Submission on

Canadian Human Rights Act Review

[99-A]

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by a working group of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The working group was comprised of members from the Administrative Law Section, the Constitutional and Human Rights Law Section, the Labour and Employment Law Section, the Citizenship and Immigration Law Section, the Standing Committee on Equality and the Sexual Orientation and Gender Identity Conference. It also received input from the Alternative Dispute Resolution Section. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

Submission on *Canadian Human Rights Act* Review

I. INTRODUCTION

The Canadian Bar Association (the CBA) welcomes this opportunity to provide comments to the review panel examining the *Canadian Human Rights Act* (the *Act*). The CBA is dedicated to the promotion of equality in the justice system, including the elimination of discrimination in law and in the administration of justice. It has sponsored wide-ranging reviews of sex discrimination in the legal profession[1] and race discrimination in the legal profession.[2] It has also taken formal positions on human rights issues at the federal, provincial and territorial levels and has engaged in law reform efforts based on those positions.

Members of the CBA represent both complainants and respondents in human rights proceedings. There is therefore necessarily a divergence of views on certain issues. In particular, the National Labour and Employment Law Section, whose members represent management, unions and individual employee clients, expressed reservations about a number of the proposals in this submission. This Section could not achieve a consensus on many of the issues. Their comments, reflected throughout, demonstrate a concern that the scope of the *Act* not be broadened until the Canadian Human Rights Commission and the Canadian Human Rights Tribunal can demonstrate their ability to cope with current case loads in a fair and expeditious

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1 CBA: *Touchstones for Change: Equality, Diversity and Accountability, The Report on Gender Equality in the Legal Profession* (1993).

2 CBA: *Racial Equality in the Canadian Legal Profession* (1999).

fashion. These serious concerns deserve to be given consideration by the Panel in its deliberations.

A significant concern from all sides, however, is that the complaints process functions quite poorly. This appears to be at least in part because the Canadian Human Rights Commission (the Commission) has not been given the proper resources to perform its functions. This is particularly felt in the regions outside central Canada where lack of funding has reduced or eliminated the Commission's presence. We cannot emphasize enough that the Commission has to do a better job of serving regions outside central Canada. It would therefore be a mistake to expand the role or power of the Commission or the Canadian Human Rights Tribunal (the Tribunal) without significantly restructuring the complaints process and providing the funding necessary for the Commission to work properly. Suggestions for restructuring the process are set out below.

The speed of the human rights process is a prime concern of all participants in the process – complainants, respondents and their representatives. All are frustrated by the length of time required by the Commission to deal with and dispose of their complaints. Speed also affects the credibility of the human rights process. Many lawyers advise their clients not to file human rights complaints because the process takes too long and is unwieldy. Similarly, many potential complainants often decide themselves not to file human rights complaints after finding out how long the process is. On the other side, once a complaint is filed, respondents (who are primarily employers) can face inordinate demand on their resources over a protracted period to answer the complaint.

The ultimate goal of a human rights statute is to ensure that discrimination is prevented and, where it exists, eliminated. However, discrimination takes many forms: intentional or unintentional; direct or adverse effect; individual, group or systemic. The strategies to accomplish the goal of human rights legislation are therefore necessarily multi-faceted. Systemic discrimination requires a systemic

approach to investigation and requires systemic remedies.[3] However, the *Act* should not take a systemic approach at the expense of individual cases. Similarly, education and communication are important functions in preventing discrimination before it happens and should not be discounted in the overall scheme.

II. GENERAL/INTERPRETATION

A. International Human Rights Standards

There are many international human rights instruments to which Canada is a party, including the *International Covenant on Civil and Political Rights,* the *International Covenant on Economic, Social and Cultural Rights,* the *Convention on the Elimination of All Forms of Discrimination Against Women,* the *Convention on the Rights of the Child* and the *International Convention on the Elimination of All Forms of Racial Discrimination*. The language of the *Act* should as much as possible reflect these international standards. We would therefore recommend that the preamble of the *Act* be amended to include a reference to Canada's international human rights obligations. This would facilitate an interpretation of the *Act* which would be consistent with these obligations. Further, there should be a periodic review of the *Act* to determine whether it is consistent with these instruments. Amendments should be made wherever appropriate.

