandoned with a change of government and resulting change in policy directions.

The most recent attempt to reform the federal human rights system in order to address systemic discrimination occurred in 2000, when a panel of well known human rights experts, chaired by the Honourable Justice La Forest recommended that the federal human rights enforcement regime be revamped,

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9 See also Howe and Johnson, Restraining Equality, supra n. 5, at 127 for a discussion of the de-emphasis of systemic approaches to addressing discrimination in Ontario in the mid 1990’s, as a result of the Progressive Conservative defeat of the NDP government.
both substantially and procedurally, in order to proactively address systemic discrimination.\textsuperscript{10}

In the course of reviewing the development of the concept of systemic discrimination over the past two decades the Panel observed that despite the potential of such cases to change patterns of inequality there was a general lack of success within the Canadian human rights enforcement process in achieving that goal.\textsuperscript{11} The Panel’s recommendations called for substantial change to the federal human rights enforcement system in order to free Commission resources to proactively address systemic discrimination.\textsuperscript{12}

Despite numerous calls for a response, the Federal Government has declined to respond to the La Forest Report and consequently none of the Panel’s recommendations have been implemented to date.\textsuperscript{13} It appears however, that the recommendations of the Panel have provided the impetus for substantial, ongoing changes in the Canadian Human Rights Commission’s approach to


\textsuperscript{11} See La Forest Report ibid., at 16.


\textsuperscript{13} See for example, Canada, Parliament, Senate, Standing Senate Committee on Human Rights, Promises to Keep: Implementing Canada’s Human Rights Obligations Report of Standing Senate Committee on Human Rights (Ottawa: Senate of Canada, December 2001) at 28; Canada [Promises], Canadian Human Rights Tribunal, Annual Report 2004, (Ottawa: Canadian Human Rights Tribunal, Minister of Public Works and Government Services Canada, 2004) in which the Tribunal states: “The Tribunal continues to await the response of the Department of Justice” at 2.
enforcement, in particular in relation to systemic discrimination.\textsuperscript{14}

In British Columbia as elsewhere in Canada, the issue of systemic discrimination within human rights enforcement has long been the subject of intense focus and debate. In 1984, systemic discrimination was "de-emphasized" with the introduction of new human rights legislation which restructured the entire human rights enforcement process, including the elimination of the human rights commission in place at the time.\textsuperscript{15} Systemic discrimination was re-emphasized in 1992 with the introduction of statutory amendments providing the Human Rights Council, the dual enforcement and adjudicative body in place at the time, with remedial powers to address systemic discrimination.\textsuperscript{16}

In 1994 a system wide review of human rights enforcement in British Columbia was implemented by Professor Bill Black acting under a special advisory appointment from the provincial government. The review resulted in the "Black Report", which recommended extensive system wide reform to the human rights enforcement process.\textsuperscript{17} As a result of the Black Report systemic discrimination

\textsuperscript{17} Black, \textit{Black Report}, ibid.
once again became a central issue on the British Columbia human rights agenda.\textsuperscript{18}

The Black Report was the impetus for major statutory and administrative reforms implemented by the government in 1997. These reforms resulted in the complete reconfiguration of the enforcement system including the creation of the British Columbia Human Rights Commission, which was given a major role in addressing the public interest in systemic discrimination.\textsuperscript{19}

In 2001 the human rights enforcement system including the British Columbia Human Rights Commission, which had been under criticism for some time, became the subject of a government initiated “core review” resulting in the “Human Rights Review Report”.\textsuperscript{20} One of the central issues discussed in the Human Rights Review Report was the Commission’s involvement in representing the public interest, in particular, in addressing systemic discrimination.\textsuperscript{21} In 2002 the Human Rights Review Report was a key document relied on by the Liberal government to justify major reforms to the human rights enforcement process in British Columbia, including replacing commission based enforcement with direct access enforcement.\textsuperscript{22}

The issue of systemic discrimination was at the forefront of the controversy

\textsuperscript{18} Lovett and Westmacott, Human Rights Review, supra n. 15 at 14.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid., at 60-64, 73, 134, and 140-141.
leading up to the introduction of direct access enforcement. For example, the issue was raised many times during the course of the extensive legislative debate on the amended human rights legislation. In a lengthy speech before the British Columbia legislature in the context of the debate on second reading of Bill 64 the Attorney General spent considerable time discussing systemic discrimination. For example, he stated:

I want to speak for a moment about systemic discrimination. The ability to address systemic discrimination has also been strengthened in the new model. Systemic complaints are those which raise issues about prohibited discrimination that is built into a system. Like all discrimination, it is experienced by individuals, but by definition, systemic discrimination affects a class or group of individuals. Sometimes it does so even though the system does not intend to discriminate on that basis. But if it has that effect, it may nonetheless be found to be systemic discrimination.

In the course of the debate on Bill 64, the opposition raised strong concerns about how the new enforcement system would address systemic discrimination.

For instance New Democrat J. Kwan stated:

...The government also says that the bill will create a more accessible system. It won't do that either. Human rights complaints will [not] be investigated and the new system will impose a six-month limit for filing a complaint. The current rule states that the complaints must be filed within a year. Complaints filed by individuals but which have an impact on other individuals in similar situations – in other words, complaints of systemic discrimination – would be nearly impossible to deal with. “Under the current legislation, the commission has a mandate to speak out on important human rights issues, and it is entitled to become a party to human rights complaints that may have brought societal consequences. The commission can seek remedies to systematic [systemic] discrimination and isn’t confined to dealing with case-by-case complaints as is being proposed under Bill 64. Citizens will be expected to rely solely on their own resources to pursue complaints, and cases will be resolved solely on the basis of the personal agendas of the parties involved. These

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23 Bill-64, Human Rights Code Amendment Act, 2002, c. 62 [Bill 64].
24 Hansard, October 23, 2002, Afternoon, supra n. 22 at 3988.
25 Ibid., at para. 1525.
are some of the issues that one must pay attention to as we debate Bill 64.26

In summary it would appear that the issue of how to effectively address systemic discrimination has been on the human rights agenda in Canada in one form or other for over twenty years, and continues to be at the forefront of developments in human rights.

The issue of systemic discrimination has brought human rights commissions across the country under scrutiny and subjected them to ongoing attempts at reform, in an effort to address perceived deficiencies in addressing this type of discrimination. Along with being a persistent theme over time, commission support for, and ability to address systemic discrimination has also appeared to be cyclical, impacted by factors such as political change and by related fiscal restraint. In British Columbia, systemic discrimination appears to have transcended enforcement models to remain a central issue pre-occupying various sides of the political agenda from the onset of new direct access enforcement model.

Nature/Purpose/Scope of the Thesis

My interest in the issue of systemic discrimination began shortly after beginning work as an advocate in the fall of 2002 in the then newly created British

26 Ibid., at 3991-3992.
Columbia Human Rights Clinic, whose primary mandate was to provide legal representation to claimants. The issue of systemic discrimination and more particularly, what I came to view as public interest implications in addressing such discrimination came to my attention as a result of my work in the Human Rights Clinic assisting claimants in settlement of their human rights claims.  

As a relative newcomer to human rights, I was not invested in any particular enforcement system and therefore was in a good position to assess the effects of the new enforcement model. During the time that I worked in the Human Rights Clinic, I observed the often very positive and powerful impact that the opportunity to settle had on most claimants, some of whom had claims in progress for several years under the old enforcement system. In my experience, the settlement process, which is discussed in-depth in Chapter III, can be transformative for both claimants and respondents due to the fact that at its best, it provides parties with the opportunity to present their perspective on the discrimination, as well as to hear the perspective of the other party, in a relatively safe environment. Despite the deep satisfaction that I experienced in my work, and general sense of a new enforcement process evolving in a positive direction, I began to have questions about the ability of the direct access process to effectively address systemic claims. Specifically, my initial concerns arose from

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27 Throughout this thesis I use the terms "claims" and "claimants", as opposed to complaints and complainants, except where directly quoting statutory and other sources. I have adopted this approach from the La Forest Report supra n. 10 at 54, for similar reasons as those cited by the Panel. See also, the Nunavut Human Rights Act, Nu. 2003, c. 12 Part 4, which refers to claims as "notifications". Additionally, in my view the terms complaint and complainant have very subjective, informal, and somewhat negative connotations, that do not adequately reflect the formal legal entitlements inherent in human rights.
questions about the “public” aspect of human rights claims in relation to the settlement process. Underlying my questions/concerns was the fact that in almost every case, claimants expressed as one their main purposes in filing human rights claims, (which for most was clearly an emotional ordeal) prevention of the same thing happening to other people. This goal often remained central for claimants throughout the settlement/negotiation stage, yet, frequently was difficult to sustain. While this issue will discussed further in Chapter III, it suffices to say at this point that in my experience, for various reasons, systemic issues are often eclipsed by “private” interests, which result in non-systemic remedies such as monetary compensation and intangibles such as expressions of apology. Where systemic issues do form part of settlement agreements there are many potential pitfalls in the implementation and enforcement of resulting remedies.

Conversations with others working in the human rights field, and further research and reflection on the subject led me to articulate my questions/concerns as being the “public interest” in systemic claims.\(^\text{28}\) I eventually came to view the public interest in human rights claims in general, as representing one of the central purposes in human rights law as articulated in human rights legislation and case law. Further, the public interest is inherent in all aspects of human rights due to the fact that the effect of discrimination, and concomitantly, the responsibility for addressing discrimination extends beyond the individual to society as a whole. In

\(^{28}\) My thanks to various people working in human rights who took the time to meet with me to discuss my thesis topic, or similarly, who engaged in informal discussions about the topic, and helped me to articulate my thoughts on the subject. In particular, I am grateful to Vicki Trerise for her insight into the issue of settlement and the public interest.
my view the public interest is even more pronounced in systemic claims due to the potential for systemic discrimination to undermine the obligation of a democratic society in achieving substantive equality for all its citizens. At the same time, addressing systemic discrimination represents the greatest potential for meeting public interest obligations through the identification and elimination of entrenched patterns of discrimination for excluded groups. The operational definition of the public interest and systemic discrimination relied on in this thesis, including the specific characteristics and the rationale for the definition, and related issues, are presented in Chapters II and reiterated in Chapter III.

In the early stages of this thesis, I began to realize what a truly large project I had taken on; not only in terms of the broad and amorphous nature of the topic, but also in light of the enormity of the task of comparing two human rights enforcement systems. This realization prompted me to take a "bird's eye", as opposed to the "worm's eye view" of the topic, coinciding with one of my main goals in writing this thesis, which is to stimulate further discussion on systemic discrimination and its treatment under enforcement models.

The overall purpose of this thesis is to compare two enforcement models, namely, commission based enforcement with direct access enforcement, in order

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29 For comments on the purposes of human rights legislation, the goals of the enforcement process, and the nexus between addressing systemic discrimination, and the public interest, see for example, William Black, “Grading Human Rights in the Schoolyard: Jubran v. Board of Trustees” (2003) 36 U.B.C.L. Rev. 45 at para. 8 [Jubran]; see also the La Forest Report, supra n. 10, at 46 and generally.

30 This expression is borrowed with gratitude and fond memories of the entertaining classroom repertoire, and excellent teaching of the late Professor Terry Wuester, Faculty of Law, University of Victoria, British Columbia.
to assess the strengths, weaknesses, and gaps, in the processes, procedures, and mechanisms \(^{31}\) under both models in effectively addressing the public interest in systemic discrimination, and further, to delineate recommendations for addressing gaps under the direct enforcement regime in British Columbia. While the specific methodologies utilized in this thesis are described in detail in Chapter I, the scope of the thesis involves a specific focus on human rights enforcement in British Columbia. Other jurisdictions in Canada are also considered, particularly in the development of operational definitions in Chapter II, in the comparative analysis in Chapter III, as well as in the analysis of various systemic provisions in Chapter IV. An additional focus is on the interests of claimants in addressing systemic discrimination, although throughout the thesis, the perspectives of respondents are also considered.

**Organization of the Thesis**

This thesis is organized into five chapters. Chapter I, provides the theoretical framework for analysis beginning with an overview of the conceptual and methodological approaches utilized, and a discussion of the central theoretical constructs which form a framework for the thesis, including the parallel between the development of the concepts of equality and discrimination. Additionally, \(^{31}\) The distinction between the terms "processes", "procedures", and "mechanisms" is somewhat ambiguous and overlapping at times. For the purposes of this thesis, processes operate on a 'macro' level and include broad policies and modes of operation, such as the enforcement process, the claims process, and the mediation process. In contrast, both procedures and mechanisms operate on a more 'micro' concrete day to day level, with procedures primarily being statutory or rules based and which govern for example various aspects of the claims process such as filing or adjudication of claims. Mechanisms on the other hand, are typically the mechanical action oriented aspects of statutory and other provisions, for example, governing the specifics of filing a claim, and the triggering of dismissal provisions.
patterns of inequality and the effects of systemic discrimination are discussed as part of the conceptual framework. Finally, the definition of systemic discrimination is considered along with the public interest in addressing systemic discrimination, leading to the development of an operational definition of systemic discrimination.

Chapter II provides an overview of human rights enforcement structures including the general purposes underlying human rights enforcement. Additionally, it presents a broad overview of traditional commission based enforcement in select Canadian jurisdictions for the purposes of delineating an operational definition of the commission based enforcement model used in the analysis/critique in Chapters III and IV. Similarly, an overview of the relatively new direct access enforcement process is presented in order to identify commonalities that form the basis for an operational definition of that model. Finally, the chapter sets out criteria for effectively addressing systemic discrimination, which are also applied in the comparative analysis.

Chapters III and IV represent the heart of the thesis, with the confluence of the conceptual framework developed in Chapters I and II with the analysis and critique. While Chapter III provides an analysis/critique of the two enforcement models, Chapter IV examines provisions that although not attributable to inherent differences between the two enforcement processes, nevertheless, have important implications for effectively addressing systemic discrimination. Both
chapters conclude with the delineation of recommendations for addressing perceived gaps in effectively addressing systemic discrimination in British Columbia.

Chapter V, the final chapter in the thesis briefly looks at the areas of education and prevention, prior to examining two potential paradigms for addressing public interest gaps under the direct access enforcement process, identified throughout the thesis. The thesis concludes with identification of areas for further study and an overall summary of the recommendations set out in the various chapters.
CHAPTER I A FRAMEWORK FOR ANALYSIS OF SYSTEMIC DISCRIMINATION

The overall purpose of this chapter is the development of a framework for the analysis of the effective treatment of systemic discrimination under human rights enforcement. The conceptual and methodological approaches utilized in this thesis are described below, followed by a discussion of underlying theoretical constructs.

1.1 Overview of Conceptual and Methodological Approaches

The methodological and conceptual approaches taken in this thesis reflects its exploratory nature. I utilize an approach to equality and discrimination that draws significantly on the feminist approach and methods of feminist scholarship. The term "feminist" typically encompasses a broad range of approaches including those of liberal, post-modern, and radical, each having its own distinctive orientation. For my purposes, the most important insight of feminism is in relation to substantive equality as opposed to formal equality that is, with an emphasis on ensuring the equality of outcome or effects, as opposed to only providing equal opportunity or similar treatment. While I adopt the well
recognized approach of “feminist substantive equality”,\textsuperscript{32} I reject the notion that a conceptual approach needs to be reduced to any one theoretical category.

Consequently the feminist substantive equality lens referred to in this research encompasses a broad approach combining elements of “critical”, “postmodern”, “liberal”, and “radical” feminism. For the sake of clarity, however, it is useful to point out the most predominant theoretical orientation utilized in this thesis, is that of “feminist critical theories”.\textsuperscript{33} While an in-depth discussion of feminist critical theories is beyond the scope of this thesis, the general characteristics of the approach will be briefly delineated below.

As suggested by Rhode, while feminist critical theories diverge in many respects, they share the following three major commitments:

1.) politically, the promotion of substantive equality between women and men;
2.) substantively, an analytical focus on gender with the aim of transforming legal practices that exclude, undermine, and devalue, women’s concerns; and,
3.) methodologically, in providing a description of the world inclusive of women’s experiences, and which identifies the necessary social transformations that will achieve full equality between women and men.\textsuperscript{34}


\textsuperscript{33} Deborah L. Rhode, “Feminist Critical Theories”, [1990] 42 Stan. L. Rev. 617, suggests that the term “feminist critical theories” refers to a body of loosely identified scholarship. I consequently use the terms “critical feminism”, or “feminist critical approach”. As discussed below, although I utilize a feminist approach, the focus is not solely on gender. Rather, other grounds of discrimination such as race are considered in the analysis [Feminist Critical Theories].

\textsuperscript{34} Rhode, Feminist Critical Theories \textit{ibid.}, at 621.
In summary, a critical feminist approach focuses on gender, acknowledges and integrates the political, and is focused on the transformation of social institutions and processes with the aim of achieving substantive equality. While I do not focus solely on women's (in)equality in this thesis, these commitments are central to the analysis/critique of the impact of systemic discrimination for excluded groups identified in this thesis, including women. Consequently, while this thesis draws on feminist analytical tools, it addresses systemic discrimination against disadvantaged groups in general.

Prior to a brief discussion about some central differences between a critical feminist approach and traditional social science and positivist legal approaches to research, it is necessary to point out two concerns commonly expressed in feminist literature regarding critical feminism, which prompted me to adopt a modified version of a critical feminist approach in my analysis.

It has been suggested that the grounding of critical feminism in postmodernism which among other things, presupposes a social construction of knowledge, leads not only to the rejection of universal foundations to truth, social, historical, and linguistic knowledge and experiences, but limits its usefulness in providing an explanation and understanding of women's common experiences particularly with respect to oppression.35

Also, rather than starting from a broad deductive approach, critical feminism

typically approaches analysis "from the ground up", moving from concrete experiences to theory.\textsuperscript{36}

A critical feminist approach broadly suggests that much of societal knowledge and resulting discourses and institutional practices, is attributable to social constructs which have the effect of homogenizing experiences through stereotypes, for example, in the construction of race. While I agree with the critical feminist critique of liberal discourses and institutions, particularly in the deconstruction of liberal constructs grounded in the notion of autonomous individualistic rationality,\textsuperscript{37} I cannot go so far as to discount entirely the notion of some degree of shared social experiences and histories. As a result, the approach taken in this thesis acknowledges a certain degree of universality of experience, for example, in the impact of discrimination based on shared identity within various excluded groups, while taking into account the influence of social constructs and discourse in interpreting and shaping such experiences.

Criticism has also been leveled at critical feminism for the general rejection of formal rights as an agent for social change.\textsuperscript{38} This view is seen as particularly problematic for non-dominant groups, most notably in addressing issues of

\textsuperscript{36} Rhodes, Feminist Critical Theories \textit{ibid.}, at 621.
\textsuperscript{37} \textit{Ibid.}, at 627.
race. The issue of the rule of law and rights, including their inherent limitations for producing social change is central to this thesis, I have taken what I view as a balanced approach to this analysis, one that acknowledges the importance of rights, but also takes into account collective interests and the limitations in legal institutions and the rule of law as an agents for achieving equality and social transformation for excluded groups.

The critical feminist approach taken in this thesis can be contrasted to the 'traditional' positivist social science approach and also the positivist legal approach to research, with a resulting impact on the research methods utilized. Broadly speaking, the first difference pertains to the role of the researcher, while the second difference can be summarized as pertaining to the research methodology.

Maguire, in the context of discussion about feminist participatory research, notes that the traditional social science research paradigm is grounded in a positivist approach, described as a form of social knowledge which is based on a dominant, patriarchal orientation towards knowledge. This approach embraces a positive (as opposed to critical) view and emphasizes phenomena that are observable and quantifiable.

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39 See in relation to criticism of Critical Legal Studies: generally Delgado, Critical Legal Studies and the Realities of Race ibid; and also generally, Delgado, The Ethereal Scholar, ibid.
41 Ibid., at 2 to 4 and 9.
Central to the positivist approach is the premise that the role of the researcher is that of a social scientist who is detached from the research subject. The 'objectivity' of the researcher is seen as being central to maintaining the necessary division between the researcher's 'personal' perspective and the research subjects/data. Similarly, legal positivism also espouses the notion of detached objectivity in relation to decision making, based on observable facts as opposed to values, resulting in 'neutral' and 'impartial' rules and laws.

Critical feminist research on the other hand questions the positivist assumption of objectivity and neutrality, viewing the concept of objectivity as an artificial construct that creates a false dichotomy between the personal values, beliefs and feelings of the researcher and the research. Further, rather than merely observing the status quo as a detached observer, the researcher is actively involved in questioning underlying assumptions with a view towards the equitable transformation of social structures. The perceived role of the researcher in both research paradigms strongly influences the approach to the subject of the research.

42 Marguire, Doing Participatory Research, ibid. at 7.
43 See for example, generally, Earl R. Babbie, Fundamentals of social research (Scarborough: Thomson/Nelson, 2002).
45 See generally, Marguire, Doing Participatory Research, supra n. 40.
46 Maguire, Doing Participatory Research, generally, ibid.; and also generally, Diana Ralph, "Researching from the Bottom Up: Lessons Participatory Research has for Feminists"(1988) 22 Canadian Review of Social Policy 36 [Researching from the Bottom Up].
As Maguire observes, the positivist social science paradigm is closely associated with the empirical-analytical inquiry which attempts to divide the world into observable, quantifiable variables. The resulting variables are translated into technical information, which produce social theories, which in turn are used to regulate and exert control over society. As a result of its claims to neutrality and objectivity, positivist research largely fails to take into account underlying political, economic, and social dynamics in systems. Finally, Maguire suggests that positivism has come to be associated with empirical inquiry and technical knowledge. A rejection of positivism is seen as a naïve rejection of this form of analysis. As a result, non-positivist research is often viewed as lacking scientific credibility.

Critical feminist research, on the other hand, as part of an alternate social science paradigm, takes into account different forms of inquiry and sources of knowledge and recognizes that a variety of types of knowledge/methods are required, depending on the social research issue at hand. Such an approach also critically examines social dynamics and power relations, connections, and

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47 Maguire, Doing Participatory Research, ibid., at 13-14.
48 Maguire, Doing Participatory Research, ibid. at 13-14, see also Diana Ralph, Researching from the Bottom Up, supra n. 46 at 38.
50 Maguire, Doing Participatory Research, ibid. at 15-16.
51 A feminist critique of power imbalance is discussed in Chapter III in relation to alternate dispute resolution processes. This area is one which has caused significant debate amongst feminists and others in terms of the implications for gender based power imbalances, as well as in relation to perceived shortcomings in addressing diversity and in providing adequate access to justice. See for example, Mary Jane Mossman, "Shoulder to Shoulder: Gender and Access to Justice: (1990) 10 Windsor Y.B. Access Just. 251; see also Annette Townley, "The Invisible-ism: Heterosexism and the Implications for Mediation" (1992) 9 Mediation Quarterly 397 [Invisible-ism].
complexities. The critical feminist inquiry does not claim to be neutral but rather, as discussed previously, is actively oriented towards transformation of social systems as a clear goal of the research.

Despite rejecting the premises underlying positivism such an approach does not necessarily reject empirical analytical inquiry methods. Rather, positivism recognizes the legitimacy in technical, interpretative and critical knowledge that can be gained from non-positivist oriented empirical analytical methods of inquiry.

As discussed above, a rejection of a positivist approach to research, including positivist legal analysis, does not necessarily result in a rejection of the associated types of knowledge and means of inquiry. Nor does it mean abandonment of a balanced perspective to the research. By balanced I mean careful and thorough consideration of a broad range of opposing information and perspectives prior to drawing conclusions. With this in mind, the discussion turns to a look at the specific methodologies utilized in this thesis.

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52 Rhode, Feminist Critical Theories, supra n. 33 at 16, and generally; see also Delgado, The Ethereal Scholar, supra, n. 38 at 302.
53 Marguire, Participatory Research, supra n.40 at 15, and generally.
54 Ibid., at at 14-15.
1.2 Methodologies

As a starting point, it is important to discuss the 'thesis of my thesis'. The central question at issue in my research was whether the public interest in systemic discrimination is adequately addressed within human rights enforcement, specifically in the traditional commission paradigm of enforcement compared with the direct access paradigm of enforcement. My hypothesis was that there are significant gaps in both models in addressing systemic discrimination. Further, one of the major weaknesses of the direct access model of enforcement is its emphasis on the individual, private nature of human rights claims, and a corresponding lack of provisions for addressing the public interest in systemic claims. While the commission model has some specific provisions for addressing the public interest there are significant problems with the practical application of these provisions. The strengths of the commission model can be utilized to enhance the direct access enforcement regime, resulting in a more effective process for addressing systemic discrimination. Further, enforcement based approaches are only one aspect of effectively addressing systemic discrimination; in order to be effective, enforcement processes need to be combined with interventionist non-enforcement initiatives such as education and other preventative processes.

The methods used in the research and analysis consisted of an extensive review of the literature and case law along with analysis of the views of human rights professionals gained from field research in the form of interviews. Additionally,
as discussed below, in keeping with the underlying critical feminist approach
described in the preceding section, I drew from my own observations working in
the area of human rights while keeping in mind ethical and professional
boundaries. The final part of the methodology involved a comparative analysis
and critique of the two enforcement systems utilizing criteria gained from the
literature review, applicable case law, and field interviews.

The first step involved conducting a comprehensive literature review,
supplemented by a review of the case law, in order to develop key research
concepts. As well as providing a framework for analysis, the specific outcome
was the development of operational definitions for key concepts such as
"systemic discrimination" and "public interest". Additionally, four assessment
criteria were developed indicating that systemic discrimination is being effectively
addressed. The criteria which are used in the Chapter III analysis and critique
are: 1.) accessibility; 2.) fairness, effectiveness and efficiency; 3.) adequacy of
resources; and, 4.) pro-activity.

The second step took the form of reviewing enabling legislation of human rights
commissions in Canada and related literature with a particular focus on five
jurisdictions. Specifically the review focused on the Federal commission model,
the Ontario commission model, and the commission model in place in British
Columbia from 1997 to 2002. The purpose was to identify commonalities leading
to the development of an operational definition of the commission model.
Similarly a review was conducted of the applicable enabling legislation and
relevant literature pertaining to British Columbia and Nunavut, the only two enforcement jurisdictions in Canada where a direct access approach to enforcement is currently in place, in order to identify common characteristics for the operational definition of the direct access model.

The third step involved conducting field research in the form of in-person and telephone interviews of human rights professionals. The specific methods utilized in the interviews are discussed below.

The fourth and final step involved the analysis and critique of the two designated enforcement models. This analysis/critique focuses on the effective treatment of the public interest in systemic discrimination by considering strengths, weaknesses, and gaps in the delineated enforcement models. The analysis is bifurcated, with Chapter III examining 8 areas which result from intrinsic differences between the structures of the two Models, and Chapter IV examining 4 areas which do not result from such differences but have major implications for effectively addressing systemic discrimination. Each area is assessed in light of the four assessment criteria identified in Chapter II as being central to the public interest in systemic discrimination.
1.3 Description of Interviews

As a preliminary matter, it should be noted that in keeping with the underlying conceptual approach to research utilized in the thesis, the traditional social science approach to selection of a statistically significant interview sample was not applied. Rather I chose to interview a relatively small, select group of professionals as described below. Similarly, contrary to the random selection of subjects prescribed in traditional social science field research, I either personally knew the majority of persons interviewed or knew of their expertise in the human rights and related areas of work. Consequently it is critical to keep in mind that the goal of utilizing this mode of research was as discussed above, to gain a contextualized perspective on the subject area as opposed to conducting a quantifiable empirical study. As previously mentioned, I also draw to some extent on my own experiences and observations in the area.

The actual content of individual interviews is set out in the discussion of the systemic and public interest in this chapter, and in relation to various issues in Chapter III. In light of concerns raised in the course of some of the non-institutional interviews, I have endeavored to minimize identifying information in order to protect the confidentiality of interviewees. As a result, identifying information is limited to the dates of the interviews, the human rights jurisdiction that the interviewees work in, work roles, and of course the opinions expressed in the interviews. In total I interviewed twelve professionals from across Canada who either currently work, or have worked in the past, in human rights, or whose
work intersects with human rights, for example, in terms of overlap of advocacy services offered to clients. I also conducted one "institutional" interview which is described below.

My overall goal in the selection of interviewees was to capture a wide variety of perspectives on systemic discrimination and the public interest. As a result, selection was based on a number of explicit factors: interviewees' role/experience in human rights; including known expertise, and the human rights jurisdiction.

Nine of the twelve interviews took place in person, with the remaining three, taking place by telephone. The interviewees are primarily from British Columbia and more specifically from the Lower Mainland and from Victoria. Two are from out of province. Specifically, one interviewee works in Ontario, while the other works in the North West Territories.

Four of the interviewees have worked under both a commission based enforcement model and a direct access based enforcement model. Three interviewees have worked exclusively under a commission based enforcement model, and three have worked exclusively under a direct access model. Two interviewees have never worked directly under either enforcement model, but rather work for organizations whose mandate intersects with human rights.

Ideally, I would have liked to have conducted more interviews, including with human rights "consumers" in order to have the benefit of a greater variety of perspectives, however, this was not possible due to institutional and time and resources constraints.
An overview of the areas that interviewees either currently work in or have worked in the past include a non-profit community group serving women, law firms of varying sizes, government agencies, non-profit advocacy centers, and human rights commissions. Past and present work roles of interviewees include lawyer, policy analyst, educator, tribunal member, human rights commissioner, human rights investigator, and executive director. Many of the interviewees either wear, or have worn, several ‘hats’ in the course of their work and consequently engage in multiple, overlapping roles. For example, one interviewee is a lawyer working in human rights who is also an educator and human rights commentator. At least two other interviewees also are executive directors who supervise other staff as well as acting as legal counsel in ‘front-line’ client work in government and in non-profit settings. In some cases it is the past work of the interviewee in human rights, combined with current work which enabled them to provide a multi-faceted perspective. For example, one of the interviewees was a former tribunal member who is currently involved with human rights in an educational capacity, while another interviewee is a former chair of a provincial human rights commission whose current legal practice includes representation of both claimants and respondents, and involvement in law reform and education in the area of human rights. A description of the interviewees is attached at Appendix A, and utilized in thesis references.

I attempted to obtain a balance of claimant and respondent perspectives in the
interviews. Three of the interviewees currently engage in both claimant and respondent work, two other interviewees work exclusively with respondents, four interviewees work exclusively with claimants, while three other interviewees do not represent either claimants or respondents, but are involved in human rights in other capacities. Gender was not a factor in the research design or in the selection process; however, I note that eight out of twelve interviewees are men.

The interviews were conducted using a list of pre-determined questions sent out to interviewees prior to the interview. The list of questions consists of eighteen open ended questions, attached in Appendix B. Selection of the questions was primarily as a result of the literature review described in step one of the methodology. The perspectives resulting from the interviews are discussed throughout the thesis, in relation to specific issues at hand.

1.4 Description of the Institutional Interview

As discussed above, I also conducted one institutional interview. The purpose of the institutional interview was to obtain information about the enforcement structure and on specific enforcement issues. Specifically I interviewed a staff member from the British Columbia Human Rights Tribunal at the Tribunal. The institution itself selected the person to be interviewed. The interview questions

56 I note that the initial list given to the first two interviewees contained two additional questions, which I found to be redundant and consequently, were eliminated from the list given to subsequent interviewees.
are attached at Appendix C. As with the individual professional interviews, in the interests of confidentiality I have not included the identity of the person being interviewed. The content of this interview is drawn on throughout the thesis.

1.5 Theoretical Framework

1.5.1 Equality and Systemic Discrimination

The literature and case law suggest that the concepts of equality and discrimination are not only interconnected but also have gradually evolved in tandem over the last two decades, resulting in increasingly expansive approaches within human rights enforcement processes. 57

It is important as a first step in the framework development to consider the interconnection between equality and systemic discrimination. The focus of the discussion will be on the substantive aspect of these concepts while a discussion of the actual enforcement processes, procedures, and mechanisms reflective of these concepts occurs in later chapters. This section provides an overview of the historical development of substantive equality and systemic discrimination as two

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key concepts that inform human rights.

As part of the discussion of the synergy between equality and discrimination I briefly consider some of the societal tensions and challenges in human rights equality issues, including opposing perspectives on the issue of further expansion of such rights. The final part of this section leads into a broad based discussion of the issues surrounding an individual versus a group perspective on equality, and what is meant by disadvantaged groups.

As was observed in the Abella Report, views on what constitutes discrimination have changed over time, evolving with information, experience, and insight.\(^{58}\) Similarly the goal of equality inherent in human rights is a fluid process requiring self examination and an openness of mind.\(^{59}\) The connection between the expansion of equality and the corresponding expansion of the concept of discrimination is well recognized among human rights commentators.\(^{60}\) The following discussion provides a global look at this evolution, with a focus on systemic discrimination.

In the early 1980's the conceptions of equality in human rights were deeply rooted in a restrictive view that similarly situated individuals should be treated in

\(^{58}\) Abella Report, Part I, Chapter I, supra n. 1 at 1.

\(^{59}\) Ibid, generally.

a like manner, despite individual differences.⁶¹

This formal approach to equality is said to be based on an Aristotelian philosophy which holds that different classes of individuals possess innately different abilities and corresponding rights.⁶² Further, formal equality is characterized by a refusal to acknowledge inequality as being represented by power imbalances between groups in our society.⁶³ There is also a corresponding tendency inherent in formal equality to view societal institutions such as the family or the market in dichotomous terms; as being either private or public, as a result shaping the perceived role and responsibility of the government in relation to each.⁶⁴

Finally it is widely held amongst human rights commentators that formal equality ultimately results in the perpetration of discrimination.⁶⁵

The link between formal equality and a corresponding restrictive view of discrimination in human rights as being limited to intentional or 'direct' discrimination is well documented.⁶⁶ The effect of the formalistic approach to discrimination within early human rights enforcement was the denial of human

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⁶³ Brodsky and Day, ibid., at 7
⁶⁴ Ibd., Brodsky and Day at 8; see also generally, Susan B. Boyd, ed., Challenging the public/private divide: feminism, law, and public policy (Toronto, Ontario: University of Toronto Press, 1997).
⁶⁵ See generally, Day, Duty to Accommodate, supra n. 61; see also R. Silberman Abella, Equality Rights, Women, supra n. 60 at 2-3.
⁶⁶ See for example, Brodsky and Day, BCHRC Report July 3, 1998, supra n. 60 at 8.
rights protection if no intent was found to discriminate.\textsuperscript{67} The conceptualization of direct discrimination also informed and consequently, constrained every aspect of human rights enforcement from available grounds of coverage, to who was able to obtain protection.\textsuperscript{68}

It is generally accepted that the courts have played a major role in the expansion of human rights principles as a result of judicial interpretation.\textsuperscript{69} For example, in the mid 1980s, in part as a result of the introduction of the Canadian Charter of Rights and Freedoms,\textsuperscript{70} Canadian courts moved towards a more expansive view of equality as reflected in the concept of substantive equality.\textsuperscript{71} Substantive equality takes into account factors such as power imbalances manifest in societal institutions and systems and the consequent effect on marginalized groups, as well as the need to address such imbalances.\textsuperscript{72}

Along with a broader view of equality came a corresponding expansion in the conceptualization of discrimination in Canada. This development moved the concept of discrimination beyond the traditional notion of direct discrimination to include indirect discrimination, systemic discrimination, and intersectional discrimination. The Charter, and the laws and policies that implement it, provide a comprehensive framework for protecting human rights in Canada.
conceptualization of discrimination away from an intent based focus to a recognition of discriminatory effects.\(^{73}\) It reflected an earlier judicial development resulting from the United States Supreme Court decision in the landmark case of \textit{Griggs v. Duke Power Co.}\(^{74}\) in which the Court held that adverse impact discrimination was actionable. As a result of this impetus, the concept of adverse effect or adverse impact discrimination gradually found its way into Canadian jurisprudence, as seen in the seminal Supreme Court of Canada cases of \textit{Bhinder v. Canadian Railway Company,}\(^{75}\) \textit{Ontario (Human Rights Comm.) and O’Malley v. Simpson-Sears Ltd.},\(^{76}\) and \textit{Alberta (Human Rights Comm.) v. Central Alberta Dairy Pool.}\(^{77}\)

While the concept of adverse impact discrimination is discussed further in relation to the upcoming discussion on systemic discrimination, it should be noted at this point that as a result of the conceptual shift in focus from intentional discrimination to the unintended effects of discrimination, the concept of adverse effects discrimination represented a significant step in human rights towards substantive equality. It also paved the way for an even more comprehensive approach to discrimination by virtue of the inherent recognition of the need to

\(^{73}\) See generally, Etherington, \textit{Promises, Promises, supra, n. 3.}
\(^{74}\) \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (4th Cir. 1971) \textit{[Griggs]}, see also William W. Black \textit{Employment Equality: A Systemic Approach} (Ottawa: Human Rights Research and Education Centre University of Ottawa, November 1985 at 26-28 for a discussion of the effect of Griggs on Canadian human rights law \textit{[Employment Equity Systemic Approach]; and also Abella Equality Rights, Women, supra n. 60 at 4, for comments on its impact on the development of concepts of discrimination and on equality assessments.}
\(^{75}\) \textit{Bhinder v. Canadian Railway Company,} [1985] 2 S.C.R. 181 \textit{[Bhinder].}
\(^{76}\) \textit{Ontario (Human Rights Comm.) and O’Malley v. Simpson-Sears Ltd.}, [1985] 2 S.C.R. 536 \textit{[O’Malley].}
\(^{77}\) \textit{Alberta (Human Rights Comm.) v. Central Alberta Dairy Pool} [1990] 2 S.C.R. 489 \textit{[Alberta Central Dairy].}
take into account individual differences and unintended effects of practices and policies.\textsuperscript{78} Despite moving human rights forward, one of the remaining negative residual effects of the early focus on direct intentional discrimination was the bifurcated or dual defense available to respondents depending on which type of discrimination at issue.\textsuperscript{79} For example, the defense available in indirect discrimination cases was a subjective standard as opposed to the objective, reasonable standard available in direct discrimination cases. This differentiation between the two types of discrimination typically resulted in the continuation of the status quo in discriminatory practices or systems in cases involving indirect discrimination.\textsuperscript{80}

The next evolution of the conceptualization of discrimination was the introduction of the concept of systemic discrimination, which will be discussed in detail in the following section in the context of developing an operational definition. At this juncture it is sufficient to note that systemic discrimination is generally viewed as further expanding the conceptualization of discrimination beyond that of adverse effect discrimination to take into account the discriminatory effects of broad patterns of discrimination on groups.\textsuperscript{81} Prior to taking a closer look at the concept of systemic discrimination and concluding the discussion on equality, the following section briefly considers tensions in achieving substantive equality.

\textsuperscript{78} La Forest Report, supra n. 10 at 7.
\textsuperscript{79} Ibid, at 10; see also Ian B. McKenna, "A Proposal for Legislative Intervention in Canadian Human Rights Law" (1992) 21 Man. L. J. 325 at 328-329 [Proposal].
\textsuperscript{80} The issue of the unification of these two defences was addressed in British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U., [1999] 3 S.C.R. 3, (1999), 35 C.H.R.R. D/257 (S.C.C.) [Meiorin], a case that will be discussed in later chapters, particularly in relation to the discussion of systemic discrimination.
\textsuperscript{81} La Forest Report, supra n. 10 at 8.
1.5.2 Tensions in Achieving Substantive Equality

The goal of obtaining substantive equality for groups has the inherent potential for ideological conflict between competing approaches to equality, namely individual, civil-libertarian based ideology versus pluralistic collectivist ideology. Such conflict is complex in that it encompasses diverse views of what constitutes equality and competing values evident for example, in the perceived role of government in promoting equality and in the degree and extent of equality that should be extended to particular groups.\(^\text{82}\) As observed by Justice Abella:

> No one opposes equality. As a principle of democratized civilizations, it is accepted without controversy. It always has been. But its definition and application produce controversy of a fundamental kind.\(^\text{83}\)

It is important for the purposes of setting out the conceptual framework of the thesis to highlight three major sources of tension in attaining substantive equality in human rights which are discussed further in the thesis, particularly in the Chapter III analysis.

The first tension, simply put is that of individual versus group rights and which


\(^{83}\) Abella, Equality Rights, Women, supra n. 60 at 2.
should predominate. This tension is manifest in enforcement processes, procedures, and mechanisms, which informs the ongoing debate about systemic discrimination. Day suggests that a group rights focus is implicit in substantive equality, a focus which must predominate in order to address conditions of inequality on a systemic level. Further, formal equality, which is based on principles and values of classical liberalism, focuses on equal treatment for similarly situated individuals. Additionally, as a result of its individualistic focus formal equality generally fails to take into account the implications that group membership has for individual freedom and the consequent need to address discrimination on a group based systemic level.84

Other human rights commentators take the view that equality in the context of human rights requires a continual balancing of rights, which in some cases involves putting limits on individual rights where they infringe on the rights of others. For example, an individual right to freedom of speech will need to be balanced against group rights to be free from discrimination.85 Moreover, some human rights commentators emphasize the interconnection between individual and group rights. For example, Jenson and Papillion point out that group rights can be exercised individually or collectively and that discrimination protections are individual protections that are based on group membership. They also

84 Day and Brodsky, Duty to Accommodate, supra n.61 at 46; see also Gwen Brodsky and Shelagh Day, "Poverty is a Human Rights Violation", December 2001, the Poverty and Human Rights Project, Commentary at 8 (unpublished) Online: http://www. povertyandhumanrights.org (last accessed November 2004).

suggest that many group based rights are exercised individually as opposed to by the group as a whole. As a result of this interconnection between individual and group rights, rather than viewing such rights as representing a substantive difference between individual and group rights, the central issues are the manner in which such rights are articulated, and the framing of the institutional response.  

Kallen also emphasizes the indivisibility between individual and group rights by suggesting that discrimination against individual members of minority groups because of their group membership constitute an act against the group as a whole. She also suggests that discrimination against the minority communities is experienced by individuals as personal oppression representing a melding of individual and group rights into a synergy of individual and collective rights.

Finally, at the other end of the continuum, other commentators hold the view that group rights within human rights should be restrained from eclipsing individual rights, for example, that individual claims should not be overshadowed by broad complex systemic claims in access to enforcement resources. Similarly, others suggest that human rights enforcement must reflect the interests of all stakeholders including those advocating for market based fiscal restraint.

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86 Jenson and Papillon, *Canadian Diversity*, supra n. 82 at 13.
88 Ibid., at n. 85 at 25.
90 Mullan, *Note Tribunals and Courts*, supra n. 4 at 646.
measures and curtailment of systemic initiatives.\textsuperscript{91}

The question of whose rights should predominate, leads to a second related tension which is exemplified in the question of how far rights should extend, specifically, the expansion of human rights protections in the recognition of prohibited grounds and areas of discrimination. Etherington characterizes choices around expansion as a values based choice reflecting equality rights priorities for members of society.\textsuperscript{92} This tension appears to be represented by two broad relatively polarized views. One perspective suggests that human rights protections have not advanced far enough in reflecting the principles of substantive equality\textsuperscript{93} and, concomitantly, that human rights have been subjected to 'backlash' in recent years, effectively undermining progress towards the attainment of equality for non-dominant groups.\textsuperscript{94} The converse perspective suggests that the expansion of such rights has gone far enough and in some cases, needs to be reined in.\textsuperscript{95}

The third tension is characterized by the potential for the equality interests of non-dominant groups to conflict, creating a hierarchy of rights. As observed by

\begin{footnotes}
\item[91] See generally, Howe and Johnson, \textit{Restraining Equality}, supra n. 5 at 127-134.
\item[92] Etherington, \textit{Promises, Promises}, supra n. 3 at 3.
\item[95] Generally, Mullan, \textit{Note Tribunals and Courts}, supra n. 4; Bob Friedland, "If you love Human Rights, clap your hands" \textit{The Vancouver Sun} (24 June, 2002); Susan Martinuk, "Tribunal of human rights all wrong" "Opinion" \textit{The Province} (5 June, 02).
\end{footnotes}
Jenson and Papillon in a pluralistic democratic society views on what constitutes equality vary not only between dominant and non-dominant groups but also between non-dominant equality seeking groups.\textsuperscript{96} Conflicting notions of equality within non-dominant equality seeking groups was recently seen in the case of Vancouver Rape Relief Society v. Nixon\textsuperscript{97} currently before the British Columbia Court of Appeal. At issue in Nixon are the rights of a non-profit women’s organization to define its membership versus the issue of inclusion and discrimination on the basis of sex, specifically, of a woman born a male who underwent female sex reassignment surgery.

In conclusion, conceptual work on substantive equality has had a synergistic influence on the development of a more expansive view of discrimination in human rights, which takes into account discriminatory effects. It would appear that the concepts of equality and discrimination have gradually evolved in tandem to take into account nuances and complexities generally resulting in a more contextual and substantive approach to discrimination and ultimately towards achieving meaningful equality in human rights. Along with this expansive approach towards human rights protections, corresponding tensions have developed regarding how substantive equality should be attained and what protections should be offered disadvantaged groups.

\textsuperscript{96} Jensen and Papillon, \textit{Canadian Diversity}, supra n. 82 at 5.

The next section looks at the issue of disadvantaged groups; specifically considering questions about who is vulnerable, the consequent impact of discrimination for vulnerable groups, and the broader implications of systemic discrimination.

1.5.3 Disadvantaged Groups

Black suggests that in order to fulfill the goals inherent in human rights law of attaining equality and eliminating discrimination it is critical to know more about the nature of inequality, and more specifically, to have an understanding of who is vulnerable to discrimination and the consequences of such discrimination.98 Black further suggests that despite the pronounced individualistic focus in our legal processes and an apparent reluctance of the common law to take group interests into account, a group perspective is crucial in the advancement of equality. Finally, a group perspective is inherent in the concept of indirect, adverse discrimination.99

In considering the issue of systemic discrimination in employment the Abella Report focused on four disadvantaged groups: women, aboriginals, disabled persons and visible minorities.100 A number of barriers to employment equity

98 Black, Black Report, supra n.16 at 4.
99 Black, Employment Equity Systemic Approach, supra n. 74 at 7.
100 Abella Report, supra n. 1 at v.
were also identified including in the areas of education and training, financial and personal support, employment practices, and attitudinal barriers. Relying in part from data from the 1981 Census the Abella Report presented a number of statistical indicators of this inequality.

For example, in terms of women's inequality, the statistics indicated that while 85% of single parent families were headed by women, 3 out of 5 women at the time were living below the poverty line, women working full time, full year round, generally earned 60 to 75% of the male average wage, and women were under-represented in management, professional and 'blue collar' positions, and conversely, were highly concentrated in support, clerical, and service positions in the government.

Aboriginal persons experienced two times the unemployment rate of other Canadians, those who were employed were concentrated in unskilled, low paying jobs, and further, Aboriginal men earned 60.2% of the income of non-Aboriginal men, while Aboriginal women earned 71.7% of the average income of non-Aboriginal women. These economic circumstances had severe social effects on Aboriginal people including high rates of incarceration, health problems, and suicide and other types of premature death.
At the time of the Abella Report the Census did not provide data on persons with disabilities or on visible minorities. Emphasizing the importance of the collection of future Census data on the two groups, the Abella Report relied on information gained from individuals and groups interviewed by the Equity in Employment Commission and various other sources. While acknowledging the diversity in types of disabilities, the Abella Report suggested that persons with disabilities faced significant barriers in employment including barriers related to training, employment access, employment accommodation, and employer attitudes. Similarly the Abella Report identified many barriers affecting visible minorities in achieving employment equity including language and other training and educational barriers, in recognition of credentials, and financial and attitudinal barriers, and both overt and indirect racism.

Statistics from the 2001 Census suggests that overall there appears to have been little progress made towards substantive equality for the four designated groups in the over twenty years since the Abella Report. While women have made progress in attaining higher levels of education there has been relatively incremental movement towards achieving employment equity. For example, despite making some small inroads into non-traditional areas of employment,

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107 Ibid., at 38.
108 Ibid., at 39-46.
109 Ibid., at 47-51.
110 Ibid., at 47.
111 Statistics Canada, Canadian Centre for Justice, Statistics Profile Series: Women in Canada (Ottawa: Minister of Industry, June 2001) at.3 [Women in Canada].
70% of all women continue to be concentrated in traditionally female lower income occupations such as teaching and nursing.\textsuperscript{112}

A significant inequality also remains in terms of the lack of parity between the wages of women and men. For example in 1998, the average earnings of women from all sources was 63% compared to men with jobs. Looking only at full time, full year work, the earnings of women amount to 72% of the wages of their male counterparts.\textsuperscript{113} Even taking account the considerable progress towards attaining higher educational levels, women with university degrees working full time, full year, earned 70% as much as men in 1998.\textsuperscript{114} Moreover, inroads made by women in narrowing the wage gap may be attributable in part to men losing ground in employment including in an overall decline in earnings.\textsuperscript{115} Statistics also suggest that women continue to head lone parent families at an 83% higher rate than men, a figure which according to Statistics Canada has remained steady since the mid-1970s.\textsuperscript{116} Compared to the men, women are more likely to be poor. For example, in 1998, 18% of women lived in poverty compared to 15% of men. Specifically, women in lone-parent families represent a disproportionate segment of the poor, with 53% of all lone-parent families

\begin{itemize}
\item \textsuperscript{112} Ibid., at 4.
\item \textsuperscript{113} Ibid., at 5; see also generally, Margot E. Young, Pay Equity: A Fundamental Human Right (Ottawa: Status of Women Canada September 2002) Online: www.swc-cfc.gc.ca (last accessed February 2005) [Pay Equity].
\item \textsuperscript{114} Statistics Canada, Women in Canada, ibid. at 5.
\item \textsuperscript{115} Statistics Canada, Census Operations Division, 2001 Census: analysis series, Earnings of Canadians: Making a living in the new economy (Ottawa: Minister of Industry, 2003) at 10.
\item \textsuperscript{116} Statistics Canada, Women in Canada, supra n. 111 at 3.
\end{itemize}
headed by women, living below income cutoffs for recognized measures of poverty.\textsuperscript{117}

The aggregate statistics for the other three groups presents an even more dismal picture. In relation to employment, the statistics indicate that Aboriginal persons continue to have strikingly high rates of unemployment: with one in four or 24\% of Aboriginals who are deemed to be labour force participants, being unemployed.\textsuperscript{118} Similar results are indicated for visible minorities who, despite generally high levels of education, are less likely than non-visible minorities to be employed, with 56\% of visible minority men employed compared to 74\% of non-visible minority men. Similarly, 53\% of visible minority women compared to 63\% of non-visible minority women were able to obtain employment.\textsuperscript{119}

The employment situation is even bleaker for persons with disabilities. Although impact varies with age, the 2001 Census statistics indicate that of those persons with disabilities able to work, disabled persons are only half as likely compared to non-disabled persons to be employed. Similarly persons with disabilities earn 60-80\% of the wages of their non-disabled counterparts.\textsuperscript{120}

\textsuperscript{117} Ibid., at 6.
\textsuperscript{118} Ibid., at 5.
Looking at other related outcomes, Aboriginal people continue to be among the poorest in the country, with 46% of all Aboriginals in 1995 having incomes below $10,000, compared to 27% of non-Aboriginals.\textsuperscript{121}

A 2003 survey commissioned by the federal government indicates that racism continues to be a serious social issue in Canada, with 46% of Aboriginal people living off reserve indicating that they had been a victim of racism or some other form of discrimination over the past two years.\textsuperscript{122} Similarly 36% of visible minorities indicated that they had also experienced racially based discrimination.\textsuperscript{123} Some commentators suggest that racial intolerance has been exacerbated by the increased emphasis placed by governments on national security and public safety.\textsuperscript{124}

\textsuperscript{121} See Statistics Canada, \textit{Canadian Centre for Justice, Statistics Profile Series: Aboriginal Peoples in Canada} (Ottawa: Minister of Industry, June 2001) at 6. Similarly, visible minorities are also significantly poorer in comparison to non-immigrants, with 24% deemed to be low income, compared to 15% of those from non-visible minority groups, at Statistics Canada, Canadian Centre for Justice, \textit{Statistics Profile Series: Canadians With Low Incomes} (Ottawa: Minister of Industry, June 2001) at 4.


\textsuperscript{124} See Kalen, \textit{Ethnicity and human rights}, supra n. 85 at 50-51. There has also increasingly been recognition of the prevalence of institutionalized racism against minorities, such as within law enforcement institutions. See for example, Maureen Brown, \textit{African Canadians in the Greater Toronto Area Share Experiences of Police Profiling: In Their Own Voices} (Ontario: African Canadian Community Coalition on Racial Profiling, March 2004); also Maureen J. Brown, \textit{We are
Persons with disabilities also report experiencing high levels of discrimination in particular in relation to the work place, with 19% of persons between the ages of 15 to 64 with severe disabilities indicating that they had been refused employment as a result of their disability within the last five years.\textsuperscript{125}

Black suggests that broad overall social costs flow from failure to address patterns of inequality affecting disadvantaged groups and conversely, there are broad social benefits in addressing such discrimination. Costs include not only the impact on individuals permanently caught up in such inequality, but also the potential for cycles of poverty and disadvantage to affect groups to the degree that resentment leads to crime and/or poor health, resulting not only in the societal costs inherent in such outcomes, but also in lost productivity. Finally, the potential benefits to proactively addressing patterns of inequality are proportionate to the degree of harm, not only for those who have experienced past discrimination, but also for society as a whole, in terms of the potential for prevention of future discrimination generally.\textsuperscript{126}

In summary, it is apparent from a review of the statistics and literature pertaining to the four groups identified in the Abella Report that despite the passage of

\textit{Not Alone: Police Racial Profiling in Canada, the United States and the United Kingdom} (Ontario: African Canadian Community Coalition on Racial Profiling, undated; and Tannis Cohen, for the Canadian Jewish Congress, \textit{Race Relations and the Law} (Toronto: Canadian Jewish Congress), (undated).

\textsuperscript{125} Statistics Canada, \textit{Disabilities}, supra n. 120 at 5.
\textsuperscript{126} Black, \textit{Black Report}, supra n. 16 at 11.
more than two decades, progress towards achieving substantive equality has been marginal. It is also apparent that there is a high social cost to society in not addressing persistent patterns of inequality. 127 At the same time, the potential benefits to society in addressing systemic discrimination are significant. 128

Prior to concluding the discussion on disadvantaged groups it is essential to point out that substantive equality analysis has not only changed the way we view particular types of discrimination but also increased awareness of the complexities inherent in the interaction of multiple and overlapping grounds of discrimination such as sex and race, and the consequent effects. 129 Consequently, an intersectional approach to discrimination consistent with a substantive feminist equality lense is applied throughout this thesis, particularly in the Chapter III analysis to take into account for instance, the impact of the intersection and overlap of sex and race on claimants in the effects of discrimination.

With the statistics indicating the prevalence and detrimental impact of discrimination on disadvantaged groups as a backdrop, the next section

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128 See for example, Parghi, Commentaries, supra n. 10 at 143-146.

considers the nature of systemic discrimination and the public interest in addressing systemic discrimination, with a view to developing operational definitions for application in Chapters III and IV.

1.5.4 Systemic Discrimination

As suggested above, systemic discrimination is generally viewed as having evolved over time to take into account the indirect effects of discrimination on groups.\(^{130}\) In order to delineate a working definition of systemic discrimination it is important to look at applicable human rights statutes, case law and literature, and the experiences and views of human rights practitioners.

Although many human rights statutes contain statutory provisions specifically aimed at addressing systemic discrimination\(^{131}\) as discussed in Chapter III, none actually define systemic discrimination. However, section 12 of the Yukon Human Rights Act specifically refers to systemic discrimination in a provision which appears to be aimed at the effects of discrimination: “Any conduct that results in discrimination is discrimination”.\(^{132}\)

\(^{130}\) La Forest Report, supra n. 10 at 8, Black, Employment Equity Systemic Approach, supra n. 74 at 125.

\(^{131}\) See for example, Section 11 of the Canadian Human Rights Act, R.S.C. 1985, H-6, as amended, which is aimed at addressing gender based wage disparity; and section 12 of the British Columbia Human Rights Code, R.S.B.C. 1996, c. 210 as am. March 31, 2003, B.C. Reg. 79/2003 [Code as amended].

\(^{132}\) Yukon Human Rights Act, R.S.Y. 2002, c. 116 at Section 12.
As previously discussed, the genesis of systemic discrimination is judicial interpretation and as a result in the absence of explicit statutory human rights provisions, case law represents a critical place to start in developing an operational definition of systemic discrimination. The landmark systemic discrimination case is the 1985 Supreme Court of Canada case of Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), which involved sex discrimination claims by a group of women in the context of non-traditional employment. In drawing from the Abella Report, Chief Justice Dickson in defining systemic discrimination, stated:

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of natural forces...

In the years since the Action Travail decision, the above definition has informed human rights literature and case law on systemic discrimination. Further the definition of systemic discrimination articulated in that case has been applied in many other cases, including the broad systemic case of National Capital Alliance on Race Relations and the Canadian Human Rights Commission v. Canada (Health and Welfare) In defining systemic discrimination, the Tribunal in


134 Ibid., at para. 33249.

National Capital stated:

The essential element, then, of systemic discrimination is that it results from the unintended consequences of established employment systems and practices. Its effect is to block employment opportunities and benefits for members of certain groups. Since the discrimination is not motivated by a conscious act, it is more subtle to detect and it is necessary to look at the consequences or the results of the particular employment system.136

Despite the frequent use of the term "systemic discrimination" the exact meaning of the term remains elusive. For example, in Kennedy v. British Columbia,137 where one of the issues before the Tribunal was whether systemic discrimination had to be specifically pleaded, the Tribunal Member stated:

The Code does not require complainants to describe the type of discrimination, whether direct or adverse-effect, covert or overt, systemic or individual, nor should it be a requirement. As evidence in this application, even experienced counsel may differ on the meaning of these terms...138

While as the Tribunal went on to observe in Kennedy "the word "systemic" does not have magical qualities", a review of the literature and case law as well as discussions with human rights practitioners about systemic discrimination, indicates a great deal of ambiguity in the analysis/approach of what constitutes...

136 Ibid., at para.164.
138 Ibid., at para. 5; see also Abella Report, supra n. 1, which declined to offer a precise definition of systemic discrimination. See also, Black, Employment Equity Systemic Approach, supra n. 74 at 125, regarding the widespread use of the term, and concomitant lack of consensus on the meaning of the term at page 12; also Justice Walter Surma Tarnopolsky and William F. Pentney eds., Discrimination and the Law volumes 1-2, loose-leaf (Toronto: Thompson Carswell 1990) at W-160 [Discrimination and the Law], which suggests that "[T]he concept of systemic discrimination is perhaps as hard to define as such discrimination is to identify...".
systemic discrimination. In light of this ambiguity it is useful as a first step in the development of an operational definition of systemic discrimination to review the commonly identified characteristics of systemic discrimination.\textsuperscript{139} In the course of my review of the literature and case law on systemic discrimination, I identified three central questions which commonly inform discussions on what constitutes systemic discrimination. I have characterized the three questions as: 1.) what is the nature of systemic discrimination? (2.) what is the scope of systemic discrimination?; (3.) what is required to prove systemic discrimination and what are the outcomes sought? I utilized these questions along with the additional query: “compared to other types of discrimination?” to provide a structure to the comparative analysis of the literature on systemic discrimination as set out below. This analysis is followed by discussion of interviewee views on what constitutes systemic discrimination, and subsequently, my own views of systemic discrimination. The discussion culminates in the delineation of a working definition of systemic discrimination.