B. "Reasonable Limits"

There should be no "reasonable limits" clause in the *Act*. The current general defences in the *Act* – the *bona fide* occupational requirement and the *bona fide* justification – already strike the appropriate balance between the individual's human rights and the legitimate interests of respondents. The tests under those defences

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[3] The National Labour and Employment Law Section does not concur with this statement, believing that systemic investigations and remedies can be too broad and intrusive.

already include a consideration of reasonable necessity.[4] Adding a "reasonable limits" clause would therefore be duplicative and would unnecessarily limit fundamental human rights.[5]

C. Ability of the Tribunal to Consider Legislation as Inoperative

In human rights proceedings, government respondents sometimes attempt to justify discrimination on the basis that it is authorized by statutes or regulations. Consistent with the Supreme Court of Canada's jurisprudence on the *quasi*-constitutional status of human rights legislation,[6] legislation should not take precedence over the *Act* unless it is clearly stated to do so. Given this case law, the Tribunal should be able to determine that the *Act* takes precedence over other legislation – in effect treating the other statute as inoperative. This authority should be spelled out in the *Act*.

A more difficult question is whether the human rights tribunal should have the authority to treat legislation as of no force and effect if it is contrary to the *Canadian Charter of Rights and Freedoms*. Allowing the Tribunal to have this power could significantly expand the scope of the *Act*, particularly when the *Charter* challenge is to a limiting provision of the *Act* itself. This raises the resource concerns noted above. Should the work of the Commission and Tribunal be increased when they can barely cope with the work they have now? Also, the possibility of *Charter* challenges is a concern to respondents because it creates uncertainty as to the nature and scope of their obligations under the *Act*.

On the other hand, if the Tribunal has the power to determine that the *Act* takes precedence over other legislation, it seems odd that it would not have a similar power under the *Charter*. There is also a certain anomaly in the fact that the Tribunal –

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4 *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, Court File No. 26274, September 9, 1999 (S.C.C.).

5 At its Annual Conference in 1996, the CBA Council passed Resolution 96-04-A, rejecting the use of a "reasonable limits" clause.

6 E.g. *Craton v. Winnipeg School Division*, [1985] 2 S.C.R. 150.

unlike labour relations boards and the Immigration and Refugee Board – is specifically charged with the examination of human rights issues, yet the courts have determined that these other boards have *Charter* powers but the Tribunal does not. From the complainants' viewpoint, they should not be required to bring time consuming and expensive court actions to challenge or determine the validity of legislation prior to pursuing a complaint.

We believe that the Tribunal should have the power to interpret and apply the *Charter*, including the power to treat legislation as of no force and effect.

There is no consensus within the National Labour and Employment Law Section for this proposal. Some members support the Supreme Court of Canada's view that the expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law, such as *Charter* determinations, which are ultimately matters within the province of the judiciary.[7] Further, the Court has found that, in this context, the Tribunal is ill-equipped to deal with *Charter* matters and that there is no real efficiency or cost saving in allowing them to do so. This is especially true given the virtually inevitable judicial review application that will follow a Tribunal's declaration of invalidity.[8]

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7 *Mossop v. Canada*, [1993] 1 S.C.R. 554.

8 *Cooper v. Canada*, [1996] 3 S.C.R. 854.

III. GROUNDS[9]

A. Making the Grounds Open-ended

The suggestion has been made that the grounds should be open-ended, presumably by adopting an "analogous grounds" approach similar to section 15 of the *Charter*. This would make the *Act* more consistent with section 15. Making the grounds consistent with section 15 would prevent expensive litigation to add missing grounds to the *Act.*[10] It would allow the *Act* to evolve as society's understanding of discrimination and of vulnerable and disadvantaged groups evolves.

On the other hand, expanding the grounds raises the same concerns noted above in terms of increasing the workload of the Commission and Tribunal, which are already significantly under-resourced. Arguably, there would be an increase in the number of claims, as complainants try to push the envelope. For example, does "analogous ground" include the status of being a public service employee, a part-time employee or a member of the armed forces? From a respondent's perspective, this is a concern because it increases uncertainty as to the nature and extent of its obligations.

We believe that the *Act* should have open-ended grounds. If this is done, then it should be made clear that the other grounds must be "analogous" to the list of grounds already contained therein. We believe that this proposal addresses much of the concern about uncertainty noted above.