1. What is the Nature of Systemic Discrimination?

One of the threshold considerations in a discussion on the nature of systemic discrimination is how it is manifested or how it presents itself. The literature and case law suggest that systemic discrimination is often covert and subtle in

\textsuperscript{139} Black came to the same conclusion in Employment Equity Systemic Approach, supra n. 74, in particular at 134. However, it must be noted that at that time there was still a major distinction in human rights law between direct and indirect discrimination; heightening the ambiguity, as O’Malley, supra n. 76, and other related cases had not yet been decided by the Supreme Court of Canada.
nature. Further, the concept of systemic discrimination was created in recognition of the fact that as a result of societal prohibitions, discrimination has become increasingly more covert and consequently, more difficult to detect.\textsuperscript{140} Systemic discrimination is also widely acknowledged as arising from day to day practices and policies which, although often facially neutral, are grounded in stereotypes and value assumptions that are discriminatory in their effect.\textsuperscript{141} In contrast, direct discrimination is generally overt and consequently, more easily detectable. Similarly, the literature and case law suggests that in contrast to direct discrimination, systemic discrimination is often unintentional.\textsuperscript{142} Comments by the Tribunal in the pay equity case of \textit{P.S.A.C. v. Canada (Treasury Board,)}\textsuperscript{143} exemplifies the above points regarding the nature of systemic discrimination:

\begin{quote}
The concept of systemic discrimination is perhaps as hard to define as such discrimination is to identify. It is not identical in concept to indirect or adverse impact discrimination. Adverse impact discrimination involves requirements which do not, on their face, discriminate on a prohibited ground, but which affect a group identifiable on a prohibitive ground in such a way as to have a discriminatory affect on that group.

While adverse impact discrimination may be quite subtle in its operation, often the effect is fairly obvious. Most people today, for example, recognize that minimum height and weight requirements discriminate
\end{quote}


Systemic discrimination is insidious and by its very nature as difficult to define as it is to pinpoint. It can include direct or overt discrimination as well as more subtle forms of discrimination such as adverse impact discrimination and entrenched and long-held discriminatory attitudes and beliefs.


\textsuperscript{142} See for example, Zinn and Brethour, \textit{The Law of Human Rights, ibid, at 1-8}; see also \textit{Action Travail, supra n. 133 at para. 33255.}

\textsuperscript{143} \textit{P.S.A.C. v. Canada (Treasury Board)} (1991), 14 C.H.R.R. D/341 (CHRT) [\textit{P.S.A.C.}].
against women. Similarly, it takes only a fairly rudimentary knowledge of religious diversity to realize that a hard hat requirement will adversely affect one particular religious group.

The concept of systemic discrimination, on the other hand, emphasizes the most subtle forms of discrimination. It recognizes that long-standing social mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious. Thus, historical experience which has tended to undervalue the work of women may be perpetuated through the assumption that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men.\textsuperscript{144}

Although widely acknowledged as being commonly unintentional, commentators suggest that systemic discrimination frequently interacts with intentional discrimination, which in turn informs and reinforces discriminatory practices. For example, in \textit{Action Travail}, Dickson C.J.C. observed the interactive and reinforcing relationship between overt and covert systemic discrimination by stating that:

\textit{... The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside of the group, that the exclusion is the result of “natural” forces, for example, that women “just can’t do the job...”}\textsuperscript{145}

The Court went on to find that the discriminatory attitudes of supervisors regarding women’s ability to perform the non-traditional work at issue informed and reinforced discriminatory hiring practices.\textsuperscript{146}

In summary, the literature and case law indicate that the nature of systemic

\textsuperscript{144} \textit{Ibid}, at paras. 35-38.

\textsuperscript{145} \textit{Action Travail}, supra n. 133 at para. 33249.

\textsuperscript{146} \textit{Ibid.}, at para. 33249 citing \textit{Abella Report}, supra n. 1; see also commentary in \textit{La Forest Report}, supra n. 10 at 13; Brodsky and Day, \textit{BCHRC Report July 3, 1998}, supra n. 60 at 2-4; and Parghi, \textit{Commentaries}, supra n. 10 at 141.
discrimination is often subtle and covert and frequently difficult to detect compared to direct overt discrimination and indirect adverse impact discrimination. It is generally manifest in day to day practices and policies, which are facially neutral, but which due to the grounding in stereotypes and discriminatory values, have a discriminatory effect. While frequently unintentional, systemic discrimination often interacts with, and mutually informs overtly discriminatory attitudes and beliefs about excluded groups.

2. What is the Scope of Systemic Discrimination?

The literature and case law generally identifies the scope of systemic discrimination as pertaining to broad patterns of discriminatory conduct compared to individual, isolated incidents of discrimination. Further, systemic discrimination substantially impacts disadvantaged groups, as opposed to impacting only individuals. Several differences arise however, in relation to commentators' views regarding who brings systemic claims, and the extent of the scope of systemic claims. In relation to the issue of who brings systemic claims, commentators such as Parghi indicate that:

...Direct and adverse effects discrimination claims are always filed by individual claimants. Systemic discrimination claims are filed by multiple

147 Action Travail, supra n. 133 at para. 33249 citing Abella Report, supra n. 1; see also commentary in La Forest Report, supra n. 10 at 13; also Brodsky and Day, BCHRC Report July 3, 1998, supra, n. 60 at 2-4; Parghi, Commentaries, supra n. 10 at 14.
claimants who all claim to have been harmed by the impugned policy or practice. Systemic claims may also be filed on behalf of complainants by third-party organizations.\textsuperscript{149}

Similarly, in regard to the extent of the scope of systemic claims, Parghi indicates that compared to individual discrimination, systemic discrimination is aimed at addressing a much wider range of conduct. She states that:

\ldots Systemic claims relate not to individual policies or practices but rather to systems of policies, practices, and attitudes that operate together to produce discriminatory effects.\textsuperscript{150}

In contrast, other commentators suggest that systemic claims are often brought by individuals, and do not always address complex, patterns of discrimination. Systemic discrimination can also be evidenced in relatively narrow practices or policies that, while directly impacting individuals, also have the potential for widespread inequitable effects on disadvantaged groups.\textsuperscript{151} For example, in their analysis of the term discrimination, Brodsky and Day state:

Consequently, systemic discrimination complaints cannot be defined according to whether the complaint is against one policy or a complex of acts, policies and rules. Nor can it be defined according to whether the complainant is an individual, a group, or an individual or organization representing, or complaining on behalf of a class. It can only be defined by its results for disadvantaged groups. In short, discrimination that results in, perpetuates, or exacerbates persistent patterns of inequality for disadvantaged groups has come to be called systemic discrimination.\textsuperscript{152}

\textsuperscript{149} Parghi, \textit{Commentaries, supra} n. 10 at 141.
\textsuperscript{150} Ibid.
\textsuperscript{152} Ibid., at 5-6.
I adopt and rely on the views of Brodsky and Day as set out above, for two reasons. Firstly, as observed by Braha, many claims brought by individuals have had important outcomes for excluded groups,\textsuperscript{153} including cases such as *Miele*,\textsuperscript{154} *Meiorin*,\textsuperscript{155} *Hussey*,\textsuperscript{156} *Moser*,\textsuperscript{157} and *Radek*,\textsuperscript{158} to name a few.

Secondly, I view a more expansive view of the scope of systemic claims as being consistent with a contextual, substantive equality approach to human rights law, as reflected in the case law.

In summary, the scope of systemic discrimination is broader than other types of discrimination, in that it generally involves patterns of discrimination, as opposed to discrete narrow incidents. At the same time, it may involve the effect of single policies or types of conduct as opposed to being confined to broad "systems" of attitudes, policies and practices. The focus on the effect of discrimination is predominately on excluded groups compared to individuals. However, systemic discrimination claims may be brought by both individuals and groups.

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\textsuperscript{155} *Meiorin*, supra n. 80.

\textsuperscript{156} *Hussey v. British Columbia (Ministry of Transportation and Highways) (No. 3)* (2003), 48 C.H.R.R. D/1.


\textsuperscript{158} *Radek v. Henderson Development (Canada) Ltd. and others (No. 3)*, 2005 BCHRT 302 [Radek].
3. What is the Required to Prove Systemic Discrimination, and what are the Outcomes Sought?

While evidentiary issues pertaining to systemic claims will be discussed in-depth in Chapter IV, for the purposes of defining systemic discrimination, the literature suggests that the required proof in systemic claims is centered on the discriminatory effects of “patterns or practices” which often necessitate the use of forms of proof such as complex statistical evidence put forward by experts. In contrast, individual and adverse impact discrimination claims typically involve isolated incidents of discrimination, and consequently, rely on less complex forms of proof.¹⁵⁹

The remedies sought in systemic claims are also typically broader than in individual, or in indirect discrimination claims. Moreover, the focus of the remedies also differs in the sense that systemic remedies are generally aimed at effecting prospective change in relation to systems and practices for the benefit of the affected group. In contrast, individual and/or indirect discrimination claims are often aimed at addressing past discrimination, and are more narrowly designed to benefit the individual personally, such as a remedy that involves reinstatement into an employment position.¹⁶⁰

In summary, the proof required in systemic claims differs from other claims in

¹⁵⁹ See generally, Beatrice Vizkelety, Proving Discrimination in Canada (Toronto: Carswell, 1987) [Proving Discrimination], also Zinn and Brethou, The Law of Human Rights, supra n. 141 at 1-10 – 1-11.
¹⁶⁰ See Parghi, Commentaries, supra n. 10 at at 142-143; also, Zinn and Brethou, The Law of Human Rights, supra n. 141 at 1-9.
light of the requirement to prove the detrimental effect of broad patterns of
discrimination on disadvantaged groups, as opposed to discrete, isolated
instances impacting individuals.

Similarly, the remedies sought in systemic claims are frequently broader, and are
focused on ameliorating future effects of discrimination on groups, as opposed to
personalized remedial measures aimed at addressing past discrimination against
individuals.

Having considered the literature and case law on systemic discrimination, the
following discussion sets out the views of interviewees on the topic.

1.5.5 Interviewee Views on Systemic Discrimination

All twelve of the human rights professionals interviewed agreed that systemic
discrimination is important to address and that it characteristically affects groups,
and is imbedded in policies and practices. Additionally, most interviewees
expressed the view that systemic discrimination can be subtle, difficult to detect,
and is often unintentional.¹⁶¹ For example, one interviewee stated that systemic
discrimination is structural, embedded and rooted in societal systems and

¹⁶¹ Intentional discrimination is not always overt, in fact it is often covert and subtle, for example
discriminatory attitudes underlying hiring decisions in an employment context are often not
explicit, and are frequently attributed to non-discriminatory reasons such as lack of skills or
suitability.
practices and that it is pervasive and manifest in patterns. Further, comments from interviewees indicated that systemic discrimination is embedded in organizations or processes, hiring practices, grounded in policies and that it often unintended, and is very subtle. Many interviewees also suggested that systemic discrimination is about inequality between groups which is built into systems. Additional comments were also consistent with the literature, for instance, in the suggestion that most discrimination these days is not as overt as that seen in the 1970s when most discrimination was more obviously intentional. Other similar comments were that systemic discrimination involves adverse effect in rules, practices, and procedures which create patterns of discrimination that go beyond the individual complaint.

Several interviewees also shared the view that while systemic discrimination can be as broad as discussed in the Abella Report in relation to employment equity or as seen in Action Travail, it can also be narrowly manifest in one rule or policy.

162 April 13, 2005, Vancouver, British Columbia, lawyer, representing both claimants and respondents, also a human rights commentator and educator [April 13, 2005 Interviewee].


164 March 23, 2005, Victoria, British Columbia, former Canadian human rights investigator, regional director, and also policy analyst under the former British Columbia Human Rights Commission [March 23, 2005 Interviewee (2)].

165 April 1, 2005 Interview, supra n. 163.

166 Ibid.

Similarly, while the effects of systemic discrimination go beyond individuals to affect disadvantaged groups, systemic claims may be brought by individuals.\textsuperscript{168}

As discussed below, despite general agreement about the fundamental characteristics of systemic discrimination, there was significant diversity among interviewees in the approach that should be taken to defining systemic discrimination. This divergence was particularly evident in the views of those who work exclusively with respondents versus those that work exclusively with claimants or with both claimants and respondents, specifically in respect of how broadly or narrowly systemic discrimination should be defined.

In summary, based on the interviews, commonly identified characteristics of systemic discrimination are: a frequently subtle and covert nature; arising from seemingly neutral, unintentional, policies and practices embedded in day to day systems in society, which may be informed and reinforced by overtly discriminating attitudes and stereotypes. Finally, systemic discrimination is manifest in broad patterns which present barriers to equality for disadvantaged groups, although it may also be present in more narrow policies and practices which, while brought by individuals, have implications for disadvantaged groups.

In the course of my research I identified two general approaches to analyzing and defining systemic discrimination. While the concept of systemic

\textsuperscript{168} For example, April 7, 2005 Interviewee, supra n. 163; April 12 Interviewee(2), ibid.; April 13, 2005 Interviewee, supra n. 162.
discrimination is generally defined in reference to the principles articulated in *Action Travail* as previously discussed, commentators place emphasis on various aspects of these characteristics, which ultimately impacts on how broadly or narrowly systemic discrimination is defined. As a result, I have termed these approaches as:

1. a predominantly narrow approach to analysis of systemic discrimination;
2. a predominantly broad approach to analysis of systemic discrimination.

The two approaches are summarized below, along with discussion of the primary characteristics and outcomes of each approach.

1. **Predominantly Narrow Approach to Analysis of Systemic Discrimination**

This approach is characterized by a relatively narrow\(^\text{169}\) perspective on what constitutes systemic discrimination. This approach emphasizes systemic discrimination as a distinct type of discrimination, which frequently involves distinguishing between direct and indirect discrimination.\(^\text{170}\) I have also noted,\(^\text{169}\) It is important to point out that I do not use the term "narrow" in a pejorative sense.\(^\text{170}\) Examples of where systemic is equated with adverse effect discrimination see generally, Magnet, *Research Note*, *supra* n. 57; and at 836; Lepofsky, *Duty to Accommodate*, *supra*, n. 140;
particularly in the course of some of my interviews, a tendency among those who adopt this approach to view systemic claims as being confined to cases involving broad, complex claims and frequently a large numbers of claimants such as in the *Action Travail* type case.\(^{171}\) There is a corresponding tendency towards narrowly construing claims, particularly those brought by individuals, so as to preclude consideration of broader, systemic implications for persons other than the claimant.\(^{172}\) For example, an interviewee who exclusively represents respondents expressed the view that systemic discrimination is associated with the civil rights type cases of the 1960s and further, that the majority of human rights claims in the current system claiming to be systemic cases are without merit. Further, while many of the individuals filing claims likely genuinely believe they have systemic claims, the majority are actually utilizing systemic issues to bring forward their own individual issues.\(^{173}\) Similarly, another interviewee who exclusively represents respondents suggested that many claims currently being

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\(^{171}\) Ian B. McKenna, "Legal Rights For Persons With Disabilities in Canada: Can the Impasse Be Resolved?" (1997) 29 Ottawa L. Rev. 153 [Legal Rights].

\(^{172}\) For an example, commentary of a relatively narrow, categorical approach to systemic discrimination, see Mullan, *Note Tribunal and Courts*, supra n. 4; also the case of *LaPointe v. Nelson (City) of Nelson* (September 2, 1998) (BCHRT) [*LaPointe*] as an example of a narrow approach to what constitutes systemic discrimination in the context of a claim brought by an individual. See Braha, *Code Achieved Purposes, supra* n. 153 for commentary on other cases such as *La Pointe* at COM-22.

\(^{173}\) See for example Black's discussion in *Jubran, supra* n. 29, regarding the approach taken in the analysis of systemic discrimination by the Court in *Jubran v. Board of Trustees*, (B.C.S.C.) recently overturned by the British Columbia Court of Appeal, in particular, at 10; also Mary Eaton's discussion of *Canada v. Mossop* in "Patently Confused: Complex Inequality and Canada v. Mossop" 1994 1(2) Rev. Const. Stud. 203 [*Mossop*].

\(^{173}\) April 12, 2005, Vancouver, British Columbia, lawyer, Ministry of Attorney General [*April 12, 2005 Interviewee (1)*].
brought forward by individual claimants in the human rights system as being systemic are actually not systemic claims.\textsuperscript{174}

2. Predominantly Broad Approach to Analysis of Systemic Discrimination

This approach is characterized by a relatively broad integrative, approach to systemic discrimination under which systemic discrimination is defined primarily in terms of the potential or actual effects on disadvantaged groups. Further, emphasis is placed on the sites of discrimination; societal institutions, and the methods of operation which are seen as discriminatory practices and policies. Consequently, as a result of a focus on the operation and effects of systemic discrimination there is a corresponding tendency to de-emphasize the need to differentiate systemic discrimination from other types of discrimination.\textsuperscript{175}

For example, two interviewees suggested that differentiating between types of discrimination may be detrimental to the goal of addressing systemic discrimination.

\textsuperscript{174} March 30, 2005, Vancouver, British Columbia, lawyer, Ministry of Attorney General. This interviewee asked that I include the following statement in relation to the interview: "the opinions and comments of the employee of the Ministry of Attorney General are his/her personal opinions only and do not reflect the views of the Ministry of Attorney General." [March 30, 2005 Interviewee].

\textsuperscript{175} See for example, Black, \textit{Equity Systemic Approach}, supra n. 74 at 134; and generally, Day and Brodsky, \textit{Duty to Accommodate}, supra n. 61; and the case of \textit{Mbaruk} v. Surrey School Board District No. 36 (1998), 30 C.H.R.R. D/182 [\textit{Mbaruk}], where the Tribunal stated at para. 38:

\begin{quote}
A distinction is sometimes drawn between "direct" and "systemic" discrimination. In my view the distinction is inappropriate. Systemic discrimination merely describes the source of the discrimination; that is, it describes discrimination that is built into a system. Systemic discrimination may be direct – for example a rule requiring all employees to retire at age 60 – or it may be adverse effect – for example all employees must work on Sunday.
\end{quote}
discrimination. One interviewee suggested that rather than treating systemic discrimination as a separate type of discrimination, it is important to adopt a contextual approach which is consistent with equality case law developments, in particular with *Meiorin*. Also, a substantive equality approach to addressing discrimination involves viewing systemic discrimination as an important aspect of all human rights claims, and de-emphasizing an individual focus to claims.\textsuperscript{176} This interviewee further suggested that an approach that distinguishes between systemic and non-systemic claims turns systemic claims into a "special project" which is easily de-emphasized and/or abandoned during times of economic restraint.\textsuperscript{177} Another interviewee noted that the differentiation of systemic discrimination from other types of discrimination was likely a "hold over" from the days when there was a legal distinction between direct and indirect discrimination.\textsuperscript{178}

Finally, the literature suggests that an effects based approach emphasizes the effect of discrimination on disadvantaged groups and takes into account endemic patterns of discrimination, and further suggests, as discussed above, that any human rights case, notwithstanding its form has the potential to varying degrees to raise systemic claims.\textsuperscript{179}

\textsuperscript{176} April 7, 2005, Interviewee, supra n. 163.

\textsuperscript{177} Ibid.

\textsuperscript{178} May 5, 2005, Vancouver, British Columbia, lawyer, representing claimants in an institutional setting. This interview also involved a brief discussion with another lawyer working in the same setting, who provided opinions which are incorporated into the reference relating to this interview. \[\text{May 5, 2005 Interviewee}\].

Consistent with the literature, several interviewees also emphasized the need to focus on the effects of systemic discrimination for groups. For example, one interviewee stated that the overwhelming feature of systemic discrimination is the number of people it impacts. Systemic is identified by the effects not by who brings it. For example, an individual can bring a systemic case that has implications for others.\textsuperscript{180} Another interviewee discussed the fact that viewing systemic discrimination in a broader manner leads to the realization that the effects of discrimination must be addressed on a broader level in order to have any meaningful impact. The interviewee suggested that a systemic approach has a systemic result while an individual approach has an individual result.\textsuperscript{181}

In my view, a predominately broad based approach to systemic discrimination is in keeping with the new integrated approach to systemic discrimination articulated by the Supreme Court of Canada in \textit{Meiorin}.\textsuperscript{182} During the course of considering the question of whether a new approach was required to address discrimination, the Court identified seven difficulties with the "conventional" approach to human rights claims, including the artificial distinction between direct and adverse effect discrimination,\textsuperscript{183} the problem of legitimizing systemic

\textsuperscript{180} See for example, April 7, 2005 Interviewee, \textit{supra} n. 163. Further, that the direct access model of enforcement as it is presently configured does not adequately address the public interest in the effective treatment of systemic discrimination in British Columbia.

\textsuperscript{181} April 12, 2005 Interviewee (2), \textit{supra} n.167.

\textsuperscript{182} \textit{Meiorin}, \textit{supra} n. 80.

\textsuperscript{183} \textit{Ibid.} at D/265 to 266.
discrimination,\textsuperscript{184} and the dissonance between the conventional analysis and the explicit purpose and terms of human rights legislation.\textsuperscript{185} Concluding that a new approach was required in addressing discrimination, the Court articulated a unified approach to analysis that eliminated the distinction between direct and indirect discrimination in terms of the availability of bifurcated defenses. It also articulated a legal framework that reaffirms the expansive systemic approach to human rights taken in cases such as \textit{Action Travail}.\textsuperscript{186} Commentators further suggest that the comprehensive and unified approach articulated by the Court in \textit{Meiorin} signaled a potential positive duty incumbent on employers and others to take proactive steps towards address systemic discrimination.\textsuperscript{187} Finally, \textit{Meiorin}\textsuperscript{188} established the need to take the public interest into account in addressing systemic discrimination in, and the primacy of, substantive equality interests.\textsuperscript{189}

Prior to articulating an operational definition of systemic discrimination it is necessary to consider the question of the public interest in human rights. This discussion begins with a global look at the purposes and nature of human rights legislation and the approach taken to statutory interpretation by the courts.

\begin{itemize}
  \item \textsuperscript{184} \textit{Ibid.}, at D/270- D271.
  \item \textsuperscript{185} \textit{Ibid.}, at D/271-272.
  \item \textsuperscript{186} Schucher, \textit{Weaving Together}, supra n. 57 at 352-353; also for example, April 7, 2005 Interview, supra n. 163.
  \item \textsuperscript{188} \textit{Meiorin}, supra n. 80.
  \item \textsuperscript{189} Schucher, \textit{Weaving Together}, generally, supra n. 57, and at 348, see also Braha, \textit{Code Achieved Purposes}, supra n. 153 see reference to \textit{Meiorin} and other cases that have advanced systemic approach to addressing discrimination at COM-25.
\end{itemize}
followed by a discussion of specific aspects of the public interest in systemic
discrimination, and concluding with articulation of an operational or working
definition of systemic discrimination including the public interest in addressing
such discrimination.

1.6 The Public Interest in Systemic Discrimination

1.6.1 Purpose and Nature of Human Rights Law

The underlying purposes of human rights legislation have been broadly
described as being “...to both address systemic denial of equality and to provide
a means of redress for individuals whose equality rights have been denied”. 190
These dual purposes have been described as representing both “public” and
“private” purposes 191 Finally, human rights case law and literature suggests that
the overall purpose of human rights legislation is not only in redressing past
discriminatory effects, but in promoting equality and preventing future
discrimination in society. 192 The broader societal interest is also reflected in the
nature of human rights law as discussed below.

190 La Forest Report, supra n. 10, presentation of the group Equality for Gays and Lesbians
Everywhere, at 13.
191 For example, see Shannon v. British Columbia (Ministry of Government Services) (No. 2)
Vancouver Registry No. L00 at paras. 22-23 [Shannon(2)].
1.6.2 The Nature of Human Rights Law

Human rights law has been held by courts to have a special, quasi-constitutional status and to encompass fundamental, inalienable rights.\textsuperscript{193} The rationale for the strong deference given to human rights legislation as articulated by the Supreme Court of Canada in \textit{Zurich Insurance Co. v. Ontario (Human Rights Commission)}\textsuperscript{194} is that human rights law:

\textit{...is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.}\textsuperscript{195}

The public policy nature of human rights law reflects the strong community interest in addressing inequality and discrimination as opposed to the predominantly private interests and the resulting legal approach seen in civil actions.\textsuperscript{196} At the same time discrimination is seen as an affront to society as whole and as representing a harm to all its members as a whole by virtue of its effect on all aspects of social relations.\textsuperscript{197}

\textsuperscript{193} Margot E. Young, \textit{Pay Equity}, supra n. 113 at Executive Summary and at 5-20.
\textsuperscript{194} \textit{Zurich Insurance v. Ontario (Human Rights Commission)} [1992] 2 S.C.R. 321 cited to 16 C.H.R.R. at para. 18, referring \textit{inter alia} to \textit{Bhinder, supra} n.75 and \textit{O'Malley, supra} n. 76 [Zurich].
\textsuperscript{195} ibid.
\textsuperscript{197} Department of Justice Canada, \textit{Screening and Carriage: Reconsidering the Commission's functions}, summary of research paper prepared by Shelagh Day and Gwen Brodsky (Ottawa:
Human rights legislation is also recognized as being a comprehensive and complete statutory scheme by virtue of the fact that there is no civil recourse for enforcement of rights.\textsuperscript{198} It is also acknowledged to be remedial in nature and accordingly aimed at making the victim whole, rather than punishing the perpetrator.\textsuperscript{199} Additionally, in light of its inherent public purposes, human rights cannot be waived or varied through contractual agreement.\textsuperscript{200} Finally, human rights law is viewed as not only reflecting social values important to Canadian society but also world values, as reflected in international human rights commitments.\textsuperscript{201}

When considering the nature of human rights it is also critical to acknowledge that as with other legal and moral rights in a democratic society, human rights are not absolute but rather, are subject to conditions and restrictions that reflect a balancing of individual/group and the collective interests, duties and responsibilities of society as a whole.\textsuperscript{202}

\textsuperscript{199} See Lovett and Westmacott, Human Rights Review, supra n. 15 at 10.
\textsuperscript{200} Ibid., at 10.
\textsuperscript{201} Ibid.
\textsuperscript{202} Kalen, Ethnicity and Human Rights, supra n. 85 at 9-10; This point was also raised by April 1, 2005 Interviewee, supra n. 163 who suggested that it was not only important to balance individual and group rights, but also rights in general against the interests of society as a whole, for example, with respect to issues such as national security.
1.6.3 Interpretation of Human Rights Legislation

According to Young, there are three implications for legislative interpretation flowing from the special status accorded human rights legislation. First, interpretation of human rights legislation must be liberal and purposive with narrowly construed exceptions. Second, interpretation must be flexible and dynamic in response to evolving social and conceptual contexts. Third, human rights legislation must be accorded primacy over other conflicting legislation.

In summary, it would appear that there is a commonly recognized societal interest in human rights which extends beyond individual interests. This broader interest is seen in the inherent purpose in protecting society as a whole by preventing and remedying broad patterns of discrimination and in the promotion of equality. Human rights legislation is also accorded special interpretive status in order to give effect to underlying, broader societal purposes. Finally, human rights legislation not only encompasses Canadian values but also world values, reflected in international human rights commitments.

Having established a broader social interest in human rights, the discussion now

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203 Young, Pay Equity, supra n. 113 at Executive Summary and 5-20.
204 Ibid., at 10.
205 Ibid., at 13. In fact, many human rights statutes have a primacy clause in them, such as in section 4 of the Code, as amended. For further discussion of the special status and approach to interpretation see Lovett and Westmacott, Human Rights Review, supra n. 15 at executive summary and 8-9.
turns to an in-depth look at the interconnection between the “public interest” and systemic discrimination.

1.6.4 The Public Interest in Addressing Systemic Discrimination

Like the term systemic discrimination, the term “public interest” is commonly used and yet seldom defined with any precision. While I grapple with the issue of public interest further in Chapters III and IV, particularly in relation to questions such as who should represent the public interest and in issues such as late filing of claims, intervenors, and legal representation, it is necessary prior to articulating an operational definition of systemic discrimination to briefly examine sources such as human rights legislation, in order to consider the meaning of public interest and its connection to systemic discrimination.

There is no definition of the term public interest in Canadian human rights statutes. However, section 3 of the British Columbia Human Rights Code, as amended sets out various purposes which are widely recognized as being indicative of the public interest in human rights.

\[206\] Code, as amended, supra n. 131. Section 3 provisions under the former Human Rights Code will be discussed in Chapter III.

\[207\] See for example, generally, Brodsky and Day, BCHRC Report July 3, 1998, supra n. 60, also, Braha, Code Achieved Purposes, supra n. 153. The previous form of this section prior to amendments in 2002 will be discussed in Chapter III.
The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code. 208

Braha, in reviewing the purposes of the Code, suggests that the section 3 provisions clearly reflect purposes beyond the individual, in recognition of systemic discrimination. 209 Specifically, section 3(d) expressly recognizes the societal or public interest in addressing systemic claims. 210 Moreover, Brodsky and Day suggest that a public interest, systemic discrimination enforcement mandate, flows not just from section 3(d) but from all of the subsections under Section 3 of the Code. 211 They further suggest that several broad public interest objectives underlie effective human rights enforcement, including a number of systemic facets:

1) recognition of the public character of human rights because they describe the society that Canada strives to be;

2) acknowledgment that human rights claimants are not simply acting in

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208 Code, as amended, supra, n.131, at section 3(a)-(e).
210 Braha, ibid.
211 Brodsky and Day, BCHRC Report July 3, 1998, supra n. 60 at 6 and 12-13. It is important to point out that this report was based on the old provisions of section 3 the Code, which as will be discussed in later chapters, had two additional sections.
their own private interests when they bring claims forward, but also serving the public interest in identifying and eliminating discriminatory practices, and that consequently they are entitled to publicly funded support, assistance and legal representation;

3) agreement that the complaint of an individual can, through its outcome, affect a large number of people, and that there is a public interest in fostering outcomes and interpretations of the law that will support the broad goal of achieving equality;

4) agreement that there is a broad public interest in addressing persistent patterns of discrimination and inequality experienced by groups, such as, Aboriginal peoples, people of color, people with disabilities, and women.212

Looking at the case law, in considering the public interest in the context of an application to amend a claim, the British Columbia Human Rights Tribunal observed in Read v. Century Holdings Ltd.: 213

In my view, the "public interest' in this context must be interpreted in accordance with the purposes of the Code as defined in s.3...

Further, in Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd. (No. 2), the Tribunal stated:

...There is usually no public interest involved in private disputes before the courts, but there is a significant public interest in human rights complaints. The public interest must inform all questions before the Tribunal, including the appropriate use to be made of affidavits on preliminary applications. The public interest in this context is largely defined by the purposes of the Code, as defined in s. 3, including: fostering a society in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia; promoting a climate of understanding and mutual respect where all are equal in dignity and rights; preventing discrimination; identifying and eliminating persistent

212 Department of Justice Canada, Day and Brodsky, Screening and Carriage, supra n. 197 at 1.
213 Read v. Century Holdings Ltd. (2003), 47 C.H.R.R. D/304 (BCHRT) [Read].
214 Ibid., at para. 68.
patterns of inequality; and providing a means of redress for those persons who are discriminated against... [emphasis added].

In the context of a preliminary decision regarding the scope of the claim in the case of Radek v. Henderson Development (Canada) Ltd., the Tribunal held that it was in the public interest to find that the claim included systemic allegations.

The broad remedial powers under section 37(2) (a)-(c), of the Code as amended, are also acknowledged to be indicative of the broad power to address the public interest in discrimination. These provisions are discussed in the section on remedies in Chapter IV.

Having looked at the statutory provisions, human rights commentary, as well as select case law relating to the public interest in human rights, it is helpful to briefly consider the meaning ascribed to the term in the dictionary as an additional source of interpretation. For example, Black's Law Dictionary defines

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216 Radeck, supra n.158.

217 While the specifics of this section will be discussed in Chapter III, see commentary by Black, Black Report, supra n. 16 at 14; also the British Columbia case of Hutchinson v. British Columbia (Ministry of Health) 2004 BCHRT 58; Hutchinson v. British Columbia (Ministry of Health) (No. 2) 2004 BCHRT 122, petition for Judicial Review filed B.C.S.C. Vancouver Registry No. L041823 July 20, 2004; sub nom British Columbia v. Hutchinson, [2004] B.C.J. No. 2434 (Q.L.). [Hutchinson], where the Tribunal ordered remedies affecting public policy. See also the Ontario case of Baylis-Flannery v. De Wilde (No. 2) (2003), 48 C.H.R.R. D/197 (ONHRT), where the Tribunal ordered a "public interest remedy" which reflects similarly wide powers under Ontario legislation to order broad remedies aimed at the prevention of future discrimination against other members of the claimant's group.
"public interest" as:

1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake esp., an interest that justifies government regulation.\(^{218}\)

The Dictionary of Canadian Law, citing the Supreme Court of Canada case of *R. v. Collins*, suggests that the public interest relates to community values. Additionally, based on *Clubb v. Saanich (District)* it includes concerns relating to society generally, and in particular, the interests of identifiable groups.\(^{219}\)

All twelve interviewees agreed that there is a public interest component to human rights generally, and specifically, in relation to systemic discrimination. Yet, all interviewees suggested that the term public interest is a highly ambiguous and subjective term. For example, one interviewee stated that the term public interest is unhelpful due to its ambiguity and that it is redundant in light of the quasi-constitutional nature of human rights, the recognized paramountcy over other laws, and the fact that Canada is a democratic, multi-cultural society, all of which makes the public interest in human rights a given.\(^{220}\)

Many interviewees commented on the public interest in addressing systemic discrimination as being embodied in, and as being critical to, the advancement of


\(^{220}\) May 5, 2005 Interviewee, *supra* n. 178.
equality interests.\textsuperscript{221} Similarly other interviewees suggested that the public interest relates to the amelioration of discrimination and disadvantage.\textsuperscript{222}

One interviewee stated that the public interest in systemic discrimination involves viewing an individual claimant as merely one example of discrimination suffered by countless others who either do not know their rights or do not want to bring claims forward.\textsuperscript{223} Additionally, from a broader perspective, it is in the public interest and the interest of a functioning and healthy democracy, that marginalized groups have a voice, for example, the poor, transgendered people, those living with AIDS and HIV, drug and alcohol addicted people and others often ignored in society and forgotten by government. Further, the public interest in human rights indicates that human rights are to be seen as being fundamental, and inherent to every person; fundamental in that they are not special favours to be bestowed, but rather inherent to our being; obligations, not something to give or take. International declarations make this very clear.\textsuperscript{224}

Similarly another interviewee stated that the public interest represents the best of our societal values as embodied in the British Columbia Human Rights Code purposes prior to the amendments to the Code,\textsuperscript{225} and as represented in section 15 of the Charter\textsuperscript{226} and international human rights agreements, and that the

\begin{footnotes}
\textsuperscript{221} For example, April 18, 2005, Interviewee, supra n. 167.
\textsuperscript{222} For example, April 12, 2005(2) Interviewee, supra n. 167.
\textsuperscript{223} April 7, 2005 Interviewee, supra, n. 163.
\textsuperscript{224} Ibid.
\textsuperscript{225} Code as amended, supra n. 131.
\textsuperscript{226} Charter, supra n. 70.
\end{footnotes}
public interest should reflect the values of equality. Further, the public interest is about ensuring that those values are in place and reflected in our laws, policies and practices.\textsuperscript{227} Finally, other interviewees commented on the public interest in the need for community input and accountability in human rights processes and mechanisms, in particular in addressing broader systemic issues.\textsuperscript{228}

Opinion diverged, however, among interviewees regarding the degree of public interest in systemic discrimination, and how it should be addressed. Almost all interviewees stated that the extent to which the public interest in human rights was addressed was dependent on the role of government, which in turn reflected a political decision. For example, one interviewee stated that while working in government it was easy to become "somewhat jaded", in the sense that the primary questions are always how much initiatives will cost, and the extent of required resources. Additionally, while the interviewee was of the view that the public has an interest in being treated fairly, and the role of the government must reflect the interests of the public and the intentions behind the Code,\textsuperscript{229} how that was put into effect was dependent on political will. For example, the interviewee suggested that there are essentially two kinds of approaches to government in British Columbia: "small government" and "large government". Specifically, a small government approach which is currently in place in the province focuses on private means, in which government interventions are viewed as intrusive on private interests. The interviewee cited the move away from proactive

\textsuperscript{227} April 13, 2005, Interviewee, \textit{supra} n. 162.
\textsuperscript{228} April 12, 2005 Interviewee(2), \textit{supra} n. 167.
\textsuperscript{229} Code, as amended, \textit{supra} n. 131.
preventative oriented programs such as employment equity programs as an example of this small government approach. The interviewee also suggested that the fact that the current government started with a core review of human rights was a strong indicator of this type of approach.\(^{230}\)

Similarly, another interviewee who worked in government in the past stated that the public interest is important not only in systemic, but also in non-systemic cases and that the public interest is a political decision.\(^{231}\) Conversely, two interviewees whose work involves government representation were of the view that while government attempts to represent the public interest on the basis of a democratically elected mandate and through policy which reflects resource allocation decisions made in consultation with stakeholders, all too frequently highly suspect systemic discrimination claims challenge such decisions with the potential effect of undermining and second guessing government decision making.\(^{232}\) Another interviewee suggested that as part of the public interest it is critical to balance human rights interests with larger societal considerations such as national security considerations.\(^{233}\)

In summary, having considered the literature, human rights legislation, case law, and the opinions and experiences of human rights practitioners, it would appear that the public interest in systemic discrimination is reflected in the underlying

\(^{230}\) March 23, 2005, Interviewee (1), supra n. 163.

\(^{231}\) Ibid.

\(^{232}\) March 30, 2005 Interviewee, supra n. 174; April 12, 2005 Interviewee (1), supra, n. 173.

\(^{233}\) April 1, 2005, Interviewee, supra n. 163.
purposes of human rights law, explicit statutory provisions in the Code, as well as being implicit in substantive equality. While the public interest in human rights includes a consideration of the interests of individuals and groups, it is broader than both, encompassing collective interests in the well being and protection of society as a whole. The following section sets out an operational definition of the systemic discrimination and the public interest in such discrimination.

1.6.5 Operational Definition of Systemic Discrimination

My view of what constitutes systemic discrimination changed over the course of this thesis, including most notably as a result of my interviews with human rights professionals. For example, my view of systemic discrimination went from that of a relatively narrow view of systemic discrimination to a more comprehensive effects based view as described in the preceding section. Specifically, rather than seeing systemic discrimination as a distinct type of discrimination characterized by broad issues brought primarily by large groups of claimants, I now hold the view that there are systemic aspects to all cases and that it is merely a matter of degree, and choice in focus and emphasis.

As a result of the expansion of my view about what constitutes systemic discrimination, I struggled with the appropriate scope of an operational definition. Specifically, I debated about whether the distinction between systemic
discrimination and other types of discrimination was outmoded given the movement toward a unified contextual approach to discrimination, and whether it should be dispensed with altogether. I eventually came to the conclusion, however, that as Black points out in the context of defining systemic discrimination in employment, an overly expansive definition of systemic discrimination leads to a lack of focus to the extent that almost all discrimination is encompassed. Given that one of the primary focuses of systemic discrimination is achieving substantive equality for excluded groups, a definition which encompasses all types of discrimination, even that which is aimed primarily at individuals would potentially undermine this goal. For example, the effect of all discrimination being considered systemic, notwithstanding degrees, ultimately, raises issues related to proof, and the use of enforcement resources (a dilemma that will discussed in Chapter III). Further, in a discussion on dispensing with the distinction between systemic and other types of discrimination, and the idea of adopting a unified approach to the methods of proof, Vizkelety concludes that:

...to adopt a single method of proof and analysis for all forms of discrimination would only compel parties and other fact finders to gloss over many relevant but complex issues.235

In light of the above considerations, while I view all human rights claims as having a systemic aspect to them in the sense that human rights protections involve the public interest, some claims are predominantly systemic in nature and

234 Black, Equity Systemic Approach, supra n. 74 at 135.
235 Vizkelety, Proving Discrimination, supra n. 159, at 238-239.
have central characteristics that distinguish them from predominantly non-systemic claims. The operational definition set out below reflects these characteristics.

1. Systemic Discrimination

Systemic discrimination arises from daily practices and policies which, although often facially neutral, are discriminatory in their effect on excluded groups in society. While systemic discrimination is typically unintentional, subtle in nature, and difficult to detect, it is often informed and reinforced by overt intentionally discriminatory attitudes. Systemic discrimination is generally seen in broad patterns of discriminatory conduct which have detrimental effects on excluded groups due to shared actual or perceived characteristics as opposed to isolated instances which primarily affect individuals. While individuals can bring systemic claims, they are often brought by, or on behalf of, groups. The required method of proof around systemic discrimination is broader and more complex than that which is required in pre-dominantly non-systemic discrimination claims. Remedies for addressing systemic discrimination are prospective, and generally, broad and aimed primarily at groups as opposed to being personal in nature and aimed at individual interests in addressing past discrimination. Systemic discrimination is multi-faceted, with the potential for grounds to overlap, compound, and intersect.

Finally, there is an inherent public interest in addressing systemic discrimination due to its implications for fulfillment of the obligation of a democratic society, extending beyond individual interests, to take into account collective interests in attaining substantive equality for all citizens.

The above definition, which will inform subsequent analysis in this thesis, is consistent with a substantive equality approach to discrimination as articulated in the Abella Report, and later in *Action Travail*.236 It also reflects the public purposes inherent in human rights law and in a broad, purposive, and dynamic approach to interpretation which is well established in human rights law. Finally, 

236 *Action Travail*, supra, n. 133.
it reflects the comprehensive unified approach to discrimination recently
articulated by the Supreme Court of Canada.

Having delineated the conceptual underpinnings of the human rights law and
established an operational definition of systemic discrimination which includes a
strong public interest component, Chapter II turns to a discussion of human rights
enforcement structures.
CHAPTER II  CANADIAN HUMAN RIGHTS ENFORCEMENT MODELS

This chapter focuses on the structures in place for delivery of human rights enforcement in Canada. It commences with an overview of the development of enforcement processes, and moves to discussion of the commission based enforcement model. As part of the discussion on human rights commissions, common characteristics of commission based enforcement regimes are identified in order to articulate an operational definition. A similar discussion occurs in relation to the direct access enforcement model, including the identification of common characteristics of the model for the purpose of articulating an operational definition. The chapter concludes with delineation of criteria on which to assess the effectiveness of the designated enforcement models in addressing systemic discrimination and the public interest. The resulting criteria will be applied in the analysis/critique in Chapters III and IV.

2.1 Overview of the Development of Human Rights Enforcement in Canada

Human rights enforcement processes in Canada were developed in large part, in
reaction to human atrocities that occurred during World War II.\textsuperscript{237} Ontario led the rest of the country by introducing the first human rights legislation in 1944, followed by Saskatchewan in 1947.\textsuperscript{238} Early legislation was quasi-criminal in nature, and in light of its focus on the intent to discriminate, it was based on a prosecutorial model of enforcement. The high thresholds for proof based on the criminal standard of beyond a reasonable doubt, not only deterred claims of discrimination, but also created major evidentiary and enforcement problems for those who brought forward claims.\textsuperscript{239}

The 1950’s and 1960’s saw movement towards a new approach to enforcement in the form of “fair practice legislation”, which provided protection for discrimination in limited areas such as housing and employment, on relatively narrow grounds such as religion and race, and later age and sex. In a clear movement away from a criminal approach to enforcement, the fair practice approach emphasized discrimination as being the result of interpersonal relations, reflected in the emphasis on resolving claims through conciliation and settlement.\textsuperscript{240}

The next evolution in human rights enforcement in Canada arose in response to perceived shortcomings in the fair practices model of enforcement. This shift towards expansion occurred in the early 1960s with the development of the first

\textsuperscript{237} Black, \textit{Black Report}, supra n. 16 at 2; see also Howe and Johnson, \textit{Restraining Equality}, supra n. 15 at 3-4.
\textsuperscript{238} \textit{Ibid.}
\textsuperscript{239} \textit{Ibid.}
\textsuperscript{240} Howe and Johnson, \textit{ibid}. at 8.
human rights commission in Ontario created to administer the newly consolidated human rights legislation.\(^{241}\) This development was followed by similar enforcement initiatives across Canada both federally and provincially, aimed at establishing more comprehensive human rights legislation, along with the creation of commissions to oversee enforcement. This development continued well into the late 1970's.\(^{242}\) Black and others suggest that the model of enforcement in place in Canada today is largely reflective of the enforcement structures developed in the 1960's and 1970's, with a few exceptions seen in jurisdictions that ventured outside of traditional enforcement models to enact equity based legislation.\(^{243}\)

Human Rights enforcement in British Columbia reflected the above trend towards expansion seen in the implementation in 1973 of consolidated human rights legislation and concomitantly, the establishment of a human rights commission. This enforcement model replaced the previous fair practices model of enforcement which had been in effect earlier and which was generally viewed as lacking in adequate enforcement mechanisms and resources.\(^{244}\) As previously mentioned in the introduction, part of the evolution of human rights in British Columbia included a massive restructuring in 1983, when the Social Credit Government, reflecting a fiscal restraint approach to human rights, dismantled

\(^{241}\) Ibid., at 9.
\(^{242}\) Ibid., at 12-13.
\(^{243}\) Black, Human Rights Report, supra n. 16 at 3, also comments of Interviewees, for example, April 4, 2005, Ontario, former commissioner, lawyer representing both claimants and respondents both federally and provincially, and involved in human rights law reform and education [April 4, 2005 Interviewee].
\(^{244}\) Black, Human Rights Report, supra n. 16 at 3.
the British Columbia Human Rights Commission, replacing it in 1984 with a more restricted British Columbia Human Rights Council.\textsuperscript{245} The \textit{Human Rights Code}\textsuperscript{246} was also abolished and replaced with substantially narrower legislation.\textsuperscript{247} This enforcement model was eventually replaced in 1997 with vastly more comprehensive human rights legislation which, among other things, created the British Columbia Human Rights Commission as the administrator of the enforcement process.\textsuperscript{248}

2.2 Overview of Human Rights Enforcement Structures

2.2.1 \textit{Common Features of Commission Based Enforcement}

Howe and Johnston suggest that although the actual structure of human rights commissions may vary, commissions across the country share commonalities in

\textsuperscript{245} The structure and mandate of the commission in British prior to 1984 was relatively restrictive, in terms of the statutory enforcement provisions, particularly when compared with the commissions described below. Notwithstanding the restrictive nature of the pre-1984 commission, its abolition was viewed by commentators as having a detrimental impact on the enforcement process in the province at the time. See for example, Black, commentary in W.W. Black, "Human Rights in British Columbia: Equality Postphoned" (1984-85) Can. Hum. Rts. Y.B. 218 [Equality Postponed] at 225 to 231.


\textsuperscript{247} Howe and Johnston, \textit{Restraining Equality}, supra n. 5 at 13-14.

\textsuperscript{248} Lovett and Westmacott, \textit{Human Rights Review}, supra n. 15 at 15. It should be noted that although a substantial portion of the legislation was proclaimed in force January 1, 1997, some sections actually came in force in 1998 and 1999. Additionally as discussed throughout this thesis, amendments to the 1997 legislation resulted in the current human rights legislation.
statutory mandates and in organizational features.\footnote{249} For example, all Canadian human rights commissions are statutorily based with enabling legislation not only stipulating the mandate of a particular commission, but also the organizational structure and procedures governing the execution of the mandate.\footnote{250} Further, Human Rights commissions operate independently from government. The mandates of commissions generally are aimed at two primary goals: 1.) administering and enforcing human rights statutes; and, 2.) promoting societal awareness and respect for the legislation through initiatives such as research and education.\footnote{251} Additionally, all commissions have commissioners, who are usually appointed on a part-time basis, and are responsible for the operation of the agency, along with the supervision of various administrative support staff.\footnote{252}

Other common features of the enforcement process under the commission model include the filing of all claims with the commission, in an approved format.\footnote{253} Similarly, commissions typically carry out enforcement of claims through processes for intake and screening of claims, investigation of claims, settlement of claims, and referral of unresolved claims to hearing before a human rights tribunal. Many commissions have exclusive carriage of claims at the hearing stage of the enforcement process.

\footnote{249} See Howe and Johnson, \textit{Restraining Equality}, supra n. 5 at 48-49, for a summary of commonalities across Canadian jurisdictions, see also Lovett and Westmacott, \textit{Human Rights Review}, \textit{supra n. 15}, at 21-26.\footnote{250} Howe and Johnson, \textit{Ibid.}, at 48.\footnote{251} \textit{Ibid.}, at 48-49.\footnote{252} \textit{Ibid.}, at 49.\footnote{253} \textit{Ibid.}, at 54.\footnote{254} Westmacott and Lovett, \textit{Human Rights Review}, \textit{supra n. 15} at 21.
Finally, all commission based jurisdictions have statutory provisions which create structures for adjudication of claims in the form of independent quasi-judicial bodies. Some jurisdictions have permanent human rights tribunals, and other jurisdictions rely on ad hoc appointments.\footnote{Ibid., at 21.}

Having presented an overview of common features of commission based enforcement, the following section takes a brief look at the structure; as opposed to enforcement processes, procedures and mechanisms, of three human rights jurisdictions as examples of commission based enforcement. The three jurisdictions are the Federal human rights regime, the Ontario human rights regime and the former commission based British Columbia human rights regime. This discussion concludes with the delineation of an operational definition of the commission model.

\section*{2.2.2 The Federal Human Rights Commission Based Enforcement}

\textbf{Structure}

Human rights enforcement within the federal human rights arena is administered by the Canadian Human Rights Commission, whose enabling legislation is set out in the \textit{Canadian Human Rights Act}.\footnote{Canadian \textit{Human Rights Act}, R.S.C. 1985, H-6, as amended [CHRA].} The Canadian Human Rights
Commission was established in 1977, and began operating a year later.\textsuperscript{257} The Commission is an independent body whose mandate is to enforce human rights for all federal government departments and agencies, federal Crown corporations, and all federally regulated business including those involved with telecommunications, transport, and chartered banks. Additionally, the Commission is responsible for federal employment equity legislation.\textsuperscript{258}

The structure of the Canadian Human Rights Commission is consistent with the general structure of other Canadian human rights commissions, as discussed in the preceding section. Commissioners are appointed for periods of up to seven years for full time appointees and up to three years for part-time appointees, and are mandated by the Canadian Human Rights Commission to oversee the administration of the enforcement process.\textsuperscript{259}

The Commission is charged with the dual mandate of administering human rights legislation by carrying out claims based enforcement, and promoting human rights legislation and the prevention of discrimination. Enforcement functions include intake, screening and investigation of claims, mediation and conciliation of claims, and dismissal of claims, or referral of claims to hearing.\textsuperscript{260} The Commission has broad powers aimed at education and prevention, including

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\textsuperscript{258} Lovett and Westmacott, Human Rights Review, supra n.15, generally, and at 22.

\textsuperscript{259} Ibid.

\end{flushright}
monitoring special programs, implementing broad educational and research
initiatives aimed ameliorating discrimination, and liaising with other human rights
organizations.\textsuperscript{261} An additional feature that makes the Canadian Human Rights
Commission unique compared to other commissions is its mandate to monitor
the application and compliance of federal statutory bodies, corporations, and
contractors with federal employment equity legislation.\textsuperscript{262}

Under the federal enforcement process, hearings take place before the Canadian
Human Rights Tribunal, which is a quasi-judicial, independent, permanent
tribunal. In addition to adjudication, the Tribunal also provides dispute resolution
services, including mediation.\textsuperscript{263} The Tribunal is also responsible for the
adjudication of employment equity claims under the \textit{Employment Equity Act}.\textsuperscript{264}

Under section 51 of the Canadian \textit{Human Rights Act}\textsuperscript{265} the role of the Canadian
Human Rights Commission at hearing is to represent the public interest.
Claimants may also retain their own legal counsel for the purposes of
representing their individual interests in the claim. As a result many claimants
represent themselves, or retain lawyers from the private Bar.\textsuperscript{266}

\textsuperscript{261} Lovett and Westmacott, \textit{Human Rights Review}, supra n. 15 at 22, at generally, \textit{CHRA 2003
Annual Report}, supra n. 12.
\textsuperscript{262} Howe and Johnson, \textit{Restraining Equality}, supra n. 5 at 60-61.
\textsuperscript{263} \textit{CHRA 2003 Annual Report}, supra n.12 at 5-6.
\textsuperscript{264} Canada, Canadian Human Rights Tribunal, \textit{Annual Report 2004}, (Ottawa: Canadian Human
Rights Tribunal, Minister of Public Works and Government Services Canada, 2004 at 25 [CHRT
Annual Report]).
\textsuperscript{265} \textit{CHRA}, supra n. 256 at section 51.
\textsuperscript{266} \textit{CHRT Annual Report}, supra n. 264.
2.2.3 The Ontario Commission Based Enforcement Structure

As previously discussed, The Ontario Human Rights Commission was the first human rights commission in Canada. It was established in 1961, and is currently governed by the Ontario Human Rights Code.[267] The Ontario Human Rights Commission reflects the common general organizational features described above in relation to the federal regime. One of the factors that distinguishes the Ontario Human Rights Commission from many other Canadian jurisdictions, with the exception of the Federal Commission, is the substantial geographical territory and population that it serves, resulting in a structurally complex enforcement system.[268] Another unique feature is that under the Ontario Human Rights Code, the Lieutenant Governor in Council must designate a minimum of three Commission members as part of a race relations division, with one of the members appointed as Commissioner of the division.[269]

2.2.4 The British Columbia Commission Based Enforcement Structure

The commission based regime in place in British Columbia from 1997 until 2003 shared common features with the Canadian Human Rights and Ontario Human

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[268] Howe and Johnson, Restraining Equality, supra n. 5 at 53.
[269] OHRC, supra n. 267, at section 28(1).
Rights regimes described above, with some slight structural variations. The mandate of the Commission as set out in the Code reflected the typical dual commission roles described above, with respect to administration of claims processes and the implementation of public education and prevention based initiatives.

One of the unique features of the enforcement structure was the provision for appointment of three commissioners to oversee administration of the enforcement process. Under section 15(2) of the Code, all three commissioners were appointed on the basis of five year terms, with eligibility for reappointment of varying lengths of time. The primary role of the head administrator, the chief commissioner, was to provide public education on the Code.

Specific responsibilities of the chief commissioner included facilitating initiatives aimed at promoting knowledge and respect for the Code, holding public consultations, and monitoring and assisting in the development and implementation of employment equity and special programs. The second commissioner position was that of the deputy chief commissioner who was empowered to represent the public interest within the enforcement process, a role which will be discussed in detail in later chapters. The third commissioner

270 Code, supra n. 246 at section 15(2).
271 See for example, ibid., at sections 15(4),15(5).
272 For commentary on this role, Westmacott and Lovett, Human Rights Review, supra n. 15 at 18; W. Anita Braha, "A Review of the Human Rights Code" Legislative Comment Annotated
position was that of the commissioner of investigation and mediation who was statutorily independent from the other commissioners, and was responsible for intake and screening of claims, investigation and mediation, and dismissal or referral of claims to a hearing.

A further unique feature of the British Columbia Commission enforcement structure, which was mandated by section 20(1) of the Code, was an advisory body known as the Human Rights Advisory Council. The Council consisted of a minimum of seven and maximum of eleven, volunteers representing a variety of regional and community backgrounds. The function of the Council was to (a) provide information to the public about the work of the commission; (b) bring forward public interest concerns to the commission; and (c) provide advice to the commission and the government on the administration of the legislation.

While, as with the commission model in the jurisdictions described above, the Commission represented the public interest in the claim, individual representation was sometimes provided to claimants and to eligible respondents by way of private bar appointment by the Legal Services Society of British Columbia. Funding for legal representation was based on an arrangement between the

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273 *Code, supra n. 246 at section 15(8).*


275 *Code, supra n. 246 at section 20(1).*

276 *Ibid., at section 20(3)(a)-(c).*
In conclusion, human rights commission based enforcements structures have a number of common features: they are creatures of statute, and they have dual overlapping mandates, with one aspect of the mandate focused on administering the claims process including provisions for intake, investigation, and dismissal, and referral to hearing, and through mediation and other dispute resolution processes. The other aspect of the commission mandate is focused on promoting a public understanding and respect for human rights through educational and prevention oriented initiatives. Commission mandates are typically carried out by commissioners, whose numbers and duties may vary across jurisdictions, but are typically responsible for overseeing the work of human rights commissions. Additionally, all commission based enforcement regimes have as a structural component an independent quasi-judicial, adjudicative body, which operates either on an ad hoc or permanent basis for the purposes of adjudicating claims.

2.2.5 Operational Definition of the Commission Model

Based on the above delineated common features of commission based

enforcement, the operational definition of "the Commission Model" for the purposes of this thesis is: a human rights enforcement model in which a human rights commission, independent from government, is statutorily empowered by human rights legislation to fulfill the dual mandate of: 1.) administering and enforcing the claims process through investigation, dismissal, or referral of claims to hearing, and through settlement of claims through mediation and other dispute resolution processes; 2.) promotion of awareness and respect for human rights through public education and through preventive initiatives such as special and equitable programs. An additional central feature is an independent, quasi-judicial body operating on either an adhoc or permanent basis, which adjudicates claims referred by the commission.

Having set out an operational definition of the Commission Model the following section looks at enforcement under a direct access structure. Similar to the discussion in the preceding section on commission based enforcement, what follows is a general discussion of features commonly associated with direct access enforcement. This discussion is followed by a look at specific jurisdictions where the model is in place, and finally, by operationalization of a definition of the direct access model.

Prior to discussing direct access enforcement it is critical to point out that the direct access model is very new to Canadian human rights enforcement. As will be discussed below, this model of enforcement is currently in operation in only
two Canadian jurisdictions, although other jurisdictions have apparently shown interest in implementing the direct access model of enforcement. Due to the fact that direct access is in effect in only two jurisdictions in Canada, and also in light of the fact that it is relatively new in both jurisdictions, it is difficult to identify commonalities in structure solely on the basis of those structures currently in place; consequently, the following description also includes an initial look at proposed structures/features of direct access as discussed in human rights literature.

2.2.6 Common Features of Direct Access Based Enforcement

The literature suggests that the central feature of the direct access approach to enforcement is that all claims are filed directly with the adjudicative body as opposed to being filed with a human rights commission. As a result, the adjudicative body has the responsibility for claims management, including creating rules and mechanisms governing pre-hearing procedure and making pre-hearing decisions regarding dismissal or referral to hearing. The adjudicative body is also responsible for providing dispute resolution, in addition to adjudicating claims.

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278 For example, see generally, La Forest Report, supra n. 10.
279 Ibid., at 53.
280 Ibid., at 52 and 59.
281 Ibid., at 59.
One proposed variation of the above basic direct access structure, involves the retention of a commission, with part of its role being the provision of information and assistance to claimants.\(^{282}\) The commission’s primary role, however, would be the proactive promotion of human rights through activities such as education and other initiatives that reflect and promote the public interest.\(^{283}\) Similarly, the commission would be empowered, based on specified criteria, to exercise discretion to decide whether or not to initiate or join cases where public interest issues were at stake.\(^{284}\) In cases where the commission was joined, it would have full party status, including the right to continue a claim in the public interest notwithstanding settlement of the individual aspect of the claim.\(^{285}\) In cases where the commission was joined as a party, claimants would derive benefit from commission support of the claim including expertise and resources.\(^{286}\) Where the commission declined to participate as a party in the claim, claimants would be provided with legal assistance under a publicly funded clinic model.\(^{287}\) Those claims that did not settle would proceed to a full hearing before the adjudicative body.\(^{288}\)

Other variations of the general, direct access structure as described at the

\(^{282}\) Ibid., at 58-59.
\(^{283}\) Ibid., at 53.
\(^{284}\) Ibid., at 53 and 63-66.
\(^{285}\) Ibid., at 65.
\(^{286}\) Ibid.
\(^{287}\) Ibid., at 77.
\(^{288}\) Ibid., at 59-60. For another general source of discussion on this structure see Department of Justice Canada, *Right to Adjudication under the Canadian Human Rights Act and How to Remedy it*, summary of research paper prepared by Joanna Birenbaum and Bruce Porter (Ottawa: Department of Justice Canada, 1999). [Right to Adjudication]. Online: http://canada.justice.gc.ca (last accessed February 2005).
beginning of this section, propose varying degrees of intervention and advocacy in relation to the roles of the adjudicative body and the commission. For example, in one proposed structure based on the direct access paradigm recommended in the La Forest Report, the commission would continue to be involved in cases (in particular in targeted cases involving systemic issues or new questions of law), but the traditional roles such as screening, investigation, mediation, would be eliminated. The adjudicative body, on the other hand would take a more active, interventionist role with respect to case management and decision making than is typically associated with traditional tribunal decision making.\(^{289}\)

Yet another variation of the direct access model involves the elimination of the commission; with claims either being filed directly with a court, or with an administrative adjudicative body. In this proposed structure, the adjudicative body would perform all of the case management and adjudicative functions. Legal representation would be provided in a publicly funded human rights clinic. Finally, a publicly funded body would be responsible for the provision of education and the promotion of human rights.\(^{290}\) It is this latter version of the direct access model with some variations that was adopted in British Columbia, which was the first human rights jurisdiction in Canada to implement direct access. An overview of the direct access enforcement structure currently in place in British Columbia is presented below.