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9 With the exception of the addition of gender identity, the National Labour and Employment Law Section does not agree that the grounds should be expanded or that they should be open-ended. The Section believes that it is not the time to expand the powers of the Commission. The Commission must first be able to cope with its current case load before adding more work.

10 As occurred, e.g., in *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

B. Gender Identity

Gender identity should be added as a grounds of discrimination. While everyone has a gender identity, there are those (often referred to as "transgenders") whose gender identity, whether male or female, doesn't fit their physical body. Transgenders face significant discrimination and ostracism in our society, and the *Act* should be amended to ensure protection for them.

Some of the case law suggests that gender identity is included under either "sex" or "sexual orientation".[11] However, it is arguable that there is a significant distinction between sexual orientation (which determines who you are attracted to) and gender identity (which determines how you see yourself). Also, a Tribunal could interpret the ground "sex" to include only a person's physical body as opposed to that person's self identity. We are therefore hesitant to leave the question to be determined by a Tribunal and recommend that the ground be specifically included in the *Act*.

C. Social Condition

The CBA shares the concerns of some groups that there should be a way of redressing discrimination against people in poverty. This discrimination has serious affects on individuals and families who are the most vulnerable and disadvantaged members of society. People in poverty should have access to basic social resources, some of which are identified in the *International Convention on Economic, Social and Cultural Rights*, to which Canada is a signatory. Indeed, it is arguable that when a person does not have access to basic social needs – food, clothing, shelter – that person's ability to exercise other civil rights is compromised.

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[11] See, e.g. *Commission des droits de la personne et des droits de la jeunesse v. Maison des Jeunes*, File No. 500-53-000078-970, July 2, 1998 (Que. Trib.).

While discrimination against poor people usually involves matters such as refusal of rental accommodation, which are normally outside of the jurisdiction of the federal Commission, inclusion of social condition in the federal *Act* would send an important national message that such discrimination is unacceptable. It could also bring tangible benefits to those in poverty in terms of financial services, federal housing and mortgage policies or federal government social benefits.

Commonly, the grounds associated with this type of discrimination is identified as "social condition", which is the term used in the Quebec *Charter of Human Rights and Freedoms*. In that province, social condition has been interpreted to include those who occupy a specific place or position in society as a result of specific circumstances such as income, occupation and education. It includes socially underprivileged people such as welfare recipients and the homeless. Other provinces prohibit discrimination on the basis of "source of income" (Alberta, Manitoba and Nova Scotia), "receipt of public assistance" (Ontario and Saskatchewan) and "social origin" (Newfoundland). Our concern about the term "social condition" is that standing alone, it may be too vague. To avoid confusion, we would prefer that the definition of "social condition" include examples of what is covered by that phrase.

D. Language Social

Language should be added as a prohibited ground of discrimination. This would be consistent with Canada's heritage of protecting linguistic minorities. A person's language forms a significant part of his or her self-identity. Discrimination against a person on the basis of the language they speak can be as arbitrary and invidious as other types of discrimination. "Language" would include not just the two official languages but other languages as well. Quebec and other provinces also protect against language discrimination. In Quebec in 1998, "language" cases represented approximately 1.6 per cent of the total complaints.

The protection against language discrimination should be made subject to the *Official Languages Act*. This would ensure that the federal government's policy of

promoting the use of both official languages in its institutions would not be subject to complaints. We believe similar policies of federally regulated employers would be adequately protected by the "affirmative action" exception in the *Act*.

IV. EXCEPTIONS/DEFENCES

A. Defences of *Bona Fide* Occupational Requirement and *Bona Fide* Justification (and corresponding duty to accommodate)

These defences should not be changed. They have been established and refined through a huge body of case law from courts, tribunals and labour arbitrators. They are therefore well understood by practitioners, and significantly altering them would cause a good deal of confusion in the human rights community. In addition, the defences have generally been interpreted in a manner which appropriately balances the rights of complainants and the legitimate interests of respondents. The defences are appropriately general to include a wide variety of circumstances.

At the moment the onus is properly on the respondent to establish the *bona fide* occupational requirement or justification and that it has properly discharged the duty to accommodate. The respondent is usually in the best position to understand the nature of the workplace, the options available and the reasons for its decision. We understand that the suggestion has been made to make the duty to accommodate a positive duty on employers by incorporating it into the prohibitions. Our concern is that this may shift the burden of proof in human rights cases from the respondent to the complainant or Commission.