\(^{289}\) Lovett and Westmacott, *Human Rights Review*, supra n. 15 at 148-149.

\(^{290}\) *Ibid.*, at 150-152.
2.2.7 Direct Access Enforcement Structure in Place in British Columbia

A direct access enforcement structure was introduced in British Columbia in March, 2003 replacing the commission based enforcement structure described in the preceding section. As previously mentioned, the direct access enforcement in British Columbia generally resembles the proposed direct access structures above, in particular with sole responsibility for the entire claims process being carried out by the British Columbia Human Rights Tribunal. While the Tribunal was continued under section 31(1) (2) of the Human Rights Code\textsuperscript{291} from the prior commission based model, as of March 31, 2003 it was statutorily empowered to enforce all human rights claims within the province, at all stages; including intake, case management and adjudication.\textsuperscript{292}

Specific functions of the Tribunal include intake and screening of claims, adjudicating interim applications including dismissal applications, managing cases through to hearing, providing dispute resolution and approval of equity and special programs, and adjudicating claims at hearing.

Legal representation for human rights claimants is provided through the British Columbia Human Rights Clinic situated in Vancouver. The Clinic is bifurcated;

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{291} Code, as amended, \textit{supra n. 131} at section 31(1)(2).
\item \textsuperscript{292} See generally, Canadian Bar Association, British Columbia, Minutes – Human Rights Section, April 30, 2003 [\textit{CBA Minutes April 30/03}].
\end{itemize}
\end{footnotesize}
with one arm, the British Columbia Human Rights Coalition, responsible for settlement of claims, and the other arm, the Community Legal Assistance Society, responsible for litigation of claims. Additionally, legal representation is also provided to claimants from the Capital Regional District through the Law Centre Human Rights Clinic which is situated in Victoria. The Law Centre Human Right Clinic also provides information and representation to respondents on a limited basis depending on financial eligibility.

The British Columbia Human Rights Coalition is responsible for providing human rights information and education on a contractual basis, along with the Ministry of Attorney General, and the Tribunal.

2.2.8 Direct Access Enforcement Structure in Place in Nunavut

The Territory of Nunavut was created on April 1, 1999. Previously, as part of the Northwest Territories, human rights enforcement was provided under fair practices legislation, based on the Northwest Territories commission

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293 See generally, Canadian Bar Association, British Columbia, Minutes – Human Rights Section, October 30, 2002 [CBA Minutes October 30/02].
294 The Law Centre Human Rights Clinic, University of Victoria Online: http://thelawcentre.ca/rights.html (last accessed April 2005).
295 See generally, Canadian Bar Association, British Columbia, Minutes – Human Rights Section, December 9, 2002 [CBA Minutes December 9/02].
enforcement model.\textsuperscript{297} Nunavut introduced its own human rights legislation in the form of the \textit{Human Rights Act}\textsuperscript{298} on November 4, 2003, which provided for a one year implementation period, coming into effect on November 5, 2004.\textsuperscript{299} The \textit{Nunavut Human Rights Act} ushered in a direct access model of enforcement. As a result of these relatively new changes, human rights enforcement under the direct access model is still very much in the developmental phase.

Similar to British Columbia, claims under the Nunavut enforcement process are filed directly with a permanent adjudicative body, established under section 16(1) of the \textit{Nunavut Human Rights Act}.\textsuperscript{300} The Nunavut Human Rights Tribunal is the sole enforcement body, and as such, administers claims from filing through to adjudication. The Tribunal also facilitates settlement of claims through the provision of dispute resolution processes.\textsuperscript{301}

Members of the Tribunal are appointed by the Commissioner in Executive Council for a term of up to four years, subject to reappointment.\textsuperscript{302} The qualifications to become a member are an interest in and sensitivity to human rights and to Inuit culture and values.\textsuperscript{303} A Tribunal member cannot be terminated except for cause.\textsuperscript{304} The Commissioner of the Executive Council must appoint a chair and one or more vice-chairs from among the Tribunal members.

\begin{itemize}
    \item \textsuperscript{297} \textit{Ibid.}
    \item \textsuperscript{298} \textit{Nunavut Human Rights Act}, S. Nu. 2003, c. 12 [NHRA].
    \item \textsuperscript{299} \textit{Human Rights Program}, supra n. 296 at 1.
    \item \textsuperscript{300} \textit{NHRA}, supra n. 298 at section 16(1).
    \item \textsuperscript{301} See generally Zinn and Brethour, \textit{The Law of Human Rights}, supra n. 141 at 17-5.
    \item \textsuperscript{302} \textit{NHRA}, supra n. 298 at sections 16(1) and 16(3).
    \item \textsuperscript{303} \textit{Ibid.}, section 16(2).
    \item \textsuperscript{304} \textit{Ibid.}, at section 16(6).
\end{itemize}
Public education and outreach relating to human rights in Nunavut is provided through a separate body under the *Legal Services Act*.\textsuperscript{306}

In conclusion, the direct access approach to enforcement is primarily characterized by the direct filing of human rights claims with an adjudicative body. Correspondingly, in some models, and in particular in the two jurisdictions discussed above, it is also characterized by the absence of a human rights commission, with the adjudicative body being solely responsible for the administration and management of claims from intake to hearing. Based on these common features, the upcoming section delineates an operational definition of the direct access model for the purposes of the analysis/critique in Chapters III and IV.

\textbf{2.2.9 Operational Definition of the Direct Access Model}

In view of the above common features of a direct access approach to enforcement, the operational definition of the Direct Access Model that is used in this thesis is:

\ \textsuperscript{305} \textit{Ibid}, at section 17(1).
\textsuperscript{306} \textit{Ibid.}, section 49(2).
a human rights enforcement model in which an adjudicative body is solely responsible for the intake, administration and adjudication of all human rights claims throughout the enforcement process. As an additional feature, it may have a commission which is involved in educational and preventative initiatives.\textsuperscript{307}

Having looked at the two models of human rights enforcement in Canada and set out operational definitions with respect to both, the following section delineates the criteria for assessing enforcement processes, procedures, and mechanisms under each model in relation to systemic discrimination.

2.3 Criteria for Assessing Effective Enforcement of the Public Interest in Systemic Discrimination

2.3.1 Discrimination

Human rights commentators, including interviewees, frequently identify several common indicators of effective human rights enforcement, in addressing the public interest in systemic discrimination enforcement. I have consolidated these indicators into four major criteria.\textsuperscript{308}

\textsuperscript{307} This was a proposed feature in the \textit{La Forest Report, supra n. 10}. To this date, no direct access jurisdictions have this feature.

\textsuperscript{308} In my view the delineated indicators are broadly representative of the indicators commonly identified by commentators. However, they may differ in form in the sense that I have created broad categories which encompass several indicators such as timeliness or expeditiousness and legal representation into a discussion of particular criterion such as the criterion of fairness, efficiency and effectiveness. See for example, Black, \textit{Black Report, supra n. 16} which identifies criterion such as "Setting Priorities and Controlling Resources" at 4, which is discussed in terms of access and efficiency criteria in Chapter III, or "Monitoring Patterns of Inequality" at 6, which is
The criteria discussed below in relation to systemic claims are also criteria that apply to the effective enforcement of non-systemic claims. However, in many cases the nature and the degree of the impact of systemic claims differs significantly from predominately non-systemic claims. An overview of the criteria and discussions regarding the connection to systemic claims are set out below, while the rationale around the choice of each criterion, and particular implications for systemic claims, is delineated in-depth in Chapters III and IV. Similarly, the potential for conflict within the criteria themselves is discussed generally below, and more specifically in upcoming chapters.\(^{309}\)

1. Accessibility

A major criterion for effective human rights enforcement in relation to systemic discrimination commonly identified by human rights commentators is the need to provide effective access to enforcement structures and processes.\(^{310}\) As discussed in the next chapter, this is especially critical for systemic claimants due to several factors including the inherent potential for major power imbalances between parties that makes it particularly difficult for claimants to bring and

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\(^{309}\) Black, *Equity Systemic Approach*, supra n. 74, in identifying criteria impacting systemic claims also notes the potential for conflict in various criteria at 176-177.

\(^{310}\) Black, *Black Report*, supra n. 16 at 29; *La Forest*, supra n. 10, generally; also generally, Birenbaum and Porter, *Right to Adjudication*, supra n. 288.
maintain such claims.\textsuperscript{311} The criterion of accessibility relates to geographical accessibility, access to appropriate information regarding human rights and the claims process, and determination of eligibility to file systemic claims. Further, such information must be not only linguistically and culturally appropriate, but also written in plain language aimed at a basis comprehension level. Another critical aspect that will be discussed later in the analysis/critique of the enforcement models is the issue of 'stake holder' access and input, particularly community groups in terms of opportunities to participate in systemic cases, and to become involved in the prevention of systemic discrimination.

Interviewees also identified accessibility as a key factor in systemic cases, identifying for instance, the importance of anyone being able to file a claim on behalf of another person.\textsuperscript{312} Other interviewees spoke of accessibility being dependent on the critical need for legal assistance in terms of claimants being able to bring systemic claims forward and maintain such claims.\textsuperscript{313} Interviewees also identified the issue of costs in human rights cases as an access issue, specifically, that the fact that costs are not awarded as a matter of course in applications and hearings, was critical to claimant access to the enforcement process.\textsuperscript{314}

\textsuperscript{312} April 12, 2005, Interview (2), supra n. 167.
\textsuperscript{313} For example, May 5, 2005, Interviewee, supra n. 178; April 7, 2005 Interviewee, supra n. 163; April 13, 2005, Interviewee, supra n. 162.
\textsuperscript{314} For example, May 5, 2005, Interviewee, \textit{ibid}.
2. **Fairness, Effectiveness, and Efficiency**

The next criterion encompasses three interrelated aspects, which as discussed later in the analysis/critique stage of the thesis, have the potential for conflict depending on underlying approaches and values.\(^{315}\) The issue of fairness informs all aspects of the enforcement process. Fairness in the enforcement process includes the need for enforcement processes ‘to be both seen to be, and to actually be’ fair, including in the handling and outcome of claims. In short, both claimants, respondents, and the public in general must have confidence in the whole enforcement system, including a sense that the enforcement system provides an opportunity for claims to be heard and to be fairly judged.\(^{316}\) The issue of fairness is particularly relevant to systemic claimants due to the vulnerability of disadvantaged groups stemming from barriers to bringing forward and successfully maintaining claims. A sense that the enforcement system is fair is also crucial to systemic claims in particular in the effective enforcement of systemic remedies.\(^{317}\) Finally, it is generally agreed that the more effective an enforcement system, the more likely it is to be viewed as being fair.\(^{318}\)

Several interviewees also referred to fairness as a key criterion in effectively addressing the public interest in systemic discrimination particularly, interviewees

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\(^{315}\) In *Equity Systemic Approach*, supra n. 74 at 176-177. Black discusses the potential for conflict for example, in relation to the goal of effectiveness and efficiency, stating that cases with the potential for the most benefit are likely to be more costly.


\(^{317}\) See for example, *Black*, *ibid.*, at 13, Black, *Equity Systemic Approach*, supra n. 74 at 175.

\(^{318}\) See for example, *Cornish Report*, supra n 7, regarding the widespread lack of confidence in the previous human rights system in Ontario, and the *Black Report*, supra n. 16 generally regarding the previous situation in British Columbia, and generally, Lovett and Westmacott, *Human Rights Review*, supra n. 15.
who engaged exclusively in respondent representation.\textsuperscript{319} Specifically, one of
the respondent counsel suggested that indicators of fairness and effectiveness
include ensuring that legitimate claims proceed while those that are not legitimate
are weeded out.\textsuperscript{320}

The next aspect of this criterion, effectiveness, relates mainly to the outcomes of
enforcement including the ability to achieve underlying purposes of human rights
legislation. A specific aspect of effectiveness that particularly applies to systemic
claims is the need to provide effective enforceable remedies aimed at eliminating
persistent patterns for disadvantaged groups.\textsuperscript{321} The provision of systemic
outcomes including appropriate enforceable remedies was also identified by
interviewees as critical to the effective enforcement of systemic discrimination.\textsuperscript{322}

As with fairness, the effectiveness of an enforcement process is informed by the
issue of efficiency. This relates to the ability of the enforcement system to
address claims in a timely and effective manner. The issue of timeliness in
addressing claims is frequently stated to be one of the most important elements
in effective enforcement.\textsuperscript{323} Timeliness refers to the length of time in processing
of claims, investigation/disclosure, hearing of interim and final matters, and the
time involved in obtaining effective remedies, factors which are particularly critical
in addressing systemic claims in view of the potential broad impact of such

\textsuperscript{319} See for example, April 12, 2005, Interviewee (1), supra n. 173.
\textsuperscript{320} Ibid.
\textsuperscript{321} Black, \textit{Black Report}, supra n. 16, at 29-30; Black, Equality Systemic Approach, \textit{supra} n. 74 at
170, and Cornish Report, \textit{supra} n. 7 at 144-148.
\textsuperscript{322} March 23, 2005, Interviewee (2), supra n. 16; April 7, 2005, Interviewee, \textit{supra} n. 163
323 Black, \textit{Black Report}, \textit{Ibid.} at 13, and 29-30; Cornish Report, \textit{supra} n. 7, generally, and
particularly at 86-87; and Lovett and Westmacott, \textit{Human Rights Review}, \textit{supra} n. 15, generally
claims and similarly, the degree of harm that occurs during the time that such claims are left unaddressed. Interviewees also identified timeliness as being critical to the enforcement of systemic claims, both in terms of providing time limits within the claims process in order to avoid undue delay and also in providing adequate time within enforcement processes to adequately address the complexities inherent in systemic claims.

Efficiency also refers to the cost effective utilization of public resources, both in terms of the direct handling of claims and also in terms of the assessment of the cost versus benefit in broader preventative measures. Effective use of resources was also raised by interviewees, in particular, the need to address systemic discrimination claims in a cost effective manner that takes into account the public interest in the use of resources.

Based on the literature, efficiency also refers to the co-ordination of the delivery of comprehensive and coherent human rights enforcement in order to maximize desired outcomes in relation to resources expended in addressing systemic claims. The importance of a comprehensive approach to addressing systemic

325 April 4, 2005, Interviewee, supra n.; also May 5, 2005, Interviewee, supra n. 178.
326 Black, Equity Systemic Approach, supra n. 74, generally and particularly at 169-170; Cornish Report, supra n. 7, generally, and particularly at 86-87.
327 April 18, 2005, Interviewee, supra n. 167; March 23, 2005, Interviewee, supra n. 16; April 1, 2005, Interviewee, supra n. 163.
328 See for example, CHRA 2003 Annual Report, supra n.12 at 55.
discrimination was raised by several interviewees.\textsuperscript{329}

3. Adequacy of Resources

There are several aspects to the criterion of the provision of adequate resources. In particular it relates to a central theme in human rights commentary, which is the need for the provision of adequate and effective legal assistance to claimants in order to fulfill underlying public interest objectives in addressing systemic discrimination.\textsuperscript{330} As discussed above in relation to access, legal assistance includes assistance in accessing information regarding entitlement, in navigating the enforcement process, and gaining access to dispute resolution and adjudicative processes.\textsuperscript{331} The provision of legal assistance is a particularly critical requirement in respect of systemic claims for several reasons that will be elaborated on in Chapters III and IV. It is important to point out at this juncture however, that one of the main reasons legal assistance is critical in such claims is the inherent procedural and substantive complexity, as frequently reflected in the sheer magnitude of the material to be addressed in systemic claims, as well as the vulnerabilities typical of systemic claimants. All of these factors make it extremely unlikely that claimants will be able to bring forward, and/or sustain systemic claims without legal assistance. As discussed above in relation to

\textsuperscript{329} See for example, April 1, 2005, Interviewee, supra n. 163; April 7, 2005, Interviewee, supra n. 163; and April 12, 2005 (2) Interviewee, supra, n.167.

\textsuperscript{330} Department of Justice Canada, Day and Brodsky, Screening and Carriage, supra n. 197 at 1.

\textsuperscript{331} Black, Black Report, supra n. 16, generally; La Forest Report, supra n. 10, generally, and at 74-76; Cornish Report, supra n. 7, generally, and at 86.
access, legal assistance was also identified by interviewees as being critical to addressing systemic claims.  

Finally, the need for the overall provision of adequate funding for resources such as adequate staffing levels in the enforcement process, and educational and preventive programs in order to effectively address systemic discrimination represents a major reoccurring theme in human rights commentary. The need for adequate resources spanning the entire human rights process from the community level for prevention and intervention in human rights cases, to the tribunal level in the adjudication of claims, was also commented on by interviewees who identified adequacy of resources as being central to effectively addressing systemic discrimination.

4. Pro-activity

This criterion relates to the public interest in proactively addressing persistent patterns of discrimination and inequality for non-dominant groups. A prospective approach to addressing systemic discrimination is seen in initiatives such as public information and education, research, monitoring of patterns of

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332 For example, April 7, 2005, Interviewee, supra n. 163; April 4, 2005, Interviewee, supra n. 243; April 13, 2005 Interviewee, supra n. 162.
333 See La Forest Report, supra n. 10 at 149; and Canada, Parliament, Senate, Standing Senate Committee on Human Rights, Promises, supra n. 13.
334 For example, March 23, 2005, Interviewee (2), supra n. 163, April 7 Interviewee, supra n. 163.
discrimination, and implementation of equity based initiatives.\textsuperscript{335} Several interviewees emphasized that in order to effectively address systemic discrimination it is critical that human rights enforcement be proactive, flexible, multi-faceted and based on a contextual approach founded on the view that to some degree all discrimination is systemic. Further, in order to be effective, initiatives aimed at addressing systemic discrimination must be comprehensive and multi-faceted, including strategies such as research, education, and equity based programs.\textsuperscript{336}

The literature suggests that the public interest in effective enforcement also requires that enforcement structures be independent from government and

\textsuperscript{335} Abella Report, supra n. 1, generally; Black, Black Report, supra n. 16, generally and at 29-31; Black, Equity Systemic Approach, supra n. 74. In my view, ideally an assessment of effectiveness should go beyond enforcement measures to include assessing outcomes for disadvantaged groups, such as employment equity measures which provide for increased representation rates in employment. However, there continues to be difficulties associated with obtaining and accurately measuring under representation of disadvantaged groups. While such data is increasingly available in some sectors of employment such as government, it is not readily available in other employment settings such as private, non-traditional employment settings. Where such data is available, accurately interpreting the data can be difficult. For example, in a situation where there are a low number of female applicants applying for a non-traditional position, several factors may account for the low numbers including problems with recruitment methods, a general lack of training or work experience which keeps women from applying, or the position may be generally unappealing to women. Additionally, the low number of applicants may be attributable to a combination of all of the above factors, or due to totally unrelated factors not captured by the data. Finally, commentators such as Carol Agocs, Department of Political Science, University of Western Ontario, Harish Jain, Michael G. DeGroote School of Business McMaster University, Systemic Racism in Employment in Canada: Diagnosing Systemic Racism in Organizational Culture (Toronto: The Canadian Race Relations Foundation, CRRF, July 2001) at 2-3 \textsuperscript{[Systemic Racism]}, suggest in the context of discussing racial discrimination, that assessment of quantitative outcomes alone are insufficient due to the fact that low numbers of disadvantage groups are often the symptom rather than the cause of systemic discrimination. Alternatively, that qualitative analysis, for example an assessment of attitudes, is also required in order to measure employment systems and organizational cultures in effectively addressing systemic discrimination.

\textsuperscript{336} March 23, 2005, Interviewee (1), supra n. 163; also April 12, 2005, (2) Interviewee, supra n. 167; and April 13, 2005 Interviewee, supra n.162.
impartial in decision making.\textsuperscript{337} Further, there needs to be mechanisms to ensure accountability to government for the expenditure of public funds, and generally, to human rights stakeholders, including respondents. Several interviewees discussed their view that effective enforcement included the need for human rights enforcement bodies to be independent from government, and also to be accountable. These interviewees indicated that public accountability involves the transparency of policies and procedures, the involvement of claimants and respondents and other stakeholders in assessing the effectiveness of the enforcement system. They also suggested that it involved accountability to government and to taxpayers around the expenditure of public funds in the enforcement process.\textsuperscript{338} Interviewees also suggested that public accountability is essential in being able to effectively carry out initiatives aimed at addressing systemic discrimination such as monitoring and reporting on patterns of discrimination.\textsuperscript{339}

In conclusion, four criteria have been identified as central to an assessment of the effectiveness of human rights enforcement in addressing systemic discrimination and will be used in the analysis/critique in Chapters III and IV:

1.) accessibility;

2.) fairness, effectiveness, and efficiency;

\textsuperscript{337} CHRC, 2003 Annual Report, supra n.12 at 54-55 and generally.
\textsuperscript{338} See for example, April 4, 2005, Interviewee, supra n. 243; also, April 5, 2005 Interviewee, supra n. 178.
\textsuperscript{339} April 4, 2005, Interviewee, ibid.; also, April 7, 2005, Interviewee, supra n. 163; April 12, 2005, Interviewee (2), supra n. 167; and April 13, 2005, Interviewee, supra n. 162.
3.) adequacy of resources; and,
4.) pro-activity.
CHAPTER III ANALYSIS AND CRITIQUE OF THE MODELS IN EFFECTIVELY ADDRESSING SYSTEMIC DISCRIMINATION

This chapter applies the conceptual framework and the analytical tools developed in the previous chapters in the analysis/critique of the two enforcement models: the Commission Model and the Direct Access Model. The two delineated Models are based on an operational definition articulated in Chapter II, and reiterated below. The analysis/critique draws on various sources: human rights and other legislation, human rights case law and literature, the thesis interviews, and my own observations. The enforcement criteria developed in Chapter II, which is also reiterated below, are utilized to assess processes, procedures, and mechanisms, directly attributable to differences in the two Models, in order to identify strengths, weaknesses and gaps in addressing systemic discrimination. Recommendations are made for addressing identified gaps in the Direct Access Model, specifically, in respect of direct access enforcement in British Columbia. Chapter IV addresses provisions that although not directly attributable to intrinsic differences in the two Models, have major implications for effectively addressing systemic discrimination. The division between the areas discussed in the two chapters is not absolute, but rather a matter of emphasis, and a consequently, acts primarily as a means of distinguishing between those features that operate differently under the two Models from those that are primarily do not, for the purposes of analysis.
Eight areas were identified as being critical to systemic claims and which predominately relate to differences between the two Models:

1) preliminary information and assistance; 2) standing to file claims; 3) intervenors; 4) case management; 5) investigation/disclosure; 6) settlement: generally, and specifically, the public interest in settlement and in settlement information; 7) monitoring and enforcement of systemic remedies: in settlement agreements and hearing orders; 8) special/equitable programs.

The provision of legal assistance to claimants will be discussed throughout the analysis/critique due to the interconnection between legal assistance and each area, as well as the overall importance of the topic.

The discussion of each of the above areas begins with a summary of the rationale behind the focus on the issue at hand, followed by a description of the applicable processes, procedures, and mechanisms available under each Model, and proceeds to the analysis/critique of both Models based on the delineated assessment criteria, in order to assess strengths, weaknesses, and gaps in each Model in effectively addressing systemic discrimination. The discussion concludes with a summary of the analysis/critique and recommendations for addressing identified gaps under the Direct Access Model.
Prior to beginning the discussion it is important to reiterate the operational definitions and the assessment criteria identified in Chapter II which are utilized in the analysis/critique.

1. Systemic Discrimination and the Public Interest

Systemic discrimination arises from day to day practices and policies which, although often facially neutral, are discriminatory in their effect on excluded groups in society. While systemic discrimination is typically unintentional, subtle in nature, and difficult to detect, it is often informed and reinforced by overt intentionally discriminatory attitudes. Systemic discrimination is generally seen in broad patterns of discriminatory conduct which have detrimental effects on excluded groups due to shared actual or perceived characteristics as opposed to isolated instances which primarily affect individuals. While individuals can bring systemic claims, they are often brought by, or on behalf of, groups. The required method of proof around systemic discrimination is broader and more complex than that which is required in pre-dominantly non-systemic discrimination claims. Remedies for addressing systemic discrimination are prospective, and generally, broad and aimed primarily at groups as opposed to being personal in nature and aimed at individual interests in addressing past discrimination. Systemic discrimination is multi-faceted, with the potential for grounds to overlap, compound, and intersect.

Finally, there is an inherent public interest in addressing systemic discrimination due to its implications for fulfillment of the obligation of a democratic society, extending beyond individual interests, to take into account collective interests in attaining substantive equality for all citizens.

2. The Commission Model

A human rights enforcement model in which a human rights commission, independent from government, is statutorily empowered by human rights legislation to fulfill the dual mandate of: 1.) administering and enforcing the
claims process through investigation, dismissal, or referral of claims to hearing, and through settlement of claims through mediation and other dispute resolution processes; 2.) promotion of awareness and respect for human rights through public education and through preventive initiatives such as special and equitable programs. An additional central feature is an independent, quasi-judicial body operating on either an ad hoc or permanent basis, which adjudicates claims referred by the commission.

3. The Direct Access Model

A human rights enforcement model in which an adjudicative body is solely responsible for the intake, administration and adjudication of all human rights claims throughout the enforcement process.

As an additional structural feature it may also include a commission whose mandate is limited to involvement in educational and preventative initiatives. 340

The analysis/critique of the above models is informed by a focus on the enforcement systems in place in five major Canadian jurisdictions with occasional reference to other jurisdictions. In respect of the Commission Model the focus is on the Federal human rights enforcement regime, the Ontario human rights enforcement regime, and the British Columbia human rights enforcement regime, under the former commission based model. In respect of the Direct Access Model, the focus is on the current British Columbia enforcement model and the Nunavut enforcement model.

340 This was a proposed feature in the La Forest Report, supra n. 10. However, to date, no direct access jurisdictions include this feature.
The four assessment criteria previously identified in Chapter II which will be used in the analysis/critique are:

1. accessibility
2. fairness, effectiveness, and efficiency
3. adequacy of resources
4. pro-activity

As previously discussed, while the above criteria could be utilized to assess the effectiveness of addressing discrimination in general, and while all claims have systemic aspects, the focus will be on those claims that are predominately systemic.

3.1 Preliminary Information and Assistance

3.1.1 Rationale

Preliminary information and assistance refers to processes, procedures, and mechanisms in place to inform and assist claimants with information about their substantive rights and the claims process prior to filing a claim. Specifically, it includes information regarding whether a right to file a claim exists and related factors such as limitation periods and information and assistance in drafting a claim.
Preliminary or pre-claim information and assistance is of critical importance in terms of filing and sustaining systemic claims. While the issue of pre-claim information and assistance is primarily one of access, it also implicates other assessment criteria such as fairness, adequacy of resources, pro-activity and accountability, which as discussed in Chapter II, are critical to effective enforcement of systemic claims. Each of these criteria will be discussed in the analysis/critique following the upcoming comparison/contrast overview of pre-claim processes and procedures under the two enforcement Models.

3.2 Overview of Applicable Processes, Procedures, and Mechanisms

3.2.1 Preliminary Information and Assistance - The Commission Model

As part of their statutory mandate, all Canadian human rights commissions are obligated to produce and distribute information regarding human rights legislation and enforcement processes. For example, section 27(1) (a) of the Canadian Human Rights Act states that the Canadian Human Rights Commission “shall develop and conduct information programs to foster public understanding of this Act and of the role and the activities of the Commission...” Similarly, section 29(b) of the Ontario Human Rights Code states that one of the Commission’s

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341 CHRA, supra n. 256 at section 27(1)(a).
functions is to "... (b) promote an understanding and acceptance of and compliance with this Act."\(^{342}\)

Based on their statutory obligations for the provision of information and pre-claim assistance, human rights commissions produce and disseminate information in various formats such as informational pamphlets about what constitutes a claim and about the claims process. This information is disseminated through a variety of means including on an in-person basis, and in a variety of formats, including electronic text, large print or audio formats for the visually impaired and blind, and in a number of languages.\(^{343}\) Additional sources of commission based information include commission annual reports,\(^{344}\) the publication of the details of commission settlements in many commission based jurisdictions,\(^{345}\) and the publication of human rights decisions on human rights tribunal websites.\(^{346}\)

As well, all human rights commissions have offices where claimants and respondents can either call or attend in-person to obtain information regarding their rights and the enforcement process, with some commissions such as the Canadian Human Rights Commission and the Ontario Human Rights Commission having several regional offices. Pre-claim services offered by

\(^{342}\) OHRC, supra n. 267 at section 29(b).

\(^{343}\) See for example, Ontario Human Rights Commission, Guide to the Human Rights Code (Toronto: Ontario Human Rights Commission, May 1999). Further, the publications are provided either in hard copy or online, in a wide variety of languages including Bengali, Chinese, Gujarati, Punjabi, Somali, and Tagalog.


\(^{345}\) See for example, Canadian Human Rights Commission, Online: http://www.chrc.ca (last accessed December 2004).

\(^{346}\) See for example, Ontario Human Rights Commission, Online: http://www.ohrc.on.ca.
commission staff include providing information about human rights entitlements and obligations to both claimants and respondents, assessment of whether claims are within the jurisdiction of the applicable human rights legislation, assistance in drafting claims, and in some cases, referral to other resources.\textsuperscript{347}

Increasingly as a means of maximizing resources, many Canadian human rights commissions have developed outreach programs in partnership with community organizations designed to provide information regarding human rights entitlements and the claims process to disadvantaged groups. For example, the Ontario Human Rights Commission has established an Aboriginal Human Rights Program which involves a partnership with community based Aboriginal organizations. The program includes a human rights liaison officer who provides information regarding substantive rights and enforcement processes and procedures on an outreach basis to the community.\textsuperscript{348}

The British Columbia Human Rights Commission also created partnerships with community groups. The purpose of community partnerships was to increase awareness of human rights entitlements, provide non-profit groups with information and skills relating to statutory entitlements and the claims process, and foster community expertise in assisting claimants in filing claims.\textsuperscript{349} The


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Commission also implemented broader community initiatives, including establishing a designated telephone line and a human rights officer employer advisor position as a resource for employers and service providers to obtain information about human rights obligations.\textsuperscript{350}

The provisions of legal assistance to claimants in most commission based jurisdictions is provided on a tariff basis through arrangements with legal aid societies who either contract with the private bar, or rely on staff lawyers to provide representation. For example, the former British Columbia Human Rights Commission had arrangement with the Legal Services Society of British Columbia, who in turn contracted with the private bar on a tariff basis for legal representation of claimants.\textsuperscript{351}

\textbf{3.2.2 Preliminary Information and Legal Assistance - The Direct Access Model}

As a result of the 2002 amendments to the \textit{Human Rights Code}\textsuperscript{352} statutory responsibility for information programs was transferred from the British Columbia Human Rights Commission to the Ministry of Attorney General.\textsuperscript{353} General human rights information is provided by the Ministry of Attorney General on the Ministry’s website. Additionally, various human rights publications produced by

\textsuperscript{350} \textit{Ibid.}
\textsuperscript{351} The Continuing Legal Education Society of British Columbia, Mary-Woo Sims, \textit{supra} n. 277.
\textsuperscript{352} \textit{Bill 64}, \textit{supra} n. 23.
\textsuperscript{353} \textit{Code} as amended, \textit{supra} n. 131, at section 5.
the Ministry are available through Government Agent offices across British Columbia.\textsuperscript{354}

Although not statutorily mandated to do so, the British Columbia Human Rights Tribunal which is responsible for the administration and adjudication of claims, produces and distributes information aimed at assisting the public in understanding the Tribunal process. This information includes guides and information sheets on topics such as human rights legislation and the complaint process. The publications are available on the Tribunal website and by mail, or in-person at the Tribunal. The Tribunal also provides information on its website regarding specific practices and procedures of the Tribunal such as applying for intervenor status.\textsuperscript{355}

Provisions for various forms of public information regarding the claims process are seen under the British Columbia Human Rights Tribunal, \textit{Rules of Practice and Procedure},\textsuperscript{356} including publication of pleadings in claims, at various stages of the enforcement process on the Tribunal website.\textsuperscript{357} The Tribunal also publishes all final decisions on the website including unreported decisions, and


\textsuperscript{355} \textit{ibid.}


\textsuperscript{357} See for example, \textit{ibid.}, at Rule 6 (1)(2), providing for public disclosure of various aspects of case files at various stages, including in subsection 3, where a claim has not settled within three months of the hearing.
Judicial Review applications.\textsuperscript{358} Tribunal hearings are open to the public, subject to applications for in-camera hearings.\textsuperscript{359} A further source of information regarding the claims process is found in the Tribunal's annual report which includes statistical information on the types and numbers of cases processed by the Tribunal.\textsuperscript{360} Finally, the Tribunal has inquiry officers who provide preliminary information regarding statutory protections and the claim process.\textsuperscript{361} The officers do not provide legal advice but rather refer inquiries regarding legal matters to the Human Rights Clinic and other resources. Case managers, who are responsible for administrating timelines and other case management processes, also provide information on the claims process, and referral to other resources.

The British Columbia Human Rights Clinic, which provides legal representation to claimants, is the result of a contractual agreement between the Ministry of Attorney General, and the British Columbia Human Rights Coalition\textsuperscript{362} and the Community Legal Assistance Society.\textsuperscript{363} The Community Legal Assistance

\textsuperscript{358} BCHRT 2003/04 Annual Report, supra n. 354 at 5.  
\textsuperscript{359} BCHRT Rules, supra n. 356 at Rule 35(3). The case of Krantz v. Sojourn Housing Cooperative, 2004 BCHRT 14, suggests that the potential exceptions are narrow.  
\textsuperscript{360} See B.C. Human Rights Coalition News from B.C. Human Rights Coalition, Volume 1, October 2004. Online: www.bchrcoalition.org (last access June 2005) at 1, while the Tribunal has a statutory obligation under the Code, as amended, to file a report with the Attorney General on an annual basis, unlike the reporting provisions under the Commission Model, there are no reporting specifications on the content of the Tribunal Annual Report. For example, as noted by the B.C. Human Rights Coalition, the Tribunal's first annual report did not contain information about the grounds of claims accepted by the Tribunal. I also note that it did not provide information about the number and types of Special Programs registered with the Tribunal. The absence of this type of information may have been due to the fact that the Tribunal had recently started operation under the Direct Access Model at the time of the report. The next annual report which I am advised will be forthcoming in September 2005, may provide more extensive information.  
\textsuperscript{361} BCHRT 2003/04 Annual Report, supra n. 354 at 7.  
\textsuperscript{362} [Coalition]  
\textsuperscript{363} CBA Minutes October 30/02 supra n. 293. Also, Community Legal Assistance Society [CLAS] collectively, Coalition and CLAS [Human Rights Clinic].
Society provides legal representation to claimants, including litigation services, while the Coalition provides settlement services to claimants prior to hearing.\(^{364}\)

Funding for the Human Rights Clinic is provided through the Ministry of Attorney General.

Under the Human Rights Clinic contract with the Ministry of Attorney General, the Coalition provides human rights education to various community and government organizations. As part of its educational mandate, the Coalition produces pamphlets, guides and other material on human rights entitlements and responsibilities. Additionally, the Coalition has a website which provides access to human rights information.\(^{365}\) A further informational service is a toll free telephone line for claimants, staffed by individuals who are trained to provide preliminary information and assessment on human rights claims, and also referral to other sources of assistance, when claims are found to fall outside of the human rights enforcement process.\(^{366}\) Finally, the Coalition currently provides pre-claim human rights information and assistance to claimants by way of the Short-Service Clinic, on a voluntary basis, in order to assist with the Tribunal's intake.\(^{367}\)

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\(^{364}\) *CBA Minutes, ibid.,* at 2.


\(^{366}\) See for example, *ibid.,* at 8.

\(^{367}\) *Ibid.,* at tab 2; The Community Legal Assistance Society was initially involved in the Short Service Pilot Clinic, however, due to resource limitations, it had discontinue its involvement. See *Community Legal Assistance Society Annual Report, April 1, 2003 – March 31, 2004* (Vancouver: Community Legal Assistance Society, 2004).
A further source of pre-claim human rights information under the Direct Access Model in British Columbia is through the Law Centre Human Rights Clinic; a program of the Law Centre Clinical Law Program, which is a service of the University of Victoria, Faculty of Law. The Law Centre Human Rights Clinic provides assistance to financially eligible claimants from the Capital Regional District requiring assistance in filing human rights claims. Assistance is also provided to respondents to human rights claims requiring information and assistance who meet pre-determined financial eligibility qualifications.\footnote{168 The Law Centre Human Rights Clinic, University of Victoria. Online: http://thelawcentre.ca/rights.html (last accessed April 2005) at 1-2.}

As discussed in Chapter II, the direct access approach to enforcement in Nunavut is still in the developmental phase, including in relation to information on human rights enforcement. For example, the Nunavut Tribunal does not yet have a website. Some provisions in the \textit{Human Rights Act}, relating to access to pre-claim information allow any person to make a request to the Tribunal to inspect or have a copy of any decision or order made by the Tribunal.\footnote{369 \textit{NHRA}, supra n. 298 at section 37.} Public education and outreach, presumably including pre-claim information, is provided through Nunavut Legal Services, which is mandated to provide public education and outreach with respect to human rights.\footnote{370 \textit{NHRA}, \textit{ibid.}, at section 49(2).}
3.2.3 Analysis/Critique

The issue of access to pre-claim information and assistance raises access related considerations about the type, format, and delivery of available information and legal assistance in light of social and economic barriers faced by systemic claimants.

The type of information provided under both the Commission and Direct Access Model, is very similar in terms of providing information about statutory rights in addition to information about the claims process. It is beyond the scope of this discussion to assess the adequacy of the content of the information provided, except to point out that, as discussed previously in relation to disadvantaged groups, many claimants who experience systemic discrimination lack formal education, and have significant cultural differences from dominant groups, including backgrounds where English is a secondary language. As a result of these barriers, the comprehension level of written and audio material is likely to be at more basic level than average for some claimants. Additionally, language and comprehension barriers are likely to compound other types of barriers typically experienced by systemic claimants, such as emotional and physical barriers and general distrust of institutions. In order for information to be accessible to systemic claimants from disadvantaged groups, human rights information must be in a plain language format aimed at basic comprehension levels.
Comparing the format of the information available under both Models, it would appear that the Commission Model offers a wider variety of accessible information in a variety of formats, arising from an explicit statutory mandate to provide such information. For example, under section 5 of the Code, the Chief Commissioner of the British Columbia Human Rights Commission was mandated to develop and conduct a program of education and information designed to promote an understanding of the Code. Section 3 of the Code, which set out the purposes of the legislation, stated in subsection (g) that one of the purposes was the creation of mechanisms for providing, \textit{inter alia}, human rights related information. In fulfillment of this mandate the Commission produced a number of publications about the role of the Commission and the claims process in a variety of formats accessible to persons with disabilities, including for example, large print and audio.

In contrast, the Direct Access Model appears to lack material in barrier free formats, a gap which poses significant limitations for persons with disabilities in accessing information regarding entitlements and the claims process, particularly on an independent basis, an access consideration which is likely to be critical for most claimants regardless of abilities. A related concern is that primary access to Tribunal materials is through the internet. While many public libraries provide

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\begin{itemize}
\item \textit{supra} n. 246 at section 5.
\item \textit{ibid.}, at section 3.
\item \textit{ibid.}, at section 3(g).
\end{itemize}
}
free internet access, that is not the case in all communities, particularly rural ones. Additionally, in my experience many people for whom English is a second language, and/or who lack formal education, are often very reluctant to use the internet, even with assistance.

The Commission Model also offers informational materials in a wider variety of languages than is currently offered under the Direct Access Model. Limitation in access to materials in other languages has the potential to impede persons from other countries of origin from accessing human rights material and potentially from bringing forward systemic claims. As suggested by an interviewee, and based on the literature and my own experience working with immigrant women, immigrants, particularly immigrant women, are least likely to see themselves as having legal entitlements. Immigrants are also more likely than non-immigrants to fear institutional reprisal and other types of consequences for making claims, in contrast to persons who are non-immigrants. A lack of culturally and linguistically accessible material potentially compounds these pre-existing barriers by further deterring claimants from disadvantaged groups in coming forward with systemic claims.

The weakness in the Direct Access Model in the lack of available, accessible material is likely attributable in part to the relative newness of processes,

375 See for example, ibid.
376 April 12, 2005, Interviewee (2) at supra n. 167.
377 My experience working with domestic workers is that many women fear that their immigration status will be jeopardized by coming forward with legal claims, a concern that has basis in foundation, particularly where claims are against employers.
procedures and mechanisms under the Direct Access Model in British Columbia compared to those available under the Commission Model. In my view however, the perceivable gap in accessibility in the availability of material in accessible formats also relates to an issue of accountability, as will be discussed further below in relation to legal assistance. It is attributable in part to a lack of statutory mandate for any one organization or body to take responsibility for the development and coordination of human rights information under the Direct Access Model in British Columbia, or similarly to put forward the public interest in human rights.

As previously discussed, the British Columbia Human Rights Tribunal provides information focused on tribunal processes, while the remainder of available information regarding substantive rights and obligations comes from the Ministry of Attorney General and the British Columbia Human Rights Coalition in its capacity as the educational arm of the Human Rights Clinic, as well in its role as a non-profit human rights organization in its own right. Tribunal involvement in pre-claim information is strictly limited to information about the Tribunal process as opposed to substantive rights. The Tribunal focus on the provision of information on the claims process, as opposed to substantive information regarding accessing rights, is clearly linked to its need to maintain impartiality in light of its role as adjudicator. As will be discussed further in Chapter V, the Ministry of Attorney General involvement in education, and specifically, in
providing information about human rights has been limited.\textsuperscript{378} While the Coalition produces and distributes some pre-claim information, its ability to implement province wide informational initiatives on its own is constrained by a lack of statutory mandate and resource limitations.\textsuperscript{379}

In contrast to the Direct Access Model, under the former Commission Model, the British Columbia Human Rights Commission was statutorily responsible for the provision of human rights information on a province wide basis. By all accounts the Commission was very effective in producing and disseminating a wide variety of information.\textsuperscript{380} This type of coordinated and proactive approach to providing claimants with preliminary human rights information and assistance is missing in the Direct Access Model.

While there is often overlap in the provision of information and legal assistance on a preliminary basis, there are additional components to the provision of legal assistance which require particular discussion. For example, legal assistance often involves assisting claimants not only in understanding their rights, but also in assessing whether or not the facts of their particular situations fall within the applicable human rights legislation. Additional aspects of providing preliminary

\textsuperscript{378} See British Columbia Human Rights Coalition, 2003-2004 The Year in Review B.C. Human Rights Clinic (Vancouver: B.C. Human Rights Coalition, 2004) at 2-3 [The Year in Review] which suggests that the educational initiatives proposed by the government in introducing the Direct Access Model were not forthcoming, for example, in the proposed partnership with the Ministry of Attorney General around the coordination of information and education services.\textsuperscript{379} Ibid., at 3.\textsuperscript{380} See for example, April 7, 2005, Interviewee, supra n. 163, April 12, 2005, Interviewee (2), supra n. 167, and also see various British Columbia Human Rights annual reports.
legal assistance include assistance with drafting claims and reviewing draft statements of particulars prior to filing.

Pre-claim access to legal assistance is critical to claimants who have experienced systemic discrimination. From all accounts, systemic claimants face tremendous barriers in bringing forward systemic claims. This perspective was expressed by at least two interviewees who stated that based on their experience representing systemic claimants, systemic claims require considerable courage and commitment on the part of claimants to bring forward and to sustain due to the complexity of the issues involved, the type and degree of resources required, and the length of time that many systemic cases take to resolve; with often tenuous outcomes.\(^{381}\) They also suggested that the fact that systemic claims often involve well established systems and institutions makes it highly likely that they will be vigorously defended in order to maintain the status quo. As a result, claimants often have to face large numbers of highly motivated legal counsel on the other side.\(^{382}\)

The major strength of the Commission Model in terms of legal assistance appears to be in the statutory based processes, procedures, and mechanisms in place for the provision of pre-claim assistance along with the provision of permanent public funding providing for legal assistance throughout the claims process. Specifically, the fact that commissions provide pre-claim assistance

\(^{381}\) See for example, April 13, 2005, Interviewee, supra n. 162, and May 5, 2005, Interviewee, supra n. 178.

\(^{382}\) Ibid.
through designated staff whose job is to assist claimants in assessing their claims on a pre-claim basis and in drafting claims, represents a significant strength. Additionally, as result of their statutory mandate, and the fact that it is not an adjudicative body, commissions are able to take on a more proactive role in providing both pre-claim information and assistance in regard to entitlements. For example, the structure of the British Columbia Human Rights Commission with the statutory division between the Commissioner of Investigation and Mediation, allowed the Commission to take an active role in providing pre-claim information and assistance, as opposed to being confined to disseminating information about the claims process.\(^\text{383}\)

In contrast, under the Direct Access Model some pre-claim legal assistance is provided by the Human Rights Clinic through telephone contact and through the Short Term Service Clinic. Such assistance, and consequently, access to pre-claim information and assistance, is severely limited by the fact that there is no statutory or even contractual basis for the provision of preliminary legal assistance under Direct Access. The legal assistance provided through the Short-Service Clinic is severely constrained by the fact that it is provided on a provisional voluntary basis, on a drop-in, first come first served basis, one day

\(^{383}\) Section 15(8) of the Code, supra n. 246, contained a prohibition against the Chief Commissioner or the Deputy Chief Commissioner interfering with any exercise of power or duty of the Deputy Chief Commissioner of Investigation and Mediation. Unfortunately this structure did not eliminate perceptions/concerns regarding overlap of the three roles.
The provisional, discretionary, non-statutory status of the Short Term Service Clinic makes the service vulnerable to change at any time.

Many human rights commentators and the majority of interviewees have commented on the private nature of the Direct Access Model. For example, one interviewee compared the claims process under the Direct Access Model to a private process where claims are filed on the basis of individual private disputes, which are adjudicated in a civil chambers style of hearing process.

Some commentators such as Day have specifically expressed concerns about an erosion of the public interest in claims, particularly systemic claims, and the increased pressure on the community and claimants in bringing forward claims under direct access.

The majority of interviewees indicated that the provision of adequately funded legal assistance at all stages of the claims process is critical to the ability of claimants to bring forward and to sustain systemic claims not only due to the complexity of such claims, including the extent of evidentiary burdens, but also because the human rights enforcement process is highly legalistic, complex and

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384 Human Rights Clinic Third Quarterly Report, supra n. 365 at Tab 2.
385 For example, March 23, 2005, (2) Interviewee, supra n. 164, April 1, 2005, Interviewee, supra n. 163, April 7, 2005, Interviewee, supra n. 163, and June 9, 2005, Victoria, British Columbia, lawyer, represented claimants under the British Columbia Commission system, currently representing both claimants and respondents [June 9, 2005, Interviewee].
adversarial. Further, most interviewees and commentators view the provision of legal assistance to claimants as being consistent with the public interest in human rights claims in terms of the acknowledgment that discrimination is not just about individuals or groups but about the values and interests of society as a whole.

In my experience, and consistent with the views of at least one interviewee, one of the practical implications of access to preliminary information and assistance in the assessment of claims relates to the consequences for the proper framing of systemic claims, a factor which has long term consequences for the sustainability of systemic claims. While claimants are frequently aware of the fact that their situation impacts on others, they are often unable for various reasons to articulate systemic issues, particularly in legal terms. While it is possible to amend a claim later in the claims process and while the amendment provisions under the Direct Access Model are broader than under the Commission Model, in reality amendments to claims pose potentially major problems in bringing forward systemic claims. Attempts to amend claims can

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388 April 7, 2005, Interviewee, supra n. 163; May 5, 2005, Interviewee, supra n. 17; see also Braha, ibid., at 45-46.

389 For example, ibid., April 7, 2005, Interviewee, also, Braha, ibid., generally.

390 See White v. Nanaimo Daily News Group Inc., 2004 BCHRT 350 at 5, at para. 23, [White] where the Tribunal comments on the difficulties that the unrepresented claimant, who self identified as being First Nations, appeared to have in his attempt to “navigate” the claims process, particularly the difficulty he had in framing claim. The Tribunal also noted: “[S]ince the introduction of the direct access complaint model, parties before the Tribunal are required to frame their complaints and responses to complaints on their own, without the assistance of the British Columbia Human Rights Commission and often without legal representation.”

391 See the Code, as amended, supra n. 131, section 27.3(2)(j), and BCHRT Rules, supra n. 356 at Rule 25. As noted in Metcalfe v. International Union of Operating Engineers, Local 882, and Others (No. 7), 2005, BCHRT 165 at para. 13, regarding well established case law which holds that the Tribunal has a broad ability to clarify the scope of claims and to make procedural amendments which are consistent with the substance of the claim.
raise time limitation issues, which sometimes result in the systemic issues being dismissed, with the result being that the remaining part of the claim is focused on the most recent single incident, devoid of the contextual pattern of discrimination.

An example of the above outcome can be seen in the hypothetical case of an individual filing a claim on her own. In framing the claim, she focuses on a recent incident involving denial of a management position by her current employer. The claimant alleges that the discrimination was based on race, colour, and place of origin. What she does not mention in her claim is that she has applied on eight different occasions for various management positions within the respondent company; all positions which she was well qualified for, and which were later filled by Caucasians, many with less service years with the company than the claimant. By the time she receives legal advice that the claim should be framed as a systemic claim, a time limitation defense may be raised by the respondent with respect to amending the claim. If the claimant is unsuccessful in amending the claim to add the other incidents of discrimination, the focus of the claim will remain on the most recent single incident of discrimination, as opposed to including the broader systemic pattern of discrimination.

The outcome of poorly framed claims may have a particularly negative impact in cases where the grounds are more difficult to establish such as in race based
systemic claims, resulting in unfair outcomes for some claimants compared to others.  

Looking at the provision of preliminary assistance from an efficiency perspective, it would seem to be more efficient to provide comprehensive assistance to claimants prior to filing the claim than have to expend more extensive resources later to attempt to address deficiencies in the claim. Further, it is important that all systemic claimants have an equal chance at access to the claims process, not just those claimants who possess the necessary skills to fully articulate their claims at the time of filing or who have access to legal assistance prior to filing claims.

The perceived strengths of the Commission Model in terms of efficient and fair access to preliminary legal assistance may however, be more theoretical than practical. For example, over the past few years many commissions such as the Canadian Human Rights Commission and the Ontario Human Rights Commission have increasingly moved towards initiating a self help approach to preliminary access to the claims process. An example is in implementing self-drafting of claims in the majority of cases. A mitigating factor however, is that despite fiscal restraint measures, based on their statutory mandate, commissions

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392 See for example, the Tribunal’s comments in White, supra n. 390 at para. 25, that it is well recognized that due to their nature, racial claims are more difficult to establish than other types of claims; citing inter alia, Naraine v. Ford Motor Co. of Canada (No. 4) (1996), 27 C.H.R.R. D/230 (Ont. Bd. Inq.) at paras. 22-31.

393 See generally for example, OHRC Annual Report 2003/04, supra n. 344.
continue to provide pre-claim assistance to claimants through staff with human rights training and expertise.\textsuperscript{394}

A major strength of the Commission Model despite reduced services is the initiative towards involving community groups and organizations in providing assistance to disadvantaged groups. The benefit of this approach for systemic claims is that it is likely to increase accessibility for claimants in terms of providing culturally and socially appropriate access to claimants in their own communities, in addition to empowering the community as a whole with further knowledge regarding systemic claims. It also meets the criterion of pro-activity in that rather than waiting for claimants to approach the institution for information and assistance regarding claims, the community is approached with training and resources in order to proactively support claimants in a way that is consistent with community values and norms. This process is also efficient in terms of addressing the dual goals of access to information and assistance, and mechanisms for prevention of discrimination by creating awareness of human rights responsibilities and entitlements at the community level, and potentially leading to informed dialogue, at the community level, before problems result in formal claims. As discussed by one interviewee and reiterated by human rights commentators, it is essential, especially in light of significant demands for services and recent major funding constraints experienced by most community groups in British Columbia, that adequate resources be provided to participating

\textsuperscript{394} See for example, ibid., at 3, which states that in the fiscal year 2003-2004, Commission staff sent out 4,847 intake packages and received 2,709 completed packages in return.
groups and organizations. This issue will be discussed further in relation to the issue of intervenors.

One other strength of the Commission Model, compared to the Direct Access Model in relation to pre-claim information and assistance, is the provision for commissions to initiate claims. While this provision will be discussed in-depth below, it is worth noting at this juncture, that it represents a strength in addressing a particularly important pre-claim issue often encountered by systemic claimants; which is the difficulty in accessing enough evidence to bring forward a systemic claim. The option of a commission initiated claim, given commission investigatory powers and resources, not only represents a strength in terms of access for systemic claimants, but also a proactive way of identifying and eliminating systemic discrimination. However, upon a closer examination, the benefits of this provision are theoretical as opposed to practical, as the power to initiate claims is rarely used by commissions, and in fact was never used by the former British Columbia Human Rights Commission.

The final issue involving pre-claim information and assistance comes into play in the provision of both information and legal assistance, namely geographical access considerations. Commissions have traditionally faced difficulty in providing adequate access to human rights information and assistance for rural

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395 Braha, Proposed Human Rights Code, supra n. 311 at COM-46; also based on April 7, 2005, Interviewee, supra n. 163.
396 For example, section 21(2) of the Code, supra n. 246, allowed the Deputy Chief Commissioner to initiate a claim, where he or she believed that there had been a contravention of the Code.
397 Braha, Proposed Human Rights Code, supra n. 311 at COM-46.
communities. This problem is exemplified in the fact that the majority of human rights claims are filed by claimants who live in urban areas. As previously discussed many commissions have offices in various parts of the province in order to provide for greater representation and access. Some human rights commissions such as the former British Columbia Human Rights Commission introduced special initiatives to increase geographical access to claims information and assistance in relation to the enforcement process. While geographical access, like many issues, is one that has implications for claims that are predominately non-systemic, it particularly affects systemic claims in the sense that many Aboriginal persons and other disadvantaged groups live in remote parts of the province. Geographical barriers compound other inherent barriers in bringing forward systemic claims.

In my view, a serious gap in the Direct Access Model compared to the Commission Model arises in relation to geographical considerations in pre-claim processes, mechanisms, and procedures, specifically in the lack of proactive initiatives aimed at providing information and assistance to communities outside of Victoria and the Lower Mainland. This is likely reflected in the distribution of

398 See for example, BCHRC Annual Report 2000/01, supra n. 374.
399 See various commission reports such as ibid.
400 The BCHRC implemented outreach to communities outside of the Lower Mainland, in an effort to overcome geographical barriers identified by survey participants who indicated that people living in regions outside of the Lower Mainland and Victoria experienced particularly high rates of discrimination and conversely, low rates of awareness about the enforcement process. See BCHRC Annual Report 2001/02 supra n. 349 at 4.
claims which are predominantly focused in the Lower Mainland and surrounding areas.\textsuperscript{401}

As previously mentioned, some initiatives are in place to provide human rights information to various parts of the province under the Direct Access Model such as through Government Agents and toll free telephone lines to the Tribunal and to the Human Rights Clinic. However, these initiatives do not address the significant gap in the lack of statutorily based, coordinated efforts aimed at ensuring that the human rights information and assistance, particularly in relation to systemic claims, is available in rural communities. Further, while both the Coalition and the Tribunal provide pre-claim telephone assistance on a province wide basis, the only in-person assistance currently offered (albeit on a provisional basis), is located in the Lower Mainland, which limits accessibility considerably, and further raises a question in terms of fairness in distribution of resources.

\textit{3.2.4 Summary and Recommendations}

The provision of adequate information about entitlement to file claims, and legal assistance in assessing and framing claims is essential to systemic claimants.

While there are processes, procedures, and mechanisms in place under the Direct Access Model in British Columbia aimed at providing access to claims

\textsuperscript{401} See for example, \textit{BCHRT 2003/04 Annual Report}, supra n 354; and \textit{Human Rights Clinic Third Quarterly Report}, supra n. 365.
information and pre-claim legal assistance, they are limited compared to what was in place under the Commission Model. This gap is related to a general lack of statutory mandate for the provision of pre-claim information and assistance under the Direct Access Model. While the Commission Model poses some limitations in providing sufficient access to information and assistance, one of its major strengths lies in its statutory mandate which ensures that it provides such assistance. Related strengths lie in its ability to initiate proactive community based initiatives and in statutory provisions to initiate claims.

In contrast, under the Direct Access Model, there is no one body mandated to coordinate legal information and assistance on a pre-claim basis. The Tribunal, due to its mandate as an independent adjudicator, is limited to the provision of information and assistance relating to the claims process. Despite its statutory mandate to do so, the Ministry of Attorney General has had limited involvement in the provision of human rights information. While the Human Rights Clinic attempts to provide pre-claim information and assistance, it is severely hampered from doing so, by a lack of statutory mandate and resources necessary to provide comprehensive and coordinated pre-claim services on a province wide basis. The consequence of this gap for systemic claims is a general lack of access to comprehensive, coordinated pre-claim information and assistance. This lack of access has implications for fairness and efficiency related problems later in the claims process.
3.2.5 Recommendations – Preliminary Information and Legal Assistance

- That an organization independent from government,\(^{402}\) which is publicly funded, be given the statutory mandate and responsibility for coordinating the development and dissemination of substantive and procedural, pre-claim and other human rights information, on a long-term permanent basis.

- That the above body be either a newly created entity or alternatively, a pre-existing entity such as Legal Services, which is already involved in the creation of legal publications and has an extensive pre-existing infrastructure and considerable expertise in the development and dissemination of legal information. See for example, the various types of legal information currently provided by Legal Services at:
  
  [http://www.lss.bc.ca/legal_info/pubs_main.asp](http://www.lss.bc.ca/legal_info/pubs_main.asp)

- That pre-claim information be made available in a variety of accessible formats; including in diverse languages such as Tagalog, Vietnamese, and Spanish, as well as in barrier free formats such as audio and large print. This information should be written in plain language and aimed at

\(^{402}\) Independence is important in light of the potential for conflict of interest in relation to systemic claims, given that the provincial government is the largest employer and service provider in British Columbia. For example, see Crane v. B.C. (Ministry of Health Services) and others, 2005, BCHRT 36.
accessible comprehension levels. It should be developed in consultation with applicable community groups.

- That pre-claim legal assistance be provided on the basis of a permanent statutorily mandated process. The process for delivery of these services should be based on the clinic model; either within the pre-existing bifurcated clinic model, or in a more comprehensive seamless clinical based format.

- That a major part of the statutorily mandated clinic be aimed at community outreach, in particular, for the purposes of connecting with community groups across the province to create ongoing access to community run clinics. At least one staff at the clinic should be designated for the purposes of community outreach. The outreach clinics should occur at least one a month, on designated dates that are well advertised within the local community. The infrastructure of Legal Services and community groups may be used in terms of access to office space, and other local resources.

- That services offered at community based clinics include preliminary legal assistance; in particular, assistance with drafting human rights claims. The outreach clinics must be adequately funded and accessible to residents of remote areas. Other forms of communication such as video
link up and computer assisted devises should be explored for use in particularly remote parts of the province such Northern British Columbia or areas off of Vancouver Island.

3.3 Standing to File Systemic Claims

3.3.1 Rationale

Entitlement to file claims relates to processes, procedures, and mechanisms within the enforcement process that determine who can file human rights claims. This issue becomes critical for systemic claimants because of barriers to access that have been previously discussed, such as lack of economic and social resources and distrust of institutions. This topic also engages the criteria of fairness, and adequacy of resources. Prior to examining the issues surrounding the filing of systemic claims, the following section provides a description and comparative overview of applicable processes, procedures, and mechanisms under both Models.

3.4 Overview of Applicable Processes, Procedures, and Mechanisms

3.4.1 Standing to File Systemic Claims – The Commission Model
The statutory and other provisions under commission based jurisdictions determining who can file claims are typically very broad in the sense they allow any person to file a claim, whether or not they are directly affected by the discrimination or are a member of the affected group. The right to file is generally subject to the right of the individual or group who has been discriminated against to refuse to consent to the filing, or the right of the commission to refuse filing on the basis that the person or group withholds consent. Additionally, the human rights legislation of many jurisdictions contains discretionary provisions for commissions to initiate human rights claims on their own or at the request of others.

In British Columbia prior to the 2002 amendments to the Human Rights Code, section 21(1) stated that any person or group of persons alleging a human rights contravention could file a claim with the Commissioner of Investigation and Mediation in a satisfactory form. Under section 21(2), the Deputy Chief Commissioner of the British Columbia Human Rights Commission could file a claim based on the belief that a person had breached the Code. Section 21(4) stated that a claim filed by any person or group of persons, or by the Deputy Commissioner with the consent of the person or group bringing the claim, will be examined and investigated by the Commission.
Chief Commissioner, could be filed on behalf of "(a) another person, or (b) a group or class of persons, whether or not the person filing the compliant was a member of the group or class." Section 21(5) provided the Commissioner of Investigation and Mediation with the discretion to refuse to accept a claim: where "(a) the person alleged to have been discriminated against does not wish to proceed with the complaint, or (b) proceeding with the complaint is not in the interest of the group or class on behalf of which the complaint was made."

3.4.2 Standing to File Systemic Claims – The Direct Access Model

The section 21 provisions for filing claims on behalf of others are the same under the Direct Access Model in British Columbia as under the former Code, with the exception of the elimination of the references to Commission initiated complaints in section 21(2), (3).

The process and procedures for filing human rights claims with the British Columbia Human Rights Tribunal are outlined in Parts 2 and 3, Rules 7-10 of the Rules. The Rules set out a number of procedures around filing of claims such as the form that the claim must be filed in, the manner of filing, and the information that claimants and respondents must provide to the Tribunal, as well

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408 Ibid., at section 21(4).
409 Ibid., at section 21(5).
410 Code, as amended, supra n. 131 at section 21.
411 BCHRT Rules, supra n. 356.
as various rules governing communications between parties, and between parties and the Tribunal.

Similar to some commission based jurisdictions, under section 21 of the Nunavut Human Rights Act, an individual or group filing a claim, in addition to having reasonable grounds for believing that the Act has been contravened, must also show that they are aggrieved because of the contravention. Unlike some commission based jurisdictions where there is such a requirement, section 22(1) of the Act also provides for filing of a claim under section 21, by "(a) another person; or (b) a group or class of persons whether or not the person filing the notification is a member of that group or class." Under subsection (2), the Tribunal must refuse a claim filed on behalf of another person or group or class of person if "The Tribunal is satisfied that (a) the person alleged to have been discriminated against does not wish to proceed with the notification; or (b) proceeding with the notification is not in the interest of the group or class on behalf of which the notification is made."

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412 NHRA supra n. 298 at section 21.
413 Ibid., at section 22(1).
414 Ibid., at section 22(2).
3.4.3 Analysis/Critique

As suggested above, the Commission Model and the Direct Access Model both provide broad statutory provisions which allow any person to file claims on behalf of others. These provisions represent a significant benefit to systemic claimants in terms of accessibility in that they allow persons who have not been directly affected by the discrimination to file systemic claims on behalf of individuals and groups who are disadvantaged and consequently, for various reasons are unable to file claims on their own behalf. They also engage issues of fairness, in terms of being able to utilize the claims process, and effectiveness, in addressing wide patterns of discrimination. As noted in the Black Report, the provision for filing representation claims reflects the broad purposes behind human rights protections of eliminating inequitable patterns of discrimination.415

The recent case of Vorley v. B.C. (Min. of Solicitor General),416 suggests that a number of representative claims have been filed under the Direct Access Model.417 However, at that point only one other case had dealt with issues arising from the representative character of such claims.418 Some commentators suggest that the number of systemic claims against governments in general, on

415 Black, Black Report, supra n. 16 at 89.
416 Vorley v. B.C. (Min. of Solicitor General), 2005, BCHRT 219 [Vorley].
417 Ibid., at 6.
418 Ibid., at 7. The other case was Stone and others v. Danderfer and others (No.2), 2003 BCHRT 75, which addressed the issue of the right of the claimant to represent his infant son, whose spouse had custody over, pursuant to court order. [Stone No.2].
the basis of funding choices and the consequent allocation of resources affecting critical areas such as health care, will likely increase in the future.\textsuperscript{419}

In spite of the broad wording of the statutory provisions for filing representative claims, a potential weakness in these provisions in relation to systemic matters is in relation to consent. The potential difficulty around obtaining consent of the person alleged to be discriminated against in systemic claims is that in many cases individuals within groups may have some very real fears about being involved in claims, even on a group basis. There may also be strong ideological conflicts within the 'group' regarding whether proceeding with a human rights claim is the best approach to addressing the discrimination.\textsuperscript{420}

Clearly, the dilemma inherent in the issue of consent is that no individual or group should be forced to bring forward a claim against their will on the basis of another person's belief that that individual or group has been discriminated against. It would also obviously be difficult to gain the cooperation of non-consenting individuals or groups in bringing forward or sustaining claims. On the other hand, the concept of consent based on the individualistic, civil libertarian notion that access to rights merely involves a rational exercise of will on the basis of various choices, may not hold true for many systemic claimants. In some cases involving particularly disadvantaged individuals and groups where the

\textsuperscript{420} See for example, Jim Beatty, "Rights tribunal agrees to hear polygamy case" The Vancouver Sun (4 September, 2004), referring to the reluctance of claimants within the community to come forward.
main focus is on survival, the issue may not so much about making a voluntary, rationale choice, as not having any choice at all in the first place. Additionally, as Braha points out, in contrast to civil litigation where the plaintiff and defendant determine participation in an action in human rights, the claim also affects society as a whole and as a result the public interest must also be taken into account in determining whether to proceed with claims.421

Another potential weakness in both Models is in relation to the issue of whether proceeding with the claim is in the interest of the group or class. In light of recent case law, several related issues arise from consideration of the best interests of the class which pose potential challenges for systemic claims. For example, who constitutes the class, the adequate representation of the class; including providing adequate notification and access to members in order to facilitate participation in the class. Each of these issues is discussed below.

Under the former Commission Model in British Columbia, the Commission was responsible for determining that the class was properly constituted and that proper notification had been given to members of the class. For example, in Morrison v. City of Coquitlam,422 one of the issues before the Tribunal was the

421 Braha, generally, Proposed Human Rights Code, supra n. 311. See also, British Columbia Human Rights Coalition v. British Columbia (Ministry of Human Resources) (1987), 8 C.H.R.R. D/427 (BCCHR) for an example, of a very broad approach to the issue of consent. Although the case occurred under the British Columbia Human Rights Council, before amendments to the Code and at a time when there was no explicit requirement for consent under the governing legislation, the Council found that the British Columbia Human Rights Coalition could bring an action on behalf of welfare recipients under age 26, without having to obtain the consent of the class of persons.
422 Morrison and others v. City of Coquitlam, (20, August 1997)(BCHRT)[Morrison].
proper notification of claimants in a representative action. The case involved a claim that had been filed with the former British Columbia Council of Human Rights. At issue was human rights legislation which is similar to the statutory provisions currently in place with respect to representative claims. The provisions effectively allowed the Council to refuse to deal with a claim unless it was satisfied that proceeding with the claim was in the interest of the group or class on behalf of which it was filed. Mr. Morrison's claim was subsequently carried forward to the Commission in 1997, resulting in a deemed referral to hearing. The Deputy Chief Commissioner exercised his right under the public interest provisions to be added as a party. In considering the issue of proper notification the Tribunal held that the human rights legislation in place at the time the claim was filed:

... necessarily requires the Council to turn its mind to the interest of the group or class and to define it..." "In order to determine what is in the interest of the group or class on whose behalf a particular complaint as been made, the Council must notify or consult with the class in some manner appropriate in the particular circumstances."\(^{423}\)

The Vorley\(^{424}\) case mentioned above provides insight into the treatment of representative claims under the Direct Access Model. The case involved a systemic discrimination claim put forward by a representative claimant on his own behalf and on behalf of other inmates of the correction centre, against the Ministry of Solicitor General, Corrections. The decision involved an application by the respondent Ministry that the Tribunal should refuse to accept the claim

\(^{423}\) Ibid., at 7.

\(^{424}\) Vorley, supra n. 416.
under section 21(5) of the Code as amended, or alternatively that it should be dismissed under section 27(1) (d) provisions that the claim was not in the interests of the Code. The claimant, who was unrepresented, did not file a response to the application.

In reviewing the provisions relating to representative claims, the Tribunal observed that the 2003 amendments to the Code resulted in fundamental changes in the processes and procedures surrounding representation claims. In contrasting the procedure under the Commission to the process under Direct Access, the Tribunal referring to the various decisions in the Morrison case, noted that the process governing representation claims at the time involved filing with the Commission, which in turn was obligated as part of the intake or investigation process, to ensure that the class was properly constituted and the members of the class were appropriately notified. In contrast, since March 31, 2003, representation claims are filed with, and reviewed by, the Tribunal. In light of the absence of an investigation process as part of the Tribunal mandate, the review of representation claims are limited. Under the Tribunal process, the onus is on the claimant to notify members of the class and to keep them apprised on an ongoing basis of the proceedings.

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425 Code as amended, supra n. 131 at section 21(5).
426 Ibid., at section 27(1)(d).
427 Ibid.
428 Morrison, supra n. 422.
429 Vorley, supra n. 416 at para. 22.
430 Ibid., at para. 23.
431 Ibid.
In deciding the applicable test to apply with respect to determining whether the interest of the group or class was met in proceeding with the claim, the Tribunal noted the lack of comprehensive set of rules governing representative claims, which it suggested was not unusual in administrative processes. The Tribunal rejected the Ministry’s argument regarding the applicability of *Auton (Guardian ad litem of) v. B.C. (Minster of Health)*, based in part, on the fact that *Auton* involved an application to certify the action as a class proceeding under the *Class Proceedings Act*, which explicitly excludes proceedings brought in a representative capacity. The Tribunal also noted that the applicability of similar legislation had been rejected by the Tribunal in *Morrison* on the basis inter alia, it explicitly pertains to civil actions. Curiously however, the Tribunal went on to apply the principles set out in two Supreme Court of Canada cases in respect of class actions, in particular, the case of *Western Canadian Shopping Centres Inc. v. Dutton*. In applying the class action principles in *Dutton*, the Tribunal acknowledged “the need to recognize the special nature of human rights complaints and the legislation under which they are made…”

The Tribunal distinguished the comments in *Morrison No. 1* regarding the inapplicability of civil proceedings by stating:

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432 Ibid., at para. 24.
433 Ibid., at para. 16.
435 Vorley, supra n. 416 at para. 16.
436 Ibid., at para. 19.
438 Ibid.
439 Vorley, supra n. 416 at para. 25.
...I am mindful that in para. 19 above, I have cited a passage from Morrison No.1 in which the Tribunal stated that the conduct of civil proceedings within the judicial system "is significantly different from the administrative structure governing the resolution of human rights disputes". However, the Tribunal made that observation in the context of the human rights structure in British Columbia prior to March 31, 2003, and, as noted above, that structure was fundamentally altered by amendments to the Code that took effect as of that date. There no longer exists a Commission with functions and responsibilities separate from those of the Tribunal. The role of the Tribunal in the direct access system now in effect more closely resembles that of a court where actions, including class actions, are filed, administered and adjudicated.  

The four conditions set out by the Supreme Court of Canada in Dutton\textsuperscript{441} which the Tribunal delineated as being applicable to representation claims under direct access are:

1.) a class must be capable of clear definition; 2.) have issues of fact or law in common to all class members; 3.) success for one class member must mean success for all in regard to the common issues; 4.) the class representative must adequately represent the class; based on an assessment of a.) the motivation of the representative, b.) the competence of the representative's counsel, c.) the capacity of the representative to bear resulting costs; and, d.) the representative's ability to vigorously and capably represent the interests of the class.\textsuperscript{442}

\textsuperscript{440} Ibid., at para. 25
\textsuperscript{441} Dutton, supra n. 437.
\textsuperscript{442} Vorley, supra n. 416 at para. 29. The Tribunal also noted similar criteria regarding class based claims under the SHRC, supra n. 403.
In applying the class action principles, the Tribunal found that while the claimant was able to meet the first three conditions, he failed on the basis of the fourth. Specifically, the claimant could not show that he had “sufficient initial ability to adequately represent...” the claimant group. There was some question about the claimant’s ability to communicate with members of the group. Both difficulties brought into question the claimant’s “ability to vigorously and capably prosecute the interests...” of the claimant group in terms of providing notification regarding the proceedings and opportunity to participate. Further, it was unclear from the claim form what steps the claimant had taken to notify the group, other than verbally. Finally, the fact that the Tribunal had received correspondence previously sent to the claimant, marked “Return to Sender – Not at This Address” indicated the claimant’s inability to adequately represent the group.

The approach articulated in Vorley raises strong concerns regarding the high threshold that claimants must meet in bringing forward representative claims. Class action principles, particularly those that necessitate the requirement of success for one class member meaning success for all, and the assessment around adequate representation, present some strong barriers for systemic claimants, which are contrary to the broad purposes of the Code and the public interest purposes behind the representative principles.

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443 Vorley, supra n. 416 at paras. 34-51.
444 Ibid., at para. 54.
445 Ibid., at para. 55.
446 Ibid., at para. 56.
447 Ibid., at para. 57.
Vorley is also disconcerting from the standpoint that it emphasizes the private court based nature of proceedings under the Direct Access Model, absent the involvement of a statutory body such as a commission. The case raises questions relating to fairness, in terms of whether disadvantaged claimants, particularly those who are incarcerated, could ever successfully obtain representation status. Based on my experience in assisting incarcerated individuals, inmate access to a means of communication to outside resources is extremely limited, as is the ability of inmates to communicate with one another. A contextual approach requires that these factors be taken into account in assessing these types of representation claims. It also emphasizes the importance of access to adequately funded representation in such claims.

Another British Columbia case of note, which raised the issue of standing to bring claims and the related issue of the jurisdiction of the Tribunal over systemic claims, and which has the potential to have serious detrimental effects on systemic claimants, is Gregoire v. B.C. (Ministry of Public Safety). While not a representation claim per se, the claim was filed by the claimant mother on behalf of her son who at the time of filing was incarcerated, and suffered from brain damage. The claim alleged that the Ministry failed to accommodate the son’s mental disability in the provision of a service or facility customarily available to the public. The claimant sought personal remedies for her son, as well as systemic remedies on behalf of other persons in her son’s situation. The son

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died prior to the claim coming to hearing. The respondent Ministry applied to the
Tribunal for the dismissal of the claim inter alia, on the basis that upon the son’s
death, the Tribunal lost jurisdiction to make the remedial orders sought. The
respondent’s arguments were based on section 59 of the Estate Administration
Act, which it argued extended the common law to preclude the continuation of
litigation on behalf of a deceased person. The Complainant argued that the
Code superceded the estate legislation and allowed the claim to continue.

The Tribunal held that the applicable section of the estate legislation permitted
the action to continue notwithstanding the death of the son and consequently, the
Tribunal retained jurisdiction over the claim. Specifically, the effect of section 59
of the Estate Administration Act was to preserve a claim brought on behalf of a
deceased, and therefore, there was no conflict with the Code. Consequently,
there was no need to rely on section 4 provisions which state that the Code
prevails over other conflicting legislation. Further, in the absence of a conflict
between the two statutes, there was no need to rely on the human rights
principles of large and liberal interpretation in order for the Tribunal to take
jurisdiction.

On appeal to the British Columbia Supreme Court, the respondent successfully
argued that the rights established under the Code are “personal” and therefore

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449 British Columbia Estate Administration Act, R.S.B.C. 1996, c. 122 at section 59 [BCEA].
450 Code, as amended, supra n. 131.
451 BCEA, supra n. 449 at section 59.
452 Greoire, supra n. 448 at para. 28.
453 Ibid., at para. 28.
cease with the death of the claimant's whose rights are breached.\textsuperscript{454} The Court also held that in order for a representative claim to be filed, there must be an individual "person" or a group or class of "persons."\textsuperscript{455} Additionally, remedies under the \textit{Code} are personal, and section 8 of the \textit{Code}, which sets out several grounds of discrimination, including service, clearly relates to "personal" rights.\textsuperscript{456} In the absence of the person on whose behalf the claim was made, no one is being discriminated against and therefore, the claim has no legal basis.\textsuperscript{457} The Court also held that the fact that the claim could be said to raise issues of systemic discrimination, and that there was a public interest in such issues, was not sufficient to provide the Tribunal with the statutory jurisdiction to proceed with the claim.\textsuperscript{458}

The Court accepted the claimant's arguments that human remedies and standing in human rights are historically broader than in civil litigation, but rejected the argument that the broader remedies available under human rights supported a continuation of the claim where the person alleging discrimination dies.\textsuperscript{459} In considering the effect of the death of the claimant in relation to representation provision allowing persons to file claims on behalf of others, the Court held that the provisions only made allowance for persons to file claims. While human rights should be broadly interpreted, they could not be interpreted to permit a

\textsuperscript{455} Ibid., at paras. 24-26.
\textsuperscript{456} \textit{Code}, supra n. 246 at section 8.
\textsuperscript{457} HMTQ Gregorie, supra n. 454 at paras. 34-35.
\textsuperscript{458} Ibid.
\textsuperscript{459} Ibid., at paras. 40-41.
person to carry a claim to hearing, in circumstances where the person alleged to have been aggrieved had died. As a result, the Tribunal had lost jurisdiction over the claim.\textsuperscript{460} The Court also held that the Tribunal had misinterpreted the estate administration legislation at issue, as a human rights claim does not fall within the meaning of the term "action", and therefore the claim could not be continued on that basis.\textsuperscript{461}

It is still too early to assess whether the outcomes described above are confined to the particular facts of the cases, which were particularly challenging, or whether they represent a general trend in representative claims. For example, one could speculate that the outcome in \textit{Gregoire} may have been more favorable had the claim been brought on behalf of a class of persons, or similarly, in \textit{Vorley}, if the claimant had been represented by legal counsel. It is difficult to come to any conclusion at this stage as there is presently a dearth of representation cases. However, there are cases that are currently in the claims process which are likely to answer this question more clearly.\textsuperscript{462} In the meantime, the above cases suggest that there is reason for concern around the applicable threshold for representation claims.

An additional problem relating directly to differences between the Direct Access Model and the Commission Model, and which may serve to exacerbate the difficulties described above in relation to consent and the threshold around the

\textsuperscript{460} \textit{Ibid.}, at paras. 42-44.
\textsuperscript{461} \textit{Ibid.}, at para. 39.
\textsuperscript{462} See for example, \textit{Andrews and others v. B.C. (Four Ministries)}, 2005, BCHRT 321.
determination of the interest of the group or class is the lack of specific provisions for representation of the public interest. According to Black, provision for commissions to initiate claims was created in recognition of the importance of the public interest in eliminating inequitable, persistent patterns of discrimination.\textsuperscript{463} Disadvantaged claimants are frequently too vulnerable to initiate and sustain systemic claims, and/or may not recognize that they have been impacted by the discrimination. Further the impact of discrimination is often not apparent until it is assessed in the context of the cumulative effect on a group.\textsuperscript{464} This mechanism in relation to bringing forward systemic claims appears to represent a major strength of the Commission Model over the Direct Access Model in terms of providing effective access to the claims process, particularly in the face of the difficulties that may be associated with representative claims.\textsuperscript{465}

A closer examination of the provisions for commission initiated claims, suggests however, that this mechanism may represent a theoretical rather than an actual strength in the Commission Model over the Direct Access Model. Commissions have seldom if ever, initiated claims. In particular, the former British Columbia Commission practice in initiating claims has been described by one human rights commentator as “under-whelming,”\textsuperscript{466} in light of the fact that in the five years of the Commission statutory mandate to initiate claims, the Commission never

\textsuperscript{463} Black, \textit{Black Report} supra n. 16 at 89.
\textsuperscript{464} \textit{Ibid.}, also, Braha, \textit{Code Achieved Purposes, supra} n. 153 at COM-12.
\textsuperscript{465} Black, \textit{Black Report, supra} n. 16 at 90 suggests that this was one of the rationales in creating the mechanism for Commission initiated representation.
\textsuperscript{466} Braha, \textit{Code Achieved Purposes, supra} n. 153 at COM-46.
initiated a claim. It has been suggested that there were several reasons the Deputy Chief Commissioner did not exercise the power to initiate claims:

   a.) his belief that this power should be exercised when there are no other effective options and there usually are options;
   b.) lack of resources; and
   c.) recognition that initiation of a complaint by his office is a serious matter requiring a considerably higher level of certainty about the existence of discrimination than is required of an individual complainant.

In spite of the difficulties associated with the commission initiated claims mechanism, many commentators suggest that it is critical to provide for an independent statutory body with stable public funding, in order to bring systemic claims forward in the public interest. As one interviewee put it, relying on claimants to bring forward claims on their own without a public body such as the Commission representing the public interest, is comparable to expecting individual citizens to enforce the criminal law, through citizen arrest provisions.

The absence of a statutorily based, publicly funded body to address the public interest in systemic claims under the Direct Access Model clearly represents a significant gap in the enforcement system, and ultimately raises questions regarding access to enforcement and the effectiveness of the process.

467 Ibid., see also Lovett and Westmacott, Human Rights Review, supra n. 15 at 63.
468 See for example, Brodsky and Day, BCHRC Report July 3, 1998, supra n. 60 generally, and particularly at 26.
469 Braha, Proposed Human Rights Code, supra n. 311 at COM-43; also, for example April 7, 2005, Interviewee, supra n. 163, April 12, 2005, Interviewee (2), supra n. 167.
470 For example, March 23, 2005, Interviewee(2), supra n.164.
3.4.4 Summary and Recommendations

Both commission based and direct access based, processes appear to provide broad procedures and mechanisms that allow any person or group to apply for standing to bring forward systemic claims. However, further examination of current case law, indicates that there are several potential barriers to effective access to standing provisions for systemic claimants under the direct access process in British Columbia. These difficulties relate to the requirement of consent of those affected by the discrimination to proceed with representation claims, the apparent high threshold being applied to assessing the interests of affected groups in proceeding with such claims, and the narrow interpretation being applied to standing provisions. It remains to be seen whether the outcomes from the cases discussed are limited to the particular facts, or determinative of the treatment of representation claims. The above issues once again underscore the critical importance of adequate access to legal assistance and resources, and in my view, to community involvement in systemic claims.

While provisions that provide commissions with standing to bring forward claims in the public interest appear to hold significant promise as a means of addressing difficulties with individual and group access to representation provisions, in practice some extreme difficulties have arisen in the utilization of such provisions. In spite of these difficulties, as part of a multi-faceted approach to addressing systemic discrimination it is important to have some statutory mechanism that can be implemented in the public interest in addition to providing for community
involvement, to address the public interest in broad systemic cases that involve issues of critical importance to society as a whole.

3.4.5 Recommendations – Standing to File Claims

- That a broad contextual approach be taken in respect of assessing standing in representation claims.

- That provision for the public interest in representation claims be taken into account through a number of mechanisms including providing adequate notice of opportunities for community and organizational participation in systemic claims as representatives, along with the provision of adequate resources for such involvement.

- That a statutory mechanism or Rule based mechanism be created, providing for the involvement of a statutorily based body, independent from government, with permanent funding, to advocate in systemic cases involving broad public interest issues.
3.5 Intervenors

3.5.1 Rationale

Canadian Human Rights legislation and/or human rights tribunals in most commission based jurisdictions have similar statutory provisions for application by interested persons to intervene in human cases. Consequently, at first glance, the issue of intervenors does not appear to relate directly to inherent differences between the two Models and therefore appears to be more suitable for the Chapter IV discussion of provisions unrelated to differences in the Models. However, I have included it in the discussion of the two Models, for two reasons. First, as discussed below, intervenors were central to the discussion surrounding the introduction of the Direct Access Model in British Columbia around addressing systemic claims, particularly in addressing public interest gaps left by the elimination of the Commission. Second, the discussion of intervenors ties into a discussion of the public interest provisions allowing commissions to intervene in claims, an issue which is illustrative of a major distinction between the two Models.

The importance of intervenor provisions in the enforcement process for systemic claims lies in the benefit of providing access to community groups and organizations in order to put forward public interest considerations in regard to the impact of the claim on the wider community. Intervenor mechanisms can
also significantly strengthen the effectiveness of systemic claims by adding credibility to positions taken by systemic claimants. In addition to the assessment criteria of access and effectiveness, at issue in this discussion are the criteria of fairness, adequacy of resources, and pro-activity.

3.6 Overview of Applicable Processes, Procedures, and Mechanisms

3.6.1 Intervenors – The Commission Model

Under Rule 8(1) of the Canadian Human Rights Tribunal Rules of Procedure, any person not a party, but who wishes to be recognized as an interested party in a hearing, may apply to the Tribunal.\(^{471}\) Similarly, Rule 17 of the Ontario Human Rights Tribunal Rules of Practice provides for a person who is not a party to apply to the Tribunal to intervene at hearing.\(^{472}\) The onus is on the applicant to bring a motion, which, \textit{inter alia}, must speak to their interest in the matter and the status and degree of intervention sought.\(^{473}\)

Similar to the Federal and Ontario regimes, the former British Columbia Commission enforcement process provided the Tribunal with discretion under

\(^{471}\) CHRA, supra n. 256 at section 8(1).


\(^{473}\) \textit{Ibid.}\n
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section 36(2) of the Code, to grant standing to intervenors under conditions.\textsuperscript{474} The right to intervene could be granted whether or not the person or group would be affected by any remedy ordered by the Tribunal. Additionally, under section 21(3), the Commission could require the Commissioner of Investigation and Mediation to add the Deputy Chief Commissioner as a party to a claim.\textsuperscript{475} Similarly, under section 36(1), the Deputy Chief Commissioner could request that the Tribunal add her or him as a party at the hearing stage.\textsuperscript{476}

3.6.2 Intervenors – The Direct Access Model

Section 22.1 of the current British Columbia Human Rights Code, as amended, which is essentially the same as under the British Columbia Commission Model, states that at any time after the claim is filed the Tribunal may allow any person or group of persons to intervene in the claim on terms specified by the Tribunal, whether or not the person would be affected by an order under the remedies section.\textsuperscript{477} Part 6, Rule 28 of the Rules delineates the process for applying to intervene in a claim.\textsuperscript{478} Applicants must file an Intervenor Application Form with the Tribunal, setting out the name of the person or group of persons wishing to intervene, the position that would be taken at hearing if allowed to intervene, the form of participation requested, for example, oral argument and/or written

\textsuperscript{474} Code, supra n. 246 at section 36(2).  
\textsuperscript{475} Ibid., at section 21(3).  
\textsuperscript{476} Ibid., at section 36(1).  
\textsuperscript{477} Code as amended, supra n. 131 at section 22.1.  
\textsuperscript{478} BCHRT Rules, supra n. 356 at Rule 28.
evidence, and the arguments in support of the application.\footnote{ibid., see also, at Form 8A Intervenor Application Form.} Rule 28(2) states that the Tribunal will deliver a copy of the application to participants, and will set a schedule for submissions.\footnote{ibid., at Rule 28(2).} The Tribunal then considers the merits of the application and submissions, and, in the event the Tribunal exercises discretion to grant the application it may, under Rule 18(4), attach specific terms and conditions to participation.\footnote{ibid., at Rule 28(4).}

The case of \textit{Sinclair v. Blackmore} \footnote{Sinclair v. Blackmore and Country Club Estates, 2004 BCHRT 433 [Sinclair].} suggests that the practice of posting hearing schedules and details of cases on the internet that have not settled three months prior to a hearing, is intended to act as notice to the public, including for the purposes of intervening.\footnote{ibid., at para. 15 citing natural justice reasons based on Mullan, Administrative Law (Toronto: Irwin Law, 2001).}

The Nunavut \textit{Human Rights Act} \footnote{NHRA, supra n. 298.} is silent with respect to intervenors.

\textbf{3.6.3 Analysis and Critique}

Community groups and organizations, including trade unions, have traditionally played a major role not only in bringing systemic claims forward, but also in intervening in such cases under the former Commission Model in British
The involvement of community groups and other organizations as intervenors in systemic claims is generally viewed by human rights commentators as being critical to the public interest in light of the nature and purposes of human rights legislation, and as reflecting the goal of democratic participation.  

The role and extent to which community groups or organizational views represent the public interest, is however, very much in debate. Some commentators express concern that groups have a tendency to put forward their own interests and agendas, rather than representing the public interest. Others view the public interest as being comprised of an amalgamation of perspectives, and consequently, that a diversity of perspectives is essential in order to ensure that the public interest in systemic claims in achieving equality for marginalized groups is adequately addressed. One interviewee suggested for example, that no individual or group owns the public interest, and consequently, that everyone has a stake in the public interest and a responsibility to uphold it. In commenting specifically about whether government should take on the role of representing the public interest, this interviewee also stated that because the government is often the respondent in systemic cases, a government role in representing the public interest other than through a statutorily independent

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485 See for example Meiron, supra n. 80.
486 Braha, Code Achieved Purposes, supra n. 153 at COM 46-47, also, April 7, 2005, Interviewee, supra n. 163, April 12, 2005, Interviewee (2), supra n. 167.
488 For example, April 7, 2005, Interviewee, supra 163, also April 13, 2005, Interviewee, supra n. 162; see also, generally Bryden, ibid.
489 April 13, 2005, Interviewee, ibid.
administrative body, is problematic from a conflict of interest perspective. In reality, it has traditionally been communities who have represented the public interest in human rights, and not commissions.

The role of community organizations as intervenors was central to the underlying rational in the provincial government’s decision to replace the Commission Model with the Direct Access Model. For example, in a debate on the second reading of Bill 64, in discussing concerns about the treatment of systemic discrimination under the commission structure which was still in place at the time, the Attorney General stated:

Let me say something about that framework. The deputy chief commissioner has had the power to initiate complaints for more than five years. He did not do so...

In discussing how systemic discrimination would be addressed in under the Direct Access Model, the Attorney General stated:

So how will systemic complaints be raised in the new model? Individuals or groups, including non-governmental organizations, will continue to have the ability to initiate complaints of a systemic nature, including complaints in which government is named as the respondent. That’s all you need. Any complaint raised has the potential to include within it systemic issues, but has to be a complaint in order for a process to get started. Once it is a complaint, if there are systemic issues, they can be addressed.

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490 Ibid., see also the commentary of Day, Comment on the Elimination, supra n 386 at C/1, regarding the observation that the Attorney General is frequently a respondent in human rights cases, and also regarding the implications for conflict between the role of respondent and public interest related roles.
491 April 13, 2005, Interviewee, supra n. 162.
492 Hansard, October 23, 2002 Afternoon, supra n. 22 at 3989.
493 Ibid.
Further:

In addition to that, the changes that we’re proposing in this legislation will allow a tribunal member or panel hearing a case to invite any person or group of persons to intervene in the complaint, whether or not that person or group would be directly affected by an order made by the member or panel. This is a new power. 494

These proposed changes will actually increase the opportunities for non-governmental organizations to intervene in cases which have systemic elements. Finally, the human rights clinic will also ensure that systemic factors are addressed in any complaints, starting by assisting individuals or groups in framing the complaint and ensuring that if there are systemic issues or factors, they are addressed either in mediation discussions or through the counsel that will be provided to some parties at hearings [emphasis added]. 495

As a step towards the analysis of whether there has been an increase in community participation in cases as intervenors, it would appear that both types of enforcement jurisdictions have broad provisions which generally provide access to non-parties to apply to intervene in cases. Variance between the provisions under the commission based jurisdictions compared to the direct access based jurisdictions occurs in respect of the absence of a specific provision for the intervention of a publicly funded body such as the commission to intervene in the public interest. Specifically, one of the resulting changes from the Direct Access Model in British Columbia was the elimination of sections 21(3) and 31(6) of the Code, providing for the involvement of the Deputy Chief Commissioner at the pre-hearing and hearing stages of the claim. 496

494 Ibid.
495 Ibid.
496 Code, supra n. 246 at sections 21(3) and 36(1).
My review of reported cases involving intervenor applications, including predominately 'non-systemic' cases from the period of 1994 to present at the Tribunal level, under both Models, indicates a total of 16 cases involving application for intervenor status, 8 under the Commission Model, and 8 under the Direct Access Model.

In 7 of the 8 cases under the Commission Model intervenors were granted leave to intervene. Of the 7 cases, 6 cases can be termed as being predominately systemic with the remaining case being predominately individual in nature. Out of the 6 predominately systemic cases, 5 involved two or more applications for intervenor status. The majority of the applicants were granted full status, including the ability to lead evidence and cross-examine witnesses. The types of organizations in the intervenor cases under the Commission Model included community organizations, professional organizations and 1 individual who was also applying to intervene on behalf of a community organization.


498 See for example, Murphy, ibid.; Morrison, ibid.; Reid, ibid.; Leon, ibid.; Abrams, ibid.; Hughson, ibid.

499 See Abrahams, ibid., Murphy, ibid., Morrison, ibid., Reid, ibid., Leon, ibid.
Looking at the intervenor cases under the Direct Access Model, in 3 out of 8 cases intervenors were granted leave to intervene.\(^{500}\) The remaining 5 applications were dismissed.\(^{501}\) Of the 3 cases granted intervenor status, 2 cases could be termed as being predominately systemic,\(^{502}\) with the remaining case being predominately individual in nature. None of the 3 cases involved more than one applicant. Additionally, none of the cases involved applications from what could be termed as community groups or community based organizations; rather 2 were from professional bodies, and the other application was from a union. In the majority of cases, 2 out of the 3 intervenors were granted full intervenor status.

Prior to discussing potential implications of the above research, some limitations and cautions need to be pointed out which may impact on the conclusions regarding the case review. First, the Commission Model cases span from the period of 1994 to 2000, while the Direct Access Model cases only cover a period from 2003 to 2005. Additionally, while the Tribunal began publishing all its decisions on the Tribunal website in sometime in the fall of 2004,\(^{503}\) not all the old decisions may be available. Further, it is highly likely that many of the Commission decisions are unreported and therefore not included in the above


\(^{502}\) Munroe, supra n. 500; Pegura, supra n. 500.

\(^{503}\) Canadian Bar Association, British Columbia, Minutes – Human Rights Section, October 21, 2004, [CBA Minutes October 21/04].
research. An additional factor is that intervenors in human rights matters appear to apply to intervene at the time of Judicial Review, or as in Vancouver Rape Relief v. Nixon, at the appeal court level, rather than at the Tribunal level. Finally, the dismissal numbers do not speak to the merits of the applications.

One other factor to consider prior to discussing the implications of the case review, is the effectiveness of the former statutory mechanism available in section 21(3) of the Code, allowing for the intervention of the British Columbia Human Rights Commission under the Commission Model. There is some divergence of opinion between commentators as to the extent and benefit of Commission intervention in claims, particularly systemic claims. For example, in the course of the Core Review of the human rights enforcement process in British Columbia, it was suggested that "[t]he DCC also participates from time to time as an intervener, in the name of the HRC, in judicial review or appeal proceedings involving important human rights issues."506

The Human Rights Review Report cited the cases of Meiorion and Grismer, in which the Commission participated in its public interest capacity. The Report also suggested that:

504 Nixon (BCCA), supra n. 97.
505 Code, supra n. 246 at section 21(3).
506 Westmacott and Lovett, Human Rights Review, supra n. 15 at p. 63.
507 Meiorin, supra n. 80.
the DCC has participated extensively in complaints that fall within the criteria of the HRC Public Interest Policy. The DCC has been instrumental in achieving systemic changes in a number of cases including some that have settled prior to hearing.509

Some commentators are notably more restrained in their assessment of the Commission's role in addressing systemic discrimination. For example, the Committee for the Advancement of Human Rights, in a submission to the Administrative Justice Project regarding a review of the enforcement process, stated in response to the above comments in the Human Rights Review Report “[w]e applaud the DCC's efforts but we believe that systemic changes can be achieved under a different model…” 510 Similarly, some commentators suggest that for various reasons, including a general reticence on the part of the Commission to participate in many systemic cases, overall, the Commission was ineffective in its public interest role.511

Despite these qualifications, it is possible to draw some conclusions regarding the strengths of the intervenor process, and specifically, whether there have been increased opportunities under the Direct Access Model for intervenors in fulfilling the role of putting forward the public interest in systemic claims. It would


510 Committee for the Advancement of Human Rights, “Response to Human Rights Review A Background Paper for the Administrative Justice Project” (unpublished) (February 15, 2002) at 11 [CAHRTS]. See also, Lovett and Westmacott, ibid., for example, at 74 and 140.

511 April 13, 2005, Interviewee, supra n. 162.
appear from the case law that community groups and other organizations are not coming forward in any great numbers to apply for intervenor status.

The above assertion is also supported by the literature and interviews that suggest that community organizations face extreme barriers in participating in systemic cases. For example, the literature indicates that a lack of access to adequate resources severely impedes community involvement in cases.\textsuperscript{512} Several interviewees, in particular one who works directly in a community organization, suggested that a major barrier that impedes community participation is that most non-profit organizations in British Columbia have experienced severe cutbacks of government funding over the last few years.\textsuperscript{513} At the same time many community groups and organizations are faced with an increasing demand for client services, in particular in light of government cutbacks to social assistance, and legal aid.\textsuperscript{514} The community based interviewee also suggested that a further barrier to participation; in addition to a lack of resources, is the mandates of most community organizations do not include a focus on legal matters and as a result, many are reluctant to intervene in human rights claims.\textsuperscript{515}

\textsuperscript{512} See for example, Braha, Proposed Human Rights Code, supra n. 311 at COM-46.
\textsuperscript{513} See for example, April 12, 2005, Interviewee (2), supra n. 167; April 7, 2005, Interviewee, supra n. 163; also June 9, 2005, Interviewee, supra n. 385.
\textsuperscript{514} April 12, 2005, Interviewee(2), ibid., see also, Professor Gillian Creese & Professor Veronica Strong-Boag, for The B.C. Coalition of Women’s Centres, The University of British Columbia Centre for Research in Women’s Studies and Gender Relations; and The B.C. Federation of Labour, Losing Ground: The Effect of Government Cutbacks on Women in British Columbia, 2001 – 2005, (Vancouver: March 8, 2005).
\textsuperscript{515} April 12, 2005, Interviewee (2), ibid.
Other barriers identified as impeding participation by community groups in the role of intervenors in cases under the Direct Access Model are a lack of adequate notice of systemic claims within the tribunal process,\textsuperscript{516} and a lack of communication about systemic claims within the Human Rights Clinic. For example, one interviewee suggested that under the current enforcement process it is difficult to obtain notice of systemic claims that may be of interest to community groups, in time to allow such groups to go through the necessary steps to intervene, such as obtaining approval from governing boards.\textsuperscript{517} The same interviewee cited a lack of process and mechanisms allowing for communication between community groups and the Human Rights Clinic as a barrier, for example in access to information about Clinic protocol governing systemic cases, and similarly, about potential opportunities for community participation in systemic cases.\textsuperscript{518} The interviewee contrasted the situation under the Commission Model with the Direct Access Model by stating that despite problems with the Commission Model, as a public body, the Commission was actively involved in the community and had specified processes and mechanisms providing for public accountability as opposed to a privatized, contractual approach to delivery of services.\textsuperscript{519}

\textsuperscript{516} See for example, \textit{CBA Minutes, April 30/03}, supra n. 292 at 5, featuring the Chair of the Human Rights Tribunal, in which it was suggested that systemic discrimination would be addressed by intervenors at hearing, and that notice to potential intervenors would be provided three months in advance of the date of hearings in order to facilitate such involvement.

\textsuperscript{517} April 12, 2005, \textit{Interviewee (2)}, supra 167.

\textsuperscript{518} \textit{Ibid.}

\textsuperscript{519} \textit{Ibid.}
In my view, community and organizational involvement in systemic claims is not only essential in terms of providing perspectives on public policy issues, it is also consistent with a contextualized, liberal approach to human rights. Involvement of the broader community also represents a proactive approach to addressing systemic claims and to attaining substantive equality. As the Tribunal suggested in the seminal intervenor case of *Cook and Warren v. Ministry of Education*, intervenors can provide tribunals with a contextual understanding of claims, including a broader perspective of the issues at stake and of the potential impact of a decision on affected individuals and groups.

It is important to qualify the above discussion regarding involvement of intervenors in systemic cases by stating, as discussed in *Hughson v. the Town of Oliver*, that intervenor applications must be balanced against potential injustice to the parties, for example, in terms of ensuring sufficient time for claimants to put forward their case. In other words, intervenors should not be allowed to "take the litigation away" from the parties. In my view, a number of safeguards within the claims process ensure a balancing of interests, not the least of which is the considerable authority and expertise of the Tribunal.

520 *Cook and Warren, supra* n.501.
521 Ibid.
522 *Hughson, supra* n. 497.
523 Ibid., at paras. 4-5.
3.6.4 Summary and Recommendations

Despite the fact that community groups were clearly intended to play a major role in addressing the public interest in systemic claims under the Direct Access Model through intervenor status, there has been a noticeable lack of such applications in the claims process to date. Identified impediments to community involvement as intervenors includes a lack of resources, legal mandate, and enforcement process barriers such as lack of sufficient notice to enable participation, and a lack of sufficient mechanisms for communication of the Human Rights Clinic protocol and opportunities for community involvement.

3.6.5 Recommendations – Intervenors

- That protocols, procedures, and mechanisms be developed by the Human Rights Clinic, providing for community involvement in systemic claims and for notice of opportunities to intervene in systemic claims. The designated community outreach position within the clinic, identified above in relation to pre-claim outreach clinics could be involved in this work.

- That permanent funding for intervention in systemic claims be provided to community groups and other organizations, based on clear criteria developed in consultation with such groups. Some consideration may be
given to creating a funding program similar to the Federal Court Challenges program.

- That an independent public body be established, or a pre-existing public body be utilized to provide a mechanism for intervention in the public interest in systemic claims that involve broad public policy issues which have the potential for broad impact on society. Potential options around this recommendation will be discussed further in Chapter V.

3.7 Case Management

3.7.1 Rationale

The issue of case management relates to the criteria of access, effectiveness, fairness and adequacy of resources. It primarily involves consideration of the need to manage systemic claims differently than other claims. It also touches on a related issue of whether as a result of the inherent public interest; systemic claims should be given priority over other claims.
3.8 Applicable Processes, Procedures, and Mechanisms

3.8.1 Case Management – The Commission Model

Although commissions continue to engage in the traditional enforcement processes, such as investigation, conciliation and referral, as is reflective of their statutory mandate, in many jurisdictions case management is undergoing modifications necessitated by economic and resources pressures.\(^{524}\)

For example, the Canadian Human Rights Commission, in a movement away from traditional claims approaches, places greater emphasis on early dispute resolution, and selective use of formal investigation of claims, streaming investigation reports where investigation does occur, and implementation of stricter times lines around investigation and other Commission processes and procedures.\(^{525}\) Additionally, the Commission has introduced a new case management system, which includes the creation of multi-disciplinary teams into four areas of expertise based on the grounds of discrimination. The multi-disciplinary team consists of staff from various Commission branches such as investigation, legal and policy who assess approaches that should be taken in relation to particular claims.\(^{526}\) The Commission has implemented a streaming

\(^{524}\) See generally, Howe and Johnson, Restraining Equality, supra n. 5 generally, and specifically at chapters 3-4.


\(^{526}\) Ibid., at 20; also based on discussions with April 1, 2005, Interview, supra n. 163.
process to expedite cases utilizing various methods, including grouping claims. It has also introduced technological changes aimed at increasing processing time of claims and the efficiency of decision making.\textsuperscript{527}

A further case management initiative implemented by many commissions is the movement towards prioritizing of claims in terms of commission policies.\textsuperscript{528} For example, the Canadian Human Rights Commission has adopted a case management approach which prioritizes cases in relation to the use of resources.\textsuperscript{529} This prioritization involves a "triage" of cases on the basis of predetermined criteria assessed as having the potential to have the greatest impact on human rights.\textsuperscript{530} Identified assessment criteria include whether the claim: 1.) raises issues of systemic or broad-based policy; 2.) addresses public policy concerns identified by the Commission as being pressing; and, 3.) raises similar facts, issues, or grounds to other claims.\textsuperscript{531}

The trend towards greater emphasis on the use of dispute resolution as a case management process and a more flexible approach to investigation can also be seen in relation to the Ontario enforcement regime. Similar to the federal regime, Ontario also places a priority on addressing systemic discrimination claims based

\textsuperscript{527} CHRC Annual Report 2003, supra n. 12.
\textsuperscript{528} Howe and Johnson, Restraining Equality, supra n. 5 at 112.
\textsuperscript{529} See for example, CHRC 2003 Annual Report, supra n.12.
\textsuperscript{530} Ibid., at 8.
\textsuperscript{531} Ibid.
on issues such as race and racial profiling despite the fact that it no longer has a regional branch devoted to systemic investigations.\textsuperscript{532}

Prior to its abolition in 2002, the British Columbia Human Rights Commission also adopted a more flexible approach to case management. For example, in 2001 the Commission introduced the "Compliance Reform Project" which, among other things, placed greater emphasis on early mediation in the interests of streamlining the complaint management process and reducing backlogs.\textsuperscript{533}

Several years earlier the British Columbia Human Rights Commission also implemented the Public Interest Program, which represented a form of prioritization of cases through the identification of systemic/public interest cases at intake. The Deputy Chief Commissioner, who as previously discussed, was empowered to initiate and/or join cases for the purpose of representing the public interest, became involved in these cases.

The criteria used to identify cases of priority under the Public Interest Program were: 1.) cases involving systemic discrimination allegations; 2.) cases where the outcome may have a significant impact on a large number of disadvantaged people; 3.) cases raising legal issues that could have the impact of clarifying and strengthening human rights protections; and, 4.) cases where resolution could

\textsuperscript{532} As late as 2000, the largest branch of the Ontario Human Rights Commission was the Regional Services and Systemic Investigations Branch, see Howe and Johnson, Restraining Equality, \textit{supra} n. 5 at 53; see also OHRC, \textit{supra} n. 267 at section 28, which establishes a race relations division within the Commission.

\textsuperscript{533} BCHRC Annual Report 2001/02, \textit{supra} n. 349 at 16.
lead to equitable remedies such as special programs that could be utilized in similar claims.\textsuperscript{534}

\textbf{3.8.2 Case Management – The Direct Access Model}

The case management process under the British Columbia Direct Access Model is set under the \textit{Rules}, which as previously noted, are created by the Tribunal for the purpose of facilitating "just and timely resolution..." of claims.\textsuperscript{535} An important aspect of case management in relation to systemic cases is the streaming of claims pursuant to Rule 17 of the \textit{Rules}, which involves the assignment of claims to two possible streams: (a) the Standard Stream, or (b) the Case Managed Stream. The assessment is done, subsequent to screening, by the Registrar in consultation with the Tribunal Chair.\textsuperscript{536}

Decisions around streaming are based on criteria set out in Rule 17(4) which includes:

(a) the novelty of the issues; (b) the complexity of the issues, facts and evidence; (c) the complexity and quantity of the documents; (d) the likelihood of success; (e) the number of participants; (f) the likely number of witnesses and/or expert witnesses; (g) the number of procedural steps that may be needed to focus the issues and expedite resolution; (h) the estimated length of the hearing; (i) the remedies being sought; (j) the requests of the complainant and respondent; (k) the potential for any

\textsuperscript{535} \textit{BCHRT Rules}, supra n. 356 at Rules Part 1-1.
\textsuperscript{536} \textit{BCHRT 2003/04 Annual Report}, supra, n. 354 at 12, also based on an e-mail from the Tribunal on April 12, 2005, resulting from my April 6, 2005, interview.
jurisdictional challenges; and/or (l) the potential for any constitutional challenges.\textsuperscript{537}

As part of the case management process, the British Columbia Human Rights Tribunal utilizes a computerized database system, which tracks cases for the purposes of identifying dates for tribunal processes and scheduling, generating form letters, and the creation of management reports.\textsuperscript{538}

Similar to the Commission Model, under the Direct Access Model, considerable emphasis is placed on settlement particularly, on participation in the early settlement process, which will be discussed further in the upcoming section on settlement and systemic claims.

The Nunavut Human Rights Tribunal, similar to the British Columbia Human Rights Tribunal, is empowered under section 18(1) of the \textit{Human Rights Act}, subject to the \textit{Act} and regulations, to make rules governing the tribunal process and management.\textsuperscript{539} While the \textit{Act} contains provisions for settlement of claims, it does not specify what processes and mechanisms may be available to facilitate settlement.

\textsuperscript{537} \textit{BCHRT Rules}, supra n. at 356 at 17, 4; see also, \textit{ibid.}, at 12.\textsuperscript{538} \textit{BCHRT 2003/04 Annual Report}, supra n. 354 at 5.\textsuperscript{539} \textit{NHRA}, supra n. 298 at section 18(1). It would appear that development of the Tribunal rules is still in progress.
3.8.3 Analysis/Critique

The Commission Model is clearly moving towards the use of an increasingly 'interventionist' approach in managing claims, whereas in the past all claims were subject to the same processes and procedures without being assessed on the basis of the nature of the claim in relation to the potential expenditure of resources. The strength of this approach clearly lies in the potential for the efficient utilization of resources based on an assessment of articulated purposes and goals of human rights claims. In theory, those with higher public interest potential have greater access to commission resources, in turn resulting in the efficient use of public resources.

An absence of some type of mechanism for assessing the cost/benefit of claims in relation to the use of resources, can clearly contribute to the enforcement processes becoming ineffective and generally overwhelmed, an outcome that was seen in many commission based enforcement systems in the past. It also brings into question efficiency and accountability concerns in terms of the expenditure of public resources, for example, such as subjecting all claims to extensive investigation procedures, absent an assessment of the claim in light of established criteria.

It would appear that as part of the interventionist approach to claims management, commissions have gone beyond merely introducing a more flexible approach to claims management, to the implementation of a values based
prioritization of claims, including placing an emphasis on systemic claims. On the surface this development appears positive, but as pointed out by some commentators, there are some inherent difficulties with giving preference to some claims over others. One key problem is the difficulty in distinguishing claims which are systemic versus those that are not, and consequently, in according special priority or access to resources to those claims. As previously discussed, all human rights claims have the potential to raise systemic issues, albeit with varying emphasis and degree. It is therefore critical to ensure that any prioritization process reflect the fact that claims brought forward by individual claimants often raise important systemic issues. Further, very few cases raise broad systemic issues for example, on the scale of Action Travail.

With safeguards in place for ensuring a flexible and informed approach to the identification of systemic claims, there is some rationale for prioritizing systemic claims within the claims management system, for many of the reasons previously mentioned including the broad purposes of human rights legislation and the public interest in addressing systemic discrimination for disadvantaged groups. Additionally, as some interviewees pointed out, addressing systemic claims represents an efficient use of resources. As one interviewee succinctly stated,

541 See for example, Miele, supra n. 154; Hussey, supra n. 156; Meiorin, supra n. 80; Moser, supra n. 157; Radek, supra n. 158.
542 This point was also raised by March 23, 2005, Interviewee (2), supra n. 164.
543 For example, April 7, 2005, Interviewee, supra n. 163.
you get "more bang for your buck" with systemic claims because of the potential for wide-spread impact, win or lose.\textsuperscript{544}

In my view, there needs to be some mechanism in place to allocate resources in the direct access claims process, or the likely outcome will be that the system becomes overrun and ultimately ineffective. The Black Report recommended assigning priority to systemic claims, based on some explicit guidelines for prioritization including: 1.) the cumulative gravity of harm; 2.) the presence of issues involving ongoing policies and practices affecting significant numbers of people, 3.) an assessment of the benefits at issue in the claims; 4.) in potential long term benefits for disadvantaged groups, 5.) the remedy at issue, in terms of the efficacy and enforceability; 6.) the benefit of the case as a potential model for best practices; and, 7.) the benefits of the case as a potential precedent in establishing legal principles for future cases.\textsuperscript{545}

The strength of utilizing criteria for assessing priority is providing a transparent process for the assessment of claims. The weakness of this approach is in relation to who should develop and implement the criteria in light of the absence of a body such as the Commission under the Direct Access Model. The bodies currently designated to provide legal representation to claimants are constrained in their ability to make such an assessment due to contractual obligations which provide for the representation of all human rights claimants subject to limited

\textsuperscript{544} May 5, 2005, Interviewee, supra n. 178.
\textsuperscript{545} Black, \textit{Black Report}, supra n. 16 at 92-93. This is a paraphrase of the list.
exceptions.\textsuperscript{546} Further, the duty of fair and effective representation of clients, in particular in relation to \textit{Law Society Legal Ethics, and Conduct Rules}\textsuperscript{547} would likely preclude a prioritization of claims by advocates and lawyers providing legal representation. Nor is the Tribunal in a position to implement prioritization criteria, as part of case management, as prioritization of claims would compromise its adjudicative role. Consequently, unless an independent, public interest body is created similar to the Commission, this type of prioritization is not realistic.

Looking more specifically at the case management process under the Direct Access Model one potential strength is the process for managing claims under the Case Managed Stream. For example, some interviewees indicated that the Case Managed Stream generally provides effective access to pre-hearing orders and procedures for addressing complex issues frequently associated with systemic claims.\textsuperscript{548} Another interviewee spoke specifically of the benefits of the Case Managed Stream in having Tribunal Members designated to particular

\textsuperscript{546} While the Human Rights Clinic does engage in a preliminary limited assessment of the individual merits of claims in terms of assessing whether there is evidence of \textit{prima facie} discrimination, it is not the type of assessment which is involved in prioritization of claims.


\textsuperscript{548} See for example, \textit{March 30, 2005, Interviewee}, supra n. 174, and also, \textit{April 12, 2005, Interviewee (1)}, supra n. 173. It is interesting to note that in the context of a Canadian Bar Association Subsection Meeting, the Tribunal Chair indicated that 80\% of the Tribunal cases would be streamed into the Standard Stream, as opposed to the Case Managed Stream. It must be noted however, that these comments were made in the early stages of the Direct Access Model, and the situation may have changed, see \textit{CBA Minutes April 30/03}, supra n. 292 at 4.
cases and consequently, in providing Tribunal Members with a strong sense of relevant issues prior to a hearing.\textsuperscript{549}

One weakness of the streaming process for systemic claims, however, is that despite the delineated criteria for streaming which clearly should attract systemic claims, not all systemic claims are streamed into the Case Managed Stream. For example, one interviewee commented that it is "hit and miss" in terms of whether systemic claims get streamed in the Case Managed Stream.\textsuperscript{550} The potential impact for systemic claims on not being properly streamed is that they may not have the benefit of the more proactive case management mechanisms available under the Case Managed Stream versus the Standard Stream, thereby increasing the need for applications, and adding to the length of time and complexity involved in systemic claims.

In my view, the apparently egalitarian claims process under the Direct Access Model is a definite strength in terms of allowing claims access to the claims process regardless of merit or potential for utilization of enforcement related resources. The relatively open access also represents a potential serious weakness, in terms of the absence of mechanisms for assessing the public interest is claims in relation to the use of public resources. One of the obvious concerns with the open access to the claims process regardless of merit or impact is that it has the potential to result in some claims utilizing a

\textsuperscript{549} April 12, 2005, Interviewee (1), supra n. 173.
\textsuperscript{550} May 5, 2005, Interviewee, supra n. 178. This coincides with my experience.
disproportionate amount of enforcement resources.\textsuperscript{551} For example, as discussed previously in relation to access to pre-claim information and legal assistance, some claimants, particularly those from non-disadvantaged groups, have a stronger sense of entitlement than others and consequently, will dissipate a disproportionate share of the resources, without some form of equalizing effect being exerted through claims management and other processes.

The theory that claims that lack merit will be addressed by the dismissal processes and procedures is somewhat specious, given that the sole triggering mechanisms of dismissal processes and procedures are through applications by respondents. While many respondents bring dismissal applications, many do not; particularly in my experience, in cases where there may be strong basis to such applications. Further, as is clear from the last section, regardless of merit, pre-hearing applications consume a great deal of Tribunal resources.

There is no easy answer to the inherent tension between access, and effectiveness and efficiency. It may be that open access to the claims process, regardless of the public interest in the claim is the cost of an accessible enforcement system. If so, it is critical that sufficient resources be made available to enforcement bodies and related organizations in order to process the high volume of claims that such an open-ended process inevitably attracts.

\textsuperscript{551} See for example, \textit{Metcalfe v. International Union of Operating Engineers, Local 882, and Others (No. 8)}, 2005, BCHRT 165 [\textit{Metcalfe (8)}] which has apparently resulted in at least 8 preliminary applications on various issues. Note: this is not a comment about the nature or merit of that case.
Under the Direct Access Model there is no body such as a commission to prioritize claims and access to resources. As discussed above, it is also clear that prioritization of claims is a 'double edged sword', necessary to some degree, but also dangerous unless based on clear criteria. These criteria must be developed in consultation with human rights stakeholders; including respondents, and affected groups. Without a body such as the commission it is questionable whether fair and efficient procedures or mechanisms aimed at case prioritization can be built in as part of the claims administration process without compromising the Tribunal's adjudicative role. This type of approach would clearly involve balancing the interests of access with efficiency related goals.

An example of attempts to balance the above goals can be seen in the civil court process, which appears to be moving away from a traditional arms length, 'neutral' case management role towards a more interventionist approach, through the use of processes which include judicial case conferencing structured to move cases forward, by for example, providing judges with the discretion to narrow issues, and impose time limits on parties.552

While it is important to ensure fairness in the enforcement process, it is also critical to ensure that resources are utilized in a fair and efficient manner, with means for public accountability. An approach that involves the Tribunal taking a

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552 See, Canadian Bar Association, Bar Talk, "B.C.'s Civil Justice Experiment" Volume 17, Number 3, June 2005.
more active role in case management may represent a potential way of achieving these goals.

The La Forest Report recommended a pro-active case management paradigm in the context of the review of the federal human rights regime. 553 For example, it recommended that the Tribunal take an active role at the pre-hearing stage in determining claims that should be subject to an expedited hearing process. 554 The view of the Panel was that a more active role in pre-hearing case management would not compromise the adjudicative role of the tribunal as long as certain safeguards were put in place consistent with the principles of natural justice, including the provision where appropriate, for parties to have the opportunity to make oral and written submissions to the Tribunal about case management decisions. 555

3.8.4 Summary and Recommendations

It would appear that there are some potential benefits, as well as hazards, in prioritization of systemic claims as part of case management under the Direct Access Model. On the one hand, prioritization of systemic claims ensures

553 La Forest Report, supra n. 10 at p. 60.
554 Ibid. at 59-60. In contrast, under the Direct Access Model in British Columbia, expedited hearings are at the discretion of the parties. It would appear that based on comments by the Chair Tribunal at a CBA Human Rights Subsection Meeting on October 21, 2004, the provision is generally underutilized, see CBA Minutes October 21/04, supra n. 503.
555 La Forest Report, supra n. 10 at 60.
adequate access to enforcement resources, which appears to be in the public interest given the broad impact of systemic claims. On the other hand, it is often difficult to apply prioritization criteria in a way that does not exclude potential systemic claimants from accessing the enforcement process. Additionally, prioritization of claims by bodies currently involved in the Direct Access Model such as the Tribunal, based on value laden criteria such as an assessment of the public interest, is not a viable option. As a result, while prioritization is good in principle, absent an independent body such as a commission, prioritization of claims is not practical under the Direct Access Model. In contrast, however, it is viable for the Tribunal to take a more active, interventionist approach to case management which does not involve prioritization of claims, such as deciding which claims are suitable for expedited hearings. While a more proactive case management process may pose some initial challenges, such as creating processes which provide access to mechanisms for ensuring administrative fairness in case management decision making, and the provision of increased resources, it represents a viable alternative to prioritization.