B. Affirmative Action Programs

The primary purpose of the *Act* is to protect vulnerable and disadvantaged groups. The creation of affirmative action programs furthers rather than hinders this purpose. It would be inconsistent with the promotion of substantive equality for disadvantaged

groups to allow such programs to be subject to human rights complaints. Respondents should be encouraged to promote substantive equality in their institutions. This exemption should remain in the *Act*.

There is a danger that the "affirmative action" exception can be misused. We would therefore suggest that this exception be circumscribed in a manner similar to Manitoba's *Human Rights Code,*[12] as follows: the program must be based on one of the protected grounds; its object must be to ameliorate disadvantage and it must be reasonably designed to meet that object.

V. HATE MESSAGES

The promotion of hatred against identifiable groups continues to be a problem in Canada. There are a variety of means to distribute hate speech, many of which fall within federal jurisdiction – telephone, radio and television, internet, mail and cross-border importation.

Unfortunately, however, jurisdiction to remedy the distribution of hate propaganda is similarly varied. Telephone distribution is currently covered by the *Act*. There is currently a debate as to whether hate speech over the internet falls within this authority. Radio and television distribution is governed by the Canadian Radio-television and Telecommunications Commission under the *Canadian Radio-television and Telecommunications Act*. Mail distribution is governed by *ad hoc* tribunals under the *Canada Post Act*. Importation is enforced by customs officers under the *Customs Act* and the appeal process contained therein. The extent of protection and effectiveness of the remedies also varies under each of these provisions.

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12 C.C.S.M., c. H175, s. 11.

Jurisdiction over civil remedies for hate speech should be consolidated under the *Act*. This would place enforcement in the hands of those familiar with human rights matters and would ensure greater consistency in the application of the law and in remedies. Further, the *Act* should be clarified to specifically include hate speech transmitted over the internet.

VI. PARTIES

A. Successor employer

When an employer sells or transfers all or part of a business, employment standards and labour relations legislation often provide that the purchaser or transferee assumes the vendor's or transferor's employment-related obligations. The rationale for this is that the employee's day-to-day employment conditions often do not change as a result of such a sale or transfer. Employees in such circumstances do not experience the change in ownership as a break in employment and therefore do not usually suspect that the new employer's obligations to them may change. Successor provisions also provide a disincentive for employers to transfer businesses solely to avoid employment-related obligations. Finally, employment statutes tend to be remedial in purpose, so the presence of successor liability allows claimants to obtain a more enforceable remedy – whether that be in the nature of a cease and desist order, some other form of mandatory order binding the employer in the future, or damages. The latter can be of particular assistance where a predecessor is no longer solvent.

On the other hand, it may be difficult for a purchaser or transferee of a business to determine the potential extent of the predecessor's liability (to do its "due diligence"), particularly when no human rights complaint has been filed. Matters such as liability under an employment standards or labour relations statute are usually more discoverable and easier to quantify than discrimination. Indeed, a predecessor may be unaware that discrimination has occurred when it sells or transfers the business.

Our group believes that for complaints of employment discrimination there should be such a provision. The National Labour and Employment Law Section does not support this proposal.

B. Complaints on Actions Outside the Country

By virtue of section 66, the *Act* binds the federal government but in fact it does not apply to all government action. In particular, it does not apply to government action against persons outside Canada who are not permanent residents or Canadian citizens. This would commonly occur at visa posts and consulates outside the country. At the moment, people outside Canada who face discrimination when applying to enter Canada cannot file complaints.

We believe that this limitation should be removed from the *Act*. In particular, persons wishing to come to Canada who are denied status for discriminatory reasons should be able to obtain relief under the *Act*. Canadian government officials or agents should all be held to the same standards with respect to fundamental human rights whether they are inside or outside the country and whether they are dealing with Canadian citizens, permanent residents or people with no status in Canada.

The issue is one of fairness, accountability and transparency of decision making by Canadian officials and agents abroad. Canada is and should be an ambassador for human rights. People around the world should know that Canadian authorities are required to deal with them fairly and without discrimination.

We believe the *Act* should clarify that the phrase "services customarily available to the public" in section 5 includes government services such as immigration. The argument has occasionally been made that immigration is not covered by this phrase. For the reasons given above, we believe all government services, including immigration matters, should be covered.