3.8.5 Recommendations - Case Management

- That an interventionist oriented case management system be implemented based on the La Forest Report \(^{556}\) along with corresponding

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\(^{556}\) *Ibid.*
mechanisms to ensure administrative fairness in case management decisions.

- That the mechanisms governing streaming of claims be strengthened to ensure that systemic claims are routinely streamed into the Case Managed Stream.

- That the Tribunal be provided with adequate resources in order to address the increased administration involved in the increased number of cases under the Case Managed Stream.

3.9 Investigation/Disclosure

3.9.1 Rationale

Adequate investigation/disclosure processes, procedures, and mechanisms are central to the ability of systemic claimants to bring forward claims, and to adequately prepare and sustain systemic claims. This issue implicates the assessment criteria of access, effectiveness, efficiency and adequacy of resources. The nature of evidentiary burdens on systemic claimants will be discussed in a subsequent section. The focus of this discussion is on the
processes, procedures, and mechanisms for obtaining such evidence in systemic claims.

3.10 Overview of Applicable Processes, Procedures, and Mechanisms

3.10.1 Investigation/Disclosure – The Commission Model

As discussed in the preceding section on case management, all Canadian human rights commissions are statutorily mandated to investigate claims accepted for filing. Additionally, all human rights statutes provide commissions with investigatory powers.

For example, section 43(1) of the Canadian Human Rights Act,\textsuperscript{557} provides the Commission with broad powers to investigate a claim, including under 43(2.1),\textsuperscript{558} obtaining a search warrant issued by the Federal Court on the basis of a belief of reasonable grounds that there is evidence within a premise that is relevant to the investigation. Under 43(2.4)\textsuperscript{559} an investigator, who is usually a human rights officer, can require production of any individual found in the premises that are the subject of the search, to produce documents for inspection. As part of the investigation, in addition to the claim form and respondent reply, both parties have the opportunity to provide the investigator with other documents and evidence for consideration in the investigation. The investigator also interviews

\textsuperscript{557} CHRA, supra n. 256 at section 43(1).
\textsuperscript{558} Ibid., at section 43(2.1).
\textsuperscript{559} Ibid., at section 43(2.4).
the respondent and claimant, as well as witnesses.\textsuperscript{560} Section 44(1) states that the investigator must "...as soon as possible, after the conclusion of the investigation, submit to the Commission a report of the findings of the investigation".\textsuperscript{561} Both parties are given the opportunity to review the investigation report and make submissions before the report is presented to the Commissioners.\textsuperscript{562} Both the claimant and the respondent have a right to apply to the Federal Court of Canada for a review of the decision of the Commission.\textsuperscript{563}

The Canadian Human Rights Tribunal Rules of Procedure, Rule \textsuperscript{564} outlines the procedures around statement of particulars, disclosure, and production at the adjudication stage. All of its subsections appear to govern production and disclosure by the parties and the Commission. Specifically, there are no provisions governing third party particulars, disclosure or production. Rule 6(5) sets out an ongoing obligation on the parties for disclosure and production, in particular in relation to new facts or information. Rule 6 (3) pertains to expert witness reports. While there was a specified time period for filing expert reports in the past, the time period is now unspecified and is determined by the Tribunal on a case by case basis.

\textsuperscript{561}CHRA, supra n. 256 at section 44(1).
\textsuperscript{562}CHRC Complaint Process, supra n. 560; and also, CHRC Investigation, supra n. 560.
\textsuperscript{563}ibid.
As previously discussed in relation to case management, the Canadian Human Rights Commission, like many commissions, has adopted a more flexible approach to investigations, tailoring the extent of the investigation to the case, or in some cases eliminating the investigation stage of the enforcement process altogether. The Commission also places considerable emphasis on reducing the length of time taken in the investigation of claims.\footnote{565 See generally Canadian Human Rights Commission, \textit{Looking Ahead Consultation Document}, supra n. 14; also April 1, 2005, \textit{Interviewee}, supra n. 163.}

The Ontario Human Rights Commission investigation process is governed by section 33 of the \textit{Human Rights Code},\footnote{566 \textit{OHRC}, supra n. 267 at section 33.} which provides for a mandatory investigation by the Commission. The Commission's investigatory powers are similar to those described above in relation to the federal arena including powers of entry, powers to request documents or items relevant to the investigation.\footnote{567 \textit{Ibid.}, at section 33(3) (a)-(d).}

Rules 41-48 of the Human Rights Tribunal of Ontario \textit{Rules of Practice} set out specific processes and procedures for disclosure and production of particulars at the adjudication stage. Of particular note, under Rule 41, the Commission must provide full disclosure of information and documents resulting from the investigation to all parties, and to any other person identified by the panel, within thirty days of the Initial Conference Call.\footnote{568 \textit{OHRT Rules}, supra n. at Rule 41.} Rule 46 states that disclosure is an ongoing obligation.\footnote{569 \textit{Ibid.}, at Rule 46.} Rule 48 provides the Tribunal with power to make an
order for disclosure or production against a party.\textsuperscript{570} Similar to the federal regime, the Ontario \textit{Rules of Practice} appear to be silent regarding third party disclosure powers. Also similar to the Canadian Human Rights Commission, the Ontario Commission has attempted to reduce the length of time of investigations.\textsuperscript{571}

The former British Columbia \textit{Human Rights Code} provided the Commission with broad powers of investigation similar to the Federal and Ontario enforcement processes. For example, section 24(1) of the \textit{Code}, gave the Commissioner of Investigation or a human rights officer the power to: (a) obtain documents and any other evidence that may relate to the claim; (b) to make any inquiry relating to the claim of any person in writing or orally. Under section 24(4) a designate of the Commission could enter a dwelling place to obtain evidence after obtaining consent from the occupant. Under section 24(7-8), in cases where consent was withheld, the Commission had the ability to apply to the Supreme Court for a warrant based on reasonable and probable grounds.\textsuperscript{572}

Similar to other commissions, procedures on disclosure and production of documents at the hearing stage were set by the British Columbia Human Rights Tribunal, pursuant to section 35(1) of the former \textit{Human Rights Code}.\textsuperscript{573} Section 35(1.1) (b) specifically empowered the Tribunal to make rules relating to

\textsuperscript{570} Ibid., at Rule 48.
\textsuperscript{571} OHRC Annual Report 2003/04, supra n. 344 at 3.
\textsuperscript{572} \textit{Code}, supra n. 247, at section 24.
\textsuperscript{573} Ibid., at section 35(1).
disclosure of evidence including pre-hearing disclosure and examination of a party under oath or by affidavit.\(^{574}\)

3.10.2 Investigation/Disclosure – The Direct Access Model

In contrast to the Commission Model, under the Direct Access Model in British Columbia, there are no statutory provisions or procedures for investigation of claims. Rather, the British Columbia Human Rights Tribunal Rules set out procedures for disclosure of documents between the parties, within specified timelines. Under the Rules, cases are streamed into the Standard Stream and the Case Managed Stream, referred to in the previous discussion on case management. Rule 18 sets out the applicable procedures for disclosure for Standard Stream claims.\(^{575}\)

Documents that are included in disclosure are particulars of the remedy sought by the claimant and copies of all documents in possession or control of the parties, which may be relevant to the claim or response to the claim. Under Rule 18(5), disclosure by claimants must occur within 60 days from the date of the Tribunal’s streaming letter.\(^{576}\) Under Rule 18(6) respondents have 30 days from the date of the receipt of claimants' disclosure to delivery to the claimant, a response to the remedy and copies of all documents in possession or control that

\(^{574}\) Ibid., at section 35(1.1) (b).

\(^{575}\) BCHRT Rules, supra n. 356 at Rule 18.

\(^{576}\) Ibid., at Rule 18(5).
are relevant to the claim or to the response to the claim.\textsuperscript{577} Under Rule 18(7) dates for disclosure are suspended if an application is made under section 27(1) (a) of the Code challenging the jurisdiction of the claim.\textsuperscript{578} Additionally under Rule 18(8) the parties may agree between themselves to change the dates for disclosure.\textsuperscript{579} Rule 18(9) provides for an on-going obligation between the parties for disclosure in the event of receipt of any new documents or change of information.\textsuperscript{580}

As a result of the consequential amendments by the Administrative Tribunals Act coming into force, the Tribunal now has the jurisdiction to order third party disclosure. Specifically, under section 34 of the Administrative Tribunals Act, upon the application of a party, the Tribunal has the discretion to order disclosure of documents from non-parties including directors and officers of companies.\textsuperscript{581}

The Nunavut Human Rights Act does not specify any provisions for disclosure. While it appears from the statute that the Commissioner in Executive Council may make regulations on a range of issues, there is no indication of any regulations being brought into force to date relating to disclosure.

\textsuperscript{577} Ibid., at Rule 18(6).
\textsuperscript{578} Ibid., at Rule 18(7).
\textsuperscript{579} Ibid., at Rule 18, 8.
\textsuperscript{580} Ibid., at Rule 18, 9.
\textsuperscript{581} British Columbia Administrative Tribunals Act, S.B.C. 2004, c. 45 at section 34 [ATA].
3.10.3 Analysis/Critique

Braha suggests that a form of discovery or disclosure within the enforcement process is necessary for a number of reasons, including assessing the opponent's case, evaluating one's own case, and adequate case preparation.\(^{582}\)

There are several problems associated with obtaining and assessing evidence of systemic discrimination due to its complex and subtle nature and the fact that systemic discrimination is often embedded in everyday policies and practices, which are often solely in the possession and control of respondents. As a result, a relatively high level of sophistication is required to access information and documents to substantiate systemic discrimination. Consequently, adequate access to a discovery or disclosure process within the enforcement process is essential in systemic claims.

The investigation process under the Commission Model and the active involvement of the commission in terms of the provision of resources and expertise appears to represent a significant strength in addressing systemic claims.\(^{583}\) Specifically, one of the major benefits of the broad provisions around investigatory powers under the Commission Model is in the Commission's powers to demand disclosure of information that may not yet be in existence,

\(^{582}\) Braha, Review, supra n. 272 at COM-6.

\(^{583}\) See the Black, Black Report, supra n. 16, at 90, which suggests that due to the fact that systemic cases are more complex than other cases, they often require a substantial resource commitment. Further, that a commission is often in the best position to assess a need for an investigation and to implement such investigations.
such as statistics on rate of hiring. In contrast, under the Direct Access Model, information and documents subject to disclosure under the Rules are those that are in the parties' "possession or control". This provision means, for example, that information that is not already in existence will not be disclosed in the ordinary course of disclosure. Such limitations in the scope of disclosure, however, do not preclude an application to the Tribunal for an order that the respondent compile such information, as was seen in the case of Young v. Provincial Health Authority and others (No. 2),\(^{584}\) where the claimant successfully argued that creation of certain documents relating to statistical information was "arguably relevant"\(^{585}\) to the issue between the parties.\(^{586}\) The difficulty with this approach is that it poses access issues in terms of the requirement of making an application, and the degree of sophistication involved in such a process. Additionally, it raises efficiency issues around time delay, and around the use of public resources in addressing such applications.

Several interviewees were of the view that the investigation provisions under the Commission Model were one of the clear benefits of the Model in terms of providing access to resources to conduct investigations and in obtaining difficult to obtain evidence.\(^{587}\) Some interviewees however, expressed concerns about

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\(^{584}\) Young v. Provincial Health Services Authority and others (No. 2), 2005, BCHRT 38. [Young].

\(^{585}\) This is the threshold test for disclosure of documents, ibid., at para. 4.

\(^{586}\) For example, ibid., at para. 25, the respondent was ordered to produce statistics reflecting the number of patients accessing its services during a specified time period.

\(^{587}\) See for example, April 12, 2005, (1) Interviewee, supra n. 173; May 5, 2005, Interviewee, supra n. 178.
the difficulties associated with commission investigations such as delay and difficulty obtaining access to information.\textsuperscript{588}

A closer look at the Commission based investigation process reveals further ambiguities. For example, Braha and other commentators suggest that commission control over the investigation process raises potential access barriers, including the fact that parties often do not have access to information resulting from the investigation process, and/or frequently may not have the opportunity to refute the evidence and information gathered in the course of the investigation. Additionally, information and evidence from commission investigations have major implications for parties beyond sustaining claims at hearing due to the fact that such information/evidence also informs commission decisions around dismissal or referral to hearing.\textsuperscript{589}

Braha also points out that under the former British Columbia Commission model, while the Commissioner of Investigation and Mediation or a human rights officer had the power under section 24(1) of the Code to compel the production of evidence from non-parties, there was no provision for parties to require such production from non-parties.\textsuperscript{590} This gap left the parties dependent on the Commission for information, for example in terms of access to the investigation

\textsuperscript{588} For example, April 4, 2005, Interviewee, supra n. 243; and April 13, 2005, Interviewee, supra n. 162.

\textsuperscript{589} Braha, Review, supra n. 272 at COM-5; See also Zutter v. British Columbia (Council of Human Rights)(1995), 3 B.C.L.R. (3d) 321, 122D.L.R. (4th) 665 (B.C.C.A.), under the Council of Human Rights, where the British Columbia Court of Appeal found that the claimant was prejudiced by the lack of disclosure of information resulting from the Council's investigation.

\textsuperscript{590} Braha, ibid., at COM-7.
report itself. Alternatively, parties had to turn to other sources of information such as through freedom of information applications, which posed notoriously high access thresholds.\textsuperscript{591} In addition to the difficulty of obtaining access to information and evidence under the Commission Model, proving the relevancy of information and documents in systemic claims posed difficulty, necessitating numerous applications by claimants for Tribunal orders compelling disclosure.\textsuperscript{592}

In discussing her experience representing 100\textsuperscript{593} claimants in \textit{Reid}, Braha noted that the case involved 60 days of hearing over a period of a year and a half, 24 witnesses, and a number of expert witnesses. Braha also noted that many volumes of evidence were used in the case, for example, with one exhibit consisting of 9 volumes of documents.\textsuperscript{594} Braha identified four practice issues of concern in systemic cases; one of which was “document management and disclosure.”\textsuperscript{595} At the time \textit{Reid} was filed there were no provisions under the Commission Model for disclosure of documents and as a result, an order for disclosure was obtained in October of 1998. Braha indicated that she was still receiving documents in 2001.\textsuperscript{596}

An additional weakness in the Commission Model in British Columbia was that, similar to the Federal and Ontario regimes, the Commission’s use of investigation

\begin{footnotesize}
\begin{itemize}
\item [591] Ibid. at COM-7.
\item [592] See for example the cases of \textit{Moore}, supra n. 509.
\item [593] Due to the fact that there was no representation provisions at the time \textit{Reid} was filed, 100 individual claims had to be filed.
\item [594] Canadian Bar Association, British Columbia, Minutes – Human Rights Section, March 12, 2001 at 3 [CBA Minutes March 12, 2001].
\item [595] Ibid.
\item [596] Ibid.
\end{itemize}
\end{footnotesize}
processes declined significantly over time due to several factors, including, most notably, decreased Commission resources. The obvious impact on claimants was a reduction in access to claims related information in the absence of a commission investigation. The Committee for The Advancement of Human Rights suggested that the lack of investigation also resulted in additional access barriers for claimants, in terms of significantly increasing the rate of dismissal of claims as investigations declined.\(^597\) For example, in the 2000 and 2001 period, the rate of investigation under the Commission was less than 600 cases compared to 1,298 during the period of 1994 to 1995. Additionally, the dismissal rate without investigation rose to 19.3% in 2000 and 2001, compared to 10.5% in 1996 and 1997.\(^598\)

A final weakness of the Commission Model relates to the issue of timeliness of investigation and disclosure of documents between parties. Timeliness in investigations is a common area of concern raised by commentators and by interviewees, specifically in terms the length of time taken by commissions in investigations of systemic claims, and the consequent negative impact on claimants.\(^599\) Typically, commission processes do not provide for time lines for disclosure of documents, which leads to a barrier to access and raises fairness issues.\(^600\) One interviewee observed that under the Commission Model in British Columbia it was not uncommon to receive huge affidavits or stacks of documents.

\(^{597}\) CAHRTS, supra n. 510.  
\(^{598}\) Ibid.  
\(^{599}\) April 4, 2005, Interviewee, supra n. 243; and also, April 13, 2005, Interviewee, supra n. 162.  
\(^{600}\) Ibid.
from opposing parties on the day of hearing, even though they had been requested on more than one occasion well in advance of the hearing. The resulting dilemma was whether to proceed with the hearing and struggle to absorb the information while in the process of conducting the litigation, or seek an adjournment, resulting in further cost and delay to systemic claimants.\footnote{April 13, 2005, Interviewee, supra n. 162.}

Comparing the Direct Access Model with the Commission Model, the fact that disclosure processes, procedures, and mechanisms are controlled by parties appears to represent a major strength in terms of access. Further, clear time lines in disclosure provisions represent a major strength in terms of ensuring timely access to relevant documents without the commission acting as an intermediary between the parties. Additionally, the provisions for enforcement of disclosure between the parties appear to provide access to effective recourse in the event that disclosure is not forthcoming. Specifically, the provisions in Rule 4(3) allow the non-breaching party to apply to the Tribunal for an order that the other party is in non-compliance, with several possible consequences, including that undisclosed documents can be prohibited from introduction at hearing, and/or the non-disclosing part may be faced with costs.\footnote{BHRT Rules, supra n. 356 at Rule 4(3).}

Conversely, party autonomy over the disclosure process under the Direct Access Model also appears to represent a primary weakness compared to the Commission Model, in terms of the degree of responsibility placed on claimants
in obtaining information and evidence. For example, claimants are charged with the sole responsibility for investigation of claims. In order to access documents the claimant must either have them in his or her possession, which is unlikely given the institutional nature of systemic discrimination, or be in a position to bring an application to obtain them. While disclosure provisions are of some assistance, they are only effective if the relevant documents are fairly obvious or the claimant is sophisticated enough to know what to request from the respondent and the respondent is cooperative in providing the documents. In the event, for example, that the respondent is not forthcoming with disclosure, the onus is on the claimant to make an application to the Tribunal for an order for disclosure, which requires legal and technical sophistication and access to resources, including legal assistance. An example of the critical impact of access to documents in systemic cases can be seen in Radek, where there was evidence at hearing to suggest that the respondent security company had kept a written record of complaints. The Tribunal noted that the records, which would have been of assistance in understanding what complaints had been made to the security company, were not produced by the respondent or pursued by the claimant at hearing. However, in the absence of such evidence, the Tribunal was able to infer from the testimony of various witnesses that the respondents failed to take the complaints seriously.

603 Radek, supra n. 158.
604 Ibid., at para. 108. The Tribunal also noted that fault was not attributed to either party for the absence of the documents.
605 Ibid., at para. 109.
An example of the above difficulties can also be seen in *Young*, as previously discussed above. The claimant applied for disclosure of various documents, which he submitted were relevant to the systemic issues. Both the respondent Ministry of Health and the British Columbia Cancer Agency strenuously opposed the claimant's application on the basis that the disclosure requests were overbroad. The claimant, who was represented by legal counsel, was successful in obtaining orders for disclosure of a number of documents. However, the Tribunal declined to order disclosure of all of the requested documents.606

One interviewee stated that given the complexity and the sheer volume of documents involved in systemic claims, legal counsel working on a pro bono basis could not possibly take on representation of a systemic claim without access to extensive resources.607 For example, in the course of acting on behalf of a claimant in a recent case, in addition to extensive and costly expert reports, approximately 15,000 documents had to be photocopied. Given that there were five legal counsel acting on behalf of the respondent, and two on behalf of the claimant, the time and cost involved in photocopying the documents was significant.608

An apparent major strength in disclosure processes and related procedures under the current legislation compared to the previous statute is the explicit provision providing parties with the means of obtaining disclosure of information.

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606 *Young*, supra n. 584.
607 May 5, 2005, Interviewee, supra n. 178.
608 Ibid.
and documents from persons who are not parties to the litigation. In contrast, under the Commission Model, parties are reliant on a commission to obtain such documents. While this may not be a significant difficulty in light of the fact that commissions are statutorily obligated to act in the public interest, the necessity of going through an intermediary in order to access information is time consuming and adds unnecessary complications, bringing into question issues of effectiveness and adequacy of resources.\textsuperscript{609} Third party information is often critical in systemic claims given the nature and type of evidence at issue in systemic claims necessary to show a pattern of discrimination, such as institutional practices and policies, which is likely to be in the hands of third parties such as subsidiary companies or service providers.

For example, the case of \textit{Metcalfe v. International Union of Operating Engineers, Local 882 and Others (No. 7)}\textsuperscript{610} involved an application by the claimant for disclosure of documents from disability insurers who were not parties to the

\textsuperscript{609} In addition, under the former Commission Model in British Columbia, the Deputy Chief Commissioner had no investigative powers of his own and was therefore dependent on the cooperation of the Commissioner of Investigation and Mediation for access to information. While provisions such as section 26(5), which stated that the Commissioner of Investigation and Mediation was obligated to inform the Deputy Chief Commissioner in writing when a claim was referred to the Tribunal for hearing, were of assistance, the Commissioner of Investigation and Mediation was statutorily independent from other Commissioners under section 15(8) of the \textit{Code}. For discussion of the issue of access to information in order to effectively address systemic claims see Brodsky and Day, \textit{BCHRC Report July 3, 1998}, supra n. 60 at 23. This issue was less of a problem, however, where the Deputy Chief Commissioner was a party to a claim due to the fact that under section 26(4), as a party he was entitled to a copy of the investigation report. Additionally, under section 26(5), the Commissioner of Investigation and Mediation was obligated to inform the Deputy Chief Commissioner in writing when a claim was referred to the Tribunal for hearing.

\textsuperscript{610} \textit{Metcalfe v. International Union of Operating Engineers, Local 882 and others (No. 7)}, 2005, BCHRT 165 [\textit{Metcalfe (7)}]. Contrast this case with an application in the same case in \textit{Metcalfe (No.3)}, 2004 BCHRT 53 [\textit{Metcalfe (3)}], prior to the amendments to the \textit{Code} as a result of the \textit{Administrative Tribunals Act}, in which the Tribunal held that it had no jurisdiction to order disclosure of documents by the same non-parties.
claim. The Tribunal held that the threshold under the *Administrative Tribunals Act* provisions was consistent with Tribunal case law which provided for disclosure where the documents "...are potentially or arguably relevant" The Tribunal noted that in some circumstances documents may be ordered to be produced directly to the Tribunal for review, rather than directly to the applicant. The Tribunal also noted in ordering disclosure by the third parties who were situated outside the province, that as a provincially created body it had no extraterritorial powers to compel parties situated outside the province, and therefore the implementation of the order was dependent on the cooperation of the third parties.

It would appear from *Metcalf* that the relatively low threshold for obtaining an order for third party disclosure is likely to make such orders relatively accessible for claimants. It would also appear that one of the major weaknesses and resulting gaps in relation to this provision is the difficulty in enforcing the order where third parties are situated outside of the province, which is often the case with corporate respondents.

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611 *Metcalf* (7) *ibid.*, at para. 10 citing *Watt v. Foster/Hestia*, 2001 BCHRT 20 and also at para. 11.
612 *ibid.*, at para. 12.
613 *ibid.*, at paras. 21-24.
614 There may be difficulties around enforcing such judgments even if they are Supreme Court Judgments. While some legislation has reciprocal enforcement provisions involving other jurisdictions, not all legislation has such provisions. From my understanding however, legislation such as the *Enforcement of Canadian Judgments Act*, [RSBC 1996], c. 115, and the *Enforcement of Canadian Judgments and Decrees Act* [SBC2003] Chapter 29, which are not enforce yet, may be of assistance in this regard.
Another related weaknesses in the third party disclosure provisions is the requirement that the Tribunal must apply under section 34(4) of the Administrative Tribunals Act, to the British Columbia Supreme Court to enforce compliance by third parties with its own disclosure orders, or similarly, under section 49(1)(d) of the Administrative Tribunals Act, to enforce orders for contempt of Tribunal processes. As noted by Braha, the Tribunal previously had the statutory power to issue subpoenas in the event of non-compliance. The fact that the Tribunal now has to apply to the Supreme Court in order to enforce compliance raises concerns about the impact of added time and resource barriers on claimants, and generally, the effective and efficient use of resources.

3.10.4 Summary and Recommendations

Access to effective processes, procedures, and mechanisms for obtaining disclosure of information and documents are critical in being able to substantiate systemic claims. Investigation provisions under the Commission Model absent

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615 ATA, supra n. 581 at section 34(4).
616 Ibid. at section 49(1)(d).
618 See for example, the case of Metcalfe v. International Union of Operating Engineers, Local 882, and others (No. 8), 2005, BCHRT 250, where the Tribunal considered an application for an order directing the Tribunal to apply to the British Columbia Supreme Court for an order for third party compliance with a previous Tribunal order for disclosure. While the Tribunal ultimately determined that the claimant had failed to provide an evidentiary basis for such an order, the process clearly involved the expenditure of time and resources.
adequate mechanisms to ensure party access to information and documents gathered in the course of the investigation, or mechanisms providing for disclosure directly between parties, are not only ineffective for systemic claims, but also detrimental to the sustainability of such claims. On the other hand, disclosure mechanisms under the Direct Access Model appear to reinforce the private nature of the claims process, placing a major burden on systemic claimants around obtaining evidence. As such they do not take into account the public interest in such cases. While third party disclosure provisions do not necessarily relate to inherent differences between the two Models, as there is provision for the Commission to obtain such disclosure, the statutory provisions under the legislation in British Columbia represent a significant benefit in obtaining evidence in systemic claims due to the access that is provided directly to claimants, and the related benefit of autonomy over claims. At the same time, these provisions also reflect a significant weakness in terms of the degree of onus put on claimants to obtain such information absent a public body such as a commission. Additionally, a further weakness relates to gaps in enforcement provisions around third party orders.

3.10.5 Recommendations – Investigation/Disclosure

- That a newly created or pre-existing, public body, independent of government be provided with the statutory authority in systemic claims
involving issues of broad public interest to implement an investigation or discovery along the lines of civil discovery processes, with the claims process temporarily being suspended and on a "stand down" basis for a specified period of time to allow for investigation.619

- That procedures and mechanisms be clearly articulated that provide for administrative and procedural fairness in such investigations, and recourse to the Tribunal around investigation processes and procedures.

- That a statutory exemption be created under the *Administrative Tribunals Act* to empower the Tribunal to enforce third party orders without having to apply to the Supreme Court.

- That the gap with respect to the extra-territoriality of third party disclosure orders be bridged with a mechanism that allows claimant access to Supreme Court extra-territoriality enforcement provisions and procedures.

3.11 Settlement

Settlement relates to processes, procedures, and mechanisms within the enforcement process focused on settling systemic claims prior to a hearing. The

619 Based on discussions with various interviewees, for example, *April 4, 2005, Interviewee, supra* n. 243.
following analysis/critique looks at various settlement processes under both Models, including early settlement, and mediation at later stages of the claims process. This section also looks at the public interest in settlements of systemic claims, including who should represent the public interest in settlement, and the degree to which it should be factored into settlements involving systemic claims. The issue of systemic remedies within settlement agreements, and monitoring and enforcement of settlements is addressed below.

3.11.1 Rationale

Settlement provisions are generally viewed by commentators as an essential component of the enforcement process, including providing claimants with options for resolving claims without having to resort to formal hearing processes. There are however, tensions and complexities related to settlement of human rights complaints, particularly systemic claims because of their high public interest component. These tensions result from the dual goals of enforcement which, as discussed in earlier chapters, are aimed at both remedying individual claims, and the broader goal of eradicating patterns of discrimination.

Two major issues arise from the above tensions, which pose difficulties for systemic claims and settlement. The first issue relates to the emphasis on informal processes and the consequent de-emphasis of rights as a means of
eliminating discrimination and achieving equality. The second issue relates to the tensions between the public interest in systemic discrimination and the private nature of settlement processes. Both are discussed below.

As discussed in Chapter II, there was a strong emphasis in early human rights enforcement on conciliation based on the view that human rights enforcement should reflect a central underlying objective of changing discriminatory attitudes.\(^{620}\) Human rights legislation eventually moved away from a focus on the interpersonal and informal towards an increasingly formalized enforcement process, based on recognition of broader goals of equality and conceptualizations of discrimination. Black suggests that over time, the goals of human rights dispute resolution processes also changed from the elimination of discriminatory attitudes to education related goals.\(^{621}\) Settlement processes in human rights also increasingly reflected the efficiency related goals of the timely processing of claims, and case management of claims backlogs. These underlying trends appear to be reflected in the apparently increasing use of informal alternative dispute resolution processes such as mediation and conciliation as a way of addressing discrimination claims, under both the Commission and Direct Access Models.\(^{622}\)

\(^{620}\) Black, \textit{Black Report}, supra n. 16 at 113; and Howe and Johnson, \textit{Restraining Equality}, supra n. 5, generally.

\(^{621}\) Black, \textit{Ibid.}, at 114

The resulting emphasis on informal processes, procedures, and mechanisms as a means of resolving human rights claims presents some potential challenges for effectively addressing systemic discrimination. For example, Delgado and other commentators suggest that formal structures embodying "...rights, rules and enforcement..." provide protections to disadvantaged groups which are not available in informal approaches. He also suggests that informality and lack of structure not only decreases the likelihood of addressing and preventing racism, but is likely to result in increased incidents of racism. He posits that it is only through the enactment of formalized rights based processes that a clear societal message that racism is unacceptable is communicated and concomitantly, and that it is only through such approaches that gains can be made towards combating racism on a wide spread systemic level. Finally, the appeal and perceived benefits of informal settlement processes, including the potential to achieve community and interpersonal connection, result from the idealized notions of white professionals and academics that do not experience racial discrimination on a daily basis, and who when they do encounter a threat to their personal interests, readily resort to the language of formalized rights.

Buckley similarly suggests that choice of processes for resolution of disputes represents a values choice, which in turn shapes the manner in which claims are

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623 Richard Delgado, Critical Legal Studies and the Realities of Race, supra n. 38 at 409, and generally.
624 Richard Delgado, The Ethereal Scholar, supra n. 38 at 315, and generally.
625 Ibid., at 305-306.
resolved and their outcomes. Alternative dispute resolution processes typically involve four main goals: fairness, effectiveness, quality and access, which often conflict. For example, the goal of achieving fairness may conflict with the goal of efficient settlements. Buckley suggests that the primary goals that should inform the dispute resolution process in a human rights context are: "effectiveness, qualitative outcome goals, access and process quality."

The potential impact of emphasis on informal disputes as a means of resolving claims within the enforcement process, and similarly, the compromised ability to effectively address the public interest in systemic claims, engages the assessment criteria of access, fair and effective processes, the efficient use of resources, and adequacy of resources.

The second issue that problematizes settlement in human rights is the inherent tension between the public interest goals of addressing systemic discrimination and those of providing effective and efficient processes, procedures, and mechanisms for individuals in remedying their human rights claims. As discussed above, this issue relates to questions regarding the extent that public interest considerations should play in settlement of systemic claims, particularly in relation to timeliness and efficiency concerns, as well as the related question


\[627\] Ibid., at 3

\[628\] Ibid.
of who should represent the public interest. Questions also arise regarding the
degree and extent of public access to systemic settlement terms and information
about such settlements. As discussed below, these concerns raise the dilemmas
of access to effective, efficient and fair enforcement processes, procedures and
mechanisms, and also adequacy of legal and other resources, and
accountability.

3.12 Overview of Applicable Processes, Procedures and Mechanisms

3.12.1 Settlement – The Commission Model

Alternative dispute resolution has traditionally been a major part of the
commission based enforcement processes. Commissions increasingly
emphasize informal dispute resolution processes as a means of resolving human
rights claims, in part in an attempt to reduce case loads and speed up the claims
process. As a result, all commissions offer some form of informal dispute
resolution throughout the claim process. Additionally, in many jurisdictions the
human rights tribunal also provides an alternative dispute resolution process prior

629 See for example, OHRC Annual Report, 2003/04, supra n. 344 at 3-4, which suggests that in
2003-2004, the Commission Mediation Office closed 1,104 cases, with a 71% mediation
settlement rate. In contrast, 288 cases were referred to the Tribunal for hearing. See also, the
Human Rights Tribunal of Ontario "Core Mandates: Adjudication and Mediation and discussion
regarding the "...savings of hundreds of hearing days and millions of dollars in legal costs to the
2005). See also, Canadian Human Rights Commission, Looking Ahead Consultation Document,
supra n. 14 at 6, which discusses the move towards a "Greater emphasis on Alternative Dispute
Resolution".
to adjudication. For example, under the federal human rights regime, section 48(1) of the Canadian Human Rights Act states that settlement is an option at any stage after the filing of a claim and before a hearing takes place. The Canadian Human Rights Tribunal also offers alternative dispute resolution at all stages of the enforcement process.

In the federal regime the option of mediation occurs early in the claim process, on a pre-investigation basis, with the Commission initially screening the claim for appropriateness for referral to the Alternative Dispute Resolution Branch. Mediation is voluntary and in the event parties refuse to participate, or are unable to settle their claims, claims are referred to the Investigations Unit for investigation. Parties who initially refuse mediation or who are unable to reach settlement can subsequently request dispute resolution at a later stage of the enforcement process.

The Canadian Human Rights Commission also utilizes conciliation, which differs from mediation primarily in its mandatory and binding nature. In some cases, prior to referral to the Tribunal, the Commission appoints a conciliator under

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630 CHRA, supra n. 256 at section 48(1).
631 Canadian Human Rights Commission, Canadian Human Rights Commission Newsletter, "Commission Moves to Improve Dispute Resolution" Vol.1, Number 1, October 2003 at 1
632 Ibid., at 3
633 Ibid.
section 47(1) of the Act, and refers claims to a mandatory 60 day conciliation period.\footnote{634 CHRA, \textit{supra} n. 256 at section 47(1); and also, see generally \textit{CHC Annual Report 2003, supra} \textit{n. 12 at 16}.}

Under section 48(1) (2), all settlement agreements must be approved by the Commission based on a review of the agreement to ensure that the terms are “fair and in the public interest.”\footnote{635 \textit{CHRA, ibid.} at section 48(1) (2). See also, Canadian Human Rights Commission, Mediation and Human Rights Complaints (Ottawa: Canadian Human Rights Commission, November 2003). Online: http://www.chrc-ccdp.ca (last accessed April, 2005) [\textit{CHRC Mediation and Human Rights}]\footnote{636 \textit{ibid.}, at 6-8.}} The role of the Commission in mediation is to represent the public interest and as discussed above, part of the public interest role played by the Commission is in reviewing settlement agreements to ensure fairness and consistency with the public interest.\footnote{636 \textit{ibid.}, at 6-8.}

Starting in 2003, mediation became a regular component of the Canadian Human Rights Tribunal process.\footnote{637 \textit{Canadian Human Rights Tribunal, Annual Report 2004,} (Ottawa: Canadian Human Rights Tribunal, Minister of Public Works and Government Services Canada, 2004) \textit{Canadian Human Rights Tribunal, 2004 Annual Report at 6 [CHRT Annual Report 2004].} \footnote{638 \textit{ibid.}, at 5-6.} \footnote{639 \textit{Canadian Human Rights Tribunal, “Mediation Procedures”} (May 13, 2004) at http://www.chrt-tcdp.gc.ca (last accessed May 2005) at “Mediation Procedures” 3.}} While emphasis is on settlement early in the adjudicative process, the option of voluntary participation in mediation is offered up to hearing.\footnote{638 \textit{ibid.}, at 5-6.} Tribunal members conducting mediations are precluded from hearing the case in the event settlement fails.\footnote{639 \textit{ibid.}, at “Mediation Procedures” 3.} Under the Federal Tribunal mediation process, settlements do not become final for seven days after the
mediation, in order to allow parties to consider the settlement and to obtain legal advice.  

Features of the Ontario human rights regime of note with respect to the settlement process and procedures compared to the federal regime described above, are the Ontario Human Rights Tribunal “Fast Track Mediation,” which dispenses with the filing of pleadings before the mediation and which occurs within 60 days of the initial conference call. In contrast, “Regular Track” mediation involves the filing of pleadings and occurs within 120 days of an initial conference call.

The settlement process under the former British Columbia Human Rights Commission was very similar to the Canadian Human Rights Commission and the Ontario Human Rights Commission. Under section 29(1) of the Human Rights Code pertaining to mediation and settlement, and section 35(1.4) pertaining to hearings, the Commissioner of Investigation and Mediation or a delegate had the discretion to provide mediation or other dispute resolution processes to the parties to a claim. Under section 29(2) the terms of settlement agreements had to be provided to the Commission. Section 29(3) prohibited the Commission from disclosing and identifying information concerning

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640 Ibid., at 6.
641 OHRT Rules, supra n. 472 at Rules 49-51 at 9.
642 Code, supra n. 246 at sections 29(1), 35(1.4).
643 Ibid., at section 29(2).
the settlement agreement without the consent of the parties.\textsuperscript{644} The British Columbia Human Rights Tribunal was also empowered under section 35(1.3) of the Code to assist parties in settlement by providing mediation or other means to achieve a settlement of the claim.

\textbf{3.12.2 Settlement – The Direct Access Model}

Similar to the Commission Model, the Direct Access Model in place in British Columbia places significant emphasis on settlement of claims. For example, Rule 16 states that settlement meetings are one of the four ways that "the tribunal manages complaints toward resolution."\textsuperscript{645} Consequently, mediation and a variety of other dispute resolution processes are available at the request of the parties at all stages of the claims process.\textsuperscript{646} In particular, similar to the Fast Track Mediation offered by the Ontario Human Rights Tribunal, the British Columbia Human Rights Tribunal has an early settlement process, which under Rule 21(4) suspends the time for filing a response and the requirement to provide disclosure of documents\textsuperscript{647} and under Rule 21(5) must be held within a specified period of time.\textsuperscript{648}

\textsuperscript{644} Ibid., at sections 29(3).
\textsuperscript{645} Ibid., at Rule 21(1), 21(7).
\textsuperscript{646} Ibid., at Rule 21(4).
\textsuperscript{647} Ibid., at Rule 21(5).
Under Rule 21(2) Tribunal members or other neutral persons may conduct settlement meetings.\textsuperscript{649} Rule 21(3) provides that the member conducting a particular settlement meeting will not be the person who conducts the hearing in the event that the settlement attempts fails, unless the parties consent in writing.\textsuperscript{650} Rule 21(9) states that all participants in a settlement meeting must sign an agreement that indicates a.) willingness to participate in the process and b.) that the information is exchanged during the settlement meeting is confidential.\textsuperscript{651} In the event of settlement of a claim, Rule 22 provides a procedure for withdrawal of the claim by the claimant.\textsuperscript{652}

Consequential amendments to the \textit{Human Rights Code}, as amended, as a result of the enactment of the \textit{Administrative Tribunals Act}, resulted in changes to the settlement process. Under section 17(1), where the parties have settled all, or part of the claim, the Tribunal must make an order dismissing part, or all, of the claim.\textsuperscript{653} Section 29(1) provides disclosure protection for a.) settlement documents or b.) statements made in the course of a settlement process.\textsuperscript{654} Section 29(2) sets out an exception to the confidentiality protections by stating that subsection 1 does not apply to a settlement agreement.\textsuperscript{655}

\textsuperscript{649} \textit{Ibid.}, at Rule 21(2).
\textsuperscript{650} \textit{Ibid.}, at Rule 21(3).
\textsuperscript{651} \textit{Ibid.}, at Rule 21(9)(a)(b).
\textsuperscript{652} \textit{Ibid.}, at Rule 22.
\textsuperscript{653} \textit{ATA, supra n.581 at section 17(1)}.
\textsuperscript{654} \textit{Ibid.}, at section 29(1).
\textsuperscript{655} \textit{Ibid.}, at section 29(2).
The Tribunal also has a *Settlement Meeting Policy and Procedure*\(^{656}\) which was amended in December 2004. The Policy and Procedure addresses issues such as the purpose of settlement meetings, the types of settlement meeting services offered by the Tribunal, the role of the mediator, settlement meeting procedures, and what happens in the event that claims do not settle. It also provides information about conditions of participation in settlement processes, including the confidentiality of settlement meetings and resulting documents, and addresses other topics such as the provisions for independent legal advice and notably, as will be discussed further below, the role of mediators in addressing public policy issues such as systemic discrimination.

The Nunavut *Human Rights Act* states in section 25 that the “Tribunal may endeavor to effect a settlement...”\(^{657}\)

### 3.12.3 Analysis/Critique – Settlement Generally

Human rights commentators generally agree that access to a broad variety of enforcement processes is critical to effectively addressing discrimination, and that alternate dispute resolution represents an important tool in the continuum of enforcement options. Many also suggest that in order to ensure that the broad


\(^{657}\) NHRA, supra n. 298 at section 25.
goal of addressing systemic discrimination is addressed, there needs to be some safeguards in place in order to make such processes fair and effective.\[^{658}\] For example, participation in settlement processes should be voluntary.\[^{659}\]

Both Models appear to provide extensive settlement processes, procedures and mechanisms and to place considerable emphasis on settlement of claims. There appears to be a continuum of informal settlement provisions, with the most informal being early or expedited settlement, which occurs pre-disclosure and pre-filing of certain pleadings, to more formal processes, with the most formal being conciliation where settlement may be imposed on the parties.

In my view, the provision for voluntary participation in settlement processes under both Models represents a major strength. The exception to voluntary settlement options is the provision in the federal regime for mandatory conciliation, which is problematic for systemic claims due to the lack of disclosure of documents available at the conciliation stage versus the pre-hearing stage. As discussed in the sections on evidence and disclosure, most systemic claims are highly dependent even at the hearing stage on evidentiary proof through expert evidence such as statistics. It is very difficult in the settlement context absent full disclosure to substantiate, for example, a case of employment related discrimination based on under-representation of a particular group, where no

\[^{658}\] See generally, Buckley, Options, supra n. 626. Also see Black, Black Report, supra n. 16.

\[^{659}\] Braha, generally, Proposed Human Rights Code, supra n. 311.
evidence has been provided by the respondent prior to settlement regarding the rate of hiring or promotion.

A related concern lies in the emphasis under both Models of the use of early settlement or expedited settlement with its particular emphasis on informality. In my experience, the cases that are most conducive to resolution through early settlement are those that are predominantly non-systemic and that involve relatively straightforward issues, particularly involving an interpersonal component. An example is a case involving a claimant who is terminated from a work place and the parties either regret the way the relationship ended and wish to part on more civil terms, and/or have a desire to provide the other party with their perspective. As discussed previously in relation to the operational definition of systemic discrimination, such cases do not necessarily lack a systemic aspect that may be addressed for example through a change in work policy, but the claim does not involve broad systemic issues.

In contrast to predominantly non-systemic discrimination cases, systemic claims arise from structural sites of power and sources of discrimination. Consequently, in order for remedies to be effective, they need to address structural and systemic change. This factor makes access to formal disclosure procedures and mechanisms, and similarly to full pleadings, critical to effective resolution of the claim. Such processes, procedures, and mechanism are clearly absent in early and expedited settlement processes.
A further concern regarding the use of mediation generally, relates to power imbalances between parties. As discussed in Chapter I, some feminists have expressed concerns regarding the potential for alternative dispute resolution processes to perpetuate gender based power imbalances between women and men, and to reinforce stereotypes such as heterosexism. Even further, due to their emphasis on informality, alternative dispute processes undermine and erode legal entitlements for women. Many commentators suggest that power imbalances are based on differences in tangibles such as education and financial resources, and intangibles such as emotional and social differences. Some commentators suggest that power imbalance can be effectively addressed through processes and mechanisms such as a more interventionist versus “neutral” mediator role, the provision of legal representation for vulnerable parties, and through mechanisms such as screening of cases. Further those other shortcomings such as mediator attitudes around homosexuality can be addressed through education. In contrast, other commentators suggest that power imbalances can only be addressed by access to adjudication processes reflecting formal legal entitlements.

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660 See for example, Townley, Invisible-ism, supra n. 51.
662 Ibid.
664 Townley, Invisible-ism, supra n. 51.
665 Bryan, Killing Us Softly, supra n. 661.
A safeguard that is in place in the Commission Model, which potentially mitigates some concerns around power imbalance, is the screening of claims for the suitability for participation in settlement processes. In contrast, under the Direct Access Model in British Columbia there are no mechanisms for screening of claims. 666 Screening of claims is critical in terms of general suitability of cases for settlement processes. Reliance on the parties to self screen is problematic, particularly in cases involving unrepresented systemic claimants. Systemic claimants are particularly vulnerable to power imbalance dynamics due to various social and economic vulnerabilities, and the general complexity of the issues involved in such cases. These vulnerabilities are compounded by the fact that, as was suggested by interviewees who represent systemic claimants, such cases are often vigorously defended. 667 While skilled mediators can address power imbalance to some extent, they are not advocates.

A major criticism of the Commission Model is that for various reasons, including the dual role that commissions play as mediator and gate keeper, claimants often feels pressured into settlement. 668 As Buckley suggests, the absence of mandatory mediation provisions does not mean that participation is voluntary in the true sense of the word. 669 While in my experience there are no overt

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666 Based on discussion with April 6, 2005, lawyer, British Columbia Human Rights Tribunal [April 6, 2005 Institutional Interviewee] and my own experience. However, in my experience some mediators at the Tribunal occasionally, call representatives of parties prior to mediations, providing an opportunity to raise concerns regarding participation, including power imbalance issues.

667 For example, April 13, 2005, Interviewee, supra n. 162; and May 5, 2005, Interviewee, supra n. 17.

668 Birenbaum and Porter, Right to Adjudication, supra n. 288 at 2.

669 Buckley, Options, supra n. 626 at 5.
pressures on claimants to engage in settlement under the Direct Access Model, there are several covert pressures. For example, the informality of the pre-hearing Direct Access processes in general, and the settlement process in particular, has a tendency to convey the message to claimants that settlement is an effective process to resolve all types of claims, and that they can adequately represent themselves due to the informality of such processes. This message, along with the increasing length of time to obtain hearing dates, can result in a strong inducement to engage in settlement prematurely, particularly where claimants are unrepresented. Many claimants initially lulled by the apparent informality of the processes into representing themselves, realize that they are unable to adequately advocate for themselves. This then leads them to seek assistance after they are well into the claims process and are facing complex procedural and substantive problems, including failed settlement negotiations and in some cases, after signing settlement agreements which do not properly address their concerns.

While in many cases, participation in early and other settlement processes is entirely appropriate, and indeed critical to the continued functioning of the Direct Access Model due to the volume of claims, it may not then be suitable for all claims, particularly systemic claims. As stated by the Tribunal in the case of Dar Santos v. University of British Columbia, "[t]here is significant public interest in the promotion of the efficient and timely resolution of disputes by promoting their
settlement...  

There are times however, when the public interest in an efficient claims process is clearly at odds with the equal, if not more critical, goals of ensuring fair and effective outcomes which address the public interest in systemic claims.

The above concerns underscore the importance of providing adequate resources for legal representation, particularly, adequate and effective access to early representation processes in order to assess the appropriateness of participation in settlement. These concerns also emphasize the need for community involvement and input into systemic claims. As suggested by Black, the community is often in the best position to support claimants around the enforcement processes, and to assess and provide input on available settlement processes in relation to the remedies being sought and the consequent impact on the community.  

However, in order to participate in any meaningful way in systemic cases, whether in a support role or other capacity, community groups require access to adequate resources, a point which will be elaborated on in the next section.

3.12.4 Summary and Recommendations

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671 Black, Black Report, supra n. 16 at 92, 136.
While access to settlement processes can be beneficial to claimants, it can also pose some serious concerns for effectively addressing systemic discrimination in terms of the emphasis on informal processes over rights based processes. For example, the absence of screening provisions for assessing claims for potential power imbalance issues, combined with the emphasis on informal settlement processes represents a significant weakness of the Direct Access Model in British Columbia. While the screening provisions under the Commission Model represent strength, there are other aspects of the Commission Model including ambiguity between enforcement roles, which represent significant weaknesses.

3.12.5 Recommendations – Settlement

- That claims be screened by the Tribunal to ensure suitability for involvement in settlement processes such as early settlement, and in terms of obvious power imbalances that may pose a barrier to participation, or may require alternate forms of participation such as ‘shuttle mediation’.

- That adequate access to legal representation be provided to claimants at the early stages of the enforcement process in order to provide claimants with a thorough assessment of their claims prior to engaging in settlement discussions.
• That where appropriate, that community and other groups including unions, be encouraged to participate in settlement processes. Further, that mechanisms and process for adequate notice of opportunities to participate in settlement be created, along with a funding mechanism to facilitate such participation.

• That provisions similar to the federal regime be created and implemented in the Tribunal assisted settlement process, providing for a 'cooling off period' prior to settlements coming into effect, allowing parties time to seek legal advice on settlement agreements.
3.13 The Public Interest in Settlement of Systemic Claims

3.13.1 Rationale

The provisions in the Commission Model for commission representation of the public interest, including initiating and joining claims, are clearly aimed at addressing the previously noted tension between enforcement goals, in the settlement process as well as at hearing.\textsuperscript{672} Other procedures and mechanisms aimed at the public interest in human rights settlements include reporting of settlements to commissions, and commission approval of settlement terms. The public interest in systemic settlements raises two interconnected issues discussed below: 1.) the public interest in ensuring systemic issues are addressed in settlement; and, 2.) the public interest in access to information about settlements.\textsuperscript{673}

3.14 Analysis/Critique

3.14.1 Addressing the Public Interest in Settlement

The public interest procedures and mechanisms provide commissions with the ability to initiate and join claims in the public interest, and consequently, appear

\textsuperscript{672} See Black, \textit{Black Report}, supra n. 16 at 119; see also, Brodsky and Day, \textit{BCHRC Report July 3, 1998}, supra n. 60 at 15, regarding the role of the Deputy Chief Commissioner in mediation.

\textsuperscript{673} Buckley, \textit{Options}, supra n. 626 at 4.
to represent a significant strength in terms of addressing the public interest in the systemic claims. Unfortunately, as was discussed regarding provisions for commissions to intervene in cases, these perceived strengths may be primarily theoretical as opposed to actual.

An example of the difficulties associated with the commission public interest provisions in respect of settlement can be seen in the case of Shannon v. British Columbia (Ministry of Government Services) (No.2), which took place under the Commission Model in British Columbia. In that case, the Tribunal ruled that the Deputy Chief Commissioner was precluded from proceeding to hearing after a settlement had been reached between the parties and the claim had been withdrawn, due to the fact that the Commission, which had been joined to the claim in the public interest, did not have true party status. Along with this weakness in the mechanism for bringing forward the public interest other concerns raised by human rights commentators in respect of the commission role include a general concern about its effectiveness in the public interest role, and about conflicts between the public interest role and other commission duties.  

While there are clearly some inherent difficulties under the Commission Model in bringing forward the public interest in systemic claims at the settlement stage, there is also some evidence indicating that the British Columbia Human Rights

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675 See for example, generally, Lovett and Westmacott, Hunan Rights Review, supra n. 15.
Commission involvement in settlements produced some significant results in a number of systemic cases.\footnote{676}{See for example, \textit{BCHRC Annual Report 2001/02}, supra n. 349 at 5.}

Similarly, in Ontario, the Commission appears to be actively involved in facilitating the public interest in settlement. For example in \textit{OHRC, Odell, Sarlina, Condie, Cluskey, Lang and Shell v. Toronto Transit Commission},\footnote{677}{\textit{OHRC, Odell, Sarlina, Condie, Cluskey, Lang and Shell v. Toronto Transit Commission}, (6 September, 2002), (Settlement OHRC).} the Commission was able to effect settlement on behalf of six claimants, resulting in various systemic remedies involving the provision of public disability transport. The Ontario Human Rights Commission also played a central role in the settlement of the case of \textit{Anishnabie v. Rainbow Concrete Industries Limited},\footnote{678}{\textit{Anishnabie v. Rainbow Concrete Industries Limited}, (16 April 2002), (Settlement OHRC).} which involved a group of claimants alleging discrimination on several grounds including on the basis of race, colour, and ancestry. In that case, various public interest remedies were negotiated on behalf of the claimants including that members of the claimants' band be considered for upcoming employment positions. A further example is the Commission's negotiation on a pre-claim basis, with ten restaurant chains, of a voluntary compliance scheme aimed at the elimination of access barriers for persons with disabilities.\footnote{679}{Canadian News-Wire, News Release, "Ten restaurant chains commit to improve accessibility" (19, November, 2004).}

A final example of the apparently effective use of the public interest role in settlement, this time at the federal human rights level, can be seen in a case
brought by Henry Vlug against Global Television Network. In that case the
Canadian Human Rights Commission successfully settled an agreement
providing for extensive closed captioning of television programming for deaf and
reached between Global Television Network and Henry Vlug on closed captioning.” “Global
Television Commits to 100% Closed Captioning of its Programming.” (16, November, 2004).}

In contrast to the Commission Model, there is a clear absence of explicit
processes, procedures, and mechanisms under the Direct Access Model for the
representation of the public interest in the context of settlement. The primary
avenue for the public interest to be brought forward in settlement is through the
parties themselves or potentially through third party interveners. An exception to
the lack of provisions for addressing the public interest in settlement is in a
Settlement Policy and Procedure introduced by the British Columbia Human
Rights Tribunal in December 2004, which states that:

To further the broad public goals of the Code, mediators may identify
public policy issues, such as systemic discrimination or new applications
of the Code that may be raised by complaints filed with the Tribunal. The
Code does not authorize the Tribunal to require that public policy issues
be addressed; however, parties may be encouraged to explore public
policy issues, and to formulate remedies that address them.\footnote{BCHRT Settlement Policy, supra n. 656.}

Several commentators have expressed concerns that the lack of provision for
addressing the public interest reinforces the private nature of the enforcement
process under the Direct Access Model by placing responsibility for the public
interest squarely on claimants, which in turn effectively hampers the ability to
effectively address systemic discrimination.\textsuperscript{682} In the context of discussions of reform to the federal human rights arena, Buckley suggests that a key component of the claims process, and concomitantly, the alternative dispute resolution process, is the provision for mechanisms to protect the public interest. For example:

Mechanisms to protect the public interest include: screening cases to appropriate processes; shaping mediation processes to empower the mediator to inject the public interest into the discussion; directing mediators to suggest systemic or policy changes as part of the settlement, where appropriate; Commission review/approval of settlement terms; and, record keeping/monitoring of settlements.\textsuperscript{683}

While several interviewees also expressed strong concerns about the emphasis on settlement of claims and the lack of provisions for representing the public interest, there was no clear agreement how to address this gap. Virtually all interviewees suggested that given the choice between the parties' autonomy over settling their own claims and the public interest, parties' rights to settlement must prevail. Absent some other mechanism for addressing the public interest, it is ultimately up to the parties to raise systemic issues and to determine how much emphasis to place on such issues in the negotiation of remedies.\textsuperscript{684}


\textsuperscript{683} Buckley, Options, supra n. 626 at 4.

\textsuperscript{684} See for example, May 5, 2005, Interviewee, supra n. 178, and June 9, 2005, Interviewee, supra n. 385.
At least one interviewee suggested that the role of the Tribunal under the Direct Access Model in British Columbia in providing mediation may implicitly convey to parties that public interest issues will be addressed as a matter of course by virtue of Tribunal involvement.\textsuperscript{685} Many human rights commentators, including some interviewees, suggest that the absence of explicit public interest provisions around settlement of systemic claims holds the potential for perpetuating further discrimination in cases where parties are prepared to agree to terms that are clearly contrary to the public interest.\textsuperscript{686} Black provides an example of the clash between formal and substantive equality in settlement, in the hypothetical case of a male claimant seeking a remedy involving access to an exclusively female fitness facility. If obtained, the remedy may provide the individual claimant with personal benefit, but magnify discrimination for women.\textsuperscript{687}

Another example, which also reflects the nuances and tensions inherent in equality decisions discussed in Chapter I, can be seen in a case which, according to media accounts was recently involved in a British Columbia Human Rights Tribunal mediation. The case involves a representation claim brought by a mother on behalf of her adolescent daughter who is a hockey player on a mixed gender bantam team. The mother alleges that the policy of the local hockey association requiring female players to change in separate locker rooms from the boys on the team is discriminatory. In reply, the respondent hockey

\textsuperscript{685} April 18, 2005, Interviewee, supra n. 167.
\textsuperscript{686} April 12, 2005, (2) Interviewee, supra n. 167; see also Black, Human Rights Reform, supra n. 179 at para. 86.
\textsuperscript{687} Black, \textit{ibid.}, at para. 86 and footnote 121.
team stated that the policy was introduced in January 2001 as a result of Human Rights Commission mediation in another jurisdiction, which resulted in a settlement agreement that integrated hockey teams involving male and female players over the age of 11 were to change in separate rooms. A further complicating factor is the presence of an October 2004 decision of the New Brunswick Human Rights Commission holding that a policy providing for separate change rooms constituted discrimination against an adolescent female hockey player. The newspaper account of the British Columbia case also referred to concerns raised by another parent of a female player about the implications of the creation of a policy allowing adolescent females and males to change in the same locker room without some strict safeguards being put in place. This case exemplifies the fact that settlements involving systemic claims can have major effects for others beyond the claimants, and how private agreements can be problematic, and consequently, the need for some mechanism to take into account in the public interest in private settlements.

One of the difficulties with the public interest is the related question of who should represent the public interest, particularly in the absence under the Direct Access Model of a specific statutory provision for public interest representation. As with the issue of the extent to which the public interest should be addressed in systemic settlements, there are no clear answers. Some interviewees indicated that despite the gap in public interest mechanisms in the settlement of systemic

688 Lori-Anne Charlton, "Hockey mom goes to court to allow daughter to dress with the boys": “Policy is ‘Discrimination’ National Post (11 July 05).
cases, the Tribunal should not take on this role because to do so would compromise its role as a fair and impartial adjudicator.\textsuperscript{689}

Mosoff suggests that the role of legal counsel in putting forward public interest considerations is constrained by the legal paradigm and the corresponding duties and obligations governing the lawyer/client relationship.\textsuperscript{690} Interviewees also discussed the fact that as legal counsel their role ultimately is to take instructions from clients. Assuming there is evidence of systemic discrimination, it is ultimately their clients' decision about whether systemic issues are brought forward and concomitantly, how much emphasis is placed on systemic issues both in settlement and at hearing. They suggested that in many cases the clients' need to move on with their lives outweighs their interests in continuing to a hearing and addressing larger systemic issues.\textsuperscript{691}

My view is that the lack of processes, procedures, and mechanisms for representing the public interest in settlement of systemic claims represents a serious gap in the Direct Access Model. While the mechanisms under the Commission Model may not be ideal, at the very least they provide some avenue for consideration of the public interest in settlement and consequently, some degree of public accountability. In contrast, settlement under the Direct Access

\textsuperscript{689} April 12, 2005, Interviewee(1), supra n. 173; June 9, 2005, Interviewee, supra n. 385.
\textsuperscript{690} See generally, Judith Mosoff, "Do the Orthodox Rules of Lawyering Permit the Public Interest Advocate to "Do the Right Thing?'': A Case Study of HIV – infected Prisoners" (1992) 30 Alta. Rev. 1258 [Orthodox Rules].
\textsuperscript{691} April 13, 2005, Interviewee, supra n. 162; May 5, 2005, Interviewee, supra n. 178.
Model reinforces the private individualized aspect of human rights enforcement to the detriment of the broad public interest mandate. This focus makes it very difficult to incorporate systemic remedies into settlement, and as will be discussed further below, to ensure that systemic remedies are enforced and monitored.

It is important to educate parties about the public interest in claims and the possibility of incorporating systemic provisions into settlement agreements. A critical aspect of the role that mediators play in settlement discussions is to educate the parties; a role which the Tribunal clearly has expertise in. However, there is a fine line between educating parties about public interest issues, and advocating for the inclusion of public interest terms in settlement agreements. The latter role is an unsuitable one for mediators, particularly Tribunal based mediators.

As part of the solution, where appropriate, the community should be encouraged to participate in mediations and other dispute resolution processes in the role of advisor and intervenor, in order to provide valuable perspectives on an aspect of the public interest in systemic claims. As discussed above, the provision of resources to community groups is necessary in order to facilitate such participation. Mechanisms must also be put in place to ensure adequate notice of opportunities to participate in settlement of systemic claims. Currently under
the Direct Access Model, the ability of intervenors to participate in settlement is dependent on the consent of the parties.\textsuperscript{692}

While the pre-condition of consent for intervenor participation in settlement is appropriate in most cases, there may be cases where a more flexible approach is required. For example, where the intervenor, particularly a community group, can provide a perspective on the impact on the community if certain remedies are adopted, it may be incumbent on the mediator to suggest involving the community on, for example, a consultative basis. In some cases, the format of the mediation may be tailored to reflect community values and experiences. For example, the Saskatchewan Human Rights Commission provides talking circles as options in the resolution of disputes involving Aboriginal parties.\textsuperscript{693}

As well, in some cases where broad public interest issues are at stake, a statutory body independent of government, with the ability to represent a broad cross-section of public perspectives, might appropriately participate in systemic settlement discussions in an educative/consultative role. As with community intervenors, this option would require mechanisms to enable such participation, including notice mechanisms and adequate funding.

\textsuperscript{692} April 6, 2005, Institutional Interviewee, supra n. 666.
3.14.2 Summary and Recommendations

The competing goals of providing access to an informal settlement process and that of addressing patterns of discrimination create tensions and complexities which are difficult to resolve. While the public interest provisions under the Commission Model have some obvious flaws, the complete absence of a means of addressing the public interest in settlement under the Direct Access Model is clearly detrimental to the public interest in effectively addressing systemic discrimination.

3.14.3 Recommendations – The Public Interest in Settlement

• That informational and educational material be developed by the Human Rights Clinic, or some other body, aimed at raising awareness of the public interest in settlements and of the types of systemic remedies that can be obtained in the settlement process.

• That Tribunal mediators be trained to raise public interest issues and in facilitating opportunities for community and other types of participation in a public interest capacity in mediation as a means of educating parties.

• That community groups and other organizations be provided with the opportunity to participate in settlements involving systemic claims,
including in terms of adequate notice provisions and funding, in an intervenor or consultative role.

- That alternate formats for dispute resolution be pursued within the Tribunal mediation process, including Healing Circles and other culturally diverse dispute resolution processes.

- That a body, independent from government, be provided with the statutory mandate to participate in an intervenor or consultative role in cases involving broad public interest issues.

### 3.15 The Public Interest in the Terms of Settlements and in Settlement Information

Black suggests that confidentiality clauses, which are commonly sought after by respondents in human rights settlements, hamper the goals of addressing systemic discrimination by eliminating access to information regarding discriminatory patterns of discrimination and valuable precedents for other cases in terms of available remedies.\(^{694}\)

While interviewees generally acknowledged the barrier presented by confidentiality provisions in the settlement process and in settlement agreements

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\(^{694}\) Black, *Black Report*, supra n. 16 at 118-119.
to addressing the public interest in systemic claims, most interviewees were of
the view, often reluctantly, that the interests of claimants' should prevail over the
public interest in settlement. Specifically, a claimant's interest in the confidential
settlement of their claims outweighed the public interest in the right to public
information. All interviewees suggested that the right of parties to keep details
of settlement agreements confidential is critical to the furtherance of settlement
objectives in the enforcement process. Some expressed the view that it may
be possible to attain a balance between the public interest in accessing
information about settlement agreements in systemic cases, and the rights of the
parties to maintain the confidentiality of settlement agreements, through the
provision of limited reporting of details of settlement.

While confidentiality of settlement agreements is critical to facilitate settlements
in systemic claims, it also is also important given the public interest in systemic
claims to have some mechanism in place for the reporting of the terms of
systemic settlements. For example, a major strength under the Commission
Model is the provision for the public reporting of settlements, in some cases
absent identifying information. Conversely, the absence of such provisions under
the Direct Access Model represents a major weakness. A mechanism for
reporting systemic settlements is critical to effectively addressing systemic
discrimination by providing access to other claimants to settlement precedents

For example, March 23, 2005, Interviewee (2) supra n. 164; April 12, 2005, (1) Interviewee,
supra n.173; June 9, 2005, Interviewee, supra n. 385; April 7, 2005, Interviewee, supra n. 163;
April 13, 2005, Interviewee, supra n. 162.

All Interviewees.

For example, April 7, 2005, Interviewee, supra n. 163.
and sources of information regarding options for addressing systemic claims. Information about settlements also provides a publicly accessible mechanism for providing accountability of settlement processes.\textsuperscript{698} While the publication of hearing decisions may satisfy similar objectives, it does not present the public with a true indication of settlement options or measures of settlement outcomes.

It is difficult to assess whether the provisions under the Commission Model for the approval of systemic settlement agreements prior to the discontinuance of the claim, furthers the public interest to any extent. My sense is that it represents more of a formality than an effective public interest mechanism. Where such provisions may be of assistance is to ensure that settlement agreements are not flagrantly contrary to the public interest, as opposed to addressing the nuances of public interest settlement provisions. Similarly, the provision under the former Commission Model in place in British Columbia for the registering of settlement agreements with the Commission, which appeared to be aimed in part at providing information to the Commission on settlements, also appears to have been of questionable benefit in promoting the public interest. While the provision will be discussed further in relation to the upcoming section on remedial provisions, at least one interviewee has suggested that this provision was not well known within the legal community and as a result was infrequently adhered to except in cases where claimants sought to enforce settlement agreements.\textsuperscript{699}

\textsuperscript{698} It is important to note that the British Columbia Human Rights Coalition provides some limited reporting of settlements under the Human Rights Clinic, for example, in various reports and newsletters.

\textsuperscript{699} April 18, 2005, Interviewee, supra n. 167.
3.15.1 Summary and Recommendations

It is clear that there is no easy solution to the dilemma of providing systemic claimants with access to confidential settlement processes and with autonomy over the resolution of their claims, and the often conflicting goal of addressing the public interest in such settlements. While commission based mechanisms for addressing the public interest through the provision of information on settlements are clearly insufficient, the absence of mechanisms for access to information about settlement agreements in systemic claims represents a gap under the Direct Access Model.

3.15.2 Recommendations – The Public Interest in the Terms of Settlement and Settlement Information

- That reporting mechanisms be implemented at the Tribunal, including in annual reports, and on the Tribunal website, providing for reporting of general information regarding settlements absent identifying information; including the numbers of settlements and the types of remedies achieved.

- That further ongoing reporting of general information occurs in the Human Rights Clinic regarding settlements, absent identifying information, including the numbers of settlements and the types of remedies achieved.
3.16 Monitoring and Enforcement of Systemic Remedies

3.16.1 Rationale

The issue of the sufficiency and scope of systemic remedies will be addressed in Chapter IV. This section looks at enforcement and monitoring of systemic remedies resulting from settlement agreements and from the hearing process.

While the implementation of remedies such as wage loss and out of pocket expense claims are likely to be relatively straightforward in their application, broader systemic remedies such as affirmative action measures are less straightforward. For example, systemic remedies pose particular challenges in light of the fact that implementation usually occurs over long periods of time, and as a result may require modification of remedies. The importance of effective procedures and mechanisms aimed at enforcing and monitoring non-monetary systemic remedies was acutely apparent in Action Travail, where the far reaching systemic remedies ordered by the Tribunal and confirmed by the Supreme Court of Canada were rendered meaningless by the lack of effective monitoring and enforcement. A similar outcome occurred in the Ontario case of McKinnon v. Ontario (Ministry of Correctional Services) where the various systemic

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700 Black, Black Report, supra n. 16 at 136.
701 Ibid., at 120.
702 See generally, Rachel Cox, Action Travail Research Paper, supra n. 325.
remedies ordered by the Tribunal to address the ongoing racial discrimination within the corrections system were never implemented, resulting in extreme hardship for the claimant as well as other potential claimants. Both cases are discussed below in the context of the discussion on monitoring and enforcement of systemic remedies.

Hosking suggests that a claim driven enforcement focus, combined with an absence of public agency involvement in claims, is detrimental to effectively addressing systemic discrimination. The absence of public interest mechanisms in the enforcement process is also highly problematic for sustaining systemic settlement agreements and hearing orders for systemic remedies, due to the fact that implementation frequently occurs over a considerable period of time.

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3.17 Monitoring and Enforcement of Systemic Remedies – The Commission Model

3.17.1 Settlement Agreements – The Commission Model

Provisions relating to enforcement of settlement agreements under the federal regime include section 48(1)(3), which provides for the Commission, or parties to settlement agreements, in cases where the settlement agreement has received Commission approval, to apply to the Federal Court to incorporate the settlement terms into an order for enforcement purposes.\(^{706}\) The Canadian Human Rights Commission is involved in some cases in the monitoring and enforcement of settlements.\(^{707}\)

A provision of note under the Ontario legislation is section 43, which pertains to enforcement of settlements, and states that in cases where a settlement agreement is in writing, signed by the parties, and approved by the Commission, the agreement is binding on the parties. Further, a breach of settlement is grounds for a new complaint.\(^{708}\)

Provisions of note under the former British Columbia Human Rights Commission pertaining to enforcement of settlement agreements included section 30(1) of the Code, which stated that a party alleging a breach of a settlement agreement, who

\(^{706}\) CHRA, supra n. 256 at section 48(1)(3).
\(^{708}\) OHRC, supra n. 267 at section 43.
had filed the agreement with the Commission, could file the agreement with the chair of the Tribunal.\textsuperscript{709} The effect of filing was that the settlement agreement could be enforced in the same manner as an order of the Tribunal, to the extent that the terms were consistent with the powers of the Tribunal.\textsuperscript{710} This provision in turn allowed the Commission or a party, to file the settlement agreement with the Supreme Court, under section 39(1),\textsuperscript{711} which under section 39(3) gave the settlement agreement the same force and effect as a judgment of the Supreme Court, with all of the resulting rights of enforcement.\textsuperscript{712}

\subsection*{3.17.2 Hearing Orders – The Commission Model}

Section 37(3) of the British Columbia \textit{Human Rights Code} provided for a term of an order made under subsection (2) to be made, compelling a respondent to provide the Deputy Chief Commissioner or another person designated in the order with information pertaining to the implementation of the order.\textsuperscript{713} Section 37(4) provided the Tribunal with the discretion to award costs against a party who, in the opinion of the Tribunal, engaged in improper conduct during the course of the investigation or hearing.\textsuperscript{714} Under section 37(6) the Deputy Chief Commissioner, whether or not a party to the claim, was to be informed in writing

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{709} \textit{Code, supra} n. 246 at section 30(1).
\item\textsuperscript{710} \textit{Ibid.}, at section 30(2).
\item\textsuperscript{711} \textit{Ibid.}, at section 39(1).
\item\textsuperscript{712} \textit{Ibid.}, at section 39(3).
\item\textsuperscript{713} \textit{Ibid.}, at section 37(3).
\item\textsuperscript{714} \textit{Ibid.}, at section 37(4).
\end{itemize}
\end{footnotesize}
of the reasons for the decision.\textsuperscript{715} Under section 38(1) until fully implemented, any party could apply to modify orders of the Tribunal made under sections 37(c) or 37(d) on the basis of unforeseen circumstances warranting modification.\textsuperscript{716} Under section 38(3), the Tribunal could vary or rescind the order where (a) it had not been fully implemented and (b) was no longer appropriate due to unforeseen circumstances.\textsuperscript{717} Finally, various provisions provided for Tribunal orders, including modified orders, to be filed by the claimant or the Deputy Chief Commissioner, with the permission of claimant, with the Supreme Court.\textsuperscript{718} Under section 39(3) such orders had the same force or effect as Supreme Court orders, including entitlement to all related proceedings.\textsuperscript{719} Section 39(4) provided the Deputy Chief Commissioner with the discretion to enforce orders filed by his or her office.\textsuperscript{720}

\textsuperscript{715} Ibid., at section 37(6).
\textsuperscript{716} Ibid., at section 38(1).
\textsuperscript{717} Ibid., at section 38(3).
\textsuperscript{718} Code, supra n. 246 at section 39(1).
\textsuperscript{719} Ibid., at section 39(3).
\textsuperscript{720} Ibid., at section 39(4).
3.18 Monitoring and Enforcement of Systemic Remedies – Direct Access Based Jurisdictions

3.18.1 Enforcement and Monitoring of Settlement Agreements – The Direct Access Model

Changes to the human rights legislation in British Columbia as a result of the Administrative Tribunals Act\(^\text{721}\) coming into force, allow the Tribunal under section 17(2), to incorporate the terms of a settlement agreement into an order at the request of the parties, if the Tribunal is satisfied that it is consistent with its enabling legislation.\(^\text{722}\) Under subsection (3), where the Tribunal declines to make an order under subsection (2), it must provide parties with reasons for its decision.\(^\text{723}\)

Under section 30(1) of the Code, as amended, in the event of a breach of a settlement agreement, a party may apply to the Supreme Court to enforce the settlement, to the extent that the terms of the agreement could have been ordered by the Tribunal.\(^\text{724}\) Further, under subsection (2) the right to enforce the agreement cannot be waived, and under subsection (3), any agreement that purports to waive the right is void.\(^\text{725}\) Both Rule 23 of the Tribunal Rules, and the Settlement Policy and Procedures state that “[T]he Tribunal does not approve or

\(^{721}\) ATA, supra n. 581.
\(^{722}\) Ibid., at section 17(2).
\(^{723}\) Ibid., at section 17(3).
\(^{724}\) Code, supra n. 246 at section 30(1).
\(^{725}\) Ibid., at 30(2)(3).
enforce settlement. The parties to the settlement are responsible for the resolution of problems arising from settlement or the settlement agreement..."726

Provisions relating to settlement under the Nunavut Human Rights Act include section 26(1), which provides for the filing of settlement agreements with the Tribunal in the event of an alleged breach.727 Under section 26(2) the filed settlement agreement may be enforced in the same manner as an order of the Tribunal, to the extent that the Tribunal has the powers to make an order on the terms set out in the agreement.728 Under section 26(3) the right to file a settlement agreement with the Tribunal cannot be waived,729 and under 26(4) any purported waiver is void.730

3.18 2 Enforcement and Monitoring of Hearing Orders – the Direct Access Model

Under section 38 of the Code, the Tribunal has the same powers it did under the Commission Model to modify remedial orders.731 This power is also delineated in Rule 37, which states that upon the application of a party, the Tribunal has the power to modify an order which has not been fully implemented. The applicant party must show

726 BCHRT Rules, supra n. 356 at Rule 23; also, BCHRT Settlement Policy supra n. 656.
727 NHRA, supra n. 298 at section 26(1).
728 Ibid., at 26(2).
729 Ibid., at section 26(3).
730 Ibid., at section 26(4).
731 Code, as amended, supra n. 131 at section 38.
a) to what extent the order has been implemented; b) the reasons why the order is no longer appropriate; c) the nature of any unforeseen circumstances that have arisen.\textsuperscript{732}

Section 39 of the \textit{Code}, as amended, and Rule 38 set out the processes and procedures for enforcing final orders and state that a party wishing to enforce an order must: 1) file a request with the tribunal requesting a certified copy of the final decision which contains the order, 2) file the certified copy of the decision containing the order in the British Columbia Supreme Court.\textsuperscript{733}

A provision of particular note under the Nunavut \textit{Human Rights Act} is section 34(5) which states that the Tribunal remains seized of a matter until an order is fully implemented.\textsuperscript{734} Section 34(7) allows for an order which is filed with a Clerk of the Court under section 34(6), to be enforced in the same manner as a court order.\textsuperscript{735}

\textsuperscript{732} \textit{BHRT Rules}, supra n. 356 at Rule 37(a)-(c).

\textsuperscript{733} \textit{Code}, as amended, supra n. 131 at section 39.

\textsuperscript{734} \textit{NHRA}, supra n. 298 at section 34(5).

\textsuperscript{735} \textit{Ibid.}, at sections 34(7).
Monitoring and Enforcement of Settlement Agreements.

Analysis/Critique

In many cases involving settlement of systemic claims, the fact that settlement is consensual and that parties have had input into the settlement terms rather than having them imposed through adjudication will result in successful implementation, particularly if there are ongoing mechanisms for monitoring of remedies. If there is a break down in the implementation process however, as noted by various commentators, access to effective processes, procedures, and mechanisms for enforcement of systemic remedies is critical in systemic claims both on a pre-hearing interim settlement basis, and at the hearing stage of the enforcement process.\(^{736}\)

Several provisions under the Commission Model explicitly relate to monitoring and enforcement of settlement agreements and appear to represent major strengths in respect of systemic claims. For example, section 29(2) of the former British Columbia *Human Rights Code* made the filing of settlement agreements with the Commission mandatory subject to disclosure limitations in section 29(3).\(^{737}\) Filing settlement agreements with the Commission resulted in access to the Tribunal for the purposes of enforcement of agreements, and ultimately, to

\(^{737}\) *Code*, supra n. 246 at section 29(2).
the Supreme Court for similar purposes.\footnote{Ibid., sections 30(1), 30(2).} These provisions appeared to provide systemic claimants with effective recourse in the face of a breach. As discussed in the section on settlement of systemic claims, however, in practice, the provision for registering settlement agreements with the Commission was little known and underutilized and consequently, largely ineffective. An additional, related difficulty with these provisions, which the Direct Access Model appears to share, lies in the fact that settlement agreements can only be enforced to the extent that the terms of the agreement are within the powers of the tribunal to make such orders.\footnote{Ibid., at section 30(2).} Given the broad powers of the Tribunal in making remedial orders, enforcement of systemic orders may not be a problem, but successful enforcement is clearly limited to the terms of agreement being within the powers of the Tribunal under the Code. This may be problematic for example, where a settlement term includes an apology.

An apparent strength in the Commission Model with respect to the enforcement of settlement agreements in systemic claims is commission involvement in monitoring and enforcing systemic remedies. According to various annual reports of the British Columbia Human Rights Commission, the Commission was actively involved not only in facilitating settlement of systemic claims, but also in monitoring the implementation of systemic remedies.\footnote{See for example, BCHRC Annual Report 2001/02 supra n. 349 at 5.}
In contrast to the Commission Model, one of the major weaknesses in the Direct Access Model is the absence of processes, procedures, or mechanisms for representing the public interest and in particular, the absence of a public body such as the commission, to monitor and enforce systemic remedies. Another weakness of the Direct Access Model is a lack of recourse to enforcement through the Tribunal for breaches of settlement agreements. Section 30 of the Code as amended, provides for application to the Supreme Court for enforcement. However, as observed by Black, recourse to the Supreme Court may not represent effective access due to the time and resources involved in such processes.\textsuperscript{741} The expense and the degree of sophistication required in enforcement are likely to be prohibitive for most systemic claimants. There is also the additional limitation under the enforcement provisions that the order can only be enforced to the extent that the terms of the settlement agreement could have been ordered by the tribunal. Attempting to persuade a court that the tribunal could have ordered a similar remedy may represent a significant access barrier to many systemic claimants in terms of the expenditure of resources required for such applications.

A provision that may strengthen Direct Access provisions on enforcement of settlements is section 16 of the \textit{Administrative Tribunals Act}, which provides the Tribunal with the discretion to incorporate the terms of a settlement into a consent order consistent with its enabling statute.\textsuperscript{742} Under subsection (2), if the

\textsuperscript{741} Black, \textit{Black Report}, supra n.16 at 120.

\textsuperscript{742} ATA, supra n. 581 at section 16(1).
Tribunal declines to make a consent order it must provide the parties with reasons for the refusal. While such orders are discretionary, given the broad remedial powers of the Tribunal, the threshold may be relatively easy to meet. The making of consent orders would likely provide access to the section 38 modification provisions, thereby allowing for modification of orders in the event of a breach prior to full implementation. For instance, the non-breaching party may apply to rescind the order, and subsequently have recourse to a hearing, as opposed to spending time and resources trying to enforce the consent order.

Another provision of note under the Administrative Tribunals Act is section 17(1)-(3) providing for "withdrawal or settlement of application(s)." Under section 1 definitions, "applications" include a "review or a complaint." Section 17(1) states, that where an applicant withdraws all or part of an application and advises the tribunal that they have settled all or part of an application, the tribunal must order that the application or part of it is dismissed. Similar to the section 16 provisions, under subsection (2) the parties may request that the tribunal make an order that includes the terms of the settlement, if the tribunal is satisfied that the order is consistent with its enabling statute. Under subsection (3), the tribunal must provide the parties with reasons in the event that it declines to make an order.

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743 Ibid., at section 16(2).
744 See Code, as amended, supra n. 131 at section 38(2).
745 ATA, supra n. 581 at section 17(1)(2).
746 Ibid., at section 17(3).
There are two main weaknesses in the above provisions from the perspective of enforcing settlement agreements. The first lies in the finality associated with the mandatory order dismissing the claim once the claimant notifies that the claim is settled. The difficulty with this provision is that in the event of a breach of a settlement agreement unless the claimant has been able to incorporate the terms of the agreement into a Tribunal order, there is no further recourse to the claims process unless the claimant can argue that the breach constituted ongoing discrimination or a form of retaliation, both of which are unlikely to succeed.

The second major problem lies in the potential difficulty in obtaining the consent of respondents to incorporate settlement terms into Tribunal orders. Respondents may resist such an approach for various reasons, including the added time and cost associated with applications, and the potential consequences of a breach; including loss of confidentiality protections and the time and costs associated with hearings.

In contrast to the Direct Access settlement provisions above, some commission based jurisdictions such Ontario have provisions, such as those in section 43 of the Ontario Human Rights Code, which provide recourse to the filing of new claims in situations involving breaches of written settlement agreements. This approach represents a particularly effective enforcement mechanism, especially when compared to other settlement enforcement provisions such as penalties for breach, which is subject to the high threshold of criminal proof. Recourse to a

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747 OHRC, supra n. 267 at section 43.
new hearing process, while resulting in extra delay and cost, provides the potential of the Tribunal ordering systemic remedies. In my view, there should be some provision for recourse to an expedited hearing process in such cases.

3.19.2 Summary and Recommendations

The Commission Model provides a number of processes, procedures, and mechanisms aimed at the enforcement of settlement agreements, including recourse to the tribunal process, and the involvement of commissions in enforcing the breach. In contrast, the only recourse available to claimants in cases involving breaches of settlement under the Direct Access Model is to attempt to enforce the settlement agreements in the Supreme Court, a process which is time consuming, expensive, and requires legal sophistication. Additionally, there is some question about the ability to enforce some types of settlement terms in Supreme Court. The lack of Tribunal based enforcement provisions for settlements, and the lack of assistance of a public body in enforcing settlement agreements, represents a major barrier for systemic claimants in the event of settlement breakdown.
3.19.3 Recommendations – Monitoring and Enforcement of Settlement Agreements

- That statutory or regulatory provisions similar to provisions under the Ontario regime be enacted for the purposes of providing claimants with recourse to an expedited hearing process in the event of breaches in settlement.

- That a public body, such as the Human Rights Clinic be mandated and adequately funded to assist claimants in enforcing settlement agreements or alternatively in accessing other processes in the event of breaches of settlement agreements.

- That the Tribunal be statutorily empowered with discretionary power to incorporate the terms of a settlement agreement into a Tribunal order upon the request of one party to the settlement agreement.
3.20 Monitoring and Enforcement of Orders for Systemic Remedies Resulting from Hearings.

3.20.1 Analysis/Critique

The provisions allowing for the involvement of a commission in a monitoring and enforcement role under the Commission Model appear to represent a potential strength over the Direct Access Model, for reasons discussed above in relation to settlement. Specifically, the provisions previously in place in British Columbia, providing for the Commission to be joined as a party or initiate its own claim in the public interest, appear to increase the chances of effective enforcement and monitoring of systemic remedies.

Similarly, under section 37(3) Code the Tribunal could order the respondent to provide the Deputy Commissioner or another designated person, with information pertaining to the Commissioner implementation of the order. As suggested by Black, the benefit of this type of provision lies in the fact that frequently a claimant has no way to verify whether an order is being implemented and consequently, options such as reporting provisions to a commission may increase the likelihood of implementation of orders.

A closer look at cases involving commission involvement in enforcement and monitoring indicates, however, that commission involvement is no guarantee of

748 Code, as amended, supra n. 131 at section 37(3).
749 Black, Black Report, supra n. 16 at 138.
successful implementation. For example, some commentators suggest that in the case of Action Travail, despite repeated requests from the claimants for assistance with enforcement of the Tribunal order, the Federal Human Rights Commission failed to assist the claimants in enforcing respondent compliance with systemic remedies.\textsuperscript{750} Despite five years of hearings, including at the Supreme Court of Canada level, the orders for an affirmative action program providing that one in four hires in non-traditional positions be women, were effectively circumvented by the respondent.\textsuperscript{751}

An example of difficulties associated with commission based enforcement mechanisms in monitoring and enforcing tribunal orders can also be seen in the long standing systemic case of OHRC and McKinnon v. Ontario (Ministry of Correctional Services),\textsuperscript{752} which involved racially, based systemic discrimination. The case involved a 1998 order by the Ontario Human Rights Tribunal for extensive systemic and other remedies based on a finding that the claimant was subjected to extreme racism. The remedies included the establishment of a Commission approved training program. As part of the order, the Tribunal was to remain seized of the case until the order was fully implemented. In 2002, the claimant applied for and obtained an order for expanded redress due to the failure of the respondent to implement the original order and also due to ongoing racial harassment. The respondent applied for Judicial Review of the tribunal

\textsuperscript{750} Rachel Cox, Action Travail Research Paper, supra n. 324 at 2.  
\textsuperscript{751} Ibid, at 1.  
\textsuperscript{752} McKinnon, supra n. 703.
decision. In upholding the decision the Ontario Superior Court found that the appeal represented:

...a unique situation in which outrageous discrimination continued unabated for a period of approximately fifteen years and in which the Tribunal's original remedial orders appear to have been at least in part, subverted.\textsuperscript{753}

The Court also noted that:

...the position of the Commission as to the effectiveness of the proposed human rights training program moved from being supportive of the proposal in 1998, to submitting that it was ineffectual in 2002.\textsuperscript{754}

The respondents subsequently appealed to the Ontario Court of Appeal who ruled in favor of the claimant on December 12, 2004.

In addition to the apparent shortcomings in the Commission's involvement in monitoring the implementation of the order respecting the training program, it also interesting to note that in the 2002 \textit{McKinnon} decision, the Tribunal ordered that a third party nominated by the Commission be retained at the expense of the Respondent, to develop and monitor the delivery of the training programs. In making the order, the Tribunal stated that "...but for want of resources..." the Commission would have been ordered to carry out the duties related to the training.\textsuperscript{755}

\textsuperscript{753} \textit{McKinnon}, (OSC) \textit{supra} n. 703 at para. 21.
\textsuperscript{754} \textit{Ibid.}
\textsuperscript{755} \textit{McKinnon} (2002), \textit{Ibid.}, at para. 312.
In contrast to the above, the case of *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*.\(^{756}\) involved the successful implementation of various systemic remedies aimed at employment equity in hiring and promotion of visible minorities.\(^{757}\) As part of the Tribunal order, the Canadian Human Rights Commission was involved in monitoring the implementation of the remedies in a reporting capacity on an ongoing basis within specified periods of time.\(^{758}\) One of the factors that may have contributed to the positive outcome in the case was the creation of an Internal Review Committee as part of the Tribunal order, consisting of a cross-section of key personnel from the respondent organization whose roles were to monitor implementation of the remedial plan in a direct hands-on capacity.\(^{759}\)

Despite the practical shortcomings of the Commission Model, the absence of a provision for enforcement and monitoring by a public body is clearly detrimental to obtaining and enforcing systemic claims under the Direct Access Model. While section 37(3) the Code, as amended, provides the Tribunal under the Direct Access Model with the power to require respondents to provide any designated persons with information regarding the implementation of the order, this provision has limited utility as a monitoring/enforcement mechanism, other

\(^{756}\) *National Capital*, supra n. 135.

\(^{757}\) See for example, Department of Justice Canada, *National Capital Alliance on Race Relations v. Canada (Health and Welfare): A Case Study*, summary of research paper prepared by Patrice A. Robinson (Ottawa: Department of Justice Canada, 1999). Online: http://canada.justice.gc.ca (last accessed February 2005) [Case Study].

\(^{758}\) *National Capital*, supra n.135 at paras. 191(18).

\(^{759}\) *Ibid.*, at paras.191 (17).
than providing other potential claimants with access to information. Combined with the Tribunal's general reluctance to order remedies that require monitoring, it seems unlikely that it would be utilized as a mechanism for monitoring or enforcing claims, given the dearth of organizations with the expertise and resources of a commission who are in the position to effectively monitor and/or enforce systemic remedies.

The absence of explicit provisions under the Direct Access Model for the Tribunal to remain seized of claims until implementation represents another weakness. For example, the explicit provision for the Tribunal to remain seized of claims until implementation under the Commission Model in Ontario appears to allow claimants recourse to the Tribunal not only in the event of a breach of the remedy, but also in the event of repetition of the same type of breach, thereby triggering commission investigation powers and recourse to the hearing process. As previously discussed in the overview of remedial processes, procedures and mechanisms, the Direct Access jurisdiction of Nunavut explicitly provides for the Tribunal to remain seized of a matter until an order is fully implemented under section 34(4) of the Nunavut Human Rights Act.

The Black Report specifically recommended that as a step towards strengthening enforcement of remedies, the Code should be amended to explicitly provide the

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760 Code as amended, supra n. 131 at 37(3).
761 NHRA, supra n. 298 at section 34(4).
Tribunal with the jurisdiction over claims until remedies are fully implemented.\textsuperscript{762} Unfortunately, this recommendation was never implemented. While the Tribunal under Direct Access frequently appears to retain jurisdiction in cases involving complex remedies as part of the order, it does so by virtue of the broad remedial provisions in section 37 of the Code as amended,\textsuperscript{763} as opposed to on the basis of explicit statutory authority. Further, it appears that the Tribunal remains seized of such cases for the purpose of providing recourse to Tribunal processes in the event of ambiguity or conflict over orders around remedies as opposed to for enforcement purposes.\textsuperscript{764} While having the Tribunal remain seized of the claim may increase the likelihood of implementation, such involvement is not as effective as provisions that explicitly provide the Tribunal with jurisdiction over the claim until the remedy is fully implemented.\textsuperscript{765}

The absence of explicit provisions providing for seizure until implemented may be somewhat mitigated by the provisions under Direct Access Model in British Columbia for modification of orders. As suggested by Black, the power to modify remedies is particularly important in cases where the implementation of the remedy is to take place over a period of time, due to the difficulty of anticipating

\textsuperscript{762} Black, \textit{Black Report}, supra n. 16 at 138-139.
\textsuperscript{763} Code, as amended, supra n. 131 at section 37.
\textsuperscript{764} See for example the case of \textit{Moser}, supra n. 157. See also \textit{Radek}, supra n. 80 at paras. 664-665, where the Tribunal ordered the Respondent to consult with the claimant and her counsel regarding the details of implementation, and in the event that there was conflict the parties could apply to the Tribunal for assistance. Further, the Tribunal would remain seized of the claim for a period of six months, and retained jurisdiction to hear argument if necessary on the implementation of the remedy.
\textsuperscript{765} The \textit{March 18, 2005, Interviewee}, supra n. 167, suggested that this may be administratively problematic for the Tribunal, as cases could potentially remain open for indefinite lengths of time, which was one of the major criticisms of the former Human Rights Tribunal.
and taking into account future contingencies at the time the order is made.\textsuperscript{766}

The negative impact of future circumstances without recourse to modification provisions was seen in \textit{Action Travail},\textsuperscript{767} where the elimination by the respondent of the "St. Lawrence Region," on which the order was focused, led to the affirmative action remedy being rendered meaningless.\textsuperscript{768}

The Direct Access Model in British Columbia explicitly provides recourse to the member or panel that made the original order, or to a member or panel designated by the Chair of the Tribunal, to modify an order prior to full implementation under section 38(1) of the \textit{Code}.\textsuperscript{769} Section 38(2) provides the Tribunal with the discretion to vary or rescind the order after determining under subsection (a) that has not been fully implemented, and (b) is no longer appropriate because of unforeseen circumstance.\textsuperscript{770} Under subsection (3) in varying the order, the Tribunal has recourse to the section 37(2) remedial provisions.\textsuperscript{771}

A strength of the above provision for modification; particularly given the typical complexities of systemic claims, which is also generally available under the Commission Model, is the recourse to the same member or panel that originally made the order, thereby allowing for consistency. One of the weaknesses of this

\textsuperscript{766} Black, \textit{Black Report}, supra n. 16 at 139.
\textsuperscript{767} \textit{Action Travail}, supra n. 133.
\textsuperscript{768} Rachel Cox, \textit{Action Travail Research Paper}, supra n. 324 at 1-2.
\textsuperscript{769} \textit{Code}, as amended, supra n. 131 at section 38(1).
\textsuperscript{770} \textit{Ibid.}, at section 38(2).
\textsuperscript{771} \textit{Ibid.}, at section 38(3).
provision that limits its utility in terms of enforcement is the necessity of claimants having to prove in addition to the order not having been fully implemented, that the order is no longer appropriate because of unforeseen circumstances.772 The second test has the potential to produce the unfair outcome of a modification order being precluded, where the respondent is apparently fully capable of, but merely refusing to implement and order, such as in the McKinnon case. The only recourse would be for systemic claimants to attempt to enforce the order with the Supreme Court, which as discussed above, is problematic for a number of reasons. The modifications may be useful however, in cases like Action Travail where changes to the region may be argued as being unforeseen.

3.20.2 Summary and Recommendations

While it is apparent from the commentary and case law that access to effective enforcement and monitoring remedies is essential in order to effectively address systemic discrimination, there are clearly some gaps under both Models in respect of this area. Without accessible and effective processes, procedures, and mechanisms, the enforcement process is rendered meaningless, as was clearly seen in Action Travail773 and McKinnon.774 This gap is particularly

772 See for example the case of Hutchinson v. B.C. (Min. of Health)(No.2), supra n. 217, where the claimants failed to meet the second arm of the test for modification. Contra, see the case of Gill and Maher, Murray and Popoff v. Ministry of Health, 2001 BCHRT 45, where the Tribunal granted an order for the modification of the time for compliance with the original order on the basis that the Respondent had successfully met the second arm of the test.
773 Action Travail, supra n.133.
774 McKinnon, supra n. 703.
apparent under the Direct Access process, in light of the absence of a body such as a commission to assist with monitoring and enforcement. At the same time, as was discussed above, the presence of a public body charged with enforcing and monitoring implementation is no guarantee of successful implementation of systemic remedies. In my view, one of the minimum requirements for effective enforcement is access to a wide variety of processes, procedures, and mechanisms, in order to increase the likelihood of successful enforcement, a viewpoint that is discussed further in Chapter V.

3.20.3 Recommendations – Enforcement of Orders Resulting from Hearings

- That human rights legislation be amended, or Rules or Regulations enacted to explicitly provide for the Tribunal to remain seized of claims in certain circumstances, such as in systemic claims, pending full implementation.

- That the statute be amended, or Rules or Regulations enacted to provide a right of recourse to file a new claim and concomitantly to an expedited hearing process in the event of a breach of a final remedial order.

- That a public body, independent from government be given the statutory mandate to be involved in the monitoring of remedies in cases involving
broad public interest implications. Potential paradigms for addressing this recommendation will be discussed further in Chapter V.

3.21 Special/Equitable Programs

3.21.1 Rationale

Most commission based enforcement processes have statutory provisions providing for commission approval of equity based programs, aimed at promoting equality for disadvantaged groups.775 In his review of human rights legislation in British Columbia Black suggested that special programs and employment equity provisions were central to achieving the goals of human rights legislation. More specifically, he suggested that in addition to representing preventive measures, such provisions “are a key part of the strategy for correcting persistent patterns of inequality.”776 He also suggested that provisions aimed at special and employment equity programs allow for the creation of systems designed to identify equality barriers, and for the development of proactive plans to eliminate

775 See for example, SHRC, supra n. 403 at section 47(1); Yukon Human Rights Act, R.S.Y. 2002, c. 116 at section 13. The Québec Charter of Human Rights and Freedoms, R.S.Q.C.-12 contains broad provisions for the creation of affirmative action programs in sections 86-92. For example, section 88 provides for the Commission to propose the implementation of an affirmative action program subsequent to investigation of discrimination, and where the proposal is not implemented, to apply to a tribunal for an order for implementation. Where the tribunal grants an order for implementation the program is filed with the tribunal, who in turn may impose any modifications considered appropriate. An exception to the general provision for affirmative action programs under commission based regimes, is the Alberta Human Rights, Citizenship and Multiculturalism Act, R.S.A. 200, c. H-14 which does not provide for any affirmative action or special programs.

776 Black, Black Report, supra n.16 at 178.
such barriers. The equity provisions primarily engage the criteria of fairness, pro-activity, and adequacy of resources.

3.22 Overview of Applicable Processes, Procedures, and Mechanisms

3.22.1 Special Programs – The Commission Model

Statutory provisions governing equity programs typically provide for commission input and approval of plans, overseeing of modifications in plans, monitoring changes in relation to plans, rescinding approval, and exempting approved plans from discrimination claims. For example, section 16(1) of the Canadian Human Rights Act, which refers to special programs, states that:

It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.\(^{778}\)

Section 16(2) provides for the Canadian Human Rights Commission to a) make general recommendations regarding special programs, plans, or arrangements; and, b) on application for approval of a special program to provide assistance and advice regarding special programs, plans and arrangements.\(^{779}\) Section

\(^{777}\) Ibid., at 179.  
\(^{778}\) CHRA, supra n. 256 at section 16(1).  
\(^{779}\) Ibid., at section 16(2) (a)(b).
17(1) provides for voluntary application by a person proposing to implement a plan to meet the needs of persons with disabilities to the Commission for approval of the plan.\textsuperscript{760} Subsection (3) provides for the exemption from discrimination claims for plans that have been approved by the Commission.\textsuperscript{781} Section 18(1) provides the Commission with the power to rescind approval of plans where there is a change in circumstances where the plan ceases to be appropriate.\textsuperscript{782} Section 24(1) states that the Governor in Council may make regulations for the benefit of disabled persons; prescribing standards of accessibility to services, facilities, or premises. Subsection (2) provides for an exemption from discrimination claims where the prescribed standards for accessibility are met.\textsuperscript{783}

The Ontario \textit{Human Rights Code} provides for the creation of special programs in section 14(1).\textsuperscript{784} The provisions are similar to those of the Federal Human Rights Commission. Of particular note is subsection (5) which exempts the Commission's power to review special programs from applying to programs implemented by the Crown or an agency of the Crown.\textsuperscript{785} An additional section of note is section 18 which provides for the protection from a finding of a breach of the \textit{Code} on the grounds of services and facilities, for special interest organizations which have an equitable purpose.\textsuperscript{786}

\textsuperscript{760} \textit{Ibid.}, at section 17(1).
\textsuperscript{781} \textit{Ibid.}, at section 17(3).
\textsuperscript{782} \textit{Ibid.}, at section 18(1).
\textsuperscript{783} \textit{Ibid.}, at section 24(1)(2).
\textsuperscript{784} \textit{OHRC, supra n. 267} at section 14(1).
\textsuperscript{785} \textit{Ibid.}, at section 14(5).
\textsuperscript{786} \textit{Ibid.}, at section 18.
The statutory provisions governing special programs under the British Columbia Commission were very similar to the provisions described above in relation to the federal and Ontario enforcement regimes. For example, section 42(1) (a)(b) stated that it was not discriminatory to advertise, adopt, or implement an employment equity program whose purpose was ameliorating conditions of disadvantage for individuals or groups based on the various grounds under the Code. Under section 42(2) the Chief Commissioner or the Deputy Commissioner had the discretionary power to make general recommendations regarding special programs, and under section 42(3), to approve any program or activity aimed at eliminating disadvantage for individuals or groups. Section 42(4) stated that any program approved under subsection (3) was deemed not to be a breach of the Code. A provision of note which is similar to the section 18 provision for special interest organizations in the Ontario Human Rights Code, is section 41 of the Code. This provision relates to "exemptions, apart from those obtained as a result of obtaining approval for special programs, for charitable, philanthropic, educational, fraternal, religious, social organizations or non-profit corporations from preferences in group membership, where the primary purpose of such groups was the promotion of the interests and the welfare of groups based on the enumerated grounds."
3.22.2 Special Programs – The Direct Access Model

The statutory provisions governing special programs described above under the Commission Model remain substantively the same with the advent of the Direct Access Model in British Columbia. Significant changes occurred, however, in relation to provisions for approval and monitoring of such programs due to the elimination of the Commission. For example, under section 42(3) of the Code, the British Columbia Human Rights Tribunal replaced the Commission as the body responsible for approval and renewal of special and equitable programs.\(^{792}\) The Tribunal has developed a special program policy which provides detailed information on the nature of special and employment equity programs, and the approval process.\(^ {793}\) The explicit exemptions for charitable and other organizations discussed above, remained the same under the amendments to the Code.

The Nunavut Human Rights Act refers to affirmative action programs in section 7(2) and states that the Act does not preclude laws, programs, or activities whose aims are the amelioration or conditions of disadvantage.\(^ {794}\) Section 7(3) provides for the continued approval under the Act, of any programs approved under the former human rights legislation.\(^ {795}\)

\(^{792}\) Code, as amended, supra n.131 at section 42(3).
\(^{793}\) British Columbia Human Rights Tribunal, Special Programs Policy. Online: http://www.bchrt.bc.ca/policies/special__programs_policy.htm (last accessed August 2005) [BCHRT Special Program Policy].
\(^{794}\) NHRA, supra n. 298 at section 7(2).
\(^{795}\) Ibid., at section 7(3).
3.22.3 Analysis/Critique of Special and Equity Programs

Both Models provide for comparable processes, procedures, mechanisms for the creation of special and equitable programs. As a result, both Models appear to provide effective measures for addressing systemic discrimination in a proactive way. The Commission Model appears to offer a distinct benefit over the Direct Access Model in terms of a mechanism for involvement and monitoring of special programs. Conversely, it appears that the absence of provisions for the involvement of a body such as the commission represents a major gap under the Direct Access Model. For example, the British Columbia Human Rights Commission Annual Reports suggest that the Commission was actively involved in monitoring and facilitating the development of special programs. In contrast, while applicants for special program approval are encouraged to seek community input into programs, and one of the requirements for approval is that they provide information on monitoring and evaluation mechanisms, unlike the Commission, the role of the British Columbia Human Rights Tribunal is limited to ensuring that the programs conform to the Special Programs Policy. Given the extensive case management and adjudicative responsibilities of the Tribunal and limited resources, it is unlikely that it is able to engage an in-depth investigation of the programs, particularly on an ongoing basis over the five year approval period.

It is interesting to compare the process for the public reporting of special programs and the numbers of special program approvals, under the Commission

796 See for example, generally, BCHRC Annual Report 2001/02, supra n. 349.
797 BCHRT Special Program Policy, supra n. 793.
Model versus under the Direct Access Model in British Columbia, as an indicator of the effectiveness of the two Models. With respect to reporting, the names of applicant organizations, along with a description of the general details of new program approvals were reported by the Commission in publicly available documents such as Commission Annual General Reports. In contrast, there has been no reporting to date of special programs under the Direct Access Model, other than a brief reference in the 2003-2003 Annual Report to the special programs process, and comment that the Tribunal approved 7 new special programs and 9 program renewals in the previous year. I have been informed by the Tribunal that plans are in progress to make details of the special program approvals available on the Tribunal website. In my view it is critical for such information to be publicly available, from both an access and an accountability perspective, in light of the strong public interest in effectively addressing systemic discrimination.

In respect of the numbers of programs approved under both Models, evidence suggests that the number of programs registered under section 42 has declined significantly with the introduction of the Direct Access Model. For example, in 2002 there were 71 programs registered under section 42. As of March 18,

798 See for example, BCHRC Annual Report 2001/02, supra n.249 at 14.
799 See BCHRT 2003/04 Annual Report, supra n. 354 at 17 B.C. In fairness, this provision was new to the Tribunal at the time of the first Annual Report. The September Annual Report may contain reference to programs receiving Tribunal Approvals.
800 April 6, 2005, Institutional Interviewee, supra n. 666.
2005, 38 programs were registered with the Tribunal, 11 of which received approval since the March 31, 2003 introduction of the Direct Access Model.802

Two interviewees specifically expressed concerns about the effect of the privatized nature of the Direct Access Model on the special program provisions. One interviewee who worked under the Commission Model suggested that prior to the introduction of Direct Access Model; several government Ministries indicated that they would not be renewing their special program status, which in the interviewee’s opinion was indicative of a general lack of support in government for equity based initiatives as part of the Direct Access Model.803 A second interviewee raised questions about the types of programs receiving approval and their overall effectiveness in achieving equality related objectives, particularly in light of an absence of mechanisms for an independent body to provide input into special programs and engage in monitoring in the public interest.804

3.22.4 Summary and Recommendations

There appear to be some questions regarding the effectiveness of the special programs provisions under the Direct Access Model, in light of the lack of

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802 These numbers are based on my calculations from a list of Special Programs kindly provided to me by the British Columbia Human Rights Tribunal on April 6, 2005.
803 March 23, 2005, Interview (2), supra n. 164.
804 April 18, 2005, Interviewee, supra n. 167.
reporting provisions, and pro-active input and monitoring provisions, and the declining numbers of such programs. In order to be effective in addressing systemic discrimination the special program provisions require proactive input and monitoring. In light of the adjudicative nature and role of the Tribunal and the already considerable demand on limited resources involved in case management and adjudication, responsibility for anything other than approval is clearly inappropriate.

3.22.5 Recommendations – Special Programs

- That a newly created, or pre-existing, independent statutory based body be empowered with the mandate for the approval, input, and active monitoring of special programs.

- That the guidelines and policies on special programs be written in plain language, and made available in barrier free formats in order to promote accessibility.

- That the body providing special program approval be available to consult with potential applicants for special program status regarding the implementation of programs, as well as to assist in addressing best practice issues on an ongoing basis.
• That the provisions governing the monitoring process be changed to allow for frequent periodic monitoring of programs given special approval.

• That names and general details of all programs receiving special program approval or being subjected to the revocation of approval, be publicly accessible.

3.22.6 Analysis and Critique of Exemptions for Charitable and Other Groups

While this provision is not directly attributable to an inherent difference between the two Models, it has implications for effectively addressing systemic claims in British Columbia under the current direct access process.

In discussing section 41 of the Code in the context of the review of human rights legislation in British Columbia, Black suggested that the wording “exemptions” was misleading due to the fact that the provisions were not exemptions from the duty of non-discrimination, but rather they provided a mechanism for achieving equality. Unfortunately, the heading of exemption was carried forward in subsequent amendments to the Code, and section 41 remains substantially the same as at the time of the Black Report.

805 Black, Black Report, supra n. 16 at 179.
As discussed previously in the context of the discussion of the tensions inherent in substantive equality between equality seeking groups, section 41 was at the forefront of the *Nixon* case. One of the issues before the Tribunal was whether the respondent organization could rely on a section 41 defence. The Tribunal noted that all Canadian human rights statutes contain provisions similar to section 41. The Tribunal in citing *Brossard (Town) v. Quebec (Commission des droits de la personne)*, indicated that such provisions assure fundamental equality related freedoms, such as freedom of expression and of association, for the purpose of non-discriminatory pursuits outside of the anti-discrimination norm mandated by human rights statutes. The Tribunal further stated that section 41 of the *Code* provides a limited exemption to the application of the statute to organizations to grant a preference to an identifiable group, where the group has a particular primary purpose of the promotion of the interests and welfare of the identifiable group. Further section 41 must be interpreted in the context of section 3 purposes of the *Code*. After reviewing various founding documents of the respondent organization, the Tribunal held that the documents did not indicate that the respondent organization had a primary purpose of being a charitable organization for the promotion of the interests of an identifiable group characterized by political belief, or by a common definition of sex characterized

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806 *Nixon*, generally, supra n. 97.
809 *ibid.*, at paras. 211-212.
810 *ibid.*, at paras. 211-212.
by that particular political belief, and consequently, it was precluded from reliance on a defence under section 41.811

The Tribunal decision in *Nixon* was overturned by the British Columbia Supreme Court on two findings; one of which held that the appellant group came within section 41 by virtue of promoting the interests and welfare of women as an identifiable group. Therefore it was entitled to exclude persons based on sex, including those born biologically men and having underwent sex reassignment surgery to become a woman.812 The British Court of Appeal Decision in *Nixon* is pending.813

3.22.7 Summary and Recommendations

The primary issue is whether the provision in respect of exemptions under the *Code*, as amended,814 is achieving the intended underlying equality objectives. It would appear that the underlying proactive objectives of addressing systemic discrimination are not being met. One of the difficulties is that the provision appears to be amenable to use as both a 'shield and a weapon' against allegations of discrimination by virtue of the emphasis on exemption, resulting in some cases in a *priori* of equality objectives.

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811 Ibid., at paras. 217-218.
812 *Nixon* (BCSC), *supra* n. 97.
813 Ibid.
3.22.8 Recommendations – Exemptions

- That, as suggested in the Black Report, the reference to "exemptions" be eliminated. Alternatively, that emphasis be placed on the proactive nature of the equality provisions, for example in wording that states that equality initiatives are to be considered consistent with the section 3 purposes of the Code. The aim of this wording would be the creation of a positive inference; as opposed to an explicit exemption. Such an inference could be relied on by groups initiating equality measures, when faced with allegations of discrimination, as evidence of non-discriminatory conduct, as opposed to a total defence to discrimination.

In summary, this chapter examined processes, procedures, and mechanisms aimed at addressing systemic claims in 8 areas which were identified as reflecting differences between the two Models. Specifically: 1.) preliminary information and assistance; 2.) standing to file claims; 3.) intervenors; 4.) case management; 5.) investigation/disclosure; 6.) settlement; including the public interest in settlement and in settlement information; 7.) monitoring and enforcement of systemic remedies resulting from settlement agreements and hearing orders; and, 8.) special/equitable programs. The analysis/critique of these areas revealed various gaps, which are primarily attributable to the absence of public interest provisions under the Direct Access Model. The overall effect of the public interest gap is to place an inordinate burden on systemic

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815 Black, Black Report, supra n. 16 at 179.
claimants in bringing forward and sustaining claims. Recommendations were made in each area for addressing this gap in the Direct Access Model.

Chapter IV, which is the penultimate chapter of the thesis, looks at areas, while not directly attributable to inherent differences in the two Models; nevertheless have major implications for effectively addressing systemic discrimination within the enforcement process.
CHAPTER IV  ANALYSIS AND CRITIQUE OF PROVISIONS CRITICAL TO SYSTEMIC CLAIMS NOT ATTRIBUTABLE TO MODEL DIFFERENCES

Whereas Chapter III examined differences in the two Models in order to assess their relative effectiveness in addressing systemic discrimination, this chapter examines processes, procedures, and mechanisms in 4 areas, although not directly attributable to differences between the Models, have serious implications for effectively addressing systemic claims. The four areas identified as being critical to systemic claims are:

1.) dismissal of claims; 2.) scope of claims; 3.) evidence; and, 4.) scope and sufficiency of systemic remedies. The provision of legal assistance to claimants will be discussed throughout the analysis/critique due to the interconnection between legal assistance and each area, as well as the overall importance of the topic.

The analysis/critique involves the application of the enforcement criteria developed in Chapter II to assess processes, procedures and mechanisms in the 4 delineated areas in order to identify strengths, weaknesses and gaps in such

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816 As discussed in Chapter III, this division is not without ambiguity, as some of the the issues discussed in this chapter have public interest components which are attributable to differences in the two Models, for example, in respect of the discussion on some aspects of remedies which involve public interest provisions.
provisions in addressing systemic discrimination, and to make recommendations in respect of the enforcement process in British Columbia.

4.1 Dismissal of Claims

All human rights jurisdictions have statutory provisions and related processes and mechanisms for screening claims in order to determine whether a claim is accepted for filing or dismissed prior to a hearing. The following section considers the rationale for a focus on screening provisions and the nature of these provisions, processes, and mechanisms. The discussion begins with a specific focus on two issues: dismissal on the basis of jurisdiction, and dismissal on the basis of an assessment of merit and their implications for systemic claims. As part of the discussion on jurisdiction, the topic of the Charter and constitutionality issues will be discussed. The final section addresses the issue of dismissal on the basis of time limitations.

4.1.1 Rationale

Commentators such as Birenbaum and Porter suggest that screening provisions are detrimental to systemic claims due to the potential denial of access to the adjudication process. They further suggest that many important systemic equality issues impacting disadvantaged groups have not been successful in

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817 Charter, supra n. 70.
818 Birenbaum and Porter, Right to Adjudication, supra n. 288 at 5.
reaching the adjudication process in the federal human rights arena due to screening.\textsuperscript{819} Similarly, other human rights commentators suggest that in British Columbia the screening functions previously performed by the Commission have been taken over by the Tribunal, resulting in denial of access for significant numbers of claimants.\textsuperscript{820} The topic of screening primarily engages the criterion of access; however, it also implicates fairness, effectiveness, and the provision of adequate resources, including legal representation.

\section*{4.2 Overview of Applicable Processes, Procedures, and Mechanisms}

\subsection*{4.2.1 Dismissal Provisions}

While the processes and mechanisms vary, all jurisdictions have traditionally been empowered with discretionary authority to accept or reject claims for filing on the basis of jurisdiction, being frivolous or vexatious, or on the basis of other more suitable venues for addressing claims.\textsuperscript{821} Screening typically occurs after claims are filed, at a preliminary stage involving a \textit{prima facie} assessment of claims.\textsuperscript{822} For example, under the federal human rights regime, section 41(1) of the Canadian \textit{Human Rights Act} empowers the Commission to refuse claims where it appears that (a) the alleged victim of the discrimination ought to exhaust

\begin{itemize}
  \item \textsuperscript{819} \textit{Ibid.}, at 5-6.
  \item \textsuperscript{820} See for example, generally, Braha, \textit{New Changes}, \textit{supra} n. 617.
  \item \textsuperscript{821} Howe and Johnson, \textit{Restraining Equality}, \textit{supra} n. 5 at 112.
  \item \textsuperscript{822} \textit{Ibid.}, see comments in relation to the Ontario regime, at 54-55.
\end{itemize}
grievance or review procedures reasonably available to them; or (b) the claim could be more appropriately dealt with initially, or completely, under a procedure provided for in another Parliamentary Act; (c) the claim is beyond the jurisdiction of the Commission; (d) the claim is trivial, frivolous, vexatious or made in bad faith, or (e) the claim is outside the one year time limit and the commission declines to extent the time. Additionally, under section 41(2) the Commission may decline to deal with an employment claim under section 10(a) where it is of the view that the matter has been adequately dealt with under an employment equity plan prepared in accordance with section 10 of the Employment Equity Act. Similarly, section 34(1) of the Ontario Human Rights Code delineates a number of discretionary factors similar to those described above, upon which the Commission can refuse to accept claims.

Under the Code in British Columbia, the Commissioner of Investigation and Mediation had even wider powers than most commissions to screen claims. For example, under section 27(1) of the Code any time after the claim was filed the Commissioner could dismiss on the basis that: (a) all or part of a claim that was outside of the Commission’s jurisdiction; (b) the alleged acts or omissions did not contravene the Code; (c) there was no reasonable basis for referring all or part of the claim to the tribunal for a hearing; (d) (i) proceeding with the claim or part of the claim would not benefit the person, group, or class alleged to have been discriminated against, or (ii) further the purposes of the Code; (e) the claim or

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823 CHRA, supra n. 256 at section 41(1)(a)(e).
824 Ibid., at section 41(2).
825 CHRA, supra n. 256 at section 34(1).
part of the claim was filed for improper purposes or made in bad faith; (f) the
substance of the claim or part of the claim had been appropriately dealt with in
another proceeding; and (g) the claim was outside the one year time limit for
filing, and the Commissioner declined to extend the time for filing.\textsuperscript{826}

Under the current legislation in place in British Columbia, the Tribunal has the
power to dismiss all or part of a claim without a hearing under section 27 of the
\textit{Code}, as amended.\textsuperscript{827} The grounds for dismissal are the same as those formerly
available to the Commission, with the exception of section 27(1) (c) which
empowers the Tribunal to dismiss a claim where it determines that there is no
reasonable prospect that the complaint will succeed.\textsuperscript{828} Additionally, the Tribunal
has the discretion to defer a claim under section 25(1) (2) of the \textit{Code}, as
amended, where it determines that another proceeding is capable of
appropriately dealing with the substance of a claim.\textsuperscript{829}

Under Rule 11(1-7) of the British Columbia Human Rights Tribunal \textit{Rules}, claims
are screened subsequent to filing, for completeness and for jurisdiction.
Claimants are notified by the Tribunal regarding incomplete claim forms, or areas
requiring verification, and must respond within the specified time period or risk
having the claim rejected by the Tribunal. In the event that the Tribunal
determines that it does not have jurisdiction to deal with a claim, reasons are

\begin{footnotes}
\item[826] \textit{Code}, supra n. 246 at section 27(1)(a)-(g).
\item[827] \textit{Code}, as amended, supra n. 131 at section 27(1)(c).
\item[828] See reference to this change in the \textit{BCHRT 2003/04 Annual Report}, supra n. 354 at 10.
\item[829] \textit{Code}, as amended, supra n. 131 at section 25(1)(2).
\end{footnotes}
provided to the claimant for the refusal. The fact that the Tribunal accepts the claim for filing does not constitute a final determination on jurisdiction as the issue may also be raised by the respondent as a basis for dismissal in an interim application.830

Under section 24(1) of the Nunavut Human Rights Act the Tribunal has discretion not to deal with all or part of a claim which could or should be dealt with under another Act.831 Section 24(2) states that the Tribunal shall consider all relevant factors, including the subject matter and the nature of the other Act and the adequacy of remedies available in the other Act in the circumstances.832 Section 24(3) sets out similar grounds for the Tribunal to refuse to deal with a claim as described above, such as where claims are trivial, frivolous, vexatious, or made in bad faith. Of note is subsection (e) which states that the Tribunal can refuse a claim where in the opinion of the Tribunal, the person who filed the claim refused a reasonable offer of settlement.833

4.2.2 Analysis/Critique Dismissal Provisions - Generally

Dismissal provisions have generally been viewed by human rights commentators as “gate keeping” powers which severely impede access to the claims process.

830 BHRT Rules, supra n. 356 at Rule 11(1-7).
831 NHRA, supra n. 298, at section 24(1).
832 Ibid., at section 24(2).
833 Ibid., at section 24(3).
Specifically, such provisions are viewed as limiting the autonomy of claimants to make decisions about their own claims, and as frequently resulting in an unfair denial of claimants' rights to adjudication on the merits of the claims. Some commentators view commission gate keeping as being particularly problematic for systemic claims due to perceptions that commissions frequently lack understanding of systemic claims and their implications for disadvantaged groups. Further, it has been suggested that community based advocacy groups are well positioned to bring systemic claims forward, and should be able to do so, without being subjected to the gate keeping barriers imposed by commissions.