C. Who May File a Complaint

The prevention and eradication of discrimination is a very important public policy objective. It is consistent with this objective to grant a wide berth to people to file complaints of discrimination – whether they are the direct victims or whether they are aware of discrimination occurring elsewhere. Often, circumstances will inhibit or prevent the direct victims from coming forward. By allowing others to file complaints, society benefits from rooting out and dealing with instances of discrimination.

Having said this, there is a legitimate concern about the Commission pursuing complaints filed by busybodies. There should be a method of preventing these third parties from engaging a process involving the expenditure of public resources when they arguably do not have an interest in the outcome.

In the system we propose, the Commission would make an assessment with respect to all complaints when they are first filed as to whether it is in the public interest for a complaint to go forward. If the Commission decided not to pursue the complaint, the complainant could pursue the complaint independent of Commission involvement. To combat the problem of busybody litigation, we suggest that a person who is not a victim of the discrimination, however that is defined, not be entitled to pursue a complaint independent of Commission involvement. Thus, third-party complaints would only be pursued if the Commission believed it was in the public interest to do so.

VII. PROCESS

A. Overview

The following are the considerations involved in crafting the right process:

- claimants should have the right to have their complaints heard by a quasi-judicial or judicial adjudicator;

- respondents should have the right to expect a system which is procedurally fair, takes their legitimate interests adequately into account and provides a disincentive for claimants to pursue frivolous claims;
- the complaint process should not take too long or be too expensive, should not be overly technical or adversarial and should emphasize early resolution or settlement of complaints;
- the investigation process needs to be transparent;
- the public interest needs to be represented in the resolution of complaints;
- those who adjudicate human rights disputes should generally have expertise in human rights, administrative law and *Charter* issues;
- the Commission has finite resources and as a result: (1) is not able to represent all complainants, regardless of the chance of success of their complaints, before a quasi judicial body and (2) should be able to direct its resources to complaints where the public interest is significant.

For complainants and for parties in general, access to a specialized human rights tribunal is important to safeguard human rights in a democratic society. The principle of non-discrimination is now considered a universal value and it is therefore important to ensure that all parties have access to a tribunal to determine the nature and extent of this fundamental principle. Letting an administrative agency control access to human rights adjudication is a source of tension and frustration for parties. The Commission's role can be perceived as an obstacle to the search for justice.

The current model of the Commission as a "gatekeeper" of complaints should be eliminated. Victims of discrimination should be able to pursue their complaints even if the Commission does not want to be involved.

In Quebec, the complainant has the right to proceed directly to the courts. From 1990 to 1997, the Quebec *Charter* was interpreted to give access to the human rights tribunal in cases where the Commission decided not to be involved. This right has recently been restrained significantly by interpretations from the Court of Appeal,

with the result that several groups are seeking legislative change to bring back the pre-1997 interpretation.[13] An examination of the volume of cases in Quebec suggests that opening up the system is not a significant cost.

A similar system exists federally in the United States under the Equal Employment Opportunity Commission (the EEOC) process. There, a party files a complaint with the EEOC, which then performs and investigation and conciliation. If the matter is not resolved, the EEOC then decides whether it will commence a lawsuit. If it decides not to, then it sends the complainant notice of a right to sue. The complainant then may bring their own lawsuit. The complainant may also request a notice of a right to sue from the EEOC once 180 days has passed from the date the complaint was originally filed.

We suggest a model for individual complaints which gives less of a role to the Commission as an investigative body and more to the Tribunal as an adjudicative body. The Commission should be the first point of contact for a complainant, and the Commission should make a quick determination as to whether it wants to be involved. This determination would be based on a short investigation, if required, and the Commission's assessment of the public interest involved in the complaint. Mediation, discussed below, would occur near the start of the process. If the Commission decides not to be involved, then the complainant would be free to pursue the complaint using their own resources. If the complainant is successful before the Tribunal, then the Tribunal could fix an amount for the reasonable legal expenses incurred by the complainant and require that these costs be paid by the Commission. Only complainants who are victims of the alleged discrimination should be able to pursue their cases independent of the Commission. Even in these cases, the Commission should probably retain the right to intervene to protect the public interest.

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13 E.g. *Menard v. Rivet*, [1997] R.J.Q. 2108.