Many commentators view the provision of claimants filing claims directly with the Tribunal as providing the answer to problems associated with screening provisions, by allowing claimants to file claims without being subject to gate keeping by commissions. Subsequent to the implementation of the direct access process in British Columbia, however, commentators have raised concerns as to whether claimants actually have increased access to the claims process. Some commentators suggest that the gate keeping powers of the former British Columbia Human Rights Commission have merely been transferred over to the Tribunal. For example, based on a review of the case

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834 Braha, Proposed Human Rights Code, supra n. 311 at COM-43; see generally, Birenbaum and Porter Right to Adjudication, supra n. at 288; also, Department of Justice Canada, Day and Brodsky, Screening and Carriage, supra n. 197, in particular at 3.
835 Birenbaum and Porter, ibid., generally.
836 ibid.; also, Rachel Cox, Action Travail Research Paper, supra n. 324, generally.
837 See for example, Birenbaum and Porter, Right to Adjudication, supra n. 288 at 4-6.
838 See for example, generally, Braha, New Changes, supra n. 617.
law relating to the Tribunal's dismissal powers under section 27(1) of the Code, including jurisdictional and time issues, Braha has concluded that dismissal provisions are generally creating "new procedural obstacles for complainants before a hearing." Further that:

Complainants have had to respond to preliminary applications in the majority of cases published. Undoubtedly, this has necessitated increased costs and delays, including the time and cost for the preparation of affidavit evidence and submissions. Moreover, the results of the preliminary applications reveal that in many cases, complainants have lost these applications. The result, without considering the merits of each case, appears to be that complainants' right to a full adjudication of their complaints has been undermined.

There was some clear disparity in the perspectives of interviewees on the issue of dismissal of systemic claims. For example, many interviewees who work with claimants view dismissal provisions as representing a barrier to bringing systemic claims forward. One interviewee expressed the view that the Tribunal in British Columbia has taken over the role of the former commission in screening out claims and consequently, that 'direct access' was a misnomer.

In contrast, an interviewee who primarily represents respondents, viewed dismissal provisions as being generally under utilized due to the time limitations around bringing applications for dismissal. The interviewee also suggested that some claims involving allegations of systemic discrimination which are of questionable merit, may proceed due to a lack of consistency in screening

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839 Code, as amended, supra n. 131 at section 27(1).
840 Braha, New Changes, supra n. 617 at COM-50.
841 Ibid., at COM-49-50.
842 For instance, April 7, 2005 Interviewee, supra n. 163; April 13, 2005 Interviewee, supra n. 162
843 April 7, 2005 Interviewee, Ibid.
Another interviewee who represents respondents also expressed frustration with the timelines for bringing applications for dismissal, and suggested that the option of bringing such applications should be available up to hearing.845

Despite the clear divergence in the views of interviewees on the effectiveness of dismissal provisions, one general area of agreement was a perception that the number of preliminary applications has increased since the beginning the introduction of the new enforcement process, and similarly, that the rate of dismissal of claims has generally gone up.846

In a review of preliminary decisions under section 27 of the Code, Braha found that during the period of April 1, 2004 to October 1, 2004, 46 out of 96 decisions occurred in relation to dismissal applications under section 27(1) of the Code.847 My own review of review of the preliminary decisions reported on the Tribunal’s website indicates that for the whole of 2004, approximately 418 decisions were rendered on preliminary matters, such as dismissal on the basis of jurisdiction, and time limitations matters; including dismissal on the basis of late filing and applications to accept claims filed out of time. As of June 16, 2005, 142 preliminary decisions were rendered by the Tribunal in 2005. It is important to keep in mind that many decisions may include more than one application for

844 March 30, 2005 Interviewee, supra n. 174.
845 April 12, 2005 Interviewee (1), supra n. 173.
846 See for example, April 13, 2005 Interviewee, supra n. 162.
847 Braha, New Changes, supra n. 617 at COM-50.
dismissal. Additionally, decisions may relate to an application for dismissal of the claim in whole or in part, and in respect of all of the respondents, or only some respondents. For example a decision may involve an application to dismiss or alternatively to defer the case.\textsuperscript{848} Also several decisions may be rendered on separate applications made in the same case.\textsuperscript{849}

I am not of the view that all claims should proceed to hearing without recourse to processes, procedures, and mechanisms that serve to weed out, for example, frivolous and vexatious claims. An absence of mechanisms for addressing such claims would potentially lead to a significant lack of fairness not only for respondents, but also for other claimants in terms of a lack of efficient use of valuable resources. Dismissal powers, however, should be narrowly construed and applied with caution in light of the broad public interest purposes behind human rights legislation.

The following sections look at specific dismissal provisions, namely, dismissal on the basis of jurisdiction, dismissal on the basis of an assessment of the prospect of success, and dismissal on the basis of time limitations.

\textsuperscript{848} See for example Vamburkar-Dixit v. Brown and others, 2004 BCHRT 161.
\textsuperscript{849} See for example, Stone (2), supra n. 418.
4.3 On the Basis of Jurisdiction

4.3.1 Rationale

Provisions which allow for dismissal on the basis of jurisdiction are of particular concern in terms of access to systemic claims involving Aboriginal matters relating to the *Indian Act*.\(^{850}\) In addition to access, this issue engages the criteria of fairness, and of efficient use of resources.

4.3.2 Analysis and Critique – Jurisdiction

In the British Columbia case of *Azak v. Nisga’a Nation and others; Robinson and Lincoln v. Nisga’a Nation and others*\(^{851}\) which involved a question of whether the claim came under provincial or federal jurisdiction, the Tribunal found that the substance of the claim came under section 91 Federal constitutional powers over ‘Indians and lands reserved for Indians’, resulting in dismissal of the claim on the basis of a lack of jurisdiction. A similar approach was taken in another British Columbia case, *Fieldon v. Gitxsan Child and Family Services Society*,\(^{852}\) where the claim was also dismissed on the basis that it came within federal jurisdiction

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\(^{850}\) *Indian Act*, R.S.C. 1970, c. I-6 [I].

\(^{851}\) *Azak v. Nisga’a Nation and others; Robinson and Lincoln v. Nisga’a Nation and others*, 2003 BCHRT 79.

over matters relating to ‘Indians’, notwithstanding, *inter alia*, the respondent organization was provincially incorporated.

The concern relating to the above approach to jurisdiction of claims involving Aboriginal matters is the potentially negative impact on access to human rights claims processes for this particularly disadvantaged group. These concerns stem in part from the potential barrier posed by section 67 of the *Canadian Human Rights Act*,853 which bars claims in the federal human rights arena relating to things done under the *Indian Act*.854 The difficulty with accessing the appropriate claims forum also raises related concerns about fairness, and efficiency. As discussed earlier, social and economic hardships are common to systemic claimants, particularly, Aboriginal claimants. Consequently, the expenditure of resources, both in terms of claimant and public resources, and the potential delay involved, not only creates added hardship and unnecessary complication to often already complex matters, but also raises serious questions of fairness.

853 CHRA, *supra* n. 256 at section 67.
854 *IA, supra* n. 850, I note however, that based on discussions with the interviewee who works in the federal human rights system, cases are being accepted by the Canadian Human Rights Commission notwithstanding that they deal with issues involving matters coming under the *IA, April 1, 2005 Interviewee, supra* n. 163. However, there is always a danger that respondents will apply to have such cases dismissed. For further discussion of concerns regarding this issue, see Canadian Human Rights Commission, *Looking Ahead Consultation Document*, *supra* n. 14 at 16.
4.3.3 Summary and Recommendations

In my view, dismissal of the types of claims discussed above leads to the strong potential that such claims will go unaddressed, due to the substantial barriers to bringing human rights claims involving certain Aboriginal issues in the federal arena. It is critical that information and assistance be provided to claimants on a pre-claim basis around entitlement to file a claim, and the claims process in respect of these types of claims. Additionally, that provincial tribunals exercise their jurisdiction to the fullest extent in assessing whether claims come within the meaning of “Indians and lands reserved for Indians” under the section 91 constitutional powers within provincial jurisdiction in light of the severe disadvantage faced by such groups, the nature and purposes of human rights legislation, and the broad public interest in addressing systemic discrimination.\textsuperscript{855}

4.3.4 Recommendations – Jurisdiction

- That the Tribunal exercise its jurisdiction to the fullest extent in assessing claims involving Aboriginal matters, including taking into account that

\textsuperscript{855} It is interesting to note the approach taken by the Tribunal in Edwards v. Lake Babine Nation and others, 2005 BCHRT 215, where it was held that the claim involved a matter coming under the Canadian Human Rights jurisdiction and therefore was outside of provincial jurisdiction. The Tribunal indicated that there was evidence to suggest that the respondents had delayed in addressing the jurisdictional issue to the point where the claim was likely outside the Federal human rights statutory time limitation. As part of the order, the Tribunal retained jurisdiction over the claim on the basis of the issue of costs for improper conduct, in the event that the Canadian Human Rights Commission declined to accept the claim due to the expiration of the time limitation.
many institutions and bodies involving such matters are now sites of intergovernmental or federal/provincial funding, and have other concurrent aspects including inter-provincial status and affiliations, the potential lack of redress available to Aboriginal claimants under federal human rights legislation, and the consequent impact on an already seriously disadvantaged group.

- That community links be developed within the Human Rights Clinic providing for outreach clinics involving Aboriginal organizations throughout the province, in order to insure legal assistance and representation in systemic claims involving Aboriginal persons who may raise jurisdictional issues. Further that adequate funding be provided to the Human Rights Clinic to develop such links as part of community its outreach initiatives.

- That consideration be given to strengthening links between the Federal Human Rights Commission and the Human Rights Clinic for the purposes of addressing these types of claims prior to filing, for example, in initiatives such as community based education, information, and pre-claim assistance, and in referral services.

- That further study be undertaken on a federal/provincial basis, involving affected stakeholders, about the implications of either repealing or
narrowing the application of section 67 of the Canadian Human Rights Act.

4.4 On the Basis of Charter and Constitutionality of Legislation

4.4.1 Rationale

Day and other commentators suggest that increasing numbers of vulnerable groups are turning to human rights legislation in order to address the impact of government legislation, cutbacks and other funding decisions made by government. Day also suggests that the ability to challenge the discriminatory affects of legislation within human rights processes is essential to the equality rights of disadvantaged people.

The primary assessment criterion at issue in this discussion is that of access, but the criterion of pro-activity is also engaged.

See for example, Day, Comment on Newfoundland and Labrador, supra n. 419. See also, Lovett and Westmacott, Human Rights Review, supra n. 15 at 95, CARHTS, supra n.510 at 9-10. Day, ibid.
4.4.2 Applicable Processes, Procedures, and Mechanisms

As discussed above, the Canadian Human Rights Tribunal Rules of Procedure\textsuperscript{858} govern the pre-hearing and hearing process under the federal human rights regime, as does the Canadian Human Rights Act.\textsuperscript{859} Specifically, Rule 9 of the Tribunal Rules of Procedure governs hearings and evidence.\textsuperscript{860} Rule 9(7) governs notice requirements for constitutional questions raised at hearings regarding the validity or applicability of legislation.\textsuperscript{861} Under the Ontario Human Rights Code and the Ontario Rules of Practice, Rule 70 sets out a 15 day notice requirement for constitutional questions regarding the validity or applicability of legislation and claims for Charter remedies.\textsuperscript{862} While the former British Columbia Code\textsuperscript{863} was silent with respect to provisions for notice in constitutional matters, it is clear from the case law that the Tribunal had the authority to deal with Charter arguments and questions of constitutionality.\textsuperscript{864}

Looking at current applicable processes, procedures, and mechanisms in British Columbia, of particular note, is section 45(1) of the Administrative Tribunals

\textsuperscript{858} CRHT Rules, supra n. 564.
\textsuperscript{859} CHRA, supra n. 256.
\textsuperscript{860} Canadian Human Rights Tribunal Rules of Procedures, at Rule 9.
\textsuperscript{861} ibid., at Rule 9(7).
\textsuperscript{862} OHRT Rules, supra n. 472 at Rule 70.
\textsuperscript{863} Code, supra n. 247.
\textsuperscript{864} Charter, supra n. 70.
\textsuperscript{865} See for example, Radloff v. Stox Broadcast Corp. and Gary Schroeder, (October 13, 1998), BCHRT in particular citing the unreported decision of Dahl and Eastgate v. True North; R.V. v. Kummerfield (September 2, 1998), and also the case of Hughson, supra n. 497, where the Tribunal made reference to the respondent's reliance on a Charter argument and filing of a notice of constitutional question at 2.
Act,\textsuperscript{866} which effectively states that the Tribunal lacks jurisdiction over constitutional questions relating to the Charter. Under section 45(2) (a) (b), of the Administrative Tribunals Act, in the event that Charter issues are raised by a party during a proceeding, the Tribunal may at any stage, upon the request of a party or the Attorney General, refer the question to the court in the form of a stated case.\textsuperscript{867}

4.4.3 Analysis and Critique – Charter and Constitutionality of Legislation

It would appear that there are specified processes, procedures, and mechanisms in most human rights jurisdictions for bringing forward evidence involving the Charter and around the constitutional validity of legislation.\textsuperscript{868} In contrast, in British Columbia subsequent to the Administrative Tribunals Act coming into force, under section 45(1), the Tribunal no longer has jurisdiction over the Charter, or constitutional questions relating to the Charter.\textsuperscript{869}

\begin{footnotes}
\textsuperscript{866} ATA, supra n. 581 at sections 45(1).
\textsuperscript{867} ibid., at sections 45(2) (a)(b).
\textsuperscript{868} See AA., B.B. and C.C. and the Department of Family and Community Services and the Department of Health and Wellness (Vice-Chair G.L.Bladon) (July 28, 2004) (NBHRT), where legislation prohibiting lesbian partners from being registered as spouses for the purposes of adoption was found to be discriminatory, and the respondent was ordered to cease applying the impugned provisions.
\textsuperscript{869} ATA, supra n. 581 at section 45(1).
\end{footnotes}
The issue of jurisdiction over the constitutionality of legislation was seen in the case of *Neubauer v. B.C. (Min. of Human Resources)*, which *inter alia* raised issues about the constitutionality of social assistance legislation prohibiting persons receiving disability assistance from being appointed to an administrative decision making body with a mandate to decide issues on the review and appeal of ministry decisions on social assistance. The Tribunal held that while it had jurisdiction to hear matters regarding the constitutionality of its enabling legislation, it did not have jurisdiction to hear matters regarding the constitutionality and the related allegations of discriminatory effect of external legislation.

Day and others suggest that the amendments resulting from the *Administrative Tribunals Act*, which curtail the Tribunal's jurisdiction in respect to constitutionality and *Charter* issues, make access to constitutional rights more difficult for disadvantaged groups particularly at a time when increasing numbers of human rights claims are being brought against government. Similarly, other commentators suggest that the removal of tribunal jurisdiction over constitutional matters represents an "elitist" view of constitutional law, which does not take into account the fact that the legislation was meant to be accessible to the average person, and further that many tribunals are more than adequately equipped to

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870 *Neubauer v. B.C. (Min. of Human Resources)*, 2004 BCHRT 34 [Nuebauer].
871 *Neubauer* was eventually heard by the Tribunal and dismissed in *Neubauer v. B.C. (Min. of Human Resources) (No.2)*, 2005 BCHRT 239 on the basis of a finding in favor of the respondent's BFOR defence.
deal with constitutional questions. In contrast, other commentators such as Lovett suggest that the amendments reflect underlying efficiency concerns in ensuring that administrative tribunal processes are accessible, timely, informal and effective. Further the amendments provide access to courts which are the most appropriate forum for litigating complex constitutional issues.

In my view, the prohibition against raising constitutional questions other than those potentially relating to the Tribunal's enabling legislation, is problematic in that it represents a barrier to access that has the potential for a particularly detrimental impact on systemic claims, which often involve allegations of the adverse effect of government legislation and policy relating to funding for critical services such as health care and social assistance. While this barrier may not affect large numbers of claims, it has the potential to represent a serious bar to broad systemic claims involving challenges to government legislation by imposing an added burden of time and cost involved in accessing the Supreme Court. Further, this barrier is incongruent with the broad purposive approach taken to the interpretation of human rights, and the Supreme Court of Canada's recognition of the competence of administrative tribunals in the interpretation and application of the Charter and issues of constitutionality, it also undermines the advancement of equality rights.

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873 Letter from Mark G. Underhill to the Editor, the Advocate (B.C.), Volume 63, Part 4, at 622-623 (4 July 2005).
875 See Nova Scotia (Workers' Compensation Board) v. Martin, 2003 SCC 54.
4.4.4 **Summary and Recommendations**

The absence of recourse to Charter arguments and/or, constitutionality challenges to “external legislation” in British Columbia is particularly detrimental to systemic claims which frequently involve questions of the discriminatory effect of government legislation.

4.4.5 **Recommendations – Charter and Constitutionality**

- That the Tribunal be statutorily exempted from the application of provisions prohibiting Charter and constitutionality based challenges from being raised in administrative tribunal proceedings.

- That adequately resourced, effective, legal assistance be provided to claimants within the human rights enforcement process.

4.5 **On the Basis of Assessment of Reasonable Prospect of Success**

4.5.1 **Rationale**

One of the main provisions under section 27(1) identified by Braha in her review of dismissal and time limitation provisions, as being of concern is section 27(1)
Braha suggests that the increased threshold of access to the enforcement process created by this provision creates procedural barriers for claimants, resulting in potential financial pressure and delay, and an increasingly likelihood that the claim will be dismissed prior to hearing. Finally, one of the specific concerns identified by Braha relates to the fact that such applications are increasingly dependent on sophisticated forms of evidence, including affidavit evidence.

4.5.2 Analysis and Critique – Assessment of Reasonable Prospect of Success

Section 27(1) (c) allows the Tribunal to dismiss claims based on an assessment that there is no reasonable prospect that the claim will succeed. In the leading case of Bell v. Sherk, the Tribunal held that there was a broad discretion to dismiss claims prior to a hearing and that the standard under section 27(1) (c) for establishing a reasonable prospect of success is higher than under the statutory provision formerly in place in British Columbia, where the test was that there was no reasonable basis for referral to hearing.

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876 Code, as amended, supra n. 131 at section 27(1) (c).
877 Braha, New Changes, supra n. 617 at COM- 50-51.
878 Ibid, at COM-52.
879 This provision was modified under the 2003 statutory amendments. The previous section 27(1)(c) provided for a claim to be dismissed in the event that “there is no reasonable basis to warrant referring the complaint, or that part of the complaint to the tribunal for a hearing.”
880 Code, as amended, supra n. 131 at section 27(1)(c).
881 Bell v. Dr. Sherk, 2003, BCHRT 63 at paras. 25-27 [Bell].
882 Ibid., at para. 23.
In *Wickham and Wickham v. Mesa Contemporary Folk Art*, the Tribunal, citing *Bell*, held that the applicable test under section 27(1) (c), is not based on a determination of whether the claimant has established a *prima facie* claim or the respondent a bona fide defence, but rather an assessment of whether, based on the whole of the material before the Tribunal, there is a reasonable prospect that the claim will succeed.

In my opinion the section 27(1) (c) dismissal provisions are particularly problematic for systemic claimants in terms of increased complexity and resources involved in defending such applications, and in increased potential delays in resolving claims. In particular, the complexity of systemic claims and the associated difficulties around obtaining evidence of systemic discrimination in the absence of provisions for investigation of claims, pose major barriers to defeating section 27(1) (c) applications. Further, many such applications are brought pre-disclosure, which increases the difficulty of providing sufficient material to substantiate a defence to such applications. Even if the application is brought after disclosure, given the institutional source of most systemic discrimination and concomitant subtlety of systemic discrimination, the claimant

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885 It should be noted that initially respondents were bringing these types of applications very early on in the claims process. The Tribunal subsequently issued a Practice Direction in October 2003 regarding the filing of applications. See BC Human Rights Tribunal Practice Direction, *Application to Dismiss a Complaint*, October 1, 2003. Online: [http://www.bchrt.bc.ca/policies/special_programs_policy.htm](http://www.bchrt.bc.ca/policies/special_programs_policy.htm) (last accessed September 2005). As a consequence, applications for dismissal especially under this section are now more likely to occur after disclosure has taken place.
may not be in possession of evidence such as statistics indicating under-representation, necessary to successfully defend such applications.

Braha also suggests that section 27(1)(c) applications are increasingly dependent on sophisticated forms of evidence, including affidavit evidence. This requirement represents particularly onerous barriers to systemic claimants in light of the complex issues involved in the claim, and the fact that, as previously noted, such claims are often vigorously defended by respondents. This situation raises the issue of fairness, and also regarding effective access to the claims process. It also underscores the need for claimants to have meaningful access to adequately funded and effective legal assistance.

4.5.3 Summary and Recommendations

It would appear that the threshold for proving that a claim has a reasonable prospect of success under section 27(1)(c) has the potential to be particularly onerous for systemic claims. Problems associated with this provision include the assessment of the merits of the case on a pre-hearing basis, combined with difficulties regarding proof of systemic discrimination on a pre-hearing, frequently pre-disclosure basis, the dependence of systemic claims on statistically based

886 Bell v. Sherk, supra n. 881 at paras. 25-24, and Braha, New Changes, supra n. 617 at COM-52.
expert evidence, and the increasingly formalized evidence requirements. This provision appears to be particularly problematic when claimants are unrepresented.

4.5.4 Recommendations – Assessment of Reasonable Prospect of Success

- That explicit provisions under the Tribunal Rules be developed which restrict the timing of applications for dismissal under section 27(1) (c) to a post disclosure basis.

- That a broad contextual approach be taken in assessing systemic claims subject to section 27(1) (c) applications which takes into account the nature of systemic discrimination and the associated barriers to obtaining evidence at a pre-hearing stage, even where disclosure has occurred.

4.6 On the Basis of Time Limitation for Filing

4.6.1 Overview of Time Limitation Provisions

In all jurisdictions, human rights legislation specifies mandatory time limitations for filing claims, with the length of time varying from jurisdiction to jurisdiction.

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887 Code, as amended, supra n. 131 at section 27(1)(c).
Similarly, all human rights legislation provides for discretionary extension of time for filing. For example, section 41(1) of the Canadian *Human Rights Act* states that the Commission shall deal with complaints filed with it unless: complaints are based on acts or omissions, the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances.\(^{888}\) In deciding whether to exercise discretion to accept late claims under section 41(1) the Commission considers factors such as the length of the delays, the reason for delays, and whether respondents will be prejudiced by delays.\(^{889}\) Similarly, section 34(1) (d) of the Ontario *Human Rights Code*, states that the Commission has the discretion not to deal with claims which occurred more that six months before filing; unless the Commission is satisfied that the delay was incurred in good faith and that no substantial prejudice will result to any person affected by the delay.\(^{890}\)

Under section 22(1) of the *Code*\(^{891}\) the time limitation for filing claims with the former British Columbia Human Rights Commission was one year from the date of alleged contraventions, or under subsection (2) in the case of continuing contraventions, one year from the date of the last alleged instance of the contravention.\(^{892}\) Under section 22(3), the Commissioner of Investigation and Mediation had the discretion to accept claims for filing after the expiration of the

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\(^{888}\) *Ibid.*, at section 41(1)(e).

\(^{889}\) See *CHRC, The Complaint Process*, supra n. 560.

\(^{890}\) *OHRC, supra* n. 267 at section 34(1) (d).

\(^{891}\) *Code, supra* n. 246 at section 22(1).

\(^{892}\) *Ibid.*, at section 22(2). Under human rights legislation in place in British Columbia prior to the 1997 legislative amendments, which *inter alia*, created the British Columbia Human Rights Commission, the time limitation period was 6 months, see Braha, *Review, supra* n. 272 at COM-4.
time limit if the commissioner determined that (a) delays in filing were incurred in
good faith, and (b) no substantial prejudice would result to any person because of the delays.893

In British Columbia, under the current legislation, section 22(1) of the Code, as amended, states that claims must be filed within 6 months of alleged contraventions, or under subsection (2), in the case of continuing contraventions, within 6 months of the last alleged instance of contraventions. Under subsection (3), the Tribunal has the discretion to accept all or parts of claims filed after the expiration of the time limitation if the Tribunal determines that a) it is in the public interest to accept such claims, and b) no substantial prejudice will result to any person because of delays.894 Rule 14(1-6) of the Tribunal Rules sets out the procedure for filing claims outside of the specified time limit, including provisions for the claimant to make submissions on why the claim was filed outside the time period, and opportunity for the respondent to respond.895 Ultimately, the Tribunal decides whether or not to accept all or part of the claim, and issues a final decision with written reasons to the claimant and respondent.896

Section 23(1) of the Nunavut Human Rights Act, states that notifications must be filed within two years of the alleged contravention.897 Section 23(2) relates to continuing contraventions and states that where the discrimination continues

893 Code, supra n. 246 at section 22(3).
894 Code, as amended, supra n. 131 at section 22(1)-(3).
895 BHRT Rules, supra n. 356 at 14(1-6).
896 Ibid., at Rule 14(1-6).
897 NHRA, supra n. 298 at section 23(1).
over a period of time, the notification must be filed within two years of the last alleged instance of the contravention.\textsuperscript{898} Section 23(3) provides the Tribunal with discretion to extend the time for filing if the Tribunal determines: (a) that the delay in filing the notification was incurred in good faith and (b) that no substantial prejudice will result to any person because of the delay.\textsuperscript{899}

4.6.2 Rationale

Time limitations raise serious issues for access to the enforcement process, particularly where they are relatively short such as the 6 month time limitation period under the current British Columbia enforcement process. Additionally, provisions for extending time which can provide some relief against time limitations are problematic where they pose high access thresholds. These issues raise concerns around access, and fairness and efficiency.

4.6.3 Analysis/Critique

In looking at time limitation provisions under the current enforcement process in place in British Columbia, Braha suggests the reduced time limitation period acts

\textsuperscript{898} Ibid., at section 23(2).
\textsuperscript{899} Ibid., at section 23(3).
as a significant impediment to access to human rights protections. For example, in a review of decisions by the Tribunal over the period of April 1, 2004 to October 1, 2004, Braha found that 46 out of 96 decisions were preliminary decisions under section 27(1) of the Code, as amended. Out of the 46 decisions, 14 related to applications to accept late claims. Of this number, 12 were dismissed.

My review of 2005 preliminary decisions in British Columbia, indicates that 45 of the 142 preliminary decisions under section 27(1) were applications to dismiss or extend on the basis of time. The outcome was that 8 claims were accepted in their entirety, 8 were accepted in part and dismissed in part, and 29 were dismissed in their entirety. In the majority of cases, claimants were unrepresented.

The current 6 month time limitation is extremely problematic for systemic claims not only due to the nature and complexity of such claims, but also to the fact that, in my experience, claimants involved in systemic claims, even more so than in predominately “non-systemic” claims, frequently attempt to work through disputes within the institutional system for long periods of time prior to reaching the point where they decide to file claims, resulting in considerable delay. Additionally, the length of time spent attempting to address systemic discrimination either on their own or with the assistance of internal support, results in claimants being

900 Braha, Proposed Human Rights Code, supra n. 311 at COM-44.
901 Braha, New Changes, supra n. 617 at COM-50.
902 Code, as amended, supra n. 131 at section 27(1).
extremely demoralized and worn down. These barriers, combined with others such as isolation and communication difficulties due to the size and nature of many institutional settings, make it very difficult to bring systemic claims forward. These factors make it difficult to get systemic claimants to come forward, but also impede the gathering of necessary information in order to file claims, and pose barriers in providing notification to other potential claimants. Additional barriers which lead to delay in bringing systemic claims forward, as previously discussed, include fear of institutional and other reprisal, and lack of resources in relation to the complexity and magnitude of the issues involved.  

Braha suggests that a further major impediment to access for claimants, resulting from the 2003 amendments to the Code, lies in the Tribunal's discretionary powers to extend the time period for filing. As discussed above, section 22(3) requires the claimant to meet an increased threshold compared to the previous statute, in the need to show that the extension of the time for filing is in the "public interest" and that no substantial prejudice will accrue to others as a result of the delay. In commenting on the negative impact of this provision on claimants, Braha indicates that it represents a significant barrier which impairs the access of claimants to the hearing process.

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903 As previously discussed, interviewees commented on the incredible demand, both emotionally, and resource wise, on claimants in bringing systemic claims forward. For example, March 23, 2005 Interviewee (2), supra n. 164; April 4, 2005 Interviewee, supra n. 243; April 13, 2005 Interviewee, supra n. 162.

904 Braha, New Changes, supra n. 617.

905 Braha, The Proposed Human Rights Code, supra n. 311 at COM-44.

906 Braha, New Changes, supra n. 617 at COM-50 and COM-55.
Braha also suggests that the test for determining the public interest, is particularly narrow, in that rather than involving a determination of whether the claim itself is in the public interest, the determination rests on whether accepting the claim outside the six month time period is in the public interest.\textsuperscript{907} She indicates that the apparent constraint of the statutory provision on the Tribunal's decision making in this area is problematic in the sense of precluding consideration of the broader public interest issues at stake in human rights protections, as well as the need for a liberal and purposive interpretation approach to the adjudication of human rights matters.\textsuperscript{908}

The leading case of Chartier v. Sooke School Dist. No. 62,\textsuperscript{909} suggests that the purposes behind the limitation are efficiency in the claims process and ensuring fairness to respondents in terms of the right to know about potential claims. For example, in considering an application for extension of the time limitation, the Tribunal observed that section 22 is aimed at ensuring that "complainants pursue their human rights remedies with some speed and to allow respondents the comfort of performing their activities without the possibility of dated complaints..."\textsuperscript{910} These are obviously efficiency and fairness related goals. Braha suggests that the balancing of interests under the legislation in this respect "... elevates the "comfort" of respondents to the level that might result in defeating a complainant's ability to have his or her complaint adjudicated on its

\textsuperscript{907} See for example, Read, supra n. 213.
\textsuperscript{908} Braha, New Changes, supra n. 617.
\textsuperscript{909} Chartier v. Sooke School Dist (2003), 47 C.H.R.R. D/214 (BCHRT) [Chartier].
\textsuperscript{910} Ibid., at 12.
merits.\textsuperscript{911} The case of \textit{Chrunik v. BCIT}\textsuperscript{912} provides an example of the emphasis of efficiency related goals over broader public interest considerations in the context of an assessment of time limitation provisions. The Tribunal held that the most important information to take into account in assessing the public interest is the reason for the delay, and further that "convincing and compelling" reasons are required to deprive respondents from the benefit of the time limitation,\textsuperscript{913} a standard which the claimant had failed to meet.

In contrast to the above approach to assessment of time, two cases exemplify instances where the Tribunal appeared to take a broad approach to assessing the public interest by considering the public interest in the claim itself, as opposed to focusing on the issue of whether accepting the claim was in the public interest. The first case, \textit{Stone and others v. Danderfer and others},\textsuperscript{914} in accepting the claim under section 22(3), and despite explicitly adopting the "pragmatic approach" taken in \textit{Read},\textsuperscript{915} the Tribunal considered the public interest in the claim itself, and its consequent impact on others in a similar situation as the complainant. For example the Tribunal notes:

Therefore, the issues raised by the Complaint involved matters and values which the Supreme Court of Canada has declared to be of importance in and to our society. They affect not only the appellant in Trociuk and the Complainant in this case, but other biological fathers of children who do not bear the fathers’ surnames, as well as those children themselves.

\textsuperscript{911} Braha, \textit{New Changes}, supra n. 617 at COM-55.
\textsuperscript{912} \textit{Chrunik v. BCIT}, 2004 BCHRT 39.
\textsuperscript{913} \textit{Ibid.}, at para. 22.
\textsuperscript{914} \textit{Stone(2)}, supra n. 418.
\textsuperscript{915} \textit{Ibid.}, at para. 42 applying \textit{Read}, supra n. 213.
Those issues and those values are also consistent with the purposes stated in s.3 of the Code.\textsuperscript{916}

The second case, \textit{Mehar and others v. International Forest Products},\textsuperscript{917} involved a group of 17 claimants. The Tribunal, after finding that the alleged discrimination could not be considered to be ongoing, and consequently, only two of the claims were filed in time, considered whether discretion should be exercised under section 22(3) of the \textit{Code} as amended,\textsuperscript{918} to extend the time. In ruling that the claim should be accepted for filing, the Tribunal accepted the claimants' argument that a discoverability approach to extending the time should be applied; based on the time within which, with reasonable diligence, the claimants could have been aware of the discrimination.\textsuperscript{919} In assessing the public interest in the claim, the Tribunal took into account the fact that it posed an important question of law, the resulting potential assistance to the broader community, and the issue of fairness in the fact that the rights of all but 2 of the 17 claimants were adversely affected. As part of the analysis, the Tribunal also took into account the section 3 purposes of the \textit{Code}; in particular, in relation to eliminating patterns of inequality.\textsuperscript{920}

The goals of efficiency and the rights of respondents to know the case that they are faced with are factors that must be taken into account and balanced with the goals of providing fair and effective access to claimants in bringing forward

\begin{footnotesize}
\textsuperscript{916} Ibid., at para. 47.
\textsuperscript{917} \textit{Mehar and others v. International Forest Products}, 2005 BCHRT 161 [\textit{Mehar}].
\textsuperscript{918} \textit{Code}, as amended, supra n.131 at section 22(3).
\textsuperscript{919} \textit{Mehar}, supra n. 917 at para. 21.
\textsuperscript{920} Ibid., at paras. 22-24.
\end{footnotesize}
claims. Placing the onus on claimants to prove the public interest, however, is a particularly onerous threshold for systemic claimants, given the inherent complexities of such claims, particularly without taking into account the public interest in the claims themselves.

The public interest test also raises strong concerns about the consistency in the approach taken to assessing such applications. For example, the narrow definition of the public interest applied in some of the cases described above lies in stark contrast to the broad definition of the public interest articulated by the Tribunal in cases such as Chartier,921 Read,922 and similar cases which suggest that "...the public interest must be consistent with the purposes set out in the Code."923 Further the Tribunal also clearly suggested in Chartier924 that there is a public interest in ensuring access to tribunal processes.925 It would seem to me that the broad purposes of the Code as amended,926 including the identification and elimination of persistent patterns of inequality as set out in section 3(d)927 require a broad contextual assessment of the public interest in the issues being brought forward in claims.

Based on the case law review, it would appear that a shorter time limitation period results in increased litigation, as seen in the large number of claimants

921 Chartier, supra n. 909.
922 Read, supra n. 213.
923 Ibid., at para 71; Chartier, ibid., at para. 14; Becker v. Cariboo, supra n. 215 at para 50.
924 Chartier, ibid.
925 Ibid., at para 14.
926 Code, as amended, supra n. 131.
927 Ibid., at section 3(d).
seeking to file claims beyond the 6 month limitation, and/or respondent
challenges on the basis of time. This litigation results in a significant expenditure
of public resources.

Finally, due to the high threshold that claimants must meet in bringing forward
claims outside the specified time period, combined with the difficulties associated
with systemic claims, claimants clearly need to have access to adequately
funded, skilled, legal assistance in order to have some chance of success with
applications to extend the time. It would appear from the cases and from
commentary that a significant number of claimants in time limit cases were
unrepresented. This point is also substantiated by information from other
sources, which indicated that as of October 2004 only 35% of claimants were
being represented by the Human Rights Clinic and 2% by the Law Centre.\textsuperscript{928}

\subsection*{4.6.4 Summary and Recommendations}

Shortened limitation periods in the British Columbia enforcement process appear
to be detrimental to systemic claimants in effectively accessing the enforcement
system. Similarly, the onus on claimants to prove the public interest in order to

\textsuperscript{928}See \textit{CBA Minutes October 21/04, supra} n. 503 at 2. It is difficult to determine whether the Law
Centre percentage included both claimants and respondents. It is also important to note that the
above figures do not indicate the number of claimants that may have sought representation from
the private bar, or arranged for representation by a non-lawyer. For further discussion on
assessment of the effectiveness of various models of representation see for example, Black,
\textit{Black Report, supra} n. 16; \textit{La Forest Report, supra} n. 10.
extend the time for filing of claims, raises strong concerns around fairness. Further, the fact that time limitation applications result in increased litigation raises questions about the efficient and effective use of resources.

4.6.5 Recommendations – Time Limitations

- That the statutory time limitation for filing claims be amended to extend the time to 12 months and to provide for a means of extending the time for filing based on discoverability, similar to the provisions available in the civil arena.

- That a broader approach to assessing the public interest be taken on a consistent basis in relation to systemic claims, by taking into account the public interest in the claim itself.

4.7 Scope of Claims

4.7.1 Rationale

As suggested in Chapter I in the discussion of the statistics on disadvantaged groups, the lives of systemic claimants are likely to be socially complex,
particularly when two or more factors of disadvantage intersect or overlap, such as race and gender. The topic of the scope of claims involves the criteria of access to enforcement protection for claimants of systemic discrimination, and the effectiveness of such protection, including in the provision of adequate legal assistance and providing for community involvement.

4.8 Overview of Applicable Processes, Procedures, and Mechanisms

4.8.1 Scope of Claims

Human rights jurisdictions provide statutory protection against discrimination on the basis of similar grounds and areas, with some minor variations. For example section 3(1) of the Canadian Human Rights Act delineates eleven prohibited grounds: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned criminal conviction. Coverage is provided in a number of areas, including the provision of goods and services, facility or accommodation customarily available to the public, discrimination in relation to commercial premises or residential accommodation, and discrimination in employment on the basis of various

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929 See generally, Howe and Johnson, Restraining Equality, supra n. 5, also with respect to grounds at 16-21 and 59.
930 CHRA, supra n. 256 at section 3(1).
931 Ibid., at section 5.
932 Ibid., at section 6.
practices. Additionally, discrimination on the basis of retaliation for filing or participating in a human rights claim is also prohibited. Of particular note is section 3.1, which states that discrimination includes one or more prohibited grounds or the combined effect of grounds.

In addition to providing protection on the basis of similar grounds as the federal regime, notably, the Ontario Human Rights Code includes protection for citizenship, and same-sex partnership status. Additional areas of coverage include receipt of public assistance in relation to harassment in accommodation, contracts, and accommodation for persons under eighteen years old who have withdrawn from parental control. The former British Columbia the Human Rights Code provided very similar coverage to the Federal and Ontario regimes.

The prohibited grounds under the British Columbia Human Rights Code as amended are the same as under the commission based enforcement regime.

While the Nunavut Human Rights Act provides substantively similar prohibitions as the human rights legislation described above, section 7(1) also specifically

933 Ibid., at sections 7-8.
934 Ibid., at sections 14.1.
935 Ibid., at section 3.1.
936 OHRC, supra n.267 at section 1.
937 Ibid., at section 2(2).
938 Ibid., at section 3.
939 Ibid., at section 4.
940 Code, supra n. 246.
941 Code, as amended, supra n. 131.
includes sexual orientation, and lawful source of income. Additionally, section 7(4) states that sex includes a) the protection of a female based on the recognition that she may become pregnant or may adopt a child, and b) a male on the basis that he may adopt a child.

Additionally, section 7(5) states that protection from discrimination on the basis of a prohibited ground also includes protection on the basis of (a) the two or more prohibited grounds, or the effect of the combination of prohibited grounds; (b) the individual’s association or relationship whether actual or perceived with an individual or class of individuals identified by a prohibited ground of discrimination.

4.8.2 Analysis/Critique

Discussion of the scope of claims involves consideration of processes, procedures, and mechanisms for effectively taking into account the effect of intersectional and multiple grounds and areas of discrimination in systemic claims. Commentators such as Duclos have noted the tendency of human

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\[942\] NHRA, supra n. 298 at section 7(1).
\[943\] Ibid., at section 7(4) (a)(b).
\[944\] Ibid., at section 7(5) (a)(b).
\[945\] A related issue involves the substantive, as opposed to procedural aspect of scope of claims, such as the expansion of the grounds to include coverage based on social and economic grounds. As previously discussed, there is increasing movement within the human rights field towards viewing such expansion as being critical to effectively addressing systemic discrimination. Discussion of the statutory expansion of human rights grounds and areas is beyond the scope of this thesis, other than to state that economic and social rights and
rights enforcement processes to reflect a categorical approach to discrimination, that is, to view discrimination as occurring in relation to particular, isolated, legalistically defined grounds such as sex or race, as opposed to taking into account the complex interactions which actually reflect the lives of claimants from disadvantaged groups. 946 The impact on systemic claims, according to Duclos, is not only an artificial simplification of complex experiences, but a de-contextualization of such experiences, resulting in the discrimination being viewed as an individualized problem as opposed to taking into account the structural and systemic sources of such discrimination. 947

Braha suggests that in order to effectively address discrimination, account needs to be taken of the interrelationship between areas of discrimination, rather than viewing them as isolated categories. 948 Similarly, as an alternative to the structured, categorical approach generally taken in discrimination claims, Duclos emphasizes the need for a flexible, fluid, relational approach to established grounds of discrimination in order to take into account the context and complexity of such claims. 949

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947 Ibid. see also Eaton, supra n. 172
949 Duclos, Disappearing Women, supra n. 946.
Other commentators on intersectionality such as Crenshaw, whose work speaks to the experience of women of color in the intersections of race and gender, are careful to point out the difference between essentialism and intersectionality. She suggests that while postmodern skepticism of social constructs and their attributed meanings is generally sound, the inherent tendency within the approach to disregard political and social meaning and relevance is limiting.\textsuperscript{950} For example, the fact that categories such as race and gender may be socially constructed does not render them meaningless. Further, similar to Duclos, Crenshaw’s view is that it is generally not the categories themselves that are problematic, but rather the values that are attached to the categories which create and reinforce social hierarchies. Categories of identity represent political choices, which in turn present opportunities to utilize such constructs to take into account sites where we can address insubordination and marginalization based on identity, and find ways to address such differences.\textsuperscript{951}

Several interviewees also emphasized the need for a contextual approach when addressing systemic claims.\textsuperscript{952} As previously discussed in relation to the definition of systemic discrimination and the public interest, a contextual approach is in keeping with the public interest in human rights, the purposes of human rights legislation, and substantive equality developments in human rights.

\begin{itemize}
\item \textsuperscript{950} Crenshaw, \textit{Mapping the Margins}, supra n. 129 at 1297 – 1298.
\item \textsuperscript{951} \textit{Ibid.}, at 1299; also, Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” [1989] U Chicago Legal F. 139 (\textit{Demarginalizing the Intersection}).
\item \textsuperscript{952} See for example, April 7, 2005 Interviewee, supra n. 163; April 12, 2005 Interviewee (2), supra n. 167; April 13, 2005 Interviewee, supra n. 162.
\end{itemize}
In my experience, the claims process in general, tends to emphasize claims categories rather than taking into account the intersections in discrimination, and the implications for claimant's experience of the discrimination. This approach limits effective and meaningful access to the claims process by forcing claimants to choose between various aspects of their identity and experiences. A concrete example is the British Columbia claims form; Form 1- Complaint Form section D. While setting out the various grounds of discrimination, the form emphasizes the separation between the categories by setting the grounds out in separate boxes and by commentary stating that the Code "forbids discrimination in each area based on the grounds lists on this form. For each area you selected, check only the ground(s) that apply to your compliant."953 Further there is there is no explicit comment regarding possible overlap between individual grounds.954 In short, the Complaint Form emphasizes a categorical approach to the areas of discrimination, without indication that there may be overlap between areas.

The current 6 month time limitation period for filing claims in British Columbia also tends to reinforce a categorical and de-contextualized approach to grounds of discrimination. For example, when a claim is brought under the grounds of sexual harassment and race; if incidents involving racial discrimination occurred...
outside the six month time period, the emphasis is likely to be solely on the sexual harassment. The race implications are likely to be discounted due to the particular instances of race discrimination being deemed to be outside the time period, as opposed to taking into account the intersections between race and sex and implications for the experience of discrimination.\footnote{Crenshaw, Mapping the Margins, supra n. 129, for discussion of the compounding and intersecting effects of race and sex discrimination.}

Tribunals have clearly taken intersectionality into account in some cases. For example, in \textit{Radek v. Henderson Development (Canada) Ltd.},\footnote{Radek, supra n. 158.} in holding in a preliminary decision that the scope of the claim included allegations of systemic discrimination, the British Columbia Tribunal noted the overlap between disability, race, colour and ancestry and stated that it was reasonable “that the complainant’s experiences cannot be compartmentalized into discrete areas…”\footnote{Radek v. Henderson Development (Canada) Ltd. and others, 2003 BCHRT 67 at para. 51} Further, as part of the analysis at hearing of \textit{prima facie} discrimination, the Tribunal applied the grounds of race, colour, ancestry and disability and found:

[S]he is multiply disadvantaged on a number of grounds protected by the \textit{Code}. These grounds cannot be separated out and parsed on an individual basis. Ms. Radek is an integrated person, with a number of characteristics, some of them protected under the \textit{Code}, all of which are alleged to have been factors in how she was treated on May 10. It is Ms. Radek who went through the events of that day, not a number of disembodied and distinct grounds...\footnote{Radek, supra n. 158 at para. 463. Despite the fact, that as is indicated by the operational definition relied on in this thesis, there is a recognized legal distinction between systemic discrimination and predominately non-systemic discrimination, the pronounced division between “individual” and “systemic” discrimination taken in the analysis in this case, seems incongruent and disconcerting in light of the contextual approach taken in respect of the grounds. It strikes me that on one hand, the analysis in respect of the grounds acknowledges that a person’s identity}
As part of the intersectional analysis, the Tribunal also took into account the historical racism suffered by Aboriginal Canadians generally, and the specific discrimination suffered by the claimant. The intersecting grounds, particularly, race and disability, were also taken into account in assessing the severity of the discrimination and the applicable quantum of damages. For example, the claimant was awarded 15,000 dollars, for injury to dignity, feelings and self respect, which is the highest award under this head of damages in British Columbia to date. Similarly, in the Ontario case of Baylis-Flannery v. DeWilde (No. 2), the tribunal took into account the intersectionality of sex and race in respect of its assessment of the extent of mental anguish experienced by the claimant in the damages award.

4.8.3 Summary and Recommendations

The importance of processes, procedures, and mechanisms for taking into account the intersections and overlap of grounds and areas, and the consequent effect on the ability of claimants to bring and to sustain systemic claims, cannot be overstated in terms of implication for effective access. While intersections cannot be divided into legal categories, on the other hand, the distinct differentiation in respect of discrimination as being either individual or systemic, ignores the interconnected relationship of the individual to the group and vice versa.

959 Ibid., at paras. 644-646.
960 Ibid., at para. 646.
961 Baylis-Flannery v. DeWilde (No. 2), supra n. 217.
and overlap in grounds and areas are sometimes taken into account in human rights cases, such approaches are far from typical.

4.8.4 Recommendations – Scope of Claims

- That Tribunal processes, procedures, and mechanisms, including information regarding claims processes and the claims and response forms, be revised to reflect the fact that both grounds and also protected areas may intersect and overlap.

- That human rights legislation in British Columbia be amended to include an explicit provision similar to other human rights jurisdictions such as Nunavut, providing for express statutory recognition of intersecting and overlapping grounds and areas of discrimination.

- That further research be conducted by a statutory body with access to adequate public funding on the implications of adding social condition as a ground of discrimination.962

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962 For examples of research in this area see Canadian Human Rights Commission, *Looking Ahead Consultation Document*, supra n. 14, and the proposal for widening the scope of coverage by adding new grounds, including social condition at 7, see also, Ontario Human Rights Commission, *Human Rights Commissions and Economic and Social Rights* (Toronto: Ontario Human Rights Commission, Research Paper Policy and Education Branch, October 01).
• Those systemic claimants be provided with access to adequately funded and effective legal assistance in properly framing and bringing forward systemic claims.

• Those communities be provided with opportunities for involvement in the development of information and the implementation of educational initiatives reflecting the impact of intersectional and overlapping grounds on disadvantaged groups.

4.9 Evidence

4.9.1 Rationale

Effective evidentiary processes, procedures, and mechanisms are particularly critical to systemic claims due to the type and extent of evidence required to prove systemic discrimination. For example, Vizkelety suggests that the task of proving systemic discrimination is particularly difficult given that methods of proof are more complex and sophisticated than required in proving direct individual discrimination. The complexity of proof in systemic discrimination cases relates to the necessity of showing "patterns or practices" of discrimination, and the corresponding need to prove adverse impact. Both types of proof

963 Vizkelety, Proving Discrimination, supra n. 159, generally, and at 238.  
964 Ibid., at 171, and 239.
frequently require the use of expert testimony and complex statistical information. 965 Finally, it is well accepted that some types of systemic cases such as those involving race-based discrimination present particular difficult evidentiary challenges. 966

As will be discussed below in the analysis/critique of the two Models, evidentiary issues implicate the assessment criteria of access, efficiency and effectiveness as well as adequacy of resources.

Two specific aspects of evidentiary issues and systemic claims will be discussed in this section: a.) expert evidence; and, b.) admissible evidence at pre-hearing and hearing.

4.10 Expert Evidence

4.10.1 Rationale

The case of Action Travail is an example of the evidentiary complexities involved in systemic claims and the reliance on statistical evidence and expert opinion.

965 Ibid., generally, at at 173-192.
As observed by Vizkelety, the case primarily involved matters of proof about the discriminatory effects of practices and policies of the respondent company.\textsuperscript{967} Expert testimony and evidence showing significant disparity in facially neutral hiring practices between women and men was central to the finding of discrimination, as was evidence of qualitative differences in hiring practices in relation to women indicating deliberate discrimination.\textsuperscript{968}

While it is beyond the scope of this thesis to provide an in-depth discussion of the nuances and complexities in statistical evidence in establishing systemic discrimination, a number of questions are raised by the use of statistical evidence in systemic cases and resulting areas of ambiguity. For example, while the literature, case law, and thesis interviews all indicate that such evidence is central to proving systemic discrimination claims, there is a great deal of ambiguity in the exact role that statistics play in systemic cases, particularly in establishing a comparator group in order to prove systemic discrimination.\textsuperscript{969}

\textsuperscript{967} Ibid., at 170.
\textsuperscript{968} Ibid., at 170-171
\textsuperscript{969} See generally Carol Agocs, Surfacing, supra n. 966. See also the case of Cucek v. B.C. (Min. of Children and Family Development) (No. 3), 2005 BCHRT 247 where the respondent Ministry was successful in having the claim dismissed on the basis of no reasonable prospect of success due to the claimant's failure to prove adverse impact in comparison to an appropriate comparator group. In contrast, see Mbaruk, supra n. 175, where the Tribunal observes at para. 50:

Evidence of adverse effect on a group to which the complainant belongs would, undoubtedly, be persuasive evidence of a \textit{prima facie} case of discrimination. However, I do not think it is a required element in every case where systemic discrimination is alleged. Such a burden would be unfair to complainants who may not have the resources to obtain the information to establish such an adverse effect – information that is often in the possession of the respondent.

Similarly, in Radek, supra n. 158 at para. 504, the Tribunal noted that the failure to provide reliable statistical evidence of disproportionate result is not an essential element of the proof of systemic discrimination, and therefore, was not fatal to the claim. Further, at paras. 502-507, the Tribunal in distinguishing between claims involving services, such as the one at issue in the case, from claims involving employment, indicated that statistical evidence may be more critical in the
Questions arise, for example, regarding factors and characteristics of data that form the basis for accurate comparisons between groups, the statistical degree of proof of under-representation required, the qualifications of expert witnesses in relation to statistical proof, whether the impact of subjective non-statistical factors should be taken into account in assessing statistical evidence indicating discrimination, and the weight that statistical evidence should be given in systemic claims at hearing.

4.11 Overview of Applicable Processes, Procedures and Mechanisms

4.11.1 Expert Evidence

latter type of cases than the former. The Tribunal indicated at para. 509, that the evidence necessary to establish systemic discrimination is dependent on the nature and context of a particular claim. Finally, at paras. 510-511, that statistical evidence of disproportionate effect is typically, solely within the knowledge and control of respondents, and therefore, requiring statistical evidence in all cases would pose an unreasonable hardship for claimants.

970 See for example, Kathleen Lawrence "Systemic Discrimination: Regulation 8 – Family Benefits Act: Policy of Reasonable Efforts to Obtain Financial Resources" (1990) 6 J.L. & Soc. Pol'y 57; also, Carol Agocs, Surfacing, supra n. 966.


972 See for example, Radek, supra n. 158.

973 See for example, Madeline Morris, "Stereotyping Alchemy: Transformative Stereotypes and Anti-Discrimination Law" (1989) 7:1 Yale L. & Pol'y Rev. 251; also, Carol Agocs, Surfacing, supra n. 966.

974 See for example the Ontario case of Ageconeb v. 517152 Ontario Ltd. (1993), 19 C.H.R.R. D/452 (Ont. Bd. Inq.) where the Tribunal in finding that the respondent had discriminated against the claimant, held that unless totally unworthy of weight, statistical evidence in its totality provides the 'trier of fact' with circumstantial evidence which when taken as a whole with other evidence may be deemed to be sufficient to support an inference of discrimination, at paras. 25-29.
Section 6(3) of the Canadian Human Rights Tribunal \textit{Rules of Procedure} sets out the procedures respecting expert witness reports and reports in response to expert reports, as well as providing the Tribunal with discretion to set the time by which parties must serve each other and file such reports.\footnote{CHRT Rules, supra n. 564 at section 6(3).} Similarly, the Ontario Human Rights Tribunal \textit{Rules of Practice and Procedures}, Rule 61, sets out the timelines around disclosure of expert reports.\footnote{OHRT Rules, supra n. 472 at Rule 61.} Under the former British Columbia Commission, the Tribunal was statutorily empowered under section 35(1) of the \textit{Code},\footnote{Code, supra n. 246 at section 35(1).} to make rules regarding Tribunal processes and procedures. As result of the dismantling of the Commission, the specifics of the rules in place at the time are no longer available.

Rule 33 of the British Columbia \textit{Rules} sets out various processes and procedures under the current enforcement process in British Columbia in respect of expert witnesses and reports.\footnote{BHRT Rules, supra n. 356 at Rule 33.}

The specifics of the Nunavut processes and procedures under Tribunal rules are not available at this time.

\textit{4.11.2 Analysis/Critique}
One of the major issues relating to the heavy reliance of systemic claims on expert opinion is the extent of resources required in order for claimants to access and put forward expert evidence. Similar comments were made by two interviewees regarding expert opinion. One interviewee, for example, commented on the difficulties associated with locating appropriate expert opinion, and in some cases of persuading experts to come forward due to fear of reprisal. Another suggested that the cost of engaging experts and the related disbursements, including photocopying, fax, and courier charges, are extremely prohibitive. Interviewees also suggested that the complexity of systemic claims and the need for expert evidence required legal counsel to be able to grasp complex issues such as statistical information, and interdisciplinary information and knowledge, often within short periods of time, added to the tremendous demand involved in representing systemic claimants. These comments once again underscore the importance of adequate resources, including legal assistance in systemic claims.

An example of the central role that expert evidence can play in establishing systemic discrimination at hearing can be seen in Radek where the Tribunal

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979 Mbaruk, supra n. 175 at para. 50.
980 April 13, 2005 Interviewee, supra n. 162. This interviewee suggested that many experts are concerned that if they testify against certain respondents, particularly government and large institutions, they will be precluding themselves from obtaining future work opportunities.
981 May 5, 2005 Interviewee, supra n. 178.
982 April 13, 2005 Interviewee, supra n. 162.
983 Radek, supra n. 158.
relied heavily on expert evidence put forward on behalf of the claimant, on stereotypes and prejudicial attitudes towards Aboriginal persons.\textsuperscript{984} 

\textit{Radek} also illustrates the types of arguments that respondents may raise in preliminary applications to disallow expert evidence.\textsuperscript{985}

### 4.11.3 Summary and Recommendations

While expert evidence plays a central role in establishing evidence of systemic discrimination, there are many inherent difficulties including in locating and retaining experts, as well as the associated costs.

### 4.11.4 Recommendation – Expert Evidence

- That systemic claimants be provided with access to well funded, effective legal representation, in particular, that adequate funding is provided to cover disbursements related to systemic claims.

\textsuperscript{984} Ibid., at para.132.  
\textsuperscript{985} Radek v. Henderson Development (Canada) Ltd. and others (No. 2), 2004 BCHRT 340.
4.12 Admissible Evidence – Pre-Hearing and Hearing

4.12.1 Rationale

Access to flexible pre-hearing and hearing processes, procedures, and mechanisms in order to address evidentiary matters is critical for systemic claimants for two reasons. The first reason, which was discussed in Chapter III in relation to investigation/disclosure, is the necessity of having adequate access to relevant information and documents in order to put forward and maintain systemic cases. The second reason relates to the potential harm that is likely to occur in some cases without access to particular types of pre-hearing and hearing orders. For example, in many cases, claimants may continue to be subject to discriminatory conditions prior to hearing, such as in cases involving the provision of ongoing employment or services.

4.13 Overview of Applicable Processes, Procedures and Mechanisms

4.13.1 Evidence - Pre-hearing and at Hearing

Under both the Canadian and the Ontario Human Rights Tribunal regimes, case conferences or pre-hearing conferences can occur at the discretion of a tribunal member, who may schedule a case conference and/or direct the parties to
Issues which can be addressed at pre-hearing conferences under both regimes include administrative issues such as setting hearing dates and/or substantive or procedural matters. Under both Tribunal rules, parties may bring motions for a decision on a preliminary matter at the conference.987

A Provision in the Canadian Human Rights Act of note in relation to the type of evidence that may be admitted at hearing is section 50(3) (c), which states that evidence may be received and accepted by the Tribunal in any form that the Tribunal member sees fit, whether not it would be admissible in a court.988 This provision is subject to a limitation in subsection (4) relating to privileged evidence, and in subsection (5) to the competence of witnesses.989 Under the Ontario enforcement regime, similar to the federal enforcement process, Rule 64 provides for the Tribunal to admit any evidence it considers relevant to the hearing, including hearsay evidence.990 Similarly, under the former British Columbia human rights statute, the Tribunal had broad discretionary powers around evidence. For example, section 35(3) provided for the receipt and acceptance of evidence at hearing considered by the Tribunal to be necessary and appropriate whether or not admissible in a court.991

986 See CHRT Rules, supra n. 564 at Rule 5(1); and also, OHRT Rules, supra n. 472 at Rule 54.
987 See CHRT Rules, ibid. at Rule 5(2); and OHRT Rules, Ibid. at Rule 56.
988 CHRA, supra n. 256 at 50(3)(c).
989 Ibid., at section 50(4)(5).
990 OHRT Rules, supra n. 472 at Rule 64.
991 Code, supra n. 246 at section 35(3).
Under the current statute in British Columbia, pre-hearing conferences are held under both types of claims streams, with some variations in procedure depending on the type of stream. For example, under Rule 18 Standard Stream cases, pre-hearing conferences are usually held by a case manager or the registrar.\textsuperscript{992} The purpose of Standard Stream pre-hearing conferences is typically administrative, as case managers are unable to make orders. As a result the focus is typically on ensuring that parties are prepared to proceed on scheduled dates, determining whether the parties are interested in settlement, and setting schedules for submissions.\textsuperscript{993} In the Case Managed Stream, pre-hearing conferences are held by a Tribunal member.\textsuperscript{994} In addition to addressing administrative issues, in case managed pre-hearing conferences Tribunal members can also deal with substantive issues such as hearing and deciding applications, making orders for production of various types of documents, and making orders for non-compliance or orders relating to the hearing process.\textsuperscript{995}

In respect of evidence at hearing, the Tribunal has broad discretionary powers to accept evidence and information in a variety of forms, including by affidavit, if the Tribunal considers it necessary and appropriate, whether or not it would be admissible in a court.\textsuperscript{996} Subsections 27.2 (2) and (3) set out exceptions based respectively, on privilege and express provisions in other statutes limiting

\textsuperscript{992} BHRT Rules, supra n. 356 at Rule 13.
\textsuperscript{993} Ibid., at Rule 17.
\textsuperscript{994} Ibid., at Rule 19.
\textsuperscript{995} Ibid., at Rule 19(5) (a-1).
\textsuperscript{996} Code, as amended, supra n. 131 at section 27.2(1).
disclosure.\textsuperscript{997} Section 27.3 delineates powers of the Tribunal to make rules and orders respecting practices and procedures, including under subsection (b) relating to evidence such as a pre-hearing examination of a party.\textsuperscript{998}

Similar to the above regimes, under section 27(2) of the Nunavut \textit{Human Rights Act}, the Tribunal with discretionary power around pre-hearing processes.\textsuperscript{999} As with the other jurisdictions described above, section 30(1) of the Nunavut \textit{Human Rights Act}, provides the Tribunal with broad discretionary power to accept evidence in any manner considers appropriate,\textsuperscript{1000} and subject to the evidentiary rules of privilege, is not bound by the civil rules of evidence.\textsuperscript{1001} Section 30(3) specifies that in the course of a hearing, the Tribunal may receive and accept evidence showing a pattern of discriminatory practice and may give evidence whatever weight considered appropriate.\textsuperscript{1002}

\textbf{4.13.2 Analysis/Critique – Evidentiary}

Human rights regimes generally provide flexible pre-hearing and hearing processes, procedures, and mechanisms in relation to evidentiary matters that facilitate access to Tribunal orders. For example, in allowing for the acceptance
of evidence in various formats regardless of admissibility in a formal court setting, including hearsay evidence and similar fact evidence which are common types of required evidence in establishing a pattern of discrimination. In Radek for instance, hearsay evidence was central to a finding of discrimination, including through the admission of notes and records written by persons not called as witnesses, and through newspaper articles,\textsuperscript{1003} evidence to which the Tribunal accorded varying degrees of weight.\textsuperscript{1004} The hearing also included a significant amount of similar fact evidence about witnesses' experiences and observations regarding similar treatment as that alleged by the claimant, and evidence that while not strictly "similar fact", was held to be directly relevant to a determination of the issue of systemic discrimination.\textsuperscript{1005} Finally, the Tribunal stated that it was prepared to take administrative notice of the fact that as a group, Aboriginal persons are historically disadvantaged and subject to negative stereotyping and prejudice. Additionally, as a group, Aboriginal persons are more likely to be disabled, and to live in poverty.\textsuperscript{1006}

A further example, of the importance of discretionary evidentiary provisions to systemic cases can be seen in the Ontario case of Morrison v. Motsewetsho (No. 2),\textsuperscript{1007} where in the course of finding in favor of the claimant who alleged sexual harassment by a former employer, and in ordering a systemic remedy, the Board

\textsuperscript{1003} Radek, supra n. 158 at paras. 50-55.
\textsuperscript{1004} Ibid., at para. 56.
\textsuperscript{1005} Ibid., at paras. 59-60.
\textsuperscript{1006} Ibid., at para. at 493.
\textsuperscript{1007} Morrison v. Motsewetsho (No. 2) (2003), 48 C.H.R.R. D/51 (ONHRT). The issue of similar fact evidence can also come into play in a pre-hearing application. See for example, Radek v. Henderson Development (Canada) Ltd. and others, supra n. 957, particularly at para.8, where a series of articles were tendered as evidence of similar fact discrimination.
of Inquiry accepted the evidence of five women who testified that they had been also experienced various forms of harassment and reprisals by the respondent. Such evidence may not have been accepted under formal processes and procedures governing a court.

Finally, it is notable that under the Nunavut legislation, the Tribunal has explicit discretionary powers to receive and accept evidence establishing a pattern of discriminatory practice, and place any weight on such evidence it considers appropriate.\footnote{NHRA, supra n. 298 at section 30(3).}

Prior to concluding this discussion it is important to comment on a mechanism in the British Columbia enforcement process that impacts on the ability to effectively access pre-hearing evidentiary procedures and mechanisms in systemic claims. As suggested in the discussion on case management in Chapter III, one of the weaknesses in the direct access process in place in British Columbia is that the effectiveness of pre-hearing conferences is largely dependent on the streaming of systemic claims into the Case Managed Stream. Further, the current streaming mechanism appears to be inconsistently applied in streaming systemic claims.
4.13.3 Summary and Recommendations

It would appear that human rights jurisdictions generally provide flexible pre-hearing processes, procedures, and mechanisms. Additionally there is a great deal of flexibility in the admissibility of evidence at hearing in various forms, regardless of admissibility in a formal court process. However, access to effective pre-hearing processes, procedures, and mechanisms in British Columbia is largely dependent on the streaming mechanisms which are unpredictable and consequently, can detrimentally impact access to dealing with evidentiary matters on a pre-hearing basis. A final consideration is the need for access to interim remedies in systemic cases in order to prevent further discrimination.

4.13.4 Recommendations – Evidence

- That streaming mechanisms be strengthened to ensure that systemic claims are consistently directed to the Case Managed Stream.

- That additional funding be provided to the Tribunal to address the administrative costs associated with any resulting increase in Case Managed cases.
• That statutory provision similar to the special remedies section under the Nunavut statute be created to provide access to the Court for interim orders including restraining orders.

• That an explicit rule or statutory provision be developed, similar to the Nunavut provisions, specifically providing for the Tribunal to receive and accept evidence showing a pattern of discriminatory practice, and concomitantly that it may give such evidence the weight that it considers appropriate in the circumstances.

4.14 Scope and Sufficiency of Systemic Remedies

4.14.1 Rationale

The issue of systemic remedies relates to processes, procedures, and mechanisms within the enforcement process providing for the remediation of systemic discrimination claims. The following analysis/critique looks at the scope and adequacy of available systemic remedies. The issue of systemic remedies engages the assessment criteria of access, fairness, effectiveness and efficiency. Specifically, as will discussed below, adequate access to remedies that are aimed at addressing the root of the discrimination, and that are capable
of being implemented, are critical to effectively addressing systemic discrimination claims.

The statutory based remedial provisions can be summarized as being compensatory rather than punitive, and aimed at the dual goals of preventing and ameliorating discrimination and making claimants whole; that is, as far as reasonably possible putting them in the position that they would have been had the discrimination not occurred.\textsuperscript{1009} Commentators suggest that tribunals generally have broad statutory powers to order a range of remedies from wage loss and compensation for pain and suffering to equity based programs.\textsuperscript{1010}

The availability of adequate and effective remedies in systemic claims that address the root of discrimination, rather than only the effects, is of critical importance in systemic claims, for individual claimants and disadvantaged groups, and for society as a whole.


\textsuperscript{1010} Black, \textit{Black Report, supra} n. 16 at 136, Hosking, \textit{Ibid., at 1}; and also, Brethour and Zinn, \textit{Ibid., at 16-1.}
4.14.2 Overview of Applicable Processes, Procedures, and Mechanisms for Systemic Remedies

Section 53(2) of the Canadian Human Rights Act outlines a broad range of orders that the Tribunal may make when the claim is found to be substantiated including under (a) (i), the adoption of a special program, plan or arrangement.1011 Similar broad remedial powers are available to the Tribunal under section 41(1) of the Ontario Human Rights Code in the event a breach of the statute is found, including to “(a) direct the party to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices.”1012

Similar to the above regimes, under the former enforcement process in British Columbia, the Tribunal had broad remedial powers under section 37(2) of the Human Rights Code.1013

The remedial provisions under the current enforcement process in British Columbia are the same as those which were available under the former enforcement regime.1014 The exception is the elimination of section 37(3) which provided for information regarding an order to be provided to the Deputy Chief Commissioner.1015

1011 CHRA, supra n. 256 at section 53(2) (a)(i).
1012 OHRC supra n. 268, at section 41(1) (a).
1013 Code, supra n. 246 at section 37(2).
1014 Code, as amended, supra n. 131 at section 37.
1015 Code, supra n. 246 at section 37(3).
The remedial provisions under section 34(3) of the Nunavut Human Rights Act are similar to those described in relation to the above enforcement regimes. Statutory provisions of particular note are the availability of “special remedies” under sections 39 and 40 of the Act. Section 39(1) provides for a claimant to apply for a court order on an interim basis, restraining a party from engaging in further breaches of the Act, or to require the party to comply with the Act until the hearing.\textsuperscript{1016} Section 40 provides for a court to grant an injunction on any terms considered to be appropriate, upon the application of any person, for the purposes of restraining another person from discrimination under the Act.\textsuperscript{1017}

4.14.3 Analysis/Critique - Scope and Sufficiency of Remedies

Most human rights jurisdictions appear to have similar statutory provisions allowing for broad remedies. For example as pointed out by Black and others, the remedial provisions of Canadian statutes typically provide prospective orders to cease and desist, aimed at both present and future discrimination.\textsuperscript{1018} The prospective nature of the remedial provisions represents significant strengths given the focus of such provisions on addressing patterns of discrimination and in preventing further systemic discrimination. Additionally, provisions specifically providing for the mandatory adoption of affirmative action types of remedies

\textsuperscript{1016} NHRA, supra n. 298 at section 39(1).
\textsuperscript{1017} Ibid., at section 40.
\textsuperscript{1018} Black, Black Report, supra n. 16 at 136; Braha, Review of Code, supra n. 272 at COM-9; Brethour and Zinn, The Law of Human Rights, supra n. 141 at 16-13.
including equitable and special programs are of considerable benefit to systemic claims.\textsuperscript{1019}

Hosking suggests in the context of a review of remedies under the \textit{Code} as amended, that despite the inherent statutory purpose of prevention, tribunal orders are rarely directed at policy or practice changes that address the root of the discrimination.\textsuperscript{1020} This is, for Hosking, an inherent limitation of the claims driven enforcement process illustrated by the fact that claimants often do not ask for systemic remedies due to a focus on their own particular situation as opposed to on the prevention of future discrimination.\textsuperscript{1021} He suggests that this may be due in part to the fact that claimants have often moved on with their lives and no longer have any connection to the respondent entity.\textsuperscript{1022} In his view, the fashioning of remedies aimed at addressing the root cause of the discrimination is generally underdeveloped, and in many cases, remedies which are aimed at providing monetary compensation provide limited effectiveness in advancing the underlying goals of prevention of discrimination. Finally, Hosking says that addressing the persistent patterns of discrimination and resulting inequality is dependent on systemic remedies, which under the direct access process are entirely reliant on the altruism of claimants.\textsuperscript{1023}

\textsuperscript{1019} Black, \textit{ibid.}, at 136; see also, Brethour and Zinn, \textit{ibid.}, at 16-13.
\textsuperscript{1020} Hosking, Remedies BC. HRC, \textit{supra} n. 704 at 13.
\textsuperscript{1021} \textit{Ibid.}, at 13.
\textsuperscript{1022} \textit{Ibid.}, at 13.
\textsuperscript{1023} \textit{Ibid.}, at 34.
Most interviewees were of the opinion that human rights statutes generally provide sufficiently broad remedial provisions. Specifically, the remedies section of the Code, as amended provides adequate access to systemic remedies.\textsuperscript{1024} Several interviewees suggested however, that systemic remedial provisions are generally underutilized, in some cases due to the fact that many legal counsel lack knowledge about the range of available remedies and as a result often do not ask for systemic remedies at hearing.\textsuperscript{1025} Most interviewees were adamant in their views that effectively addressing systemic discrimination requires systemic remedies, as opposed to purely individually focused remedies.\textsuperscript{1026}

Examples of cases where systemic remedies were ordered in British Columbia include \textit{Moser v. District of Sechelt},\textsuperscript{1027} where the Tribunal ordered the respondent District in consultation with the claimant, to take steps to ameliorate the effects of the discriminatory practice involving access to a seawall for disabled persons. The Tribunal retained jurisdiction in the event that agreement could not be reached between the parties. In \textit{Pillai v. Lafarge Canada Inc.},\textsuperscript{1028} the Tribunal ordered the respondent company to review its harassment policies with all its employees at a monthly meeting following the release of the decision. In \textit{Hutchinson v. B.C. (Min. of Health) (No.2)}\textsuperscript{1029} various extensive remedies were ordered by the Tribunal, including systemic orders that the respondent Ministry

\textsuperscript{1024} For example, April 4, 2005 Interviewee, supra n. 243; April 18, 2005 Interviewee, supra n.167; May 5, 2005 Interviewee, supra n. 178.
\textsuperscript{1025} Ibid.
\textsuperscript{1026} For example, March 23, 2005 (2) Interviewee, supra n. 164; April 7, 2005, Interviewee, supra n. 163; May 5, 2005, Interviewee, supra n. 178.
\textsuperscript{1027} Moser, supra n.157.
\textsuperscript{1028} Pillai v. Lafarge Canada Inc., 2003 BCHRT 26 [Pillai].
\textsuperscript{1029} Hutchinson, supra n. 217.
facilitate the hiring of the claimant father as a caregiver for his disabled daughter, that the Ministry develop criteria for exceptions to its policy prohibiting the hiring of family members as caregivers, and provide public notice of the criteria to stakeholders.\textsuperscript{1030} In \textit{Radek},\textsuperscript{1031} the systemic remedies awarded included anti-discrimination training, and implementation of a complaints procedure.\textsuperscript{1032} Notwithstanding the fact that the Tribunal found the allegations of both individual and systemic discrimination justified, it rejected the claimant’s submission that the award for injury to dignity should be awarded to an affected group as opposed to the claimant personally. The Tribunal’s reasoning was based on the fact that section 37(2) (d)(iii) explicitly states that such awards are to be paid “to the person discriminated against...”\textsuperscript{1033} The claim was brought by an individual claimant, as opposed to being brought in the form of a representation claim.\textsuperscript{1034}

A final example of a British Columbia case that involved systemic remedies is \textit{Chipperfield v. British Columbia (Ministry of Social Services)}.\textsuperscript{1035} Subsequent to the failure of the parties to agree on changes to a Ministry subsidy policy impacting social assistance recipients, the Tribunal ordered the Ministry to implement a non-discriminatory transportation subsidy policy within six months of the decision.\textsuperscript{1036}

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\footnotesize
\textsuperscript{1030} \textit{Ibid.}
\textsuperscript{1031} \textit{Radek}, supra n. 158.
\textsuperscript{1032} \textit{Ibid.}, at para. 667.
\textsuperscript{1033} \textit{Code}, supra n. 246 at sections 37(2) (d)(iii).
\textsuperscript{1034} \textit{Radek}, supra n. 158 at para. 639.
\textsuperscript{1035} \textit{Chipperfield v. British Columbia (Ministry of Social Services) (No.2) (1998) 30 C.H.R.R. D/262.}
\textsuperscript{1036} \textit{Ibid.}
\end{flushleft}
Examples of Ontario cases involving orders for systemic remedies include *Baylis-Flannery v. De Wilde (No. 2)*, where the respondent was ordered to implement an anti-discrimination policy, to take an educational training program on anti-discrimination principles, and to provide the Ontario Human Rights Commission with the names and telephone numbers of female employees hired, and contact information for all female applicants applying for positions at any place of business owned or operated by the respondent, for a period of two years. Similarly, in *Morrison v. Motsewetsho (No. 2)*, the Tribunal ordered the respondent to implement a comprehensive workplace harassment and anti-discrimination policy, attend a training program on harassment at his own expense, and provide a copy of the decision to any employment office where he recruits employees, and to post a copy of the Tribunal decision in his offices.

A preliminary review of the case law indicates while systemic remedies are awarded in all of the delineated jurisdictions, differences can be seen across the jurisdictions in terms of the frequency and extent of such awards. The infrequency of orders for systemic remedies and the relative narrowness of the types of remedies ordered in British Columbia compared to the other two jurisdictions may be due to several factors; including the relative newness of the direct access process and the low numbers of applications for systemic remedies. Another explanation for the dearth of such orders suggested by

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1037 *Baylis-Flannery v. De Wilde (No. 2)*, supra n. 217.
1038 *Morrison v. Motsewetsho (No. 2)*, supra n. 1007.
1040 See for example, *Baylis-Flannery v. De Wilde (No. 2)*, supra n. 218; *Pillai*, supra n. 1028; *Moser*, supra n. 157; *Hussey*, supra n. 156; *Hutchinson*, supra n. 217.
commentators, including interviewees, is the absence of a commission or other body to oversee ongoing supervision of systemic remedies.\textsuperscript{1041}

On a final note, the power to provide interim remedies in order to prevent further damage in systemic claims appears to represent a major strength which is absent under the current legislation in British Columbia. The ability to order interim remedies was identified by the Black Report as being important in circumstances where the delay in obtaining a final order at hearing would be detrimental to claimants.\textsuperscript{1042} Provision for interim orders is critical, due to the fact that systemic claims frequently involve lengthy hearings, and also involve groups, thereby increasing the potential for an increased negative impact. The Nunavut enforcement regime appears to provide extensive provisions for interim remedies within the special remedies section described above. Specifically, the broad injunctive powers appear to be particularly beneficial in cases involving ongoing discrimination, compared to the option in British Columbia, of filing a new claim under the retaliation provisions and facing the delay involved in having to go through the entire claims process for a second time. While the strength of the Nunavut provisions is potentially weakened by the requirement of an application to the Supreme Court, it is likely that in the relatively few cases where such recourse is necessary, the benefits of such orders will outweigh the costs. It is

\textsuperscript{1041} For example, April 7, 2005 Interviewee, supra n. 163; April 13, 2005 Interviewee, supra n. 162. See also, minutes of the meeting of the Canadian Bar Association, British Columbia, Minutes – Human Rights Section, June 29, 2004 at 4.

\textsuperscript{1042} Black, \textit{Black Report}, supra n. 16.
also likely given the Supreme Court processes, that claimants may be able to recoup some of their costs.

4.14.4 Summary and Recommendations

While human rights legislation generally provides for a broad range of systemic remedies, for various reasons orders for systemic remedies appear to be more frequent and expansive in some jurisdictions than others. This difference may be attributable to factors unrelated to differences in the enforcement processes such as claimants' goals of moving on with their lives, resulting in a focus on monetary and other individual specific remedies to the exclusion of systemic remedies. However, it may also be related to other factors that are directly attributable to the differences between the two Models such as the relative newness of the direct access process in British Columbia, and a consequent lack of knowledge on the part of claimants and their legal counsel regarding the potential range of available systemic remedies. However, as discussed in Chapter III, it is more likely that it is attributable to the lack of a public body in British Columbia such as a commission to monitor the enforcement of such remedies. Whatever the cause for the difference in outcomes, it is clear that access to broad flexible systemic remedies is essential to effectively addressing the root causes of systemic discrimination.
4.14.5 Recommendations – Scope and Sufficiency of Systemic Remedies

- That education be provided to legal advocates and counsel regarding the broad range of systemic remedies available under the Code.\textsuperscript{1043}

- That research be carried out by a body which is independent from government, with access to sufficient funding, to look at ways of supporting the community in monitoring and enforcing systemic remedies in the absence of a public body.

- That the remedial section of the Code, as amended, be applied in a broad and purposive manner to enable orders for systemic remedies.

In summary, this chapter examined 4 areas which although not attributable to differences in the two Models, nevertheless are critical to effectively addressing systemic claims:

1.) dismissal of claims; 2.) scope of claims; 3.) evidence; and, 4.) scope and sufficiency of systemic remedies. The findings of the analysis/critique indicate that while there are a broad range of provisions generally available under human rights legislation in the delineated areas for effectively addressing systemic discrimination, overall gaps exist, for example, in the scope of claims, particularly in restrictions in taking into account the complex realities of systemic claimants. Additionally, the way in which some provisions are being applied is problematic.

\textsuperscript{1043} Code, as amended, supra n. 131.
for systemic claimants, for example, in the dismissal provisions in British
Columbia. Similarly, the narrow scope of remedies being ordered in systemic
claims in British Columbia, compared with other jurisdictions also restricts the
ability to effectively address systemic discrimination. Various recommendations
for addressing the gaps identified in this chapter under the British Columbia
enforcement process were made in respect of each area.
CHAPTER V  CONCLUSION AND SUMMARY OF RECOMMENDATIONS

The central question at issue in this study was whether the public interest in systemic discrimination is adequately addressed within human rights enforcement, specifically, under the traditional Commission Model of enforcement compared with the relatively new Direct Access Model of enforcement. Additionally, I looked at provisions that while not specifically attributable to differences between the two Models, nevertheless have important implications for effectively addressing systemic claims. The four criteria utilized throughout the analysis/critique were: 1.) accessibility; 2.) fairness, effectiveness, and efficiency; 3.) adequacy of resources; and, 4.) pro-activity.

Recommendations were made throughout this analysis aimed at addressing identified gaps in respect of the enforcement process in British Columbia.

Overall conclusions drawn from the critique/analysis indicate that by itself neither Model adequately addresses systemic discrimination. Further, that while a broad range of provisions are generally available under all human rights jurisdictions, there are some difficulties associated with the application of these provisions such as dismissal of claims which act as barriers to effectively addressing systemic discrimination which are not directly attributable to differences in the two Models.
In terms of differences between the two Models, while the Commission Model has processes, procedures, and mechanisms for specifically addressing the public interest in systemic discrimination such as the ability to initiate and join claims, there are many difficulties associated with such provisions. On the other hand, the clear absence of public interest related provisions under the Direct Access Model has effectively privatized the human rights process, resulting in the inappropriate placement of the onus of bringing forward the public interest squarely on claimants, who are not responsible for the public interest, and for the various reasons previously discussed, are unlikely to be in a position to shoulder such a burden. Besides placing an inordinate and unfair burden on systemic claimants in raising and sustaining public interest issues, this gap results in access difficulties, for example, in bringing forward systemic claims, and in obtaining the type of evidence required to prove systemic claims. In turn, the emphasis on claimant initiative in bringing systemic claims forward has resulted in an even greater need than previously, for adequate legal information and assistance for claimants in order to access the claims process and to ensure effectiveness in such access. This requirement has not entirely been met to date, particularly in relation to pre-claim information and assistance, and in developing community links for participation in the claims process.

Several specific barriers were also identified as interfering with effective enforcement of systemic claims generally, which although are not directly attributable to the two Models, nevertheless have serious implications for
effectively addressing systemic discrimination. Barriers which were identified include the application of dismissal provisions such as jurisdiction, assessment of reasonable prospect of success, and time limitations, scope of claims, evidentiary issues, and scope and sufficiency of systemic remedies.

Despite the public interest related weaknesses identified, the Direct Access Model has many inherent strengths, including providing claimants with 'direct access' to enforcement processes and a certain degree of autonomy over decision making in settlement and choice of remedies. Several recommendations were made in relation to the identified gaps under Direct Access Model in British Columbia, and in avoiding limitations identified in relation to the application of various provisions not specifically attributable to the Direct Access Model, with the aim of strengthening the claims process in effectively addressing systemic discrimination. These recommendations are summarized at the conclusion of the thesis.

Based primarily on the views of various human rights commentators who have considered systemic discrimination in-depth, I would agree that the enforcement process represents only one part of a continuum of processes required for effectively addressing systemic discrimination. While the Direct Access Model has strong potential for effectively addressing systemic discrimination with

\[^{1044}\text{Abella, Abella Report, supra n. 1; Black, Black Report, supra n. 16; La Forest Report, supra n. 10. Also various interviewees including April 4, 2005 Interviewee, supra n. 243; April 7, 2005 Interviewee, supra n. 163; April 18, 2005 Interviewee, supra n. 167; June 9, 2005 Interviewee, supra n. 385.}\]
the addition of the public interest provisions identified in this thesis, it is only one aspect of an overall strategy. What is also required is a comprehensive approach combining the strengths of both enforcement Models as well as interventionist, non-enforcement approaches. A synergy of approaches holds a greater potential for addressing the public interest in systemic discrimination than either enforcement model on its own.

Examples of interventionist non-enforcement approaches include provisions for public inquiries, powers for creating guidelines, rules, regulations, best practices, and statutes which proactively address systemic discrimination. In my opinion, further study is required in order to identify strategies for implementation of interventionist, non-enforcement processes, procedures, and mechanisms in order to supplement and augment the enforcement process.


1047 Black, Black Report, supra n. 16 at 183-185.


1049 See for example, Ontarians with Disabilities Act, S.O. 2001, c. 32, including, the creation of codes aimed at standard setting for example, around accessibility. Another option would be the creation of a provincial employment equity legislation similar to the Employment Equity Act, S.C. 1995, c. 44, which would not be reliant on the filing of claims but rather, would require employers and others to take proactive measures aimed at achieving equality.
wish to emphasize, however, that I am not advocating for yet more studies to add to the already voluminous, unimplemented recommendations on systemic discrimination, but rather for the development of practical strategies in partnership with affected groups and communities based on pre-existing research.

As concluded by the Abella Report in respect of equality in employment, what is needed is nothing less than a "...massive policy response to systemic discrimination." \(^{1050}\) I believe that strategic non-enforcement based policies and strategies combined with a comprehensive enforcement process have the potential to reduce, and perhaps in the future even eliminate, systemic barriers that currently represent a "built in headwind" \(^{1051}\) for disadvantaged groups.

Prior to concluding the thesis, the following section considers the issue of the public interest gap under the Direct Access Model, in particular in respect of education and prevention, followed by an overview of two models for addressing the public interest gap generally.

\(^{1050}\text{Abella Report, supra n. 1 at 254.}
^{1051}\text{Griggs, supra n. 74 at 432.}
5.1 Addressing the Public Interest Gap

Many commentators suggest that one of the most critical means for addressing the public interest in systemic discrimination is through implementation of educational and preventative measures.\textsuperscript{1052} Several commentators have indicated that the elimination of the British Columbia Human Rights Commission resulted in a major gap in educational and preventative processes, procedures, and mechanisms under the Direct Access Model for addressing systemic discrimination.\textsuperscript{1053} The discussion below highlights some of the concerns identified in relation to education and prevention and systemic discrimination, as a springboard for an overview of potential paradigms for addressing the public interest gap generally, under the Direct Access Model.

5.2 Education and Prevention

Black and other human rights commentators suggest that enforcement models have generally failed to keep pace with equality developments in human rights, particularly in addressing discrimination on a systemic level.\textsuperscript{1054} Similarly, many human rights commentators express doubts about the general adequacy of enforcement based processes alone in addressing systemic discrimination, and

\textsuperscript{1052} See for example, generally, Braha, \textit{The Proposed Human Rights Code}, supra n. 311.
\textsuperscript{1053} Ibid.
\textsuperscript{1054} Black, \textit{Black Report}, supra n. 16; also, April 4, 2005 Interviewee, supra n. 243.
suggest rather that a multi-faceted approach is required, including proactive educational and preventive measures.\textsuperscript{1055}

As a result of the perceived general deficiencies in the claims enforcement process and mounting fiscal restraint, commissions have increasingly utilized their broad statutory powers to place greater emphasis on the educational and preventative aspect of their mandates, as an essential component of claims enforcement.\textsuperscript{1056} For example, the former British Columbia Human Rights Commission exercised its statutory mandate to provide extensive educational initiatives aimed at broadly addressing systemic discrimination, including developing community-based educational partnerships with organizations working with disadvantaged groups.\textsuperscript{1057} As with other commissions, the British Columbia Human Rights Commission also had broad educational and preventative statutory powers aimed at addressing discrimination through research, monitoring and public reporting of patterns of discrimination, and through public inquiries.\textsuperscript{1058}

In contrast, with the amendment to the \textit{Code} in 2002, and the consequent elimination of the Commission, the educational purposes under section 3 were

\textsuperscript{1055} See generally, Abella, \textit{Abella Report}, supra n. 1; Black, \textit{Black Report}, supra n. 16; \textit{La Forest Report}, supra n. 10.

\textsuperscript{1056} See for example, generally, \textit{CHRC Annual Report} 2003, supra n. 12, and the \textit{OHRC Annual Report} 2003/04 supra n. 344.

\textsuperscript{1057} See for example, \textit{BCHRC Annual Report} 2001/01, supra n. 374.

\textsuperscript{1058} See for example, \textit{Code}, at supra n. 246, section 6(1), which provided the Chief Commissioner or Deputy Chief Commissioner with the discretionary power to encourage research, and section 19(1)(2) which gave the Chief Commissioner the power to submit special reports to the government on matters that were urgent and could not be deferred to the annual report.
eliminated.\textsuperscript{1059} Under section 5 of the Code, as amended, the Ministry of Attorney General became solely responsible for "developing and conducting a program of public education and information designed to promote an understanding of the Code",\textsuperscript{1060} including under section 6, for (a) conducting or encouraging research into human rights matters, and (b) implementing consultations in relation to the statute.\textsuperscript{1061}

In introducing the Direct Access Model in debate around the Human Rights Amendment Act, 2002,\textsuperscript{1062} the Attorney General stated that:

In the new model, the educational function will be carried out by three organizations: the Ministry of Attorney General, the Human Rights Tribunal and a publicly funded, independent legal clinic. Basic information on the code, its purposes, its areas of coverage and protected grounds will be developed and provided to the public by the Ministry of Attorney General. Government clearly has the responsibility to promote human rights and to inform the public about their rights. There is, however, no reason to situate this responsibility in an organization at arm's length from government. In this respect, Bill 64 differs from Bill 53. We heard questions about this issue of education, and as a result of the public consultation, we have come forward with a bill that states the education responsibility clearly in the face of the legislation and makes it the responsibility of the Ministry of the Attorney General.\textsuperscript{1063}

Further that:

Education and training on human rights law will be the responsibility of a publicly funded, independent legal clinic. The B.C. Human Rights Coalition, an independent society, will be mandated by the ministry to develop and deliver a program of preventive education and training to

\textsuperscript{1059} Ibid., section 3.  
\textsuperscript{1060} Code, as amended, supra n. 131 at section 5.  
\textsuperscript{1061} Ibid., at section 6.  
\textsuperscript{1062} Bill-64, supra n. 23.  
\textsuperscript{1063} Hansard, October 23, 2002, Afternoon, supra n. 22 at 3988.
promote the purposes of the code and encourage compliance. This coalition has in fact been delivering such a program for a number of years, and it is well respected in this field. The additional resources that the government will provide will enhance the coalition’s ability to carry out this important work and will assist the government in meeting its responsibility to promote an understanding and acceptance of human rights.\textsuperscript{1064}

In the context of a meeting with the Human Rights Subsection of the Canadian Bar Association for the purposes of introducing the Direct Access Model, the Attorney General stated that he intended to meet with the Ministry of Education in order to include a focus on human rights in the school curriculum, particularly, early on in the educational process.\textsuperscript{1065}

In a press release around the new Direct Access Model, in October 2002, the Attorney General suggested that:

Education, research and promotion of human rights protection can and will be undertaken by the government. The new model includes funding for a clinic to provide education and training as well as legal advice and support to parties.\textsuperscript{1066}

Reports from human rights commentators, including the British Columbia Human Rights Coalition, which as previously discussed, provides what education is currently available in the province, suggest that the government has not lived up to its full responsibility around the provision of education under the Direct Access

\textsuperscript{1064} Ibid.
\textsuperscript{1065} Minutes of the Canadian Bar Association, British Columbia, Minutes – Human Rights Section, December 9/02, supra n. 295 at 4.
Model. For instance, the Coalition and other commentators, including a
government interviewee, suggest that the Ministry-chaired Education Planning
Committee, which was developed to coordinate information and educational
initiatives, has not got off the ground due to the absence of government
support.\(^{1067}\) As a result, the sole responsibility for providing human rights
education and information to the entire province, other than limited information
provided by the Ministry of Attorney General and Tribunal information focused on
the claims process, rests with the Human Rights Coalition on a contractual basis.
While few would dispute the considerable expertise of the Coalition in the area of
human rights education, as suggested by the Coalition itself, it lacks the
resources and infra-structure to adequately address the magnitude of the
responsibility on its own, particularly in light of the statutory responsibility of the
government.\(^{1068}\)

The current situation under the Direct Access Model in relation to adequate
processes, procedures, and mechanisms for education and prevention
represents a major gap in the system and generally undermines the ability to
adequately address systemic discrimination. This gap reflects the general lack of
public interest provisions within the Direct Access Model, and the strong
movement towards privatization of human rights.

\(^{1067}\) See for example, B.C. Human Rights Coalition, 2003-2004 The Year in Review B.C. Human
Rights Clinic, supra n. 378 at 2-3. Also based on March 23, 2005 Interview (1), supra n. 163. I
was also advised by the interviewee that to his/her knowledge no educational initiatives have ever
been developed as part of the school curriculum.

\(^{1068}\) See for example, \textit{ibid.}, at 2-3. Also, \textit{ibid.}, Interviewee.
5.3 Recommendations – Education and Prevention

• That the Ministry of Attorney General initiate a public consultation under the section 6 statutory provisions with affected stakeholders including respondent organizations, to assess the effectiveness of the Direct Access Model generally to date, and specifically, in meeting educational and preventative objectives.

• That following the above consultation, the Ministry of Attorney General strike a community based committee whose mandate is to develop and coordinate broad educational and preventative initiatives, on an ongoing basis.

• That community groups and organizations be adequately funded by the government for their involvement in developing and implementing educational and preventative initiatives.

5.4 Two Models for Addressing the Public Interest Gap under Direct Access

An overriding theme articulated in Chapter III, as well as above in relation to education and prevention, was a perceived gap in the Direct Access Model in processes, procedures, and mechanisms for addressing the public interest in
systemic discrimination. This section provides a brief look at two potential paradigms for addressing the overall public interest related gaps under the Direct Access Model.

It seems to me that there are three potential approaches to addressing the overall gap in the Direct Access Model, however, one, which involves the resurrection of the Commission Model is not a viable option. For many reasons, rightly or wrongly, there was a general loss of confidence in the Commission Model so that reversion to commission based enforcement would have deleterious effects on human rights generally in British Columbia. Conversely, as discussed earlier, the Direct Access Model has many benefits, and as currently structured represents a positive direction for enforcement, provided that public interest gaps are addressed.

Based on my view that a return to the Commission Model is not feasible, following is an overview of two other options for addressing the public interest gap. Briefly, the first option involves the creation of a new statutory body to represent the public interest, while the second involves building a public interest component into pre-existing statutory structures.

Several commentators have called for the development of a publicly funded independent body with a statutory mandate to provide education, and to engage
in research and monitoring. Commentators further suggest that this provision is not only necessary for addressing the public interest in discrimination, but also in order to comply with international human rights standards including the principles relating to the Status of National Institutions, or the “Paris Principles”, which call for the effective enforcement of human rights through an adequately funded body independent from government with broad educational powers.

In my view, for the various reasons discussed throughout this thesis, it is absolutely essential that a body with all of the above features be developed not only to address the public interest in relation to education and prevention, but also as a body which could be involved from time to time in a public interest capacity, in cases involving broad public interest issues. The dilemma and the challenge is what form such a body should take. Two potential models are broadly set out below.

5.4.1 Creation of a New Statutory Body

Some groups suggest that a new body be created in the form of a “Centre of Excellence” with the above described features, including public funding and independence from government, to act as a resource for research and human

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1069 See for example, Braha, The Proposed Human Rights Code, supra n. 311 at COM47. see also CARHTS, supra n. 510.
rights expertise, in particular for systemic issues, and to provide policy advice to
the community. Further, it should be community based, and have provision for
accountability to government such as a Board of Directors.\(^\text{1071}\)

In many ways, the development of a new statutory body such as a “Centre of
Excellence” represents an ideal option for addressing the public interest gap.
However, it also raises some related concerns regarding whether such a body
could adequately address the gaps identified in respect of the public interest in
settlement and in monitoring and enforcing human systemic remedies, given its
non-advocacy based mandate. Additionally, about what organizations should be
involved in running such a body, given the need to ensure a process for broad
community involvement and input; including the respondent community. In my
view, a consultation process should be coordinated by the Ministry of Attorney
General to further explore this option, under its statutory responsibility for
education under section 5 of the \textit{Code}, as amended.\(^\text{1072}\) A final concern stems
from skepticism regarding the likelihood of such a body being approved by the
government, in light of current fiscal restraint policies in place that are likely to
prevail for some time to come. In light of this situation, I propose a more realistic
approach to the public interest gaps, in the form of a second option that involves
building public interest provisions into pre-existing statutory bodies and
processes.

\(^{1071}\) See for example, \textit{CARHTS}, supra n. 510; see also, Lovett and Westmacott, \textit{Human Rights
Review}, supra n. 15 at 150-151.
\(^{1072}\) \textit{Code}, as amended, supra n. 131 at section 5.
5.4.2 Building on Pre-Existing Statutory Bodies and Processes

This option builds on pre-existing statutory bodies and processes. For example, as discussed in relation to the provision of pre-claim information, the Legal Services Society could be used to develop and coordinate the dissemination of human rights information across the province. In terms of advocacy in broad public interest cases, the most obvious pre-existing body is the Office of the Ombudsman. The Office of the Ombudsman is statutorily independent from government, and has pre-existing statutory powers to conduct independent inquiry into government and other entities such as municipalities, and universities.\(^{1073}\) The pre-existing governing statute could be amended to provide the Office of the Ombudsman with the statutory mandate to act in the public interest capacity in systemic claims, including to intervene in broad systemic human rights claims,\(^{1074}\) and to monitor human rights related matters for discriminatory patterns, as well as to engage in education and legislation. In order to play an effective role, however, in addition to necessary statutory amendments; including the provision to make binding decisions,\(^{1075}\) the Office of

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\(^{1073}\) See for example, generally, the *Ombudsman Act*, R.S.B.C. 1996, c. 340; and also, Ombudsman British Columbia, Online: [http://www.ombudsman.bc.ca](http://www.ombudsman.bc.ca) at “about the Ombudsman” and also, “Who Can the Ombudsman Investigate?”. It should be noted however, that there are currently limitations in terms of who the Ombudsman can investigate.

\(^{1074}\) Early this year, a coalition of anti-poverty groups across British Columbia filed a systemic complaint with the office of the Ombudsman against the Ministry of Human Resources alleging “unfair practices experienced by poor people who need assistance from the Ministry.” See The British Columbia Public Interest Advocacy Centre, News Release, “Anti-poverty groups across BC complain to Ombudsman about unfairness at Ministry of Human Resources” (2, February, 2005).

the Ombudsman which has been subject to severe fiscal cutbacks over the past few years,\textsuperscript{1076} would have to be given access to sufficient, permanent funding and other resources.

In summary, two primary options are available for addressing the public interest gaps under the Direct Access Model. While the creation of a new statutory body may be ideal, it is questionable whether it is fiscally practicable. The second option, which involves utilizing pre-existing statutory bodies and processes, may represent a more viable option for addressing the public interest gaps. In any event, this issue requires broad community consultation facilitated by the Ministry of Attorney General as the statutory body currently responsible for education.

5.4.3 \textit{Recommendation – Public Interest Gap}

- That as part of its statutory mandate for education the Ministry of Attorney General facilitates broad community consultation on options for addressing public interest gaps under the Direct Access Model.

5.4.4 Conclusion

In conclusion, while the Direct Access Model is generally effective in addressing systemic discrimination, the primary gap in British Columbia is in the absence of a means of addressing the public interest in systemic claims. This gap perpetuates and reinforces a privatized approach to addressing systemic claims as opposed to reflecting the need to address broad patterns of discrimination for the benefit of society as a whole. Further, it results in an inordinate burden being placed on claimants in bringing forward and sustaining systemic claims in the public interest. The public interest requires the creation of an independent statutory body in order to address this major gap. Two options were presented; one involves the creation of a new statutory body, the other, the modification of pre-existing statutory bodies. It was concluded that the latter option is more practical given the current political climate, and the likelihood of ongoing government fiscal restraints. Additionally, several provisions within the pre-existing legislation were assessed, and found to be generally adequate for addressing systemic discrimination. However, the application of these provisions was found to require a more contextual approach than is currently being applied in order to effectively address systemic discrimination. Recommendations for addressing these gaps in the British Columbia enforcement process were identified throughout the thesis and are summarized below.
5.5 Overall Summary of Recommendations

5.5.1 Chapter III Recommendations

5.5.1.a Preliminary Information and Legal Assistance

- That an organization independent from government,\textsuperscript{1077} which is publicly funded, be given the statutory mandate and responsibility for coordinating the development and dissemination of substantive and procedural, pre-claim and other human rights information, on a long-term permanent basis.

- That the above body be either a newly created entity or alternatively, a pre-existing entity such as Legal Services, which is already involved in the creation of legal publications and has an extensive pre-existing infrastructure and considerable expertise in the development and dissemination of legal information. See for example, the various types of legal information currently provided by Legal Services at:
  \url{http://www.lss.bc.ca/legal_info/pubs_main.asp}

- That pre-claim information be made available in a variety of accessible formats; including in diverse languages such as Tagalog, Vietnamese, and

\textsuperscript{1077}Independence is important in light of the potential for conflict of interest in relation to systemic claims, given that the provincial government is the largest employer and service provider in British Columbia. As an example of these types of claims see \textit{Crane v. B.C. (Ministry of Health Services) and others}, 2005 BCHRT 361.
Spanish, as well as in barrier free formats such as audio and large print. This information should be written in plain language and aimed at accessible comprehension levels. It should be developed in consultation with applicable community groups.

- That pre-claim legal assistance be provided on the basis of a permanent statutorily mandated process. The process for delivery of these services should be based on the clinic model; either within the pre-existing bifurcated clinic model, or in a more comprehensive seamless clinical based format.

- That a major part of the statutorily mandated clinic be aimed at community outreach, in particular, for the purposes of connecting with community groups across the province to create ongoing access to community run clinics. At least one staff at the clinic should be designated for the purposes of community outreach. The outreach clinics should occur at least one a month, on designated dates that are well advertised within the local community. The infrastructure of Legal Services and community groups may be used in terms of access to office space, and other local resources.

- That services offered at community based clinics include preliminary legal assistance; in particular, assistance with drafting human rights claims.
The outreach clinics must be adequately funded and accessible to residents of remote areas. Other forms of communication such as video link up and computer assisted devises should be explored for use in particularly remote parts of the province such Northern British Columbia or areas off of Vancouver Island.

5.5.1. b Standing to File Claims

- That a broad contextual approach be taken in respect of assessing standing in representation claims.

- That provision for the public interest in representation claims be taken into account through a number of mechanisms including providing adequate notice of opportunities for community and organizational participation in systemic claims as representatives, along with the provision of adequate resources for such involvement.

- That a statutory mechanism or Rule based mechanism be created, providing for the involvement of a statutorily based body, independent from government, with permanent funding, to advocate in systemic cases involving broad public interest issues.
5.5.1. c Intervenors

- That protocols, procedures, and mechanisms be developed by the Human Rights Clinic, providing for community involvement in systemic claims and for notice of opportunities to intervene in systemic claims. The designated community outreach position within the clinic, identified above in relation to outreach clinics could be involved in this work.

- That permanent funding for intervention in systemic claims be provided to community groups and other organizations, based on clear criteria developed in consultation with such groups. Some consideration may be given to creating a funding program similar to the Federal Court Challenges program.

- That an independent public body be established, or a pre-existing public body be utilized to provide a mechanism for intervention in the public interest in systemic claims that involve broad public policy issues which have the potential for broad impact on society. Potential options around this recommendation will be discussed further in Chapter V.
5.5.1. d Case Management

- That an interventionist oriented case management system be implemented based on the La Forest Report\textsuperscript{1078} along with corresponding mechanisms to ensure administrative fairness in case management decisions.

- That the mechanisms governing streaming of claims be strengthened to ensure that systemic claims are routinely streamed into the Case Managed Stream.

- That the Tribunal be provided with adequate resources in order to address the increased administration involved in the increased number of cases under the Case Managed Stream.

5.5.1. e Investigation/Disclosure

- That a newly created or pre-existing, public body, independent of government be provided with the statutory authority in systemic claims involving issues of broad public interest to implement an investigation or discovery along the lines of civil discovery processes, with the claims

\textsuperscript{1078} La Forest Report, supra n. 10.
process temporarily being suspended and on a “stand down” basis for a specified period of time to allow for investigation.\(^\text{1079}\)

- That procedures and mechanisms be clearly articulated that provide for administrative and procedural fairness in such investigations, and recourse to the Tribunal around investigation processes and procedures.

- That a statutory exemption be created under the *Administrative Tribunals Act*\(^\text{1080}\) to empower the Tribunal to enforce third party orders without having to apply to the Supreme Court.

- That the gap with respect to the extra-territoriality of third party disclosure orders be bridged with a mechanism that allows claimant access to Supreme Court extra-territoriality enforcement provisions and procedures.

5.5.1. *Settlement*

- That claims be screened by the Tribunal to ensure suitability for involvement in settlement processes such as early settlement, and in terms of obvious power imbalances that may pose a barrier to

\(^{1079}\) Based on discussions with various interviewees for example, *April 4, 2005 Interviewee*, supra n. 243.

\(^{1080}\) *ATA*, supra n. 581.
participation, or may require alternate forms of participation such as 'shuttle mediation'.

- That adequate access to legal representation be provided to claimants at the early stages of the enforcement process in order to provide claimants with a thorough assessment of their claims prior to engaging in settlement discussions.

- That where appropriate, that community and other groups including unions, be encouraged to participate in settlement processes. Further, that mechanisms and process for adequate notice of opportunities to participate in settlement be created, along with a funding mechanism to facilitate such participation.

- That provisions similar to the federal regime be created and implemented in the Tribunal assisted settlement process, providing for a 'cooling off period' prior to settlements coming into effect, allowing parties time to seek legal advice on settlement agreements.
The Public Interest in Settlement

- That informational and educational material be developed by the Human Rights Clinic, or some other body, aimed at raising awareness of the public interest in settlements and of the types of systemic remedies that can be obtained in the settlement process.

- That Tribunal mediators be trained to raise public interest issues and in facilitating opportunities for community and other types of participation in a public interest capacity in mediation as a means of educating parties.

- That community groups and other organizations be provided with the opportunity to participate in settlements involving systemic claims, including in terms of adequate notice provisions and funding, in an intervenor or consultative role.

- That alternate formats for dispute resolution be pursued within the Tribunal mediation process, including Healing Circles and other culturally diverse dispute resolution processes.

- That a body, independent from government, be provided with the statutory mandate to participate in an intervenor or consultative role in cases involving broad public interest issues.
5.5.1. h The Public Interest in the Terms of Settlement and Settlement Information

- That reporting mechanisms be implemented at the Tribunal, including in annual reports, and on the Tribunal website, providing for reporting of general information regarding settlements absent identifying information; including the numbers of settlements and the types of remedies achieved.

- That further ongoing reporting of general information occurs in the Human Rights Clinic regarding settlements, absent identifying information, including the numbers of settlements and the types of remedies achieved.

5.5.1. i Monitoring and Enforcement of Settlement Agreements

- That statutory or regulatory provision similar to provisions under the Ontario regime be enacted for the purposes of providing claimants with recourse to an expedited hearing process in the event of breaches in settlement.

- That a public body, such as the Human Rights Clinic be mandated and adequately funded to assist claimants in enforcing settlement agreements or alternatively in accessing other processes in the event of breaches of settlement agreements.
• That the Tribunal be statutorily empowered with discretionary power to incorporate the terms of a settlement agreement into a Tribunal order upon the request of one party to the settlement agreement.

5.5.1. j  Enforcement of Orders Resulting from Hearings

• That human rights legislation be amended, or Rules or Regulations enacted to explicitly provide for the Tribunal to remain seized of claims in certain circumstances, such as in systemic claims, pending full implementation.

• That the statute be amended, or Rules or Regulations enacted to provide a right of recourse to file a new claim and concomitantly to an expedited hearing process in the event of a breach of a final remedial order.

• That a public body, independent from government be given the statutory mandate to be involved in the monitoring of remedies in cases involving broad public interest implications.
5.5.1. *k* **Special Programs**

- That a newly created, or pre-existing, independent statutory based body be empowered with the mandate for the approval, input, and active monitoring of special programs.

- That the guidelines and policies on special programs be written in plain language, and made available in barrier free formats in order to promote accessibility.

- That the body providing special program approval be available to consult with potential applicants for special program status regarding the implementation of programs, as well as to assist in addressing best practice issues on an ongoing basis.

- That the provisions governing the monitoring process be changed to allow for frequent periodic monitoring of programs given special approval.

- That names and general details of all programs receiving special program approval or being subjected to the revocation of approval, be publicly accessible.
5.5.1.1 Exemptions

- That, as suggested in the Black Report, the reference to "exemptions" be eliminated.\textsuperscript{1081} Alternatively, that emphasis be placed on the proactive nature of the equality provisions, for example in wording that states that equality initiatives are to be considered consistent with the section 3 purposes of the Code. The aim of this wording would be the creation of a positive inference; as opposed to an explicit exemption. Such an inference could be relied on by groups initiating equality measures, when faced with allegations of discrimination, as evidence of non-discriminatory conduct, as opposed to a total defence to discrimination.

5.5.2 Chapter IV Recommendations

5.5.2. a Jurisdiction

- That the Tribunal exercise its jurisdiction to the fullest extent in assessing claims involving Aboriginal matters, including taking into account that many institutions and bodies involving such matters are now sites of inter-governmental or federal/provincial funding, and have other concurrent aspects including inter-provincial status and affiliations, the potential lack

\textsuperscript{1081} Black, \textit{Black Report, supra} n. 16 at 179.
of redress available to Aboriginal claimants under federal human rights legislation, and the consequent impact on an already seriously disadvantaged group.

- That community links be developed within the Human Rights Clinic providing for outreach clinics involving Aboriginal organizations throughout the province, in order to insure legal assistance and representation in claims involving Aboriginal persons who may raise jurisdictional issues. Further that adequate funding be provided to the Human Rights Clinic to develop such links as part of community its outreach initiatives.

- That consideration be given to strengthening links between the Federal Human Rights Commission and the Human Rights Clinic for the purposes of addressing these types of claims prior to filing, for example, in initiatives such as community based education, information, and pre-claim assistance, and in referral services.

- That further study be undertaken on a federal/provincial basis, involving affected stakeholders, about the implications of either repealing or narrowing the application of section 67 of the Canadian Human Rights Act.
5.5.2. b  Charter and Constitutionality

- That the Tribunal be statutorily exempted from the application of provisions prohibiting Charter and constitutionality based challenges from being raised in administrative tribunal proceedings.

- That adequately resourced, effective, legal assistance be provided to claimants within the human rights enforcement process.

5.5.2. c  Assessment of Reasonable Prospect of Success

- That explicit provisions under the Tribunal Rules be developed which restrict the timing of applications for dismissal under section 27(1)(c) to a post disclosure basis.

- That a broad contextual approach be taken in assessing systemic claims subject to section 27(1)(c) applications which takes into account the nature of systemic discrimination and the associated barriers to obtaining evidence at a pre-hearing stage, even where disclosure has occurred.
5.5.2. d  **Time Limitations**

- That the statutory time limitation for filing claims be amended to extend the time to 12 months and to provide for a means of extending the time for filing based on discoverability, similar to the provisions available in the civil arena.

- That a broader approach to assessing the public interest be taken on a consistent basis in relation to systemic claims, by taking into account the public interest in the claim itself.

5.5.2. e  **Scope of Claims**

- That Tribunal processes, procedures, and mechanisms, including information regarding claims processes and the claims and response forms, be revised to reflect the fact that both grounds and also protected areas may intersect and overlap.

- That human rights legislation in British Columbia be amended to include an explicit provision similar to other human rights jurisdictions such as Nunavut, providing for express statutory recognition of intersecting and overlapping grounds and areas of discrimination.
• That further research be conducted by a statutory body with access to adequate public funding on the implications of adding social condition as a ground of discrimination.\textsuperscript{1082}

• That systemic claimants be provided with access to adequately funded and effective legal assistance in properly framing and bringing forward systemic claims.

• That communities be provided with opportunities for involvement in the development of information and the implementation of educational initiatives reflecting the impact of intersectional and overlapping grounds on disadvantaged groups.

5.5.2. \textit{f Expert Evidence}

• That systemic claimants be provided with access to well funded, effective legal representation, in particular, that adequate funding is provided to cover disbursements related to systemic claims.

\textsuperscript{1082} For examples of research in this area see Canadian Human Rights Commission, \textit{Looking Ahead Consultation Document}, supra n. 14, and the proposal of widening the scope of coverage by adding new grounds, including social condition at 7; see also, Ontario Human Rights Commission, \textit{Human Rights Commissions and Economic and Social Rights} (Toronto: Ontario Human Rights Commission, Research Paper Policy and Education Branch, October 2001).
5.5.2. g  Evidence

- That streaming mechanisms be strengthened to ensure that systemic claims are consistently directed to the Case Managed Stream.

- That additional funding be provided to the Tribunal to address the administrative costs associated with any resulting increase in Case Managed cases.

- That statutory provisions similar to the special remedies section under the Nunavut statute be created to provide access to the Court for interim orders including restraining orders.

- That an explicit rule or statutory provision be developed, similar to the Nunavut provisions, specifically providing for the Tribunal to receive and accept evidence showing a pattern of discriminatory practice, and concomitantly that it may give such evidence the weight that it considers appropriate in the circumstances.
5.5.2. h  Scope and Sufficiency of Systemic Remedies

- That education be provided to legal advocates and counsel regarding the broad range of systemic remedies available under the Code. 1083

- That research be carried out by a body which is independent from government, with access to sufficient funding, to look at ways of supporting the community in monitoring and enforcing systemic remedies in the absence of a public body.

- That the remedial section of the Code, as amended, be applied in a broad and purposive manner to enable orders for systemic remedies.

5.5.3  Chapter V Recommendations

5.5.3. a  Education and Prevention

- That the Ministry of Attorney General initiate a public consultation under the section 6 statutory provisions with affected stakeholders including respondent organizations, to assess the effectiveness of the Direct Access

1083 Code, as amended, supra n. 131.
Model generally to date, and specifically, in meeting educational and preventative objectives.

- That following the above consultation, the Ministry of Attorney General strike a community based committee whose mandate is to develop and coordinate broad educational and preventative initiatives, on an ongoing basis.

- That community groups and organizations be adequately funded by the government for their involvement in developing and implementing educational and preventative initiatives.

5.5.3. b Public Interest Gap

- That as part of its statutory mandate for education the Ministry of Attorney General facilitates broad community consultation on options for addressing public interest gaps under the Direct Access Model.
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**Nova Scotia**


**Nunavut**


**Ontario**


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APPENDIX “A”

A) Professional Interviews


March 23, 2005, Victoria, British Columbia, former Canadian human rights investigator, regional director, and also policy analyst under the former British Columbia Human Rights Commission [March 23, 2005 Interviewee (2)];


April 1, 2005, Vancouver, British Columbia, federal human rights; former human rights investigator, currently a director [April 1, 2005 Interviewee];

April 4, 2005, Ontario, former human rights commissioner, lawyer, representing both claimants and respondents both federally and provincially, and involved in human rights law reform and education [April 4, 2005 Interviewee];

April 7, 2005, North West Territories, former human rights officer under the British Columbia Human Rights Council, and British Columbia Human Rights Commission, and currently works for a human rights commission [April 7, 2005 Interviewee];

April 12, 2005, Lower Mainland, British Columbia, lawyer, Ministry of Attorney General [April 12, 2005 Interviewee (1)];

April 12, 2005, Vancouver, British Columbia, director, non-profit community organization serving women [April 12, 2005 Interviewee (2)];

April 13, 2005, Vancouver, British Columbia, lawyer, representing both claimants and respondents, also a human rights commentator and educator [April 13, 2005 Interviewee];

April 18, 2005, Vancouver, British Columbia, former human rights tribunal member, currently a human rights educator [April 18, 2005 Interviewee];

May 5, 2005, Vancouver, British Columbia, lawyer, representing claimants in an institutional setting. This interview also involved a brief discussion with another lawyer working in the same setting, who provided opinions which are
incorporated into the references relating to this interview [May 5, 2005 Interviewee];

June 9, 2005, Victoria, British Columbia, lawyer, represented claimants under the British Columbia Commission system, currently representing both claimants and respondents [June 9, 2005 Interviewee].

B) Institutional Interview

April 6, 2005, lawyer, British Columbia Human Rights Tribunal [April 6, 2005 Institutional Interviewee].
The Public Interest in Addressing Systemic Discrimination in British Columbia:
A Comparison of Human Rights Enforcement Models

1. What distinguishes systemic discrimination from other types of discrimination?

2. Do you think it is important to address systemic discrimination? Why or why not?

3. Should the public interest be considered in human rights? If yes, how?

4. Have you ever been involved in the representation, or support of a systemic discrimination complaint? If yes, what was your experience?

5. Are there difficulties associated with addressing systemic discrimination? If yes, what are they? If no, please elaborate.

6. Are human rights enforcement systems and processes adequately equipped to address systemic discrimination? Why or why not?

7. What mechanisms/processes do you think are required to address systemic discrimination? How could those mechanisms/processes be put into practice?

8. Have the number of cases of systemic discrimination increased or decreased in the past few years? If yes, what do you attribute to the increase or decrease?

9. In your view, should systemic cases be managed differently than other types of cases in the enforcement process? If yes, how?

10. Who should represent the public interest in human rights? Why?

11. What are some indicators that the public interest is being served in terms of addressing systemic discrimination?

12. Should private settlements between parties involved in systemic cases be allowed? Why or why not? If yes, should public interest considerations play any part in such settlements? If yes, how? If no, why not?
13. Are there special considerations that should be addressed in adjudicating systemic cases? If yes, what are they? If no, why not?

14. Is it possible to obtain an adequate remedy through adjudication of systemic cases? Why or why not? If yes, what would an adequate remedy be?

15. How do you view the Commission model in terms of effectiveness in addressing the public interest in systemic discrimination? Do you think that this view is shared by human rights practitioners, the public generally, and consumers of the system?

16. How do you view the Direct Access Model in addressing the public interest in systemic discrimination? Do you think that this view is shared by human rights practitioners, the public generally, and consumers of the system?

17. Are there alternative ways of addressing systemic discrimination outside the enforcement model that you think would be more effective? If yes, what are they?

18. Do you have any other comments?
APPENDIX “C”

Shelley Chrest
LL.M. Thesis 2005

The Public Interest in Addressing Systemic Discrimination in British Columbia: A Comparison of Human Rights Enforcement Models

Special Programs

How many special programs ("SP") are currently registered with the Tribunal pursuant to section 42(3) of the Code?

How many SP have been registered since the Direct Access model came into effect?

How many are programs that were formerly under the B.C. Human Rights Commission and have been renewed by the Tribunal?

How many SP involve government bodies? Private businesses? Non-profit organizations?

What is the nature of the SP that have been approved by the Tribunal e.g. employment equity?

What type of programs fall under "general special programs"?

How long does the average SP approval last before it must be renewed?

What are the percentages of special programs that are located in the Lower Mainland compare to other areas of the province?

Are the details of SP available to the public? If so, where?

Systemic

Are there any specific practices/procedures in place within the Tribunal system for systemic cases, such as particular case management procedures?

Is there any specific process in place in assigning tribunal members to hear systemic cases, for instance, such as particular experience/expertise of members in dealing with systemic matters?
Are there any special problems/challenges in administering/managing systemic cases?

Does Tribunal staff receive any specific training on systemic discrimination?

Who can make a representative complaint on behalf of a group?

   a) What criteria does the Tribunal use in accessing whether such complaints should be accepted?
   b) Does the applicant have to have the consent of, or be a member of, the identified group or class?
   c) Are representative complainants able to bring a complaint on behalf of unknown future members of the group or class?
   d) If the affected group or class decides that they no longer wish to continue a complaint, can the representative complainant continue the complaint against the wishes of the affected group or class?

How many cases were decided by the Tribunal last year that involved broad systemic issues or remedies? How many systemic cases are pending?

Does the Tribunal ever remain seized of a case, where there is an ongoing systemic remedy to be implemented?

**Intervenors**

How many applications have been made by potential interveners under the Direct Access system?

How many of those applications were accepted by the Tribunal?

What criteria does the Tribunal use to assess interveners’ applications?

Does the group/individual applying to intervene have to have the consent of the complainant/s in order to receive approval to intervene?

Are there potential problems/complexities when interveners are involved in a case, for instance, from a case management perspective?

Do interveners generally choose to participate fully in the hearing process, or on limited basis, for instance, by way of written evidence?
Pre-Hearing/Hearing

What is the current length of time to hearing for cases in general? For systemic cases?

What is the current length of time for decisions on interim applications?

What is the current length of time from hearing to judgment?

What is the scope of judicial notice in systemic cases, regarding broad issues such as recognition of patterns of inequality?

What are the considerations involved in successfully being granted an order for obtaining disclosure from non-parties?

Settlement

What is the current length of time to obtain a settlement meeting date?

How do the provisions in the revised settlement policy regarding consideration of public policy issues work in practice?

What does the Tribunal mean by public policy issues?

Does Tribunal staff receive training in identifying public policy issues?

How frequently are interveners involved in the settlement process? What role do they generally play?

Does the Tribunal do any screening of cases for suitability for participation in the settlement process, for instance, if the case involves broad systemic issues?

Is it possible for the Tribunal to put the terms of a settlement agreement into an order? If yes, are such orders published?