Bearing in mind that a large number of complaints are disposed of prior to referral for hearing, the National Labour and Employment Law Section has concerns about direct access to the Tribunal, principally because of the concern about frivolous claims. While this could be alleviated somewhat by allowing cost sanctions, discussed below, and by providing a method for the Tribunal to dismiss frivolous complaints at the outset, it believes frivolous claims would still represent a significant drain on the financial resources of employers and unions.

One concern is whether the parties should be able to review the Commission's decision as to whether it will be involved. Allowing the decision to be judicially reviewed in court could cause significant delays, particularly when parties are intent on dragging the process out. Also, we envisage this decision as being mainly discretionary. Allowing court review could result in decisions which unnecessarily circumscribe this discretion. At the same time, however, there should be some accountability on the part of the Commission. We therefore suggest that a Commission decision be reviewable in a summary manner by a one-member panel of the Tribunal, with no right of appeal thereafter.

We generally favour complainants pursuing their complaints before the Tribunal – a specialized body with knowledge of human rights law. However, we do see a role for the courts to hear cases at first instance, particularly in cases of urgency. As such, we recommend the Manitoba model, where parties are allowed to bring an action based on violation of the statute.[14] However, they are limited in such proceedings to an injunction or to a declaration of rights. This would enable them to obtain quick relief in cases of urgency while at the same time giving them an incentive to generally proceed before the Tribunal.

The system suggested above is one potential way of solving the backlog problem and the concern of all stakeholders that the system takes too long. It is also a way of resolving complainants' concerns that their complaints are being dismissed for

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14 *Human Rights Code*, C.C.S.M. c. H175, s. 54.

reasons of administrative expediency as opposed to substance and that they are not getting their day in court. Finally, it is a way for the Commission to control resources and set its own priorities. Having said this, we do have a concern that allowing complainants to bring their cases using their own resources will lead to reduced government funding of the Commission and Tribunal. We would strongly urge that this not happen.

There need to be precise guidelines concerning the Commission's investigative process. This would enhance the transparency of the Commission process and the understanding users have of that process. It will also enhance procedural fairness for all parties and will no doubt increase efficiency and speed of the process. At the moment, the process is left to sections 39 to 44 of the *Act* which are not sufficiently detailed. Although the Commission has the authority to issue such guidelines under section 43(4), it has either not done so or not made its guidelines widely available. This has resulted in unproductive and unnecessary debates and litigation on procedural points. Quebec has had detailed rules since 1990 which have specified the rights and roles of the parties and the investigator during the investigation. This has enhanced the system in that province.

This system may not be adequate to resolve problems of systemic discrimination. The Commission should have more control and a broader investigatory role in such circumstances. This would include the Commission having the power to engage in a wide-ranging investigation of an organization – including reviews of documents and interviews of various representatives in an attempt to understand the nature of the problem, if any. If this study revealed systemic discrimination, the Commission should be able to choose between various litigious and non-litigious options for rectifying the problem. This might include mediation, education or, if necessary, referral of the matter to a Tribunal where the respondent disputes the claim. As an administrative matter, the Commission could perhaps identify systemic problems by keeping a catalogue of complaints filed. It could periodically review this catalogue to identify whether there are indicia of systemic discrimination in certain

organizations. The National Labour and Employment Law Section disagrees with the above proposal, believing it to be unnecessarily broad and intrusive.

B. Choice of Forum

The primary issue is between grievance arbitration in unionized workplaces and the human rights process.

There are several interests at stake here. There is a public interest in ensuring the efficient and cost-effective administration of justice. There is the companion interest of respondents in not having to defend themselves in two separate forums with respect to the same matter, whether or not these proceedings occur at the same time. These two interests would favour requiring human rights issues to proceed only in one forum.

On the other hand, if complainants are going to be forced to choose between forums, they have an interest in ensuring that the substantive rights and remedies as between those forums do not differ substantially. There is also an interest in ensuring the public interest is represented in human rights cases regardless of which forum is chosen. Finally, it is arguable that there is an interest in ensuring that human rights cases are adjudicated by people with some expertise in the issues.

With this in mind, there appear to be at least three options. First, complaints involving rights under the *Act* would only be heard by the Canadian Human Rights Tribunal. The second would be to allow matters under the *Act* to proceed in other forums as long as the rights and remedies of the adjudicator in the other forum were the same as the Tribunal's. This may be of concern under a collective agreement, however, because the parties may have not have contemplated these substantive rights and remedies during negotiations. Further, to ensure protection of the public interest, there could be a requirement that when issues arise in proceedings as to the violation of the *Act*, notice would be given to the Commission, who would then have the authority to intervene. This may be a bit cumbersome, however.

The third option is the one we favour – granting the Tribunal the explicit power to suspend its proceedings pending the outcome of another process. Once that other process is completed, the Tribunal could determine, based upon a motion by the parties or the Commission, whether its own proceeding should continue. This decision would take into account the remedies granted and the public interest. Issue estoppel would apply to the findings of fact and law of the other body.

The advantages of this include elimination of most duplication between forums, while at the same time ensuring that the public interest is protected and that the complainant's access to appropriate human rights remedies is not foregone.

C. Interim Relief

Interim relief should be available from the Tribunal in cases of hate speech. More often than not, purveyors of hate speech continue to engage in their activities even after complaints are filed, usually up to the point of a Tribunal order and sometimes even beyond. The Commission and Tribunal process tends to be fast-tracked in these cases but can still take months, if not years, to complete. In the meantime, the continued public dissemination of hate speech can cause long term effects on individuals and society as a whole which are serious in nature and widespread in scope yet are not easily measured or quantified.

The Commission recognized this in pursuing the injunction at issue in *Canadian Human Rights Commission v. Canadian Liberty Net*,[15] At the same time, it is of note that the Supreme Court of Canada found the power to award interim relief is not necessarily incidental to the Commission's or Tribunal's powers. We believe it is important for the Tribunal to possess the explicit power to issue interim cease and desist orders with respect to hate propaganda pending a full hearing. This would ensure that continued harm caused by hate speech be prevented quickly and at the

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15 [1998] 1 S.C.R. 626.

same time would put the decision in the hands of an agency familiar with human rights principles.

Interim relief in other types of cases would be governed by our proposal above, allowing access to the Court for injunctive relief.[16]

D. Mediation

The CBA supports the use of mediation when a complaint is first filed. Evidence from the Ontario Human Rights Commission, which instituted voluntary mediation a couple of years ago, shows that this system has resolved a large number of cases at the outset when a complaint is filed. Sixty per cent of parties opted for mediation and 81 per cent of these cases were settled.

One question is whether mediation should be mandatory or voluntary. In some situations, forcing someone to engage in mediation may be inappropriate – certain cases of sexual or racial harassment, for example. On the other hand, mandatory mediation may result in more cases settling, which is a benefit to the process as well as the individuals involved. On the whole, however, we believe that mediation should be voluntary – in other words, only conducted where both parties consent.

The timing of the mediation is important. The current conciliation system for complaints happens only late in the process when parties have already invested time and money and when their positions have become entrenched. There should be a specific time limit for holding this mediation.

We believe that the preferred style of mediation should be a facilitative model as opposed to an evaluative one. In the facilitative model, the mediator attempts to assess the parties' needs with a view to getting them to come to their own agreement.

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16 See text accompanying footnote 13, supra. The National Labour and Employment Law Section does not concur with this proposal.

Unlike in the evaluative model, facilitative mediators do not share their assessment of the potential success of the claim with the parties.

The Commission should be responsible for administering the mediation program, including the development of a roster of mediators, issuing guidelines for mediation and a establishing a preferred approach. This would ensure consistency and quality in the mediation program.

E. Limitation Period

The CBA supports a limitation period for filing a complaint of one year from the date of the last act complained of. The Commission could be given the discretion to extend this based on a given set of criteria, such as whether the delay in filing was incurred in good faith and whether there were any serious prejudice which results from the delay.

Sometimes unsophisticated complainants are not aware until it is too late that a course of conduct affecting them may be discriminatory. We would therefore suggest that the Commission's discretion be more flexibly exercised under the "good faith" heading.

F. Disclosure Process

On the assumption that there will be fewer and less in-depth investigations prior to the commencement of a human rights tribunal hearing, a disclosure process should be instituted. Disclosure should be made early on in the process. There is an advantage in parties disclosing as much as is reasonable prior to mediation, as the success rate of mediation significantly increases when there is proper disclosure. At the same time, mediation has little advantage for respondents if they are effectively required to prepare their cases beforehand. Disclosure should be an ongoing obligation throughout the process, so that respondents know the case they have to

meet. Parties generally would be required to disclose preliminary objections, documents and will-says for potential witnesses.

We believe that disclosure procedures should be contained in the statute. This would ensure transparency and heighten the enforceability of disclosure orders.

The National Labour and Employment Law Section does not support these proposals, believing that significant disclosure obligations early in the process can involve time and resources which would outweigh the benefits of early resolution mechanisms.

G. Remedies

The usual make-whole remedies should continue to apply, such as cease and desist orders and damages. The Tribunal should be allowed to compensate complainants for hurt feelings and mental distress. There should be no maximum cap on this type of damage. A cap assumes that all cases will be similar in nature. However, discrimination can cause severe psychological injury which may be well beyond the norm.

The National Labour and Employment Law Section does not support removing the cap on hurt feelings and mental distress damages. Arguably, the Tribunal has not yet developed an institutional discipline to make awards within the proper range.

The current prohibition on the Tribunal awarding employment equity plans should be removed. In *Action Travail des Femmes*,[17] the Supreme Court of Canada approved of the use of such remedies to prevent discrimination in the future. Cases of systemic discrimination often require systemic remedies. The National Labour and Employment Law Section does not support this proposal.

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17 *Canadian National Railway v. Canadian Human Rights Commission*, [1987] 1 S.C.R. 1114.

The Commission should be empowered to award costs in exceptional circumstances, which would include claims or defences found to be frivolous. This would help control frivolous or vexatious proceedings or defences and parties' conduct during the Tribunal process. Some members of the National Labour and Employment Law Section would delete the "exceptional circumstances" limitation, although this would not receive general support from the Section.

H. Mediation during Tribunal

If the parties consent, the Tribunal should be allowed to adjourn its proceedings to refer the case to mediation. The parameters and roster of mediators would be the same as noted above.

I. Approval and Enforcement of Settlements

Currently, the Commission must approve settlements entered into by the parties. We recognize that this power is intended to ensure that settlements reflect the public interest. It also ensures that parties negotiate wider and more durable solutions where the discrimination affects others within the organization – for instance where it results from an ongoing policy or practice. At the same time, the need for Commission approval may encourage parties to continue litigation and prolong confrontation where settlement is more appropriate.

We suggest that the *Act* provide that settlements not approved by the Commission be without prejudice to the Commission's ability to pursue further policy complaints in relation to the same matter. This would allow parties to settle voluntarily without Commission approval but run the risk of further Commission action if the matter involves wider implications.

We also believe the *Act* should include a provision either allowing complaints to be filed for breach of settlement or allowing the Tribunal to incorporate settlements into Tribunal orders where they are not complied with. This would facilitate enforcement

of settlements in a manner similar to normal civil litigation, where parties can bring motions for judgment in accordance with accepted offers to settle. In turn, this would enhance the impact and credibility of the mediation and settlement system proposed above.

VIII. COMMISSION FUNCTIONS

A. Education and Communication

In the final analysis, the success of the human rights system depends in large part on how it changes peoples' attitudes. An enforcement mechanism is just one aspect of this. It is therefore very important that the Commission retain its education and communication functions, as important tools in furthering human rights. Further, the Commission should have the power, as the *Commission des droits de la personne et des droits de la jeunesse* does in Quebec, to examine discriminatory legislation, stimulate public debate and recommend amendments if required.

B. Guidelines

The Commission should continue to be able to pass guidelines on substantive issues concerning how it thinks the *Act* should be interpreted. However, these guidelines should not bind the Tribunal. The independence and impartiality of the Tribunal could be compromised given that the Commission is often a party.

The Commission and Tribunal should be able to pass binding guidelines on purely procedural matters such as disclosure requirements, investigation procedures and mediation.

IX. COMPOSITION OF TRIBUNAL

The CBA supports having a full-time Tribunal with members appointed for fixed, yet renewable terms. This structure undeniably promotes credibility, competence and

efficacy of Tribunal members. It also lessens the possibility of allegations that the Tribunal is not independent and impartial.

X. CONCLUSION

We thank the panel for the opportunity to provide input. Although opinions within the CBA are divided on several of the issues, our overall message is not. There are serious problems with the human rights process in the federal jurisdiction. These problems have a pronounced impact on the credibility of the process from the perspective of both complainants and respondents. Given the fundamental importance of human rights legislation to our society, it is important that the system be improved in a fundamental way. We trust your final report conveys this message to the federal government.